

# Contemporary Developments in International Law

*Essays in Honour of Budislav Vukas*

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# ITLOS's Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles in the *Bangladesh/Myanmar* Case: Theoretical and Practical Difficulties

*Alex G. Oude Elferink\**

## I Introduction

When I was asked to contribute to the *Liber Amicorum* for Budislav Vukas it took me little time to decide on a subject. Closely following the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS), I always read his individual opinions with interest for the originality of their views and because of the insights they provided on the orders and judgments of the Tribunal. Just prior to my being invited to contribute, the Tribunal had rendered its judgment in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*.<sup>1</sup> The judgment was a first in a number of respects. It was the first maritime delimitation case decided by the ITLOS, it was the first instance in which a court or tribunal had to deal with the relationship between the procedure for the establishment of the outer limits of the continental shelf beyond 200 nautical miles and its delimitation between neighboring states, and it was the first international case pronouncing on the principles and rules applicable to this delimitation. In the light of the judgment's breaking new ground, I regretted that Judge Vukas was no longer on the Tribunal to shed his light on it.<sup>2</sup>

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1 Hereinafter *Bangladesh/Myanmar* case. Judgment of 14 March 2012 (available at <[www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/C16\\_Judgment\\_14\\_03\\_2012\\_rev.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf)>).

2 As his writings indicate, Budislav Vukas has critically assessed the delimitation provisions of the United Nations Convention on the law of the sea (1833 UNTS 396; hereinafter UNCLOS) and in this connection among others considered the relationship between the delimitation of the exclusive economic zone and the continental shelf (B. Vukas "The LOS Convention and Sea Boundary Delimitation" in B. Vukas *The Law of the Sea; Selected Writings* (Martinus Nijhoff Publishers, Leiden: 2004), pp. 83–109 at pp. 101–102). This was one of the matters at issue in the *Bangladesh/Myanmar* case (see judgment of 14 March 2012, paras. 463–476). UNCLOS provided the applicable law between Bangladesh and Myanmar.



As the title of my contribution indicates, I feel that there is room to question the approach of the Tribunal to the delimitation of the continental shelf beyond 200 nautical miles, but other parts of this fascinating judgment also deserve scholarly attention. To give one example, the Tribunal in delimiting the exclusive economic zone and continental shelf up to the 200-nautical-mile limit of Myanmar first determined that Bangladesh's St. Martin's Island should not be taken into account in establishing a provisional equidistance line.<sup>3</sup> In the second stage of determining this part of the maritime boundary the Court then adjusted this provisional equidistance line to account for the circumstance that the concavity of Bangladesh's coast made that the provisional equidistance line led to "a cut-off effect on that coast requiring an adjustment of that line".<sup>4</sup> The Tribunal in the second stage also revisited St. Martin's Island, posing the question whether the island should be considered a relevant circumstance requiring an adjustment of the provisional equidistance line.<sup>5</sup> Considering the Tribunal's treatment of St. Martin's Island at the first stage of the delimitation, which was concerned with the selection of basepoints for the provisional equidistance line and rejected using the island in this connection, it should not come as a surprise that St. Martin's Island was not considered a relevant circumstance requiring an adjustment of the provisional equidistance line.<sup>6</sup> The Tribunal's rejection of St. Martin's island as a basepoint for the provisional equidistance line was couched in language that rather was reminiscent of the jurisprudence in relation to the assessment of relevant circumstances than that concerning the selection of basepoints.<sup>7</sup>

To arrive at a boundary in the second stage of the delimitation process, the Tribunal adjusted its provisional equidistance line giving no weight to St. Martin's Island to a considerable extent, and to this effect used an azimuth of 215°. The Tribunal justified this approach by observing that:

the direction of any plausible adjustment of the provisional equidistance line would not differ substantially from a geodetic line starting at an azimuth of 215°. A significant shift in the angle of that azimuth would

<sup>3</sup> Judgment of 14 March 2012, para. 265.

<sup>4</sup> *Ibid.*, para. 297.

<sup>5</sup> *Ibid.*, para. 316.

<sup>6</sup> For the conclusion of the Tribunal in this respect see *ibid.*, para. 319.

<sup>7</sup> See *ibid.*, para. 265. To illustrate my point I refer the reader to the International Court of Justice's approach to the selection of basepoints and the assessment of islands as relevant circumstances in its judgment of 19 November 2012 in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, paras. 202–204 and 215–216.

result in cut-off effects on the projections from the coast of one Party or the other.<sup>8</sup>

This approach was criticized by a number of judges for the tenuous link between the provisional equidistance line and the azimuth of 215°. <sup>9</sup> Such criticism would have been avoided if the Tribunal had taken basepoints on St. Martin's Island into account in determining the provisional equidistance line and considered whether the island constituted a relevant circumstance requiring an adjustment of the provisional equidistance line at the second stage of the delimitation process. It can be noted that the provisional equidistance line giving full effect to St. Martin's Island is much closer to the maritime boundary established by the Tribunal than its provisional equidistance line. <sup>10</sup> A limited shift of the equidistance line giving full weight to St. Martin's Island at the second stage of the delimitation process, taking into account as relevant circumstances St. Martin's Island and the concavity of Bangladesh's coast, would have resulted in a boundary that would have been quite similar to the boundary established by the Tribunal. Such an approach would also seem to reflect better the requirement of balancing all relevant circumstances "rather than reliance on one to the exclusion of all others". <sup>11</sup>

The remainder of this contribution is concerned with the delimitation of the continental shelf beyond 200 nautical miles effected by the ITLOS in the *Bangladesh/Myanmar* case. The first section will set out the background to this part of the case. The next section will set out how the Tribunal dealt with the delimitation of the continental shelf beyond 200 nautical miles. The third section will evaluate the Tribunal's approach in the light of the existing case law on maritime delimitation. This, among others, concerns the link between the provisional delimitation method and the basis of entitlement to maritime

8 Judgment of 14 March 2012, para. 334.

9 See declaration of judge Wolfrum, pp. 3–5 and separate opinion of judge Cot, Section 5; see also joint declaration of judges Nelson, Chandrasekhara Rao and Cot.

10 For a comparison of these two equidistance lines and the maritime boundary along the azimuth of 215° see illustration map 2 appended to the separate opinion of judge Gao and sketch-map no. 9 included in the judgment of the Tribunal.

11 *North Sea continental shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), judgment of 20 February 1969 [1969] *ICJ Reports*, para. 93; see also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (hereinafter *Tunisia/Libya*), judgment of 24 February 1982 [1982] *ICJ Reports*, paras. 107 and 133; *Continental Shelf (Libya/Malta)* (hereinafter *Libya/Malta*), judgment of 3 June 1985 [1985] *ICJ Reports*, paras. 73 and 79; *Maritime delimitation in the area between Greenland and Jan Mayen*, judgment of 14 June 1993 [1993] *ICJ Reports*, para. 92.

zones. The next section looks at an example from practice to illustrate the kind of difficulties the approach of the Tribunal might run into and explains how the states concerned in that case have addressed the delimitation. A final section before the conclusions will briefly discuss the literature on the delimitation of the continental shelf beyond 200 nautical miles and suggests possible alternatives to the Tribunal's approach.

## II Background to the Delimitation of the Continental Shelf beyond 200 Nautical Miles

Bangladesh and Myanmar are neighboring states in South East Asia and both are coastal states of the Bay of Bengal. Bangladesh and Myanmar, like Bangladesh's other neighbor, India, are parties to UNCLOS. Bangladesh's position in the north of the Bay of Bengal in between India and Myanmar might potentially considerably limit the extent of its maritime zones. Due to the configuration of the Bay of Bengal, the 200-nautical-mile limit of Bangladesh is located in its entirety within 200 nautical miles of the coasts of India and Myanmar. This situation acquires particular significance because the continental shelf of the coastal states in the Bay of Bengal extends beyond 200 nautical miles. Myanmar contended that Bangladesh was not entitled to a continental shelf beyond 200 nautical miles because recognizing such an entitlement would be against the rights Myanmar enjoyed automatically to a continental shelf within 200 nautical miles and Myanmar's right to extend its exclusive economic zone to the outer limit of 200 nautical miles under UNCLOS.<sup>12</sup> This position is based on the view that the continental shelf beyond 200 nautical mile of one coastal state cannot extend into the 200-nautical-mile zone of another coastal state. In the case of Bangladesh, this view would imply that it would be 'shelf locked' within the 200-nautical-mile zones of Myanmar and India. Myanmar during the proceedings before the ITLOS had also submitted that the delimitation of the exclusive economic zone and continental shelf within 200 nautical miles should lead to an outcome that would even preclude Bangladesh from extending its continental shelf to Bangladesh's 200-nautical-mile limit.<sup>13</sup>

<sup>12</sup> See Judgment of 14 March 2012, para. 468; see also *ibid.*, para. 469.

<sup>13</sup> *Ibid.*, para. 470; see also Note of the Permanent Mission of the Republic of the Union of Myanmar to the United Nations No. 146/032017 of 31 March 2011 (available at <[www.un.org/Depts/los/clcs\\_new/submissions\\_files/bgd55\\_11/mmr\\_nv\\_un\\_001\\_08\\_04\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/mmr_nv_un_001_08_04_2011.pdf)>), p. 1.

Being parties to UNCLOS, Bangladesh and Myanmar had to comply with the obligations in relation to the establishment of the outer limit of the continental shelf beyond 200 nautical miles contained in the Convention's article 76. The Convention requires a coastal state to submit information on such outer limits within 10 years of the entry into force of the Convention for the state concerned to the Commission on the Limits of the Continental Shelf (CLCS).<sup>14</sup> The CLCS is charged with considering this information and issuing recommendations on the outer limits to the coastal state. Outer limits established by the coastal state on the basis of the recommendations of the Commission shall be final and binding.<sup>15</sup> Myanmar complied with its obligation to submit information to the CLCS on 16 December 2008.<sup>16</sup> The outer limits of Myanmar's continental shelf contained in the submission extend as far south as approximately 12.86° N and are between 240 and 400 nautical miles from the coast of Myanmar.<sup>17</sup> Bangladesh, in a reaction to Myanmar's submission, indicated that it did not give its consent to the consideration of the submission by the CLCS. Bangladesh among others indicated that it considered that Myanmar did not have a natural prolongation in the area concerned and that it had objected to the baselines Myanmar had employed in its submission.<sup>18</sup> In view of the Rules of Procedure of the CLCS, this reaction implied that the Commission would not be in a position to consider Myanmar's submission or to make recommendations on the establishment of outer limits by Myanmar.<sup>19</sup>

Bangladesh made a submission to the Commission in February 2011.<sup>20</sup> The outer limits of Bangladesh's continental shelf contained in the submission extend between approximately 380 and 390 nautical miles from Bangladesh's

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14 LOS Convention, Annex II, article 4.

15 *Ibid.*, article 76(8).

16 The Executive summary of Myanmar's submission and other information related to the submission are available at <[www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mmr.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mmr.htm)>.

17 See Continental Shelf submission of Union of Myanmar; Executive Summary, pp. 6–7 for the coordinates of the points defining Myanmar's outer limit and their location.

18 Note verbale No. PMBNY-UNCLOS/2009 of the Permanent Mission of Bangladesh to the United Nations to the Secretary General of the United Nations of 23 July 2009.

19 *Rules of Procedure of the Commission on the Limits of the Continental Shelf* (CLCS/40/Rev.1 of 17 April 2008), Annex I, para. 5(a).

20 The Executive summary of Bangladesh's submission and other information related to the submission are available at <[www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_bgd\\_55\\_2011.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bgd_55_2011.htm)>.

coast.<sup>21</sup> The entire continental shelf of Bangladesh as defined in its submission overlapped with the continental shelf of Myanmar's submission.<sup>22</sup> Myanmar's continental shelf as defined in its submission extends some 130 nautical miles south beyond the outer limit submitted by Bangladesh. Myanmar reacted in a similar fashion to its neighbor's submission as Bangladesh had done previously in relation to Myanmar's submission. Myanmar observed that it considered that Bangladesh's continental shelf did not extend beyond the 200-nautical-mile limit and "*a fortiori*, [not] beyond this limit",<sup>23</sup> and also protested the straight baselines established by Bangladesh.<sup>24</sup> Like Bangladesh, Myanmar invoked the Rules of Procedure of the CLCS to block the consideration of the submission of its neighbor.<sup>25</sup>

Bangladesh had brought the case against Myanmar in respect of the delimitation of their maritime zones in October 2009. Originally this concerned arbitration in accordance with Annex VII of UNCLOS, but in December 2009 the case was transferred to the ITLOS. In order to arrive at the last part of its judgment concerned with the delimitation of the continental shelf beyond 200 nautical miles, the Tribunal had to address a number of other issues. First, the delimitation method it would adopt within 200 nautical miles might result in a boundary that would exclude a delimitation beyond that distance. As was observed above, this was the position of Myanmar. The Tribunal held otherwise. The boundary it determined within 200 nautical miles made a boundary beyond that distance a possibility. Next, the Tribunal had to consider Myanmar's argument that Bangladesh was 'shelf locked'. The Tribunal rejected Myanmar's arguments in this respect, and thus opened the way for the delimitation of the continental shelf beyond 200 nautical miles. However, before addressing this matter it still had to consider Bangladesh's contention that the natural prolongation of Myanmar did not extend beyond 200 nautical miles. The Tribunal found that this primarily concerned an issue of interpretation of the

21 See Submission by the People's Republic of Bangladesh; Executive Summary, p. 11 and Annex for the coordinates of the points defining Bangladesh's outer limit and their location.

22 Most of the continental shelf as defined in Bangladesh's submission moreover overlaps with India's continental shelf. The delimitation of this continental shelf between Bangladesh and India currently is the subject of an arbitration under Annex VII of UNCLOS.

23 Note verbale No. 146/03 20 17 of the Permanent Mission of the Republic of the Union of Myanmar to the United Nations, New York to the Secretary General of the United Nations of 31 March 2011, p. 1.

24 *Ibid.*, p. 2.

25 *Ibid.*

Convention, and that it could deal with this matter. The Tribunal concluded that Myanmar, like Bangladesh, had entitlements to the continental shelf that, as their submissions to the CLCS indicated, “overlap in the area in dispute in this case”.<sup>26</sup>

The Tribunal also had to consider the implications of the absence of recommendations of the CLCS on the outer limits of the continental shelf of Bangladesh and Myanmar. In this connection, two aspects need to be distinguished. On the one hand, the question was whether the Tribunal could proceed with a delimitation in the absence of recommendations of the Commission. For a number of reasons, the Tribunal concluded that it could exercise its jurisdiction in this case.<sup>27</sup> On the other hand, the absence of certainty concerning the location of the outer limits of the continental shelf might impact on the delimitation process itself. This uncertainty would not allow the precise determination of the extent of the entitlement of each party. This determination might be relevant in assessing the equitableness of the outcome of the delimitation process. This issue is further considered below.

### III The Tribunal's Approach to the Delimitation of the Continental Shelf beyond 200 Nautical Miles

The case between Bangladesh and Myanmar constituted the first instance in which an international court or tribunal had to determine the boundary of the continental shelf beyond 200 nautical miles. However, this matter had been previously considered in an arbitration between two of Canada's provinces, Nova Scotia and Newfoundland and Labrador.<sup>28</sup> The arbitral tribunal first concluded that article 6 of the Convention on the continental shelf,<sup>29</sup> to which Canada was a party, remained part of the applicable law. It observed that the

26 Judgment of 14 March 2012, para. 449. The discussion on this point is contained in *ibid.*, paras. 395–449.

27 See *ibid.*, paras. 360–394.

28 The arbitral tribunal had been instructed to “apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require” (Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas as defined in the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and the *Canada-Newfoundland Atlantic Accord Implementation Act* (hereinafter *Newfoundland and Labrador and Nova Scotia arbitration*); Award of the tribunal in the second phase of 26 March 2002 (available at <[www.cnsopb.ns.ca/sites/default/files/pdfs/phaseii\\_award\\_english.pdf](http://www.cnsopb.ns.ca/sites/default/files/pdfs/phaseii_award_english.pdf)>), para. 2.1).

29 Adopted on 29 April 1958 (499 UNTS 311).

case law of the International Court of Justice (ICJ) did not suggest that parties to the Convention were no longer bound by it due to developments in the law relating to the continental shelf or its delimitation. Article 6 also applied to the area extending to the outer edge of the continental margin beyond 200 nautical miles.<sup>30</sup> Article 6 provides that the boundary of the continental shelf is the equidistance line unless another boundary is justified by special circumstances. The tribunal subsequently considered the relationship between article 6 and article 83 of UNCLOS.<sup>31</sup> The tribunal observed that the “apparent contrast between these two articles has been attenuated by subsequent practice and the case law”.<sup>32</sup> In the case law, it generally had “become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it”.<sup>33</sup> The applicability of the Convention on the continental shelf in the case before the arbitral tribunal reinforced the case for beginning with an equidistance line, but that in any case provided the starting point in most cases, including under article 83 of UNCLOS.<sup>34</sup>

The ITLOS in the *Bangladesh/Myanmar* case took a similar approach to the tribunal in the *Newfoundland and Labrador and Nova Scotia* arbitration. It first of all noted that article 83 of UNCLOS does not contain any limitation as to the area to which it is applicable: “Article 83 applies equally to the delimitation of the continental shelf both within and beyond 200 [nautical miles]”.<sup>35</sup> The Tribunal then immediately turned to the delimitation method to be employed. At the outset the Tribunal seems to suggest that its selection of this specific method was based on the case before it, observing that:

the delimitation method to be employed in *the present case* for the continental shelf beyond 200 nautical miles should not differ from that within 200 [nautical miles].<sup>36</sup>

This implied that the equidistance/relevant circumstances method, which had been applied by the Tribunal to the delimitation within 200 nautical miles and which is the standard approach within that distance, continued to be

30 *Newfoundland and Labrador and Nova Scotia* arbitration; Award of the tribunal in the second phase of 26 March 2002, para. 2.25.

31 *Ibid.*, paras. 2.26 and following.

32 *Ibid.*, para. 2.27.

33 *Ibid.*, para. 2.28

34 *Ibid.*

35 Judgment of 14 March 2012, para. 454.

36 *Ibid.*, para. 455; emphasis provided.

applicable.<sup>37</sup> This focus on the specific case is also present in the Tribunal's explanation of the effects of the equidistance/relevant circumstances method. The Tribunal noted that:

this method can, *and does in this case*, permit resolution also beyond 200 nm of the problem of the cut-off effect that can be created by an equidistance line where the coast of one party is markedly concave...<sup>38</sup>

Thus, the Tribunal might seem to be suggesting that in other cases the equidistance/relevant circumstances method might not be able to achieve an equitable solution.

The Tribunal, however, also posited that the equidistance/relevant circumstances rule had general application because of its relationship to the basis of entitlement to maritime zones:

This method is rooted in the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf. This should be distinguished from the question of the object and extent of those rights, be it the nature of the areas to which those rights apply or the maximum seaward limits specified in articles 57 and 76 of the Convention.<sup>39</sup>

After its pronouncement on the applicable method, the Tribunal proceeded with a reexamination of the relevant circumstances.<sup>40</sup> Interestingly, the Tribunal refrained from describing the provisional equidistance line, which would normally be the first step in the application of the equidistance/relevant circumstances method. Presumably, this may be explained by the fact that the provisional equidistance line beyond 200 nautical miles is governed by the same basepoints as the Tribunal had selected for drawing a provisional equidistance line within that distance.<sup>41</sup>

In the area beyond 200 nautical miles, the Tribunal had to consider only two relevant circumstances that had been presented by Bangladesh. Myanmar,

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*; emphasis provided.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, para. 456.

<sup>41</sup> As a matter of fact one of these basepoints,  $\mu_4$  on the coast of Myanmar, seems to become relevant only beyond 200 nautical miles (see *ibid.*, sketch-maps nos. 4 and 5).



which considered that Bangladesh's continental shelf did not extend beyond 200 nautical miles, had refrained from presenting any argument in this respect.<sup>42</sup> Bangladesh had argued that the concavity of its coast constituted a relevant circumstance within 200 nautical miles and submitted that this continued to be the case beyond that distance. It submitted that the cut-off effect caused by applying an equidistance line became even more pronounced further off shore.<sup>43</sup> The second relevant circumstance Bangladesh invoked in the area beyond 200 nautical miles was based on the different basis of entitlement of the shelf within and beyond the 200-nautical-mile limit. Beyond that limit distance did not have a role to play in determining entitlement, which instead was only based on geological and geomorphological continuity with the land territory. As Myanmar at best only had a geomorphological continuity, Bangladesh considered that it had "the most natural prolongation into the Bay of Bengal".<sup>44</sup>

Bangladesh's 'most natural' prolongation theory was summarily dismissed by the Tribunal. The Tribunal had already determined that the natural prolongation of both parties extended beyond 200 nautical miles and that they had overlapping entitlement. There thus could be no question of Bangladesh getting a larger part of the disputed area for having "the most natural prolongation".<sup>45</sup> The Tribunal agreed with Bangladesh that the concavity of Bangladesh's coast had a continued effect beyond the 200-nautical-mile limit. As a consequence, it held that the equidistance line could be adjusted by the same method that had been used to delimit the exclusive economic zone and the continental shelf within 200 nautical miles.<sup>46</sup>

Having determined the extent of the adjustment of the provisional equidistance line on the basis of an assessment of the relevant circumstances, the Tribunal applied the disproportionality test to check whether the line it had arrived at within and beyond 200 nautical miles led to an equitable result. This required the Tribunal to determine the relevant maritime area and the lengths of the relevant coasts of the parties. The Tribunal held that the relevant maritime area "is that resulting from the projections of the relevant coasts of the Parties".<sup>47</sup> The relevant area established by the Tribunal is bounded by a number of straight lines along the coasts of the parties, a

42 *Ibid.*, para. 459.

43 *Ibid.*, para. 458.

44 *Ibid.*, para. 457.

45 *Ibid.*, para. 460.

46 *Ibid.*, paras. 461–462.

47 *Ibid.*, para. 489.

meridian running from the land boundary between Bangladesh and India and a parallel running west from Cape Negrais on the coast of Myanmar.<sup>48</sup> This relevant area includes most of the continental shelf area that is beyond an equidistance line with India but does not include those parts of the continental shelf of Bangladesh and Myanmar that are beyond that equidistance line. Thus most of the overlapping continental shelf entitlements beyond 200 nautical miles are excluded from the relevant area.<sup>49</sup> The Tribunal represented the relevant coasts of Bangladesh and Myanmar by a number of straight lines.<sup>50</sup> The ratio between the relevant coasts was approximately 1:1.42 in favor of Myanmar, and the relevant area was divided in a ratio of 1:1.54 in favor of Myanmar. The Tribunal found that this did not lead to “any significant disproportion in the allocation of maritime areas...relative to the respective coastal lengths” and that there was no need for shifting of the Tribunal’s provisional line to arrive at an equitable result.<sup>51</sup>

#### IV The Tribunal’s Approach Evaluated

The Tribunal’s starting point to the delimitation of the continental shelf beyond 200 nautical miles – that article 83 of UNCLOS does not make a distinction between areas within and beyond that distance – might at first sight seem to be beyond reproach. The wording of the article indeed seems neutral in this respect. However, article 83 is silent on the content of the substantive rules to be applied, but only refers to the result that is to be achieved. The attainment of this result may require applying different principles and rules within and beyond 200 nautical miles. Article 83 in itself thus does not provide support for applying the same delimitation methodology within and beyond 200 nautical miles.

As was set out above, the Tribunal’s reasoning for choosing to apply the same delimitation methodology within and beyond 200 nautical miles is based on two strands: it hints at its appropriateness in the case at hand and this method being grounded in the basis of coastal state rights over maritime zones. As to the first strand, it is of course required that the method found to be applicable, can actually be applied to the case at hand, but this does little to substantiate its appropriateness in general. In view of the criticisms that the

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48 For the Tribunal’s definition of the area and its depiction see *ibid.*, paras. 489–496 and sketch-map no. 8.

49 See also below text after note 69.

50 See *ibid.*, paras. 202, 204 and 498.

51 *Ibid.*, paras. 498–499.

case law in the past has placed too much emphasis on the individual case and too little on the predictability and general applicability of the law,<sup>52</sup> this argument rather might have received less emphasis. It could be argued that this could have been especially so in view of the Tribunal's conviction that the equidistance/relevant circumstances method was grounded in the basis of coastal state rights over maritime zones.

The fundamental question is whether the Tribunal was right in concluding that the equidistance/relevant circumstances method:

is rooted in the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf.<sup>53</sup>

First, it can be noted that the reference is to the combined rule of equidistance and relevant circumstances. This contrasts with the International Court of Justice's justification for applying the equidistance line as a provisional line in *Libya/Malta*:

As the Court has found above, the law applicable to the present dispute, that is, to claims relating to continental shelves located less than 200 miles from the coasts of the States in question, is based not on geological or geomorphological criteria, but on a criterion of distance from the coast or, to use the traditional term, on the principle of adjacency as measured by distance. It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.<sup>54</sup>

It will be obvious that the Tribunal could not have based itself on this reasoning of the Court to justify the equidistance line as a provisional line for the delimitation of the continental shelf beyond 200 nautical miles. Entitlement in this case is not based on distance from the coast, but mainly on geomorphological criteria. In the specific case of Myanmar and Bangladesh, a strict equidistance line would have no relation to the area of overlapping entitlements beyond 200 nautical miles, and the Tribunal's provisional equidistance line

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52 The most prominent publication in this respect is probably P. Weil *The Law of Maritime Delimitation – Reflections* (Grotius Publications, Cambridge: 1989), which at one point talks about the “crusade against equidistance” (*ibid.*, p. 203).

53 Judgment of 14 March 2012, para. 455.

54 *Libya/Malta*, judgment of 3 June 1985 [1985] *ICJ Reports*, p. 13 at pp. 46–47, para. 61.

was located in the northwestern corner of the part of the relevant area beyond 200 nautical miles defined by the Tribunal.

How should the Tribunal's innovative approach of linking the equidistance/relevant circumstances method, instead of the equidistance method, to the basis for entitlement be judged? First, it can be noted that the Tribunal employs a more general notion of basis of entitlement than the Court in *Libya/Malta*. The basis is the sovereignty of the coastal state over the coast. That notion is also at the basis of the above finding of the International Court of Justice in *Libya/Malta*. However, instead of linking this basic notion to the more specific basis for entitlement of the continental shelf, as the Court did in *Libya/Malta*, the Tribunal explicitly severs this link, observing that a distinction has to be made between the basis of entitlement rooted in sovereignty over the coast and the object and extent of the rights of the coastal state, "be it the nature of the areas to which those rights apply or the maximum seaward limits specified in articles 57 and 76 of the Convention".<sup>55</sup>

The Tribunal fails to explain what distinguishes the relationship of the equidistance/relevant circumstances method to its very general definition of the basis for entitlement from the relationship of other possible methods to that basis for entitlement. As was already argued above, a provisional equidistance line may be located beyond the area of overlapping continental shelf entitlements beyond 200 nautical miles. This would seem to make a method that results in a provisional line in the area of overlapping claims more appropriate. In the past, the jurisprudence has in fact applied such an approach, which implies immediately balancing all relevant circumstances to arrive at a boundary line without first establishing a provisional equidistance line. Without submitting that this is the right approach to the delimitation of the continental shelf beyond 200 nautical miles, it should be clear that this method is just as much rooted in the Tribunal's basis of entitlement as the equidistance/relevant circumstances method, or even more so, as it does not entail using a provisional line that may be outside the area of overlapping entitlements.

The Tribunal considered two relevant circumstances advanced by Bangladesh. The rejection of Bangladesh's argument that its natural prolongation was 'most natural' can only be welcomed. Entitlement to an area of continental shelf either exists or does not exist. There are no different classes of entitlement that deserve different treatment in delimitation between neighboring states.<sup>56</sup> The Tribunal's finding that the concavity of Bangladesh's coast remained a relevant circumstance beyond 200 nautical miles is not surprising

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<sup>55</sup> Judgment of 14 March 2012, para. 455.

<sup>56</sup> See also *ibid.*, joint declaration of judges *ad hoc* Mensah and Oxman, para. 11.

in the light of the fact that the same coastal geography is relevant for areas within and beyond 200 nautical miles.

The Tribunal's approach to the proportionality test is in line with the earlier jurisprudence, and the conclusion that there is no disproportion is unexceptional. The exact definition of the relevant area would seem to raise a question. As was noted above, the Tribunal defined this area as that resulting from the projections of the relevant coasts. The Tribunal does not explain how the projections of the relevant coasts are related to those coasts. A comparison of the straight line the Tribunal used to represent Bangladesh's south-facing coast shows that the western limit of the relevant area is not a perpendicular to the straight line representing coast, but has an angle to that coast of  $95^\circ$ . A similar issue exists in relation to the southern limit of the relevant area. However, it does not seem that a definition of the relevant area based on frontal projection would have led to radically different outcomes of the proportionality test.

A final assessment of the boundary established by the Tribunal will only be possible once the boundaries of Myanmar and Bangladesh with India beyond 200 nautical miles will have been established. A preliminary assessment might suggest that the Tribunal has gone quite far in adjusting the provisional equidistance line to address the concavity of Bangladesh's coast as a relevant circumstance. If the tribunal in the arbitration between Bangladesh and India were to apply a similar approach to the delimitation as the Tribunal, and Myanmar and India were to extend their existing boundary beyond the 200-nautical-mile limit using the same method as within that limit, Bangladesh's continental shelf would extent further from its coast than Myanmar's continental shelf would from Myanmar's coast. This again points to the need for a further consideration between the nature and extent of continental shelf entitlements and their delimitation. Within 200 nautical miles an equidistance line between Myanmar and India no doubt leads to an equitable result, and this method was agreed between the two states. Beyond that distance, application of this same method would give Myanmar only a small part of the area of overlapping continental shelf entitlements.

#### v **An Example Illustrating the Difficulties Involved in Applying the Equidistance/Relevant Circumstances Method**

An example may illustrate the difficulties one may run into in applying the equidistance/relevant circumstances rule advocated by the Tribunal in *Bangladesh/Myanmar*. This concerns the delimitation of the continental shelf between Denmark/Greenland and Iceland in the Irminger Sea.

Iceland made a submission to the CLCS in respect of the western part of the Reykjanes Ridge in April 2009.<sup>57</sup> The area enclosed in the outer limit submitted by Iceland starts from the point of intersection of Iceland's 200-nautical-mile limit with that of Greenland to the south west of Iceland. From that point Iceland's continental shelf beyond 200 nautical miles extends south for hundreds of nautical miles along the outer limit of Greenland's 200-nautical-mile zone and beyond. Denmark/Greenland made a submission to the CLCS in relation to two areas of continental shelf to the south of Greenland in June 2012.<sup>58</sup> One of these areas in the Irminger Sea overlaps in its entirety with the continental shelf included in the outer limits submitted by Iceland. The Danish/Greenlandic limit in this area also starts at the intersection of the 200-nautical-mile limits and then continues south at a distance of between a couple and some tens of nautical miles from the 200-nautical-mile limit of Greenland. This overlap means that there is a need for the delimitation of the continental shelf beyond 200 nautical miles between Denmark/Greenland and Iceland.

A provisional equidistance line between Denmark/Greenland and Iceland would only be located in the area of overlapping continental shelf entitlement in a small section close to the intersection of the 200-nautical-mile limits. In the most southerly part of the area of overlapping claims an equidistance line between Greenland and Iceland would be some 100 nautical miles distant from the area of overlapping entitlements. This clearly makes the equidistance line inappropriate as a provisional line.

Iceland and Denmark/Greenland have agreed upon a provisional delimitation for their continental shelf beyond 200 nautical miles in the Irminger Sea.<sup>59</sup> The Agreed Minutes indicate that the area of overlapping continental shelf beyond 200 nautical miles is divided giving 53% of the area to Greenland/Denmark and 47% to Iceland. The provisional delimitation line is determined

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57 The Executive summary of Iceland's submission is available at <[www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_isl\\_27\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_isl_27_2009.htm)>.

58 The Executive summary of Denmark/Greenland's submission is available at <[www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_dnk\\_61\\_2012.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_dnk_61_2012.htm)>.

59 Agreed Minutes on the delimitation of the continental shelf beyond 200 nautical miles between Greenland and Iceland in the Irminger Sea of 16 January 2013 (on file with the author). The same approach had been followed previously between Denmark the Faroe Islands, Iceland and Norway in relation to the continental shelf beyond 200 nautical miles in the North East Atlantic (Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of the Northeast Atlantic of 20 September 2006 (available at <[www.regjeringen.no/en/dep/ud/documents/Laws-and-rules/retningslinjer/2006/Agreed-Minutes.html?id=446839](http://www.regjeringen.no/en/dep/ud/documents/Laws-and-rules/retningslinjer/2006/Agreed-Minutes.html?id=446839)>)).

taking this ratio into account for all turning points of the line. The Agreed Minutes do not specify the reasons for this division. A number of factors might have played a role in this respect: the lengths of the relevant coasts of the parties facing the area; the distance of the area to the coasts of the parties; and the extent of the continental shelf of both parties beyond the area of overlapping entitlements beyond 200 nautical miles.

## VI Is There an Alternative to the Equidistance/Relevant Circumstances Method?

The delimitation of the continental shelf beyond 200 nautical miles has received limited attention in the legal literature. The existing literature does not suggest that there is one readily available generally applicable method.<sup>60</sup> Colson has cautiously suggested that the equidistance line would be a useful tool as a starting point in the delimitation of the continental shelf beyond 200 nautical miles.<sup>61</sup> Marques Antunes and Lilje-Jensen and Thamsborg instead have suggested that the extent of the 200-nautical miles limit of a coastal state linking up with its continental shelf beyond 200 nautical miles could be the basic parameter for the delimitation of the continental shelf beyond the 200-nautical-mile limit.<sup>62</sup> However, Marques Antunes adds that this notion should not be seen as “an absolutely overriding fact. Its weight is to be determined in the delimitation process through an approach that integrates all relevant facts.”<sup>63</sup> Lilje-Jensen and Thamsborg submit that equidistance also can be expected to play an important role in the delimitation of the continental shelf beyond 200 nautical miles.<sup>64</sup> This conclusion should not come as a complete surprise. In cases in which the continental shelf within 200 nautical miles has

60 See D.A. Colson “The Delimitation of the Outer Continental Shelf between Neighboring States” 97 (2003) *The American Journal of International Law*, pp. 91–107; J. Lilje-Jensen and M. Thamsborg “The Role of Natural Prolongation in relation to Shelf Delimitation beyond 200 Nautical Miles” 64 (1995) *Nordic Journal of International Law*, pp. 619–645; N.S. Marques Antunes *Towards the Conceptualisation of Maritime Delimitation* (Martinus Nijhoff publishers, Leiden: 2003), pp. 330–333; R. Meese “La Délimitation du Plateau Continental au-delà des 200 Milles” in Académie de la Mer *Le Plateau Continental Étendu aux Termes de la Convention des Nations Unies sur le Droit de la Mer du 10 Décembre 1982; Optimisation de la Demande* (Pedone, Paris: 2004), pp. 181–229.

61 Colson, *op. cit.*, p. 107.

62 Lilje-Jensen and Thamsborg, *op. cit.*, p. 643; Marques Antunes, *op. cit.*, pp. 330–331.

63 *Ibid.*

64 Lilje-Jensen and Thamsborg, *op. cit.*, p. 644.

already been defined by lines in which the equidistance method played a major role, the “basic parameter” of the 200-nautical-mile opening would be no more than a thinly disguised variation of the equidistance method. Meese at first sight fully supports using the equidistance-relevant circumstances method to delimit the continental shelf beyond 200 nautical miles.<sup>65</sup> However, he then points to the crucial problem of the equidistance method:

Pourquoi appliquer la méthode d'équidistance – qui s'apparente à une division égale d'une surface – applicable à un critère de distance dégagé pour le plateau continental dans les 200 M dans un espace à identité de formes à un plateau continental basé sur un critère de fonds sous-marins à diversité de formes et qui ne pourra pas aboutir à une division égale identique de cette surface additionnelle?<sup>66</sup>

Although this short review shows considerable support for the equidistance method, as Meese's observation indicates, it is not linked to entitlement like it is within 200 nautical miles. As was set out above, this link provided the justification for the International Court of Justice for selecting the equidistance line as a provisional delimitation line for delimitations within that distance. In view of the fact that there is no other single method of delimitation that could occupy this place in the case of the delimitation of the continental shelf beyond 200 nautical miles, it is submitted that one should rather look for generally formulated principles that allow one to identify the appropriate methods in the light of the parameters defining entitlement in the individual case. A starting point for this search could be the judgment of the ICJ in the *North Sea continental shelf* cases. The Court in that instance was faced with a similar situation to the one we are at present studying for the continental shelf beyond 200 nautical miles. Denmark and the Netherlands had persistently argued that continental entitlement was based on absolute proximity (*i.e.* distance) from the coast. The Court refuted this contention and instead held that entitlement was based on natural prolongation.<sup>67</sup> In the light of that conclusion, the Court had to determine the applicable rules of delimitation. According to the Court in the cases before it:

65 Meese, *op. cit.*, p. 228.

66 *Ibid.*, p. 229; see also *ibid.* p. 213.

67 *North Sea continental shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), judgment of 20 February 1969 [1969] *ICJ Reports*, paras. 43–46.



delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other[.]<sup>68</sup>

Let me first of all stress that I am not suggesting giving primacy to geomorphology or geology. No such primacy as a matter of fact was given to these factors by the Court.<sup>69</sup> Rather, the first step in a delimitation should be to determine the extent of overlap of continental shelf entitlements. In addition, it should be established to what extent the natural prolongation of one of the parties extends beyond that of the other party. If this area also overlaps with that of a third state, it should be considered how the delimitation of the continental shelf between the parties would affect the delimitation in the area beyond.

If the equidistance line were to result in a broadly equal division of the area of overlap and did not cut a party off from areas beyond the area of overlapping claims that is also subject to delimitation with a third state, it could be taken as the point of departure for the further delimitation process. However, if that is not the case, a different method should be chosen that achieves a similar result. Alternatively, in this latter case it could be considered to refrain from defining a provisional delimitation line, but instead to move directly to the stage of balancing all relevant circumstances, the approach that was also found to be applicable by the Court in its 1969 judgment.

The above approach would require a closer consideration of the location of the outer limits of the continental shelf than was the case in *Bangladesh/Myanmar*. This would seem to make this approach difficult to implement in the absence of certainty about these outer limits because the CLCS has not yet issued recommendations to all of the coastal states concerned or is blocked from considering the submissions because the consent of one or more of the states is lacking. A number of options would seem to be available in this case. One would be for a court or tribunal to consider whether it would be justified to block the consideration of a submission in the light of the relevant

68 *Ibid.*, para. 101(C)(1).

69 See A.G. Oude Elferink *The delimitation of the continental shelf between Denmark, Germany and the Netherlands: Arguing law, practicing politics?* (Cambridge University Press, 2013), Chapter 9.3.

provisions of UNCLOS.<sup>70</sup> Secondly, a court or tribunal could limit itself to stating the consequences of the applicable law for the specific case without defining a specific line. Finally, it could be considered to apply the approach that has been taken by Iceland and Denmark/Greenland<sup>71</sup> of provisionally delimiting the areas of overlapping continental shelf agreements and providing at the same time that this delimitation will be adjusted in a specific way if one or more of the parties concerned will receive recommendations from the CLCS indicating that its limits fall short of those contained in the submission.

## VII Concluding Remarks

The judgment in *Bangladesh/Myanmar* was the first instance in which an international court or tribunal considered the rules applicable to the delimitation of the continental shelf beyond 200 nautical miles in detail. In the light of the circumstances of the case, the Tribunal's choice to apply the equidistance/relevant circumstances method is understandable. The provisional equidistance line established by the Tribunal was located in the area of overlapping continental shelf entitlements beyond 200 nautical miles and the boundary resulting from the adjustment to take into account the relevant circumstances can be said to lead to an equitable outcome. Moreover, when asked by the Tribunal, the parties had not argued that the Tribunal should apply a different methodology. Bangladesh explicitly supported the equidistance/relevant circumstances method, while Myanmar did not address the delimitation beyond 200 nautical miles because it considered that the boundary did not extend to this area.<sup>72</sup> Nonetheless, the Tribunal's finding that this method is generally applicable to the delimitation of the continental shelf beyond 200 nautical miles is problematic. In certain cases, the equidistance method will have no relation to the area of overlapping entitlements, making it inappropriate as a provisional starting line. As was argued above, there does not seem to be one other method that can take the place of the equidistance method. It is suggested that it could be worthwhile to return to the International Court of Justice's finding on the applicable law in the *North Sea continental shelf* cases.

70 See further A.G. Oude Elferink "Causes, consequences and solutions relating to the absence of final and binding outer limits of the continental shelf" (in: C.R. Symmons (ed.) *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, Leiden)) pp. 253–272 at pp. 264–271.

71 See further above.

72 See judgment of 14 March 2012, paras. 451–453.

The equidistance line could still provide a provisional starting point where it results in a broadly equal division of overlapping entitlements and does not cut a party off from areas beyond the area of overlapping claims that are the subject of delimitation with a third state. However, if that is not the case, a different method that does achieve such a result should be chosen as a starting point. Alternatively, it could be considered to refrain from defining a provisional delimitation line in that case, but instead move directly to the stage of balancing all relevant circumstances, the approach that was also found to be applicable by the Court in its 1969 judgment.