

---

## Relevant Coasts and Relevant Area

### The Difficulty of Developing General Concepts in a Case-Specific Context

ALEX G. OUDE ELFERINK\*

#### 7.1 Introduction

Geography no doubt is at the heart of the law of maritime delimitation. As the case law has time and again noted, ‘the land dominates the sea.’<sup>1</sup> States have entitlements to maritime zones because they have a coastline and the extent of these maritime zones in general is measured from the baselines along that coast. Similar considerations apply to the delimitation of maritime boundaries between states. However in this case, it is not only a requirement to establish the seaward extent of the maritime domain of one coastal state. Maritime delimitation requires the determination of the relationship between the coasts of the states concerned and the maritime area in which delimitation has to be affected. In this connection, the case law has developed and applied the concepts of relevant coasts and relevant area.<sup>2</sup> However, the case law has not been consistent in this respect. For instance, a number of cases – including cases that have been decided in

\* I would like to thank Catherine Blanchard for her assistance in identifying and analyzing the relevant academic literature and her comments on an earlier version of the chapter. I would like to thank my coeditors and the participants to the workshop in the framework of this book project for their comments on an earlier version of the chapter. Any errors or omissions remain the sole responsibility of the author.

<sup>1</sup> In the context of maritime delimitation law, this principle was first formulated in *North Sea Continental Shelf (North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands))* [1969] ICJ Rep. 3, Judgment of 20 February 1969, [96].

<sup>2</sup> See L. Lucchini and M. Voelckel, *Droit de la mer* tome II, *Délimitation* (Pedone Paris 1996) 219, where the authors point out that other terms have been used next to the term relevant area. They submit that this reflects the uncertainty surrounding the concept of the relevant area (*ibid.*). Apart from the relevant area, the case law may also define the broader

the first decade and a half of this century – has refrained from defining the relevant area or has only defined it in general terms, while other cases have defined it in precise terms with reference to limits defined by geographical coordinates or with reference to specific points.

The concepts of relevant coasts and relevant area serve three purposes. First, the relevant coasts and the relevant area serve to identify the coasts that have to be considered in the delimitation process and the area in which the delimitation between the parties has to be affected. Second, a disparity between the lengths of the relevant coasts of the parties may constitute a relevant circumstance justifying an adjustment of the provisional delimitation line. Third, the relevant coast and the relevant area are used to assess whether the boundary line resulting after an evaluation of the relevant circumstances of a case leads to an equitable solution. The present chapter will focus on the first of these issues.<sup>3</sup> The other two issues are considered in, respectively, Chapters 9 and 11 of this volume.

Section 7.2 of this chapter focusses on the definition of the concepts of relevant coasts and relevant area. The first sub-section traces the origins of these concepts and aims to provide a further understanding of their purpose. Section 7.2.2 briefly considers the normative nature of the concepts of relevant coasts and relevant area. Section 7.2.3 discusses the different criteria that have been advanced by the case law to identify the relevant coasts and relevant area. As the analysis in Section 7.2.3 indicates, the general criteria that have been formulated by the International Court of Justice (ICJ) in *Tunisia/Libya* have been most often relied upon by the judiciary. Section 7.2.3 looks at the question how the general direction and length of the relevant coast have been determined in the case law. Section 7.3 further assesses how the general criteria to determine the relevant coasts and the relevant area have been applied in the circumstances of the specific case. Section 7.3 concludes that the application of these general criteria raises a number of questions. In that light, Section 7.4 considers whether there are other general criteria that are more easily applicable across the board. Section 7.4.1 discusses possible alternatives, while

geographical framework in which the delimitation takes place (see e.g. M. D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford University Press Oxford 1989) 125–131; Lucchini and Vœlckel, n. 2, 238–239). This broader geographical framework may also impact on the delimitation exercise (see e.g. the discussion in Evans, n. 2, 126–131).

<sup>3</sup> The case law at times has defined the relevant area having reference to (1) an area in which a third state has an interest or (2) a boundary between one of the parties and a third state. This specific issue is considered in more detail in Chapter 10 of this volume.

Section 7.4.2 considers their merits and shortcomings. Section 7.5 contains concluding remarks.

## 7.2 Defining the Relevant Coasts and the Relevant Area

### 7.2.1 *Genesis of the Concepts*

The concepts of relevant coast and relevant area, like other key concepts in the law of maritime delimitation, have their origin in the case law. However, the drafting history of the delimitation provisions of the Geneva Conventions could be said to contain the seeds for the subsequent development of the concept of relevant coast. During the debate in the International Law Commission (ILC), it was suggested that a departure from the equidistance line might be justified on account of ‘any exceptional configuration of the coast, as well as the presence of islands.’<sup>4</sup> At the 1958 United Nations Conference on the Law of the Sea (UNCLOS I), there was some further consideration of the role of islands in the delimitation process. Very small islands located beyond the territorial sea of the mainland on a continuous continental shelf need not be taken into account in determining the equidistance line. As a general criterion, it was proposed that ‘islands should be treated on their merits.’<sup>5</sup> A couple of points are to be noted about these references. Determining what constitutes an exceptional configuration of the coast would seem to require an assessment of the coast concerned in its broader context. This could imply either looking at the coast of the state concerned or looking at that coast and its relationship with the coasts of one or more other states. Although the references to islands are similarly general in nature, it would seem that one of the criteria to assess their role in the delimitation process is their size. More specifically, in view of the fact that maritime entitlements are generated by the coast, this criterion would seem to require looking at coastal lengths. The fact that the treatment of very small islands was placed in the context of the presence of mainland coasts suggests that the assessment of the weight to be attributed to islands is a comparative exercise, requiring to look both at the island and other coasts involved in the delimitation process. The context in which these remarks were made – determining the impact of exceptional coastal configurations or islands

<sup>4</sup> *Yearbook of the International Law Commission* 1953, vol. I, 216, [82].

<sup>5</sup> Statement by the UK, *United Nations Conference on the Law of the Sea; Official Records* (A/CONF.13/37), vol. VI, 93, [3]; the latter point was supported by the US (*ibid.*, 95, [23]).

on the equidistance line – suggests the underlying assumption of these remarks. As the discussions in the ILC and at UNCLOS I indicate departures from the equidistance line in specific instances may be required to guarantee that the outcome of a delimitation is equitable.<sup>6</sup>

The judgment in *North Sea Continental Shelf*,<sup>7</sup> the first case dealing with the delimitation of the continental shelf, did not explicitly refer to or define the concepts of relevant coasts and relevant area, but key elements in the ICJ's reasoning presuppose the need to rely on them. Having concluded that equitable principles and the rule of equity were basic legal notions in the matter of continental shelf delimitation,<sup>8</sup> the Court turned to considering the implications of the rule of equity.<sup>9</sup> After an explanation as to why the equidistance method 'leads unquestionably to inequity' in certain circumstances,<sup>10</sup> the Court turned to the implications of equity for looking at the coasts of the parties involved in a delimitation. As the Court observed:

equity does not require [...] rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy.<sup>11</sup>

However, the situation in the North Sea was different. The coastlines of Denmark, Germany and the Netherlands were 'comparable in length and [...] have been given broadly equal treatment by nature' and that light it would be 'unacceptable [...] that a State should enjoy continental shelf rights considerably different from those of its neighbours.'<sup>12</sup> As is apparent, making this assessment both requires a determination of the coasts of the parties and the area of continental shelf that would belong to them as a consequence of its delimitation. This requirement is also implicit in the proportionality test the Court introduced as a final element of the delimitation process.<sup>13</sup>

### 7.2.2 Normative Nature of the Concepts

The case law has not given a clear and unequivocal answer as regards the normative nature of the concepts of relevant coasts and relevant area.

<sup>6</sup> For a discussion of this point, see e.g. A. G. Oude Elferink, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation* (Martinus Nijhoff Dordrecht 1994) 16–20.

<sup>7</sup> *North Sea Continental Shelf*, n. 1.      <sup>8</sup> *Ibid.*, [85].      <sup>9</sup> *Ibid.*, [88] and following.

<sup>10</sup> *Ibid.*, [89].      <sup>11</sup> *Ibid.*, [91].      <sup>12</sup> *Ibid.*      <sup>13</sup> *Ibid.*, [98].

For instance, the ICJ in a number of recent decisions has referred to the 'legal concept of the "relevant area."<sup>14</sup> On the other hand, the International Tribunal for the Law of the Sea (ITLOS) and the arbitral tribunal in the Bay of Bengal cases did not address the legal status of the concepts of relevant coast and relevant area, while the tribunal in *Barbados v. Trinidad and Tobago* in its 2006 Award observed that the 'identification of the relevant coasts abutting upon the areas to be delimited is one [...] objective criterion, relating to the very source of entitlement to maritime areas.'<sup>15</sup>

The case law, as further discussed below, does not indicate that there is rule of law prescribing the definition of the relevant area and the relevant coasts in a specific manner. For instance, the Court in *Maritime Dispute (Peru v. Chile)* observed that while in some previous cases it had made a precise calculation of the relevant coasts and the relevant area, it did not do so in other cases, in which the specific circumstances of the case made such precise calculations problematic.<sup>16</sup> The Court also took the latter approach in *Maritime Dispute (Peru v. Chile)*.<sup>17</sup> This approach to the concepts of relevant coasts and relevant area indicates that it is critical to look at their operationalization in the individual case and whether such operationalization has been approached consistently, rather than focusing on their normative nature.

### 7.2.3 General Criteria to Identify the Relevant Coasts and Relevant Area

The case law has not provided a clear definition of the concepts of relevant coasts and relevant area. Rather, starting from the basic precept of 'the land dominates the sea,' the case law has defined criteria that allow the identification of the relevant coasts and the relevant area in the particular case.<sup>18</sup> The case law displays a twofold division as regards these general criteria: (1) reliance on the criteria as first defined in *Tunisia/Libya* and (2) a number of approaches different from those defined in *Tunisia/Libya*.

<sup>14</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment), [2009] ICJ Rep. 61, 99, [110]; *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012], ICJ Rep. 624, 682, [157].

<sup>15</sup> *Arbitration between Barbados and Trinidad and Tobago* [2006] Award, 27 RIAA 147, [231].

<sup>16</sup> *Maritime Dispute, Peru v. Chile* [2014] ICJ Rep. 3, [193]. <sup>17</sup> *Ibid.*, [194].

<sup>18</sup> See e.g. *In the Matter of the Bay of Bengal Maritime Boundary (Bangladesh v. India)* PCA Case 2010–2016, [279].

### 7.2.3.1 The *Tunisia/Libya* Criteria

Clearly stated general criteria to define the relevant coasts and the relevant area were first expressed by the ICJ in *Tunisia/Libya*:

74. The coast of each of the Parties, therefore, 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.

75. Nevertheless, for the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court. It is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation. The sea-bed areas off the coast beyond that point cannot therefore constitute an area of overlap of the extensions of the territories of the two Parties, and are therefore not relevant to the delimitation.<sup>19</sup>

These criteria indicate an inextricable link between the relevant coasts and the relevant area, in which both concepts reciprocally define each other. The relevant coasts of the parties are identified by determining which parts of their coasts contribute to overlapping areas of continental shelf, while the area of overlapping continental shelf is determined by the coastal relationship(s) between the coasts of the parties.<sup>20</sup>

According to *Tunisia/Libya* the determination of the relevant area is achieved by looking at the *seaward* extension of the relevant coasts.<sup>21</sup>

<sup>19</sup> *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep. 18, [74] and [75].

<sup>20</sup> As Evans observes: 'whilst the relevant coasts do generate the area of potential overlap and frame the relevant framework area, these bounds themselves are a reflection of their ability to do so. It is by reference back to the possibility of overlap that the relevance of the coasts is assessed' (Evans, n. 3, 127); see also D. R. Rothwell and T. Stephens, *The International Law of the Sea* (Hart Oxford 2009) 429. However, subsequently, Evans has observed that 'the idea of the 'relevant area' within which the delimitation is to be conducted has become secondary to, and largely a function of, the identification of the 'relevant coasts.' M. D. Evans, 'Maritime Boundary Delimitation,' in D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, and T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press Oxford 2015) 255, 267.

<sup>21</sup> Different terms have also been used to characterize the relationship of the coast to the maritime entitlements it generates. For instance, a number of cases employ the formulation of

The judgment does not provide a further definition of the term ‘seaward.’ The ordinary meaning of ‘seaward’ connotes that something is pointing towards or facing the sea,<sup>22</sup> while ‘facing’ implies being placed with the face towards something.<sup>23</sup> The term ‘facing’ is also used in combination with cardinal points (e.g., in a northwards-facing direction). Taken together, it would seem that the term seaward extension in its ordinary meaning implies that it includes maritime areas that are bounded by lateral limits perpendicular to the relevant coast. As will be discussed below, this conclusion on the ordinary meaning of the term seaward (extension) does not accord with the Court’s actual determination of the relevant area in *Tunisia/Libya* or that determination in other cases.

The general criteria to determine the relevant coasts and relevant area stated in *Tunisia/Libya* have been explicitly adopted in a number of subsequent cases: *Black Sea*,<sup>24</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*,<sup>25</sup> and *Bangladesh v. India*.<sup>26</sup> *Bangladesh/Myanmar*, without explicitly quoting *Tunisia/Libya* on this point, also adopts these general criteria.<sup>27</sup>

### 7.2.3.2 Other Approaches to Defining the Relevant Coasts and the Relevant Area

In a number of cases – *Nicaragua v. Honduras*, *Jan Mayen*, and *Guyana v. Suriname* – the general criteria to define the relevant coasts of the parties have been defined differently than in *Tunisia/Libya*. In these cases, the relevant coasts of the parties have been identified by reference to the delimitation method that is selected, i.e., respectively a bisector of the general

coasts ‘abutting’ on a maritime area (see e.g. *Case Concerning the Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* [1978] 18 RIAA 3, [28], [70], [79], and [192]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain)* [2001] ICJ Rep. 91, [247]). An analysis of those cases indicates that there is no material difference between the term ‘abutting’ and ‘seaward’ (see e.g. *ibid.* and the text below at n. 51 and 100).

<sup>22</sup> *Oxford Dictionary of English*, 3rd ed., online version (2015). See also S. Fietta and R. Clev-erly, *A Practitioner’s Guide to Maritime Boundary Delimitation* (Oxford University Press Oxford 2016) 49 and Figure A2.7 at 48.

<sup>23</sup> See e.g. the definition of the verb ‘to face’ in the online edition of *Merriam-Webster*.

<sup>24</sup> *Black Sea*, n. 15, [99].

<sup>25</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 15, [150].

<sup>26</sup> *Bangladesh v. India*, n. 27, [279] (reference is to the judgment in *Black Sea*, which in turn refers to *Tunisia/Libya*).

<sup>27</sup> *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* [2012] ITLOS Rep. 4, [489]; see also [185].

directions of the coasts of the parties<sup>28</sup> and the equidistance method.<sup>29</sup> It may be noted that neither *Nicaragua v. Honduras* nor *Guyana v. Suriname* provide criteria to determine the relevant area. In the former case the ICJ did not define a relevant area,<sup>30</sup> while in the latter case the tribunal did not explicitly define the relevant area, but did provide a ratio for the division of the relevant area by the boundary it determined.<sup>31</sup> In *Nicaragua v. Honduras*, the choice for different criteria may be explained by the fact that the criteria formulated in *Tunisia/Libya* would not result in the definition of relevant coasts and a relevant area that would allow a meaningful evaluation. Honduras's relevant coast as determined by the ICJ measured along a straight line projects seaward in a north-easterly direction and the same coast of Nicaragua projects in a seaward direction slightly south of east.<sup>32</sup> By no stretch of the imagination is it possible to maintain that these coasts generate overlapping entitlement in a seaward facing direction. To the contrary, in *Guyana v. Suriname* the adoption of the general criteria of *Tunisia/Libya* would have allowed the identification of relevant coasts and a relevant area. In *Jan Mayen*, the ICJ defined the relevant area in part by

<sup>28</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* [2007] ICJ Rep. 659, [287]–[289].

<sup>29</sup> *In the Matter of an Arbitration between Guyana and Suriname (Guyana v. Suriname)* [2007] 30 RIAA 1, [352]; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* [1993] ICJ Rep. 38, [20] and [67]. The methodology involved in these three cases is further discussed below in Section 7.4.2.

<sup>30</sup> Another example of a case in which the relevant area was not defined is *Guinea/Guinea-Bissau (Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau)* [1985] 19 RIAA 149. The reason for this approach is provided by [120] of the Award, which discusses the proportionality test. As the tribunal points out, its determination of the relevant coasts result in relevant coasts that are similar in length. As a consequence, the tribunal considers it unnecessary to effect proportionally test, observing that 'au regard de la proportionnalité, aucune des deux parties ne saurait prétendre à un avantage supplémentaire.' It may be observed that that the fact that states have similar relevant coasts does not necessarily imply that the relevant area is divided in a similar manner by the selected delimitation line.

<sup>31</sup> *Nicaragua v. Honduras*, n. 28, [392]. The Award indicates that the boundary established by the tribunal attributes 51 per cent of the relevant area to Guyana and 49 per cent to Suriname. Almost the same figures (51.8 per cent and 48.2 per cent) are attained if the maritime areas within 200 nm of the baselines of Suriname and Guyana bounded by equidistance lines of Guyana with its neighbours and the notional boundary between Suriname and France is assumed to be the relevant area. That presumed definition of the relevant area accords with the coastal frontages that the tribunal uses to determine the ratio between the coasts of the parties (see *ibid.*, [132] and [392]). A division of 51 per cent to 49 per cent is attained if the areas within 200 nm from the baselines of both states are considered, excluding the relevant area beyond Suriname's notional boundary with France. However, the coastal frontage of Guyana used by the tribunal extends west of these relevant areas.

<sup>32</sup> For the definition of the coastal front lines of Honduras and Nicaragua, see *Nicaragua v. Honduras*, n. 28, [296] and [298] and Sketch-map 3.

reference to the area of overlapping entitlements. However, it also included areas that are only part of the maritime entitlements of one of the parties that are located between the relevant coasts of the parties.<sup>33</sup>

In the majority of cases, courts and tribunals have either been less clear on the general criteria to identify the relevant coasts or have directly focused on the definition of the relevant coasts and area for the specific case at hand, without explicating relevant criteria in any detail. For instance, in *Barbados v. Trinidad and Tobago*, the arbitral Tribunal in looking at the coastal frontages relevant for the delimitation limited itself to observing that ‘what matters is whether they abut as a whole upon the disputed area by a *radial* or *directional* presence relevant to the delimitation.’<sup>34</sup> An example of the second approach is provided by *Libya/Malta*.<sup>35</sup> Without first identifying criteria for determining the relevant coasts of the parties, the Court considers and defines these coasts in the context of identifying relevant circumstances that may require an adjustment of the provisional equidistance line.<sup>36</sup> For Malta, no explanation for the identification of the relevant coast is offered.<sup>37</sup> In the case of Libya, the Court observes that ‘the terminus of the frontier with Tunisia, must clearly be the starting point,’<sup>38</sup> without providing any explanation as to why that is the case. To the east, Libya’s relevant coast is bounded by Ras Zarruq.<sup>39</sup> This point had also been identified by Libya and the Court observes that Ras Zarruq is close to the meridian of 15° 10’ E. Italy had stated to have claims to the area east of this meridian and the Court found that it could not delimit a boundary between Malta and Libya in this area also claimed by Italy.<sup>40</sup> It may be noted that this latter finding would seem to disqualify the Court’s selection of the western limit of Libya’s relevant coast. That western limit is some 215 kilometres to the west of the point at which the meridian of 13° 50’ E intersects the coast of Libya. This meridian

<sup>33</sup> For a criticism of this approach, see N. M. Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Martinus Nijhoff Leiden 2003) 305. In support of the approach of the Court, it could be argued that not taking into account a maritime area directly in front of the relevant coasts of the parties would sever the link between the relevant coasts and the relevant area, which would seem to be contrary to the principle that the land dominates the sea through the projection of the coasts.

<sup>34</sup> *Barbados v. Trinidad and Tobago*, n. 15, [331] (emphasis provided).

<sup>35</sup> This choice may be explained by the fact that the Court found that ‘the geographical context [of the case] 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’ (*Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep. 13, [74]).

<sup>36</sup> *Ibid.*, [66] and [68]. <sup>37</sup> *Ibid.*, [68]. <sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* Ras is the Arabic word for ‘cape.’ <sup>40</sup> *Ibid.*

had also been used by Italy to identify the extent of its claims. The Court's identification of Libya's relevant coast also begs the question how the relevant area off that coast is identified. While the eastern terminus of Libya's relevant coast as selected suggests the facing projection of that coast to be determinative, that explanation clearly is not available for its western terminus. The Court itself observes that in looking at the disparity of the coastal lengths as a relevant circumstance it does not need to look at the relevant area.<sup>41</sup> In effecting the proportionality test, the Court indicates that the relevant area is bounded by the meridians of 13° 50' E and 15° 10' E that identify the limits of Italy's claim. In its reasoning the Court in this connection refers to the relevant coasts of the parties. As was mentioned above, Libya's relevant coast is located in large part beyond this relevant area, making the link between the two concepts tenuous at best.

The language that is used to define the relevant coasts and the relevant area in other cases does suggest that the coasts, which face the area in which the delimitation has to be effected, provide the relevant coasts for that delimitation. For instance, the tribunal in *Eritrea/Yemen* defined the extent of the relevant coasts of the parties by drawing a perpendicular to the general direction of the coast from the terminus of the land frontier of one of the parties to the opposite coast of the other party. The coast of the other party beyond the intersection with that perpendicular (respectively the coast of Eritrea in the north and that of Yemen in the south) did not constitute part of the relevant coasts.<sup>42</sup> In *Anglo-French Continental Shelf* the Court of Arbitration, in defining the coastal relationship between the relevant coasts of France and the UK in the Atlantic region, refers to the fact that

the further extension south-westwards of the United Kingdom's coast has a tendency to make it obtrude upon the continental shelf situated to seawards of the more westerly facing coast of the French Republic in that region.<sup>43</sup>

The ICJ in *Cameroon v. Nigeria* considered that

[t]he part of the Cameroon coastline beyond Debundsha Point faces [Equatorial Guinea's island of] Bioko. It cannot therefore be treated as facing Nigeria so as to be relevant to the maritime delimitation between Cameroon and Nigeria.<sup>44</sup>

<sup>41</sup> Ibid., [67].

<sup>42</sup> *Eritrea v. Yemen*, Award on Territorial Sovereignty and Scope of the Dispute (*Eritrea v. Yemen*) [1998] 22 RIAA 211, [167].

<sup>43</sup> *Anglo-French Continental Shelf*, n. 21, [235].

<sup>44</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)* [2002] ICJ Rep. 303, [291].

Finally, courts and tribunals in some cases refrain from (explicitly) defining the relevant coasts and the relevant area. In *Maritime Dispute (Peru v. Chile)* the Court explained the absence of the definition of the relevant coasts and the relevant area by the unusual situation of that case.<sup>45</sup> In *Cameroon v. Nigeria*, the Court determined the relevant coast of Cameroon, but refrained from defining the relevant coast of Nigeria. The Court was considering this matter in light of a Cameroonian argument that its longer relevant coasts constituted a relevant circumstance. Having itself determined what constituted Cameroon's relevant coast, the Court concluded that it was no longer needed to determine the relevant coast of Nigeria: 'whichever coastline of Nigeria is regarded as relevant, the relevant coastline of Cameroon [...], is not longer than that of Nigeria.'<sup>46</sup> This conclusion of the Court might seem to indicate that the Court in this case considered that implementing the general criteria as stated in *Tunisia/Libya* would not have allowed a definitive conclusion on this point. It may also be noted that application of the criteria of *Tunisia/Libya* to the coasts of Cameroon and Nigeria would seem to result in the conclusion that all of the south-facing coast of Nigeria generates seaward projections overlapping with the seaward projection of the west-facing coast of Cameroon north of Debundsha Point. At the same time, it would seem difficult to maintain that the western part of the south-facing coast of Nigeria is relevant for the delimitation with Cameroon. The absence of a defined relevant coast of Nigeria excluded the definition of the relevant area and the Court indeed did not do so.<sup>47</sup>

#### 7.2.4 *Determination of the General Direction and Length of the Relevant Coast*

In view of the uses of the concepts of relevant coasts and relevant area, two further determinations are required in respect of the relevant coasts. One is how to determine the general direction(s) of those coasts from which to assess their seaward projection. The other is how to determine the length of the relevant coasts.

Determining the general direction of the relevant coast should be a straightforward exercise. Once the relevant coast has been determined,

<sup>45</sup> *Maritime Dispute (Peru v. Chile)*, n. 16, [193].

<sup>46</sup> *Cameroon v. Nigeria*, n. 44, [301]. The Court in its judgment does not identify the various coastlines it considered potentially relevant in this respect.

<sup>47</sup> A further example of a case that only deals with the relevant coasts and relevant area fleetingly is *Qatar/Bahrain*, n. 21, [170], [187], [224], and [247].

its general direction may be determined by drawing a straight line along that coast. Such a straight line represents the average of the direction of all individual segments of that relevant coast. The case law does not contain any indication that it looks at the direction of relevant coasts by assessing the seaward direction of individual coastal features.

In measuring the length of the relevant coast, the case law has taken two approaches. Where the coasts of the parties are relatively straight they may be measured along their natural configuration.<sup>48</sup> How these coasts are exactly measured is not clear from the case law. For instance, the ICJ in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* indicates that the relevant coasts are measured along ‘the general direction of the coast.’<sup>49</sup> This reference to general direction might suggest the use of straight lines.<sup>50</sup> However, from the coastal length figures the Court provides for the relevant coasts, it is clear that they are not measured along straight lines.<sup>51</sup> Sketch-map 6 included in the judgment identifying the relevant coasts of the parties suggests that in particular in the case of the Colombian coast, the line representing the relevant coast follows the actual coast closely.

At the same time, the case law also provides examples where relatively straight coasts are measured along a straight line. One example is provided by *Libya/Malta*. Libya’s relevant coast as determined by the Court is measured ‘following its general direction,’<sup>52</sup> although this coast is without marked indentations. The figure that the Court provides for the length of this coast,<sup>53</sup> indicates that it is represented by one straight line. The Court does not provide an explanation for this approach. An explanation might be that Malta’s coast is measured along its straight baselines.<sup>54</sup> Another explanation might be that the Court looked at coastal lengths to check whether there was a disparity justifying an adjustment of the provisional equidistance line. As the Court observed ‘the degree of such adjustment does not depend upon a mathematical operation.’<sup>55</sup> In that light it would also not be necessary to make a very precise determination of the relevant

<sup>48</sup> See e.g. the discussion on relevant coasts in *Black Sea*, where the ICJ in general measures the length of the relevant coast along its natural configuration, but in the case of the Yavorlyts’ka Gulf and the Dniestr Firth represents the relevant coast of Ukraine by a straight line along the mouth of these features (n. 16, [100] and Sketch-map 4); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 15, [145] and [151]–[152].

<sup>49</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 14, [145] and [151].

<sup>50</sup> See also below, n. 57.

<sup>51</sup> For Nicaragua, the Court provides a figure of 531 kilometres (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 14, [145]) while its mainland measured along a straight line measures around 450 kilometres.

<sup>52</sup> *Libya/Malta*, n. 35, [68].      <sup>53</sup> *Ibid.*      <sup>54</sup> *Ibid.*      <sup>55</sup> *Ibid.*

coasts.<sup>56</sup> Another example of measuring coastal length by straight lines along relatively smooth coasts is provided by *Guyana v. Suriname*.<sup>57</sup> The tribunal does not offer an explanation for this choice.

Straight lines have also been used to determine coastal length along highly indented and irregular coastlines. For instance, in *Jan Mayen*, the Court determines the length of the relevant coasts of both Greenland and Jan Mayen by one straight line segment.<sup>58</sup> While the coast of Greenland is highly irregular with many deep fjords, the coast of Jan Mayen facing Greenland is relatively straight. The Court also measures the length of the relevant coasts along the baselines of the parties. In the case of Greenland this concerns straight baselines, while the baseline of Jan Mayen is the low-water line.<sup>59</sup> The numbers for both these measurements are similar and result in almost identical ratios between the relevant coasts of respectively 1:9.1 and 1:9.2.<sup>60</sup> The judgment does not explain why it adopts these two approaches for measuring the relevant coasts.

A justification for using straight lines to determine the lengths of the relevant coast is provided by *Bangladesh/Myanmar*. The ITLOS observes that for Bangladesh it measures the coast by two straight lines '[t]o avoid difficulties caused by the complexity and sinuosity of that coast.'<sup>61</sup> Two straight lines are also employed in the case of Myanmar. This is done 'to avoid difficulties caused by the sinuosity of the coast and to ensure consistency in measuring the respective coasts of the Parties.'<sup>62</sup>

In other instances, the judiciary has refrained from determining the length of the relevant coasts of the parties.<sup>63</sup> In *Barbados v. Trinidad and Tobago* the tribunal engages in a detailed discussion of the relevance of the length of the coasts of the parties in the delimitation process.<sup>64</sup> However, the tribunal does not commit itself to providing a specific figures for these

<sup>56</sup> However, it may be noted that the Court excluded Malta's straight baselines to and from the islet of Filfla in determining the length of Malta's relevant coast (ibid.). Use of these baselines would have extended Malta's relevant coast by about two kilometres. This would hardly seem to be a relevant difference in the light of determining a disparity between the relevant coasts.

<sup>57</sup> *Guyana v. Suriname*, n. 29, [132]. For the relationship between these coastal frontages and the relevant coasts, see below at n. 109. The tribunal characterizes these coasts as 'unremarkable' (ibid., [375]).

<sup>58</sup> *Jan Mayen*, n. 29, [61]. <sup>59</sup> Ibid. and Sketch-map 2.

<sup>60</sup> Ibid. <sup>61</sup> *Bangladesh/Myanmar*, n. 27, [201].

<sup>62</sup> Ibid., [204]. See also *North Sea Continental Shelf*, n. 1, [98].

<sup>63</sup> For another example, see above n. 48 for a discussion of the relevant coasts of Cameroon and Nigeria.

<sup>64</sup> *Barbados v. Trinidad and Tobago*, n. 15, [321]–[334].

coast to which the tribunal refers as ‘coastal frontages abutting upon the area of overlapping claims.’<sup>65</sup> The tribunal also refrained from determining the size of the relevant area.<sup>66</sup>

### 7.3 Application of the General Criteria Formulated in *Tunisia/Libya* to the Specific Case

As discussed in Section 7.2.3, a number of judicial decisions have explicitly relied on the general criteria to identify the relevant coasts and the relevant area as formulated by the ICJ in *Tunisia/Libya: Black Sea, Bangladesh/Myanmar, Territorial and Maritime Dispute (Nicaragua v. Colombia)*, and *Bangladesh v. India*. The present section considers how these general criteria have been applied to the facts in *Tunisia/Libya* and these other cases. In *Tunisia/Libya* itself, the Court found that these criteria implied that the relevant coast of Tunisia extended as far north as Ras Kaboudia and that of Libya as far east as Ras Tajoura. The judgment does not offer any further explanation for the selection of these specific points.<sup>67</sup> In the case of Ras Kaboudia, this selection seems uncontroversial. The coasts to the south and north of this point clearly face in different directions. In the case of Ras Tajoura, the choice is less obvious, except perhaps for the fact that it is an easily identified point. The general direction of the coast west and east of this point is not different and the overlapping entitlements of the two states extend east beyond the meridian passing through Ras Tajoura.

The relevant area in *Tunisia/Libya* is defined for the purposes of the proportionality test, and the Court observes that for this purpose ‘the essential aspect [ . . . ] is simply that one must compare like with like, the exact method of drawing the outer boundaries is not critical, provided the same approach is adopted to each of the two coasts.’<sup>68</sup> The limits of the relevant area are then defined by a parallel and a meridian running through respectively Ras Kaboudia and Ras Tajoura. As the Court observes, this choice has the ‘advantage of cartographical convenience.’<sup>69</sup> Convenience apart, it can be questioned whether the Court really adopts the same approach for both coasts. In the case of Tunisia, the parallel passing through Ras

<sup>65</sup> *Ibid.*, [350].

<sup>66</sup> The tribunal refers to the concept of relevant area in paragraph [377] of the Award.

<sup>67</sup> *Tunisia/Libya*, n. 19, [75]. For a criticism of this aspect of the judgment, see also Y. Tanaka, ‘Reflections on the Concept of Proportionality in the Law of Maritime Delimitation,’ (2001) 16 *Journal of Marine and Coastal Law* 433, 439.

<sup>68</sup> *Tunisia/Libya*, n. 19, [130]. <sup>69</sup> *Ibid.*

Kaboudia includes a large area in the relevant area that is located north of the seaward facing projection of Tunisia's mainland coast. The angle between that projection and the parallel is  $42^\circ$ .<sup>70</sup> On the Libyan side the choice of a meridian instead diminishes the relevant area as compared to the seaward projection of Libya's relevant coast. The lateral limit of Libya's seaward facing projection is about  $9^\circ$  north of east.<sup>71</sup> In defence of the Court, it might be submitted that the term 'seaward' should not be equated with a projection from the coast at a straight angle (i.e., and angle of  $90^\circ$ ) and that a projection bounded by an angle of  $132^\circ$  to the general direction of the relevant coast still is a seaward projection of that coast. However, if that argument is accepted, the selection of Ras Kaboudia and Ras Tajoura as identifying the western and eastern extremities of the relevant coasts becomes untenable as the coasts beyond these points under that broader definition of seaward projection also are contributing to the relevant coasts. More importantly, the approach of the Court conflicts with its premise that 'the same approach [has to be] adopted to each of the two coasts.'<sup>72</sup>

In *Black Sea* the Court first indicated that all coasts generating overlapping entitlements could potentially contribute to the definition of the relevant coasts.<sup>73</sup> In determining the relevant coasts of Ukraine, the Court excluded the Karkinit'ska Gulf because its 'submarine extension cannot overlap with the extensions of Romania's coast.'<sup>74</sup> This approach is debatable. Even if the exacting standard of projection at a straight angle to the coast were to be applied, a part of the promontory at the northern entrance of the Gulf generates projections that overlap with the seaward projections of Romania. The same applies to a part of the coast at the back of the Gulf. A comparison with other parts of the relevant coasts and the relevant area as determined by the Court further underscores this point. First, the Court considers that the east- and west-facing coast of Ukraine in the general

<sup>70</sup> The Court determined the general direction of Tunisia's mainland coast in connection with the delimitation of the second part of the continental shelf boundary (ibid., [128] and Map Number 3 at 76). The Court in this connection also determined that the Kerkennah Islands should be given half weight in effecting this delimitation. If a general direction line giving half weight to the Kerkennah Islands would be taken into account the angle between that general direction and the parallel would be  $52^\circ$ .

<sup>71</sup> This figure has been obtained by representing the Libyan relevant coast by one straight line segment passing through the terminus of the land boundary with Tunisia and Ras Tajoura, which corresponds to the method use by the Court to determine the general direction of the relevant coast of Tunisia up to Ras Kaboudia.

<sup>72</sup> *Tunisia/Libya*, n. 19, [130]. <sup>73</sup> *Black Sea*, n. 14, [78].

<sup>74</sup> Ibid., [100] and Sketch-map 5.

area of Odessa are part of Ukraine's relevant coast.<sup>75</sup> Like the coasts of the Karkinit'ska Gulf, these coasts face each other and their seaward extensions do not overlap with the extensions of Romania's coast in a seaward direction. Second, the south-eastern corner of the relevant area is defined as a meridian starting at Cape Sarych.<sup>76</sup> That meridian makes an angle of about 130° with the general direction of the relevant coast of Ukraine on the Crimea between Cape Khersones and Cape Sarych. If that same angle were to be applied to determine whether the coasts of the Gulf of Karkinit'ska and the coast of Romania produce overlapping projections, a large part of the coast of the Gulf would be part of Ukraine's relevant coast.

In *Territorial and Maritime Dispute (Nicaragua v. Colombia)* the Court concluded that the entire coast of Nicaragua, except for a short stretch of coast south of Punta de Perlas constituted Nicaragua's relevant coast.<sup>77</sup> Although the Court concluded that Nicaragua's coast was east-facing,<sup>78</sup> the relevant area to the north is not bounded by a parallel of latitude. Instead, the northern limit is bounded by the maritime boundary between Nicaragua and Honduras, which in large part is constituted by an azimuth. That azimuth makes an angle of around 20° with a parallel of latitude. The area up to the boundary with Honduras certainly can be considered to be relevant to the delimitation between Colombia and Nicaragua. The maritime entitlements of both states overlap in this area and a maritime boundary could potentially have extended into this area.<sup>79</sup>

The Court's definition of Colombia's relevant coast in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* also points to the difficulties that may arise from looking at the seaward projection of the relevant coasts to determine the relevant area. The Court rejected Nicaragua's argument that only the west-facing coasts of the Colombian islands of San Andres and Providencia should be taken into account. As the Court pointed out the area of overlapping entitlements extended well to the east of the islands.<sup>80</sup> Consequently, the Court considered that the entire coast of San Andres and Providencia should be taken into account.<sup>81</sup> Although

<sup>75</sup> Ibid., Sketch-map 4.      <sup>76</sup> Ibid., [106] and [114] and Sketch-map 5.

<sup>77</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 14, [145] and Sketch-map 5.

<sup>78</sup> Ibid., where the Court observes the east-facing coasts of islands fringing the Nicaraguan mainland are parallel to that mainland coast.

<sup>79</sup> See also *ibid.*, Sketch-map 8, for the provisional equidistance line determined by the Court.

<sup>80</sup> Ibid., [151].

<sup>81</sup> Ibid. The Court reached the same conclusion for smaller Colombian islands ([152]). These smaller islands will not be further considered in the present context as they do not materially affect the conclusions that area presented.

the Court seemingly presents its argument in terms of facing coasts,<sup>82</sup> its definition of the relevant area can only be explained on the basis of a radial projection from the coasts of the islands.<sup>83</sup> Dividing the coast of San Andres and Providencia in a number of segments facing in different directions would not result in an omni-directional overlapping entitlement with the east-facing coast of Nicaragua.

The most notable aspects of the two Bay of Bengal cases as regards the relevant coasts and relevant area is perhaps that the arbitral tribunal in *Bangladesh v. India* provided some operationalization of the term 'seaward extension.' The parties differed about the southern end point of India's relevant mainland coast. In this connection, the tribunal observed:

there is a margin of appreciation in determining the projections generated by a segment of coastline and a point at which a line drawn at an acute angle to the general direction of the coast can no longer be fairly said to represent the seaward projection of that coast.<sup>84</sup>

The tribunal did not further consider when this would be the case, as it deferred to the view of the parties. Neither India nor Bangladesh had argued that the relevant coast extended beyond Sandy Point, which projects seaward at a straight angle into the relevant area.<sup>85</sup> However, a further indication of the tribunal's view on this matter can be gleaned from its discussion on the Andaman Islands. The tribunal considered that the northern part of the Andaman Islands (the northern part of Smith Island and adjacent islands) formed part of the relevant coast of India, but that the southern part did not.<sup>86</sup> The seaward extension of the northern part of the Andaman Islands projects into the relevant area at an angle of around 90° to the general direction of that coast. For the southern (excluded) part of the Andaman Islands these angles would range between approximately 70° and 80°.<sup>87</sup> This difference in treatment of the northern and southern

<sup>82</sup> *Ibid.*, [151].

<sup>83</sup> See also P. Reichler, 'A Case of Equitable Maritime Delimitation: Nicaragua and Colombia in the Western Caribbean Sea,' (2013) 2(3) *Revista Tribuna Internacional*, 129, 135.

<sup>84</sup> *Bangladesh v. India*, n. 18, [302]. Although this pronouncement might suggest that the tribunal only expressed itself on acute angles (i.e., an angle of less than 90°), this finding implicitly also applies to obtuse angles (i.e., an angle of more than 90°). A line that intersects a line representing the general direction of the coast at a point A on one side of point A will form an acute angle with that general direction line and at the other side an obtuse angle.

<sup>85</sup> *Ibid.*, and Map 4. <sup>86</sup> *Ibid.*, [304]; see also *ibid.*, Map 4.

<sup>87</sup> These figures have been established on the basis of a general direction of approximately 10° east of true north of the coast of Smith Island between the latitudes 12° 35' N and 11° 49' N. The angles have been determined by measuring the angle of a line starting at points on the coast at these latitudes and the southern limit of the relevant area as defined by the tribunal.

part of the Andaman Islands suggests that the tribunal largely adhered to the ordinary meaning of the term 'seaward projection' as set out above in Section 7.2.2.1.

## 7.4 Alternatives to the General Criteria Formulated in *Tunisia/Libya*?

### 7.4.1 Possible Alternatives

The determination of the relevant coasts and the relevant area in accordance with the general criteria formulated in *Tunisia/Libya* raises a number of concerns. As the preceding analysis indicates, these criteria may not allow the identification of relevant coasts and a relevant area due to the specific geography of the specific case unless the ordinary meaning of the term 'seaward projection' is stretched beyond recognition. That problem is illustrated in a telling way by the discussion of *Nicaragua v. Honduras*. However, if the coasts of the parties face each other, solely looking at the seaward projections of these coasts may not result in including all of the area of overlapping entitlements that are relevant to the delimitation in the relevant area. This issue is illustrated by *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, in which case the relevant area was determined on the basis of the east-facing projection of the mainland coast of Nicaragua and a radial projection from the islands of San Andres and Providencia. The present section further considers possible alternatives to the general criteria of *Tunisia/Libya* as they have been proposed by the case law and academic literature, and which are also discussed in Section 7.2.2.2. Section 7.4.2 provides an assessment of these alternatives.

In *Anglo-French Continental Shelf* one of the issues concerned the delimitation of the continental shelf between the French mainland coast and the English mainland coast in the region of the Channel Islands. A median line between the two mainland coast is located to the north of the Channel Islands. As the court of arbitration observed, because of their location the Channel Island and their territorial sea block the natural prolongation of France to the median line with the UK.<sup>88</sup> The court of arbitration rejected the geographically based theory of France that the natural prolongation of the French coast 'turns in some manner around the

<sup>88</sup> *Anglo-French Continental Shelf*, n. 22, [165] and [192]. It is clear from the reasoning of the court of arbitration that it held that in assessing the natural prolongations of territory it is required to look at their projection to seaward (see also above text n. 44).

Channel Islands.<sup>89</sup> Instead of relying on this geographical argument, the court of arbitration held that

in these cases the effect to be given to the principle of natural prolongation of the coastal State's land territory is always dependent not only on the particular geographical and other circumstances but also on any relevant considerations of law and equity.<sup>90</sup>

The fundamental consideration for the court in this connection was the 'equality of the two States in their geographical relation to the continental shelf of the Channel.'<sup>91</sup> The ICJ in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* was faced with a similar issue as the court of arbitration. In this case, the Colombian islands of San Andres and Providencia and a number of smaller islands and their territorial seas could be said to block the seaward projection of the east-facing coast of the Nicaragua. The Court did not explicitly address this question, but determined the relevant area by first establishing the area of overlapping entitlements.<sup>92</sup> As the Court observes, Nicaragua's coasts project a potential maritime entitlement up to 200 nautical miles from the Nicaraguan baselines. The fact that Colombia's islands are located inside that potential entitlement does not block that projection.<sup>93</sup> The relevant area as defined by the Court also includes all of the maritime area directly to the east of the islands.<sup>94</sup>

In *Guyana v. Suriname* the arbitral tribunal adopted as relevant coasts of the parties those coasts on which basepoints that generated the full course of the equidistance line between the parties were located. In justifying this choice, the tribunal explained that since the provisional starting point of the delimitation was an equidistance line, 'it seems logical and appropriate to treat as relevant the coasts of the Parties which generate' that line.<sup>95</sup> Interestingly, the tribunal does not use these relevant coasts in connection with the proportionality test it effectuates. Instead it uses the 'coastal frontages' of the parties between the mouth of the Corentyne River, whose western bank is the boundary between Guyana and Suriname, and the terminus of their land boundary with respectively Venezuela and French

<sup>89</sup> Ibid., [165] and [192].      <sup>90</sup> Ibid., [194].      <sup>91</sup> Ibid., [195].

<sup>92</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 14, [159].

<sup>93</sup> Ibid. It may be questioned whether the terms 'projection' and 'project' are the most appropriate to convey the idea that entitlement exists in the entire maritime area up to the outer limit of the maritime zone concerned.

<sup>94</sup> See *ibid.*, Sketch-map 7.      <sup>95</sup> *Guyana v. Suriname*, n. 29, [352].

Guiana.<sup>96</sup> The award does not explain why it takes this approach. The relevant paragraph even refers to the ‘relevant coastal lengths.’<sup>97</sup>

The approach of using the coast between the basepoints as the relevant coast was also adopted by the ICJ in *Jan Mayen*.<sup>98</sup> The Court in this connection limits itself to observing that this approach is ‘not arbitrary’ and ‘appropriate.’<sup>99</sup> This approach has also found support in the literature. Lucchini justifies this approach with reference to the role of equidistance within the delimitation process.<sup>100</sup> It has also been suggested that only the coasts that contribute to the existence of overlapping entitlements should be taken into account.<sup>101</sup>

As was mentioned above in Section 7.2.3, the ICJ’s determination of the relevant area in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* implies that the coasts of the Colombian islands were considered to project radially and not in the direction in which their coasts face. In rejecting Nicaragua’s contention that only the west-facing coasts of the islands formed part of Colombia’s relevant coast, the Court only provided the justification that the overlapping entitlements of the parties extended ‘well to the east of the Colombian Islands.’<sup>102</sup> Another example of using radial projections – or not looking only at seaward projection – is provided by *Jan Mayen*. This case is concerned with the delimitation of the continental shelf and fisheries zones between the opposite coast of Greenland and Jan Mayen. In view of the geography of the area, the coast of Greenland projects seaward for the entire course of a potential maritime boundary. On the other hand, the coast of Jan Mayen which faces Greenland, to which the Court refers as the ‘coastal front’ of Jan Mayen, only measures around fifty-five kilometres.<sup>103</sup> If the seaward projection of this coastal front would have been taken into consideration in determining the relevant area, the relevant area would not have included a large part

<sup>96</sup> *Ibid.*, [132] and [392]; [392] refers to the coastal frontages and the percentages for these frontages that are provided in this paragraph match with the lengths of the coastal frontages as provided in [132].

<sup>97</sup> *Ibid.*, [392]. <sup>98</sup> *Jan Mayen*, n. 29, [20] and [67]. <sup>99</sup> *Ibid.*

<sup>100</sup> L. Lucchini, ‘La délimitation des frontières maritimes dans la jurisprudence internationale: vue d’ensemble,’ in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (Leiden Martinus Nijhoff 2006) 1, 12; see also D. Anderson, ‘Baselines in the Modern Law of the Sea,’ in M. Lodge and M. Nordquist (eds.), *Peaceful Order in the World’s Oceans* (Leiden Brill 2014) 51, 65–66; Antunes, n. 33, 305; Tanaka, n. 67, 461. Antunes does indicate that this approach may not be appropriate in all circumstances (305).

<sup>101</sup> See e.g. Lucchini 2006, n. 100, 12; Tanaka, n. 67, 462.

<sup>102</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 14, [151].

<sup>103</sup> *Jan Mayen*, n. 29, [61].

of the area of overlapping entitlements and the area in which a potential boundary would be located.<sup>104</sup> From the Court's reasoning in discussing the relevant area it is clear that it considered that it was required to include the entire area of overlapping entitlements that is subject to delimitation in the relevant area.<sup>105</sup> That definition implies that the radial projection of the coast of Jan Mayen was taken into consideration to determine the relevant area. The idea that the relevant area should be determined by looking at the radial projections of the coasts of the parties has also been argued in the literature.<sup>106</sup> Weil provides a theoretical basis to this approach, observing that the entitlements of coasts project omni-directional and that there is no reason why this should be otherwise where these entitlements overlap with the entitlements of another coast.<sup>107</sup>

A final alternative to determine the relevant coasts is provided by *Nicaragua v. Honduras*. The ICJ in this case found that the circumstances of the case did not allow it to determine a provisional equidistance line<sup>108</sup> and instead decided to delimit the boundary by a bisector line between the relevant coasts of the parties.<sup>109</sup> The key element in this respect was the geographical configuration of the coast.<sup>110</sup> In determining the relevant coasts the Court considered how different options for the relevant coasts represented by straight lines would impact on the bearing of a bisector line. In this connection two considerations had to be balanced. First, such lines would have to provide a proper representation of the coast of the parties and e.g., not cut off a significant part of the coast concerned.<sup>111</sup> Second, the coastal segment to be selected should be of sufficient length 'from which to reflect a coastal front more than 100 nautical miles out to sea.'<sup>112</sup>

#### 7.4.2 *Assessment of the Alternatives to the General Criteria of Tunisia/Libya*

The preceding sub-section provides a number of alternatives to the general criteria of *Tunisia/Libya* for determining the relevant coasts and the relevant area. The proposition to define the relevant coasts by reference to the basepoints that generate the equidistance line at first sight might seem

<sup>104</sup> See *ibid.*, Sketch-map 1. <sup>105</sup> *Ibid.*, [19]–[20], [67], and [71].

<sup>106</sup> See e.g. P. Weil, *The Law of Maritime Delimitation: Reflections* (Grotius Cambridge 1989) 63–69; Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Oxford 2006), 141.

<sup>107</sup> Weil, n. 106, 63–66. <sup>108</sup> *Nicaragua v. Honduras*, n. 28, [280].

<sup>109</sup> *Ibid.*, [287]. <sup>110</sup> *Ibid.*, [292]. <sup>111</sup> *Ibid.*, and following. <sup>112</sup> *Ibid.*, [296].

to offer a more objective and predictable approach than the selection on the basis of the criterion that the relevant coasts are those that generate overlapping entitlements in a seaward direction. The almost total absence of any attempt to define the term 'seaward' more precisely and the inconsistencies in identifying the relevant coast in the individual case have made this criterion subjective and the outcome of its application unpredictable. In *Jan Mayen* and *Guyana v. Suriname* the definition of the relevant coasts of the parties by selecting the coasts on which the basepoints generating the equidistance line are located works well. The relevant coasts can be determined without difficulty and there does not seem to exist any clear ground to criticize these relevant coasts.<sup>113</sup> These coasts do not give any reason to assume that they do not contribute to the overall goal of delimitation of achieving an equitable solution. However, when this criterion for defining the relevant coasts is applied to other cases, its usefulness as a generally applicable criterion is no longer apparent.<sup>114</sup>

For instance, in *Nicaragua v. Honduras* the Court found that it could not apply the equidistance method because of the disagreement between the parties over the title to islands that were formed at the mouth of the boundary river and the uncertainty of the basepoints for determining the equidistance line due to the configuration and unstable nature of the coast at that mouth.<sup>115</sup> If there would have been no dispute over the islands in the mouth of the river, and the Court would have used basepoints on these islands to generate the equidistance line, that line would have been generated solely by those basepoints and basepoints on a number of small islets and rocks off the mainland coasts of Honduras and Nicaragua. As a consequence, the relevant coasts of the both states would have been defined by two points at the mouth of the boundary river and small stretches of coast on a number of insignificant features, while completely disregarding the mainland coasts of the parties, which constitute the main geographical features of this case.

*Territorial and Maritime Dispute (Nicaragua v. Colombia)* further illustrates that using the equidistance line's basepoints may lead to debatable

<sup>113</sup> In *Guyana v. Suriname*, there might be some argument about the exact starting point of the relevant coast of both parties at their common land boundary (*Guyana v. Suriname*, n. 29, [352]). However, any differences in this respect are of limited significance in view of the location of the most western and eastern basepoint of the equidistance line.

<sup>114</sup> See also *Barbados v. Trinidad and Tobago*, n. 15, [329]; S. M. Punzhin, 'Printsipy Razgranicheniia Morskikh Prostranstv,' in R. A. Kolodkin and S. M. Punzhin (eds.), *International Law of the Sea, Essays in Memory of A. L. Kolodkin* (Statut Moscow 2014) 61, 68.

<sup>115</sup> *Nicaragua v. Honduras*, n. 28, [280].

results. In this case, the equidistance line is determined by basepoints on small islands fringing the Nicaraguan mainland coast and basepoints on Colombia's San Andres and Providencia and a number of smaller features. Adopting these coasts as the relevant coast would completely ignore the main geographical feature of this delimitation, the mainland coast of Nicaragua.

Apart from these difficulties in using the basepoints generating the equidistance line as an alternative for defining the relevant coasts, it also raises a more fundamental concern. The concept of relevant coasts is intended to contribute to an assessment of how an equitable solution may be achieved in delimiting the continental shelf and the exclusive economic zone. In most cases this requires an evaluation as to whether the equidistance line leads to an equitable solution. Accepting that the relevant coasts should be determined with reference to the basepoints of the equidistance line would make the determination as to whether the equidistance line result in an equitable solution dependent on the very method that needs to be evaluated.<sup>116</sup> A similar concern would seem to apply to an approach that takes into account the coasts that contribute to the existence of overlapping entitlements. Where entitlement is based on distance, this approach implies that it includes all coasts that are within that distance from each other.<sup>117</sup> Where entitlement is not based on distance, as is the case for the continental shelf beyond 200 nm, this approach does not allow determining the relevant coasts.<sup>118</sup>

Determining the relevant area by looking at the radial projections of the relevant coasts resolves one of the problems inherent in determining the relevant area by looking at the seaward projections of the relevant coasts. As a coast viewed along its general direction never faces seaward in all directions, applying that seaward projection to determine the relevant area may result in excluding areas that are part of the overlapping entitlements of the parties in which a part of the delimitation line will be located from the relevant area. At the same time, the concept of radial projections does not resolve the question how to determine the stretch of the coast that is the relevant coast for the purposes of the delimitation. In *Jan Mayen* the ICJ, while impliedly using a radial projection from the relevant coast of the island of Jan Mayen to determine the relevant area,

<sup>116</sup> See also Fietta and Cleverly, n. 22, 597.

<sup>117</sup> Moreover, this approach raises a similar concern as the approach based on the radial projection of the coasts (see further below).

<sup>118</sup> See also Fietta and Cleverly, n. 22, 48–49.

determined the relevant coast of Jan Mayen by selecting the coast between basepoints generating the equidistance line. This coast is also the part of coast of Jan Mayen that faces the relevant coast of Greenland in a seaward direction. In the case of the island of Jan Mayen there might be little debate about the selection of that coast, but as the current discussion shows this may not be so in many other instances. For Weil the starting point for looking at the radial projections of the coasts of the states concerned is the determination of which coasts have a facing relationship.<sup>119</sup> This again raises the question how to determine which parts of the coast display such a facing relationship. In other words, the concept of radial projection is more appropriate in conceptualizing the relevant area, but it does not really assist in identifying the relevant coasts unless it is accepted that all coasts that are contributing to generating overlapping entitlements are included.<sup>120</sup>

The method employed by the ICJ in *Nicaragua v. Honduras* at first sight is specific to the circumstances of that particular case. However, at the same time it could be argued that the reasoning underlying the selection of the relevant coasts is in line with the general precepts of equity and leads to a careful assessment of the individual case.<sup>121</sup> Something similar could be said about the court of arbitration's determination in *Anglo-French Continental Shelf* that the location of the Channel Islands in relation to the mainland coast of France did not imply that this mainland coast did not disqualify a part of France's coast as relevant coast. It may be noted that *Anglo-French Continental Shelf* stands out for not relying on geometric methods to determine the relevant coast. On the one hand, it could be submitted that this contributes to the unpredictability of the case law. On the other hand, the court of arbitration's approach could be said to allow for the flexibility to deal with the particularities of the individual case and avoids relying on general criteria that cannot be applied to all individual cases.

## 7.5 Concluding Remarks

The concepts of relevant coasts and relevant area no doubt are part and parcel of the conceptual toolbox for maritime boundary delimitation. At

<sup>119</sup> Weil, n. 106, 72. Weil, among others, relies on *Anglo-French Continental Shelf*, n. 21, which refers to the coasts abutting on the area to be delimited.

<sup>120</sup> For a discussion of the latter point, see above n. 128 and following.

<sup>121</sup> See further above.

the same, the case law has not come up with a consistent approach in relation to these concepts. For instance, a number of cases – including cases that have been decided in the first decade and a half of this century – has refrained from defining the relevant area or has only defined it in general terms, while other cases have defined the relevant area with reference to limits defined by geographical coordinates or specific points.

The case law's engagement with the concepts of relevant coasts and relevant area illustrates the difficulties involved in establishing general criteria defined at a certain level of precision that can be applied in a consistent manner to all geographical situations with which the case law has been confronted.<sup>122</sup> The general criteria formulated in *Tunisia/Libya*, which have been accepted by a considerable number of cases,<sup>123</sup> do not allow the identification of meaningful relevant coasts and a meaningful relevant area in all geographical situations. Key to these criteria is the identification of the overlapping maritime entitlements extending from the coasts of the parties in a seaward direction. In this approach the coasts of the parties drive the identification of the parts of those coasts that constitute the relevant coasts for the purpose of the delimitation of their maritime boundary and the relevant area. In this sense, the *Tunisia/Libya* criteria are in full accord with one of the basic precepts of the law of the sea, namely that 'the land dominates the sea.'<sup>124</sup>

At the level of application, the *Tunisia/Libya* criteria have been mired by a number of difficulties. As was already noted above, it may not be possible to apply them in practice. In addition, the case law has, with the exception of *Bangladesh v. India*,<sup>125</sup> failed to come up with a further operationalization of the concept of 'seaward projection.' As was set

<sup>122</sup> In that sense, the present discussion calls to mind the idea that each boundary delimitation represents a unique situation, due to the great variety of geographical circumstances that may be found. This variety in turn would make it difficult if not impossible to define rules of general application (see e.g. L. D. M. Nelson, 'The Roles of Equity in the Delimitation of Maritime Boundaries,' (1990) 86 *American Journal of International Law* 837, 838–839. For a criticism of the notion of *unicum* see e.g. Antunes, n. 33, 259–260; Lucchini and Vøelckel, n. 2, 93; Weil, n. 106, 180–185; see also below, n. 141.

<sup>123</sup> These cases do show a refinement of *Tunisia/Libya* in the sense that they first explicitly identify the area of overlapping entitlements before proceeding to identify the relevant coasts and the relevant area. This arguably makes the process of identifying the relevant coasts and relevant area more transparent and predictable.

<sup>124</sup> As noted above, this principle formed the starting point of the Court's analysis of the concepts of the relevant coasts and the relevant area in *Tunisia/Libya* (*Tunisia/Libya*, n. 19, [73]). This same approach has been followed in other cases following the precedent of *Tunisia/Libya* (see e.g. *Bangladesh v. India*, n. 18, [279]).

<sup>125</sup> See also below next paragraph.

out in Section 7.2.3.1, the ordinary meaning of this term would imply a projection to the general direction of the relevant coast at a straight angle and, as was argued, *Bangladesh v. India* largely seems to subscribe to that view. A review of the case law indicates that courts and tribunals have not always adopted this ordinary meaning in identifying the lateral limits of the relevant area. As was set out in *Tunisia/Libya*, one of the lateral limits of the relevant area makes an angle of  $42^\circ$  with the general direction of the relevant mainland coast of Tunisia. Not dissimilar differences have been pointed out in respect of other cases. Such divergences from the ordinary meaning of the term seaward seem to make the use of this term a misnomer. The discussion of, among others, *Tunisia/Libya* and *Black Sea* moreover shows that the case law has not only been inconsistent when cases are compared, but also in respect of the treatment of different stretches of coast in the same, individual case.

As was pointed out above, *Bangladesh v. India* is the one case in which an attempt was made to quantify the meaning of the term 'seaward' projection. The tribunal in that case takes projection at a straight angle as a starting point of its analysis and observes that too acute an angle of the seaward projection to the general direction of a coast implies that such a coast cannot be part of the relevant coast. The tribunal did not consider this question in relation to the Indian coast south of Sandy Point, because neither party had argued that part of the coast to be part of the relevant coast.<sup>126</sup> Although this no doubt relieved the tribunal of a difficult if not impossible task – the relevant coast south of Sandy Point is straight for a considerable distance, implying that the tribunal might have had to find that an acute angle of  $x^\circ$  still leads to a seaward projection, but an angle of  $x - 1^\circ$  does not – it can be questioned whether such deferral to the views of the parties leads to predictability and consistency.

The case law also reveals different approaches to measuring the lengths of the relevant coast of the parties. Coastal length may both be measured along the actual coast and by straight lines along the coast. This is only in part explained by coastal geography. One other factor partly explaining these differences is the overall approach to the specific delimitation concerned. Where a court or tribunal wants to make a numerical proportionality test it obviously needs to put a figure on the length of the relevant coasts, while this need not be done in other cases.

In view of the fact the criteria developed in *Tunisia/Libya* appear problematic in their practical application, Section 7.4 considers a number of

<sup>126</sup> *Bangladesh v. India*, n. 18, [302].

alternatives that have been used in the case law or have been advocated in the academic literature. First, in *Jan Mayen and Guyana v. Suriname*, the relevant coasts were determined by selecting the coasts of the parties between the basepoints that generate the provisional equidistance line. As is observed, in the context of those two cases that approach suggests itself as a viable alternative. However as Section 7.4.2 concludes, on closer consideration this approach is not generalizable in a meaningful sense and raises methodological concerns. Second, the concept of radial projection, rather than being a full-fledged alternative to the concept of seaward projection, only addresses one of the shortcomings of the latter concept.

In light of the difficulties quantifiable geometric criteria run into, Section 7.4.2 posits that a preferable approach might have been to solely rely on more general precepts underlying maritime delimitation law. That approach would have provided the flexibility to deal with the particularities of the individual case and avoided relying on general criteria that cannot be applied (equally) to all individual cases. In fact, one of the main lessons that may be drawn from the current discussion is the risk inherent in developing general criteria in the context of a specific case (i.e., *Tunisia/Libya*), without apparently having a clear understanding of or considering how these general criteria would play out in the geographical framework of other bilateral delimitations. As a consequence subsequent cases have had to disavow those criteria explicitly or impliedly. As a result the case law on this point can neither be characterized as wholly predictable nor wholly consistent.<sup>127</sup>

<sup>127</sup> As has been argued by Evans: '[w]hile determining the relevant area for the purposes of delimitation is critical, it remains unclear and controversial. Given also the significance attached to the "relevant coasts" for this purpose, and the relationships between them in terms both of geographical alignment and length, this too becomes a central question and this is reflected in their increasing prominence in recent cases. Yet even a cursory survey indicates the high degree of arbitrariness which attaches to these calculations' (Evans, n. 20, 270–271). See also *ibid.*, 267–268 and 272; Antunes, n. 33, 305 and 324–325; Lucchini, n. 100, 11–12; Lucchini and Vœlckel, n. 2, 220, 223, and 227; Tanaka, n. 67, 458; Tanaka, n. 106, 178). On the other hand, Fietta and Cleverly submit that '[w]hile there has been some inconsistency, the process of identifying the relevant coasts and the relevant area broadly involves [...] three stages' (Fietta and Cleverly, n. 22, 45). However, they subsequently observe that the judiciary has 'taken some markedly different approaches to the identification of relevant coasts and relevant areas' (*ibid.*, 594).