CLARIFICATION AND REFINEMENT OF THE RULES AND METHODS FOR MARITIME DELIMITATION THROUGH THE PRECEDENTS OF INTERNATIONAL COURTS AND TRIBUNALS

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Introduction

In its Judgment in the *Black Sea* case, the International Court of Justice, hereafter referred to as the "Court," stated that the three-stage approach had been specified with precision as the delimitation method. The Court explained these stages as follows: the first stage is the establishment of a "provisional delimitation line, employing methods that are geometrically objective and also appropriate for the geography of the area"; the second is the examination of the factors calling for the adjustment or shifting of the provisional line in order to achieve an equitable result; the third stage is the verification of the result. The Court emphasized the importance of the "median line" and "equidistance line" in the first stage when determining a provisional line that is geometrically objective and appropriate for the geography of the area.[1] In fact, international courts and tribunals have supported the three-stage approach since the Court rendered the Judgment in the *Black Sea* case.

In this paper, I review the process in which international courts and tribunals have contributed to the precision of the three-stage approach and discuss the tasks of international courts and tribunals in the settlement of disputes concerning maritime delimitation.

1. Maritime Delimitation before the Adoption of UNCLOS: Delimitation of the Continental Shelf

To examine the rules and methods for maritime delimitation, it is necessary to refer to the Court's findings in the *North Sea Continental Shelf* cases, because they contributed to the formulation of the basic notion of the continental shelf, hereafter referred to as CS, and influenced its subsequent development.

The Court identified three ideas which have underlain the development of the legal régime of the CS: first, the obligation of the Parties to enter into meaningful negotiations; second, the obligation of the Parties to act in such a way that equitable principles are applied; and third, the nature of the CS as the natural prolongation of the

[1] *Black Sea, I.C.J. Reports 2009*, p. 101, para. 116.

land territory.[2] In regard to the third point, the Court further noted the principle that "land dominates the sea" and "the land is the legal source of the power which a State may exercise over territorial extensions to seaward."[3] In response to the Parties' arguments based on the notion of natural prolongation in the *Tunisia/Libya* case,[4] the Court concluded that the notion of natural prolongation provided no practical criterion for the delimitation because of the single unity of the CS at issue in this case. Consequently, it applied equitable principles to the delimitation and examined various factors as relevant circumstances.[5]

2. UNCLOS and Maritime Delimitation

(1) Coexistence of the Two Institutions of EEZ and CS in UNCLOS

UNCLOS' drafters included two institutions beyond the territorial waters, exclusive economic zone, hereafter referred to as EEZ and the CS. These two institutions are distinct in nature but closely related. While the CS, as the Court found in its Judgment in the *North Sea Continental Shelf* cases, had been considered an institution of customary international law and the notion of "natural prolongation" constituted a part of the definition of the CS in Article 76, paragraph 1, Article 55 provides that EEZ is a new institution introduced by this Convention and its definition is based only on the distance from the coast in Article 57. Each coastal State is entitled to exercise its sovereign rights within the maritime area covered by these definitions. Thus, these provisions constitute the bases for the entitlement of the coastal states with regard to the maritime areas beyond their territorial seas.

(2) Need for the Harmonization of the Rules and Methods for the Delimitation of EEZ and CS

Although the drafters attempted to clarify the rules and methods for the delimitation of the respective institutions, they were unsuccessful in reaching the agreement. As a compromise of various views, an identical expression is admitted in Articles 74 and 83, which lack concrete rules and methods for delimitation.[6] Because of the remaining ambiguity in the rules and methods for delimitation in those provisions, it has been left for international courts and tribunals to interpret and apply the common

[2] *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 46, para. 85.
[3] *Ibid.*, pp. 51-52, paras. 96-98.
[4] *Tunisia/Libya, I.C.J. Reports 1982*, pp. 44-49, paras. 38-50.
[5] *Ibid.*, pp. 58, para. 68 and p. 92, para. 133.
[6] M. Kawano, "International Courts and Tribunals and the Development of the Rules and Methods Concerning Maritime Delimitation," *Journal of International Law and Diplomacy*, Vol. 112, No. 3 (2013), pp. 434-435.

expression of the delimitation to "achieve an equitable solution" in cases where the Parties cannot settle their dispute by mutual agreement. In particular, when the dispute concerning maritime delimitation relates to the EEZ and CS, international courts and tribunals are required to consider the harmonization of the rules and methods for the delimitation of these different institutions.

(i) *Libya/Malta* Case (Judgment of 1985)

The Court has already considered this issue in its Judgment in the *Libya/Malta* case. Although the subject before it related only to the delimitation of the CS, the Court considered the effects of the co-existence of these two institutions and admitted the close link between EEZ and CS explaining as follows:

"This does not mean that the concept of the continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts."[7]

As a result of the emphasis on the criteria of distance, the Court first determined the provisional median line and adjusted it by taking into consideration all the relevant circumstances in order to achieve an equitable result.[8]

(ii) Cases Subsequent to the *Libya/Malta* Case

In cases following the *Libya/Malta* case, international courts and tribunals have faced the delimitation of territorial seas, EEZ and CS. Thus, the criterion of distance has become even more important to "achieve an equitable solution." In the *Qatar* v. *Bahrain* case, the Court followed the approach taken in previous cases and found that "the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated."[9]

In the *Cameroon* v. *Nigeria*, the Court stated as follows:

"The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdiction is to be determined. They are expressed in the so-called equitable

[7] *Libya/Malta, I.C.J. Reports 1985*, p. 33, para. 33.
[8] *Ibid.*, p. 38, para. 45, pp. 46-47, paras. 60-63 and p. 55-56, paras. 77-78.
[9] *Qatar v. Bahrain, I.C.J. Reports 2001*, p. 111, paras. 229-231.

principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method to be employed in the delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve and 'equitable result.'"[10]

The method for determining the provisional equidistance line and its shifting or adjustment was employed by the Arbitral Tribunals pursuant to compulsory arbitration under Part XV of the UNCLOS in the cases of *Barbados/Trinidad and Tobago* and *Guyana* v. *Suriname.*[11]

International courts and tribunals have generally employed the method of provisional equidistance and its shifting or adjustment by taking into consideration the relevant circumstances as far as there is no compelling reason. For example, in the *Caribbean Sea* case, the Court stated that the equidistance/relevant circumstances method did not automatically have priority over other methods and there may be factors that make its application inappropriate.[12] Because of the special geographical and geological features of the coasts involved, it could not identify base points and construct a provisional equidistance line for the SMB delimiting maritime areas off the Parties' mainland coasts[13] and decided to employ the angle-bisector method.[14]

(3) Proliferation of the Delimitation Effected by a Single Maritime Boundary (SMB)

In most of the recent cases referred to an international court or tribunal, the Parties have tended to request that the court or tribunal determine the "single maritime boundary," hereafter referred to as SMB. This practice began in the 1980s.

(i) SMB in the Cases Referred on the Basis of a Special Agreement

The *Gulf of Maine* case was the first time the Court had an opportunity to examine the maritime delimitation that would be effected by an SMB. This case was referred to the Chamber of the Court on the basis of the Special Agreement, in which the parties requested that the Court decide the course of the SMB "that divides the continental shelf and fishery zones."[15] The delimitation effected by an SMB has been

[10] *Ibid.*, p. 441, para. 288.
[11] With regard to the *Barbados/Trinidad and Tobago* case, please see Kawano, *supra* note 6, p. 442 and *Guyana* v. *Suriname, Award of the Arbitral Tribunal, 17 September 2007*, p. 110, para. 246.
[12] *Caribbean Sea, I.C.J. Reports 2007*, p. 741, para. 272.
[13] *Ibid.*, pp. 742-743, paras. 277-280.
[14] *Ibid.*, p. 746, para. 287.
[15] The Chamber specifically noted that it was the first case to make a decision on an SMB and examined its appropriateness, *Gulf of Maine, I.C.J. Reports 1984*, p. 267, paras. 26-27.

requested in the Special Agreements in the arbitration cases of *Guinea/Guinea-Bissau* and *St. Pierre and Miquelon*.[16]

(ii) SMB in the Cases Unilaterally Referred

There are numerous cases that have been unilaterally referred to an international court or tribunal and whose delimitation was effected by an SMB.

In the *Jan Mayen* case, the parties' view with regard to the delimitation effected by an SMB differed. While Denmark, in its Application, requested that the Court decide on a single line for the delimitation of the fishery zone and CS area, Norway emphasized the conceptual difference of the two boundaries, even admitting the coincidence of those two lines.[17] Admitting the distinction in the legal rules to be applied to these areas, the Court concluded that, for both, it was proper to begin the process of delimitation by provisionally drawing a median line and adjusting or shifting it according to the examination of special circumstances.[18]

In the *Qatar* v. *Bahrain* case, the parties originally intended to refer their dispute to the Court by a Special Agreement, which could be seen in the Bahraini Formula. The Court confirmed its binding effect and was satisfied that it could exercise its jurisdiction in this case.[19] As this Formula requested the Court to draw an SMB "between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively" to the parties, the Court confirmed that the parties consented to the Court drawing an SMB.[20] The Court stated that the concept of an SMB "does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various – partially coincident-zones of maritime jurisdiction appertaining to them."[21]

Since this case was decided, there have been several cases in which a court or tribunal affirmed the Parties' intent to request the delimitation effected by an SMB. These cases are as follows; *Cameroon* v. *Nigeria* case (ICJ, Judgment of 2002), *Barbados/Trinidad and Tobago* (Arbitral Award of 2006), *Guyana/Suriname* (Arbitral Award of 2007), the *Caribbean Sea* case (ICJ, Judgment of 2007), the *Black Sea* case

[16] *Guinea/Guinea-Bissau*, *International Law Reports*, Vol. 19, p. 166, para. 42 and *St. Pierre and Miquelon*, *International Legal Materials*, Vol. 31 (1992), p. 1152, para. 1.
[17] *Jan Mayen*, *I.C.J. Reports 1993*, pp. 56-57, para. 41.
[18] *Ibid.*, pp. 57-59, paras. 43-48 and p. 62, paras. 53-54.
[19] *Qatar* v. *Bahrain*, *I.C.J. Reports1 1994*, p. 121, para. 25.
[20] *Qatar* v. *Bahrain*, *I.C.J. Reports1 2001*, *supra* note 9, p. 91, para. 168.
[21] *Ibid.*, p. 93, para. 173.

(ICJ, Judgment of 2009), *Bay of Bengal* case (ITLOS, Judgment of 2012), and *Nicaragua* v. *Columbia* case (ICJ, Judgment of 2012).[22]

The proliferation of the delimitation effected by an SMB may be explained by its practical nature.

(4) Role of International Courts and Tribunals in Disputes Concerning Maritime Delimitation

It is necessary to note that international courts and tribunals have consistently emphasized the importance of consistency, predictability and objectivity.[23] In order to ensure that the decisions can satisfy these conditions, it is easy to imagine that international courts and tribunals give greater support to objective criteria. It can be suggested that the criterion of distance is decided mathematically, which means there is a greater sense of objectivity, and that this might be an additional reason why courts and tribunals depend heavily on distance in their decisions regarding provisional lines. It should also be added that the emphasis on predictability and objectivity has influenced the process of the examination of relevant circumstances. The fact that most courts and tribunals have admitted the disparity of the length of the coasts of the Parties and the configuration of the coasts as the relevant circumstances for the purposes of shifting and adjusting the provisional line may be explained by such an emphasis on the predictability and objectivity.[24] It should also be added that the arbitral award stated the importance of transparency in the *Bangladesh/India* case, which will be examined later as one of the most recent cases. International courts and tribunals are required to respect consistency, predictability, objectivity and transparency as to the forum to be chosen by

[22] *Cameroon* v. *Nigeria*, *I.C.J. Reports 2002*, p. 440, para. 286, *Barbados/Trinidad and Tobago*, *Award of 11 April 2006*, pp. 71-72, paras. 234-235, *Guyana/Suriname*, p. 108, para. 334, *Caribbean Sea*, *I.C.J. Reports 2007*, *supra* note 12, p. 685, paras. 72-73, *Black Sea*, *I.C.J. Reports 2009*, *supra* note 1, pp. 66-68, para. 11-13, *The Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, pp. 59-60, para. 178-181 and *Territorial and Maritime Dispute (Nicaragua* v. *Columbia)*, *I.C.J. Reports 2012*, pp. 670-671, para. 132-136.

[23] In the earlier precedents, international courts and tribunals discussed the legal nature of the equitable principle in maritime delimitation. The ICJ took the view that it was important to ensure consistency and predictability in the *Libya/Malta* case, *I.C.J. Reports 1985*, p. 39, para. 45. In the *Guinea/Guinea-Bissau* case, the Tribunal stated that the delimitation should be executed on an equitable and objective basis and found it necessary to consider the objective factors enabling it to achieve an equitable solution, *International Law Reports*, Vol. 19, p. 182, para. 91 and p. 186, para. 102.

[24] Kawano, *supra* note 6, pp. 17-23.

the Parties and are expected to contribute to the final settlement of the disputes referred to them.[25]

(5) Refinement of the Three-Stage Approach

It must be suggested that there is a need for the harmonization of the methods for the delimitation of EEZ and CS, and the preferences of the Parties to the delimitation effected by an SMB and the emphasis on objectivity by international courts and tribunals in the maritime delimitation cases have led to the clarification and refinement of the rule and methods of delimitation. As indicated, the three-stage approach outlined in the *Black Sea* case reflects the achievement of the decisions of international courts and tribunals in this field and has been referred to in subsequent cases. Moreover, in most precedents, international courts and tribunals have used the equidistance or median line as a provisional delimitation line. It is true that this approach has not obtained the status of a customary international legal rule. However, as far as there is no compelling reason not to take the three-stage approach, it has become usual for an international court or tribunal to take this approach, as the Court indicated in the *Caribbean Sea* case.[26]

International courts and tribunals preference for the three-stage approach and their emphasis on objective determination have influenced the relevant circumstances that are examined in the second stage. They have put the primary emphasis on the proportion of the coasts' lengths and the coastlines' geographical configuration, both of which can be examined objectively. At the same time, the geological conditions, the possibility of resources, and other subjective elements have not been approved as relevant circumstances in many cases.

It should also be noted that, since the *Black Seas* case, international courts and tribunals have specified the relevant area for delimitation and examined the proportion of the areas divided between the parties in the third stage, the stage for disproportionality test.[27] The Court has already noted the importance of the "relevant area" in the context of the delimitation of a CS in the *Tunisia/Libya* case.[28] However, it seems that by introducing the "relevant area" to be specified in the first stage and examined in the third stage, the Court examines the maritime delimitation not as the

[25] Please see Section 3 (2).
[26] Please see note 11.
[27] *Black Sea, I.C.J. Reports 2009, supra* note 1, p. 89, paras. 77-78 and pp. 99-100, paras 110-111.
[28] *Tunisia/Libya, I.C.J. Reports 1982, supra* note 4p. 82, para. 114.

issue of a "line," but rather as the division of the "maritime areas." Moreover, international courts and tribunals have supported this approach in subsequent cases.[29]

3. The Three-Stage Approach in the Decisions Rendered in 2014

In 2014, the Court rendered its Judgment in the *Maritime Dispute (Peru* v. *Chile)*[30] and the Arbitral Tribunal rendered an Award in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India).*[31]

(1) *Maritime Dispute (Peru* v. *Chile), Judgment of 27 January 2014*

In the *Maritime Dispute (Peru* v. *Chile)* case, the Court concluded that an agreed single maritime boundary existed between the Parties at 80 nautical miles long from the coast.[32] With regard to the line beyond that point, the Court first noted that, while Chile had signed and ratified UNCLOS, Peru was not a party to it; while Chile claimed sovereignty and sovereign rights in pursuance with UNCLOS, Peru claimed a 200-nautical-mile "maritime domain," which is used in its Constitution. As the Agent of Peru admitted that the notion of "maritime domain" as used in its Constitution was consistent with the maritime zones set out in UNCLOS, the Court considered it appropriate to proceed "on the basis of Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS which, as the Court has already recognized, reflect customary international law."[33] The Court then stated that "[t]he methodology which the Court usually employs in seeking an equitable solution involves three stages" and that "[i]n the first, it constructs a provisional equidistance line unless there are compelling reasons preventing that."[34] The Court noted that the case before it was unusual in that the starting-point for delimitation is located much further from the coast.[35] The Court, however, stated that "[t]he usual methodology applied by the Court has the aim of achieving an equitable solution" and proceeded to the construction of a provisional equidistance line starting at the endpoint of the existing maritime boundary.[36] The

[29] For example, it should be noted that the relevant area played a very significant role in the decision in the *Nicaragua* v. *Columbia* case, *I.C.J. Reports 2012*, *supra* note 22, pp. 682-686, paras. 155-166.
[30] *Maritime Dispute (Peru* v. *Chile), Judgment of 27 January 2014.*
[31] *The Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014.*
[32] *Peru* v. *Chile*, *supra* note 30, para. 176.
[33] *Ibid*., paras. 178-179.
[34] *Ibid*., para. 180.
[35] In most cases, an international court or tribunal is requested to decide the delimitation line between the coasts of the disputing parties. In this case, however, the starting point was 80 nautical miles from the closest point on the Chilean coast and about 45 nautical miles from the closest point on the Peruvian coast, *ibid*., para. 183.
[36] *Ibid*., para. 184.

Court then determined the base points and the provisional equidistance line.[37] With regard to this line, the Court concluded that there was no relevant circumstance that required the adjustment or shift of that line and that this conclusion caused no significant disproportionality.[38]

(2) *Bangladesh/India, Award of 7 July 2014*

In the *Bangladesh/India* case, Bangladesh referred the dispute to compulsory arbitration, as called for under Part XV of UNCLOS, to which India responded. As far as the maritime delimitation was concerned, the Parties did not explicitly mention the delimitation effected by an SMB, but they did claim one line for the delimitation of territorial seas, the EEZ and CS within and beyond 200 nautical miles in their final submissions.[39] In response to these submissions, the Tribunal first determined the delimitation line for the territorial seas.[40] It then proceeded to the delimitation beyond the territorial seas and separated the examination of the delimitation line of the EEZ and CS within 200 nautical miles without distinguishing the EEZ from the CS and that for CS beyond 200 nautical miles.[41] This section will take up the delimitation of EEZ and CS.

The Parties took different views with regard to the proper methodology for the delimitation of the EEZ and CS within 200 nautical miles. While India supported the three-step approach and equidistance/relevant circumstances method, Bangladesh preferred the angle-bisector method.[42] The Tribunal found that the three-stage approach and equidistance/relevant circumstances method ensured "a high degree of transparency" in comparison to the angle-bisector method.[43] It also stated that the "equidistance/relevant circumstances method is preferable unless, as the International Court of Justice stated in *Nicaragua* v. *Honduras*, there are 'factors which make the application of the equidistance method inappropriate.'"[44]

In addition to taking the equidistance/relevant circumstances method, it should also be noted that the Tribunal identified the relevant area for delimitation before it decided the provisional line. Moreover, the identified relevant area played an important

[37] *Ibid*., paras. 185-186.
[38] *Ibid*., paras. 191-194.
[39] *Bangladesh and India*, *supra* note 31, paras. 60 and 62.
[40] *Ibid*., paras. 226-276.
[41] *Ibid*., paras. 277-508.
[42] *Ibid*., paras. 314-335.
[43] *Ibid*., paras. 340-334.
[44] *Ibid*., para. 345.

role in the examination of the disproportion test.[45] This approach is very similar to that taken by the ICJ in the *Black Sea* case and by the ITLOS in the *Bangladesh/Myanmar* case.

4. New Tasks of International Courts and Tribunals in the Disputes Concerning Maritime Delimitation

(1) Delimitation of a CS beyond 200 Nautical Miles

(i) Competence of International Courts and Tribunals to Decide the Delimitation of a CS beyond 200 Nautical Miles

Article 76 of UNCLOS gives the Parties the option to claim the sovereign right over a CS beyond 200 nautical miles. In principle, this provision endows the Commission on the Limits of the Continental Shelf, hereafter referred to as CLCS, the competence to decide such a claim. The CLCS's competence may be sufficient where there are no overlapping claims by two or more States regarding the sovereign rights over a CS beyond 200 nautical miles. However, in reality, there are such overlaps that cause disputes between the States concerned. Moreover, CLCS is deemed to avoid its recommendation with regard to the areas in dispute. Therefore, the CLCS process is not essentially designed to contribute to the settlement of disputes concerning the overlapping of areas claimed by more than two States.

The Court had already pointed out the possibility of the delimitation of a CS beyond 200 nautical miles in the *Libya/Malta* case.[46] In the *St. Pierre and Miquelon* case, which involved France's claim of its rights over a CS beyond 200 nautical miles, the arbitral court found that the decision of this issue "would constitute a pronouncement involving a delimitation, not 'between the Parties' but between each of them and the international community, as represented by organs entrusted with the administration and protection of the international sea-bed area …that has been declared to be the common heritage of mankind" and denied its competence to deal with it.[47] In the *Barbados/Trinidad and Tobago* case, although the Arbitral Tribunal confirmed its jurisdiction to discuss the delimitation of a CS beyond 200 nautical miles, it concluded that it was not necessary to decide this point.[48] In the *Nicaragua* v. *Honduras* case, the claim for the CS beyond 200 nautical miles was raised in the context of the endpoint of the SMB. The Court stated that any claim of CS rights beyond 200 nautical miles "must

[45] *Ibid*., paras. 306-311 and 490-497.
[46] *Libya/Malta, I.C.J. Reports 1985*, *supra* note 7, pp. 55-56, para. 77.
[47] *St. Pierre and Miquelon, International Legal Materials*, Vol. 31 (1992), pp. 1171-1173, paras. 75-82.
[48] *Barbados/Trinidad and Tobago*, *supra* note 22, pp. 208-209, para. 213.

be in accordance with Article 76 of UNCLOS and reviewed" by the CLCS.[49] It might be suggested that international courts and tribunals tried here to make a decision on the issue of the delimitation of a CS beyond 200 nautical miles.

In such a situation, the ITLOS rendered the first judgment containing the decision on the delimitation of a CS beyond 200 nautical miles in the *Bay of Bengal* case.[50] The ITLOS fully noted the importance of its decision. After the examination of its function in relation to the CLCS because of possible conflicts of the competences, the ITLOS found it appropriate to exercise its jurisdiction on this issue, not only to resolve a longstanding dispute between the Parties, but also to ensure UNCLOS' efficient operation.[51]

(ii) Cases since the Judgment in the *Bay of Bengal* Case

The Judgment in the *Bay of Bengal* case has paved the way for States to discuss the issue of the delimitation beyond 200 nautical miles before an international court or tribunal.

In the *Nicaragua* v. *Columbia* case, Nicaragua added the submission regarding the delimitation of a CS beyond 200 nautical miles. However, the Court declined this submission because Nicaragua did not submit the sufficient documents.[52] It should further be noted that there are two pending cases before the ICJ in which the Applicant has requested that the Court decide the delimitation of the CS beyond 200 nautical miles.[53]

As far as arbitration under UNCLOS is concerned, in the *Bangladesh/India* case, both Parties requested that Arbitral Tribunal decide the delimitation line of a CS beyond 200 nautical miles, although they took different views with regard to the proper methods for the delimitation.[54] The Tribunal, in addition to the hearing of the requests of the Parties, noted that the Judgment by the ITLOS in the *Bay of Bengal* case ruled

[49] *Caribbean Sea, I.C.J. Reports 2009*, *supra* note 12, p. 759, para. 319.
[50] *The Bay of Bengal*, *supra* note 22, pp. 103-137, paras. 341-476.
[51] *Bay of Bengal*, *supra* note 22, pp. 110-115, paras. 373-393.
[52] *Nicaragua* v. *Columbia, I.C.J. Reports 2012*, *supra* note 22, pp. 668-670, paras. 125-131.
[53] *Application Instituting Proceedings in the Question of the Delimitation on the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, filed in the Registry of the Court on 16 September 2013, p. 2, para. 2 and *Application Instituting Proceedings in the Dispute Concerning Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, filed in the Registry of the Court on 28 August 2014, p. 1, para. 2.
159-166.
[54] *Bangladesh/India* case, *supra* note 31, paras. 438-455.

that "the delimitation of the continental shelf beyond 200 nm through judicial settlement was in conformity with article 76 of the Convention."[55]

(iii) Method for the Delimitation of a CS beyond 200 Nautical Miles

Another influence of the Judgment by the ITLOS in the *Bay of Bengal* case is the methods for the delimitation of a CS beyond 200 nautical miles. As has already been discussed, while the harmonization of the delimitation of CS and EEZ has played a significant role in the waters within 200 nautical miles, the delimitation beyond 200 nautical miles requires only that of the CS. Therefore, the method for delimitation of a CS beyond 200 nautical miles may be different from that of CS and EEZ within 200 nautical miles.

In the *Bay of Bengal* case, the ITLOS first clarified the distinction between entitlement and delimitation with regard to this point. It stated that the question of delimitation emerged in cases where the entitlements overlapped. Bangladesh denied Myanmar's entitlement to this area because of the interruption of the continuity of "natural prolongation."[56] It considered that the "natural prolongation" in Article 76, paragraph 1, required geological as well as geomorphological continuity between the landmass of the coastal State and the seabed beyond 200 nautical miles.[57] The ITLOS noted the close interrelation between the notion of natural prolongation and that of the continental margin under Article 76, paragraphs 1 and 4[58] and found that the entitlement to a CS beyond 200 nautical miles should be determined by reference to the outer edge of the continental margin, which is to be ascertained in accordance with Article 76, paragraph 4. Consequently, it confirmed that both Parties had overlapping entitlements to a CS beyond 200 nautical miles.[59] Concerning the delimitation method for a CS beyond 200 nautical miles, the ITLOS found it possible to employ the same method with the delimitation of the maritime area within 200 nautical miles employing the equidistance/relevant circumstances method.[60] In the examination of the relevant circumstances, although the ITLOS rejected the Bangladesh's arguments based on natural prolongation to support its entitlement to a greater portion, it took into consideration the concavity of the Bangladeshi coast for the adjustment or shifting of the provisional equidistance line.[61]

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55 *Ibid*., paras. 456-458.
56 *Bay of Bengal*, *supra* note 22, pp. 117-124, paras. 397-423.
57 *Ibid*., p. 124, para. 426.
58 *Ibid*., p. 127, para. 434.
59 *Ibid*., p. 131, para. 449.
60 *Ibid*., p. 132, para. 455.
61 *Ibid*., p. 132-134, paras. 455-462.

The Arbitral Tribunal took the same approach in the *Bangladesh/India* case. The Tribunal considered it appropriate to take the three-stage approach in the delimitation of a CS beyond 200 nautical miles; in the first stage, it decided the provisional equidistance line. As far as the method for the delimitation line was concerned, the Tribunal resorted to the provisional equidistance/relevant circumstances method for the delimitation of a CS beyond 200 nautical miles, which was the same method used for that of the EEZ and CS within 200 nautical miles.[62] It also considered that the relevant circumstance to be taken into consideration for the adjustment of the provisional line was the particular geographic configuration of the inner part of the Bay of Bengal.[63]

It should further be noted that the Tribunal examined the adjustment of the delimitation line without distinguishing within and beyond 200 nautical miles.[64] It did not distinguish the delimitation within and beyond 200 nautical miles, even in the third stage of the delimitation, that is to say, when applying the disproportionality test.[65]

It seems that, as far as the entitlements of the disputing parties overlap, the issue of delimitation arises and for the purposes of the delimitation, there is no particular distinction of method between the areas within and beyond 200 nautical miles. In a sense, the refinement of the delimitation method for the maritime areas within 200 nautical miles has contributed to the general approach for maritime delimitation as a whole. If an international court or tribunal uses a method other than the equidistance/relevant circumstances one, it will need to have a compelling reason to justify its approach.

(iv) Grey Area

In the *Bay of Bengal* case, the ITLOS admitted that the delimitation of CS beyond 200 nautical miles may result in a "grey" area, where a State has the sovereign right over the superjacent waters and the other State has the sovereign right over the seabed beneath it. In this case, the ITLOS noted that "the boundary delimiting the area beyond 200 nm from Bangladesh but within 200 nm of Myanmar is a boundary delimiting the continental shelves of the Parties, since in this area only their continental shelve overlap."[66] The ITLOS admitted the "complex legal and practical problems" inherent in an area of this kind and stated that "each coastal State must exercise its rights and

[62] *Bangladesh/ India*, *supra* note 31, para. 464.
[63] *Ibid.*, paras. 473-475.
[64] *Ibid.*, paras. 476-480.
[65] *Ibid.*, paras. 490-497.
[66] *Bay of Bengal* case, *supra* note 22, p. 136, para. 471.

perform its duties with due regard to the rights and duties of the other."[67] It further pointed out that the Parties may determine the appropriate measures to ensure the discharge of their obligations in this regard.[68]

In the *Bangladesh/India* case, the Arbitral Tribunal also admitted the occurrence of the grey area, an area that lies beyond 200 nm from the coast of Bangladesh and within 200 nm from the coast of India.[69] In almost the same terms as those in the Judgment in the *Bay of Bengal* case, this Tribunal noted the importance of the exercise of the rights and performance of duties by one State with due regard to the rights and duties of other States.[70] It also stated that "[i]t is for the Parties to determine the measures they consider appropriate in this respect, including through the conclusion of further agreements or the creation of a cooperative arrangement" and that it "is confident that the Parties will act, both jointly and individually, to ensure that each is able to exercise its rights and perform its duties within this area."[71]

(2) Proceedings before an International Court or Tribunal in a Dispute Concerning the Maritime Delimitation and Third Parties

(i) The Bilateral Nature of the Procedures of International Courts and Tribunals and the Protection of the Rights and Interests of a Third Party

As the basic system of international adjudication has developed as a forum respecting the sovereignty of States, the procedures of international courts and tribunals are, in principle, designed for the settlement of international disputes of a bilateral nature. The relativity of the binding effect of their decisions and the *Monetary Gold* principle clearly reflect that basic nature. The Statute of the Court, Articles 62 and 63, allows third parties to intervene. Consequently, the Statute has a certain mechanism for protecting the rights and interests of third parties in bilateral proceedings.

However, in the present international community, there are several types of international disputes that can be referred to the Court as a bilateral dispute even though they imply several multilateral elements. A dispute concerning maritime delimitation is one example of a dispute implying multilateral elements. When a dispute concerning maritime delimitation is referred to an international court or tribunal, third parties may have rights and interests. The issue may become particularly more important, when the court or tribunal examines the division of the relevant area.

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[67] *Ibid.*, paras. 472-475.
[68] *Ibid.*, para. 476.
[69] *Bangladesh/ India*, *supra* note 31, para. 498.
[70] *Ibid.*, para. 507.
[71] *Ibid.*, para. 508.

(ii) Rights and Interests of a Legal Nature of Third Parties under Article 62 of the Statute in a Dispute Concerning Maritime Delimitation

Historically, there are two precedents in which a third party, pursuant to Article 62 of the Statute, has requested of the Court permission to intervene in the proceedings in the dispute concerning the maritime delimitation. It should be noted that in the *Nigeria* v. *Cameroon* case, one of the preliminary objections raised by Nigeria was the possibility of affecting the rights of Equatorial Guinea and Sao Tome and Principe.[72] The Court considered that this objection did not have an exclusively preliminary character.[73] In fact, Equatorial Guinea requested the Court for the permission to intervene because the maritime delimitation line between the parties might have affected its right and interest; the Court permitted it to intervene.[74] In its final Judgment, the Court found that mere presence of these two States, whose rights might have been affected by the decision of the Court, did not in itself preclude it from having jurisdiction over a maritime delimitation between the Parties to the case before it.[75]

In the *Black Sea* case, the Court noted the potential rights and interests of third parties in the determination of the relevant area. It determined the relevant area by taking these rights and interests into consideration and without prejudice to the position of any third State regarding its entitlements in the area concerned.[76]

In the *Nicaragua* v. *Columbia* case, Nicaragua referred the dispute only against Columbia. However, there are several States facing the Western Caribbean Sea. Among these, Costa Rica and Honduras applied for the permission to intervene but neither request was granted. Costa Rica applied for the permission to intervene as a non-party for the purpose of informing the Court of the nature of its legal rights and interests and seeking to ensure that the Court's decision regarding the maritime boundary between the Parties in this case did not affect those rights and interests; the Court, however, found that Costa Rica did not sufficiently demonstrate the existence of its rights and interests of a legal nature that might be affected by the decision in the main proceedings.[77] Honduras applied for permission to intervene as a State party for the conclusive settlement of the dispute over the maritime delimitation in the relevant

[72] *Cameroon* v. *Nigeria, I.C.J. Reports 1998*, p. 289, para. 19 and pp. 322-324, paras. 112-116.
[73] *Ibid.*, pp. 324-326, paras. 117 and 118 (2).
[74] *Cameroon* v. *Nigeria, I.C.J. Reports 1999*, p. 1135, para. 18.
[75] *Ibid.*, p. 421, para. 238.
[76] *Black Sea, I.C.J. Reports 2009, supra* note, 1, p. 100, paras. 112-114.
[77] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 354, para. 12, p. 356, para. 18 and pp. 371-373, paras. 85-90.

region and in the alternative, as a non-party to protect its rights and interests and to inform the Court of the nature of those rights and interests that could have been affected by the decision of the Court in the main proceedings. The Court found that Honduras failed to establish it that it had an interest of a legal nature that might be affected by the decision in the main proceedings.[78] The Court found that it could deal with the dispute before it in a purely bilateral way by refraining from the delimitation of the areas to which third parties may have interests. All the Judges who appended either a dissenting opinion or declaration argued the interests and rights of a legal nature could not be sufficiently protected by the limited binding effect of the Judgment provided in Article 59 of the Statute.[79]

In the final Judgment of 2012, the Court considered the potential entitlement of third parties in the determination of the relevant area for the delimitation in order to affect the rights and interests of these third parties by its Judgment.[80] Judge Donoghue took up this issue again in her opinion.[81] Both Judges *ad hoc* Mensah and Cot pointed out the special feature of the waters in this region.[82] Their views may have influenced the Judgment because the Judgment pointed out the multilateral nature of the UNCLOS and the importance of the consideration of the public order in the case of maritime delimitation.[83]

The Award in the *Bangladesh/India* case seems to reflect a further issue. In this case, the Tribunal admitted that the grey area it had described overlapped in part with that described in the *Bay of Bengal* case. It took the view that it did not "prejudice the rights of India *vis-à-vis* Myanmar in respect of the water column in the area where the

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[78] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011*, pp. 426-427, para. 12, p. 356, pp. 427-428, para. 16 and pp. 439-444, paras. 57-75.

[79] As the purpose of the intervention was different, there were slight differences in the views of the Judges who appended their opinion or declaration. However, the fundamental arguments focused on the nature of the rights and interests of a legal nature to be protected by the mechanism of intervention. For the Application of Costa Rica, Dissenting Opinions of Judges Al-Khasawneh, Abraham and Judge Donoghue, *ibid.*, pp. 374-392 and pp. 714-716, Joint Dissenting Opinion of Judges Cançado Trindade and Yusuf, *ibid.*, pp. 401-413, and Declarations of Judge Keith and Judge *ad hoc* Gaja, *ibid.*, pp. 393-400 and pp. 417-418. For the Application of Honduras, Dissenting Opinions of Judges Abraham and Donoghue, *ibid.*, pp. 447-457 and pp. 471-492, Joint Dissenting Opinion of Judges Cançado Trindade and Yusuf, *ibid.*, pp. 466-470, and Declarations of Judges Al-Khasawneh and Keith, *ibid.*, p. 446 and pp. 458-465

[80] *Nicaragua* v. *Colombia*, *supra* note 22, pp. 683-686, paras. 159-166.

[81] Separate Opinion of Judge Donoghue, *I.C.J. Reports 2012*, pp. 760-761, paras. 31-37.

[82] Declaration of Judge *ad hoc* Mensah, *ibid.*, pp. 766-767, para. 13 and Déclaration de M. le juge *ad hoc* Cot, *ibid.*, pp. 769-770, paras. 7-13.

[83] *Nicaragua* v. *Colombia*, *supra* note 22, p. 669, para. 126 and p. 716, para. 244.

exclusive economic zone claim of India and Myanmar overlap."[84] It is true that the Arbitral Award is binding only between the Parties before the Tribunal. However, it may be suggested that its finding that "articles 56, 58, 78, and 79 all call for *States* to exercise their rights and perform their duties with due regard to the rights and duties of other *States* (emphasis added by the author),"[85] which reflects the intention of the Tribunal to recommend that the rights and duties not only of the Parties but also of Myanmar should be duly regarded.

(3) Multilateral Elements in One Maritime Dispute

The maritime dispute cases of today are complicated and involve the conflicting rights and interests of several States. It should be discussed how and to what extent international courts and tribunals are able to function effectively in the disputes of a multilateral nature when their procedures are of an essentially bilateral nature. The limited legally binding effect of the decisions under Article 33, paragraph 2, of the Statute of the ITLOS, or Article 59 of the Statute of the ICJ, typically reflect the bilateral nature of international judicial procedures.

It is true that the procedures for the intervention of a third party may allow the court or tribunal to consider the multilateral elements of the dispute before it. However, it should be questioned whether the intervention of a third party provides a sufficient and successful solution for settling international disputes of a multilateral nature.

The multilateral elements can be seen in international disputes other than those concerning maritime delimitation. International courts and tribunals are, through their decisions, expected to play a leading role not only in the settlement of bilateral disputes, but also in ensuring the effective compliance with the rules under UNCLOS and other international legal rules. We should admit that some of those international legal rules are for the maintenance of the order of the sea as a source of unity in the present international community.

Concluding Remarks

It should be suggested that the precedents of international courts and tribunals have contributed to the development and refinement of the rules and methods for maritime delimitation. It may be rather difficult to ignore those rules and methods even

[84] *Bangladesh/India*, *supra* note 31, para. 506.
[85] *Ibid.*, para. 507. In the *Bay of Bengal* case, the ITLOS stated that "*each coastal State* must exercise the rights and perform its duties with due regard to the duties of *the other* (emphasis added by the author," *supra* note 22, p. 137, para.475.

in the negotiations between the Parties to agree to settle their maritime delimitations. As Articles 74 and 83 of UNCLOS provide, States are expected to settle maritime delimitations by mutual agreement.

It should also be suggested that new aspects of international disputes concerning maritime delimitation have emerged. It is necessary for international courts and tribunals to examine their fundamental functions and their relations with CLCS when they decide to admit the claims concerning the delimitation of a CS beyond 200 nautical miles. As far as the multilateral nature of disputes concerning maritime delimitation, the international community may be required to examine its means for settling those disputes. It seems that the procedures used by existing international courts and tribunals are not sufficient and effective for settling disputes of a multilateral nature. It may be suggested that the international community is required to consider how to settle those dispute effectively by peaceful means.