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MARITIME DELIMITATION CASE LAWS FOR UPCOMING LITIGATIONS

Abstract

The case laws from the decided cases, from the North Sea Continental Shelf case up to the Bangladesh v Myanmar case, have established a set of unified principal steps for maritime delimitation, relating to the Territorial Sea (TS), the Exclusive Economic Zone (EEZ), the Continental Shelf (CS) and a single maritime boundary.¹ This paper reviews existing agreements, identifies relevant coasts, looks at delimitation of the TS, EEZ and CS. The paper concludes that the developed case laws from the decided cases of the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS) will have strong influence in future litigations, particularly in the Bangladesh v India case. This paper ends with a set of directions that the Court or Tribunal may consider. The Court and Tribunal need to consider whether the provisional equidistance line chosen needs to be modified to achieve an equitable solution, with regards to a number of special or relevant circumstances. Circumstances related to coastal geography, in particular length of the coastline, shape of the coastline and presence of islands, are the most relevant in this context. However, the Court may also have other circumstances such as historic title, socio-economic considerations and distribution of natural resources, security and conduct of the state parties. The Court may apply an ex-post facto disproportionality test to verify whether the delimitation line as modified is equitable. The Court may make any further necessary modifications. Finally, the Court and Tribunal will also need to specify starting and end points to the delimitation and will need to avoid encroaching on the rights of third states. These legal frameworks and case laws of the judgments of the ICJ and the ITLOS will provide milestones for future maritime delimitations.

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¹ITLOS, Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, 2012.

1. Introduction

Maritime delimitation in the jurisprudence of the ICJ and the ITLOS has been a considerable subject of research in the last few decades. The development of case laws and legal frameworks through the decided cases of the ICJ and Arbitral Tribunals, starting from the North Sea Continental Shelf case to the Bangladesh v Myanmar case, has been well recognised. The ICJ and Tribunals always prefer to develop or clarify essential legal principles of maritime delimitation. However, the first task for the Court or Tribunal in any maritime delimitation case is to determine the relevant coasts to be taken into account. The growing body of jurisprudence developed through international Judicial and Arbitral decisions always support that maritime delimitation between adjacent coasts would be the land boundary between the states at the low water line. In cases where there is an uncertain land terminus, the Court has established a starting point for the maritime delimitation at a short distance out to sea leaving a decision on the land terminus for diplomatic resolution by the states concerned. In delimitation cases, the ICJ and arbitral tribunal always take an attempt to identify the relevant coasts and baselines, questions of sovereignty over disputed islands or certain coastal regions of land territory.

As state's entitlement to maritime areas is measured by reference to its coastline, it is essential in any case of maritime delimitation for the Court or Tribunal to determine the coastline of each party that generates overlapping claims. In case of opposite or adjacent coasts, the predominant practice of the Court is to delimit the single maritime boundary, EEZ or CS up to 200 nautical miles (nm) or until it reaches a point where the rights of third state are affected. The Court and Tribunals need to look at whether there is any existing agreement, formal or tacit or any method to draw a delimitation line. This article focuses on the principles followed in the delimitation cases from the North Sea CS case to the Bangladesh v Myanmar case to identify the relevant case laws. This observation may influence the upcoming Bangladesh v India litigation in the ITLOS. This paper follows 'Doctrinal Legal Research'² methodology with 'Analytical Approach'³ and Rational Deductions⁴. The paper attempts to identify

² Doctrinal Legal Research provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps predicts future developments. This type of research is normally carried out by judges and legal experts. The main fields of doctrinal research are the law of torts and administrative law. See, H N Tewari, *Legal Research Methodology*, Ahmadabad Law Agency, Haryana, India, 2004, pp. 11-16.

³ A A Faruque, *Essentials of Legal Research*, Palal Prokashani, Dhaka, 2009, p. 33.

⁴ Rational Deductions are based on the legal points (ratio decidendi) on which the case was decided. Ratio decidendi is a Latin phrase meaning 'the reason' or 'the rationale for the decision'. The ratio decidendi is 'the point in a case which determines the judgment' or 'the principle which the case establishes'. See, S N Jain, *Doctrinal and Non-doctrinal Research*, India, 1972.

‘Judicial Activism’ (e.g. creativity of the judges).⁵ The paper covers relevant maritime delimitation cases from 1969 to 2012 including existing agreements among the State Parties within the meaning of Articles 15 and 16 (2) of the United Nations Convention on the Law of the Sea i.e. UNCLOS (1982)⁶ and Article 102 (1) and 102 (2) of the United Nations (UN) Charter⁷.

This paper reviews existing agreements in section two, identifies relevant coasts in section three, looks at delimitation of the TS in section four, EEZ and CS in section five. The paper concludes in section six that the developed case laws from the decided cases of the ICJ and the ITLOS will have strong influence in future litigations, particularly in the Bangladesh v India case. The paper ends with a set of directions that the Court or Tribunal may consider.

2. Reviewing Existing Agreements

The prior formal agreements on maritime boundary (see Table 1) are considered in a number of decided cases. In view of the Court, there is a possibility that state practice may evidence a tacit agreement to a particular maritime delimitation or delimitation method for the TS, CS or EEZ. In the case between Cameroon and Nigeria, a number of treaties and agreements affected the delimitation process.⁸ In the Bangladesh v Myanmar case, the Tribunal addressed the question whether the 1974 Agreed Minutes constituted an agreement within the meaning of Article 15 of the Convention or not. The Tribunal recalled the Japan v Russian Federation case⁹ and also the Qatar v Bahrain case, where the ICJ observed that international agreements might take a number of forms and be given a diversity of names and that Agreed Minutes might constitute a binding agreement.¹⁰ In the Bangladesh v Myanmar case, the Tribunal did not accept the Agreed Minutes of 1974. It owed to lack of registration as required by Article 102, Paragraph 1, of the UN Charter. It was due to the failure to deposit charts or lists of geographical coordinates with the Secretary-General of the United Nations as provided in Article 16, Paragraph 2, of the Convention. The Tribunal reached the same conclusion regarding the 2008 Agreed Minutes since these Minutes did not constitute an independent commitment but simply reaffirmed what was recorded in the 1974 Agreed Minutes.¹¹ The Tribunal further viewed that the evidence presented by Bangladesh fell short of proving the existence of a

⁵ Abdul Halim, *The Legal System of Bangladesh after Separation*, Dhaka: University Publications Limited, 2008.

⁶ United Nations, *The Third United Nations Convention on the Law of the Sea*, on 10 December 1982 in Montego Bay, Jamaica, came into force on 16 November 1994.

⁷ United Nations, *Charter of the United Nations*, 26 June 1945.

⁸ ICJ, *The Cameroon v Nigeria: Equatorial Guinea intervening case*, 2002.

⁹ ITLOS, *The Japan v Russian Federation case*, 2007, p 18.

¹⁰ ICJ, *The Qatar v Bahrain case*, 2001.

¹¹ ITLOS, *op. cit.*, 2012.

tacit or de facto boundary agreement concerning the TS. The Tribunal also explained that, in international law, a situation of estoppel exists when a state, by its conduct, creates the appearance of a particular situation and another state, relying on such conduct in good faith, acts or abstains from an action to its detriment. The effect of the notion of estoppel is that a state is precluded, by its conduct, from asserting that it does not agree to, or recognises, a certain situation. The Tribunal recalled the observations in the North Sea CS case and in the Gulf of Maine case. In the view of the Tribunal, there was no indication that Myanmar's conduct caused Bangladesh to change its position to detriment or suffer some prejudice in reliance on such conduct. Therefore, the Tribunal decided that Bangladesh's claim of estoppel could not be upheld.¹²

Table 1. Relevant Maritime Agreements among the State Parties (1954 - 1993)

Agreements among State Parties	Year of Agreement
The Thailand - Vietnam Agreement	1992
The Malaysia -Thailand Agreement	1990
The Denmark - German Democratic Republic Agreement	1988
The Colombia - Panama Agreement	1976
The Colombia - Ecuador Agreement	1975
The Japan - South Korea Agreement	1974
The France - Spain Agreement	1974
The Australian-Indonesian Agreement	1972
The Germany - Netherlands Agreement	1971
The Saudi Arabia - Kuwait Agreement	1965
The Chile and Peru Agreement	1954
The Peru and Ecuador Agreement	1954

Source: various sources collected by author

3. Identifying Relevant Coasts

In cases where states either do not agree on the relevant baselines along the relevant coasts or have not mapped out the baselines, the Court and Tribunal may also be called upon to determine the baselines. In the Bangladesh v Myanmar case and in the Qatar v Bahrain case, the Court had to determine base points. Indeed, in its jurisprudence, the Court always emphasised the need to be faithful to the actual geographical situation¹³ in defining the relevant coast and to avoid completely refashioning nature.¹⁴ In the Qatar v Bahrain case, the Court recognised that the maritime features in question were part of Bahrain's overall geographic configuration and they were not part of a deeply indented coast. Also, they could not be characterised as a fringe of islands. The situation was therefore different from the one analysed in the case of Norway and described in the

¹² *Ibid.*

¹³ ICJ, The Continental Shelf case (Libyan Arab Jamahiriya v Malta), 1985, p. 45.

¹⁴ ICJ, The North Sea Continental Shelf case, 1969, p. 49.

UNCLOS. The Court noted that Bahrain also contended that as it was a de facto archipelagic state, it was entitled to draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago¹⁵ under the Article 47 of the UNCLOS. The Court used normal baselines in this case. The Court faced with a second difficulty in determining the applicable baselines in this case as a result of the presence in the area of low tide elevations. In the case between Qatar and Bahrain, certain low-tide elevations were situated in the area where the TS of the two states overlapped, since each of the two states claimed a TS sea of 12 nm and the distance between the coasts of the mainland of Bahrain and that of the Qatar peninsula were nowhere more than 24 nm. In principle, therefore, each of them had rights to use the low-water line of these low-tide elevations for measuring the breadth of the TS.¹⁶

In the Qatar v Bahrain case, Qatar argued that its longer coastline required such an adjustment to be made to the provisional equidistance line. The Court disagreed in that the Hawar Islands belonged to Bahrain and it did not consider that there was a significant disparity between the lengths of the relevant coasts of each party. Another crucial aspect of coastal geography is the configuration of the coastline. In the North Sea Continental Shelf cases, the concave nature of the coasts of Germany sandwiched between the Netherlands and Denmark was held to be a relevant circumstance. The configuration of the coastline was also held to be a relevant circumstance in the Qatar v Bahrain case. It is true that in the past, the Court recognised the relevance of the geophysical characteristics of the area of delimitation in identifying a line of separation between the CSs of the parties.¹⁷ Again, in the Tunisia v Libya case, the Court recognised that identifying natural prolongation may, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation.¹⁸ The Court also viewed that a marked disruption of the sea-bed may constitute an indisputable indication of the limits of two separate CS or natural prolongations.¹⁹ However, such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation.²⁰ In the Bangladesh v Myanmar case, the Tribunal observed that the coast of Bangladesh as a whole is concave. In the North Sea cases, the Federal Republic of Germany specifically invoked the geographical situation of Bangladesh to illustrate the effect of a concave coast on the equidistance line.²¹ The ITLOS found the concavity of the coast of Bangladesh is a relevant

¹⁵ ICJ, The Qatar v Bahrain case, 2001, p. 96.

¹⁶ *Ibid.*, p. 101.

¹⁷ ICJ, The North Sea Continental Shelf case, 1969, p. 51.

¹⁸ ICJ, Case concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya), 1982, p. 47.

¹⁹ *Ibid.*, p. 57.

²⁰ ICJ, The Continental Shelf case between Libyan Arab Jamahiriya v Malta, 1985, p. 36.

²¹ ICJ, The North Sea Continental Shelf case, 1969, p. 42.

circumstance²² in the Bangladesh v Myanmar case (see Table 2), because the provisional equidistance line produces a cut-off effect on that coast, requiring an adjustment of delimitation line. The Tribunal measured relevant coasts of Bangladesh and Myanmar and found that ratio between these coastal lengths is about 1:1.42 in favour of Myanmar.²³ The Tribunal viewed St. Martin's Island as a vital feature in delimitation of the TS.²⁴

Table 2: Relevant Maritime Delimitation Cases (1969 - 2012)

Reports	Title of the Case	Date of Judgment
ICJR 1969	The North Sea Continental Shelf Case	20 February 1969
ICJR 1977	The France v United Kingdom Case	30 June 1977
ICJR 1982	The Tunisia v Libya Case	24 February 1982
ICJR 1984	The Gulf of Maine Case	12 October 1984
ICJR 1985	The Libya v Malta Case	03 June 1985
ICJR 1985	The Guinea v Guinea-Bissau Case	14 February 1985
ICJR 1993	The Denmark v Norway Case	14 June 1993
ICJR 1999	The Eritrea v Yemen Case	12 June 1999
ICJR 2001	The Qatar v Bahrain Case	16 March 2001
ICJR 2002	The Cameroon v Nigeria Case	10 October 2002
ICJR 2004	The Romania v Ukraine Case	16 September 2004
ICJR 2007	The Nicaragua v Honduras Case	08 October 2007
ITLOS 2012	The Bangladesh v Myanmar Case	14 March 2012

Source: various sources collected by author

4. Delimitation of the TS

When engaged in the task of delimiting the TS, the Courts and Tribunals seek to remove any inequitable effect of special circumstances by modifying the equidistance line. However, in some cases, modification of the provisional equidistance line was sufficient to achieve an equitable result.²⁵ In the Nicaragua v Honduras case in the Caribbean Sea, the Court, while maintaining that equidistance principle in delimiting the TS, opined that it would not be sufficient

²² Paper presented by M Yeadul Islam on "Recent Judgment of ITLOS: An Insight" in the Seminar on *Judgment in the Bangladesh-Myanmar Maritime Delimitation Case: Significant Precedent in the Law of the Sea*, organised by Bangladesh Law Commission, Dhaka on 23 July 2012.

²³ ITLOS, Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, 2012.

²⁴ *Ibid.*

²⁵ Paper presented by M Yeadul Islam on "Delineation of Maritime Zones of Bangladesh and Delimitation of the Boundaries with Neighboring Coastal States" in the Seminar on *Delimitation of Bangladesh Maritime Boundaries with India and Myanmar: Prospects for a Solution* organised by the Department of Law, University of Chittagong on 6 October 2009.

to adjust the provisional equidistance line but that special circumstances required the use of a different method of delimitation known as the bisector method.²⁶ The equidistance-special circumstances rule in the Qatar v Bahrain case was held to have a customary character.²⁷

The ICJ recognised in some cases that the equitability of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain islets, rocks and minor coastal projections. It is difficult to state from the Court's decisions on any simple rule on how the disproportionate effect of such features is to be eliminated. Indeed, much depends on the circumstances of the case. The effect that a small island has on the equidistance line may vary depending on whether the island is located far from, or close to, the coast and on whether the coastlines of the parties are adjacent or opposite. In light of the foregoing view, the ICJ and the Arbitral Tribunals adopted a variety of ways of addressing any disproportionate effect.

Mostly, the Court and Tribunal allowed a partial effect on the delimitation line in case of an island. The more partial effect would be the greater potential for distortion of the boundary. In some cases, such as the Qatar v Bahrain case, the island was given almost no effect. But in the Bangladesh v Myanmar case, the Tribunal awarded full effect to St Martin's Island in adjusting the equidistance line for the Territorial Sea.²⁸ Again, the land boundary between Nicaragua and Honduras ends at Cape Gracias a Dios which is a sharply convex territorial projection abutting upon a concave coastline on either side to the north and southwest. This means that the pair of base points to be identified on either bank of the boundary river Coco would assume a considerable dominance in constructing the equidistance line.²⁹ In the Bangladesh v Myanmar case, the Tribunal noted that the coast of Bangladesh as a whole portrays a classic example of a concave coast. The Tribunal further viewed that on account of the concavity of the coast in question, the provisional equidistance line produces a cut-off effect on the maritime projection of Bangladesh and that the line, if not adjusted would not result in achieving an equitable solution as required by Articles 74 and 83 of the Convention. For equity, the Tribunal became convinced that the delimitation of the maritime boundary in the EEZ and the CS would depend on the geographic realities and the circumstances of the case.

5. Delimitation of the EEZ and CS

In the North Sea CS case, the Tunisia v Libya case and the Gulf of Maine case, the Court in each instance considered the geomorphology of the area to be

²⁶ ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984, p. 327.

²⁷ ICJ, Maritime Delimitation and Territorial Questions between Qatar and Bahrain, 2001, p. 94.

²⁸ ITLOS, *op. cit.*, 2012.

²⁹ ICJ, The Nicaragua v Honduras case, 2007, p. 742.

delimited, in particular to establish whether there were any features interrupting the continuity of the CS. In these cases, the Court clearly considered that any such discontinuities may be relevant to the delimitation of the CS or single maritime boundary. In the North Sea CS, the ICJ was asked to consider the principles and rules applicable to delimitation of the CS among West Germany v Netherlands and West Germany v Denmark in the North Sea. Under Article 6 of the Continental Shelf Convention, delimitation is to be by agreement, or failing that, by a median line equidistant from the nearest points of the TS of each state, subject only to variations for special circumstances. As West Germany was not a party to the 1958 Convention, the Court decided that the Article 6 was not part of customary law and was binding only on those parties to the Convention. In the North Sea case, the Court recognised that the equidistance special circumstance rule could result in an equitable delimitation in certain cases, especially where a state owned a concave coast which would distort the median line. Therefore, in its view, delimitation under customary law was to be effected by the application of equitable principles in order to achieve an equitable result, with the ultimate aim of ensuring that each state had as much CS as was a natural prolongation of its land territory. No single method of delimitation was obligatory, but particular consideration should be paid to the general configuration of the coast, the physical shape of the shelf and the relative lengths of the coastlines of the claimant states. There exists similarity between the coastlines of Bangladesh and Germany as both have concave features.

In the Anglo-French CS case of 1979, the Tribunal emphasised that the purpose of the equidistance special circumstance rule was to achieve an equitable delimitation to be achieved. In the Tunisia v Libya case, the ICJ was asked to identify the principles which the parties should use in delimiting their adjacent CS. According to the Court, the basic rule of customary law was that, in the absence of agreement, delimitation should be on the basis of equitable principles to achieve an equitable result and such equitable principles would vary from case to case. Delimitation according to natural prolongation was not, in itself, necessarily equitable. Therefore, in the Tunisia v Libya case, attention was paid primarily to geographical features, such as the proportionality of the lengths of the coast to the area of the CS, the changes in direction of the Tunisian coast and the existence of offshore islands.³⁰ In the opinion of the ICJ, the equitable result is the primordial requirement and the equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.³¹

It is well established that application of the principles of equidistance, which is more formal and mechanical in nature, does not always ensure the spirit of justice. But the equitable principle is more flexible and open ended in nature. It is

³⁰ ICJ, The Tunisia v Libya case, 1982, p. 60.

³¹ *Ibid.*

generally accepted that median line delimitation on the basis of equidistance principle between opposite coasts results in an equitable solution, particularly if the coasts in question are nearly parallel. In case of adjacent coasts, the application of equitable method is usually followed for delimitation in order to ensure an equitable solution.³² However, the application of the equitable principle should be warranted by the existence of special circumstances. Existing judicial decisions endorse the equitable principle. Concave coast is one of the most prominent geographical circumstances in equitable solution. For instance, maritime agreements among Germany-Netherlands (1971), Denmark-Germany (1988), Colombia-Panama (1976) and France-Spain (1974) are based on equitable principle. It has also been viewed in the *Libya v Malta* case.³³

The principle of equitable demarcation is firmly rooted in the Law of the Sea and emanates from the idea of uniqueness of each boundary. Such uniqueness is the result of great variety of geographical features of the CS which indicates that it is very difficult to posit any fixed rule governing the establishment of maritime boundaries between the states. The idea of the uniqueness of each boundary finds significant support in the jurisprudence of the ICJ and the Arbitral Tribunals dealing with maritime boundary disputes. The ICJ and the Arbitral Tribunals dealing with the delimitation of maritime boundaries have consistently held that the equidistance principle was not mandatory rule of the international law and it did not enjoy any priority or preferential status. In cases coming before the Court, states have increasingly requested the Court to delimit a single maritime boundary for the CS and the EEZ. This occurred in the *Qatar v Bahrain* case and the *Bangladesh v Myanmar* case.

In delimiting the CS and the EEZ of both adjacent and opposite coasts, the Court generally first provisionally draws an equidistance line, or at least considers the appropriateness of such an equidistance line. The Court then considers whether there are circumstances which must lead to an adjustment of that line or indeed, in extreme cases, to the use of another delimitation technique in order to achieve an equitable solution. This approach was adopted in the *Qatar v Bahrain* case, the *Greenland v Jan Maine* case, the *Cameroon v Nigeria* case and the *Bangladesh v Myanmar* case, where the final delimitations were modified the equidistance lines. In the *Nicaragua v Honduras* case the Court concluded that an equidistance line could not produce an equitable outcome in light of the particular circumstances of the case and applied the bisector method.³⁴ In the most recent case of *Maritime Delimitation in the Black Sea*, the *Romania v Ukraine* case, the Court, after a careful consideration of the various relevant circumstances in the dispute between the parties, decided that there was no need to adjust the provisional equidistance line drawn by the Court.

³² ICJ, *The Eritrea v Yemen* case, 1999; ICJ, *The Denmark v Norway* case, 1993.

³³ ICJ, *The Libya v Malta* case, 1984, p. 44.

³⁴ ICJ, *The Nicaragua v Honduras* case, 2007.

In the Qatar v Bahrain case, the Court, following its jurisprudence, first drew a provisional equidistance line for the CS and EEZ. It then turned to consider whether a number of the relevant circumstances raised by the parties warranted the adjustment of this provisional equidistance line.³⁵ One important concept in maritime delimitation relevant to coastal geography is the concept of proportionality. Proportionality is based upon the relationship between the relative lengths of the coasts of the parties abutting the maritime area to be delimited and the relative areas of maritime space allocated to each of the parties by means of delimitation. In a number of cases, such as the Bangladesh v Myanmar case, the Gulf of Maine case, the Greenland v Jan Maine and the Libya v Malta delimitations, the Court considered the equitability of a provisional equidistance line by comparing the ratio between the lengths of each party's coast and the maritime areas allocated to that party by the provisional line.

One party may have a significantly longer coastline than the other. But the maritime area allocated by the provisional line may not reflect the disparity in coastal length. In that case, the Court without requiring precise mathematical proportionality modifies the provisional equidistance line in order to achieve a more equitable ratio. The concept of proportionality is also employed as an *ex post facto* verification of the equitableness of a maritime delimitation, a disproportionality test, which was done in the Bangladesh v Myanmar case.³⁶ There are indeed at least three similarities between the North Sea CS case and the Bangladesh v Myanmar case.

The first is the concavity of the coast of the states concerned. The second is the role of geology and the relevance of the concept of natural prolongation. The third is the necessity for the judge seized with the dispute to exercise law-making functions. In the North Sea case, the ICJ had to determine the rules for the delimitation of the CS. In the 2012 case, the ITLOS had to determine the method for delimiting the CS beyond 200 nm. In addition to the great advantages of judicial consistency, transparency and predictability of the law, adherence to judicial precedents produces two drawbacks. The Court follows the general trend in endorsing some misunderstandings or equivocal solutions of its predecessors. The delimitation of the single maritime boundary between Bangladesh and Myanmar follows very much the trend in recent delimitation cases. In delimiting the single boundary between the EEZ and the CS, ITLOS professed to start by a provisional equidistance line.³⁷ However, it then immediately proceeds to choose the base-point for this line, thus producing what in reality is a modified equidistance line.

³⁵ ICJ, The Qatar v Bahrain case, 2001.

³⁶ ITLOS, *op. cit.*, 2012.

³⁷ *Ibid.*, p. 76.

The second drawback is the absence of elaboration on some points, in the likely wish to avoid discussing critically previous decisions. The decision therefore does not significantly depart from the established law as developed by the ICJ and the Arbitral Tribunals in their law making capacity. In the *Bangladesh v Myanmar* case, the Tribunal has taken care to add its little bit to the existing case law and to move it one step forward. The two most evident examples are the delimitation of the CS beyond 200 nm and the regime applicable in the grey areas. The Tribunal clarified that the TS will prevail upon the EEZ and that a state may exercise rights in an area of overlapping that does not impede the exercise of rights by the other state.³⁸ It has also shed light on the meaning of agreement in Article 15 of the UNCLOS, on the basis of the entitlement to a CS beyond 200 nm and on the relationship between the role of the Commission on the Limits of the CS and that of the binding dispute settlement mechanism in Part XV of the UNCLOS. In this case, the ITLOS made clear that a Court or Tribunal having jurisdiction on the basis of Part XV of the UNCLOS can delimit the CS beyond 200 nm even in the absence of recommendations by the Commission on the Limits of the CS³⁹ and that there are no reasons to abstain from exercising its jurisdiction.⁴⁰

Secondly, the ITLOS defined that natural prolongation for the purposes of Article 76 of the UNCLOS is same as the continental margin, as defined in the same article.⁴¹ The legal consequences of the recent judgment of the ITLOS should have a strong influence in future litigation. It will be interesting to see what role will be attributed by the ICJ or the ITLOS, to the ITLOS decision of 2012, in the upcoming litigations: the *Peru v Chile* case and the *Bangladesh v India* case of 2014.

6. Conclusion

The case laws and legal frameworks through the decided cases, starting from the *North Sea CS* case to the *Bangladesh v Myanmar* case, have established a set of unified principal steps for maritime delimitation, relating to the TS, the EEZ, the CS or a single maritime boundary. The Court must first consider whether any part of the maritime delimitation is already the subject of formal or tacit agreement between the parties. If so, the Court or Tribunal must not disturb that aspect of the delimitation. The Court or Tribunal must determine the relevant coasts for the delimitation and also determine which base points are to be used for the construction of a provisional equidistance line. The choice of base points is to be made on a purely legal basis with any inequities arising from such a choice to be dealt with at a later stage. The Court and Tribunal draw a provisional

³⁸ *Ibid.*, p. 55.

³⁹ *Ibid.*, p. 108.

⁴⁰ *Ibid.*, p. 115.

⁴¹ *Ibid.*, p. 127.

equidistance line, unless the special circumstance is such as to warrant the application of an entirely different method.

The Court and Tribunal need to consider whether the provisional equidistance line chosen needs to be modified to achieve an equitable solution, with regards to a number of special or relevant circumstances. Circumstances related to coastal geography, in particular length of the coastline, shape of the coastline and presence of islands, are the most relevant in this context. However, the Court may also have other circumstances such as historic title, socio-economic considerations and distribution of natural resources, security and conduct of the state parties. The Court may apply an ex-post facto disproportionality test to verify whether the delimitation line as modified is equitable. The Court may make any further necessary modifications. Finally, the Court and Tribunal will also need to specify starting and end points to the delimitation and will need to avoid encroaching on the rights of third states. These legal frameworks and case laws of the judgments of the ICJ and the ITLOS will provide mile stones for future maritime delimitations. It will be interesting to see what role will be attributed by the ICJ in the Peru v Chile case. It is certain that the existing case laws relevant to concavity of the coast, concept of proportionality and equity will have strong influence on the upcoming litigations, particularly on the Bangladesh v India case of 2014.