

## The Maritime Delimitation: Principles and Configurations

Tafsir Malick NDIAYE

*Judge of the International Tribunal for the Law of the Sea, Hamburg, Canada.*

*\*Corresponding Author: Tafsir Malick NDIAYE, Judge of the International Tribunal for the Law of the Sea, Hamburg, Germany. Email : Ndiaye@itlos.org*

### ABSTRACT

Articles of UNCLOS relate respectively to the delimitation of the territorial sea, the EEZ and the continental shelf. They are completed by the States and the International Courts and Tribunals. UNCLOS, Delimitation Customary Law Awards

**Keywords:** UNCLOS; Delimitation; Customary Law; International Courts and Tribunals; Relevant coast; Relevant Maritime Zone; Maritime Boundary; Provisional equidistance line, Relevant circumstances; Unilateral delimitation; Bilateral delimitation; Delineation; judgement; Awards.

### INTRODUCTION

The Third United Nations Conference on the Law of the Sea (UNCLOS) held unprecedented talks and gathering of nations, to define the maritime spaces between different categories of countries<sup>1</sup> The United Nations Convention on the Law of the Sea opened at its signature on the 10th of December 1982<sup>2</sup> at Montego Bay, Jamaica. It came, along with the final act of the Third United Nations Conference on the Law of the Sea - approved and signed by the participants - as an official explanation of the talks that led to the adoption of the Convention (1973 -1982) as well as the adoption by the Conference of four resolutions.

This is a result of fourteen years of hard work, with the participation of more than one hundred and fifty representatives from all over the world, of all judicial systems, rich and poor, coastal States, archipelagic States, the islands, the land locked States and those known as geographically disadvantaged in terms of oceanic space. These States gathered to draw out and establish a complete judicial system that could encompass all the aspects of the law of the sea, stressing that the problems that face maritime boundaries are closely related to one

another and should be contemplated as a whole<sup>3</sup>. This process started in 1967, when the concept of Common Heritage of Mankind was discussed in the General Assembly of the United Nations regarding the preservation of the seabed and its pacific use<sup>4</sup>.

As René Jean Dupuy explains, although it is not always easy to draw the general rules in a social area with conflicting interests, the difficulties are more and more numerous and all the more complex when it comes to the heritage sharing. The discussions are more about spaces limits than principles. Hence, it is just to hide their interest or justify their appropriations. The freedom of the sea, like a wounded cetacean, is bound to wander at large<sup>5</sup>.

State-Parties to the Convention have pointed out that new facts occurred since the United Nations Conferences on the Law of the Sea, held in Geneva in 1958 and 1960, have stressed the need for a new generally acceptable Convention on the law of the sea<sup>6</sup>. With the gaining or rather the recovering of independence of States, the wind of upheaval has blown the seas. The Convention, which deals with all the aspects of the law of the sea, acts as a « Constitution of the

---

Judge of the International Tribunal for the Law of the Sea

<sup>1</sup>R.J. Dupuy, "L'Océan partage", Pedone 1979, pp.1.

<sup>2</sup>UN Convention in the Law of the Sea, Entry into force: 16 November 1994

---

<sup>3</sup>Ibid. Preamble

<sup>4</sup>B. Zuleta UN Convention on the Law of the Sea, United Nations (1983), pp XX-XXIV.

<sup>5</sup>R.J Dupuy, L Océan Partage, p.1.

<sup>6</sup>See preamble UNCLOS.

Oceans»<sup>7</sup>. It came into force twenty-four years ago<sup>8</sup> and has 168 Member-States today. The very few States, like the United States of America, that have yet to adhere to the Convention, view it, nevertheless, as the backbone of applicable law.

As the Ambassador Tommy KOH, President of the third United Nations Conference on the Law of the Sea, states:

*“my dream that the Convention will become the « Constitution » of the world's oceans has come to pass. It is the constitution of the oceans because it treats the oceans in a holistic manner. It seeks to govern all aspects of the resources and uses of the oceans. In its 320 articles, and 9 annexes, as supplemented by the 1994 General Assembly Resolution 48/362 relating to Part XI of the Convention and the 1995 Agreement relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, the Convention is both comprehensive and authoritative”<sup>9</sup>.*

Indeed, UNCLOS is at the core of the ruling mechanism relating to the sea and its original aspects. The profound institutionalization makes the cooperation between Member-States compulsory. The institutions, such as the RFMO, are diverse and their rules very asserted. The Convention has also put the law of the sea under the jurisdiction of international Courts and Tribunals, defining an unprecedented system of disputes settlement, such as the delimitation of maritime boundaries between States<sup>10</sup>.

The treaty law that gradually evolved, thanks to the codification conferences and delimitation by

bilateral agreements, acts as an important source of the law of delimitation. The works of the United Nations International Law Commission have produced the provisions of the 1958 Geneva Convention, relating to the delimitation of the territorial sea and the Continental shelf. The Third United Nations Conference on the Law of the Sea has spawned UNCLOS.

UNCLOS contains provisions related to the delimitation of the territorial sea, the continental shelf and the exclusive economic zone<sup>11</sup>. Nevertheless; the delimitation dispute shows that these provisions do not hold the expected prominent role<sup>12</sup>. Furthermore, the delimitation by bilateral agreements have generated a quite indigent activity to enforce itself through customary handlings. It appears that the fundamental role in formulating the judicial rules and principles, governing the law of maritime delimitation lies with the international courts and tribunal<sup>13</sup>.

The oceans are a human working space of great importance as well as a pool of biological and non-biological resources. That is the reason why UNCLOS gives a major role to individual actors formally subject of international law<sup>14</sup>, as in the

---

<sup>11</sup>Ibid.

<sup>12</sup> It should be recalled that in the North Sea Continental Shelf cases the International Court of Justice had refused to consider in Article 6 of the 1958 Geneva Convention on the Continental Shelf a rule of customary character. It had then to endeavour to define the legal principles which should govern the delimitation of the continental shelf between two States; See the North Sea Continental Shelf Case (Republic of Federal Republic of Germany v. Denmark) and (Federal Republic of Germany v. The Netherlands), judgment of 20 February 1969, ICJ 1969, p. 1 n the case of the Maritime Delimitation in the region between Greenland and Jan Mayen, the Court will have a more decided attitude: "Thus, for the delimitation of the continental shelf ... even if it were Article 6 of the 1958 Convention, but the customary law of the continental shelf as developed in the jurisprudence ...", Maritime delimitation case in the area between Greenland and Jan Mayen (Denmark v. Norway), judgment of 14 June 1993, ICJ 1993, 38, paragraph SI; There is a perception that conventional law was thus thrown out of the law of maritime delimitation.

<sup>13</sup>Indeed, the delimitation has generated more cases than any other subject of international law, whether at The Hague Court, the Arbitral Courts or the UNCLOS Annex VII tribunals.

<sup>14</sup>The International Tribunal for the Law of the Sea has experienced nine cases of prompt release under article Z92 of UNCLOS. These are: Case No. 2

---

<sup>7</sup>In the words of Ambassador Tommy Koh (Singapore), President of the Third United Nations Conference on the Law of the Sea, who said in his speech at the closing session of the Montego Bay Conference on 11 December 1982 that: "the question is whether or not we have the right to a fair trial. My answer is in the affirmative, "in the Law of the Sea, op. Cit., (Note 2), "A constitution for the Oceans", Remarks by T. Koh, pp. XXXIII-XXXVII.

<sup>8</sup>UNCLOS entered into force on 16 November 1994.

<sup>9</sup>Tommy Koh "UNCLOS at 30: Some Reflections", chapter 8, of L. del Castillo (ed.), Law of the Sea, From the Grove to the International Tribunal for the law of the Sea, Liber Amicorum Judge Hugo Caminos, Brill / Nijhoff, 2015, p. 107

<sup>10</sup>See, Tafsir Malick Ndiaye "The Judge, Maritime Delimitation and the Gray Areas", Indian Journal of International Law, Springer 2016, DOI 10.1007/s40901-016-0027-2, pp. 1-41, spec. P.2.

prompt release procedures or the activities in the area. Although the Convention is at the core of the normative mechanism, one must reckon that the instruments at disposal are numerous in regards to the law of the sea, given the dozens of texts<sup>15</sup>

That is to say, the sources of the law of the sea are prolific<sup>16</sup>. First, we have international treaties within the meaning of the 1969 Vienna Convention. Since the conclusion of the four Geneva Conventions, the law of the sea has been marked multilateral treaties among which is the UNCLOS, which encompass both codification and progressive aspects<sup>17</sup>. The

---

"Saiga" (No. 2); Case No. S "Camouco"; Case N) 6 "Monteconfurco"; Case No. 8 "Grand Prince"; Case No. 11 "Volga"; Case No. 13 "Juno Trader"; Case No. 14 "Hoshinmaru"; Case IS "Tomimaru" and Case No. 19 "Virginia G"; See the Tribunal's website [www.itlos.org](http://www.itlos.org). Similarly, the Seabed Disputes Chamber has received a request for an advisory opinion, Case No. 17 "Responsibilities and obligations of States sponsoring persons and entities in the framework of activities in the Area".

<sup>15</sup> See A.V. Lowe and S.A.G. Talmon, Basic documents on the Law of the Sea, The Hart Publishing, Oxford and Portland, 2009, 1012 p., The authors explain in that: "One of the most striking characteristics of the Law of the Sea is the richness of its documentary sources. Its framework treaty, the monumental 1982 U N Convention on the Law of the Sea, is truly a framework (and one with many significant gaps) which holds together an extensive network of treaties, standards and other measures. Fertile mulch of state practice and case-law. By no means all of this material is readily available ... "Editor's Preface, p. XIII.

<sup>16</sup> On historical aspects, see L. del Castillo (ed.), Op. Cit. [Note 9], p. 9-106; B. Zuleta op. Cit. [Note 4], p. XX; Donald R. Rotherwell and Tim Stephens, International Law of the Sea, Hart Publishing, Oxford and Portland, 2010, pp. 1-29. G. Gidel, The International Public Law of the Sea, Chateauroux, Mellotée, 1932, Tome 1.

<sup>17</sup> In his closing address to the Third United Nations Conference on the Law of the Sea, Ambassador Tommy Koh's Chairman, Ambassador Tommy Koh, explained: "The third topic.....The argument that, except for Part XI, the Convention is unacceptable and legally insupportable. The regime of transit through the straits used for international navigation and the regime of archipelagic sea lanes are two examples of the many new concepts in the Convention. Even in the case of article 76 on the continental shelf, the article contains new law in which it has expanded the concept of continental shelf to include the continental slope and the

Convention is a series of multilateral treaties which sometimes fill in its gaps and implement them in specific. Specialized or regional areas. We have what we call "the Judgements relating to the implementation of the UNCLOS" whose headings are enough to understand the purpose.

Convention on Conventional Questions of the Law of the Sea, in which it incorporates the Geneva Conventions. Indeed, UNCLOS, on the one hand the "Agreement on the application of Part XI of the United Nations convention on the Law of the Sea of 10 December 1982, adopted on 28 July 1994 "and the" United Nations Convention of 10 December 1982 on the conservation and management of fish stocks moving both within and beyond exclusive economic zone;(straddling stocks) and highly migratory fish stocks, adopted on 4 August 1995", on the other hand. The 1994 agreement amends UNCLOS to which it becomes an integral part and provides that:

"The provisions of this Agreement and of Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail<sup>18</sup>."

With the other mandate of the Fish Stock Agreement (FSA) was to supplement UNCLOS<sup>19</sup> in order to ensure the conservation and management of these stocks under better conditions and to avoid their overexploitation; UNCLOS on stocks have proved to be incomplete and have failed to ensure their sustainable use. They, rather, represent a general framework<sup>20</sup>. They impose the States "with respect to their national measures for the conservation

---

continental rise. (...) ", T. Koh, op. cit. (Note 2), p. xxxv ; The fact remains that UNCLOS is a Codification Convention on Conventional Questions of the Law of the Sea, in which it incorporates the Geneva Conventions. Indeed, UNCLOS "n'efface pas nombre de règles coutumières classiques dont elle précise les modalités d'application, et qui subsistent parallèlement », I. Savadogo, « Les navires battant pavillon d'une organisation internationale », L. Savadogo, "Ships flying the flag of an international organization" AFDI, 2007, p. 646

<sup>18</sup> Agreement relating to the application of Part XI of the UNCLOS of 10 December 1982, Article 2 (1).

<sup>19</sup> See Article 2 of the Agreement on straddling stocks of 4 August 1995.

<sup>20</sup> See document of DOALOS of the United Nations A.Conf.164 / INF5. 2.1)

of the living resources of the high seas<sup>21</sup> and the obligation to cooperate in the conservation and management of such resources<sup>22</sup> these obligations appear rather soft and recall obligations of behaviour<sup>23</sup>.

Therefore, when assessing the status of UNCLOS and its impact in the contemporary law of the sea, account should be taken of those agreements and the practice of States in the implementation of the Convention<sup>24</sup>. In addition to these instruments, there are other specialized multilateral conventions dealing with various maritime activities within the framework of the International Maritime Organization (IMO)<sup>25</sup>, fisheries (FAO) or underwater resources (UNESCO). Moreover, other agreement deals with the most diverse matter of the law of the sea. One can mention:

*The United Nations Convention on the Conditions of Registration on of Ships of 7 February 1986*<sup>26</sup>; *The Convention for the Suppression of Unlawful Acts Against Maritime Navigation of 10 March 1988*; *The United Nations on the Arrest of Ships of 12 February 1999*; *The Abidjan Convention on Environmental Protection of 23 March 1981*; *the Oslo*

<sup>21</sup>Article 117 of UNCLOS

<sup>22</sup>Article 118 of UNCLOS

<sup>23</sup>See, R. CasadoRaigon, "implementation of the provisions on high seas fisheries of the United Nations Conservation on the Law of the Sea", *Maritime Spaces and Resources (ERM)*, 1994, No. 8, P.214.; Mr. Savini, "the regulation of fishing on the high seas by the General Assembly of the United Nations. About Resolution 44/225 on Large Drift Gillnets", *AFDI* 1990, p.777.

<sup>24</sup>In particular national legislation giving effect to the provisions of UN CLOS as well as acts enacted by international and regional organizations

<sup>25</sup>Among the important conventions adopted within the framework of IMO are the SOLAS Convention and its amending protocols; The MARPOL Convention {1973/1978}; The IMMARSAT Convention (1976) and the SAR Convention of 1979. See, G. Librando, "The IMO and the Law of the Sea", in D.J. Attard {General Editor}, *the IMLI Manual on International Maritime Law, Vol. 1: The Law of the Sea*, Oxford University Press, 2014, pp.577-605. For UNESCO, the Convention on the Underwater Cultural Heritage of 2001, see T. Scovazzi, "Protection of underwater cultural heritage: the UNCLOS and 2001 UNESCO Convention", *IMLI Manual op. cit.* Pp.443-461.; As for FAO, let us recall the 1993 Compliance Agreement and the 2009 Port State Measures. See Basic Documents op cit. [Note 15] Nos. 54 and 65.

<sup>26</sup>This Convention is not yet in force.

*Operations Convention of February 1992 and the Barcelona Convention on the Protection of the Maritime Mediterranean Agreement of 10 June 1995*<sup>27</sup>.

Alongside these multilateral conventions, we have numerous bilateral conventions giving effect to the provisions of the Convention, in particular in the field of maritime delimitation.

By and large, many maritime boundaries in the world are not delimited. The total number of potential maritime boundaries is 420<sup>28</sup> and there are about 200 delimitation agreements to day<sup>29</sup>. That is to say, that to law of maritime future.

Subsequently, the second important source is international customary law. By "asserting that matters not regulated by the Convention will continue to be governed by the rules and of international law<sup>30</sup>", the Convention acknowledges the important role of law; born from its use and practice. It was intended to secure international navigation and gave rise to important notions that nowadays compose the legal system: internal waters; territorial sea; high seas, freedom of the seas; exclusive jurisdiction of the flag State; Historic bay, universal jurisdiction in the fight against piracy. This customary law was practiced until the middle of the twentieth century, when the codification of the law of the sea begun, which proved to be a creation work. Its importance is renewed:

"especially with respect to those areas of convention law which are not clearly articulated in the existing treaties or in areas where State practice may have extended the application of some of the treaty provisions<sup>31</sup> in the treaties or in areas. The ICJ has recognize this phenomenon in many of these decisions<sup>32</sup> and in

<sup>27</sup>See Basic Documents cited above [Note 15] for these various Conventions.

<sup>28</sup>See, US Dept of State, Bureau of Oceans and International Environment and Scientific Affairs, *Limits in the Seas*, No. 108, 1st revision, *Maritime Boundaries of the World*, 1990, 2.

<sup>29</sup>See the five volumes of JL Charney and LM Alexander, *International Maritime Boundaries*, The American Society of International Law, Nijhoff Publishers, 1993, 1998, 2002, 2007 and the three DOALOS volumes on "Maritime Delimitation Agreements», As well as volume 5 of *Maritime Boundaries: World Boundaries*, edited by Gerald H. Blake, Routledge, 2002.

<sup>30</sup>Preamble of U N CLOS dated 10 December 1982.

<sup>31</sup>Ibid

<sup>32</sup>See, for example, the delimitation of the maritime boundary in the Gulf of Maine region (Canada /



particular those relating to maritime delimitation<sup>33</sup>,

The importance of international customary law and its relationship with UNCLOS are recalled in the most diverse legal instruments<sup>34</sup> and this synchronous relationship of the two sources, in a rapidly changing law such as the law of the sea, is of prime importance. Then, we have the jurisprudence and the doctrine as other important sources of the law of the sea<sup>35</sup>.

### As E. Jouannet states

« Comment ne pas souligner...l'apport de la CIJ dans la consolidation des règles coutumières sur le droit de la mer, de même qu'inversement dans le rejet de certains principes du domaine de la coutume ? L'ensemble de ses arrêts consacrés à ces questions en est une parfaite illustration<sup>36</sup> ».

It appears that the fundamental role in the formulation of the legal rules and principles governing the law of maritime delimitation lies with international Courts and Tribunals- which define and specify them - rather than the States practice. With regard to the doctrine. Its role although sometimes discussed has never been undermined in the field of the law of the sea.

With maritime delimitation, international law has been enriched with a new chapter that has developed rapidly in proportion with the related

challenges and expectations. The delimitation of maritime areas between neighbours is of vital importance in that it provides for stable and long-lasting relations.

Many maritime boundaries in the world are, however, not delimited. The total number of potential maritime boundaries is 420<sup>37</sup>, yet there are only about 200 boundary agreements to date. This implies that disputes relating to maritime delimitation have many days ahead of them. To settle such disputes, States shall have to negotiate among themselves or use available dispute resolution mechanisms. Customary law, developed progressively through conferences on codification and bilateral boundary agreements, and appears a priori as an important source for maritime boundary delimitation law. Proceedings of the UN International Law Commission led to the 1958 Geneva Conventions on the delimitation of the territorial sea and the continental shelf. The third United Nations Conference on the Law of the Sea gave rise to the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982. The latter provides for the delimitation of the territorial sea, the continental shelf and the economic exclusive zone. However<sup>38</sup>, a review of maritime delimitation disputes reveals that these provisions hardly occupy the central place they are expected to. Moreover, bilateral boundary agreements have not produced adequate practice of the law to be able to impose itself as customary law. The fundamental role in the formulation of legal rules and principles that

---

United States), Rec ICJ 1984, p. 246, §§ 79-96; Case concerning the Continental Shelf Libya / Malta, Rec. ICJ. 1985, p. 13, §§ 26-34.

<sup>33</sup>See Tafsir Malick Ndiaye, "The Judge, maritime delimitation and the Grey areas" op. Cit [Note 9]. See also, Continental Shelf Affairs in the North Sea, (FRG / Danmark) and (FRG / Netherlands), Rec ICJ 1969, p. See also, Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Gulf of Bengal (Bangladesh / Myanmar) before the international Tribunal for the Law of the Sea, Judgment of 14 March 2012, and paragraph 183.

<sup>34</sup>See, for example, the UNESCO Convention on the Underwater Cultural Heritage of 2001 (Article 3); The 1993 FAO Agreement on Compliance (Preamble); The FAO Code of Conduct for Responsible Fisheries of 1995 (Article 3.1), the International Plan of Action for 2001 IUU fishing (Article 10), or the FAO Port State against IUU fishing (Preamble).

<sup>35</sup>See Tafsir Malick Ndiaye, "The Judge, maritime delimitation ..." op. Cit [Note 10], p. 2.

<sup>36</sup>E. Jouannet, Droit non écrit", Denis Alland (dir.) Droit International public, Paris, PUF, 2000, Coll. Droit fondamental, p. 289

---

<sup>37</sup>The US Dept of State, Bureau of Oceans and International Environment and Scientific Affairs, Limits in the Seas, No: 108, 1st Rev (Maritime Boundaries of the World, 1990).

<sup>38</sup>It may be recalled that in the North Sea Continental Shelf (Germany v Denmark) Merits, Judgment [1969] ICJ Rep 3, the ICJ refused to apply the provisions of Article 6 of the 1958 Geneva Convention on the continental shelf as a rule of customary law. It hence focused on defining the legal principles that should govern the delimitation of the continental shelf between the two States. It nonetheless had a more marked attitude in the maritime delimitation case in the region located between Greenland and Jan Mayen (Denmark v Norway) [1993] ICJ Rep 61 [51]: For the delimitation of the continental shelf ... even if customary law on the continental shelf was to be applied instead of Article 6 of the 1958 Convention as developed in the jurisprudence'. There is the impression that customary law was hence ousted in favour of maritime delimitation law.

should govern the law on maritime delimitation therefore appears to be the responsibility of the International Court of Justice (ICJ) and arbitrary tribunals. The tribunals apply the delimitation rules as indicated by the Court while occasionally introducing some innovations, which are later adopted by the ICJ in a spirit of mutual benefit. It is worth noting at this point that the International Tribunal for the Law of the Sea (ITLOS) was first seized of a maritime delimitation case with the presentation of the case on the dispute regarding the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal on 14 December 2009<sup>39</sup>.

The review commences with the presentation of the overall geographical setting; in other words, the maritime area within which delimitation should be determined; this area can be illustrated on a map<sup>40</sup>. The judge may then recall the origin and evolution of the dispute, as indicated on the documents presented by the parties<sup>41</sup>, prior to addressing the applicable law.

It is developed out of international custom and treaties, for instance, the Conventions on the law of the sea concluded in Geneva (Geneva Conventions) on 29 April 1958 and the UNCLOS on 10 December 1982.

Articles 15, 74 and 83 of the UNCLOS relate, respectively, to the delimitation of the territorial sea, the EEZ and the continental shelf<sup>42</sup>.

---

<sup>39</sup>Proceedings instituted in the dispute concerning the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal, ITLOS /Press 140 (16 December 2009).

<sup>40</sup>See, for example, Maritime delimitation in the Black Sea (Romania v Ukraine) Judgment [2009] ICJ Rep 69.

<sup>41</sup>See, Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, 19 RIAA 149-196 (14 February 1985) [18, 24].

<sup>42</sup>Article 15 of the Convention stipulates: Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith. Articles 74 and 83 of the Convention are similarly worded and provide that: (1) The delimitation of the exclusive economic zone [continental shelf] between

The review of the jurisdiction clause, regardless of whether it is an arbitration clause or the application itself, allows the judge to determine the conditions of referral to the court and verifies if these were met at the time the documents instituting the proceedings were submitted, thereby authorizing the judge to be seized of the case.

Now we will deal with the principles (I) before contemplating the configurations (II).

### PRINCIPLES OF DELIMITATION

#### The Relevant Coasts

Relevant coasts are crucial in the delimitation exercise. They are the basis of a State's entitlement to the areas to be delimited. As indicated by the ICJ, the title of a State to the continental shelf and to the EEZ is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts<sup>43</sup>. The land is the legal source of the power which a State may exercise over territorial extensions to seaward<sup>44</sup>. Moreover, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it<sup>45</sup>. It is

---

States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. (2) If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV. (3) Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation. (4) Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone [continental shelf] shall be determined in accordance with the provisions of that agreement. The UNCLOS, 1833 UNTS 3 (1982).

<sup>43</sup>Maritime delimitation in the Black Sea, supra note 4, 89 [77].

<sup>44</sup>North Sea Continental Shelf Case [1969] ICJ Rep 51 [96].

<sup>45</sup>See the subject matter of delimitation disputes are indeed many: in the *Grisbadarna Case* (Norway v Sweden) [1909] 11 RAA 147 ff, the arbitral award of 14 March 1908 stipulates: 'Article 3: The Arbitral Tribunal shall decide whether the boundary line should be considered, either wholly or in part, as fixed by the Boundary Treaty of 1661 with the map annexed thereto, and in what manner the line thus

therefore important to determine the relevant coasts of each party to the case, which confer legal entitlement of the countries to the continental shelf and the EEZ, i.e., those whose projections overlap, because the purpose of delimitation is to resolve the issue of overlapping claims by drawing a line of separation between the maritime areas concerned.

As explained by the ICJ<sup>46</sup>, the role of relevant coasts can have two different though closely related legal aspects in relation to the delimitation of the continental shelf and the EEZ. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line<sup>47</sup>. 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>48</sup>. After ascertaining the relevant coasts of each party, the judge establishes the ratio between the lengths of the respective coasts of each State and then verifies if there is any disproportionality between the ratio of the lengths of the coasts of each party

---

established should be drawn; that in so far as the boundary line shall not be considered as fixed by that Treaty and map, the Tribunal shall determine the boundary line'; first, the outstanding dispute between the two Emirates of Dubai and Sharjah concerning the demarcation of the boundaries between them shall be referred to arbitration in the Continental Shelf Case (Tunisia/Libya) [1982] ICJ Rep 18 ff article one of the special agreement of 10 June 1977 stipulates: 'The Court is requested to render its judgement in the following matter:

What principles and rules of international law may be applied for the delimitation of the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and to the area of the continental shelf appertaining to the Republic of Tunisia and the Court shall take its decision according to equitable principles and the relevant circumstances which characterize the area as well as the new accepted trends in the Third Conference on the Law of the Sea.'

<sup>46</sup>Romania v Ukraine, supra note 4, 89 [78]

<sup>47</sup>North Sea Continental Shelf Case, supra note 8, 51 [96].

<sup>48</sup>Tunisia v Libya, supra note 9, [1982] ICJ Rep 61 [75].

and that of maritime areas on either side of the delimitation line<sup>49</sup>.

---

<sup>49</sup>The ICJ has often faced difficulties to determine relevant coasts. In the Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta) [1985] ICJ Rep [74] states: 'In the view of the Court, there is no reason of principle why the test of proportionality, more or less in the form in which it was used in the Tunisia/ Libya case, namely the identification of -relevant coasts", the identification of "relevant areas" of continental shelf, the calculation of the mathematical ratios of the lengths of the coasts and the areas of shelf attributed, and finally the comparison of such ratios, should not be employed to verify the equity of a delimitation between opposite coasts, just as well as between adjacent coasts. However, there may well in such a case be practical difficulties which render it inappropriate in that form. These difficulties are particularly evident in the present case where, in the first place, the geographical context is such that the identification of the relevant coasts and the relevant areas is so much at large that virtually any variant could be chosen, leading to widely different results, and in the second place the area to which the judgment will in fact apply is limited by reason of the existence of claims of third States, To apply the proportionality test simply to the areas within these limits would be unrealistic;' However, the primacy of coastal geography in terms of delimitation is settled jurisprudence: 'It is ... necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited' North Sea Case, supra note 1, [1969] ICJ Rep [96]; '...the method of delimitation which it adopts for the Atlantic region must be one that has relation to the coasts of the Parties actually abutting on the continental shelf of that region.' "The coast of each of the Parties ... constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position,' Tunisia v. Libya, supra note 9, [1982] ICJ Rep [74]; 'The delimitation line to be drawn in a given area will depend upon the coastal configuration,' Gulf of Maine case. In the case concerning the Gulf of Maine area (Canada v United States of America) [1984] ICJ Rep 246 ff, the special agreement of 29 March 1979 stipulates in its article 2: The Chamber is requested to decide, in accordance with the principles and rules of international law applicable in the matter as between the Parties, the following question: What is the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America I. .]. 2) The Chamber is requested to describe the course of the maritime boundary in terms of geodetic lines connecting geographic coordinates of points. The

### The Relevant Maritime Zone

Seaward projections of relevant coasts of the coastal State and the encroachment effect of these projections on those at sea of the other coastal State determine maritime delimitation. This means therefore that the delimitation exercise only takes into account coasts that generate overlapping titles. It is for this reason that the utility of the notion of relevant maritime zone is often challenged. The ICJ<sup>50</sup> sought to justify the use of this notion. It observed that the legal concept of the "relevant area" has to be taken into account as part of the methodology of maritime delimitation.

In the first place, depending on the configuration of the relevant coasts in the general geographical context and the methods for the construction of their seaward projections, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand. Secondly, the relevant area is pertinent to checking disproportionality.

This will be done as the final phase of the methodology. The purpose of delimitation is not to apportion equal shares of the area or indeed proportional shares.

The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.

The Court further observes that<sup>51</sup> for the purposes of this final exercise in the delimitation process the calculation of the relevant area does not purport to be precise and is approximate.

The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas<sup>52</sup>.

---

Chamber is also requested for illustrative purposes only to depict the course of the boundary on ... chart ... [1984] ICI Rep [205].

<sup>50</sup>Romania v Ukraine, supra note 4, 99 [110].

<sup>51</sup>Ibid [111].

<sup>52</sup>Germany v Denmark, supra note 2, 21-22 [18], the Court states: '[...] having regard both to the language of the Special Agreements and to more general considerations of law relating to the regime of the continental shelf, its task in the present proceedings

The relevant maritime zone covers the entire area of coastal extensions of litigating States. These projections may overlap those of third-party States<sup>53</sup>.

After establishing the relevant maritime zone, the judge will then proceed with the maritime delimitation requested by the litigating parties.

To this end, he shall make use of the applicable rules on delimitation that emerge from the jurisprudence in the absence of rules in the UNCLOS.

### Delimitation of the Maritime Boundary

It is outlined by the ICJ<sup>54</sup> in the Case Concerning the Continental shelf (Libya /Malta) in which it states: 'In applying the equitable principles thus elicited, within the limits defined above, and in the light of the relevant circumstances, the Court intends to proceed by stages; thus, it will first make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result; it will then examine this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result.'

---

relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination de novo of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.' In the delimitation case (Greenland v Jan Mayen), supra note 2, [64], the Court states: '[...] Thus the law does not require a delimitation based upon an endeavour to share out an area of overlap on the basis of comparative figures for the length of the coastal fronts and the areas generated by them. The task of a tribunal is to define the boundary line between the areas under the maritime jurisdiction of two States; the sharing-out of the area is therefore the consequence of the delimitation, not vice versa.'

<sup>53</sup>Romania v Ukraine, supra note 4, 100 [112], the Court notes that the delimitation will occur within the enclosed Black Sea, with Romania being both adjacent to, and opposite Ukraine, and with Bulgaria and Turkey lying to the south. It will stay north of any area where third-party interests could become involved.

<sup>54</sup>Libya v Malta, supra note 13, 46 [60]



The provisional delimitation line is determined, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case<sup>55</sup>. So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts.

No legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation is the same for both<sup>56</sup>.

Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to the delimited.

The Court considers therefore the extent to which the Court may, when constructing a single-purpose delimitation line, deviate from the base points selected by the Parties for their territorial seas. When construction of a provisional equidistance line between adjacent States is called for, the Court will have in mind considerations relating to both Parties' coastlines when choosing its own base points for this purpose.

The line thus adopted is heavily dependent on the physical geography and the most seaward points of the two coasts. In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. At this stage, the judge pays no heed to any relevant circumstances, and the line is drawn in accordance with strictly geometric criteria on the basis of objective data<sup>57</sup>. Based on the coastal configuration of litigating States, the

---

<sup>55</sup>Case Concerning the Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v Honduras), [2007] ICJ Rep 745 [281], it is stated: '... the Court finds itself within the exception provided for in Article 15 of UNCLOS, namely facing special circumstances in which it cannot apply the equidistance principle. At the same time equidistance remains the general rule.'

<sup>56</sup>This is stated by the ICJ in the aforementioned Black Sea Case, supra note 4, 101[116].

<sup>57</sup>Ibid 101 [118].

provisional line may vary: an equidistance line between adjacent coasts and a median line between opposite coasts, for example. Given that the course of the final line should result in an equitable solution<sup>58</sup>, the Court will at the second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result<sup>59</sup>. This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

In the third stage, the Court will verify that the line does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime areas of each State by reference to the delimitation line. A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths<sup>60</sup>.

---

<sup>58</sup>In compliance with the first paragraphs of Articles 74 and 83 of the UNCLOS.

<sup>59</sup>Case Concerning the Land and Maritime Boundary (Cameroon and Nigeria, Equatorial Guinea intervening) [2002] ICJ Rep <<<http://www.icjci.org/docket/files/94/7453.pdf>>>. On 29 March 1994, the Government of Cameroon filed an application in the Registry of the ICJ in which it observed that 'delimitation [of the maritime boundary between the two States] has remained a partial one and, despite many attempts to complete it, the two parties have been unable to do so.' It consequently requested the court, 'In order to avoid further incidents between the two countries, [...] to determine the course of the maritime boundary between the two States beyond the line fixed in 1975.' In the Case between Cameroon and Nigeria, the ICJ states in [288]: '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 jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in 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 an "equitable result."' See also the aforementioned case Nicaragua v Honduras, supra note 19, 741

<sup>60</sup>Romania v Ukraine, supra note 4, 103 [122]: 'This is not to suggest that these respective areas should be proportionate to coastal lengths: as the Court has said "the sharing out of the area is therefore, the

### The Provisional Equidistance Line

This includes two key stages: selection of base points and consequently the construction of the line itself. The geography of the area to be delimited plays an important role in the selection of base points. The judge will therefore always describe the general geographical context when called upon to carry out maritime delimitation.

In the case of the Black Sea delimitation, the Court had to indicate the conclusions drawn from the fact that the dispute related to both adjacent and opposite coasts. The Court will identify the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines. The points thus selected on each coast will have an effect on the provisional equidistance line that takes due account of the geography<sup>61</sup>.

According to the Court<sup>62</sup>,<sup>26</sup> the geography shows that the capacity of the coasts to generate overlapping titles indicates the existence of two areas: in one case, the coasts are adjacent; in the other, they are opposite. In practice, the first conclusion which the Court draws from this is that, on the Romanian coast, the significant base points from which the equidistance line and the median line must be established are the same, since this coast is both adjacent and opposite to the Ukrainian coast. The second conclusion is that, as the Ukrainian coast consists of two portions one adjacent to the Romanian coast, the other opposite to it—the base points to take into account must be defined separately, according to whether the adjacent or opposite portion is concerned. The third conclusion

is the identification of a turning-point on the equidistance line where the effects of adjacency give way to those of the coasts on the opposite side, resulting in a change in the direction of the line. Lastly, the Court will need to consider the relevance or otherwise of Serpents' Island in terms of the choice of base points.

---

consequence of the delimitation, not vice versa". Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway), Judgment, [1993] ICJ Rep 67 [64]

<sup>61</sup>Ibid, 105 [127]

<sup>62</sup>Ibid [128].

After describing the views of Parties on base points to be taken into consideration in order to draw the provisional equidistance line between adjacent coasts of the two parties, the Court examined the question of whether the base points to be used could be the same as those selected by each State to determine the outer limit of its territorial sea. In this respect, the Court observed<sup>63</sup> that the geometrical nature of the first stage of the delimitation exercise leads it to use as base points those which the geography of the coast identifies as a physical reality at the time of the delimitation. That geographical reality covers not only the physical elements produced by geodynamics and the movements of the sea, but also any other material factors that are present. The Court upholds the dual principle of baselines and base points.

It appears that the base points and baselines for the purpose of delimitation are independent of those that serve to measure the breadth of the territorial sea and other maritime jurisdictions. The Court<sup>64</sup> observes that the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the EEZ and the issue of identifying base points for drawing an equidistance / median line for the purpose of delimiting the continental shelf and the EEZ between adjacent/opposite States are two different issues.

In the first case, the coastal State may determine the relevant base points in compliance with provisions of the UNCLOS<sup>65</sup>. This is, however, an exercise that always has a point of international relevance<sup>66</sup>.

In the second case relating to the delimitation of maritime zones between two States or more, the Court cannot rely on the selection of base points by one of the parties. When called upon to delimit the continental shelf and EEZ, the Court shall use base points in reference to the physical geography of relevant coasts.

After identifying the base points on the coastlines of the two parties, the Court will trace the provisional equidistance line based on those points, which will be identical to the provisional

---

<sup>63</sup>Ibid [131].

<sup>64</sup>Ibid [137].

<sup>65</sup>These include articles 7, 9, 10, 12 and 15 of the UNCLOS.

<sup>66</sup>Fishries case (United Kingdom v Norway) [1952] ICJ Rep 116 [132].

median line. This line will be confronted with the relevant circumstances in order to achieve an equitable result.

### The Relevant Circumstances

When the provisional equidistance line is drawn, the judge considers whether any factors calling for an adjustment or displacement of this line to achieve an equitable result<sup>67</sup>. These factors, considered as relevant circumstances<sup>68</sup>, allow the judge to ensure that the provisional equidistance line that has been drawn based on the geometrical method from base points identified on the Parties' coastlines is not, in the light of the special circumstances, perceived as inequitable. If such was the case, the judge would adjust the line in order to reach an equitable solution<sup>69</sup>.

Regarding applicable rules, the Court observes that the respective length of coasts can play no role in identifying the equidistance line which has been provisionally established. Delimitation is a function which is different from the apportionment of resources or areas<sup>70</sup>. There is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line.

Where disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made. The Court acknowledged that 'a substantial difference in the lengths of the parties' respective coastlines may be a factor to be taken into consideration in order to adjust or

---

<sup>67</sup>This principle was constructed over a long period from 1969 Case Concerning the North Sea Continental Shelf, Tunisia v Libya (1982), Case Concerning the Gulf of Maine (1984) and Libya v Malta (1985) with the (contd.) famous statement of principle of the Court: 'but in any event the baselines as determined by coastal States are not per se identical with the points chosen on a coast to make it possible to calculate the area of continental shelf appertaining to that State. In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain "islets, rocks and minor coastal projections".' Libyan Arab Jamahiriya v Malta, supra note 13, 48 [64].

<sup>68</sup>Cameroon v Nigeria, supra note 23, 441 [288]. North Sea Case, supra note 2, 53 [53].

<sup>69</sup>As provided for in paragraph 1 of articles 74 and 83 of the UNCLOS.

<sup>70</sup>North Sea Continental Shelf, supra note 2, 22 [18].

shift the provisional delimitation line<sup>71</sup>. The Court found that the disparity between the lengths of the coasts of Jan Mayen and Greenland (approximately 1:9) constituted a "special circumstance" requiring modification of the provisional median line, by moving it closer to the coast of Jan Mayen, to avoid inequitable results for both the continental shelf and the fisheries zone<sup>72</sup>.

In the Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine area (Canada v. United States of America), the Court examining 'the equitable criteria that may be taken into consideration for an international maritime delimitation' stated:

*The fact that to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for a delimitation, or a method that can be used to implement such delimitation. The Chamber recognizes that this concept is put forward mainly as a means of checking whether a provisional delimitation established initially on the basis of other criteria, and by the use of a method which has nothing to do with that concept, can or cannot be considered satisfactory in relation to certain geographical features of the specific case, and whether it is reasonable or otherwise to correct*

---

<sup>71</sup>Cameroon v Nigeria, supra note 23, 446 [301].

<sup>72</sup>Maritime Delimitation (Greenland and Jan Mayen), supra note 16, the Court observed that 'it should however be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen,' [69]; In the Case between Libya and Malta, the Court observed: 'If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence,' supra note 13, 45 [58]. In the same case, the Court considered that the difference between the lengths of the relevant coasts of Malta and Libya (1:8 ratio) was 'so great as to justify the adjustment of the median line' and that 'the degree of such adjustment does not depend upon a mathematical operation and remains to be examined'; *ibid.*, 50 [68].

*it accordingly. The Chamber's views on this subject may be summed up by observing that a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction*<sup>73</sup>.

The question of special circumstances to be taken into consideration will be dealt with at a later stage by the Court. According to the Court<sup>74</sup>, although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a judge, although there is assuredly no exhaustive list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature.

In fact, the judge will only focus on circumstances relating to the legal title of the State on disputed maritime areas and which will allow him to draw a delimitation line that is acceptable and equitable for parties.

After taking into consideration, or not, one or more relevant circumstances likely to result in the adjustment or shifting of the provisional delimitation line, the judge will determine and draw what will become the final delimitation line. All that remains is to verify the absence of disproportionality for the judge to fully accomplish his task.

### Verification of the absence of Disproportionality

The judge will now turn to check that the result thus far arrived at, so far as the envisaged delimitation line is concerned, should not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. The

<sup>73</sup>Case Concerning the Gulf of Maine, supra note 13, 323 [185]

<sup>74</sup>Libya v Malta, supra note 13, [48].

ICJ<sup>75</sup> recommends the attitude to be adopted. Views contained in the judgment in the case concerning the delimitation of continental shelf between the United Kingdom and the French Republic are decisive<sup>76</sup>. In examining the concepts of "proportionality" and "reasonable evaluation of natural features," the Tribunal stated: Particular configurations of the coast or individual geographical features may, under certain conditions, distort the course of the boundary, and thus affect the attribution of continental shelf to each State, which would otherwise be indicated by the general configuration of their coasts. The concept of "proportionality" merely expresses the criterion or factor by which it may be determined whether such a distortion results in an inequitable delimitation of the continental shelf as between the coastal States concerned. It is disproportion rather than any general principle of proportionality which is the relevant criterion or factor ... there can never be a question of completely refashioning nature ... it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features ... Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf ... proportionality is not in itself a source of title [...], but is rather a criterion for evaluating the equities of certain geographical situations ... The element of proportionality ..., its role being rather that of a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity<sup>77</sup>.

Checking the absence of disproportionality can only be approximate. Diverse techniques have in the past been used for assessing coastal lengths, with no clear requirements of international law

<sup>75</sup>North Sea Continental Shelf, supra note 2, [98]: "...to be taken account of [...] the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines.

<sup>76</sup>Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, XVIII RIAA 189 and ff., [100, 101, 246, 250]; see also Guinea v. Guinea-Bissau, XIX RIAA 183-184 [94-95].

<sup>77</sup>Black Sea Delimitation, supra note 4, 129 [212].



having been shown as to whether the real coastline should be followed, or baselines used, or whether or not coasts relating to internal waters should be excluded<sup>78</sup>; each maritime delimitation case is a "unicum"<sup>79</sup>. After half a century, maritime delimitation has reached maturity with its three stages. The first stage, which is the starting point, consists of drawing a provisional equidistance line. The second stage consists of ensuring that this line produces an equitable result in which case the provisional line becomes final<sup>80</sup>.<sup>44</sup> However, if the provisional equidistance line does not produce an equitable result, the judge shall adjust or shift

<sup>78</sup>Ibid., [213]

<sup>79</sup>(1984) ICJ Rep 290(81)

<sup>80</sup>In the Reply of the United States of America in the Case Concerning the Gulf of Maine, Mr. Colson explained: "The final preliminary issue of geographical significance with which we will deal and then set aside is the matter of the so-called grey area. [...] Let us turn now to the four reasons we would give to suggest that the grey area is not a matter that should concern the Chamber in this case. First, the grey area issue has been known for some time and to our knowledge it has never deterred States from applying a method or methods other than the equidistance method when it was equitable to do so. Second, the three United Nations Law of the Sea Conferences have paid no heed to the grey area issue. Third, State practice has not been concerned with this issue. And, fourth, the Parties have provided a means for dealing with the issue in the Special Agreement. [...] Figure 109 of our presentation shows two charts—one of the Chile-Peru maritime boundary and the other of the Peru-Ecuador maritime boundary. [...] In the case of the boundary between Chile and Peru, the grey area created by the boundary measure approximately 7,800 square nautical miles. In the case of the boundary between Peru and Ecuador, it is smaller, measuring about 400 square nautical miles [...]. We would also point out that areas of various sizes exist worldwide, including such negotiated delimitations as those between Kenya-Tanzania, Colombia-Ecuador, The Gambia-Senegal, Guinea-Bissau-Senegal, the northern boundary between Portugal and Spain, and Brazil-Uruguay. Accordingly, the fact that a grey area would exist were the United States line or others through the Northeast Channel to prevail, is not an unusual circumstance such as to warrant the Chamber's concern. The grey area in this case, which would be created by the United States line, is approximately 5700 square nautical miles," ICJ Oral Proceedings, Gulf of Maine Case (Canada/ United States of America), vol. VII, 217-220. Judgment was delivered on 12 October 1984 by the Chamber formed pursuant to the Court order of 20 January 1982. (Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, [1984] ICJ Rep 246)

this line based on the relevant circumstances of the case; this is the third and final stage. This three-stage paradigm will render great service to the judge in his search for a solution to the maritime delimitation dispute by offering stability and predictability. We shall now discuss what is referred to as the "Grey area", the "Alta mar" or the "Outer triangle".

### THE CONFIGURATIONS

The Convention shared the oceans all the States of the world and allocating maritime spaces among the various categories of countries.

However, in implementation reveals that the rough edges are stubborn. The fundamental task for States to undertake, under the Convention is therefore to complete and finalise the process of delimitation of maritime areas in such a way as to have an effective of the method of allocation adopted by the Convention - the so-called zonal approach, which seeks to reconcile the demands of some with the interests of others - and to enable good governance of the seas and oceans.

This zonal approach determines for each zone its spatial limits and the rights and obligations of the different of State. The areas in question are: the territorial sea; The Contiguous Zone; Archipelagic Waters; The Exclusive Economic Zone; The Continental Shelf; The High Seas; The International Seabed Area; Internal Waters; The Archaeological Zone and The Historic Bays. We have three different challenges here, first, tasks to be undertaken on the ground of the prescriptions of the UNCLOS. Second, outstanding tasks are made of problems which were not apparent when the Convention was negotiated. And Third, problems relating of fundamental changes of circumstances. This process relates to delimitation of maritime spaces between with adjacent coasts and the determination of the outer limit of the continental shelf beyond 200 nautical miles. This generates four forms of delimitation: unilateral delimitation (1), conventional delimitation (2), jurisdictional delimitation (3) and the determination of the outer limit of the continental shelf beyond 200 nautical miles or delineation (4).

### The Unilateral Delimitation

The unilateral delimitation concerns the separation of the national territory from an international space. It applies to areas under the jurisdiction of the coastal State: international, territorial sea, continental shelf and exclusive

economic zone the delimitation of such areas is the exclusive competence of the coastal State. However, it still has an international aspect<sup>81</sup> the question of internal waters, which is absent from treaty law, deserves to be clarified. The same applies to criterion relating to the single dividing line<sup>82</sup>. In the maritime delimitation, coastline, baselines, islands, shoals and other geographic or geodetic factors play an important role<sup>83</sup>

---

<sup>81</sup>As the ICJ states, "while it is true that the act of delimitation is necessarily a unilateral act because the riparian State alone has the capacity to do so, on the other hand, the validity of the delimitation with regard to States Thirds is a matter of international law", *Anglo-Norwegian Fisheries Affairs*, Judgment of 18 December 1951, Rec.1951, p.132. This recalls the regime applicable to nationality. "It does not depend either on the law or on the decisions of a State to determine whether that State has the right to exercise its protection in the case in question", ICJ, *Nottebohm second phase*, 1955, p. 20, "because international law leaves it to each State to regulate the attribution of its own nationality". I bid. P.23, On the other hand, the internal validity of nationality is the first condition of its international validity. indeed, insofar as international law recognizes the exclusive competence of States in the determination of nationality, it subordinates to its own requirements its effectiveness in the international order. That is why the challenge by a State of an act of nationality does not invalidate it but makes it unenforceable. As Brownlie remarks, "Nationality is a problem, *inter alia*, of attribution, and regarded in this way resembles the law relating to territorial sovereignty. National law prescribes the extent of the territory of a state, but this prescription does not preclude a forum which is international law from deciding questions of title in its own way, using criteria of international law", I. Brownlie, *The Relations of Nationality in Public International Law*, BYBIL, 1963, p. 290-291.

<sup>82</sup>Like the Comment Y. Tanaka referring to the 1958 and 1982 Conventions on the Law of the Sea, "These treaties contain no provision with regard to the delimitation of internal waters, Case of a bay with several riparians. In addition to this, the single maritime boundary, which would delimit the continental shelf and the EEZ / fishery zone (FZ) by one line, is at issue. Considering that the factors to be taken into account may be different for the seabed and superjacent waters, it seems possible that the delimitation line of a continental and an EEZ / FZ would differ as well". Y. Tanaka, *International Law of the Sea*, Second Edition, Cambridge University Press, 2015, p.198.

<sup>83</sup>T.M. Ndiaye, "The Judge and the Maritime Delimitation: Instructions for Use", *Governing Ocean Resources, New Challenges and Emerging Regimes*, a tribute to judge Choon-Ho Park, MartinusNijhoff Publishers, 2013, p. 139-161; Spec. P.145-147.

These various factual data make it possible for the State to determine the spatial basis for the exercise of its jurisdiction over maritime areas<sup>84</sup>.

Which means:" the legal link between the territorial of the State and its certain adjacent maritime areas is established through its coasts? The notion of adjacency as a function of distance rests entirely on that of the littoral and not on that of the land and mass<sup>85</sup>

It appears that the determination of the relevant coast and its configuration (presence of islands, and other geographical factors) constitute a circumstance of particular importance in maritime delimitation. The entitlement of a State is based upon the areas to be delimited.

As indicated by the ICJ, the title of a State on the Continental and exclusive economic zone is based on the principle that land dominates the sea because of the projection of coastal facades<sup>86</sup>.

Land is the legal source of the power that a State can exercise in maritime extensions<sup>87</sup>. Besides, it is the coast of the territory of the State that determines the entitlement on the submarine areas bordering this coast<sup>88</sup>. The role of the relevant coasts may have two distinct but related legal aspects in the context of the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coast in order to determine, in the specific context of a case, the overlapping claims in those areas since the object of each delimitation is to resolve the problem of overlapping claims

---

<sup>84</sup>The ICJ states in the *North Sea Continental Shelf* case, para, 96: "... the principle that land dominates the sea is applied; It is therefore necessary to look closely at the geographical configuration of the coasts of the countries whose boundaries the Continental Shelf should be delimited.

<sup>85</sup>ICJ, *Libya v Malta*, judgment of 3 June 1985, paragraph 119 states: "The rights which a State may claim to have over the sea relate not to the extent of its territory behind its coasts, but with these coasts and with the way they border this territory, A State with a small area of land can claim to maritime territories much larger than a large State. It all depends on their respective sea frontages and how they present themselves".

<sup>86</sup>See, case concerning the maritime delimitation in the Black Sea, (*Romania v, Ukraine*), Judgment of 3 February 2009, Rec, ICJ, 2009 para, 77, (S3)

<sup>87</sup>ICJ, case concerning the Continental Shelf in the North Sea, rec. 1969, judgment of 20 February 1969, paragraph 51. (S4)

<sup>88</sup>ICJ, *Continental Shelf case (Tunisia C Libya)* Judgment of 24 February 1982, paragraph 73, (55)

by drawing a divisive line of separation between the maritime spaces concerned.

Secondly, the relevant coasts should be identified for verification of any disproportion between the ratios of the coast lengths of each State to that of the maritime spaces located on either side of the delimitation line<sup>89</sup>. Proportionality is the criterion for verifying the fairness of delimitation. It looks at the length of the relevant coast or the composing elements of the area of the maritime zones to be allocated to each State<sup>90</sup>.

As to the baselines, they are established in the Convention and make it possible to measure the breadth of the areas under national jurisdiction: territorial sea, contiguous zone, exclusive

---

<sup>89</sup>See the case concerning delimitation in the Black Sea, op.dt [Note 50], paragraph 78, also T.M. NDIAYE op.cit [Note 49], p 149 (S6)

<sup>90</sup>The International Court of Justice has sometimes found it difficult to determine the relevant coasts. In the case of *Libya v. Malta* states: «. in the opinion of the court, no principled reason precludes the use of the proportionality test in much the same way as in the case *Tunisia / Libya*, which consists of determining the "relevantcoasts", calculating the arithmetic ratios between the lengths of coast and the allocated areas and finally comparing these ratios in order to ensure the fairness of a delimitation between coasts Facing each other as well as between adjacent ribs. But in this case, some practical difficulties may well make the test inappropriate in this form, Thesedifficulties are particularly evident in the present case where, to begin with the geographical context, the margin of determination of relevant coasts and relevant areas is so wide that virtually any variant could be adopted, Then the area to which the judgment will in fact apply is limited by the existence of the claims of third States. It would be illusory to apply proportionality only to the areas within those limits; (...) ", *Case of the Continental Shelf Libya / Malta*, op. cit. (See footnote S above), para. 74. On the other hand, the primacy of coastal geography in terms of delimitation is a constant jurisprudence: "it is necessary to take a close look at the geographical configuration of the coasts of the countries whose continental shelf must be delimited", *Affi. Of the Continental Shelf in the North Sea*, op.cit. Paragraph 96; "The method of delimitation to be adopted must be in relation to the coasts of the parties actually bordering the continental shelf", *Case of the Delimitation of the Continental Shelf {United Kingdom, C. France} 1977, RSA, Vol, XVIII, 130, 240*; "A line of delimitation to be drawn in a given area is a function of the configuration of the coasts", a case concerning the delimitation of the maritime boundary in the Gulf of Maine region (*Canada C. United States of America*) 1984, Rec. ICJ 1984, p.246, para. 205.

economic zone and continental shelf. Their route method and the "straight baselines" method.

According to article 5 of the Convention: "Unless otherwise provided for in the convention the normal base line from which the breadth of the territorial sea is measured, is the low water mark along the coast, a shown on the large-scale charts officially recognized by the coastal State<sup>91</sup> " In the case of straight baselines<sup>92</sup> their use implies the existence of a indented and cut away coast or the presence of a string of Islands along the coast or in the immediate vicinity of the coast, The course of the lines must not deviate appreciably from the general direction of the coast, and the breadth of the sea below the straight lines must be sufficiently connected with terrestrial domain to be subjected to the regime of internal waters.

These straight baselines may not be drawn to or from low-tide elevations unless lighthouses or similar facilities have been constructed or the alignment of such straight baselines has gained International recognition.

Moreover, these lines cannot be drawn in such a 'Nay that the territorial sea of another State is cut off from the high seas or from an exclusive economic zone. Under Article 14 of the Convention the coastal State may, depending on the situation, establish baselines in accordance with one or more of the methods provided for in the preceding articles. It should also be noted that there is a need for advertising measures, in particular for straight baselines, their legal status and regime.

The challenge facing States is the impact of sea-level rise on the baselines, given that between 2000 and 2009 this level rose more than the previous, 5000 years<sup>93</sup>.

---

<sup>91</sup>Articles 5, 7, 9-11, 13-14 and 16 lay down the rules for the drawing of baselines for measuring the breadth of the territorial sea. Nevertheless, the lines specified in these provisions also make it possible to measure the width of the other spaces under the jurisdiction of the coastal State. The contrary provision referred to in Article 5 concerns: reefs, straight baselines, mouths of rivers, bays, harbours and shallow shoals.; See, Robin Churchill, "Coastal Waters," *The IMLI Manual on International Maritime Law, Vol.1; The Law of the Sea*, General Editor David J. Attard, Oxford University Press, 2014, pp. 1-25.

<sup>92</sup>Article 7 of the Convention

<sup>93</sup>See J Attenhoffer, "Baselines and Base Points: How the Case Law Withstands Rising Sea Levels and Melting Ice" (2010) "[Http://www.asil.org/losreports](http://www.asil.org/losreports)" (2014); D. Freestone and J. Pethick,

### Conventional Delimitation: Bilateral Agreements

The delimitation of maritime spaces between neighbours is of great importance in that it confers stability and permanence in their mutual relations. It happens that many maritime borders in our world are not delimited. The total number of maritime borders is 420<sup>94</sup> and there are only about 200 delimitation agreements to day, most of which have come into force<sup>95</sup>. This also means

---

"Sea Level Rise and Maritime Boundaries" in G.H. Blake (ed.), *Maritime Boundaries*, Routledge (1994), 73; In the case, "The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, award of 7 July 2014", the Tribunal said, paragraph 399: "The Tribunal will first address the instability of the coast of the Raimangal and Haribhanga estuary. It notes that the coast of Bangladesh is unstable. In coming to this conclusion, the Court is guided by the documented changes in the form and form of some formations in the Raimangal estuary. South Talpatty / New Moore Island is one example. The Tribunal does not consider it necessary, however, to go into any detail on this issue, since it does not consider this instability to be a circumstance that would justify the adjustment of the provisional equidistance line in the delimitation of the exclusive economic zone and continental Shelf. This Decision of the International Court of Justice in the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), Judgment, ICJ Reports 2007, p. P.745, para. 281). That judgment considered the instability of a coast with respect to 116 whether the establishment of base points was feasible. Moreover, as this Tribunal has emphasized in respect of the territorial sea (see paragraphs 214-219, 248 above), only the present geophysical conditions are of relevance. Natural evolution, uncertainty and lack of predictability as to the impact of climate change on the marine environment, especially the coastal front of States, make all predictions concerning the amount of coastal erosion or accretion unpredictable. Future changes of the coast, including the consequences of climate change, cannot be taken into account in adjusting a provisional equidistance line>>

<sup>94</sup>See, US Dept. Of State, Bureau of Oceans and International Environment and Scientific Affairs, *Limits in the Seas*, No. 108; 1st revision, *Maritime Boundaries of the World*, 1990, 2.

<sup>95</sup>The five volumes by J.L. Charney and L.M. Alexander, *International Maritime Boundaries*, The American Society of International Law, Nijhoff Publishers, 1993, 1998, 2002, 2007; And the four volumes published by DOALOS on "Maritime Delimitation Agreements", as well as volume S of *Maritime Boundaries: World Boundaries*, edited by Gerald H. Blake, Routledge, 2002. These books

that the process has not been completed, especially since the existing delimitation agreements cover scarcely all maritime space. They relate mostly to the continental shelves and let indeterminate the other spaces; hence the recent tendency to establish single divisive lines embracing areas under national jurisdiction. This is a major challenge in the years to come. The conventional delimitation derives from a prescription of the Convention, which provides that any delimitation of the exclusive economic zone and the continental shelf must be effected by agreement.

Articles 15, 74 and 83 of UNCLOS deal respectively with the delimitation of the territorial sea, the exclusive economic zone and the delimitation of the continental shelf. Article 15 of UNCLOS provides: "When the coasts of two States are adjacent each other, neither of them shall be entitled, unless otherwise between to extend its territorial sea beyond the median line, or bridges of which are equidistant from the points nearest to from baselines from which the breadth of the territorial sea of each of the two States is measured".

However, this provision shall not apply where, to the existence of historical titles or other special circumstances, it is necessary to delimit the territorial sea of the two States', otherwise. Articles 74 and 83 of UNCLOS have identical wording and provide:

- The delimitation of the economic zone the continental between State:
- Whose coasts are adjacent or facing each other shall be effected agreement in accordance with international law as referred to in Article 38 of the Statute of the International Court of Justice in order to achieve an equitable solution.
- If they do not reach an agreement within a reasonable time, the States concerned shall have recourse to the provided for in Part XV.
- Pending the conclusion of the agreement referred to in paragraph 1, the interested States, in a spirit of understanding and cooperation, shall endeavour to conclude provisional arrangements of a practical nature and not to jeopardize or obstruct during this transitional period, the conclusion of the final agreement. The provisional arrangements shall be without prejudice to the final delimitation.

---

provide an insight into the <<State of interstate practice.



- Where an agreement is in force between the interested States, questions relating to the delimitation of the economic zone (of the continental shelf) shall be settled in accordance with that agreement<sup>96</sup> States practice relating to the delimitation of the EEZ and the continental shelf is disparate. The delimitation agreements provide very little information on the principles and methods States in their negotiation to establish the delimitation line adopted<sup>97</sup>. This practice could not be imposed on the customary basis. Indeed, the examination of the disputes over maritime delimitations shows that conventional requirements hardly occupy the central place that one was entitled to expect from them. As one author notes: "In the drafting of these provisions, there was disagreement between the supporters of equidistance >> and the supporters of equitable principles.

---

<sup>96</sup>With regard to the delimitation of the exclusive economic zone compared with that of the continental shelf, see: International Court of Justice: Continental Shelf case (Tunisia / Libya), Judgment of 24 February 1982; The case of maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993; Case concerning delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain) Judgment of 16 March 2001; Case concerning the land and sea boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Judgment of 10 October 2002; Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Gulf of Bengal (Bangladesh / Myanmar), International Tribunal for the Law of the Sea, Case No. 16, Judgment of 14 March 2012

<sup>97</sup>See V. Leanza and M.C. Caracciolo, "The Exclusive Economic Zone" in the I MLI Manual op. Cit. [Note 11] pp.177-216; "Many of the international bilateral agreements do not deal specifically with the delimitation of this area, but they do delimit the seabed and subsoil marine and the water column. These agreements can be divided into three groups depending on their approach to the issue of delimitation: the first group, certainly the most numerous, uses the delimitation method of the median or equidistance; [...] the second group merely provides that the delimitation should be made in accordance with international law [...] another group establishes directly the geographical coordinates, without indicating which method was used in the delimitation, or resorts to methods other than that of the median Or equidistance "p. 205.

The confrontation between the two groups was also linked to another difficult issue concerning peaceful settlement of disputes. Whilst the supporters of "equidistance" were, as part of the package, in favour of establishing a compulsory, system for the settlement of delimitation disputes, the supporters of "equitable principles" generally rejected the idea of compulsory judicial procedures<sup>98</sup>. It was on this basis that Articles 74 and 83 were designed as an escape route that can never aspire to be completeness. These provisions do not refer to a method of delimitation but merely states that delimitation must result in a fair result<sup>99</sup>, and the evocation of the status of the ICJ is not a source of clarity. It is none the less true that the delimitation agreements are objective in nature, that is to say they are opposable *erga omnes* and in the case of succession of State, they are binding to the successor at the time territorial transfer. Thus the principle of *uti possidetis* has been the latin American states as soon as their independence was proclaimed in the 19th century This principle has been received in Africa as the "intangibility of frontiers"<sup>100</sup>.

It appears, however, that the fundamental role in the for formulation of the legal and principles governing the law of maritime delimitation lies with the International Court and the arbitral tribunals. The latter apply the rules indicated by the Court, while at the same time bringing some innovations which are taken up by the Court, enabling a mutual enrichment. International Courts and Tribunal have thus made it possible to develop the law of maritime delimitation.

---

<sup>98</sup>V. Tanaka op. Cit. [Note 48], p. 200-201; See also, Virginia Commentaries, Vol li, Dordrecht, Nijhoff. 1993, p. 796 - 819. See also, M.D. Evans "Maritime Boundary Delimitation" Oxford Handbook of the Law of the Sea, Oxford University Press, 2015, p. 2S4-279.

<sup>99</sup>According to the International Court of Justice "... delimiting with concern for achieving an equitable result, as required by international law in force, does not amount to delimiting inequity [which] is not a method Delimitation but only an objective which should be borne in mind when carrying out that purpose". Case concerning land and sea boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Judgment of 10 October 2002, paragraph 294.

<sup>100</sup>See the Cairo Declaration of 21 July 1964, see also ICJ, case of the border dispute between Burkina Faso and Mali, ICJ 1986, p. 566, para. 23.

### Delimitation by International Courts and Tribunals

UNCLOS provides that if they fail to reach an agreement within a reasonable time, the interested States shall resort to the procedures provided for in Part. Jurisdictional delimitation most often results from the failure of negotiations in the determination of the maritime boundary between two States.

Moreover, the existence of exclusive economic zones and of technologies for the exploration and exploitation of mineral resources has made the delimitation of maritime areas a major problem of modern times. In particular:

*"The recourse to ICJ in matters of maritime delimitation is an element of the general requirement for authoritative settlement of maritime boundaries, whether agreement, arbitration or judicial award; and this is my turn is a function of the increased possibilities of extraction of the mineral resources of the seabed<sup>101</sup>. One should note the tendency of States to prefer the bilateral approach to delimitation issues even if they are in a geographical situation with several States. Most of the delimitation agreements are bilateral agreements and most of the proceedings are instituted by the notification of a special agreement even in circumstances where the judge or the arbitrator must take due account of the right of third parties, like in the case of non-intervention<sup>102</sup>."*

The delimitation presupposes knowledge of the entitlements of the two Parties in the interested area. Thus, the first issue to be considered by the judge is whether the parties have competing entitlements on the space to be delimited<sup>103</sup>. The

---

<sup>101</sup>H. Thirlway "recent trends and challenges of the ICJ Jurisprudence", Japanese Yearbook of International Law vol. 55, 2012, p. 4-30, spec. P.8.

<sup>102</sup>Ibid. P.9 in the case of intervention in the matter, rather an opposition of one or both parties was observed. This confirms the bilateral approach chosen by the States.

<sup>103</sup>In the case of the territorial and maritime dispute (Nicaragua v. Colombia), judgment of 19 November 2012, Rec. ICJ, 2012, p.624, para. 141, the Court said: "The Court will therefore begin by defining the relevant coasts of the parties, namely those overlapping projections, the delimitation of resolving the question of overlapping claims by tracing a line of separation between the maritime spaces ". It will point out in the case of the Continental Shelf Tunisia / Libya, Rec.1982, p.61, paragraph 73: "It is the coast of the territory of the State which is decisive for creating the title over the sub- Seas along this coast ".

problem of the dividing line in overlapping maritime areas has been the subject of a voluminous dispute with regard to the EEZ.

Moreover, the continental shelf beyond 200 nautical miles has grown and has increased the interest of States with submissions made to the Commission on the limits of the continental shelf and the shift in jurisprudence observed over the last few decades.

Maritime delimitation has in fact produced more cases than any other subject of international law, whether at The Hague Court, before the arbitral tribunals and today before the International Tribunal for the Law of the Sea and The Tribunals, annex VII of UNCLOS. In this way, it appears that the fundamental role in the formulation of rules and principles governing the law of maritime delimitation lies with International Courts and Tribunals rather than with interstate practice<sup>104</sup>.

The relationship between the Continental Shelf and the Exclusive Economic Zone on the resources of the seabed and subsoil. Rights on the continental shelf are inherent, due to the legal regime while the EEZ must be claimed and is creation proclaimed by the State<sup>105</sup>.

### As Y Tanaka Remarks

« Considering that the factors to be taken into account may be different for the seabed and superjacent waters, it seems possible that the delimitation line of a continental shelf and an EEZ/FZ would differ as well. A divergence of factors relevant to the seabed and superjacent waters may entail the risk of creating two competing lines dividing coincident areas and create a situation in which part of the EEZ belonging to one state may overlap part of another state's continental shelf. Such a situation would give rise to complex problems relating to jurisdiction<sup>106</sup>»

---

<sup>104</sup>T.M. Ndiaye op. Cit. [Note 49], p.140.

<sup>105</sup>See D. Attard, The Exclusive Economic Zone in International Law, Oxford University Press, Oxford 1987; F. OrregoVincuna, The Exclusive Economic Zone, Cambridge University Press, Cambridge, 1989.

<sup>106</sup>See D. Attard, The Exclusive Economic Zone in International Law, Oxford University Press, Oxford 1987; F. OrregoVincuna, The Exclusive Economic Zone, Cambridge University Press, Cambridge, 1989.

Another difficult problem relates to the title to the continental shelf comprising, according to the UNCLOS, the seabed and its subsoil beyond its territorial sea, throughout the natural prolongation of the land territory of that State to the outer edge of the Continental limit, or up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, when the outer edge of the continental margin is at a lower distance. In other words, the title to the continental shelf is based both on the criterion of the distance and on that of the natural prolongation. This, especially since UNCLOS allows the coastal State to fix the outer limit of its continental shelf when it extends beyond 200 nautical miles<sup>107</sup>.

On the basis of the previous considerations, the judge determines the method of delimitation and constructs the provisional equidistance line. He examines, if necessary, the relevant circumstances before verifying the absence of disproportion in accordance with the three-step paradigm that now appears as the solution to the maritime delimitation dispute. In fact, since the Continental Shelf case in the North Sea, some twenty delimitation cases have been submitted to international jurisdictions and most of the judgments or sentences have been rendered. At the beginning, the jurisprudence concerned delimitations of continental shelves. Nowadays, jurisdictions are called upon to determine maritime boundaries with a single line dealing with all maritime spaces. Indeed, the very difficult legal issue that arises is whether or not the line of the continental shelf should be granted to the water column. This is the challenge faced by International Courts and Tribunals. In the case of maritime delimitation in the Black Sea, the ICJ stated that:

*"Paragraphs 4 of articles 74 and 83 of the UNCLOS are relevant to assess Romania's position that the instruments of the year 1949 have established, around the Snake Island a boundary delimiting the exclusive economic zones and the continental shelf beyond of point I. (...) it is clear from the practice of States that a new agreement is necessary for a chosen line to be used to delimit another. This is usually the case when States agree to use the line delimiting their continental shelf to mark the boundaries of their respective exclusive economic zones"*<sup>108</sup>.

<sup>107</sup>UNCLOS, s. 76 paras. 2-7, see Nicaragua v. Colombia op. Cit. [Note 24] para. 121.

<sup>108</sup>Case concerning the maritime delimitation in the Black Sea (Romania v. Ukraine) Judgment,

It should also be noted that maritime delimitation proceedings have been introduced on the basis of compulsory jurisdiction, i.e. on the basis of compulsory procedures resulting in mandatory decisions, in accordance with Part XV of UNCLOS. Therefore, four cases have been submitted to the arbitral tribunals of Annex VII: Arbitral Tribunals: Barbados v. Trinidad and Tobago; French Guiana v. Suriname; Bangladesh v. India and Philippines v. China.

### The Delineation

The purpose here is to determine the outer limit of continental shelves extending beyond 200 nautical miles<sup>109</sup>, also called delineation.

Under the UNCLOS<sup>77</sup>, Continental shelf of a coastal State includes the seabed and its subsoil beyond its territorial sea, over the whole extent of the natural prolongation of the land territory of that State to the outer edge of the continental margin, or up to 200 nautical miles of the baselines from which the breadth of the territorial sea is measured, when the outer edge of the continental margin is at a lower distance.

There are three important elements in these provisions. First, the distance of 200 nautical miles of the baselines from which the breadth of the territorial sea is measured. Then, the concept of the natural prolongation of the territory of the coastal State, and finally the outer edge of the Continental margin. Where the outer edge of the continental margin extends beyond 200 nautical miles, the outer limit of the continental shelf shall be determined on the basis of the Paragraph 4 of Article 76, which resorts to geomorphological criterion. On the basis of geological data and the shape and contour of the undersea topography, geomorphological criterion arises logically from the notion of natural prolongation of the territory of the coastal State<sup>110</sup>. The geomorphological

ICJ Reports 2009, p. 61, para. 69.

<sup>109</sup>See V. Marotta Rangel, the Continental Shelf in the 1982 Convention on the Law of the Sea, RCADI, 198S - V, volume 194, pp. 342-364; L. Lucchini, "Article 76 of the United Nations Convention of 10 December 1982 on the Law of the Sea" in The Continental Shelf extended under the United Nations Convention on the Law of the Sea of 10 December 1982. Optimization of demand, INDEMER, Paris, Pedone, 2004, pp.9-29; R. Churchill and V. Lowe, The Law of the Sea, 3rd ed. Manchester University Press, 1999; D. R. Rothwell and T. Stephens, The International Law of the Sea, Hart Publishing, Oxford and Portland, 2010, p. 98-119.

<sup>110</sup>See V. Marotta Range! op. Cit. [Note 76] p.348; H. Hedberg, "Relation of Political Boundaries on the

criterion gave rise to the Irish amendment which combines two methods, allowing the coastal State to have criteria for determining the edge of its continental margin: this is on one hand, the Gardiner formula and the Hedberg Formula, on the other. In this way, article 76 of the UNCLOS uses geomorphological concepts - Gardiner and Hedberg formulas – to determine the outer edge of the Continental shelf beyond 200 nautical miles.

The Gardiner formula refers to the thickness of sedimentary rocks. It is stated in article 76, Paragraph 4 (a) (i) which provides:

- "(...) the coastal State defines the outer edge of the continental margin when it extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by:
  - A line drawn in accordance with paragraph 7 with reference to the extreme fixed points where the thickness of the sedimentary rocks is at least one-hundredth of the distance between the point and the foot of the continental slope".
- This formula has an intimate connection with the criterion used to assess the presence or absence of hydrocarbon resources<sup>111</sup>.
- The Hedberg formula relates to the 60 nautical miles at the foot of the continental slope. For the purposes of the Convention, "The State shall define the outer edge of the continental margin when it extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by (ii) a line drawn in accordance with paragraph 7 with reference to fixed points not more than 60 nautical miles from the foot of the continental slope<sup>112</sup>>>".
- In the absence of evidence to the contrary, the foot of the continental slope coincides with the most marked break at the base of the slope<sup>113</sup>.
- Moreover, the coastal State determines the outer limit of its continental shelf by linking a length of lines, not exceeding 60 nautical

miles from the fixed points defined by longitude and latitude coordinates.<sup>114</sup>It may choose between the Irish and Hedberg formulas, the one which appears to him the most favourable. However, "The fixed points that define the marked lines on seabed's, the outer limit of the continental shelf, drawn according to paragraph 4 (a) (i) and (ii), shall be located at a distance not exceeding 350 nautical miles of the baselines from which the breadth of the territorial sea is measured, or at a distance not exceeding 100 nautical miles from the 2,500 meter isobath which is the line connecting the points of 2500 meters of depth<sup>115</sup>".

On an underwater ridge, paragraph 6 of Article 76 provides that the outer limit of the continental shelf shall not exceed a line drawn 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to shoals that are natural features of the continental margin, such as plateaux, Thresholds, ridges, benches or spurs.

The UNCLOS has established the Commission on the Limits of the Continental Shelf, a scientific and technical body prescribed by article 76, paragraph 8, and annex II of the Convention<sup>116</sup>. Its task is to formulate recommendations on States' claims for the continental shelf beyond 200 nautical miles. The coastal State has sole competence to determine the outer limits of its continental shelf beyond 200 nautical miles. However, it must do so on the basis of the recommendations issued by the Commission. The Commission comprises 21 members, expert in geology, geophysics or

<sup>114</sup>Article 76, paragraph 7 of UNCLOS

<sup>115</sup>Article 76, paragraph 5 of UNCLOS

<sup>116</sup>A. de Marfly-Mantuano, "The Work of the Continental Shelf Limits Commission" in *The Extended Continental Shelf*, op.cit. [Note 76] pp.31-44; O. Roughton and C. Trehearne, "The Continental Shelf" in the IMLI Manual on International Maritime Law, Vol. 1, the Law of the Sea op.cit. pp.137-175, spec.pp.154-174. Paragraph 8 in fine of Article 76 states: "The Commission shall make recommendations to the coastal States on questions concerning the fixing of the outer limits of their continental shelf. The limits fixed by a coastal State on the basis of these recommendations shall be final and binding".

Ocean Floor", *Virginia Journal of international law*, 1976, pp.S7-75.

<sup>111</sup>See Tanaka, op. Cit. [Note 48] p.135.

<sup>112</sup>Article 76, paragraph 4 (a) (ii) of UNCLOS

<sup>113</sup>Article 76, paragraph 4 (b) of UNCLOS



## The Maritime Delimitation: Principles and Configurations

hydrograph, elected by the States Parties from among their nationals<sup>117</sup>. The members of the Commission are elected for a term of five years.

They are eligible for re-election. They shall not be instructed by any government or any authority external to the Commission and shall refrain from any action likely to adversely affect their image as a member of the Commission<sup>118</sup>.

The Commission has two essential functions. On the one hand, to examine the data and other information submitted by the coastal States with regard to the outer limit of the continental shelf when that shelf extends beyond 200 nautical miles and submit recommendations in accordance with article 76, and the Memorandum of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea. On the other hand, at the request of the coastal interested States to issue scientific and technical advice for the establishment of the data's<sup>119</sup>.

The Commission functions through subcommittees composed of seven members appointed in a balanced manner taking into account the specific elements of each request submitted by the coastal State. Members of the Commission who are nationals of the coastal State that has submitted an application may not be members of the sub-committee examining the application<sup>120</sup>. The subcommittee shall submit its recommendations to the committee, which shall approve them by a two-thirds majority of the members present and voting. These recommendations of the Commission are submitted to the coastal State which submitted the request and to the Secretary-General of the United Nations<sup>121</sup>.

Due to the technical complexity of determining the outer edge of the continental margin and the limit of the continental shelf, the Commission

---

<sup>117</sup>UNCLOS, Annex II, Article 2, paragraph

<sup>118</sup>Rules of Procedure of the Commission dated 17 April 2008, CLS / 40 / Rev. Rule 11 (CLCS Rules of Procedure).

<sup>119</sup>UNCLOS, Annex II, Article 3 (1).

<sup>120</sup>UNCLOS, Annex II, Article 5. The same shall apply to a member of the Commission who has assisted the coastal State by providing scientific and technical advice on the route. I bid.

<sup>121</sup>UNCLOS, Annex II, Article 6.

adopted its Scientific and Technical Guidelines on 13 May 1999, which present themselves as an authorized exegesis of Article 76 of the UNCLOS.

As of 26 April 2016, seventy-seven applications were submitted to the Commission. It presented 24 recommendations to the coastal States concerned. It should be noted that when considering the applications submitted to it, the Commission decides on the validity of the outer limit of the continental shelf beyond 200 nautical miles; and it does so on a scientific and technical level. It shall refrain from interfering with pending maritime delimitation disputes. In that case:

*"The Commission shall not consider the request made by the State party to the dispute and shall not take a decision on the request, except with the prior agreement of all States Parties to the dispute. Dispute ...<sup>122</sup>".*

The problem, therefore, is whether the international courts are equipped to deal with a delimitation of a continental shelf beyond 200 nautical miles.

Although the determination of the outer limit of the continental shelf and the delimitation of the Maritime boundary are two different concepts,

---

<sup>122</sup>See document CLCS / 11 (CLCS Scientific and Technical Guidelines) adopted by the Committee on 13 May 1999 at its fifth session. The deadline for submission of applications is 10 years from the entry into force of the Convention for the State concerned. This time limit was extended on 29 May 2001 (see SPLOS / 72) and the possibility of submitting preliminary information on the outer limit of the continental shelf beyond 200 nautical miles was offered to coastal States [SPLOS / 183]. 20 June 2008. Concerning the interpretation and application of UNCLOS in the examination of applications - the Commission lacking legal experts - consideration was given to the possibility of establishing a mechanism for requesting an advisory opinion on Questions of interpretation of provisions other than Article 76 and Annex II of the Convention. However, the proposal was withdrawn and the Commission decided to consider this matter. See document CLCS / 74 of 30 April 2012 on the state of play of the work of the Commission [Address by its President]. See also A. G. Oude Elferink "The Establishment of Outer Limits of the Continental Shelf beyond 200 Nautical Miles by the Coastal State: The Possibilities of Other States to Impact on the Process ", 2009, 24IJMCL, p.535.

they have an intimate connection and most of the applications submitted to the Commission are related to a maritime boundary<sup>123</sup>.

As noted by the ICJ, the procedure before the Commission aims at the delimitation of the outer limit of the continental shelf and, consequently, the determination of the extent of the seabed which is a matter for national legislation. It is distinct from the delimitation of the Continental Shelf, governed by Article 83 of the UNCLOS, which shall be effected by agreement between the interested States or through recourse to dispute settlement procedures<sup>124</sup>. The Convention makes a clear distinction between the delimitation of the continental shelf and the delimitation of its outer limit beyond 200 nautical miles. The fact that the outer limit of the Continental Shelf beyond 200 nautical miles has not been established has not prevented the Tribunal from determining the existence of title to the Continental Shelf between the interested States.

However, the Tribunal did not determine the outer limit of the Continental Shelf beyond 200 nautical miles. Rather, it extended the dividing line on this side. In this regard, the International Tribunal for the Law of the Sea established a precedent by recognizing itself as competent to delineate - not to draw the outer limit - the Continental Shelf between two States beyond 200 nautical miles in the case of Bangladesh / Myanmar in the Gulf of Bengal. It states:

*«décide qu'au-delà de cette limite de 200 milles marins, la frontière maritime se poursuit le long*

---

<sup>123</sup>B. Kwiatkowska, "Submission to the UN Commission on the limits of the Continental Shelf: The Practice of Developing States in cases of Disputed and unresolved maritime boundary delimitation or land disputes maritime --other gold, part one" (2013) 28 IJ MCL 219, 230; see also B. M. Magnusson "Is there a Relationship between the temporal and the Delineation Delimitation of the continental shelf beyond 200 Nautical Miles" (2013) IJ MCL 28, 465; Bjorn Kunoy" Delimitation of the year Indicative Overlapping area of Entitlement to the outer Continental Shelf" BYBIL, 2012, OUP, p. 61-81.

<sup>124</sup>Question of the continental shelf delimitation between Nicaragua and Colombia beyond 200 nautical miles from the coast of Nicaragua (Nicaragua v. Colombia), Preliminary Objections, judgment of 17 March 2016, p.37, paragraph 112.

*de la ligne géodésique, visée au paragraphe 5, qui commence au point 11 en suivant un azimut de 215° ; jusqu'à ce qu'elle atteigne la zone ou les droits des Etats tiers peuvent être affectés*<sup>125</sup> ».

The outer limit of the continental shelf beyond 200 nautical miles is attracting increasing interest due to the advancement of technology in the exploration and exploitation of mineral resources. It should be noted that the distinction between the delimitation of the continental shelf and its delineation, that is to say, the delimitation of its outer limit beyond 200 nautical miles, may open the way to the creation of what is known as the "Grey Area", the "Alta Mar" or the "Outer Triangle"<sup>126</sup>.

### CONCLUSION

With the climate change and the sea level rise, the maritime delimitation may be impacted

---

<sup>125</sup>Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh / Myanmar), Judgment, ITLOS Reports 2012, p.4, paragraph 6; See also A. G. Oude Elferink, "ITLOS approach to the delimitation of the continental shelf beyond 200 Nautical Miles in the Bangladesh / Myanmar Case: Theoretical and Practical Difficulties" in contemporary Developments in International Law, Essays in Honour of Budislav VUKAS, BrillNijhoff 2015, pp. 230-249; The author explains p.240 "The Court's starting points to the delimitation of the continental shelf beyond 200 nautical miles - that Article 83 of UNCLOS Does not make a distinction entre areas Within and beyond That distance - might at first sight to be beyond scem Reproach. The wording of the article is neutral in this respect. HOWEVER, Article 83 is silent on the content of the substantive rules to be Applied, aim only Refers to the result May require Applying different principles and rules within and beyond 200 nautical miles. Article 83 in so far not to provide the same delimitation methodology within and beyond 200 nautical miles "; See, in addition, B. KUNOY, "the admissibility of a plea to an international adjudicative forum to delimit the Outer Continental shelf prior to the adoption of final recommendations by the Commission on the Limits of the Continental Shelf" (2010) IJMCL, 237; R.R. Churchill, "The Bangladesh / Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation", (2012) 1 CJICL, 137; B. Magnusson op. Cit. [Note 93] P.465.

<sup>126</sup>See TafsirMalickNdiaye, "The Judge, Maritime Delimitation and the Grey Areas", Indian Journal of International Law, 2016, Vol.56, [DOI: 10-1007 / s40901-016-0027-2].

## The Maritime Delimitation: Principles and Configurations

seriously. In particular, one must think of the breadth of the territorial sea; the Outer Limit of the Territorial Sea; Normal Baseline; Reefs, Straight Baselines; Internal Waters; Mouths of Rivers; Bays, Roadstead's; Low-Tide elevations; Combination of methods for determining

baselines; Lists of geographical coordinates and the delimitation of the territorial sea between states with opposite or adjacent coasts. It could be a matter of international concern and of new challenges for the international community as a whole.

**Citation:** *Tafsir Malick NDIAYE “ The Maritime Delimitation: Principles and Configurations”, Journal of Law and Judicial System, 2(2), 2019, pp.29-51*

**Copyright:** © 2019 Tafsir Malick NDIAYE. This is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.