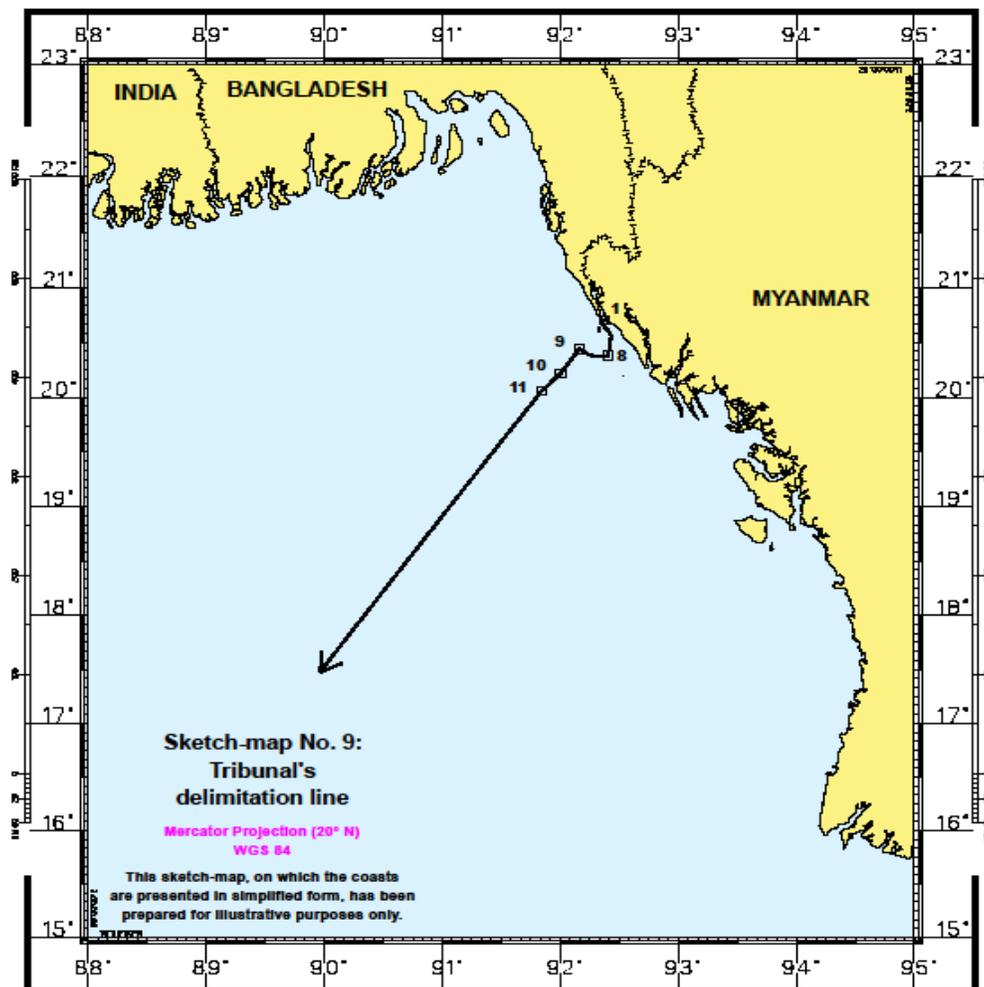


# Myanmar v. Bangladesh

## The International Tribunal for the Law of the Sea: The Implications of the Case for the Bay of Bengal and Elsewhere

Mark E. Rosen

April 2013





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A handwritten signature in black ink, appearing to read 'Mark E. Rosen'.

Mark E. Rosen  
Senior Vice President and General Counsel  
Office of the President

**Myanmar v. Bangladesh**<sup>1</sup>  
**The Implications of the Case for the Bay of Bengal and Elsewhere**

**Mark E. Rosen, JD, LLM\***

**Introduction**

The Bay of Bengal is now unique in that it was the first time that the newly constituted International Law of the Sea Tribunal (ITLOS) in Hamburg adjudicated a comprehensive maritime boundary dispute between the overlapping continental and maritime zone claims of Bangladesh and Myanmar. There were serious economic and political consequences for both states in the event of an adverse decision;<sup>2</sup> yet, both states consented to the jurisdiction of the ITLOS to decide their overlapping maritime boundaries. The big question surrounding this decision is whether this case is just another judicial decree or something special. We will also examine whether there are things in this decision that policy makers can build upon to help resolve other maritime disputes. In my view, this decision was both positive and precedent setting - both as a matter of international law and policy and because it helped assure the continuing viability of the 1982 Law of the Sea Convention.

**The Myanmar v. Bangladesh Litigation**

Before examining the merits of the case and the positions of the parties, it is useful to recall the jurisdictional limits of the ITLOS, an entirely new court. ITLOS was an outgrowth of the 1982 Law of the Sea (LOS) Convention and empanelled in 1996 shortly after the LOS Convention globally entered into force. The jurisdiction of the Tribunal comprises all maritime disputes submitted to it in accordance with the Convention, including issues pertaining to the administration of oceanic areas beyond the jurisdiction

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\*Vice President and Deputy General Counsel, CNA Corporation. The views expressed in this article are those of the author alone and do not represent the views of CNA or its sponsors.

<sup>1</sup> Dispute concerning *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012 (available on the website of the ITLOS 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)) (hereinafter "The Decision"). For commentary on the case, see I. Papanicopolulu, 'From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea', EJIL: Talk!, 23 March 2012, available at <<http://www.ejiltalk.org/from-the-northsea-to-the-bay-of-bengal-maritime-delimitation-at-the-international-tribunal-for-the-lawof-the-sea/>> and R. Churchill, The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation, \_\_\_\_ *Cambridge Journal of International and Comparative Law*, 137, 2012. Available at: <http://www.google.com/search?client=safari&rls=en&q=Churchill+The+Bangladesh/Myanmar&ie=UTF-8&oe=UTF-8> (hereinafter "Churchill)."

<sup>2</sup> One immediate economic effect concerned proposed exploration licenses what were awarded by Myanmar in 2008 to companies from South Korea and China for an area south of St. Martin's Island. Those licenses had to be abandoned as a result of the decision in favor of licenses which Bangladesh had issued to Conoco Phillips. According to press accounts, there have been confirmed finds in this area and the reserves are quite large. Boot, W. "Sea Tribunal Ruling: Bangladesh's Gain, Burma's Paying" *The Irrawaddy*, March 20, 2012. Available at: [http://www2.irrawaddy.org/article.php?art\\_id=23245&page=1](http://www2.irrawaddy.org/article.php?art_id=23245&page=1)

of individual states – the international seabed. It also includes all matters specifically provided for in any other agreement<sup>3</sup> which confers jurisdiction on the Tribunal (Statute, Article 21) and the Tribunal has jurisdiction over all disputes concerning the interpretation or application of the Convention, subject to the provisions of Article 297 and to the declarations made by states parties in accordance with Article 298 of the Convention.

In simple terms, those two Articles allow states to choose among a menu of dispute settlement options under the LOS Convention, including litigation before the ITLOS, litigation before the International Court of Justice (ICJ), or two types of arbitration (the method chosen by the U.S.). Also, reflecting the great sensitivities of large states, like the U.S., to not be “hauled into court” on matters which affect grave matters of sovereignty, Art 298 allows the states to exclude certain categories from mandatory dispute settlement issues pertaining to a coastal state’s management of its exclusive economic zones (EEZ) fish stocks, military or law enforcement matters, and certain types of boundary disputes.

Neither state in their filings sought to establish strict boundary conditions over the court’s inquiry or exclude certain matters from the scope of their consent to jurisdiction. As a result, the Court’s opinion<sup>4</sup> squarely addressed all of the competing maritime boundary issues. To be discussed more fully below, the Court also went beyond what the parties expected.

So far as can be determined, this agreement has been respected by the litigants even though the international press is reporting that Bangladesh was much happier with the outcome than Myanmar.<sup>5</sup> The Bangladesh media is “unanimously celebratory” with some stating that the decision amounted to the “greatest achievement of our international diplomacy after independence....” The Myanmar media and Ministry of Foreign Affairs have not issued statements on the case; however, there is no evidence that Myanmar does not intend to abide by the decision. Even if Myanmar didn’t get all that it bargained for in the decision, they can take solace in the fact that their maritime frontiers are now legally fixed and they are now in a position to invite firms to develop their offshore hydrocarbon resources with surety that their exploration activities and investments will not be vitiated by an adverse court decision or, worse, by a Bangladeshi or Indian gunboat.

The Bay of Bengal has all the ingredients to become a contested maritime region because of the presence of numerous islands, disputes over straight baselines, a highly irregular coastline dominated by the Mouth of the Ganges/Meghna River Estuary, overlapping continental shelves and EEZs, and commercially viable reserves of oil and gas<sup>6</sup> -

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<sup>3</sup> This would include international agreements which invoke the court’s jurisdiction or, as was the case between Myanmar and Bangladesh, the consent of the state parties.

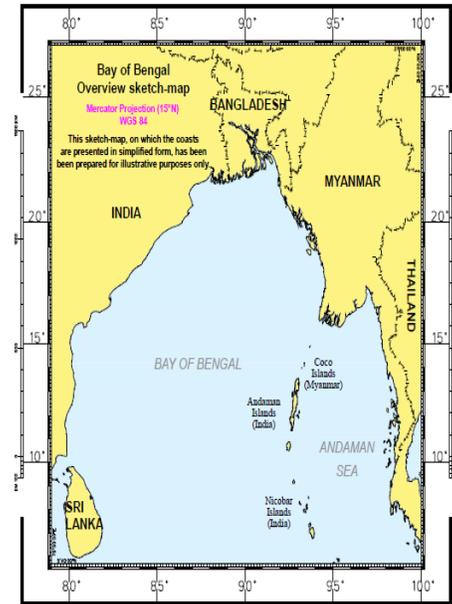
<sup>4</sup> Int’l Tribunal of the Law of the Sea, Case No. 16, Mar 14, 2012. Available at: [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/1-C16\\_Judgment\\_14\\_02\\_2012.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf)

<sup>5</sup> This is an unfortunate mischaracterization of the outcome since, as discussed later in this paper; Myanmar did win a number of very important points in the litigation having to do with the legal effect to be given to St. Martin’s Island.

<sup>6</sup> Reuters, The Australian oil and energy firm Santos has found commercially viable reserves of natural gas in the Bay of Bengal in one of three wells drilled at Sangu off Chittagong port, the company's chief

Figure 1

especially those due South of Bangladesh that were arguably part of Myanmar/Burma's (hereinafter Myanmar) continental shelf.<sup>7</sup> Bangladesh is located in the northeast corner of the Bay of Bengal and has a concave coastline as well as a coastline that has been somewhat unstable due to flooding and erosion. The coast, which is essentially a low-lying floodplain, is one of the most vulnerable countries in the world to environmental disaster since its network of rivers and low-lying flood plains make it both fertile and subject to erosion from floods, droughts and storms and inundation due to global climate change and increases in sea level. By contrast, Myanmar's comparatively unspoiled coast includes large areas of mangroves and coastal mudflats interphased with sandy beaches. The maritime area which was the subject of the case lies in the northeastern part of the Bay of Bengal and covers an area of approximately 2.2 million square kilometers and is bordered by Sri Lanka, India, Bangladesh and Myanmar. (See Fig. 1).



In *Bangladesh v. Myanmar*, the ITLOS was asked to delimit three maritime boundaries between the two states: the territorial sea boundary; the single maritime boundary between the EEZs and continental shelves of the two states; and the boundary of the continental shelf (CS) beyond 200 miles from the parties' baselines. Bangladesh and Myanmar had attempted without success to resolve their differences via bilateral negotiations<sup>8</sup> prompting Bangladesh to institute arbitral proceedings in October 2009 against Myanmar (and India<sup>9</sup>), pursuant to Annex VII of the LOS Convention. On 4 November 2009, Myanmar proposed that the case between it and Bangladesh should be transferred to the ITLOS. The following month, Bangladesh agreed to accept the jurisdiction of the ITLOS.

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representative in Bangladesh said on Wednesday, Wed Feb 15, 2012. Available at: <http://www.reuters.com/article/2012/02/15/santos-bangladesh-idUSL4E8DF3ET20120215>

<sup>7</sup> Netherland Blog and News Agency. "Bangladesh to Add Offshore Gas Blocks After Dispute with Burma Ends" March 24, 2012. Available at: [http://www.google.com/imgres?imgurl=http://4.bp.blogspot.com/-RlakAvMwxDc/T2wkboVbzKI/AAAAAAAAAB\\_A/h7Zkq9l7ksc/s1600/Baylaim.jpg&imgrefurl=http://www.nl-aid.org/continent/south-asia/bangladesh-to-add-offshore-gas-blocks-after-dispute-with-burma-ends/&h=275&w=320&sz=24&tbnid=RC2BBLTBMTJB2M:&tbnh=87&tbnw=101&prev=/search%3Fq%3Doil%2Band%2Bgas%2Bbay%2Bof%2Bbengal%26tm%3Dsch%26tbo%3Du&zoom=1&q=oil+and+gas+bay+of+bengal&usg=\\_\\_W3ilAS4zUogIxUpKl5iI6YnmhHo=&hl=en&sa=X&ei=l\\_VZUNGKCuXk0QGss4HwBw&ved=0CCkQ9QEwBw](http://www.google.com/imgres?imgurl=http://4.bp.blogspot.com/-RlakAvMwxDc/T2wkboVbzKI/AAAAAAAAAB_A/h7Zkq9l7ksc/s1600/Baylaim.jpg&imgrefurl=http://www.nl-aid.org/continent/south-asia/bangladesh-to-add-offshore-gas-blocks-after-dispute-with-burma-ends/&h=275&w=320&sz=24&tbnid=RC2BBLTBMTJB2M:&tbnh=87&tbnw=101&prev=/search%3Fq%3Doil%2Band%2Bgas%2Bbay%2Bof%2Bbengal%26tm%3Dsch%26tbo%3Du&zoom=1&q=oil+and+gas+bay+of+bengal&usg=__W3ilAS4zUogIxUpKl5iI6YnmhHo=&hl=en&sa=X&ei=l_VZUNGKCuXk0QGss4HwBw&ved=0CCkQ9QEwBw)

<sup>8</sup> Since 1973, there have been persistent efforts to resolve the dispute. Two informal agreements were reached and over a dozen bilateral meetings were held.

<sup>9</sup> India consented to arbitration with Bangladesh. This occurred pursuant to Annex VII of the LOS Convention which establishes international arbitration as the default in the event there is a disagreement concerning the dispute settlement mechanism which the two parties have chosen.

## The Territorial Sea Boundary

The first challenge the court faced was to establish a territorial sea baseline at the juncture of Bangladesh–Myanmar land border that happened to lie on either side of the mouth of the Naaf River. Fixing this single maritime boundary was important since all other maritime zones are derivative of the territorial sea boundary. In delimiting the single maritime boundary between the overlapping EEZs and continental shelves of opposite or adjacent countries, international tribunals use the “equidistance/relevant circumstances<sup>10</sup>” method which involves construction of a hypothetical equidistance line, and then assessing that provisional equidistance line against relevant circumstances which would produce and inequitable result and/or result in a one country receiving a disproportionately large amount of ocean territory. Also, the ITLOS had to determine whether the boundary was already determined pursuant to a prior 1974 agreement between the parties which – as per Bangladesh – would entitle them to claim a full 12 NM territorial sea on either side of St. Martin’s Island, as depicted in **Figure 2**. That so-called agreement was contained in a 1974 note verbale<sup>11</sup> that established provisional boundaries for the area depicted in **Figure 3** so that ships belonging to each nation would understand the transit regimes that they had to follow. The note verbale was never formalized as a treaty; indeed, the note used the term “ad hoc understanding” and also noted that the two sides “agreed to continue discussions in the matter with a view to arriving at a mutually acceptable maritime boundary.<sup>12</sup>”

Figure 2

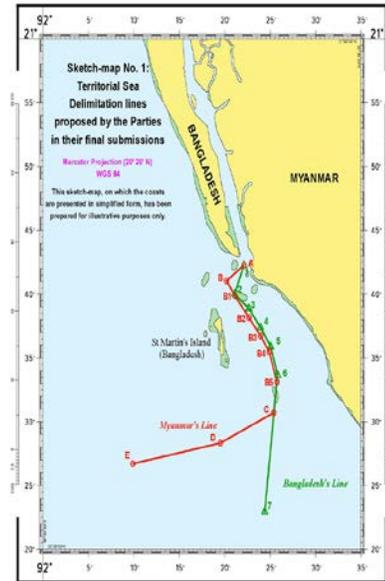


Figure 3



<sup>10</sup> Case concerning Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment, ICJ Reports 2009, p. 61 (hereinafter referred to throughout as the Serpent Island Case). Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=ru&case=132&k=95>

<sup>11</sup> The note verbale is reputed to be legally predicated upon Agreed Minutes from series of meetings held in 1974 to establish some temporary boundaries so that vessels from both countries would understand the limits of each other’s territorial sea and when vessels had to adhere to the rules regarding innocent passage. A draft treaty was also circulated but never was finalized. Myanmar characterized the agreement as an outgrowth of “technical level” talks. Bangladesh argued that the note was evidence of a binding international agreement.

<sup>12</sup> The Decision, *supra* note 1 at page 28.

The ITLOS held that the note verbale was not sufficient to establish a legally binding agreement, particularly because the use of the words “ad hoc” and the language of futurity pertaining to the need for a “comprehensive boundary treaty.” In the Court’s view, this denoted something that was not fixed and legally binding under International Law. Also, the fact that the agreement was never given due publicity (a requirement in the LOS Convention) or registered with the UN, as is required under Article 102 of the UN Charter, undoubtedly affected the calculus whether the agreement was intended to be fixed and legally binding. Finally, to the extent that the informal agreement ripened into evidence of a “tacit” or de facto agreement based on the written words (note verbale) and the practice of both states, ITLOS also rejected that line of argument: “evidence of a tacit legal agreement must be compelling....”.

Had ITLOS’ endorsed the note verbale it would have resulted in the incorporation of the southerly portion of St. Martin’s Island<sup>13</sup> into the territorial calculation and resulted in a slight enhancement of the position of Bangladesh.<sup>14</sup> Bangladesh argued that St. Martin’s island<sup>15</sup> met all of the criteria for being an Island under Article 121 of the LOS Convention and that the Island, if given the full benefit, would project its territorial sea further east towards mainland Myanmar. Myanmar, on the other hand argued that increasing “state practice” is to “ignore the effect of small to middle sized islands” vis-à-vis the claims of a continental state.<sup>16</sup> They also argued that giving effect to the full maritime zones which could be generated by St. Martin’s Island (vis-a-vis the Myanmar coast), given its strange proximity to the Myanmar coast, would be inequitable and that “special circumstances” existed for deviating from the normal process for establishing maritime zones.<sup>17</sup> Finally, Myanmar argued that since St Martin island was well to the West of the other islands at the Mouth of the Naaf River, that St. Martin’s should not be categorized as a “Coastal Island” that could be used in establishing a straight baseline which links “fringing” islands on a coastline.<sup>18</sup>

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<sup>13</sup> Bangladesh side proposed the intersecting point of the two 12 [nm] arcs (Territorial Sea limits from respective coastlines) drawn from the southernmost point of St. Martin’s Island and Myanmar mainland as agreed in 1974.

<sup>14</sup> The most notable area in which the note verbale would have enhanced Bangladesh’s position pertains to the direction of the boundary below point 6 on **figure 3**. It would have been further east by a few miles.

<sup>15</sup> The island has “a surface area of some 8 square kms and sustains a permanent population of about 7,000 people” and serves as “an important base of operations for the Bangladesh Navy and Coast Guard”. Bangladesh maintains that fishing “is a significant economic activity on the island”, which also “receives more than 360,000 tourists every year.” Bangladesh notes that “[t]he island is extensively cultivated and produces enough food to meet a significant proportion of the needs of its residents”. The Decision, *supra* note 1 at pg. 49.

<sup>16</sup> St. Martin’s Island is an important “special circumstance” which necessitates a departure from the median line. The Decision, *supra* note 1, at pg. 46.

<sup>17</sup> St. Martin’s Island lies in front of Myanmar’s mainland coast, it is located almost as close to Bangladesh’s mainland coast as to the coast of Myanmar and it is situated within the 12 nm territorial sea limit from Bangladesh’s mainland coast

<sup>18</sup> Under the LOS Convention, islands which are immediately adjacent to a continental country’s coastline can be designated as “fringing islands” under Art 7 of the Convention – entitling the coastal state to use those islands (vs. the low water mark on the continent) as the connecting or base points for straight baselines which constitute the starting point of the coastal state’s territorial sea and other maritime zones.

The ITLOS sided with Bangladesh and rejected Myanmar's argument that the geographic effect of St Martin's Island should be totally discounted<sup>19</sup> because assigning a 12NM territorial sea would distort the boundary line in such a way as would lead to an inequitable result. Art 15 of the LOS Convention allows for such action when there are historic or "special circumstance," but the Court was not convinced that the correct factors were present. In the end, the Court accorded the Island a 12NM sea but the ITLOS strangely decided not to use St. Martin's Island as a base point in the boundary line (see Fig. 3) because the island was located immediately in front of Myanmar's mainland coast and its use would result in a line that blocked the seaward projection of Myanmar's Northern coast. In the Court's words, this would result "in an unwarranted distortion of the delimitation line and amount to a judicial refashioning of geography."<sup>20</sup> Instead the ITLOS chose two base points on Bangladesh's coast and four on the coast of Myanmar. Beginning from a point midway in the mouth of the Naaf River, the ITLOS then constructed an equidistance line using its selected base points as depicted in Figure 3. The net effects for both countries, after all of this intense discussion and analysis, was that the territorial sea boundary line in the area from the mouth of the Naaf River along the Northern Coast of Myanmar shifted only slightly from the boundary which Myanmar was originally seeking.

In the context of finding the single territorial sea boundary, ITLOS only paid lip service to the principle that Islands are entitled to the same zones as continental land masses (a full EEZ and CS); yet they chose to effectively disregard the effects of St. Martin's in establishing the territorial sea boundaries among the adjacent continental countries for the purposes of establishing the single territorial boundary line. A noted international expert in boundary disputes described it thusly:

As to St. Martin's Island, the ITLOS, while accepting that in principle islands could be considered to be relevant circumstances depending on "the geographic realities and the circumstances of the specific case", held that St. Martin's Island was not a relevant circumstance in this case for the same reason that it was not used as a base point in constructing the equidistance line. This seems a little confusing as it suggests that islands are a factor to be taken into account both in constructing the equidistance line as the provisional boundary and as a relevant circumstance for adjusting that line. (citations omitted)<sup>21</sup>

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<sup>19</sup> Citing to the *Qatar v. Bahrain* (Merits, Judgment, I.C.J. Reports 2001, p. 40, at p. 104, para. 219) in which the ICJ held that "insignificant maritime features" will not be given full effect. The Court did give full effect to St. Martin Islands 12NM territorial sea.

<sup>20</sup> The Decision, *supra* note 1, at para 265.

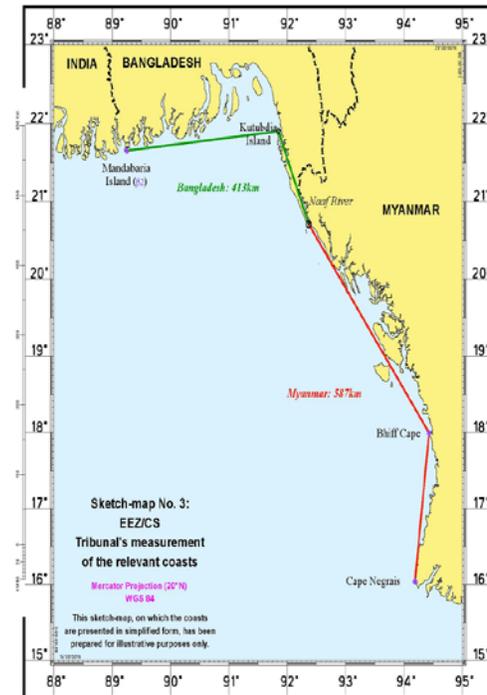
<sup>21</sup> Churchill, *supra* note 1 at 144.

## EEZ and Continental Shelf Within 200 NM Miles

While the ITLOS decision spends considerable time delimiting the territorial sea boundary in the area adjacent to the Mouth of Naaf River, the much more economically important question was how the EEZ and Continental Shelf lines would be drawn in three respects: (a) how far East would the North-South line projecting the Eastern portion of the Bangladesh EEZ extend - - thereby resulting in much less sea space on the Eastern Coast of Myanmar?; (b) Would Bangladesh be able to leverage the effects of St. Martin's Island to obtain a much increased maritime zone to the south of the Island? and (c) would Bangladesh be entitled to a closure line from the Mandabaria to Kutubdia (due to its unstable boundary) thereby resulting in a significantly larger territorial sea, EEZ, and CS at the expense of Myanmar because it projects much further south?

The Court quickly disposed of the question of Bangladesh's use of straight baselines on their immediate coast: "To avoid difficulties caused by the complexity and sinuosity of that coast, it should be measured in two straight lines..." as depicted in **Figure 4**.<sup>22</sup> Because the boundaries of Myanmar and Bangladesh are adjacent, delimiting their mutual boundary was much more difficult than situations in which there are countries on opposite sides of a body of water and the court (or parties) can simply draw an equidistance line to establish the outer limits of their respective EEZs and Continental Shelves.<sup>23</sup> Unfortunately, most boundary delimitations in these circumstances must be effected on the basis of "international law in order to achieve an equitable solution..."<sup>24</sup> because the text of the Convention (specifically Articles 74.1 and Article 83) does not contain a prescriptive formula on how this is to be

Figure 4



<sup>22</sup> The court basically agreed with the position of Bangladesh that the long baseline was justified because the area constituted an estuary, and that a long closure traversing the mouth of the Meghna River was treated like the opening to the Bay of Fundy in Canada wherein Canada got the benefit of a straight baseline. See, Para 200-201 of the Decision. The Court used the term

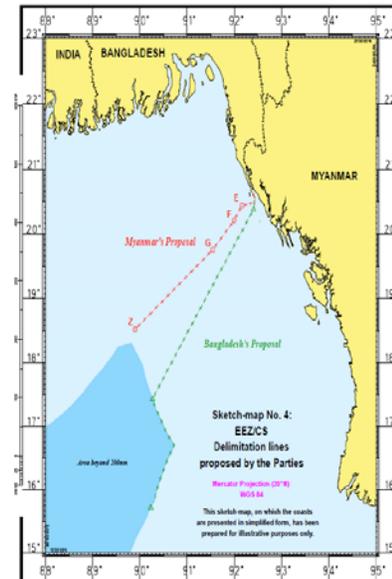
<sup>23</sup> The 1958 Territorial Sea Convention defines equidistance as "the line every point of which is equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each of the two States is measured." Mechanically, such an equidistance baseline is established by drawing arcs from points on each country's coastline that are equally far from a reference point and then "connecting the dots."

<sup>24</sup> The Decision, *supra* note 1 at paragraph 225. The Court's language is almost a verbatim quote of Article 74.1 of the Convention.

accomplished.<sup>25</sup> In most cases, of course, tribunals appropriately rely upon the past decisions by courts and arbitral tribunals.<sup>26</sup>

Myanmar argued that an equidistance approach could be because equidistance arcs could be drawn from the adjacent coasts of Bangladesh to the Coast of Myanmar. In support of their argument, they cited to the recent *Romania v. Ukraine* case (the Serpent Island Case)<sup>27</sup> in which that court more or less followed an equidistance test but reserved the right to adjust the line if the provisional equidistance line bore no relationship to the length of the coastline and resulted in inequality.<sup>28</sup> Bangladesh argued that the case law did not support mechanical application of the equidistance method if it produced irrational results. They argued that this was particularly true in situations, like that of Bangladesh, that the coastline was either concave or convex. Instead, they urged the court to follow the “angle bisector method” that was used by the ICJ in delimiting the Gulf of Maine and the Tunisian/Libyan continental shelves. **Figure 5** depicts the positions of the parties;

Figure 5



as can be readily seen, the adoption of the Myanmar strict equidistance closure line would greatly block the seaward expansion of Bangladesh’s continental shelf and EEZ.

In the end the Court rejected Myanmar’s argument for the strict application of the equidistance test; namely, that the LOS Convention mandated that delimitation of maritime zones must be done in “order to achieve an equitable solution without specifying the method to be applied.”<sup>29</sup> Drawing from the *Romania v. Ukraine* case, the Court affirmed a three step approach wherein a provisional equidistance line is drawn and then adjusted to achieve an equitable result (such as eliminating blockage of the seaward projection of a coastal state’s EEZ or Continental Shelf due to concavity) or adjusted if the maritime area of each state is “markedly disproportionate” to the ratio of the two coastlines.<sup>30</sup> The Court, after going through these three steps, ultimately concluded that the concavity of the Bangladesh Coast (like Germany’s coast in the *North Sea Continental Shelf Cases*) was a special factor that would “block out” the natural prolongation of their EEZ and CS. The ITLOS adopted a line similar to that proposed by Bangladesh (see Fig. 5) except that it projected slightly further West than shown.

<sup>25</sup> The terms “equitable solution” is not a legal jump ball. There have been a large number of cases decided by the ICJ and international arbitration tribunals which have given legal content to those words.

<sup>26</sup> Article 38 of the Statute of the Court for the International Court of Justice. See Also, Art 74 of the LOS Convention.

<sup>27</sup> <http://www.icj-cij.org/docket/files/132/14987.pdf>

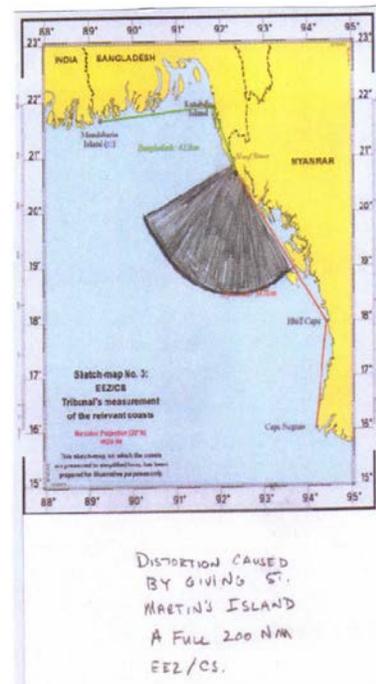
<sup>28</sup> ICJ Judgment, *supra* note \_\_\_ at pg. 18. <http://www.icj-cij.org/docket/files/132/14987.pdf>

<sup>29</sup> Decision, Para 225 citing to the 1969 ICJ North Sea Continental Shelf Cases in which that court had to delimit the adjacent continental shelves of Denmark, Germany and the Netherlands - - also an area in which Germany had a concave coastline similar to that of Bangladesh.

<sup>30</sup> The Decision, *supra* note 1 at paras 233 and 240

St. Martin's Island surfaced again in the context of delimiting the EEZ and CS of the two countries. In this context, the Court had to confront whether that Island was entitled to its own Continental Shelf and EEZ. The practical effect of such a finding would have been to draw a 200NM circle around St. Martin's Island that would encroach into the EEZ/CS of Myanmar – even after the opposing boundaries were delimited to the appropriate midline (see Fig. 6) and drag the coastal boundary further East towards Myanmar's coast. There was no question that St. Martin's Island qualifies as an Island within the meaning of Art 121 of the LOS Convention and, by right, is entitled to a full Continental Shelf, EEZ and territorial sea.

Figure 6



Bangladesh argued that St. Martin's Island should be given full effect and the fact that it, in front of one coast or another, is not legally significant; particularly because the Island is geographically in front of both coastlines.<sup>31</sup> Myanmar argued that St. Martin's island was geographically insignificant when compared to the adjacent continental countries and that a finding of “special circumstances” justified a deviation from the normal rule. In addition, they argued that there are no modern cases in which there is a situation, like that of St. Martin's Island, in which a 5KM long “coastal island” was used to generate 13,000 square KMs of maritime area.<sup>32</sup> In support of their argument, Myanmar cited the recent Serpent Island case in which the International Court of Justice discounted the effect of Serpent Island (a Ukrainian Island within the EEZ of Ukraine) in assessing the adjacent boundaries of Romania and Ukraine in the Black Sea. (see Fig. 7).

The Court sided with Myanmar (disregarding the vigorous dissent of the Chinese Judge):

...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 and the circumstances of the specific case. There is no general rule in this respect..... St. Martin's Island is an important feature.... However, 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

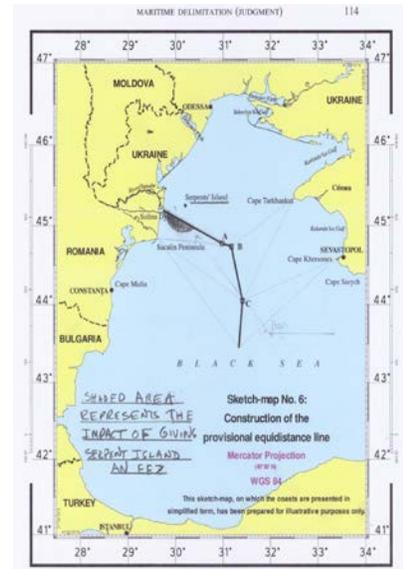
<sup>31</sup> Paragraphs 298-300 of the Decision: “whether or not an island can be characterized as being ‘in front of’ one coast or another does not in itself determine whether it is a special or a relevant circumstance”. It refers in this regard to the Case concerning the Delimitation of the Continental Shelf between United Kingdom of Great Britain and Northern Ireland, and the French Republic, in which the Court of Arbitration observed that the pertinent question is whether an island would produce “an inequitable distortion of the equidistance line producing disproportionate effects on the areas of shelf accruing to the two States” (Decision of 30 June 1977, RIAA, Vol. XVIII, p. 3, at p. 113, para. 243).

<sup>32</sup> Recall that the court chose to not include St. Martin's island as a base point among the fringing islands which were part of the territorial sea straight baseline (Figure 3). Had it been included as a base point, it would have been considered a coastal feature and not given its own EEZ/CS.

in a line blocking the seaward projection from Myanmar’s coast in a manner that would cause an unwarranted distortion of the delimitation line<sup>33</sup>

Figure 7

It is odd that the court did not explicitly cite the Serpent Island case (Fig. 7) in reaching its decision to discount the effect of St. Martin’s Island in fixing the seaward expanse of each nation’s EEZ and CS. The Serpent Island case is the only definitive judicial ruling on whether “minor” islands are to be given full effect in maritime delimitation after the LOS Convention’s entered into force. That case is also noteworthy because the provisions in Article 121 the 1982 LOS Convention defining islands as those oceanic territories capable of “human habitation or economic life of their own” was “not put down in a conventional text until the LOS Convention (1982) that is somewhat new to the law of the sea.<sup>34</sup>” In any event, in the Serpent Island case, the ICJ held:



“[there are] two principles underpinning its jurisprudence on this issue : first, that the “land dominates the sea” in such a way that coastal projections in the seaward direction generate maritime claims (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96); second, that the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other Party. Consequently “the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court<sup>35</sup>

<sup>33</sup> The Decision, *supra* note 1 at paragraphs 317-318. The separate opinion of the Judge Gao from China took the majority to task for, on the one hand, giving the island full legal effect and then completely discounting its effect in computing the extended CS and EEZ (although it was given full effect (12NM in the computation of the single territorial sea boundary. Gao strongly disagreed with the opinion because of its “inconclusiveness” and the failure to accord St Martin’s Island its “legitimate seaward projection” added “insult to injury.” (at 33). Gao was of the opinion that the Island should have been given “half effect.”

<sup>34</sup> Gjetnes, M. “The Legal Regime of Islands in the South China Sea” Master’s Thesis, University of Oslo (2000) at page 48. Available at: <http://www.seasteading.org/wp-content/uploads/2012/02/GjetnesThesis.pdf>

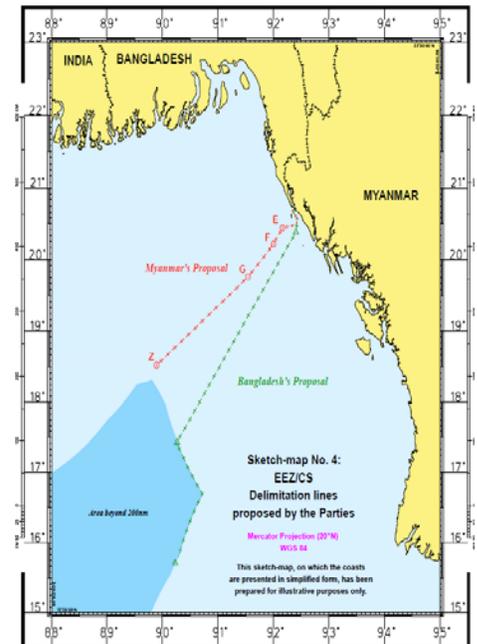
<sup>35</sup> The Decision, *supra* note 1 at page 97

## EEZ and Continental Shelf Beyond 200NM (Shaded Area, Fig. 8)

The final issue that the court had to address was the delimitation of the continental shelf areas beyond 200NM. On this question, Myanmar argued that they had never consented to the court's jurisdiction over this question; indeed, they questioned the court's authority to rule on these types of questions.

Under the LOS Convention, the normal process for adjudicating whether a state meets the geographic criteria for receiving an extended continental shelf (beyond 200NM) is for the state to make a submission to the Commission on the Limits of the Continental Shelf (CLCS), a body of independent experts in geology, geophysics and hydrography established by the LOS Convention. The CLCS make recommendations to the coastal state regarding its submission and, if accepted by the coastal state, then the shelf established on the basis of those recommendations is final and binding, LOS art 76(8). If the Coastal State does not agree with the technical analysis of the CLCS, then it becomes a matter in dispute.

Figure 8



The text of the LOS Convention is less than clear on the relationship between the establishment of the outer limit of the continental shelf according to the procedure just described and the delimitation of the boundary between overlapping and/or adjacent continental shelves beyond 200 miles.<sup>36</sup> Further, neither state had consented to the jurisdiction of the CLCS to resolve the question of their adjacent continental shelf claims. In sum, neither litigant had authorized the ITLOS to decide whether either state was entitled to a continental shelf beyond 200NM and, if so, how the area would be delimited in those adjacent areas which overlapped.

According to the noted international law of the sea expert, Robin Churchill, there is no consistent approach taken by international courts and tribunals as to their competence to adjudicate claims beyond 200NM.<sup>37</sup> Even though this legal vacuum existed and the CLCS was stymied in its work to adjudicate the outer limits of the adjacent continental shelf due to Myanmar's lack of consent, ITLOS was comfortable in deciding that they had jurisdiction to adjudicate this issue. In the court's words: "the record in this case affords little basis for assuming that the Parties could readily agree on other (dispute settlement) avenues available to them...[and] a decision by the Tribunal to not exercise its jurisdiction...would fail to resolve a long-standing dispute...[and]...not be conducive to the efficient operation of the Convention."<sup>38</sup>

<sup>36</sup> Article 76 (10) conditions all of the deliberations by the CLCS "without prejudice" to the rights of other states with opposite or adjacent continental shelves.

<sup>37</sup> Churchill, *supra* note 1 at 148.

<sup>38</sup> The Decision, *supra* note 1, paras 390 and 391.

The threshold question as to a coastal state's entitlement to claim a continental shelf beyond 200NM is whether the coastal state is a so-called "broad margin" state and entitled to an extended continental shelf. Under Art 76 of the LOS Convention, this would be a mixed legal and scientific inquiry that is conducted by experts at the CLCS based on geographic and geologic data that would substantiate that areas beyond 200NM represent a "natural prolongation" of the land territory (Bangladesh) or an extension of the land territory based on the thickness of sedentary rock (Myanmar). After accepting the scientific evidence submitted by both parties, and with little discussion, ITLOS endorsed the scientific data both countries had broad continental margins and both were entitled to a continental shelf beyond 200NM. Also, because the areas were adjacent and overlapped, the court simply extended the delimitation line further west (see Fig. 8, Bangladesh Proposal) since, in the court's view, delimitation must be effected using single boundary lines.

### **The ITLOS as a Forum for Contentious Maritime Disputes**

The Bangladesh/Myanmar case was novel in that it was both the first time that the newly minted ITLOS had decided a complex maritime boundary matter. In times past, boundary disputes were resolved via International Court of Justice and arbitral tribunals with the express consent of the states, but with mixed results. Up to now, the ITLOS had only decided 19 cases; the majority of them being cases involving the seizure of vessels by coastal states for safety or environmental reasons.

On a technical level, the decision was very noteworthy because ITLOS showed a great willingness to "step into the breach" and aggressively assert its jurisdiction – at the risk of stepping on the toes of sovereign governments. The conclusion that the court was especially assertive is based on the facts that the court:

- Bypassed the CLCS process. Both parties had made submissions to the CLCS but the processes had not yet run their course;<sup>39</sup>
- Ignored the objections of Myanmar to the court's assertion of jurisdiction over questions pertaining to delimitation of the CS beyond 200NM;
- Established a legal standard for delimitation of adjacent CS area beyond 200NM (an issue not definitively covered in the LOS Convention); and
- Made findings as to the geological and geomorphic features of the continental shelf areas of both countries without reference to a formal scientific study to corroborate their legal findings.

In being assertive, the court seemed to be branding itself as problem solvers. Namely, the Court was prepared to render decisions which enabled the parties to move forward with a

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<sup>39</sup> Recall that the parties had not consented to the CLCS to resolve any overlapping claims issues.

definitive result and no loose ends. Had the court, for example, forced the litigants to complete their submission process before the CLCS it would have delayed the outcome for many years. For these two countries which are in dire need of the inbound capital that will come from foreign investment in oil and gas exploration activities in the Bay, the court showed that it was mindful that it was established to solve problems and not pontificate or procrastinate. The ITLOS decision also showed that the activist court was operating in marked contrast to the longstanding jurisprudence - of the U.S. and elsewhere - of judicial restraint and only answering the limited questions that were squarely put before them.

The jury is still out in terms of how other nations with maritime disputes will come to regard the ITLOS's decision. However, the fact that the court exercised a measure of judicial activism should not be viewed negatively because the court is composed of genuine law of the sea experts and the opinion contained clear and unmistakable language which was easy to understand and implement. More importantly, the opinion was heavily grounded in the LOS Convention. In those instances when the Court felt it necessary to fill gaps in the LOS Convention pertaining to the Court's jurisdiction beyond 200NM and the delimitation rules which should be applied, the Court went to great lengths to frame their opinion as a logical extension of the LOS Convention - - based on the actual text of the Convention, the case law, as well as the Convention's negotiating history.

This minor instance of activism in which the court simply said they would apply the same delimitation principles beyond 200NM that they would apply inside of 200NM, is in sharp contrast to actions by the former prosecutor Carla Del Ponte of the International Criminal Tribunal for the Former Yugoslavia (ICTY). That court, which was the precursor to the International Criminal Court, sought to investigate and possibly indict NATO and U.S. leaders, including Bill Clinton, Madeline Albright and General Wesley Clark for alleged war crimes during the Serbia air campaign. While the charges were later dropped; that incident left scars that may have led to the U.S. decision to never sign the Treaty of Rome<sup>40</sup> out of fear that an activist court would engage in politically motivated prosecutions of world leaders. By contrast, the modest activism by ITLOS was designed to address a textual gap in the LOS convention. ITLOS, mindful that it would be decades before that textual gap could be "fixed" with Treaty amendments and that the parties were anxious to have the overall dispute settled, elected to address the gap.

There was no political messaging in *Bangladesh v. Myanmar*; rather, there seemed to be a concerted desire on the part of the court to promote the comprehensive settlements of protracted maritime disputes that would encourage other disputants to seek out the good offices of the court rather than take unilateral actions that would undermine the oceans governance goals in the 1982 LOS Convention.

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<sup>40</sup> The Treaty of Rome established the International Criminal Court. See Generally, Holt and Dallas, "On Trial: the US Military and the International Criminal Court" The Stimson Center- Report No. 55, March 2006 available at: [http://www.stimson.org/images/uploads/research-pdfs/US\\_Military\\_and\\_the\\_ICC\\_FINAL\\_website.pdf](http://www.stimson.org/images/uploads/research-pdfs/US_Military_and_the_ICC_FINAL_website.pdf)

## Broader Implications of the Decision

The decision of Myanmar and Bangladesh to submit their dispute to ITLOS and the acceptance of the verdict by both sides may send signals to countries in the middle of a maritime dispute related to boundaries and resources that the ITLOS is a fair forum to take disputes. It is also a forum which acts with comparative speed: the court was seized of the matter in January of 2010 and the final decision was issued in March of 2012.

The case could create an opening for larger states to once again make use of international courts. This was the policy goal when the International Court of Justice was established in 1945. States, especially larger states, have historically resisted being “dragged into” international tribunals to adjudicate sensitive matters of national security or sovereignty because of a perception that international tribunals are very UN - and developing country centric - and employ a disproportionate number of jurists from developing countries that comprise the Group of 77.<sup>41</sup> That Group has views which are most often not aligned with those of larger capitalist countries and in general promotes an agenda in which developed countries are supposed to transfer material assistance and technology to developing countries<sup>42</sup> and, in some more extreme cases, yield to some of the principles popularized in the 1970s and 1980s for a New International Economic Order.<sup>43</sup>

Even though the G-77 and NIEO positions have softened over time and developed countries are now more engaged in multilateral activities with G-77 countries, the U.S. and other developed countries have been historically unwilling to submit disputes to International Courts, including the International Court of Justice<sup>44</sup> and the International Criminal Court because of apprehension that politics will be injected into the decision making and out of fear that some UN jurists are unaccustomed to western legal systems. It was for this very reason that some developed countries did not accept the mandatory jurisdiction of the ITLOS pursuant to Art 298 of UNCLOS and virtually all have chosen to exclude a large number of disputes – including boundary disputes – from the scope of the mandatory dispute procedures set forth in Article 297 of the LOS Convention.

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<sup>41</sup> The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries signatories of the “Joint Declaration of the Seventy-Seven Countries” issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva.

<sup>42</sup> See, E.g., Statement on Behalf of the Group of 77 by Ambassador Edi Yusup, Charge D’Affaires ad Interim/Deputy Permanent Representative of the Republic of Indonesia to the United Nations before the WTO. (Geneva, 3-5 September 2012). <http://www.g77.org/geneva/statements/090312.html>

<sup>43</sup> The more controversial tenets of NIEO were Developing countries must: (a) be entitled to regulate and control the activities of multinational corporations operating within their territory; (b) be free to nationalize or expropriate foreign property on conditions favorable to them; (c) be free to set up associations of primary commodities producers similar to the OPEC; and (d) all other States must recognize this right and refrain from taking economic, military, or political measures calculated to restrict it. Many of the NIEO principles are codified in the Charter of Economic Rights and Duties of States adopted by the UNGA on 12 December 1974. UNGA A/RES/29/3281. <http://www.un-documents.net/a29r3281.htm>

<sup>44</sup> After the court ruled that the U.S.’s covert war against Nicaragua was in violation of international law (Nicaragua v. United States), the United States withdrew from compulsory jurisdiction in 1986. *Official Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986.

The question remains whether ITLOS has opened the door to more use of this particular international court by all states, given the large number of particularly contentious issues arising out of competition for ocean resources and disagreement over numerous concepts in the LOS Convention. In my judgment, this decision may tip the balance in favor of more use of this court for a number of reasons. First, the ITLOS is composed of highly respected Law of the Sea experts who professed, throughout the Opinion, that their decisions would be exclusively guided by the LOS Convention and “other Rules of International Law not incompatible with” the LOS Convention.<sup>45</sup> Second, the ITLOS stated in numerous instances that their purpose was to give “coherent and efficient” implementation of the Convention.”<sup>46</sup> Finally, the fact that all of the individual rulings by the ITLOS judges were nearly unanimous<sup>47</sup> lends credence to the notion that litigants can expect that the judges are most interested in rendering a technically accurate and authoritative adjudication of LOS issues in a reasonable period of time. Given the large number of pressing disputes and the potential for conflict, this decision may reassure those states that haven’t, until now, been willing to take the plunge with this new and comparatively untested international forum.

### **An Assessment on a Policy Level**

To preserve the opposing interests of coastal and non-coastal interests, the 1982 Law of the Sea (LOS) Convention was negotiated to codify the balancing of interests and to establish jurisdictional zones between individual, nation-state, and “international” rights to ensure the protection of the marine environment, public order, and the responsible exploitation of resources. It is also important to note that a primary goal in the negotiation of the 1982 LOS Convention was to deter states who were asserting excessive maritime claims and to curb other excesses, including unregulated fishing and almost no environmental standards. The 1982 Convention emerged as a “package deal” such that now almost all industrialized countries in the world are party to the Convention. The Judges on the ITLOS fully understood both the historic predicate for the 1982 Convention and the need to uphold and strengthen the core principles of the LOS Convention. Conversely, failing to judicially act would invite: imprudent management of marine living resources, armed conflict over disputed oceanic claims, or action by states to establish zones which regulate the passage of ships and aircraft - - in contravention with the LOS Convention’s High Seas Freedoms.

There were three important aspects to the decision which may signal that the Courts – especially the ITLOS – can serve an important moderating influence in LOS matters.

First, was their willingness to aggressively assert jurisdiction to solve a complex number of interrelated maritime disputes. Arts 297 and 298 of the LOS Convention established

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<sup>45</sup> Opinion, *supra* Note 1 at Para 55.

<sup>46</sup> Opinion, *supra* Note 1 at Para 373. See also, paras 358, 376, 390, 392, 467

<sup>47</sup> Most decisions were 21 votes for a measure and 1 vote against. One vote was unanimous. The most fractious vote was 19 for a measure and 3 votes against.

complicated rules for the selection of courts and the types of disputes which can be referred to the court. Thus far, decisions by the ICJ and Arbitral Tribunals have tended to exercise judicial restraint and only answer the narrow question that was put to them. ITLOS, as noted previously, was quite aggressive in asserting its competence and jurisdiction and preventing the litigants from cherry-picking only those issues which they felt they could win. For protracted disputes such as the South China Sea, in which some states could be expected to use legal and political maneuvering to thwart the jurisdiction of the court on those areas of great sensitivity, the willingness of ITLOS to “take the bull by the horns” and issue a comprehensive settlement is a refreshing development.

There are limits to how far the ITLOS can take matters. Were it to be seized of jurisdiction to adjudicate South China Sea claims on a final basis or provisionally, it would either need the consent of the states parties (either expressly or as per another binding agreement) or have to refer questions of sovereignty over disputed land territories to the International Court of Justice since it has no competence in those matters.

The second aspect of the *Myanmar v. Bangladesh* decision which displayed that the ITLOS was mindful of its role as the legal guardian of the LOS Convention was its decision to twice discount the effects of St. Martin’s Island in fixing boundaries. It did it first in fixing the single maritime boundary between Bangladesh and Myanmar. It did it a second time in determining the breadth of the Myanmar EEZ and Continental Shelf (CS).

The case of St. Martin’s Island was nearly identical to that which the ICJ confronted in the Serpent Island litigation (Fig. 7) in which the ICJ discounted the effect of Serpent Island in delimiting the adjacent maritime boundary of the two countries even though a “strict” reading of the Convention would have resulted in Ukraine acquiring extra oceanic territory as a result of the southerly distortion of the delimitation line.

One can only envision that ITLOS took a cue from the International Court of Justice that was concerned with the worldwide trend for states to go rock or minor island “hopping” to acquire large swaths of ocean territory. This issue is not expressly addressed in the text of the LOS Convention but when one critically examines its negotiating context and to curtail unilateral and excessive “grabs” of ocean territory, the ITLOS decision was reasonable and stabilizing. Also, in exchange for that restraint regarding St. Martin’s Island which benefitted Myanmar, the court displayed judicial acumen finding the presence of equitable factors justifying an adjustment of the adjacent maritime boundary so that Bangladesh could get an EEZ/CS which extended far into the Bay.

Time will tell how policy makers will regard *Bangladesh v. Myanmar*. However, as was the case with the Serpent Island case, most observers would probably agree that Romania was the big winner in that since the decision resulted in Romania’s receipt of over 80% of the disputed territory. And, some of that victory was attributable to the fact that they beat back Ukraine’s effort to get additional maritime territory based on Serpent Island EEZ claim. Interestingly, not long after the decision was reached, the Ukrainian President characterized the decision as “just and final” and hoped “the ruling opens new

opportunities for further fruitful cooperation in all sectors of the bilateral cooperation between Ukraine and Romania.”<sup>48</sup>

One hope is that future courts and arbitral panels will follow the precedent in these two cases and not give undue effect to minor oceanic territories<sup>49</sup>. To do otherwise invites states to continue to assert extreme claims over minor territories – as present in the East and South China Seas which are contentious and destabilizing. As is demonstrated in the Serpent Island case and, hopefully, *Bangladesh v. Myanmar*, there is much more to be gained by countries taking a long-term view. Even though one country may do slightly better in litigation than another, political leaders are in a much better position to weather the effects of those small losses in court in contrast to the political fallout which would occur if the leaders gave something away in a bilateral negotiation. Also, if the leaders take a truly long term view, a partial victory means that the areas no longer under dispute are ripe for development. The absence of clear title almost always means that investment capital will stay on the sidelines. From a trade and investment perspective, it is far better for a state to have a clean title to 50 acres than disputed title to 100 acres.

Lastly, ITLOS’ decision to disregard the Note Verbale between Myanmar and Bangladesh which supposedly fixed the maritime boundary between the two countries in

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<sup>48</sup> Ukrainian News Agency (Feb 5, 2009).

<sup>49</sup> What might be termed as a step “sideways” was a decision by the ICJ in the case *Nicaragua v. Columbia* \_\_\_\_ ICJ \_\_\_\_ (November 19, 2012). [ <http://www.icj-cij.org/homepage/>] There the court was presented with a number of questions including the adjudication of sovereignty claims of various small rocks associated with two *bona fide* islands that belonged to Columbia and lay on the continental shelf of Nicaragua. The case has an excellent discussion of the general concept of "effective" occupation; specifically, the types of actions which a state can/should take in order to be considered in determining whether it has effectively occupied a disputed territory. The Court held that Columbia had sovereignty over two major islands and cays.....all of them are within 200NM of the Nicaraguan Coast based on a binding treaty of effective occupation of the lesser cays and rocks that were associated with the three main islands. However, because these islands lay on the Nicaraguan Continental Shelf/EEZ, the question arose how the EEZ and Continental shelf of Nicaragua would be affected. An ancillary question was also raised as the fixing of median line between Nicaragua and Columbia based on the fact that Nicaragua believed it entitled to an extended continental shelf under Article 76 of the LOS Convention. Note that at least two of the islands were bona fide islands within the meaning of Article 121 of the LOS Convention and ran in a basic North-South Direction such that they would have the effect as acting as a barrier blocking the expanse of Nicaragua's EEZ and Continental Shelf (p. 49). After declaring that the regime of islands in LOS applied, the court applied the test discussed in the Serpent Island Case, specifically: "the title of a State to the continental shelf and to the exclusive economic zone is based on the principle (common law) that the land dominates the sea through the projection of coasts or the coastal fronts" Serpent Island Case, 2009 ICJ Reports p. 89. In this particular case, the total coastal area of the N-S Islands facing Nicaragua totaled only 58kms...as contrasted with the Nicaraguan coast which is 531km long from N-S. Moreover, the "actual" Columbian coast was over 400NM away and not a factor in the delimitation question. In tortured reasoning in which the Court acknowledged that three of the Islands met the tests under Article 121 and are entitled to a 200NM EEZ and Continental Shelf the court, citing the Bay of Bengal and Serpent Island decision, held that according the three recognized islands would lead to an inequitable result given the marked disproportion between the two sets of total coastlines and produce what the court terms a "cut off" effect involving a few small islands. In the end, the court gave the two major islands full EEZ and Continental Shelf entitlements moving East (in the direction of Columbia) but gave them a small projection in the direction of the Nicaraguan Coastline and moving North South. Various cays, rocks and smaller islands were only given 12NM territorial seas. (p. 67).

the vicinity of St. Martin's Island again showed an element of leadership in protecting the integrity of the LOS Convention. In discounting the effect of the Note, the court took a hard line in terms of what constitutes the type of legally binding instrument that will justify amending a maritime boundary. This has obvious implications for other disputes, especially over minor oceanic territories, in which the various claimants are advancing their claims on scant historical documents, oblique references in treaty instruments, unilateral pronouncements, recent occupation, and dotted lines to show evidence of an agreement and/or legal title. Indeed, the court is taking excellent lessons from the English Common Law that agreements respecting real property must be in writing and signed by all of the appropriate parties. Even though ITLOS does not necessarily have jurisdiction over the questions of title in the East China Sea or South China Sea, there is no question that the ruling will inform future decisions of courts and arbitral panels. Will ITLOS be forced to rule on the strength of title to disputed territories in the South China Sea or East China Sea; it is quite possible that the ITLOS would rule that *NO ONE* has clear title to those areas and that they belong to no particular country. Given that prospect, one hopes that the various claimants would find it in their interest to negotiate a settlement in which they get a fractional share of the resources versus nothing at all!

### **Other Disputes**

It is beyond the scope of this paper to examine all other disputes in detail, but the delimitation of the adjacent continental shelves and EEZs for the Arctic among the US, Canada, Denmark (Greenland), Norway and Russia.<sup>50</sup> would seem to be an excellent candidate for the Court because most of the issues associated with delimitation of the Arctic Claims involves mediating among opposing or adjacent boundaries and the outer limits of the continental shelves in that area. This is to be contrasted with maritime disputes which are laced with questions of conflicting claims over ownership of islands/rocks.

Completion of the Maritime Delimitation between Bangladesh and India and India and Myanmar before the Permanent Court of Arbitration (at the Hague) would also seem an appropriate matter to refer to the ITLOS.<sup>51</sup> A decision in the India-Bangladesh Arbitration is not expected until 2014 (5 years after the case commenced); leading some to argue<sup>52</sup> that India and Bangladesh Arbitration is ripe for referral to ITLOS since that

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<sup>50</sup> This particular issue was chosen because most of the disputes involve interpretations of the Law of the Sea Convention and not conflicting claims to land territories. Also, because the five claimants are well steeped in the traditions of the LOS and most exploitive activities will be taking place in the areas which would clearly fall inside of the claimants continental shelves, this court seem, at first blush, to be well suited to take on the task of delimiting the adjacent continental shelf and EEZ claims of the countries.

<sup>51</sup> On October 8, 2009, the People's Republic of Bangladesh instituted arbitral proceedings to delimit of the maritime boundary between Bangladesh and the Republic of India pursuant to Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea (UNCLOS). Article 287(3) of UNCLOS, arbitration under Annex VII is the default means of dispute settlement if a State has not expressed any preference with respect to the means of dispute resolution available under Article 287(1) of UNCLOS (and has not expressed any reservation or optional exceptions pursuant to Article 298 of UNCLOS)

<sup>52</sup> Chowdhury, Z. "Is Settlement of Maritime Boundary Dispute with India Possible after ITLOS Verdict?" Financial Express, V. 20, No. 350 (Mar 18, 2012) Available at: [http://www.thefinancialexpress-bd.com/more.php?news\\_id=123870&date=2012-03-18](http://www.thefinancialexpress-bd.com/more.php?news_id=123870&date=2012-03-18)

court made a number of important legal judgments which will affect the arbitral decision. Specifically, the ITLOS established the coordinates of the entire Myanmar coastal baselines and established that both Bangladesh and Myanmar are classified as “broad margin” states and are entitled to a Continental Shelf beyond 200M. Given that ITLOS has already done much of the “heavy lifting,” quick resolution of the remaining maritime boundary issues by ITLOS would provide a legally binding outcome that would pave the way for India and Bangladesh to engage in off-shore oil exploration and to institute a well-coordinated fisheries management system.

## **CONCLUSION**

In a landscape which is dotted with contentious disputes over resources and turf, any good news is welcome. The ITLOS decision is hardly a panacea; although one thing is crystal clear: the Court’s decision provided a clear signal to the international legal community by the ITLOS that they are “open for business.” This is a welcome sign since the Court seems to have an excellent understanding of their role in helping to promote the rule of law in the oceans – as expressed in the 1982 Law of the Sea Convention and provide interpretative enhancements to the LOS Convention in those areas where the text may not be as clear as one would like. That is the job of courts and, so long as the court stays true to its ultimate responsibility of preserving the integrity of the LOS Convention, the findings by the court will very likely influence decisions by other courts and arbitral panels. At the risk of some naiveté, the ITLOS ruling – professional, non-partisan, prompt, and comprehensive – may also serve as an inducement to states wishing to develop their marine resources to bring their disputes to ITLOS for resolution. Policy-makers will always face the risk of an adverse decision if they refer disputes to the ITLOS. But, in this political environment, those risks may often be outweighed by the benefits of gaining clear title to adjacent oceanic territory to attract investment capital and avert war.



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