

## THE JUDGMENT IN THE DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN BANGLADESH AND MYANMAR IN THE BAY OF BENGAL (BANGLADESH/MYANMAR) CASE

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### Abstract

On 14 March 2012, the International Tribunal for the Law of the Sea (“ITLOS” or the “Tribunal”) handed down its long-awaited judgment in the *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (the “Judgment”). It is the first dispute concerning maritime boundary delimitation decided by the Tribunal. The Tribunal delimited the maritime boundary throughout each of its three elements in the Bay of Bengal: the territorial sea; the exclusive economic zone; and the continental shelf. The Judgment follows the accepted three-stage methodology of maritime delimitation: identification of equidistance line; evaluation of any relevant circumstances; no disproportionality. However, the Tribunal followed the recent judgment of the International Court of Justice (“ICJ” or the “Court”) in the *Romania v. Ukraine* case by reproducing the Court’s highly-criticised introduction of subjective elements into the process of identifying base-points for the equidistance line. Of particular note, this is now the second judgment of an international court or tribunal to address the question of delimitation of the continental shelf beyond 200 nautical miles between two States. The Tribunal decided that it had jurisdiction to delimit the outer continental shelf. It pointed out that such a delimitation was different to and not inconsistent with any existing or future demarcation of the outer continental shelf by the Commission on the Limits of the Continental Shelf (“CLCS”). It also concluded that demarcation of the continental shelf beyond 200 nautical miles followed the same process as demarcation of the continental shelf within 200 nautical miles. In its approach to the delimitation of the outer continental shelf, the Tribunal’s decision was consistent with the *Barbados v. Trinidad and Tobago* award.

### 1. Background

Bangladesh and Myanmar are States with adjacent coasts in the Bay of Bengal. Each has ratified the United Nations Convention on the Law of the Sea (“UNCLOS”).<sup>1</sup> In 1979,

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<sup>1</sup> Bangladesh ratified the Convention on 27 July 2001 and Myanmar on 21 May 1996.

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following bilateral negotiations, Bangladesh proposed a line of delimitation in the exclusive economic zone and continental shelf, referred to as the *Friendship Line*. Despite the fact that there was no official agreement, between 1978 and 2005, according to Bangladesh, Myanmar's conduct was in accordance with this proposed boundary. From 2005, Myanmar changed its practice, offering a number of concessions blocks for oil and gas exploration in the area between the *Friendship Line* and the equidistance line as defined by Myanmar. Bangladesh considered that these activities seriously prejudiced its rights to equitable delimitation and its sovereign rights for the purpose of exploring and exploiting natural resources in the exclusive economic zone and continental shelf. Bangladesh decided to submit the delimitation dispute to an arbitral procedure, in accordance with Annex VII to UNCLOS. Myanmar responded by proposing that the matter should instead be submitted to the Tribunal. Bangladesh accepted Myanmar's proposal.<sup>2</sup>

Meanwhile, Myanmar submitted an application to the CLCS claiming areas of continental shelf beyond 200 nautical miles in the disputed area.<sup>3</sup> Bangladesh insisted that Myanmar's claims were not in accordance with UNCLOS. On 25 February 2011, Bangladesh made its own submission to the CLCS, itself claiming entitlement to continental shelf beyond 200 nautical miles in the area.<sup>4</sup>

## 2. The Judgment

### 2.1 Territorial sea

In relation to the territorial sea, the Tribunal first addressed the issue of whether the Parties had in fact delimited their territorial sea, either by signing the Agreed Minutes of 1974 and 2008 or by way of a tacit agreement. Bangladesh advocated that the maritime boundary between Bangladesh and Myanmar in the territorial sea should be the line first agreed between them in 1974 and reaffirmed in 2008. Myanmar was of the view that the 1974 Agreed Minutes were nothing more than a conditional agreement: it emphasised that it had made clear repeatedly that its government would not sign and ratify a treaty unless it resolved the entire delimitation dispute (i.e., throughout the territorial sea, exclusive economic zone and continental shelf).

The Tribunal concluded that there were no grounds to consider that the Parties had

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<sup>2</sup> Documents available at <http://www.itlos.org/index.php?id=108#c513> (accessed on 10 September 2012).

<sup>3</sup> The submission of Myanmar is available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mmr.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mmr.htm) (accessed on 10 September 2012).

<sup>4</sup> The submission of Bangladesh is available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_bgd\\_55\\_2011.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bgd_55_2011.htm) (accessed on 10 September 2012).

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entered into a legally binding agreement by signing the Agreed Minutes of 1974 and 2008 or by way of a tacit agreement. The Tribunal was of the view that that the officials from Myanmar did not have the full powers or authority to enter into such an agreement,<sup>5</sup> nor did either State subject the agreement to domestic constitutional requirements for such agreements.<sup>6</sup> The Tribunal also rejected arguments that the conduct of the two States had established a boundary,<sup>7</sup> along with Bangladesh's related claim of estoppel.

The Tribunal thus proceeded to delimit the territorial sea on the basis of Article 15 of UNCLOS.

The Tribunal first examined whether there were any historic titles or special circumstances. It considered whether St. Martin's Island (under the sovereignty of Bangladesh) constituted a special circumstance for the purposes of the delimitation of the territorial sea. The Tribunal determined that there were no issues of historic titles in the area and it found that St. Martin's Island merited full effect in the delimitation. Thus, it delimited an equidistance line boundary in the territorial sea, giving "full effect" to St. Martins Island.<sup>8</sup>

### 2.2 Exclusive economic zone and continental shelf

In relation to the exclusive economic zone and the continental shelf, the Tribunal had been asked by the Parties to draw a single maritime boundary. The Tribunal was required, of course, by the express terms of Articles 74 and 83 of UNCLOS to delimit the maritime boundary in a way that would achieve an "equitable result" between the Parties. Consistent with the jurisprudence of international courts and tribunals, the Tribunal adopted a three stage-approach to the delimitation. As a first stage, it constructed a provisional equidistance line; as a second stage, it determined whether there were any "relevant circumstances" requiring adjustment of the provisional equidistance line; and as the third stage, the Tribunal checked whether the line, as adjusted, resulted in any "significant disproportion" between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each party.

In approaching the first stage and drawing an equidistance line, the Tribunal introduced a subjective element into the identification of base points. In doing so, the Tribunal departed from the consistent approach taken by preceding decisions and awards not to

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<sup>5</sup> *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, para. 96. The judgment can be found on ITLOS website at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/1-C16\\_Judgment\\_14\\_02\\_2012.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf) (accessed on 10 September 2012).

<sup>6</sup> *Id.*, para. 97.

<sup>7</sup> *Id.*, paras. 100-118.

<sup>8</sup> *Id.*, para. 152.

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introduce subjective elements into the three-stage delimitation methodology until the second stage.

The Tribunal underlined that it was not obliged to use the base points indicated by the Parties but could select its own base points “on the basis of the geographical facts of the case”.<sup>9</sup> However, having said that, instead of determining the base points on the basis of the geographical facts of the case, the Tribunal proceeded to refashion the geographical facts of the case and, in consequence, made St. Martin’s Island disappear in a puff of judicial fiction.

ITLOS decided not to use St. Martin’s Island as a base point, it said, because the island was located immediately in front of Myanmar’s mainland coast. The Tribunal held that its use as a base point would result in a line that blocked the seaward projection from Myanmar’s coast, resulting “in an unwarranted distortion of the delimitation line”.<sup>10</sup> Instead ITLOS chose two base points on Bangladesh’s coast and four on the coast of Myanmar.<sup>11</sup> Readers familiar with maritime delimitation and the Law of the Sea will recognise in the Tribunal’s words the reasoning that is usually reserved for the subjective element in the second stage of the delimitation methodology.

It is not clear why ITLOS decided to put the subjective element of the delimitation methodology into the objective process of determining base points using geography as it exists. No legitimate explanation was provided in the Judgment, although it is fair to presume the Tribunal was just blindly following the ICJ on this point (see below). It might have been that the factor cited by the Tribunal (cutting off) constituted a relevant circumstance that required the adjustment of the equidistance line, once identified. However, it is not satisfactory that the Tribunal camouflaged what it was doing by manipulating the base points. ITLOS’s decision to deal with St. Martin’s Island in relation to the identification of the provisional equidistance line, rather than by way of making an adjustment thereafter as a relevant circumstance in order to achieve an equitable result, meant that ITLOS approached the relevant circumstances part of the delimitation methodology with an already-modified “equidistance” line.

In so doing, the Tribunal was following the Court’s highly-criticised departure from the accepted methodology of delimitation in its recent judgment in the *Romania v. Ukraine*<sup>12</sup> case. In that case, the ICJ ruled that to use Serpents’ Island as a base point in the construction of the provisional delimitation line would be equivalent to “a judicial

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<sup>9</sup> *Id.*, para. 264.

<sup>10</sup> *Id.*, para. 265.

<sup>11</sup> *Id.*, para. 266.

<sup>12</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, available at <http://www.icj-cij.org/docket/files/132/14987.pdf>.

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refashioning of geography”.<sup>13</sup> The ICJ and the Tribunal have presented a challenge to international lawyers to come to terms with the twin propositions that using geography as it actual exists constitutes a judicial refashioning of geography whilst, on the other hand, creating a geographical legal-fiction does not constitute a judicial refashioning of geography.

The second stage of the delimitation was for ITLOS to consider whether there were any relevant circumstances that would require an adjustment of the already-modified “equidistance” line. Bangladesh argued that there were three relevant circumstances in the delimitation: the concave shape of Bangladesh’s coastline – because strict equidistance would create a “cut-off” effect when equidistance lines between Bangladesh and Myanmar intersected with those between Bangladesh and India; St. Martin’s Island; and the Bengal depositional system, which comprises “both the landmass of Bangladesh and its uninterrupted geological prolongation into and throughout the Bay of Bengal”. Bangladesh cited delimitations in other maritime boundary disputes involving concave coastlines to support its arguments.<sup>14</sup> Accordingly, Bangladesh advocated the use of an angle bisector line rather than an equidistance line.

Myanmar, by contrast, rejected Bangladesh’s contentions on the grounds that equidistance was the “standard” method and that the methodology of the *North Sea Continental Shelf* cases was outmoded by later developments of the law of the sea. Myanmar argued that there were no relevant circumstances in the delimitation and that the boundary should therefore follow an unadjusted equidistance line.

As far as St. Martin’s Island is concerned, ITLOS discounted it a second time, as a relevant circumstance in order to modify the already-modified “equidistance” line that it had modified in the first stage by discounting St. Martin’s Island in terms of base points. The Tribunal observed that the effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographic realities, insisting on the fact that each case is unique and requires specific treatment in order to reach an equitable solution. Although St. Martin’s Island is an important feature susceptible to be considered as a relevant circumstance, ITLOS noted that because of its location, giving effect to St. Martin’s Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar’s coast in a manner that would cause an unwarranted distortion of the delimitation line. Thus, ITLOS decided not to give any effect to it in drawing the delimitation line of the exclusive economic zone and the continental shelf.

While rejecting the Bengal depositional system as a relevant circumstance – on the basis

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<sup>13</sup> *Id.*, para. 149.

<sup>14</sup> *Supra*, note 5, paras. 1.08-1.10.

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that a single maritime boundary within 200 nautical miles was to be determined on the basis of geography of the coasts of the Parties in relation to each other and not on the geology or geomorphology of the seabed of the delimitation area – the Tribunal agreed with Bangladesh that the concavity of its coast constituted a relevant circumstance.<sup>15</sup> This was because an equidistance line boundary would produce a so-called “cut-off” effect to the prejudice of Bangladesh. Accordingly, the Tribunal determined that an adjustment of the provisional equidistance line was required in favour of Bangladesh in order to safeguard its maritime entitlement.

### 2.3 Continental shelf beyond 200 nautical miles

The parties disagreed as to whether the Tribunal had jurisdiction to delimit the continental shelf beyond 200 nautical miles and whether the Tribunal, if it determined that it had jurisdiction to do so, should exercise such jurisdiction. Myanmar argued that the Tribunal had no authority to delimit the outer continental shelf; Bangladesh argued that it did.

Myanmar stated that the question of the jurisdiction of the Tribunal with regard to the delimitation of the continental shelf beyond 200 nautical miles should not arise in the case. In the view of Myanmar, any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area. Myanmar also argued that, since the outer limit of the continental shelf had not yet been established on the basis of the recommendations of the CLCS, the Tribunal could not determine the line of delimitation over that area.

Bangladesh claimed that the Tribunal was empowered by the Convention to adjudicate disputes between States arising under Articles 76 and 83 of UNCLOS. As the Convention does not distinguish between jurisdiction over the inner and the outer part of the continental shelf, the Tribunal had jurisdiction to carry out delimitation beyond 200 nautical miles.

In the past, international courts and tribunals have expressed different views as to whether they may delimit the continental shelf beyond 200 nautical miles in areas where the CLCS has not made a recommendation to the coastal States concerned. In the *Canada/France* and *Nicaragua v. Honduras* cases, the arbitral tribunal and ICJ, respectively, decided that they could not delimit the continental shelf boundary beyond 200 miles.<sup>16</sup> In marked contrast, in the *Barbados v. Trinidad and Tobago* case, the UNCLOS Annex VII arbitral tribunal decided that it could do so.<sup>17</sup>

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<sup>15</sup> *Id.*, paras. 290-315.

<sup>16</sup> *Case concerning Delimitation of Maritime Areas between Canada and France*, (1992) 31 ILM 1145, at 1171–2, paras. 75–82; and *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, at 759, para.



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In the Judgment, ITLOS expressly followed the decision of the tribunal in the *Barbados v. Trinidad and Tobago* case. In that case, the Annex VII tribunal had concluded unequivocally that “the dispute to be dealt with by the Tribunal includes the outer continental shelf, since [...] it either forms part of, or is sufficiently closely related to, the dispute [...] and [...] in any event there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf”.<sup>18</sup> The tribunal expressly rejected Trinidad and Tobago’s claim to have had an outer continental shelf; the single maritime boundary delimited by the tribunal constrains Trinidad and Tobago’s maritime territory to an area that falls entirely within Barbados’s 200 nautical line limit.<sup>19</sup>

In the present case, with regard to the rights of third parties, the Tribunal observed that, as provided for in Article 33, paragraph 2, of the Statute of ITLOS, its decision has no binding force except between the parties in respect of that particular dispute. Accordingly, the delimitation of the continental shelf by the Tribunal could not prejudice the rights of third parties. The Tribunal concluded that it had jurisdiction to delimit the continental shelf in its entirety.

The Tribunal further noted that there is a clear distinction between the *delimitation* of the continental shelf under Article 83 and the *delineation* of its outer limits under Article 76. Under the latter article, the CLCS has the function to make recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so expressly without prejudice to delimitation of maritime boundaries. By contrast, the settlement of disputes relating to the delimitation of maritime boundaries is entrusted to the dispute settlement procedures set out at Part XV of UNCLOS.

The Tribunal declared that the delimitation method to be employed over the continental

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<sup>17</sup> However, in practice it did not do so as there were no overlapping continental shelves beyond 200 nautical miles. See *Arbitration between Barbados and Trinidad and Tobago*, RIAA, Vol. XXVII 147, at 209, paras. 217, 242 and 368.

<sup>18</sup> *Id.*, para. 213.

<sup>19</sup> In the *Barbados v. Trinidad and Tobago* case, the tribunal held that it had the power to delimit the outer continental shelf as between the two States but that a delimitation line was not required in that respect because Trinidad and Tobago’s maritime entitlement fell entirely within the maritime territory of Barbados. Trinidad and Tobago’s maritime entitlement therefore reached no more than 200 miles at its furthest extent. At the same time as the tribunal clarified that, under UNCLOS, a court or tribunal delimiting the maritime territory of States Party has the jurisdiction to delimit their outer continental shelf, it also rejected the “leapfrog” theory, propounded by certain theoreticians and geographically disadvantaged States, according to which a State with no maritime territory abutting the high seas can nonetheless “leapfrog” over the EEZ and continental shelves of its neighbours in order to claim outer continental shelf.

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shelf beyond 200 nautical miles should not differ from that within 200 nautical miles.<sup>20</sup> Accordingly, it applied the equidistance/relevant circumstances method. Having considered the concavity of the Bangladesh coast to be a relevant circumstance for the purpose of delimiting the exclusive economic zone and the continental shelf within 200 nautical miles, the Tribunal found that this relevant circumstance had a continuing effect beyond 200 nautical miles.<sup>21</sup> The Tribunal thus extended the adjusted equidistance line that it had already delimited for the exclusive economic zone and continental shelf within 200 nautical miles. According to the Tribunal, this line extends until it reaches the area where the rights of third States (i.e., India) might be affected.<sup>22</sup>

### 2.4 Grey area

A grey area in the context of maritime boundary delimitation refers to the situation where an area on one side of a maritime boundary is beyond 200 nautical miles from the State on the same side of the boundary but within 200 miles of the State on the other side of the boundary.

The delimitation of the continental shelf beyond 200 nautical miles, as effected by ITLOS, gave rise to an area of limited size - referred to by the Parties as a “grey area” located beyond - 200 nautical miles from the coast of Bangladesh but within 200 nautical miles from the coast of Myanmar, yet on the Bangladesh side of the delimitation line.

As a consequence, the seabed of the grey area is Bangladesh’s continental shelf and the superjacent waters Myanmar’s exclusive economic zone.

According to Bangladesh, as for differentiating water-column rights and continental-shelf rights, there is no textual basis in the Convention and such solution could cause practical inconvenience. In Myanmar’s view, the problem of a “grey area” did not arise in the case, because equitable delimitation did not extend beyond 200 nautical miles. The Tribunal noted that, in the grey area, the maritime boundary delimits the Parties’ rights with respect to the seabed and subsoil of the continental shelf but does not otherwise limit Myanmar’s rights with respect to the exclusive economic zone, notably those with respect to the superjacent waters.

It is up to each State, acting in accordance with UNCLOS to “exercise its rights and perform its duties with due regard to the rights and duties of the other”.<sup>23</sup> This is the first occasion on which an international court or tribunal has pronounced on the status of grey areas.

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<sup>20</sup> *Supra*, note 5, para. 455.

<sup>21</sup> *Id.*, paras. 456-460.

<sup>22</sup> *Id.*, para. 462.

<sup>23</sup> *Id.*, para. 475.

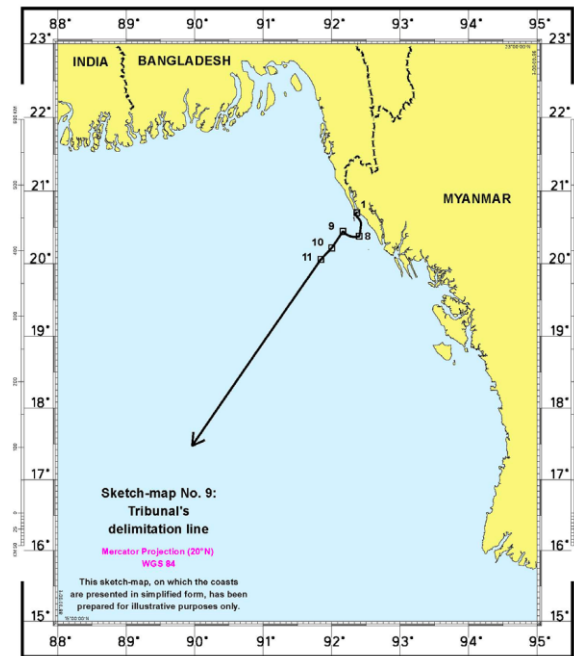


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The maritime boundary as delimited by the Tribunal is illustrated on the map below, which is taken from the Tribunal's judgment.



### 3. Concluding Comments

The Judgment is a mixed contribution to the law of maritime boundary delimitation. With regard to the delimitation of the territorial sea, the exclusive economic zone and the continental shelf within 200 nautical miles, the Tribunal followed the three-stage approach established by other international courts and tribunals over recent decades. However, it departed radically from the accepted methodology in terms of dealing with St. Martin's Island. The Tribunal took it into account as a subjective element introduced at the first stage of the delimitation process, rather than as a relevant circumstance in the second stage. It is unclear that the Tribunal recognised the radical nature of its departure from the orthodox, in this respect. It will be interesting to see whether international courts and tribunals, and in particular the ICJ, in future delimitations will follow this much-criticised approach to delimitation or whether they will apply the previously-accepted delimitation methodology.

As regards the delimitation of the continental shelf beyond 200 nautical miles, the Tribunal followed the decision of the UNCLOS Annex VII arbitral tribunal in the

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*Barbados v. Trinidad and Tobago* case. Furthermore, in declaring that the principles used for the delimitation of the continental shelf up to 200 nautical miles should apply also to that part of the continental shelf beyond 200 nautical miles, the Tribunal rejected the notion that the physical geology or geomorphology of the seabed in such areas should be determinative to delimitation.

In the present case, the judgment of ITLOS has combined with the award of the *Barbados v. Trinidad and Tobago* tribunal to assist the work of the CLCS. As with Barbados and Trinidad, since there is no longer a dispute between those States about whether there is a delimitation of the outer continental shelf between them and, if so, what it is, the CLCS can now consider the submissions of each State that has entitlement to outer continental shelf and issue its recommendations.

The judgment will undoubtedly be an important point of reference in the on-going dispute between Bangladesh and India concerning their maritime boundaries in the Bay of Bengal. Its consistency with the *Barbados v. Trinidad and Tobago* tribunal on the issue of delimiting the outer continental shelf means that it will certainly be followed on that point more broadly. It remains to be seen whether its approach to dealing with St. Martin's Island means that ITLOS's first foray into maritime boundary delimitation will bring it more or fewer cases.

Observers of international boundary litigation will note that, yet again, the party whose team was led by a law firm has prevailed over the party whose team did not include a law firm. This is another confirmation of the trend to the increasing professionalisation of public international law adjudication over the past decade or more.