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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Право делимитации морских пространств в его развитии международными судебными органами

Шуэша Ляо

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

The Law of Maritime Delimitation as Developed by International Judiciary

Xuexia Liao

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Летняя Школа по международному публичному праву 2024 года
Summer School on Public International Law of 2024

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

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В 2024 году Летняя Школа состоялась в пятый раз и прошла в гибридном формате. В Москве курсы читали Альфредо Кросато Нойманн, Шуэша Ляо, Эйрик Бьорге и Бенуа Майер. Ряд лекций были проведены с подключением экспертов онлайн в библиотеке Центра. Онлайн-занятия провели Ида Караччоло, Нилюфер Орал, Кэти-Энн Браун и сэр Майкл Вуд. Были прочитаны лекции на такие темы, как право международных договоров, изменение климата и международное право, обязательства по международному праву, различные аспекты морского права и, конечно, лекции в рамках общего курса по международному публичному праву. Эти и другие материалы Летней Школы прошлых лет доступны на сайте iclrc.ru.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову, С. В. Усоскину — и всем, кто внёс вклад в реализацию этой идеи.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered at the Summer School on Public International Law.

The Summer School is a project of the ICLRC aimed at providing those learning, working, or aspiring to work in the sphere of international law with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of a general course on public international law, lectures on special topics, and seminars delivered by leading international law experts, as well as of independent and collective studying.

In 2024, the Summer School was held for the fifth time, in a hybrid format. The offline courses in Moscow were delivered by Alfredo Crosato Neumann, Xuexia Liao, Eirik Bjorge, and Benoit Mayer. A number of lectures were held at the Center's Library with remote experts, namely Ida Caracciolo, Nilufer Oral, Kathy-Ann Brown, and Sir Michael Wood. Among the topics of the lectures were the law of treaties; climate change and international law; obligations under international law; lectures on the law of the sea; and of course, the general course on public international law. These and the past years materials of the Summer School are available on the website iclrc.ru.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, Bakhtiyar Tuzmukhamedov, and Sergey Usoskin — as well as others who helped implement the project.

Шуэша Ляо

Шуэша Ляо — доцент юридического факультета Пекинского университета. Она получила докторскую степень в Высшем институте международных исследований и развития в Женеве (2018 г.) и диплом Гаагской академии международного права (2016 г.). В сферу её научных интересов входят делимитация морских пространств, режим континентального шельфа и международное урегулирование споров. Она является автором книги «Делимитация континентального шельфа за пределами 200 морских миль: на пути к общему подходу к установлению морских границ» (CUP 2021) и ряда научных статей, опубликованных в таких журналах, как *Leiden Journal of International Law, Ocean Development & International Law* и *International Journal of Marine and Coastal Law*. Она также вносит вклад в Энциклопедию международного публичного права Макса Планка и входит в редакционный совет журнала *Chinese Journal of Environmental Law*.

Xuexia Liao

Dr. Xuexia Liao is assistant professor at Peking University Law School, Beijing. She holds a Ph.D. diploma from Graduate Institute of International and Development Studies, Geneva (2018) and Diploma of Hague Academy of International Law (2016). Her research interests include maritime delimitation, the continental shelf regime, and international dispute settlement. She is author of "The Continental Shelf Delimitation beyond 200 Nautical Miles: Towards a Common Approach to Maritime Boundary-Making" (CUP 2021) and a number of research articles published by *Leiden Journal of International Law, Ocean Development & International Law,* and *International Journal of Marine and Coastal Law*. She also contributes to Max Planck Encyclopedia of Public International Law and serves on the editorial board of *Chinese Journal of Environmental Law*.

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INTRODUCTION

As a body of principles and rules, the law of maritime delimitation only came into shape in the second half of the 20th century, primarily because of the expansion of sovereign claims to maritime areas. Traditionally, there were very few applicable rules of maritime delimitation because the areas to be delimited were confined to small portions of seas, namely, the territorial sea. However, after the Second World War, coastal States' jurisdiction over maritime areas expanded, as claims were made to the continental shelf and then to exclusive economic zones (EEZ). The result was that almost every coastal State's maritime claim would come into conflict with that of others, giving rise to the need of dividing the large areas of overlap. It is the delimitation of these expansive maritime zones that is the focus of the current special course. The law of maritime delimitation is developed by international courts and tribunals and is famously referred to as 'judge-made law'. The reason is partly that international treaties provide no detailed rules for carrying out the delimitation process and partly that, in State practice, States enjoy complete political autonomy in drawing maritime boundaries, which reduces the possibility of the emergence of *opinio juris*, a constitutive element of customary international law. Only when States could not agree on the course of their maritime boundaries and decide to resort to a third-party, the need for principles and rules arise. This also explains the limited application of the law of maritime delimitation, since that body of law only applies in a judicial or arbitral context, though it is not uncommon that States refer to it so as to justify their own delimitation positions.

Beginning with the 1969 *North Sea Continental Shelf*, the International Court of Justice (ICJ, or 'the Court') laid the foundation for the law of maritime delimitation and throughout its jurisprudence a delimitation methodology has gradually consolidated, which was

widely applied to the delimitation of the continental shelf, the fisheries zones/EEZ and, more frequently nowadays, a single delimitation of the continental shelf and the EEZ. However, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) establishes its own and specialized dispute settlement system and introduces into the landscape of international adjudication the International Tribunal for the Law of the Sea (ITLOS) as well as *ad hoc* tribunals to be established in accordance with Annex VII. A question naturally arises: how the multiplicity of international courts and tribunals impacts on the further development of the law of maritime delimitation.

In this special course, I will examine the law of maritime delimitation, focusing on the key elements of the delimitation process. It is the principles and trends rather than technical details that will be considered. While maritime delimitation is undoubtedly supported by science such as geography and cartography, it remains a legal and political process. Concurrently, I will structure the lectures by comparing the roles of ICJ and UNCLOS in the development of the law of maritime delimitation. My argument is that, while the ICJ dominated the shaping of the law in delimiting the continental shelf and EEZ within 200 nm, UNCLOS tribunals were the pioneers in developing the rules concerning the delimitation of the continental shelf beyond 200 nm, which is a renewed regime under UNCLOS. Although UNCLOS tribunals initially reinforced the delimitation methodology established by the ICJ in dealing with maritime boundary disputes, alleviating concerns about fragmentation, recent development in the delimitation of the continental shelf beyond 200 nm presents a different perspective. In this context, despite some convergences, the ICJ and UNCLOS tribunals diverged on certain crucial issues. The law of maritime delimitation thus provides a useful lens through which the contemporary landscape of international judiciary may be appreciated, where UNCLOS tribunals are thriving and competing with the ICJ. In turn, an institutional perspective of courts and tribunals may illuminate the pathways through which the law itself is evolved.

LECTURE 1:

The Law of Maritime Delimitation: An Overview

As authoritatively stated by the International Court of Justice (ICJ, or 'the Court'), 'the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned'.[1] The law of maritime delimitation is thus a body of rules governing the division of the overlap generated by the competing maritime claims of coastal States. It is thus necessary to first understand the rules governing maritime entitlements before turning to the rules of delimitation. This opening lecture will provide (1) the concepts of maritime zones as well as their respective limits in the light of their historical evolution; (2) the nature of maritime delimitation; (3) the conventional rules governing maritime delimitation; and (4) a preliminary survey of the case law concerning maritime delimitation.

1. Seaward Limits of Maritime Zones

Maritime entitlements conferred upon coastal States by international law went through profound change throughout the 17th century to the 20th century, and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) eventually settled the definition of maritime zones as well as their respective limits.[2] The historical development of maritime zones is a central part to the development of the law of the sea, because human activities in the oceans are regulated largely according to the specific zones

[1] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* [2009] ICJ Rep 61 [77].
[2] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1892, in force 16 November 1994) 1833 UNTS 396.

they took place. The spatial distribution of jurisdiction of States is foundational for ocean governance.[3]

The evolution of the maritime zones could be traced in the light of the tension between claims to sovereignty and to freedom, a structural force underlying the law of the sea.[4] Coastal States' claims to exclusive control of the seas and the countering claims of the freedom of the seas came into direct conflict in the 17th century. At this stage, treatises written by publicists made a significant contribution to the basic ideas of the spatial distribution of oceans and seas. The Dutchman Hugo Grotius gave expression to the idea of the freedom of the seas in his capacity as the lawyer hired by the Dutch East India Company, defending the interests of the latter in the capture of treasures of a Portuguese vessel.[5] His opponents, including John Selden and William Wellwood put forward the view that seas could be subject to occupation and control by a State.[6] Eventually, a compromise emerged out of the competing two schools, which was reflected in the works of another Dutch publicist, Bynkershoeck, who claimed that coastal States' control of seas was limited to the areas where the State actually exercises sovereignty, measured by the military capacity of the State. Bynkershoeck proclaimed a 'cannon shot rule' that was immensely influential, according to which the seas under the sovereignty of coastal States extend as far as the cannon shot of the State would reach.[7]

Therefore, up to the 19th century, it was established that the seas and oceans were divided into two regimes, namely, territorial sea under the sovereignty of coastal States and the high seas, which was

[3] See Yoshifumi Tanaka, *The International Law of the Sea* (4th edn, Cambridge University Press 2023) 4.
[4] Tullio Treves, 'Historical Development of the Law of the Sea' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 3.
[5] Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edition, Manchester University Press 2022) 9.
[6] Treves (n 4) 4.
[7] ibid 5.

open to all. The 'cannon shot rule', which is apparently ambiguous, gave way to the measurement of the territorial sea by a fixed limit. Throughout the 19th century, most States agreed that territorial sea extended to 3 nautical miles (nm) from the coast, though practice claiming a 6-nm territorial sea or even 12-nm territorial sea existed.[8] The differences on the breadth of territorial sea would become one of the most acute issues dividing States in the international efforts of codifying and developing the law of the sea. The 1930 Hague Codification Conference failed to produce an agreement on the regime of territorial seas, though a list of articles on its definition, nature, and scope was annexed to the conference report.

The 1958 Convention on the Territorial Sea and the Contiguous Zone, produced by the First United Nations Convention on the Law of the Sea, similarly did not include an article on the seaward limits of the territorial sea due to the persisting divergences of views, but it largely incorporated the list of draft articles appended to the 1930 Hague Codification Conference. It was until 1982 UNCLOS that seaward limits of the territorial sea were eventually agreed. Under Art.3 of UNCLOS, every coastal State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nm.

Towards the end of the 19th century the concept of contiguous zone became accepted. It is a zone of limited scope, and in this zone coastal States do not have sovereignty, but rather certain limited functions such as fiscal and immigration jurisdictions, whose aim is to protect the public order of the coastal States' territories. The 1958 Convention on the Territorial Sea and Contiguous Zone defines the scope and functions of the contiguous zone, which are reproduced without significant debate or change into Art.33 of UNCLOS.[9]

The division between territorial sea and the high seas as the basic structure of spatial distribution of oceans was under

[8] ibid 5–6.
[9] See Churchill, Lowe and Sander (n 5) 210.

significant challenge since the Second World War. The period in the aftermath of 1945 was marked by a 'territorial temptation' of expansive exclusive claims made to the seas and seabed, beginning with the 1945 Truman Proclamation.[10] In the Proclamation the United States claimed exclusive jurisdiction over the natural resources including oil and gas in the seabed and subsoil of the continental shelf, which, nevertheless, fell short of a claim of sovereignty.[11] This claim was apparently in tension with the division between territorial sea and the high seas and may be seen as an infringement of the freedom of the high seas. However, it was quickly followed by a widespread State practice that laid exclusive claims to the continental shelf. By 1950, the Special Rapporteur J.P.A. François appointed by the International Law Commission (ILC) observed that 'a large number of proclamations by States already existed, which constituted a starting point for the formulation of positive law'.[12]

While the early State practice claiming the continental shelf varied in nature and scope, the 1958 Convention on the Continental Shelf (CCS) defined the legal continental shelf as 'the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'.[13] While the 200-metre-isobath criterion confines the legal continental shelf with a certain geographical scope, the other 'exploitability criterion' theoretically permits unlimited extension of coastal States' jurisdiction over the seabed and subsoil. The 1958 CCS also

[10] Bernard H Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 American Journal of International Law 830, 831–832.
[11] Presidential Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (September 28, 1945) (hereinafter 'Truman Proclamation').
[12] ILC Yearbook 1950 Vol. I, para.78.
[13] Art.1 of the Convention on the Continental Shelf (Geneva, 29 April 1958, into force 10 June 1964) 499 UNTS 311.

establishes that coastal States have exclusive and inherent rights to the continental shelf, by which it means that the continental shelf cannot be explored or exploited without the consent of the coastal State and continental shelf rights are not subject to effective occupation or proclamation. The legal nature of continental shelf rights was maintained ever since and carried over to Art.77 of UNCLOS. Nevertheless, the legal definition of the continental shelf under the 1958 Convention was replaced by Art.76(1) of UNCLOS, under which the continental shelf either extends throughout the natural prolongation of the coastal State to the outer edge of the continental margin, or to a distance of 200 nm.

In the 1960s, coastal States, especially the African and Latin American States, started to proclaim exclusive zones for fishery resources, and this rapidly developing practice was consolidated under the terminology EEZ during the Third United Nations Conference on the Law of the Sea in 1973–1982. The concept of EEZ emerged out of the desire of coastal States, especially developing States, for control and management of the natural resources off their coasts, in particular fish stocks.[14] Thus the rationale of the EEZ differs from that of the continental shelf, which is concerned with the non-living resources of the seabed and subsoil, though both of them were originally rooted in the expansion of coastal States' exclusive jurisdiction over maritime areas initiated since the 1945 Truman Proclamation. Nevertheless, under Art.57 of UNCLOS, the EEZ shall not extend beyond 200 nm, making it common that coastal States' continental shelf and EEZ overlap geographically. Moreover, Art.56(1) of UNCLOS provides that in the EEZ coastal States have the sovereign rights 'for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil'. Accordingly, the sovereign rights within the EEZ include those within the continental shelf. But Art.56(3)

[14] Churchill, Lowe and Sander (n 5) 255.

further provides that 'the rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI'.

Other than the continental shelf and the EEZ, a different kind of challenge to the freedom of high seas, however, came from developing States' call to internationalizing the deep seabed. Back in the 1960s, technological development discovered mineral resources, such as polymetallic nodule and cobalt-rich crusts, in the ocean floor and it was predicted that these mineral resources might be of great industry potential. However, concern was expressed that these resources may fall within the exclusive control of developed and industrialized States under the 'exploitability criterion' of the continental shelf. The concept of 'common heritage of mankind', coined by Maltese Ambassador Arvid Pardo, was put forward to counter the creeping expansion of the continental shelf. According to the 1970 General Assembly Resolution 2749,

> The sea-bed and ocean floor beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind. This area shall not be subject to appropriation by any means by States or persons, and no State shall claim or exercise sovereignty or sovereign rights over any part of this area.[15]

Part XI of UNCLOS establishes the regime governing 'the Area', defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.[16] It was supplemented and modified (to an extent) by the 1994 Implementing Agreement.[17]

[15] 1970 General Assembly Resolution 2749 (XXV) on Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, UN Doc. A/RES/25/2749 (1970).
[16] Art.1(1) of UNCLOS.
[17] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994, into force 16 November 1994) 1836 UNTS 3.

To summarize, UNCLOS sets up a contemporary framework for spatial distribution of maritime zones and ends the controversies regarding the seaward limits of certain maritime zones, such as the territorial sea and the continental shelf. Under UNCLOS, the territorial sea, the contiguous zone, the continental shelf and the EEZ fall within the national jurisdiction of coastal States. All the maritime zones under national jurisdiction are measured by reference to baselines, which represent the coastal configuration of the coastal States.[18] The high seas are subject to freedom, though their geographical scope has been significantly reduced given the expansion of the territorial sea and the establishment of the continental shelf and the EEZ regimes. For its part, the Area as well as the activities thereof is regulated by an international regime.

Only in terms of territorial sea, EEZ, and the continental shelf UNCLOS lays down delimitation rules. UNCLOS contains no delimitation rules for the contiguous zone, potentially because spatially the contiguous zone overlaps with that of the EEZ and the continental shelf, so a boundary for the latter two would for practical purposes satisfy the needs of coastal States for maritime boundaries.[19]

2. The Nature of Maritime Delimitation

As mentioned in the beginning, maritime delimitation is a process of dividing the overlapping entitlements. After UNCLOS settles the seaward limits of the territorial sea, the EEZ and the continental shelf, the area of overlap is now ascertainable in concrete cases by reference to the rules of maritime entitlements. Delimitation is, on the other hand, about how the area of overlap is divided. The nature of this process has been aptly put by Weil:

[18] UNCLOS provides normal baselines (Art.5), straight baselines (Art.7), and archipelagic baselines (Art.47).
[19] Churchill, Lowe and Sander (n 5) 210.

> Every time the maritime projections of two States meet and overlap, each of them must inevitably forgo the full enjoyment of the maritime jurisdictions it could have claimed had it not had the geographical misfortune to find its appropriation in conflict with that of its neighbour. A line of separation then has to be drawn, which is exactly what maritime delimitation is all about.[20]

This observation made two critical points about the delimitation process. First, every delimitation presupposes an area of overlapping entitlements. Without overlap, there is no delimitation. Second, by maritime delimitation, no State eventually enjoys the full extent of its entitlement. How, then, *should* the area of overlap be divided? Many questions can be asked and here are some illustrative examples:

(1) Shall each of the States get an equal share of the overlapping areas?

(2) Shall delimitation be carried out by sharing out the natural resources?

(3) Shall more space be given to the State with a larger land territory, or the State with longer coasts?

(4) Shall more space be given to the richer country or to the poorer country?

All these questions are normative and political ones, because they involve policy choices and preferences, and in fact we can imagine entirely different approaches to maritime delimitation if we answer these questions differently. These choices and preferences are made and maintained by the international judiciary in concrete cases. They are expressed in legal principles and rules

[20] Prosper Weil, *The Law of Maritime Delimitation: Reflections* (Grotius Publications Limited 1989) 3.

and implemented by scientific or geometrical methods. It is in this sense that maritime delimitation is, and always will be, a legal-political process.[21]

3. Conventional Rules on Maritime Delimitation

The 1958 Convention on the Territorial Sea and the Contiguous Zone and the CCS contain rules of delimitation concerning territorial sea and the continental shelf respectively. Art.12 of the Convention on the Territorial Sea and the Contiguous Zone provides that:

> 1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

The rule consists of two elements. The first is the method of equidistance, which produces a median line that is equidistant from the nearest points on the baselines of each of the two States. The second is historic title or other special circumstances. It is often referred to as 'equidistance/special circumstances' rule. The Convention, however, does not define what would qualify as special circumstances, nor does it clarify how special circumstances and equidistance method play out in concrete delimitation process. The 'equidistance/special circumstances' is incorporated into Art.15 of UNCLOS, which is virtually identical with Art.12 of

[21] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246 [56].

the 1958 Convention, and it is found to be part of customary international law.[22]

Art.6 of the CCS concerning the delimitation of the continental shelf, for its part, adopts an 'agreement — equidistance — special circumstances' rule:

> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Although Art.6 differentiates delimitation between adjacent States and that between opposite States, the rule is essentially the same. In 1969 *North Sea Continental Shelf*, the customary status of Art.6 was contested and denied by the ICJ.[23] Neither did this rule survive the negotiations of UNCLOS. In fact, the delimitation rule for the continental shelf and the EEZ was one of the most controversial issues that almost killed the conference. For there were two groups

[22] *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Merits) [2001] ICJ Rep 40 [175].
[23] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3 [81].

of States, one in support of equidistance and the other of equitable principles, a term coined by the ICJ in *North Sea Continental Shelf*.[24] The conflict was intractable, and, eventually, it was the compromise text proposed by the President of the Conference that was agreed, which did not refer to equidistance, special circumstances, or equitable principles.[25] Currently, Arts.74(1) and 83(1) of UNCLOS, worded identically, govern the delimitation of the EEZ and the continental shelf respectively:

> The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Essentially, what is required by these provisions is, simply, that coastal States shall try to reach an agreement on the basis of international law in order to achieve an equitable solution. It is because of the emptiness of these provisions that the ICJ observed in 1985 *Libya/Malta*: 'The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific content.'[26] Since Arts.74(1) and 83(1) contain no delimitation method or rule, it is left to the international judiciary to develop the applicable methodology to the delimitation of the continental shelf and the EEZ.

4. Case Law of Maritime Delimitation: A Preliminary Survey

Beginning with 1969 *North Sea Continental Shelf* and up to the end of 2024, the ICJ has decided 14 cases concerning maritime

[24] ibid [85].
[25] See Tanaka (n 3) 261–262.
[26] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13 [28].

delimitation. Among them, three cases dealt solely with the continental shelf delimitation,[27] one case concerns only the question of the delimitation of the continental shelf beyond 200 nm,[28] and ten cases involved the single delimitation of the continental shelf and the EEZ/fishery zones.[29] Single maritime delimitation is the drawing of a single line in delimiting various maritime zones, and it is a common practice of States in concluding maritime boundary agreements. According to the ICJ,

> [T]he concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and… finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various — partially coincident — zones of maritime jurisdiction appertaining to them.[30]

Among the 14 cases, in seven of them the ICJ also delimited the territorial seas of the parties,[31] in four of them the ICJ decided territorial disputes in addition to maritime boundary disputes,[32] and in one of them the ICJ extended the maritime boundary to delimit the continental shelf beyond 200 nm.[33] That the ICJ could decide territorial disputes with the consent of the parties is one critical difference in the jurisdiction *ratione materiae* between the ICJ and UNCLOS tribunals, as the latter have no jurisdiction over disputes concerning territorial sovereignty according to Art.288(1)

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[27] 1969 *North Sea Continental Shelf*, 1982 *Tunisia/Libya*, and 1985 *Libya/Malta*.
[28] 2023 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*.
[29] 1984 *Gulf of Maine*, 1993 *Jan Mayen*, 2001 *Qatar v. Bahrain*, 2002 *Cameroon v. Nigeria*, 2007 *Nicaragua v. Honduras*, 2009 *Black Sea*, 2012 *Nicaragua v. Colombia*, 2014 *Peru v. Chile*, 2018 *Costa Rica v. Nicaragua*, and 2021 *Somalia v. Kenya*.
[30] *Qatar v. Bahrain* (n 22) [173].
[31] 2001 *Qatar v. Bahrain*, 2002 *Cameroon v. Nigeria*, 2007 *Nicaragua v. Honduras*, 2012 *Nicaragua v. Colombia*, 2014 *Peru v. Chile*, 2018 *Costa Rica v. Nicaragua*, and 2021 *Somalia v. Kenya*.
[32] 2001 *Qatar v. Bahrain*, 2002 *Cameroon v. Nigeria*, 2007 *Nicaragua v. Honduras*, and 2012 *Nicaragua v. Colombia*.
[33] 2021 *Somalia v. Kenya*.

of UNCLOS. However, according to the fundamental principle that 'the land dominates the sea', maritime entitlements derive from coastal States' sovereignty over the land territory,[34] and in case of territorial disputes, the scope of maritime entitlements of the coastal States cannot be ascertained without first ascertaining the sovereignty over the disputed land. That is why many maritime boundary disputes remain unsettled due to the existence of an unresolved or unresolvable territorial dispute.

Other than the ICJ, coastal States also submit their maritime boundary disputes to *ad hoc* arbitrations. Up to date there are four such cases, namely, 1977 *Anglo-French Continental Shelf Arbitration*, 1985 *Guinea/Guinea-Bissau Arbitration*, 1992 *St. Pierre and Miquelon Arbitration*, and 1999 *Eritrea/Yemen Arbitration*. Only the *Anglo-French Continental Shelf Arbitration* was concerned with the delimitation of the continental shelf whereas the remaining cases dealt with single maritime delimitation of the continental shelf and EEZ.

UNCLOS tribunals are relatively recent actors in the field of maritime delimitation. The first maritime delimitation dispute was submitted to UNCLOS dispute settlement in 2004. So far, UNCLOS Annex VII arbitral tribunal decided three maritime delimitation cases, namely, 2006 *Barbados v. Trinidad and Tobago*, 2007 *Guyana v. Suriname*, and 2014 *Bangladesh v. India*. ITLOS, for its part, also delimited maritime boundaries in three cases, i.e., 2012 *Bangladesh/Myanmar*, 2017 *Ghana/Côte d'Ivoire*, and 2023 *Mauritius/Maldives*.

It is observed that the ICJ has adjudicated more maritime boundary cases than the combined total of those decided by *ad hoc* arbitral tribunals and UNCLOS tribunals. However, even a preliminary survey of the case law reveals an intriguing phenomenon: while the ICJ has undoubtedly been the most active actor in shaping the law of maritime delimitation, especially the

[34] *North Sea* (n 23) [96].

law governing the delimitation of the continental shelf and the EEZ within 200 nm, UNCLOS tribunals have addressed more cases concerning the continental shelf beyond 200 nm than the ICJ (the number is three to one).[35] Notably, it was ITLOS that first delimited the continental shelf beyond 200 nm in 2012 *Bangladesh/Myanmar*, whereas the ICJ undertook to delimit the continental shelf beyond 200 nm in 2021 *Somalia v. Kenya*, which remains the only instance in which the ICJ actually drew a boundary for the continental shelf beyond 200 nm.

The following lectures will therefore first examine the development of the law of maritime delimitation by the ICJ before turning to the practice of UNCLOS tribunals concerning maritime delimitation within 200 nm. Afterwards, the last two lectures will focus on the delimitation of the continental shelf beyond 200 nm by comparing the jurisprudence of UNCLOS tribunals with that of the ICJ.

[35] UNCLOS tribunals delimited the continental shelf beyond 200 nm in 2012 *Bangladesh/Myanmar*, 2014 *Bangladesh v. India*, and 2017 *Ghana/Côte d'Ivoire*.

LECTURE 2:

The International Court of Justice and the Evolution of Delimitation Methodology

Maritime boundary disputes are submitted to the ICJ through special agreement or clause declarations under Art.36(2) of the ICJ Statute. Dispute settlement treaties also offer a jurisdictional basis for States to resort to the ICJ. For instance, Latin American States usually refer their maritime boundary disputes to the ICJ on the basis of Pact of Bogotá. These jurisdictional bases exist independently from UNCLOS, and their parallel existence enabled coastal States to choose between UNCLOS dispute settlement mechanism and the ICJ after UNCLOS came into force.

This lecture examines the substance of the law of maritime delimitation as developed by the ICJ over the last 50 years, dividing it into different stages in the light of the inherent tension underlying the law of maritime delimitation, namely, between certainty and flexibility.

I should emphasize at the beginning that the ICJ was not the only actor that contributed to the content of this body of law. Decisions of certain *ad hoc* arbitral tribunals, such as the 1977 *Anglo-French Continental Shelf Arbitration*, were also constructive. But it was the ICJ that systematized the key elements of the law of maritime delimitation and gradually consolidated the delimitation methodology that is now generally applied in maritime delimitation.

1. The Tension Between Certainty and Flexibility

There exists persistent tension in the law of maritime delimitation between certainty and flexibility, as the law was

developed with the aim to fulfilling two contrasting needs. As pointed out by Weil,

> In defining the legal rules governing maritime delimitation the courts have always been faced with the formidable challenge of striking a balance between two contradictory requirements. On the one hand is the necessity, inherent in the law, of defining rules which are sufficiently general in character to cover all individual situations of like character, for, without a minimum of generality, the rule of law will not fulfil the functions of predictability and certainty expected of it. On the other hand, too general a rule risks being inappropriate in some cases, and applying it may lead to unreasonable or inequitable results.[36]

The tension between these two requirements arises because, in reality, there are no two identical geographical contexts in which delimitation is carried out; each delimitation is a 'unicum'.[37] Geographical contexts vary from one case to the other, so rules or methods that produce a reasonable result in one case may not achieve the same in another different situation. Flexibility is thus to be maintained in order to pursue an equitable result in each case. However, if the rules are too flexible or their application too unpredictable, the judicial exercise of maritime delimitation might be seen as subjective and arbitrary, which may undermine the normativity of the legal process. That is why certainty, predictability and stability of the rules are also to be achieved in defining the content of the law of maritime delimitation.

The tension between certainty and flexibility underlies the development of the law of maritime delimitation in the case law of the ICJ. The following sections will consider the different stages of the development that gave different weight to either certainty or

[36] Weil (n 20) 12.
[37] *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau)* (1985) XIX RIAA 149 [89].

flexibility and the efforts of the ICJ to strike a balance between the two.

2. *North Sea Continental Shelf* and the Result-Oriented Approach

The 1969 *North Sea Continental Shelf* were landmark cases for modern law of maritime delimitation, and they concerned the delimitation of the continental shelf between the Federal Republic of Germany on the one hand, and the Netherlands and Denmark on the other. There were two separate cases joined in accordance with the special agreement of the parties.

Before the parties failed to reach agreement on their continental shelf boundaries, they had already delimited their territorial seas by drawing two equidistance lines. However, the continental shelf delimitation negotiations came to a deadlock because Denmark and the Netherlands insisted on extending the equidistance lines to delimit the continental shelves as well, which was not acceptable for Germany, since the two equidistance lines would meet at a point in front of the coast of Germany, cutting it off from reaching the middle point of the North Sea. The parties thus submitted the dispute to the ICJ, but they deliberately refrained from asking the Court to draw the boundary lines. Instead, they requested the Court to declare the applicable 'principles and rules of international law'.[38]

Germany at that time was not a party to the 1958 CCS, but Denmark and the Netherlands were. During the proceedings, Denmark and the Netherlands argued that the equidistance rule as embodied in Art.6 of the CCS should apply either as a treaty rule opposable to Germany or as a customary international rule. Germany rejected both arguments and contended that the delimitation should achieve a just and equitable share in that the

[38] *North Sea* (n 23) [2].

continental shelf should be divided so that each coastal State would be entitled to a continental shelf extending up to the central point of the North Sea.[39]

A central dispute in *North Sea Continental Shelf* was whether the equidistance rule under Art.6 of the CCS formed part of customary international law so that it could be applied to delimit the continental shelf of the parties. The ICJ found that equidistance was not a mandatory method, because Art.6 of the CCS was not codification of a customary rule nor did it give rise to customary international law after the Convention entered into force.[40] Although the Court acknowledged that 'no other method of delimitation has the same combination of practical convenience and certainty of application', these technical advantages did not suffice to transform the method into a rule of law. Most importantly, the application of equidistance in the particular circumstances of the present case would produce 'extraordinary, unnatural or unreasonable' effects,[41] because the coasts of Germany were concave. According to the ICJ, the inequity produced by the equidistance method would be most pronounced in case of the presence of irregular coastal configurations:

> The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus, it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.[42]

[39] See ibid [13–15].
[40] ibid [81].
[41] ibid [24].
[42] ibid [90].

In the view of the Court, simple application of equidistance to the concave coasts of Germany would result in inequitable results. However, the ICJ did not accept the 'equitable share' argument of the Germany either. The Court found the task of delimitation 'relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors'.[43] According to the ICJ,

> Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.[44]

Although this observation has a certain mystical quality, in the context of *Continental Shelf* its meaning was rather straightforward. It referred to the legal nature of continental shelf rights being inherent rights within the meaning of Art.2 of the CCS, an article declared by the ICJ to be customary.[45] Since each coastal State is entitled to the continental shelf by the operation of international law, the idea of sharing out as contended by the Germany is incompatible with the inherent nature of continental shelf rights. That is why the ICJ continued with the following observation:

> [T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose

[43] ibid [18].
[44] ibid.
[45] ibid [19].

> of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.[46]

This notion of natural prolongation had a huge impact over the subsequent change of the concept of continental shelf, as it was incorporated into Art.76(1) of UNCLOS and formed a basis for coastal States to claim a continental shelf beyond 200 nm. However, the ICJ made this observation to emphasize that coastal States were entitled to a continental shelf because of their sovereignty over the land territory. In other words, it was the legal basis of the continental shelf rights rather than the geographical scope of such rights that was highlighted. Another way of expressing the same idea is the principle that 'the land dominates the sea'.[47]

After rejecting the equidistance rule advanced by Denmark and the Netherlands as well as the 'equitable share' argument put forward by the Germany, the Court had to enumerate the principles and rules deemed applicable to the situation under consideration. It is in responding to this question that the ICJ laid the foundation for the law of maritime delimitation. The 'basic legal notions' consisted of principles 'that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles'.[48] The term 'equitable principles' was drawn by the ICJ from 1945 Truman Proclamation and it was not defined by the Court. For the parties to *North Sea Continental Shelf*, the applicable principles were summarized as

> Delimitation is to be effected by agreement in accordance with equitable principles, and taking into 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

[46] ibid.
[47] ibid [96].
[48] ibid [85].

> 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.[49]

But the Court did not define the scope or content of equitable principles or the scope of relevant circumstances, except the reference to the non-encroachment on the natural prolongation. The fact that the notion of natural prolongation was not defined by the Court further contributed to the ambiguity. The Court specified the equitable principles only with reference to another principle, namely, 'equity does not necessarily imply equality':

> There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline.[50]

Other than that, the Court acknowledged that

> [T]here is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[51]

Though inherently vague and broad, it should be noted that the Court relied on the concepts of equitable principles and relevant circumstances to address a specific circumstance underlying the

[49] ibid [101].
[50] ibid [91].
[51] ibid [93].

dispute of *North Sea Continental Shelf*, namely, the concavity of the coastal configuration of Germany. The ICJ, after spelling out these broad principles, specified certain 'factors' to be taken into account by the parties in their negotiations, including 'the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited',[52] 'unity of deposits of resources',[53] and 'a reasonable degree of proportionality…between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines'.[54]

Two observations can be made about *North Sea Continental Shelf*. First, the ICJ already spelled out the basic elements of the law of maritime delimitation, which included equitable principles, relevant circumstances, and delimitation methods. The development of the law of maritime delimitation revolved around these basic concepts. Second, this case encouraged the emergence of a so-called result-oriented approach to equity for continental shelf delimitation.[55] As the ICJ observed in this case: '[I]t is necessary to seek not one method of delimitation but one goal.'[56] The goal — equitable result — would be achieved by balancing up all the relevant circumstances. Which circumstance is relevant and how much weight shall be given to each circumstance might vary from case to case.

However, both equitable principles and relevant circumstances are nebulous concepts. They do not have definite content, and the ICJ was explicit that there was no limit of relevant circumstances to be taken into account by States. What is clear under this result-oriented approach is that no single method is mandatory. Equidistance is not considered to be a rule, but merely a method to be chosen from a toolbox if it contributes to achieving an equitable result. Therefore, the result-oriented approach is marked by high flexibility but little

[52] ibid [96].
[53] ibid [97].
[54] ibid [98].
[55] See Tanaka (n 3) 242.
[56] *North Sea* (n 23) [92].

certainty or predictability. It lacks predictability because the scope of relevant circumstances is not defined or definable, and it is inherently uncertain as to how relevant circumstances impact on the drawing of boundary lines. Thus, *North Sea Continental Shelf* were criticized for giving the ICJ excessive discretion and 'equitable principles' amounted to allow the Court to make a decision *ex aequo et bono*.[57]

In fact, in two subsequent cases dealt with by the ICJ, namely, *Tunisia/Libya* and *Gulf of Maine*, the ICJ maintained the preference for the equitableness of the result over the predictability of the delimitation process. In *Tunisia/Libya*, the ICJ observed that: 'It is… the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.'[58] Again, in *Gulf of Maine*, the Court continued with the emphasis on an equitable result rather than the normativity of the delimitation process:

> There has been no systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation, and this would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations…their equitableness or otherwise can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases.[59]

In these cases, equity was measured by reference to the delimitation result, and there were no predetermined principles or a set of relevant circumstances that would ensure the equitableness of the delimitation. Under the result-oriented approach, since every

[57] See Wolfgang Friedmann, 'The North Sea Continental Shelf Cases — A Critique' (1970) 64 American Journal of International Law 229, 236.
[58] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep 18 [70].
[59] *Gulf of Maine* (n 21) [157–158].

geographical context differs from each other, what is an equitable result also varies from case to case. This approach thus ensures maximum flexibility of the delimitation process.

3. *Libya/Malta* and the Stabilization of the Step-by-Step Approach

The 1985 *Libya/Malta* was a turning point for the law of maritime delimitation as developed by the ICJ jurisprudence. At this point in time, UNCLOS was concluded, though it had not been in force yet. Nevertheless, the landscape of the law of the sea had changed considerably in terms of the legal bases for coastal States' maritime jurisdictions. The EEZ regime was established, and coastal States may proclaim an EEZ up to 200 nm. In *Libya/Malta*, the ICJ observed that '[i]t is…incontestable that…the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.'[60] On the other hand, the legal concept of the continental shelf was redefined by two alternative criteria, one of the 200-nm distance criterion and the other of natural prolongation to the outer edge of the continental margin.

In this case, Libya and Malta were opposite to each other. Malta argued that the legal basis for the continental shelf was the distance criterion and an equitable boundary line should be a median line.[61] Libya relied on the concept of natural prolongation, and it claimed that the continental shelves between the two parties were divided by a rift zone. Libya argued that this rift zone constituted a fundamental discontinuity in the seabed, which marked the limits of the respective natural prolongation of the two countries. Accordingly, the boundary line should be found in that zone.[62]

[60] *Libya/Malta* (n 26) [34].
[61] ibid [30].
[62] ibid [36].

The ICJ rejected Libya's arguments, on the basis that the distance criterion rather than natural prolongation shall be applied. The Court reasoned that:

> [E]ven though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 Convention demonstrates, the two institutions — continental shelf and [EEZ] — are linked together in modern law…This does not mean that the concept of the continental shelf has been absorbed by that of the [EEZ]; it does however signify that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts.[63]

In other words, since the EEZ regime had become customary international law, the distance criterion common to EEZ and the continental shelf should play a more important role in defining coastal states' maritime entitlements. According to the Court,

> This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil.[64]

Nevertheless, it should be emphasized that the distance between Libya and Malta was less than 200 nm, which means that, in any case, neither of them could claim a continental shelf beyond 200 nm even under Art.76 of UNCLOS. In this sense, the natural prolongation criterion under Art.76 of UNCLOS was irrelevant in *Libya/Malta*. By

[63] ibid [33].
[64] ibid [34].

rejecting the relevance of natural prolongation, the ICJ also refused to take into account the circumstance of fundamental discontinuity in the seabed claimed by Libya. For '[n]either is there any reason why a factor which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purposes of delimitation'.[65] On the contrary, the Court gave more weight to the consideration of the equidistance method, since '[t]he legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation'.[66]

The ICJ adopted a step-by-step approach to delimitation. In the first step, it drew a provisional equidistance line, which was 'clearly destined to play an important role in producing the final result'.[67] This was because Libya and Malta are opposite to each other, and, in such a geographical context, the use of equidistance line would normally result in an equal division of the area of overlap. The second step consisted of 'examin[ing] this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result'.[68] In the present case, the significant disparities between the coastal lengths of the two parties — almost 9:1 in favour of Libya — was considered relevant. To address this circumstance, the ICJ moved the equidistance line north, that is, closer to Malta, which gave Libya larger maritime space.[69] Finally, the ICJ made a broad assessment about the equitableness of the result, and concluded that 'there is certainly no evident disproportion in the areas of shelf attributed to each of the Parties respectively such that it could be said that the requirements of the test of proportionality as an aspect of equity were not satisfied'.[70] This 'test of proportionality' was drawn from

[65] ibid [40].
[66] ibid [27].
[67] ibid [60].
[68] ibid.
[69] See ibid [71–73].
[70] ibid [75].

North Sea Continental Shelf, in which the ICJ suggested the parties to that dispute to take into account 'the element of a reasonable degree of proportionality'.[71]

The use of the step-by-step approach illustrates that the perceptions of equity in the law of maritime delimitation changed from result-oriented equity to process-oriented equity, the latter being a step-by-step approach that incorporates equidistance as a provisional method.[72] Under the process-oriented approach, the delimitation process was streamlined, and the role of relevant circumstances was redefined as correcting the potential inequities produced by the provisional line. Under the result-oriented approach, however, the role of relevant circumstances (as well as equitable principles) was determinative of the delimitation methods. Consequently, the process-oriented approach enhances the certainty of the delimitation process and reduces the element of flexibility. Under this approach, each element of the law of maritime delimitation is assigned a place and their role is to play in a predetermined order. It also maintains the flexibility required by maritime delimitation because equidistance will only produce a provisional line, which is subject to change after taking into account all the relevant circumstances. As emphasized by the ICJ in *Libya/Malta*,

> 'Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.'[73]

[71] *North Sea* (n 23) [101(D)(3)].
[72] Yoshifumi Tanaka referred to the approach adopted in *Libya/Malta* as 'corrective-equity approach'. See Tanaka (n 3) 245.
[73] *Libya/Malta* (n 26) [45].

Although the term 'equitable principles' was not explicitly mentioned under the step-by-step approach, it would be wrong to say that equitable principles disappeared from the delimitation process. That is because it is ultimately the principles that determine which circumstance is relevant and how the boundary lines should be drawn. Under the process-oriented approach, equitable principles operate primarily in the second step in association with assessment of relevant circumstances.

Since *Libya/Malta*, the step-by-step approach was applied by the ICJ in *Jan Mayen*,[74] *Qatar v. Bahrain*,[75] and *Cameroon v. Nigeria*. While *Libya/Malta* dealt with the continental shelf delimitation only, these subsequent cases were concerned with single maritime delimitation of the continental shelf and the fishery zone/EEZ. And in *Cameroon v. Nigeria*, the Court was confident to state that,

> The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'.[76]

The ICJ thus referred to the step-by-step approach as 'equitable principles/relevant circumstance method', and it was interesting to note that it assimilated this approach for single maritime

[74] See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* [1993] ICJ Rep 38 [51–53].
[75] See *Qatar v. Bahrain* (n 22) [217].
[76] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2002] ICJ Rep 303 [288].

delimitation with the equidistance/special circumstances method for the territorial sea delimitation under Art.15 of UNCLOS.

4. *Black Sea* and the Establishment of Three-State Approach

Eventually, the ICJ formulated the delimitation methodology as a three-stage approach in 2009 *Black Sea*, which was essentially built up on the jurisprudence since *Libya/Malta*. The Court reaffirmed that 'when called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages'.[77] First, the Court will draw a provisional equidistance line unless there are compelling reasons that make it unfeasible. Second, the Court will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. Third, the Court will verify that the line produced by the first two steps does not lead to an inequitable result by conducting a disproportionality test.[78]

What distinguishes the three-stage approach from the previous equitable principles/relevant circumstances approach is the third step, which formally requires the Court to carry out a disproportionality test. Disproportionality test requires the Court to verify if there is any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line. To conduct the test, the Court will first identify the relevant coasts and relevant areas before proceeding to applying the delimitation methodology. Then, the Court will measure the coastal lengths and the size of the relevant area. However, it should be pointed out that the ICJ, or any other court, never found there to be

[77] *Black Sea* (n 1) [115].
[78] ibid [116–122].

significant disproportionality after going through the first two steps. The exercise of disproportionality test is also criticized for being subjective, as there are no objective or consistent methods to measure the coastal lengths and the size of the relevant area.[79] It is in fact unthinkable that the ICJ would redo the delimitation after the conduct of disproportionality test. As a result, the disproportionality test is a formalistic exercise, through which the Court demonstrates and confirms the equitableness of the result arrived at by the first two steps.[80] Though redundant, the ICJ insisted in going through the disproportionality test even though in some occasions the Court will satisfy itself with 'a broad assessment' that does not involve presenting specific figures about relevant coasts or relevant area.[81]

Since *Black Sea*, the ICJ applied the three-stage approach in all maritime delimitation cases, and in 2018 *Costa Rica v. Nicaragua* it referred to the three-stage approach as 'established methodology'.[82]

When summarizing the case law of the ICJ, it can be found that the result-oriented approach that put equitable principles and relevant circumstances in the center of the delimitation process had gradually given away to the three-stage approach. Some observations can be made by comparing the two approaches to maritime delimitation.

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[79] See Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press 2016) 609; Yoshifumi Tanaka, 'The Disproportionality Test in the Law of Maritime Delimitation' in Alex G Oude Elferink, Tore Henriksen and Signe Veierud Busch (eds), *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (Cambridge University Press 2018) 315–316.

[80] See Malcolm D Evans, 'Maritime Boundary Delimitation: Where Do We Go From Here?' in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press 2006) 155.

[81] *Maritime Dispute (Peru v. Chile)* [2014] ICJ Rep 3 [193–194].

[82] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* [2018] ICJ Rep 139 [135].

First and foremost, under the three-stage approach equidistance has acquired a *de facto* privileged status. This is in fact the most dramatic development of the law of maritime delimitation as in *North Sea Continental Shelf* the ICJ was at pains to stress that equidistance was not mandatory. Even in *Libya/Malta*, equidistance was applied as a starting point because it contributed to producing the final result, and the ICJ was careful to maintain that '[t]he Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used.'[83] In other words, the use of equidistance was justified by equitable principles and relevant circumstances in that case. However, in *Black Sea*, the ICJ considered that equidistance shall be used as a starting point unless there are compelling reasons making it unfeasible, for example, where the coasts were highly unstable, and the construction of equidistance was thus impossible.[84] Consequently, the standard to depart from equidistance in the first stage of maritime delimitation was very strict. Nonetheless, in *Nicaragua v. Colombia* the ICJ seemed to have relaxed the 'compelling reasons' standard by suggesting that 'it will not be *appropriate* in every case to begin with a provisional equidistance/median line'.[85]

The second difference between the two approaches is the role given to relevant circumstances. Under the three-stage approach, relevant circumstances are meant to address the inequities that might be caused by the provisional equidistance line, whereas under the result-oriented approach, relevant circumstances are considered first, which will determine the choice and application of the delimitation methods. Accordingly, while under the result-oriented approach, inequities produced by equidistance would justify the non-use of equidistance method, under the three-stage

[83] *Libya/Malta* (n 26) [43] (emphasis in the original).
[84] See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* [2007] ICJ Rep 659 [280].
[85] *Territorial and Maritime Dispute (Nicaragua v. Colombia)* [2012] ICJ Rep 624 [194].

approach, equidistance method constitutes a starting point regardless of whether it creates inequities or not, since its use is merely provisional.

Another important difference is the scope of relevant circumstances. Whereas the ICJ in *North Sea Continental Shelf* pronounced that there was no legal limit to the considerations of relevant circumstances, in *Libya/Malta* the Court embarked on reducing the scope of relevant circumstances by stating that:

> Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion.[86]

Specifically, the development of the case law demonstrates that only geographical circumstances, such as concavity of the coasts and significant disparities in coastal lengths[87] were considered relevant while non-geographical circumstances such as economic factors[88] or resource-related factors were not.[89] The reason why geographical circumstances are deemed relevant is that the delimitation process is spatial in nature; it is not resource-sharing or an exercise of distributive justice.[90]

To conclude, the real difference between the two approaches is that the three-stage approach formalized an ordered process of maritime delimitation, making the delimitation procedure more

[86] *Libya/Malta* (n 26) [43].
[87] See *Jan Mayen* (n 74) [69].
[88] See *Tunisia/Libya* (n 58) [107].
[89] See *Cameroon v. Nigeria* (n 76) [304].
[90] See *North Sea* (n 23) [18].

predictable in comparison to the result-oriented approach. Under the three-stage approach, there is a clearly defined starting point, i.e., equidistance method. It also operates with a reduced scope of relevant circumstances, which, prior to *Libya/Malta* case, was unlimited and thus unpredictable. This step-by-step approach ensures a high degree of predictability and eliminates excessive subjectivity that was found in earlier jurisprudence. One may say that the inherent tension between certainty and flexibility in maritime delimitation finds a balanced expression in the three-stage approach.

LECTURE 3:

UNCLOS Tribunals and the Law of Maritime Delimitation

The preceding lecture discusses the development of the law of maritime delimitation by the ICJ since 1969 *North Sea Continental Shelf* to the present and explains the evolution of the delimitation methodology from a result-oriented approach to the currently established three-stage approach. This lecture will move on to UNCLOS tribunals, which are meant to be major actors in the development of the law of the sea after the entry into force of UNCLOS. It will begin with an introduction of how UNCLOS dispute settlement mechanism operates, with special reference to one of the key features of this system, namely, the multiplicity of fora. Next it will examine in which aspects UNCLOS tribunals contribute to reinforcing the law of maritime delimitation by partaking in the course initiated by the ICJ.

1. Multiplicity of Fora in the DNA of UNCLOS Dispute Settlement

UNCLOS is a unique multilateral treaty in that it incorporates compulsory procedures that parties cannot opt out of, and it stood out at the time of its conclusion as the only multilateral treaty in which compulsory judicial procedures were an integral part of the treaty rather than being made an optional protocol. In this respect, it differs from the 1958 Conventions on the Law of the Sea, as the First United Nations Conference on the Law of the Sea produced an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, which confers on the ICJ compulsory jurisdiction regarding the disputes arising out of any of the four

1958 Conventions.[91] However, only 37 states were parties to it and this instrument was never applied.

The major reason for including a robust dispute settlement mechanism within UNCLOS was that the Convention was negotiated as a package-deal.[92] Therefore, it was widely shared among the delegates that the competing rights and obligations of the parties to UNCLOS so carefully balanced would easily disintegrate through unilateral interpretations in case of a dispute.[93] Accordingly, compulsory procedures involving impartial third parties were deemed necessary to ensure objective and uniform interpretation and application of the treaty so as to maintain the delicate balance of the package-deal. As prescribed by Art.309 of UNCLOS, no reservations or exceptions may be made to UNCLOS unless expressly permitted.

That said, UNCLOS dispute settlement mechanism is by nature limited in its material scope, since UNCLOS tribunals are only competent to resolve disputes concerning the interpretation or application of UNCLOS under Art.288(1). They cannot exercise jurisdiction over disputes arising outside the scope of this treaty, such as territorial disputes. This is a crucial difference between UNCLOS tribunals and the ICJ since the latter could deal with disputes with different subject-matters through the consent of the parties. For example, in *Qatar v. Bahrain*, the ICJ decided both territorial disputes and maritime boundary disputes.

Three guiding principles may be identified with respect to UNCLOS dispute settlement mechanism. First, the parties' freedom

[91] Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (Geneva, 29 April 1958, into force 30 September 1962) 450 UNTS 169.
[92] See Hugo Caminos and Michael R Molitor, 'Progressive Development of International Law and the Package Deal' (1985) 79 The American Journal of International Law 871, 884.
[93] AO Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (Brill Nijhoff 1987) 9.

and preference of dispute settlement procedures always prevails. Second, compulsory procedures are accorded residual jurisdiction. These compulsory procedures include not only judicial or arbitral proceedings that entail binding decisions but also compulsory conciliation that does not entail binding decisions. Third, multiplicity of fora, ranging from permanent institutions (ICJ and ITLOS) to *ad hoc* arbitration. The last principle is the most relevant in relation to the development of the law of maritime delimitation.

UNCLOS dispute settlement mechanism is provided by Part XV of the Convention and its structure is simple. There are three sections in Part XV and their relationship is spelled out in Art.286:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Section 1 offers parties a wide range of non-compulsory procedures and should be resorted before any of the parties to the dispute resorts to the compulsory procedures under Section 2. Specifically, Section 1 sets out general provisions, including Art.279 that reaffirms the obligation of States to settle disputes peacefully, and Art.280 that accords priority to the parties' choice of means of dispute settlement. Arts.281 and 282, for their part, coordinate the use of the means of dispute settlement chosen by the parties and the compulsory procedures under Section 2. Art.283 requires States to exchange views regarding means of dispute settlement once a dispute arises.

Section 2 specifies the fora, their jurisdiction, applicable law, and procedures of UNCLOS tribunals. And the multiplicity of fora is coded into this section, which will be elaborated shortly. Section 3 provides limitations and exceptions to the compulsory procedures under Section 2. Art.297 specifies the disputes that

are automatically excluded from the compulsory procedures while Art.298 allows parties to opt out of certain categories of disputes from the compulsory procedures.

As mentioned earlier, an essential characteristic of UNCLOS dispute settlement mechanism is that it enables the parties to choose among a wide range of judicial bodies. Under Art.287, parties could choose from the following list to settle disputes arising under UNCLOS: (1) ITLOS, (2) ICJ, (3) arbitral tribunal to be established in accordance with Annex VII, and (4) special tribunals to be established in accordance with Annex VIII. States are free to choose among the list when they sign, ratify, or accede to UNCLOS or at any time later. They can choose one or more institutions, specifying a preferred order or not.

Theoretically, all the fora except Annex VIII tribunals are competent to deal with maritime boundary disputes.[94] A question thus arises: how is it possible for a party to know which forum to resort to if a dispute crystallizes? This problem is resolved by the following formulas. If the two parties made the same choice over the same forum, then one of them can unilaterally resort to that procedure only, unless they mutually agree to submit the dispute to other fora. If one or two of the parties made no choice, they are deemed to have accepted Annex VII arbitration. If the two parties, however, made different choices, then one of them may unilaterally submit the dispute to Annex VII arbitration, unless they agree otherwise.

These formulas apparently render the Annex VII arbitration a sort of residual jurisdiction, in that if States make no choice, they are deemed to have accepted it anyway. The system also favours a State that chooses Annex VII arbitration since whether the other

[94] Annex VIII tribunals are only competent to deal with specific categories of disputes including fisheries, navigation, marine scientific research, and protection of marine environment. It has not been in use yet.

party made the same choice or not, or if the other party made no choice at all, they would go to Annex VII arbitration if no special agreement about the forum could be made. It should be pointed out that during the negotiations, there were proposals that gave the residual compulsory jurisdiction to the ICJ or ITLOS, but none of them were accepted.[95] It was believed that arbitration, a procedure where parties have a larger control over its composition and procedure, was the least intrusion to the freedom and sovereignty of States.[96]

But in respect of disputes concerning maritime boundary delimitation, it is not always the case that they can be submitted to UNCLOS tribunals. It is because maritime boundary disputes, including those concerning territorial sea, the continental shelf, and the EEZ, could be opted out by States under Art.298 of UNCLOS tribunals. This optional exception to the compulsory procedures goes together with a further exception that States are obliged to submit the maritime boundary disputes to compulsory conciliation procedure under Annex V, section 2, if certain conditions are met.[97] Under Annex V, section 2, each party to the dispute could unilaterally initiate the conciliation procedure without the specific

[95] See Adede (n 93) 103.

[96] See Tullio Treves, 'Article 287' in Alexander Proelss (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (Hart 2017) 1851.

[97] Art.298(1) of UNCLOS provides:

'1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.'

consent of the other party, and the Conciliation Commission thus constituted could proceed with the consideration of the dispute even without the participation of the dissenting party, should the Commission find itself with competence over the dispute. Nevertheless, the report issued by the Conciliation Commission on legal and factual issues has no binding force. So far, the only (and a successful) example of using compulsory conciliation under UNCLOS was Timor Sea Conciliation between Timor-Leste and Australia.[98] Timor-Leste initiated the conciliation procedure unilaterally under Art.298(1)(a)(i) and Annex V of UNCLOS. Though Australia challenged the competence of the Conciliation Commission, it participated in the subsequent conciliation after the Commission decided that it had competence over the dispute. In 2018, the parties reached a maritime boundary agreement in respect of East Timor Sea with the assistance of the Conciliation Commission.[99]

To summarize, for UNCLOS tribunals to have jurisdiction over maritime boundary disputes between States parties to UNCLOS, several procedural hurdles have to be overcome. First, the parties to the dispute must have resorted to the procedures under Section 1 of Part XV without success, which involves the exchange of views under Art.283 and, if the parties have agreed to other means of dispute settlement, those means shall be resorted to first. Second, the maritime boundary disputes are not subject to the declarations made by the parties' declaration under Art.298(1)(a)(i) of UNCLOS.

So far, some parties to UNCLOS have made declarations under Art.287 and Art.298(1)(a)(i), and a survey of this practice gives a general idea about the potential role of UNCLOS tribunals in

[98] See Timor Sea Conciliation (Timor-Leste v. Australia), available at: https://pca-cpa.org/en/cases/132/.
[99] See Xuexia Liao, 'The Timor Sea Conciliation under Article 298 and Annex V of UNCLOS: A Critique' (2019) 18 Chinese Journal of International Law 281.

maritime boundary disputes.[100] Up to the end of July 2024, 49 States had made a declaration under Art.287, choosing one or more fora listed under that provision. Among these States, 12 have chosen ITLOS only,[101] 6 have chosen the ICJ only,[102] 2 have chosen the Annex VII arbitration only,[103] and the remaining have chosen two or more fora. When States made multiple choices, some of them specified a preferred order,[104] others did not.[105] In these latter cases, when a dispute arises among the parties, the obligation to exchange views under Art.283 provides a channel for them to agree over a specific means of dispute settlement.

Overall, one may say that among the States that do make choices, a majority of them prefer ITLOS, because there are 39 declarations choosing ITLOS, while 29 declarations choosing the ICJ. Therefore, a general tendency seems to be that States prefer permanent bodies to *ad hoc* arbitration.[106] But, apparently, among the 169 States parties to UNCLOS, a considerable majority has been deemed to accept Annex VII arbitration since they made no choice under Art.287.

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[100] Declarations made upon signature, ratification or accession, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, last accessed 26 January 2025. All figures referred to in this section are collected and valid by 31 July 2024.

[101] Examples include Algeria, Angola, Bulgaria, Chile, Fiji, Greece, Madagascar, Switzerland, and Tanzania.

[102] Denmark, Honduras, Norway, Sweden, United Kingdom, and Nicaragua.

[103] Egypt and Slovenia.

[104] For example, Austria specified that it 'chooses one of the following means for the settlement of disputes concerning the interpretation or application of the two Conventions in accordance with article 287 of the [said Convention], in the following order: 1. The international Tribunal for the Law of the Sea established in accordance with Annex VI; 2. A special arbitral tribunal constituted in accordance with Annex VIII; 3. The International Court of Justice.'

[105] For example, the Netherlands declared the acceptance of the jurisdiction of the ICJ and ITLOS 'without specifying that one has precedence over the other'.

[106] Tullio Treves, 'Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice' (1998) 31 New York University Journal of International Law and Politics 809, 819.

Some curious declarations made under Art.287 are worth mentioning. Two States — Cuba and Guinea Bissau — made a declaration under Art.287 excluding explicitly ICJ, which seems to be a reversed use of Art.287. Some States made declarations under Art.287 accepting ITLOS over a particular dispute. These amount to a special agreement that the parties reached to submit the specific dispute to ITLOS. For example, Panama declared under Art.287 that

> [I]t accepts the competence and jurisdiction of the International Tribunal of [*sic*] the Law of the Sea for the settlement of the dispute between the Government of the Republic of Panama and the Government of the Italian Republic concerning the interpretation or application of UNCLOS that arose from the detention of the Motor Tanker NORSTAR, flying the Panamanian flag.[107]

In *M/V Norstar*, ITLOS found that 'the declaration of Panama is more limited than that of Italy and is restricted to this particular case. ...the Tribunal considers it appropriate to point out that the Convention does not preclude a declaration limited to a particular dispute'.[108]

The USSR chose Annex VII arbitration 'as the basic means for the settlement of disputes concerning the interpretation or

[107] See also Bangladesh' Declaration relating to Article 287 with respect to Myanmar:

> Pursuant to Article 287, paragraph 1 of the 1982 United Nations Convention on the Law of the Sea, the Government of the People's Republic of Bangladesh declares that it accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of dispute between the People's Republic of Bangladesh and the Union of Myanmar relating to the delimitation of their maritime boundary in the Bay of Bengal.

> Similarly, Nigeria's Declaration under article 287:

> In accordance with Article 287, paragraph 1 of the 1982 United Nations Convention on the Law of the Sea, the Government of the Federal Republic of Nigeria hereby declares that it accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of disputes between the Swiss Confederation and the Federal Republic of Nigeria concerning the M/T 'San Padre Pio'.

[108] *M/V "Norstar" (Panama v. Italy),* Preliminary Objections [2016] ITLOS Rep 44 [58].

application of the Convention', but upon ratification, the Russian Federation made no choice under Art.287. In *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, the arbitral tribunal considered that since the Russian Federation regarded itself as the continuator State of the USSR, and since both the USSR and Ukraine chose Annex VII arbitration as the 'basic' or 'principal' means for the settlement of disputes concerning the interpretation or application of the Convention, the parties had chosen the same procedure under Art.287(4) of UNCLOS.[109]

The ICJ is one of the fora that States parties of UNCLOS could choose under Art.287, but States may also have accepted the compulsory jurisdiction of the ICJ by other treaties or agreements. Therefore, there is a need to coordinate the compulsory procedures of UNCLOS and the procedures before the ICJ. The drafters of UNCLOS anticipated such a possibility, and a solution is found in Art.282:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

According to the ICJ, the term 'otherwise' encompasses the acceptance of the ICJ's jurisdiction through a declaration made under Art.36(2) of the ICJ Statute.[110] Accordingly, in a case that both parties have accepted the ICJ's jurisdiction over disputes concerning maritime delimitation, that procedure prevails

[109] *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russia),* Preliminary Objections, Award of 21 February 2020 [41].
[110] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Preliminary Objections) [2017] ICJ Rep 3 [127–128].

unless the parties agreed to submit that dispute to UNCLOS procedures.

As to declarations under Art.298(1), 30 States have made such declarations to exclude maritime boundary disputes. Among them, 8 States specified in their declarations under Art.298 that they exclude maritime boundary disputes from a particular forum (mostly Annex VII arbitration),[111] while 2 States — Nicaragua and Iceland — made declarations under Art.298(1) to *accept* a particular procedure provided under Art.287 for settlement of maritime boundary disputes. The primary effect of these declarations would be excluding maritime boundary disputes from Annex VII arbitration. This is because, even if these States made a choice under Art.287, they would have to go to Annex VII arbitration if a maritime boundary dispute arises between them and another State that made different choices or made no choices. Therefore, to exclude maritime boundary disputes from Annex VII arbitration in their declaration under Art.298(1), these States preclude the possibility of another party to the boundary dispute to unilaterally resort to Annex VII arbitration.

Similarly, for Nicaragua and Iceland, the choice of a particular procedure within their declaration under Art.298(1) of UNCLOS ensures that the maritime boundary dispute, if it arises, would not be submitted unilaterally to Annex VII arbitration. Nicaragua chose the ICJ under Art.287 and it chose the ICJ to settle maritime

[111] These States and their excluded forum are as follows: Angola (Annex VII arbitration), the Republic of Congo (Annex VII and Annex VIII arbitration), the Democratic Republic of the Congo (Annex VII arbitration), Denmark, (Annex VII arbitration), Norway (Annex VII arbitration), Slovenia (Annex VII arbitration), Cuba (Annex VII arbitration), Guinea Bissau (ICJ). To give an example, Norway's declaration under Art.298 is drafted as: 'The Government of the Kingdom of Norway declares pursuant to article 298 of the Convention that it does not accept an arbitral tribunal constituted in accordance with Annex VII of any of the categories of disputes mentioned in article 298'.

boundary dispute under Art.298(1).[112] Consequently, no State could bring a maritime boundary dispute with Nicaragua to Annex VII arbitration as a result of its declaration under Art.298. Iceland made no choice under Art.287, and, therefore, it is deemed to have accepted Annex VII arbitration. However, due to its declaration under Art.298 that accepts only compulsory conciliation,[113] an Annex VII arbitral tribunal would not have jurisdiction over the specified dispute.

2. UNCLOS Tribunals in Reinforcing the Law of Maritime Delimitation

Given the parallel existence of judicial and arbitral tribunals that have jurisdiction over maritime delimitation under UNCLOS dispute settlement mechanism, it was feared of fragmentation, a problem arising out of proliferation of international courts and tribunals.[114] However, as will be discussed in the following, fragmentation does not seem to materialize in respect of the law of maritime delimitation. Instead, UNCLOS tribunals contributed to reinforcing the law of maritime delimitation by (1) strengthening the delimitation methodology developed by the ICJ and (2) clarifying the role of relevant circumstances in the delimitation process.

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[112] The declarations of Nicaragua read:

> In accordance with article 287, paragraph 1, of the Convention, Nicaragua hereby declares that it accepts only recourse to the International Court of Justice as a means for the settlement of disputes concerning the interpretation or application of the Convention.
>
> Nicaragua hereby declares that it accepts only recourse to the International Court of Justice as a means for the settlement of the categories of disputes set forth in subparagraphs (a), (b) and (c) of paragraph 1 of article 298 of the Convention.

[113] The declaration of Iceland provides: 'Under article 298 of the Convention the right is reserved [by the Government of Iceland] that any interpretation of article 83 shall be submitted to conciliation under Annex V, Section 2 of the Convention.'

[114] See Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 New York University Journal of International Law and Politics 679, 680–688.

2.1. Strengthening a common delimitation methodology

In the first maritime boundary dispute submitted to UNCLOS tribunals, that is the *Barbados v. Trinidad and Tobago Arbitration* decided by an Annex VII tribunal, the tribunal followed the step-by-step approach. The Court reviewed the law of maritime delimitation as developed in the jurisprudence and paid particular attention to the observations of the ICJ decisions. According to the tribunal,

> The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result … This approach is usually referred to as the 'equidistance/relevant circumstances' principle.[115]

The substance of this two-step approach is thus the same with the step-by-step approach of *Libya/Malta*, though it is interesting that the tribunal referred to this approach as 'equidistance/relevant circumstances' *principle*, whereas the ICJ, in *Cameroon v. Nigeria*, termed the approach 'equitable principles/relevant circumstances' *method*.

A year later, in *Guyana v. Suriname Arbitration*, another maritime boundary dispute settled by an Annex VII tribunal, the tribunal adopted the two-step approach. In the tribunal's view,

[115] *Maritime Boundary Arbitration (Barbados v. Trinidad and Tobago)* (2006) XXVII RIAA 147 [242].

> In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance. The process of delimitation is divided into two stages. First the court or tribunal posits a provisional equidistance line which may then be adjusted to reflect special or relevant circumstances.[116]

The tribunal also emphasized that '[i]t is important to note that recent decisions indicate that the presumption in favour of equidistance, established in the case law relating to States with opposite coasts, also applies in the case of States with adjacent coasts',[117] an observation that was later confirmed by the ICJ's formulation of the three-stage approach in *Black Sea*. In *Guyana v. Suriname*, the tribunal delimited the maritime boundary for the continental shelf and the EEZ with an equidistance line and found no relevant circumstances that required adjustment of this line.[118] Notably, although the tribunal considered that the delimitation methodology consisted of two stages, it checked the proportionality between the ratio of relevant areas and that of coastal frontages.[119]

In the first maritime boundary dispute submitted to ITLOS, *Bangladesh/Myanmar*, ITLOS followed the three-stage approach as formulated by the ICJ in its most recent decision and observed that:

> The Tribunal notes that jurisprudence has developed in favour of the equidistance/relevant circumstances method… In applying this method to the drawing of the delimitation line in the present case, the Tribunal, taking into account the jurisprudence of international courts and tribunals on this

[116] *Maritime Boundary Arbitration (Guyana v. Suriname)* (2007) XXX RIAA 1 [335].
[117] ibid [338].
[118] ibid [392].
[119] See ibid.

> matter, will follow the three stage-approach, as developed in the most recent case law on the subject.[120]

The three-stage approach, or, in the vocabulary of UNCLOS tribunals, the equidistance/relevant circumstances method, was again applied in 2014 *Bangladesh v. India Arbitration*, another Annex VII arbitration. In that case, the tribunal commented on the development of the law of maritime delimitation:

> Since articles 74 and 83 of the Convention do not provide for a particular method of delimitation, the appropriate delimitation method—if the States concerned cannot agree—is left to be determined through the mechanisms for the peaceful settlement of disputes. In addressing this question, international courts and tribunals are guided by a paramount objective, namely, that the method chosen be designed so as to lead to an equitable result and that, at the end of the process, an equitable result be achieved. … This Tribunal wishes to add that transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process. The ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention.[121]

This observation made two important points. First, the delimitation process, in addition to being predictable, has to be transparent as well. The tribunal considered that the three-stage approach — or 'equidistance/relevant circumstances method' — is more advantageous in this respect than other delimitation methodologies because 'it clearly separates the steps to be taken

[120] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2012] ITLOS Rep 4 [238–240].
[121] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* (2014) 167 ILR 1 [339].

and is thus more transparent'.[122] Second, the tribunal accorded significant weight to the jurisprudence of maritime delimitation and went as far as to consider that the international case law should be read into Arts.74 and 83 of UNCLOS. The implication would thus be that, not only international courts and tribunals shall employ the delimitation methodology to decide maritime boundary disputes, States parties should also be applying the methodology, which to an extent is in tension with the traditional understanding that States enjoy complete autonomy in concluding maritime boundary agreements.

Subsequently, in *Ghana/Côte d'Ivoire*, the special chamber of ITLOS maintained that 'the international jurisprudence concerning the delimitation of maritime spaces in principle favours the equidistance/relevant circumstances methodology'.[123] In this case, Côte d'Ivoire contested that the equidistance/relevant circumstances method had become a default method and argued that the most appropriate method to be adopted was bisector method.[124] The special chamber rejected this view and considered that 'in the absence of any compelling reasons that make it impossible or inappropriate to draw a provisional equidistance line, the equidistance/relevant circumstances methodology should be chosen for maritime delimitation'.[125] Accordingly, the equidistance/relevant circumstances method should be applied in principle unless compelling reasons render its application impossible or inappropriate. This presumption in favour of the equidistance/relevant circumstances method sets a high standard of proof for the parties. In *Ghana/Côte d'Ivoire,* the special chamber delimited the maritime boundaries with an equidistance line without giving weight to any circumstance advanced by Côte d'Ivoire.

[122] ibid [343].
[123] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* [2017] ITLOS Rep 4 [289].
[124] ibid [271].
[125] ibid [289].

In *Mauritius/Maldives*, the latest maritime boundary delimitation case before ITLOS, the special chamber upheld the established status of equidistance/relevant circumstances method and assimilated it with the three-stage approach: 'The Special Chamber further notes that, in applying the equidistance/relevant circumstances method to the delimitation, international courts and tribunals have developed the three-stage approach.'[126] Thus for the special chamber, applying the three-stage approach was essentially the same thing as applying the equidistance/relevant circumstances method:

> The Special Chamber thus finds that the appropriate method to be applied for delimiting the exclusive economic zone and the continental shelf within 200 nm between Mauritius and the Maldives is the equidistance/relevant circumstances method. In applying this method, it will follow the three-stage approach.[127]

Consequently, as a general trend, UNCLOS tribunals, whether Annex VII tribunal, or ITLOS (including special chambers), consistently applied the step-by-step approach developed in the case law of the ICJ. Though termed differently, the substance of the delimitation methodology remains the same across international courts and tribunals. In this sense, UNCLOS tribunals contributed to strengthening the step-by-step approach and consolidated its status as the prevailing delimitation methodology for maritime delimitation.

2.2. Clarifying the role of relevant circumstances

Not only UNCLOS tribunals followed the jurisprudence of the ICJ in upholding the use of the step-by-step approach to maritime

[126] *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives),* ITLOS, Judgment of 28 April 2023 [97].
[127] ibid [98].

boundary delimitation, but they also contributed to stabilizing the substance of the delimitation methodology. This consists of, first, partaking in the course of narrowing down the scope of relevant circumstances and, second, specifying why and how certain relevant circumstances are given weight in the delimitation process.

In terms of the scope of relevant circumstances, *Barbados v. Trinidad and Tobago Arbitration* observed that the determination of relevant circumstances 'has increasingly been attached to geographical considerations, with particular reference to the length and the configuration of the respective coastlines and their characterization as being opposite, adjacent or in some other relationship',[128] while '[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance'.[129]

There is substantive consistency across the jurisprudence of the ICJ and UNCLOS tribunals that only geographical circumstances were considered relevant while non-geographical circumstances generally received no weight. In the case law of the ICJ, access to natural resources was not considered relevant, as the Court found that 'fishing — or navigation, defence or, for that matter, petroleum exploration and exploitation — cannot be taken into account as a relevant circumstance', unless the ignorance is likely 'to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned'.[130] The only exception was *Jan Mayen*, in which the ICJ adjusted part of the provisional equidistance line to make it possible for the two parties to have equitable access to fisheries in a certain part of the maritime areas.[131] In *Bangladesh v. India*, the tribunal declined to adjust the

[128] *Barbados v. Trinidad and Tobago* (n 115) [233].
[129] ibid [241].
[130] *Gulf of Maine* (n 21) [237].
[131] See *Jan Mayen* (n 74) [76].

provisional equidistance line on the basis of fishing in the Bay of Bengal, after reviewing the jurisprudence of the ICJ.[132] Conduct of the parties, such as oil concessions, was also rarely taken into account. According to the ICJ,

> [A]lthough the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.[133]

In *Ghana/Côte d'Ivoire*, where Ghana contended the existence of tacit agreement over the maritime boundary, the special chamber employed the strict standard of proof applied by the ICJ: 'Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed.'[134] Moreover, the special chamber rejected Ghana's contention that the conduct of the parties relating to oil concessions constituted a relevant circumstance, observing that 'a *de facto* line or modus vivendi related to oil practice cannot *per se* be a relevant circumstance in the delimitation of an all-purpose maritime boundary with respect to superjacent water as well as the seabed and subsoil'.[135]

In addition to confining the scope of relevant circumstances to geographical ones, UNCLOS tribunals similarly accorded relevance to a limited category of geographical circumstances, which largely includes irregularities of coastal configurations, presence of islands

[132] *Bangladesh v. India* (n 121) [423–424].
[133] *Cameroon v. Nigeria* (n 76) [304].
[134] *Nicaragua v. Honduras* (n 84) [253].
[135] *Ghana/Côte d'Ivoire* (n 123) [477].

or other maritime features, and significant disparities of coastal lengths. The relevance of these geographical circumstances was also established in the jurisprudence of the ICJ,[136] hence there exists substantive consistency in this regard as well.

North Sea Continental Shelf is the landmark case for the relevance of coastal configuration as in those cases the relevant circumstance was the concavity of coasts. Afterwards, as long as international courts and tribunals identified such irregular coastal configuration, they would normally consider how to attenuate the cut-off effect produced by the use of equidistance line to such coasts. In *Bangladesh/Myanmar* and *Bangladesh v. India*, both tribunals adjusted the provisional equidistance lines by taking into account the concavity of the coast of Bangladesh. More importantly, ITLOS developed the rational for giving effect to the concavity of coasts:

> The Tribunal notes that in the delimitation of the exclusive economic zone and the continental shelf, concavity per se is not necessarily a relevant circumstance. However, when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.[137]

In *Bangladesh v. India*, the tribunal, building upon the above observation, developed the criteria of identifying cut-off effect:

> The Tribunal considers that a cut-off produced by a provisional equidistance line must meet two criteria to warrant adjustment of the provisional equidistance line. First, the line must prevent a coastal State from extending its maritime boundary as far

[136] See Massimo Lando, *Maritime Delimitation as a Judicial Process* (Cambridge University Press 2018) 168–192.
[137] *Bangladesh/Myanmar* (n 120) [292].

> seaward as international law permits. Second, the line must be such that—if not adjusted—it would fail to achieve the equitable solution required by articles 74 and 83 of the Convention. This requires an assessment of where the disadvantage of the cut-off materializes and of its seriousness. In adjusting the provisional equidistance line in the present case, the Tribunal must give due consideration to the need to avoid encroaching on the entitlements of third States.[138]

Another geographical circumstance that is usually taken into account by the ICJ is the presence of islands, islets and other maritime features. Islands generate the same entitlement as land territory,[139] but practice is diverse in giving maritime features effect in maritime delimitation.[140] A key consideration is whether the islands or maritime features will produce a cut-off effect or disproportionate effect over the boundary line, namely, distorting the line or placing the line too close to the other state. This is the case if the islands are located very close to the other State, or the island is very small or insignificant compared to the coast of the other State. In *Bangladesh/Myanmar*, ITLOS gave no effect to St. Martin's Island, which belongs to Bangladesh but is located very close to the coasts of Myanmar. According to ITLOS,

> St. Martin's Island is an important feature which could be considered a relevant circumstance in the present case. However, because of its location, giving effect to St. Martin's Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line. The distorting effect of an island on an equidistance line may

[138] *Bangladesh v. India* (n 121) [417].
[139] Art.121 of UNCLOS. See also *Qatar v. Bahrain* (n 22) [185].
[140] See Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn, Cambridge University Press 2019) 258–260.

> increase substantially as the line moves beyond 12 nm from the coast.[141]

In *Costa Rica v. Nicaragua*, the ICJ gave half effect to the Corn Islands of Nicaragua 'given their limited size and significant distance from the mainland coast'.[142] But before making this decision, the ICJ invoked the observation made by ITLOS in *Bangladesh/Myanmar*:

> [T]he effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographic realities and the circumstances of the specific case. There is no general rule in this respect. Each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable.[143]

It thus appears that both the ICJ and UNCLOS tribunals tend not to formulate generally applicable criteria to determine the effect given to maritime features. Instead, they are content of having a large margin of appreciation in this regard. One may wonder whether such reasoning is helpful for the certainty of the law of maritime delimitation.[144]

Finally, significant disparities in coastal lengths are regarded as a relevant circumstance. The underlying theory of this circumstance is the element of proportionality, as established since *North Sea Continental Shelf*. This circumstance was taken into account by the ICJ in *Libya/Malta*,[145] *Jan Mayen*,[146] and *Nicaragua v. Colombia*.[147] In the jurisprudence of UNCLOS tribunals, the Annex VII tribunal decided to adjust the provisional equidistance line on this basis in *Barbados v. Trinidad and Tobago Arbitration*. In that case, the tribunal

[141] *Bangladesh/Myanmar* (n 120) [318].
[142] *Costa Rica v. Nicaragua* (n 82) [154].
[143] ibid [153], citing *Bangladesh/Myanmar* (n 120) [317].
[144] See Declaration of Judge Wolfrum, *Bangladesh/Myanmar* (n 120), 138.
[145] *Libya/Malta* (n 26) [68].
[146] *Jan Mayen* (n 74) [69].
[147] *Nicaragua v. Colombia I* (n 85) [211].

observed that '[t]he reason for coastal length having a decided influence on delimitation is that it is the coast that is the basis of entitlement over maritime areas and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria'.[148] Distinguishing considerations of proportionality from apportioning maritime areas, the tribunal further considered that:

> Delimitation rather requires the consideration of the relative lengths of coastal frontages as one element in the process of delimitation taken as a whole. The degree of adjustment called for by any given disparity in coastal lengths is a matter for the Tribunal's judgment in the light of all the circumstances of the case.[149]

To conclude, UNCLOS tribunals aligned with the ICJ not only in the formulation and application of the step-by-step approach but also in the substance of the delimitation methodology, especially in the examination of relevant circumstances. Currently, the ICJ and UNCLOS tribunals are consistent in giving effect to geographical circumstances and remain cautious with respect to non-geographical ones.

However, as mentioned earlier, UNCLOS tribunals have a modest jurisprudence concerning maritime delimitation in comparison to the ICJ. So far, UNCLOS tribunals have dealt with only 6 maritime boundary disputes, while the ICJ decided more than a dozen. It seems that States prefer to go to the ICJ to settle maritime boundary disputes. Initially, this might be explained by the fact that the cumulation of the case law of the ICJ gave States a stronger sense of predictability. But after UNCLOS tribunals showed their willingness to adhere to the jurisprudence of the ICJ, would this preference over ICJ fade away? While this question requires more time to be tested out, it is important to note that among the 6 maritime boundary

[148] *Barbados v. Trinidad and Tobago* (n 115) [239].
[149] ibid [328].

disputes that have been submitted to UNCLOS tribunals, 5 of them concerned the continental shelf beyond 200 nm. In contrast, in the extensive case law of the ICJ, there were only 3 such cases, two of which concerned the same parties, namely, Nicaragua and Colombia.

The continental shelf beyond 200 nm is thus sort of a game-changer for UNCLOS tribunals. And why this is the case and how UNCLOS tribunals broke new ground in this regard are questions to be considered in next sessions.

LECTURE 4:

International Judiciary and the Continental Shelf Delimitation Beyond 200 NM

Now we turn our discussion to the development of the law concerning the continental shelf delimitation beyond 200 nm. As mentioned earlier, UNCLOS tribunals are pioneers that made considerable contribution to clarifying and developing the law and methodology in this respect. To appreciate the scale of UNCLOS tribunals' contribution, this lecture will begin with an introduction to the legal regime of the continental shelf beyond 200 nm under UNCLOS and explain why its delimitation raises questions for the law of maritime delimitation.

1. The Legal Regime of the Continental Shelf Beyond 200 NM

The delimitation of the continental shelf beyond 200 nm is a relatively novel enterprise because the legal concepts of continental shelf underwent a thorough change during the negotiations of UNCLOS. Under the 1958 CCS, coastal States' continental shelf either extends to the 200-metre isobath (depth criterion) or extends as far as it is capable of exploitation (exploitability criterion). Both definitions have a clear purpose of facilitating coastal States' exploitation of natural resources and their geographical scope does not necessarily correspond to the physical continental shelf.[150] Thus, the legal concept of the continental shelf was not exactly a replica of the physical continental shelf as understood in science.

[150] As observed by the ICJ in *Tunisia/Libya*, 'the legal concept, while it derived from the natural phenomenon, pursued its own development'. *Tunisia/Libya* (n 58) [42].

However, the definition of the continental shelf under the CCS became outdated very quickly because the advance of technology made it possible for drilling much deeper and much further into the seabed, and oil and gas resources were found not only in the seabed of the continental shelf, but also in the continental margin. Therefore, some wide-margin coastal States argued that the legal concept of the continental shelf should be expanded to include the continental margin. However, other countries preferred the continental shelf and the EEZ to have the same geographical scope, or even to abolish the regime of the continental shelf. Still others were concerned that too large a scope of the continental shelf would deprive the 'common heritage of mankind' of any useful meaning. Eventually, the legal concept of the continental shelf under UNCLOS reflects a compromise between these conflicting positions.[151]

Art.76 of UNCLOS defines the continental shelf and the establishment of the outer limits of the continental shelf when it extends beyond 200 nm. It contains 10 articles and it is one of the most complicated articles under UNCLOS. Art.76(1) defines the continental shelf as:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

[151] See Satya N Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II* (Martinus Nijhoff Publishers 1993) 842 et seq.

This provision provides two alternative criteria of defining the continental shelf, namely, a distance-based criterion and the natural prolongation to the outer edge of the continental margin criterion. They are alternative because if a coastal State's continental shelf extends beyond 200 nm, it would be defined in accordance with subsequent provisions that specify the limits of the continental shelf. However, if the continental shelf does not extend to 200 nm, the coastal State will be entitled to a 200-nm continental shelf.

The remaining provisions of Art.76 define the substantive and procedural steps to establish the outer limits of the continental shelf. According to Art.76(2), the continental shelf shall not extend beyond the limits provided for in paragraphs 4 to 6. These paragraphs specify the substantive criteria for coastal States to establish the outer limits of the continental shelf, and they contain a mixture of elements drawing from geography, geology, geomorphology, and jurisprudence. Accordingly, application of Art.76 requires both legal and scientific expertise.[152]

To be as simple as possible, the seaward limits of the continental shelf beyond 200 nm are established by considering the following rules. First, it is necessary to identify the foot of the continental slope (FOS), a salient geomorphological feature that underlies the definition of the continental shelf beyond 200 nm. Second, from the FOS, coastal States are allowed to apply two formulas to determine the outer edge of the continental margin, one is a distance-based formula and the

[152] *Bangladesh/Myanmar* (n 120) [411].

other relies on the thickness of the sediments of the seabed.[153] Next, coastal States need to further consider if the outer edge of the continental margin located under Art.76(4) exceeds the maximum limits under Art.76(5)-(6). Under these provisions, the outer limits of the continental shelf shall not exceed either 350 nm from baselines or 100-nm from the line connecting the depth of 2500 metres.

Even the above simplified explanation is sufficient to make the point that determination of the continental shelf beyond 200 nm requires significant input in terms of scientific research, collection of underwater data, and analysis of the geomorphology or geology of the seabed. It is certainly scientifically demanding. But, however difficult it is, the outer limits of the continental shelf beyond 200 nm are definable, which is, in fact, the real achievement of Art.76 of UNCLOS.[154] If one compares the legal definition of the continental shelf under UNCLOS with that of the CCS, it is obvious that under the exploitability criterion, there is virtually no limit to coastal State's continental shelf, and therefore the scope of the legal continental shelf is uncertain. But under UNCLOS, the precise seaward limits of the continental shelf beyond 200 nm could be

[153] Art.76(4) of UNCLOS provides:

(a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

[154] See Ted L McDorman, 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World' (2002) 17 The International Journal of Marine and Coastal Law 301, 307.

determined by applying Art.76, even though that process involves a scientifically challenging exercise.

In addition to the substantive criteria, coastal States also have to satisfy certain procedural requirements under Art.76(8) to determine their seaward limits of the continental shelf beyond 200 nm. UNCLOS establishes a scientific and technical body, the Commission on the Limits of the Continental Shelf (CLCS). The CLCS consists of 21 experts on geophysics, geology and hydrography, and they are elected by the States parties to UNCLOS. The function of the CLCS is specified by Art.3 of Annex II to UNCLOS, which includes considering the data and materials submitted by coastal States and making recommendations in accordance with Art.76. The CLCS could also provide scientific and technical advice if requested by a coastal State.

The CLCS is entrusted by UNCLOS to interpret and apply Art.76 and plays a significant role in the establishment of the outer limits of the continental shelf beyond 200 nm. Under Art.76(8),

> Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

There are, therefore, three limbs under this provision. First, coastal States submit information to the CLCS. Second, the CLCS recommends the outer limits of the continental shelf, and third, coastal States establish the outer limits on the basis of the recommendations of the CLCS. The procedural requirement is also

part of the package of UNCLOS regarding the continental shelf regime.

The recommendations of the CLCS are not legally binding. However, given that coastal States' outer limits of the continental shelf established on the basis of the CLCS recommendations are final and binding, it is impossible for coastal States to set them aside. Though the precise meaning of 'final and binding' is subject to debate,[155] ITLOS considered it to mean that 'the opposability with regard to other States of the limits thus established depends upon satisfaction of the requirements specified in article 76'.[156]

In case of disagreement by the coastal State with the recommendations of the CLCS, the coastal State shall, within a reasonable time, make a revised or new submission to the CLCS.[157] The Commission may recommend that further supporting data is needed and suggests the coastal State to make a revised submission. It may also happen that the Commission recommends that the coastal State is not entitled to a continental shelf beyond 200 nm.[158]

The CLCS started to function in 1999. It received the first submission from the Russian Federation in 2001. The workload of the CLCS has, however, exceeded what was anticipated during the negotiations of UNCLOS. 95 submissions were made to the CLCS.[159] Some States made multiple submissions with respect to different areas of the continental shelf. Some States filed partial submissions

[155] See International Law Association, 'Report of Committee on Legal Issues of the Outer Continental Shelf', *Report of the Seventy-First Conference* (2004) 22–23.
[156] *Bangladesh/Myanmar* (n 120) [407].
[157] Art.9 of Annex II to UNCLOS.
[158] See Summary of Recommendations in regard to the submission made by the United Kingdom in respect of Ascension Island (15 April 2010), paras.53-54, available at: https://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/gbr_asc_isl_rec_summ.pdf.
[159] See submissions to the CLCS, available at: https://www.un.org/Depts/los/clcs_new/commission_submissions.htm. The figure was consulted by 31 July 2024.

and reserved their rights to make future partial submissions. States also tend to make revised submissions as well, which further prolong the delineation procedure. Currently, only 24 submissions received recommendations.[160]

Before proceeding to consider the questions of delimitation beyond 200 nm, it is useful to point out the differences between the two continental shelf entitlements. First, the continental shelf beyond 200 nm is, obviously, not distance-based. The entitlement depends on the satisfaction of geomorphological or geological standards specified by Art.76. In contrast, the scope of a 200-nm continental shelf is geometrically determined by reference to the baselines of the coastal State. Second, the continental shelf beyond 200 nm is subject to the verification of the CLCS. According to the ICJ, the main role of the CLCS consists of 'ensuring that the continental shelf of a coastal State does not extend beyond the limits provided for in [Art.76(4)-(6)] and thus preventing the continental shelf from encroaching on ... "the common heritage of mankind"'.[161] A third difference between the two continental shelf entitlements is found in Art.82, under which coastal States that have established the continental shelf beyond 200 nm have to make payments and contributions with respect to the exploitation of the continental shelf beyond 200 nm, sharing their benefit with the international community through the International Seabed Authority, an international organization established by UNCLOS to regulate activities within the Area.

Although the two continental shelf entitlements differ in substantive, procedural, and institutional aspects, it is important to put these differences into perspective. Whereas the method

[160] See submissions to the CLCS, available at: https://www.un.org/Depts/los/clcs_new/commission_submissions.htm. The figure was consulted by 31 July 2024.

[161] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Preliminary Objections) [2016] ICJ Rep 100 [109].

to establish the existence and scope of the entitlement differs between the continental shelf within and beyond 200 nm, these differences by no means affect the legal nature of the continental shelf beyond 200 nm. Coastal States' rights to the continental shelf beyond 200 nm are as sovereign, exclusive, and inherent as those to the continental shelf within 200 nm.[162]

It is similarly important to keep in mind the distinction between delineation and delimitation. Delineation refers to the process of establishing the outer limits of the continental shelf and it involves ascertaining the scope of the continental shelf entitlement. It is essentially a unilateral act. This step may be necessary for purposes of determining the area of overlapping entitlements, which is a precondition to maritime delimitation. On the other hand, delimitation refers to the division of the area of overlapping entitlements. Delineation and delimitation are thus two separate processes governed by different rules.[163] Art.76(10) provides that 'provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts'. Accordingly, coastal States' unilateral establishment of the outer limits of the continental shelf, even based on the recommendations of the CLCS, are not opposable to a neighbouring State if they have overlapping claims to the continental shelf beyond 200 nm.[164] Where there is overlap, it is always delimitation that will eventually settle the division of the respective maritime jurisdictions for the coastal States.

[162] Art.77 of UNCLOS.
[163] See *Bangladesh/Myanmar* (n 120) [376].
[164] See Alex G Oude Elferink, 'Causes, Consequences, and Solutions Relating to the Absence of Final and Binding Outer Limits of the Continental Shelf' in Clive Ralph Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers 2011) 257.

2. Judicial Hesitation in Delimiting the Continental Shelf Beyond 200 NM

When it comes to the continental shelf delimitation beyond 200 nm international courts and tribunals are confronted with questions that do not arise in maritime delimitation within that distance, which boil down to two questions. First, can courts and tribunals delimit the continental shelf beyond 200 nm before coastal States establish the outer limits of the continental shelf, or before they receive recommendations from the CLCS, or even before they submit information to the CLCS?

To approach this primary question, two further questions need to be asked and answered. One is whether the delimitation carried out by courts and tribunals would prejudice the work of the CLCS. The other is whether courts and tribunals are competent to determine the parties' entitlement to the continental shelf beyond 200 nm, which may involve evaluating contested technical and scientific data. These two questions have to be posed because the absence of established outer limits of the continental shelf is bound to raise doubts about the exact extent of coastal States' entitlements to the continental shelf beyond 200 nm.[165]

A second major question is, what methodology should be applied to delimit the continental shelf beyond 200 nm? Should it differ from the established methodology within 200 nm? In maritime delimitation within 200 nm, the established methodology involves the use of a provisional equidistance line, which often ensures an equal division of the area of overlap,[166] and the consideration of geographical circumstances. However, the fact that the continental shelf beyond 200 nm is not distance-based renewed discussion about the proper delimitation methodology. It

[165] International Law Association (n 155) 15.
[166] *Nicaragua v. Honduras* (n 84) [287].

is because the jurisprudence of international courts and tribunals tends to suggest a link between the entitlement to maritime zones and the appropriateness of the delimitation methodology. For instance, in *Gulf of Maine* the Chamber of the ICJ observed that 'preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation'.[167] Circumstances of coastal geography are considered 'neutral' for purposes of single maritime delimitation of the continental shelf and the EEZ. Moreover, *Libya/Malta* made the point that '[t]he legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation'.[168] Does it entail that once the delimitation is concerned exclusively with the continental shelf beyond 200 nm circumstances pertinent only to the continental shelf should be taken into account? Therefore, the question concerning the delimitation methodology for the continental shelf beyond 200 nm centres on the applicability of equidistance and whether circumstances other than coastal geography, such as the geomorphological or geological circumstances of the seabed would be relevant in the delimitation process.

The jurisprudence concerning the continental shelf delimitation beyond 200 nm develops by approaching these questions, and it develops very slowly prior to *Bangladesh/Myanmar*. In fact, these earlier cases where the parties requested the delimitation beyond 200 nm are marked by judicial hesitation. Although in none of these cases did the court or tribunal delimit the continental shelf beyond 200 nm, their reasoning did have an impact on later development.

In 1992 *St. Pierre and Miquelon Arbitration*, France claimed that it had a continental margin extending beyond 200 nm from the coasts of St. Pierre and Miquelon and requested the Court of Arbitration

[167] *Gulf of Maine* (n 21) [194].
[168] *Libya/Malta* (n 26) [27].

to prolong the boundary lines to delimit the areas beyond 200 nm. The Court of Arbitration declined to delimit the continental shelf beyond 200 nm, because it considered that

> Any decision by this Court recognizing or rejecting any rights of the Parties over the continental shelf beyond 200 nautical miles would constitute a pronouncement involving a delimitation, not 'between the Parties' but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international seabed Area (the sea-bed beyond national jurisdiction) that has been declared to be the common heritage of mankind. This Court is not competent to carry out a delimitation which affects the rights of a Party which is not before it.[169]

The reasoning behind this observation is that the outer limits of the continental shelf beyond 200 nm would represent the limits between areas under national jurisdiction and those belonging to the 'common heritage of mankind'. The Court of Arbitration thus appears to suggest that, unless that limit was clear, any delimitation may prejudice the rights of the international community. At that time UNCLOS had not entered into force and the CLCS had not been established. It is also notable that the Court of Arbitration further considered that the disagreement over the factual situation of the French continental shelf claim 'strengthens the Court's decision to abstain from pronouncing on the substance of the matter. It is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist'.[170] Prudence thus prevailed in this case.

In 2006 *Barbados v. Trinidad and Tobago Arbitration*, Trinidad and Tobago asked the tribunal to delimit the continental shelf

[169] *Decision in Case concerning Delimitation of Maritime Areas (St. Pierre and Miquelon),* 31 ILM 1145 (1992) [78–79].
[170] ibid [81].

beyond 200 nm, arguing that the parties' dispute included the delimitation of the areas beyond 200 nm, whereas Barbados disagreed over the scope of the dispute. The tribunal confirmed that it had jurisdiction to delimit the continental shelf beyond 200 nm, making a point that later became influential in the jurisprudence of UNCLOS tribunals: 'The Tribunal considers that the dispute to be dealt with by the Tribunal includes the outer continental shelf, since…in any event there is in law only a single "continental shelf" rather than an inner continental shelf and a separate extended or outer continental shelf.'[171]

Nevertheless, the tribunal eventually did not extend the boundary line beyond 200 nm because, in its view, its task was to delimit a single maritime boundary, whereas 'there is no single maritime boundary beyond 200 nm'.[172] The reasoning is not free from ambiguity, as the tribunal interpreted single maritime boundary to be a delimitation that simultaneously divides the continental shelf and the EEZ. Since there is no EEZ beyond 200 nm, there is no single maritime boundary. However, if one understands single maritime boundary as a continuous boundary line that divides multiple maritime areas,[173] such as one that divides the territorial sea and the continental shelf, this observation seems to be unfounded.

Another case that is worth mentioning is one decided by the ICJ, *Nicaragua v. Honduras*. No issue of the continental shelf beyond 200 nm was involved, because neither party requested the Court to delimit the continental shelf beyond 200 nm. However, after the ICJ delimited the maritime boundary without specifying an endpoint, it made the following observations:

[171] *Barbados v. Trinidad and Tobago* (n 115) [213].
[172] ibid [368].
[173] This understanding of single maritime delimitation seems to be accepted by the ICJ. See *Qatar v. Bahrain* (n 22) [173].

> The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-State rights. It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; *any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder*.[174]

For some, this observation implies that courts and tribunals cannot delimit the continental shelf beyond 200 nm unless the claim to the continental shelf beyond 200 nm has been reviewed by the CLCS.[175] For others, this observation is merely an *obiter dictum*, as the case is not concerned with the delimitation of the continental shelf beyond 200 nm.[176]

To sum up, these judicial and arbitral decisions of an earlier age did not give uniform or consistent answers to the question of the delimitation of the continental shelf beyond 200 nm, partly because they arose in different procedural and historical contexts. It was until *Bangladesh/Myanmar* that an international tribunal

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[174] *Nicaragua v. Honduras* (n 84) [319] (emphasis added).

[175] See Alina Miron, 'The Acquis Judiciaire, a Tool for Harmonization in a Decentralized System of Litigation? A Case Study in the Law of the Sea' in Chiara Giorgetti and Mark Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals* (Cambridge University Press 2022) 146; Bjørn Kunoy, 'Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf' (2010) 25 International Journal of Marine and Coastal Law 237, 262.

[176] See Signe Veierud Busch, 'The Delimitation of the Continental Shelf Beyond 200 Nm: Procedural Issues' in Alex G Oude Elferink, Tore Henriksen and Signe Veierud Busch (eds), *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (Cambridge University Press 2018) 328; Xuexia Liao, *The Continental Shelf Delimitation Beyond 200 Nautical Miles: Towards A Common Approach to Maritime Boundary-Making* (Cambridge University Press 2021) 126–127.

systematically approached the questions arising out of delimitation of the continental shelf beyond 200 nm.

3. *Bangladesh/Myanmar* and the Breakthrough

Bangladesh, Myanmar, and India are neighbouring countries surrounding the Bay of Bengal, and all of them claimed a continental shelf beyond 200 nm and submitted information to the CLCS.[177] Bangladesh instituted separate proceedings against Myanmar and India. After consulting with Myanmar, Bangladesh and Myanmar agreed to submit the dispute to ITLOS.[178] The case with India went to an Annex VII tribunal.

In *Bangladesh/Myanmar*, Myanmar did not question the jurisdiction of ITLOS to deal with the continental shelf delimitation beyond 200 nm but it argued that it was not appropriate to exercise that jurisdiction. ITLOS thus analyzed the existence of jurisdiction as well as the appropriateness to proceed with the delimitation beyond 200 nm.

ITLOS first confirmed its jurisdiction by reference to the concept of single continental shelf. According to the tribunal,

> Article 76 of the Convention embodies the concept of a single continental shelf. In accordance with article 77, paragraphs 1 and 2, of the Convention, the coastal State exercises exclusive sovereign rights over the continental shelf in its entirety without

[177] Myanmar submitted information to the CLCS on 16 December 2008, while India and Bangladesh submitted information on 11 May 2009 and 25 February 2011 respectively. See 'Submissions to the CLCS', available at: https://www.un.org/Depts/los/clcs_new/commission_submissions.htm.

[178] Both Bangladesh and Myanmar made a declaration pursuant to Art.287 of UNCLOS, accepting the jurisdiction of ITLOS for the settlement of dispute between them relating to the delimitation of maritime boundary in Bay of Bengal. Myanmar withdrew this declaration on 14 January 2010, which did not affect ITLOS' jurisdiction in *Bangladesh/Myanmar*. See declarations of Bangladesh and Myanmar, available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

> any distinction being made between the shelf within 200 nm and the shelf beyond that limit. Article 83 of the Convention, concerning the delimitation of the continental shelf between States with opposite or adjacent coasts, likewise does not make any such distinction.[179]

Since all these provisions governing the definition, legal nature, and delimitation of the continental shelf do not distinguish an inner and an outer continental shelf, there is legally no basis to separate the delimitation of the continental shelf beyond 200 nm from maritime delimitation within that distance. ITLOS drew the concept of single continental shelf from *Barbados v. Trinidad and Tobago Arbitration* and developed it into a general theory underlying the jurisdictional question.

More importantly, ITLOS observed that delimitation of the continental shelf beyond 200 nm need not await the establishment of the outer limits of the continental shelf or the recommendations of the CLCS. ITLOS distinguished the role of the CLCS from that of tribunals under UNCLOS based on a distinction between delineation and delimitation:

> There is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention, which include international courts and tribunals.[180]

[179] *Bangladesh/Myanmar* (n 120) [361].
[180] ibid [376].

ITLOS thus found that no prejudice will be caused by the exercise of the judicial function of settling boundary disputes to the function of the CLCS, just as the function of the CLCS in respect of delineation of the outer limits of the continental shelf is without prejudice to the question of delimitation.[181] A final consideration addressed by ITLOS was a policy one. Before resorting to ITLOS, Bangladesh lodged an objection against the CLCS' consideration of Myanmar's submission. According to the CLCS Rules of Procedure, this resulted in an impasse in the delineation procedure, because the CLCS would not consider a State's submission unless the parties to the dispute explicitly consented to it.[182] In the view of ITLOS, '[a] decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention'.[183]

Given these considerations, ITLOS decided that it had jurisdiction over the delimitation of the continental shelf beyond 200 nm, and it was appropriate to exercise the jurisdiction. An outstanding objective that marks ITLOS' reasoning was the efficiency of the operation of UNCLOS through the complementary functions of the bodies established by the Convention. This line of reasoning was lacking in previous cases concerning the continental shelf beyond 200 nm

[181] ibid [379].

[182] Under the CLCS Rules of Procedure, paragraph 5(a) of Annex I 'Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes' provides that:

> In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

[183] *Bangladesh/Myanmar* (n 120) [391].

and it shows that ITLOS perceived itself as an 'institutional guardian' of UNCLOS.[184]

In addition to the jurisdictional questions, ITLOS also considered whether it was competent to determine the parties' entitlements to the continental shelf beyond 200 nm, and it resolved the issue by relying on the legal nature of its exercise:

> A coastal State's entitlement to the continental shelf exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present. It does not require the establishment of outer limits…as [Art.76] contains elements of law and science, its proper interpretation and application requires both legal and scientific expertise. While the Commission is a scientific and technical body with recommendatory functions entrusted by the Convention to consider scientific and technical issues arising in the implementation of article 76 on the basis of submissions by coastal States, the Tribunal can interpret and apply the provisions of the Convention, including article 76. This may include dealing with uncontested scientific materials or require recourse to experts.[185]

Though ITLOS was unequivocal that it was competent to interpret Art.76 from legal perspective, it remained silent as to whether it was competent to analyze the scientific and technical data in support of the application of the provisions under Art.76. In this case, the dispute concerning the parties' entitlement to the continental shelf was indeed one of legal nature. Bangladesh relied on the notion of natural prolongation and argued that there existed fundamental discontinuity between Myanmar's land territory and the Bay of Bengal in geological terms, which precluded Myanmar from having a continental shelf beyond 200 nm.[186] Moreover, since

[184] See Lan Ngoc Nguyen, *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies* (Cambridge University Press 2023) 286.
[185] *Bangladesh/Myanmar* (n 120) [411].
[186] ibid [424].

the continental shelf in the Bay of Bengal had a geological connection with the territory of Bangladesh, Bangladesh argued that it should have a larger share of the continental shelf beyond 200 nm in the delimitation process given the 'most natural prolongation'.[187]

ITLOS rejected both arguments. It clarified the notion of natural prolongation under Art.76(1) and modernized this *North Sea Continental Shelf* concept under the framework of UNCLOS. It pointed out that, '[w]hile the term "natural prolongation" is mentioned in [Art.76(1)] it is clear from its language that the notion of "the outer edge of the continental margin" is an essential element in determining the extent of the continental shelf'.[188] ITLOS observed that the notion of natural prolongation was not elaborated by the subsequent provisions of Art.76, and its role was mainly historical, as 'during the Third United Nations Conference on the Law of the Sea the notion of natural prolongation was employed as a concept to lend support to the trend towards expanding national jurisdiction over the continental margin'.[189] Therefore, the key concept that defines the scope of coastal States' entitlement to the continental shelf beyond 200 nm was thus not natural prolongation, but the outer edge of the continental margin. It followed that

> [T]he reference to natural prolongation in article 76, paragraph 1, of the Convention, should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin. Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4.[190]

As a result, there is no need to separately establish the existence of natural prolongation or geological continuation under Art.76(4).

[187] ibid [457].
[188] ibid [429].
[189] ibid [433].
[190] ibid [437].

ITLOS hence rejected the argument that Myanmar was not entitled to a continental shelf beyond 200 nm by reason of the significant geological discontinuity dividing the Burma plate from the Indian plate.[191]

After interpreting the notion of natural prolongation, ITLOS turned to determine the entitlements of the parties, and it did so by relying on uncontested scientific materials. In fact, the Bay of Bengal presented a unique situation in that the existence of a thick layer of sediments throughout its seabed was acknowledged during the negotiations of UNCLOS.[192] Accordingly, once decided that geological continuity was not a necessary element in determining the entitlement to the continental shelf beyond 200 nm, it was scientifically certain that both countries were entitled to the continental shelf beyond 200 nm.

Nonetheless, ITLOS cautioned that

> Notwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question.[193]

This observation seems to imply that if there was significant uncertainty as to the existence of a continental margin in the area in question, it would not be appropriate for ITLOS to exercise jurisdiction over the delimitation beyond 200 nm. It thus appears that this consideration would overturn the other considerations that support ITLOS' exercise of jurisdiction, such as the distinction between delineation and delimitation, the different functions between ITLOS and CLCS, and the policy consideration of the

[191] ibid [438].
[192] ibid [444].
[193] ibid [443].

efficient operation of UNCLOS. Indeed, in 2023 *Mauritius/Maldives*, the special chamber of ITLOS decided not to proceed to delimitation beyond 200 nm by building upon the 'significant uncertainty' standard.[194]

A final question to be considered by ITLOS was that of delimitation methodology. In maritime delimitation within 200 nm, ITLOS employed 'equidistance/relevant circumstances approach', which was essentially the three-stage approach. In delimitation beyond 200 nm, ITLOS found that the methodology should not differ because

> [A]rticle 83 of the Convention addresses the delimitation of the continental shelf between States with opposite or adjacent coasts without any limitation as to area. It contains no reference to the limits set forth in article 76, paragraph 1, of the Convention. Article 83 applies equally to the delimitation of the continental shelf both within and beyond 200 nm.[195]

In applying the delimitation methodology, ITLOS rejected the most natural prolongation argument put forward by Bangladesh because it had decided that geological factors were not relevant in the present case. Instead, ITLOS considered that the concavity of the Bangladesh coast had a continuing effect beyond 200 nm, and it thus extended the boundary line within 200 nm to the areas beyond 200 nm by giving effect to that circumstance.[196] ITLOS drew an arrow instead of indicating an end point of the boundary, meaning that the boundary line will continue until it reaches the point where the interests of third States might be affected. This is a usual practice in maritime boundary delimitation to protect third states' interests.

To conclude, ITLOS significantly contributed to theorizing the law and methodology concerning the continental shelf beyond

[194] *Mauritius/Maldives* (n 126) [448-450].
[195] *Bangladesh/Myanmar* (n 120) [454].
[196] ibid [461].

200 nm. It broke away from the hesitation that marked the earlier case law and grounded the propriety of exercising jurisdiction on the concept of single continental shelf, the distinction between delimitation and delineation, and the complementary roles assigned to the CLCS and tribunals under UNCLOS. It also contributed to clarifying the meaning of natural prolongation and thus elucidated the determination of the entitlement to the continental shelf beyond 200 nm under Art.76 of UNCLOS. Furthermore, by rejecting the relevance of geological circumstances advanced by Bangladesh and by giving effect to the geographical circumstance in delimitation beyond 200 nm, ITLOS suggested that the delimitation methodology for continental shelf beyond 200 nm did not differ from that within 200 nm. Therefore, the approach in *Bangladesh/ Myanmar* demonstrates a preference for a common approach to maritime delimitation within and beyond 200 nm.

LECTURE 5:

Towards Pluralism: Development in the Continental Shelf Delimitation Beyond 200 NM

In *Bangladesh/Myanmar*, ITLOS broke new ground in the delimitation of the continental shelf beyond 200 nm and systematically responded to the question whether international courts and tribunals were competent to delimit the shelf in the absence of CLCS recommendations. In subsequent cases concerning the delimitation of the continental shelf beyond 200 nm, UNCLOS tribunals consistently followed the reasoning of ITLOS and thus built up a relatively stable jurisprudence. In contrast, there exists a certain amount of confusion and contradiction in the jurisprudence of the ICJ in cases concerning the continental shelf beyond 200 nm, before the ICJ eventually agreed with UNCLOS tribunals over the appropriateness of delimiting the continental shelf beyond 200 nm in the absence of CLCS recommendations. However, in its latest decision of *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (hereinafter '*Nicaragua v. Colombia II*'), the ICJ made observations regarding the legal regime of the continental shelf that were markedly different from the jurisprudence of UNCLOS tribunals (or, indeed, its own jurisprudence). The development thus attests to the emergence of pluralism in the field of the delimitation of the continental shelf beyond 200 nm, which alerts the fragility of the common ground over certain basic issues of the law of maritime entitlement and the law of maritime delimitation.

1. The Building-up of Consistent Jurisprudence of UNCLOS Tribunals

The reasoning of ITLOS in *Bangladesh/Myanmar* was largely followed by subsequent UNCLOS tribunals in *Bangladesh v. India*, *Ghana/Côte d'Ivoire*, and *Mauritius/Maldives*, even though in the last case the special chamber of ITLOS decided not to proceed with delimitation beyond 200 nm.

Bangladesh v. India and *Ghana/Côte d'Ivoire* share some similarities with *Bangladesh/Myanmar*. First, all these cases concern the delimitation between adjacent coasts, which entails that the delimitation beyond 200 nm is bound to carry on from the end point of the maritime delimitation within 200 nm. Second, there is factual certainty regarding the parties' entitlements to the continental shelf beyond 200 nm. In *Bangladesh v. India*, the parties agreed that both of them had entitlements to the continental shelf beyond 200 nm in the Bay of Bengal,[197] and Bangladesh withdrew the 'most natural prolongation' argument.[198] In *Ghana/Côte d'Ivoire*, Ghana had received positive recommendations from the CLCS, a factor that was non-existent in previous cases. The special chamber of ITLOS thus had no doubt about the continental shelf beyond 200 nm for Côte d'Ivoire since 'its geological situation is identical to that of Ghana'.[199]

In these two cases, the tribunals maintained the major elements in the reasoning of ITLOS in *Bangladesh/Myanmar*. In *Bangladesh v. India*, the tribunal considered that '[t]here is a clear distinction in the Convention between the delimitation of the continental shelf under article 83 of the Convention and the delineation of its outer limits under article 76',[200] and that the function of the tribunals under Part XV of UNCLOS related

[197] *Bangladesh v. India* (n 121) [457].
[198] ibid [439].
[199] *Ghana/Côte d'Ivoire* (n 123) [491].
[200] *Bangladesh v. India* (n 121) [80].

to settling maritime boundary disputes while that of the CLCS concerned the delineation of the continental shelf beyond 200 nm. Therefore, these functions were complementary and delimitation by the tribunals would not prejudice the work of the CLCS. Similarly, noting the impasse in the delineation for India and Bangladesh due to the objections raised to their submissions, the tribunal observed that

> [I]naction by this Tribunal would in practice leave the Parties in a position in which they would likely be unable to benefit fully from their rights over the continental shelf. The Tribunal does not consider that such an outcome would be consistent with the object and purpose of the Convention.[201]

In terms of delimitation methodology, the arbitral tribunal recognized that the same delimitation methodology should be used within and beyond 200 nm. In this respect, *Bangladesh v. India* developed the jurisprudence in two aspects. First, instead of relying on Art.83 as the legal basis for the same delimitation methodology, the tribunal grounded the reasoning on the concept of single continental shelf.[202] Second, in contrast to *Bangladesh/ Myanmar*, which delimited the maritime boundary within 200 nm and then extended the adjusted line to the areas beyond 200 nm, the tribunal in *Bangladesh v. India* drew a provisional equidistance line throughout the delimitation within and beyond 200 nm and adjusted the line by taking into account the relevant circumstance, i.e., concavity of the coast. As observed by the tribunal, 'consistent with the concept of a single continental shelf [...], any adjustment of the provisional equidistance line within 200 nm should result in a delimitation line extending into the area beyond 200 nm'.[203] In other words, *Bangladesh v. India* saw a higher degree of integration

[201] ibid [82].
[202] ibid [465].
[203] ibid [437].

of the delimitation methodology within and beyond 200 nm than that of *Bangladesh/Myanmar*.[204]

In *Ghana/Côte d'Ivoire* there was no serious doubt about the appropriateness of delimiting the continental shelf beyond 200 nm, and the special chamber simply based the decision on the concept of single continental shelf.[205] The special chamber emphasized that it 'can delimit the continental shelf beyond 200 nm only if such a continental shelf exists',[206] an observation echoing the 'significant uncertainty' statement in *Bangladesh/Myanmar*. Similarly, the special chamber affirmed the employment of the same delimitation methodology by invoking the concept of single continental shelf:

> As far as the methodology for delimiting the continental shelf beyond 200 nm is concerned, the Special Chamber recalls its position that there is only one single continental shelf. Therefore it is considered inappropriate to make a distinction between the continental shelf within and beyond 200 nm as far as the delimitation methodology is concerned.[207]

In this case, the coastal geography of the two countries was relatively straightforward, and there were no unusual geographical circumstances. The conduct of parties in relation to oil activities was advanced by Ghana but was rejected by the special chamber.[208] The eventual boundary line within and beyond 200 nm was an equidistance line.

Therefore, a consistent jurisprudence of UNCLOS tribunals has been building up. The reasoning affirming the appropriateness of

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[204] See Xuexia Liao, 'Delimitation Methodology for the Continental Shelf beyond 200 Nautical Miles: Three-Stage Approach as a Way Forward?' (2024) 37 Leiden Journal of International Law 379, 389.
[205] *Ghana/Côte d'Ivoire* (n 123) [490].
[206] ibid [491].
[207] ibid [526].
[208] ibid [479].

delimiting the continental shelf beyond 200 nm was stabilized, which includes the concept of single continental shelf, the distinction between delimitation and delineation, the complementary roles of the CLCS and courts and tribunals, and the deadlock in the delineation procedure. Moreover, all these cases opted for a common approach to delimiting the maritime zones within and beyond 200 nm, which was the three-stage approach.

Whereas in *Mauritius/Maldives*, the special chamber of ITLOS declined the delimitation of the continental shelf beyond 200 nm, its reasoning was developed from *Bangladesh/Myanmar*. Invoking the statements in respect of the unique situation of the Bay of Bengal and the standard of 'significant uncertainty', the special chamber observed that: 'It notes that this standard serves to minimize the risk that the CLCS might later take a different position regarding entitlements in its recommendations from that taken by a court or tribunal in a judgment.'[209] In this case, Mauritius proposed different routes to establish its entitlement to the continental shelf beyond 200 nm and the Maldives contested the legal and factual viabilities of these routes. Applying the 'significant uncertainty' standard, the special chamber found that there existed significant uncertainty in Mauritius' entitlement to the continental shelf beyond 200 nm, thus it was not in a position to proceed to delimitation beyond 200 nm.[210]

It may thus be summarized that in the jurisprudence of UNCLOS tribunals, it is established in what circumstances and under what theories a court or tribunal could or could not delimit the continental shelf beyond 200 nm, and in cases where the delimitation is carried out, a common delimitation methodology is preferred.

[209] *Mauritius/Maldives* (n 126) [433].
[210] ibid [448–450].

2. Convergences and Divergences in the Jurisprudence of the ICJ

While the jurisprudence of UNCLOS tribunals on the delimitation of the continental shelf beyond 200 nm was building up, there was a greater degree of caution in the jurisprudence of the ICJ. Though the ICJ cross-referenced the reasoning of the decisions of UNCLOS tribunals, it also departed from certain other important observations. There were thus both convergences and divergences if one compares the jurisprudence of UNCLOS tribunals and that of the ICJ.

The first case in which a State asked the ICJ to delimit the continental shelf beyond 200 nm was 2012 *Nicaragua v. Colombia*. Colombia was not a party to UNCLOS, and, therefore, customary international law applied in that case.[211] The ICJ first settled territorial disputes between the parties. According to the judgment, Colombia had sovereignty over San Andrés, Providencia, Santa Catalina, and other islands including Alburquerque Cays, Quitasueño, and other maritime features located in between the mainland of Nicaragua and Colombia.[212] The distance between Nicaragua and Colombia is beyond 400 nm, and, therefore, there is no overlap of the EEZ between the two mainland coasts. However, since Colombia has sovereignty over the above-mentioned islands and maritime features, there are overlapping entitlements between the mainland coast of Nicaragua and the Colombian islands.

Nicaragua claimed a continental shelf beyond 200 nm that extends into the 200-nm limits of Colombia, and it requested the ICJ to delimit a continental shelf boundary dividing the overlapping areas. Nicaragua in its final submission I (3) asked the Court to define 'a continental shelf boundary dividing by equal parts the

[211] *Nicaragua v. Colombia I* (n 85) [114].
[212] See *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Preliminary Objections [2007] ICJ Rep 832 [90]; *Nicaragua v. Colombia I* (n 85) [103].

overlapping entitlements to a continental shelf of both Parties'.[213] By the time Nicaragua put forward the continental shelf delimitation request, it had not submitted information to the CLCS according to Art.76(8) of UNCLOS and only submitted preliminary information, an instrument serving an indicative purpose, which by itself fell short of satisfying the procedural requirement under Art.76(8).[214]

There are at least three particular legal issues in *Nicaragua v. Colombia* that did not arise in the jurisprudence of UNCLOS tribunals. First, Nicaragua claims a continental shelf beyond 200 nm that overlaps with Colombia's 200-nm continental shelf, whereas before UNCLOS tribunals, both parties to the dispute claimed the continental shelf beyond 200 nm and their claims overlapped. Colombia argued that Nicaragua's continental shelf beyond 200 nm cannot extend into Colombia's 200-nm limits because one State's entitlement on the basis of the 200-nm distance always prevails over another State's entitlement on the basis of natural prolongation.[215] Second, since Nicaragua and Colombia are opposite to each other, it is necessary to know the outer limits of the Nicaragua's continental shelf beyond 200 nm to determine the area of overlap, which is a precondition to delimitation. In such a scenario the distinction between delineation and delimitation, as upheld by UNCLOS tribunals, would not be tenable. And it is doubtful whether the delimitation exercise would not prejudice the work of the CLCS if the judiciary had to determine, even approximately, the outer limits of the continental shelf beyond 200 nm of the parties. To overcome this problem, Nicaragua argued in the oral proceedings that 'the Court could make that delimitation by defining the boundary in words such as "the boundary is the median line between the outer edge of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia's 200-mile

[213] *Nicaragua v. Colombia I* (n 85) [106].
[214] ibid [127].
[215] See ibid [123].

zone"'.[216] Finally, if determination of Nicaragua's outer limits of the continental shelf was necessary, what were the customary rules governing the outer limits of the continental shelf? Were the provisions under Art.6(2)-(6) customary so that they could be applicable between Nicaragua and Colombia?

Without responding to these questions in a clear manner, the ICJ found that

> [S]ince Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it.[217]

This finding was ambiguous because it gave rise to two different understandings. On the one hand, it may entail that Nicaragua's submission was rejected because Nicaragua failed to prove that it had a continental shelf beyond 200 nm. On the other, it may also be understood as the Court refrained from deciding Nicaragua's submission because Nicaragua had not satisfied the procedural requirement of Art.76(8) of UNCLOS, as the Court found earlier that 'the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention'.[218]

After deciding that it cannot uphold Nicaragua's continental shelf delimitation claim, the ICJ proceeded to delimit the single maritime boundary between Nicaragua and Colombia, that is, the delimitation of the continental shelf and the EEZ between Nicaragua's mainland and Colombia's islands.[219]

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[216] ibid [128].
[217] ibid [129].
[218] ibid [126].
[219] See ibid [132].

However, in 2013 Nicaragua submitted information to the CLCS and initiated proceedings against Colombia again. In *Nicaragua v. Colombia II*, Nicaragua put forward the same continental shelf boundary claim and asked the Court to effect 'the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia'.[220]

Colombia challenged the jurisdiction of the ICJ and the admissibility of Nicaragua's claim. The principal objection raised by Colombia was that the delimitation claim had been adjudicated and it was thus barred by the principle of *res judicata*. In addressing this objection, the ICJ interpreted the relevant parts of the 2012 Judgment and found that it did not make a decision about Nicaragua's continental shelf claim. The ICJ cannot uphold Nicaragua's submission in that case because Nicaragua did not fulfil the procedural requirement under Art.76(8) of UNCLOS. According to the Court:

> It has found that delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of information on the limits of its continental shelf beyond 200 nautical miles, provided for in paragraph 8 of Article 76 of UNCLOS, to the CLCS.[221]

Since Nicaragua had filed submission under Art.76(8) to the CLCS before the initiation of the proceedings, the ICJ found that the condition imposed by the 2012 Judgment had been fulfilled, and that, as a result, Nicaragua's current continental shelf delimitation claim was not precluded by the application of the *res judicata* principle.[222]

[220] 2016 *Nicaragua v. Colombia II* (n 161) [1].
[221] ibid [85].
[222] See ibid [86–87].

Colombia additionally contested the admissibility of Nicaragua's continental shelf delimitation claim, arguing that the ICJ could not delimit the continental shelf boundary because Nicaragua had not received recommendations from the CLCS. In this connection, the ICJ endorsed the reasoning of UNCLOS tribunals by distinguishing delineation from delimitation:

> The procedure before the CLCS relates to the delineation of the outer limits of the continental shelf, and hence to the determination of the extent of the sea-bed under national jurisdiction. It is distinct from the delimitation of the continental shelf, which is governed by Article 83 of UNCLOS and effected by agreement between the States concerned, or by recourse to dispute resolution procedures.[223]

Since 'the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS', the latter is not a prerequisite for the ICJ to entertain a State's claim to delimit the continental shelf beyond 200 nm.[224] The Court thus rejected Colombia's objection and decided that Nicaragua's continental shelf delimitation claim admissible. The case thus proceeded to the merits stage.

In *Nicaragua v. Colombia II*, although the ICJ joined the UNCLOS tribunals in upholding the distinction between delineation and delimitation and affirmed that delimitation of the continental shelf beyond 200 nm does not require established outer limits of the continental shelf or CLCS recommendations, it found that submission to the CLCS in accordance with Art.76(8) a precondition to delimitation. The latter finding lacked textual and jurisprudential basis and was utterly controversial.[225] In 2023 *Mauritius/Maldives*, in response to the Maldives' objection that Mauritius did not make a

[223] ibid [112].
[224] ibid [114].
[225] See Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson, and Judge *ad hoc* Brower, ibid 155–157.

submission to the CLCS prior to the initiation of proceedings, the special chamber observed that

> [T]his argument presupposes that the filing of a submission with the CLCS prior to the institution of the proceedings is a procedural requirement for the delimitation of the continental shelf beyond 200 nm. The Special Chamber does not consider that there is any rule requiring that a submission be made prior to the institution of delimitation proceedings.[226]

Consequently, though *Nicaragua v. Colombia II* saw a significant development in the jurisprudence of the ICJ that contributed to the consistency of the law concerning the continental shelf beyond 200 nm, it also twisted the jurisprudence by adding a non-existent precondition.

Before the ICJ delivered the judgment on merits for *Nicaragua v. Colombia II*, it decided another case concerning the continental shelf beyond 200 nm, namely, *Somalia v. Kenya*. In this case, the ICJ continued to confirm the appropriateness of delimiting the continental shelf beyond 200 nm before the parties receive the CLCS recommendations on the basis of the distinction between delimitation and delineation. However, it is notable that the ICJ employed cautious and qualifying terms, demonstrating a higher degree of prudence than that of UNCLOS tribunals. In its 2017 Judgment on preliminary objections, the ICJ stated that

> It may be the case that, as the Parties agree, the endpoint of their maritime boundary in the area beyond 200 nautical miles cannot be definitively determined until after the CLCS's recommendations have been received and the outer limits of the continental shelf beyond 200 nautical miles established on the basis of those recommendations. This is consistent with Article 76, paragraph 8, of UNCLOS. A lack of certainty regarding

[226] *Mauritius/Maldives* (n 126) [377].

> the outer limits of the continental shelf, and thus the precise location of the endpoint of a given boundary in the area beyond 200 nautical miles, does not, however, necessarily prevent either the States concerned or the Court from undertaking the delimitation of the boundary *in appropriate circumstances* before the CLCS has made its recommendations.[227]

Accordingly, the lack of delineation does not 'necessarily' prevent the delimitation 'in appropriate circumstances', which signifies that there might be circumstances that would render such a delimitation inappropriate. Again, in the 2021 Judgment on merits, the Court 'emphasized that the lack of delineation of the outer limit of the continental shelf is not, in and of itself, an impediment to its delimitation *between two States with adjacent coasts*'.[228] Given the particularities of *Nicaragua v. Colombia II,* which was currently pending before the ICJ, the prudence exhibited by the ICJ was thus understandable.

Eventually, the ICJ delimited the continental shelf beyond 200 nm by using the same delimitation methodology by extending the adjusted line within 200 nm to the areas beyond 200 nm, without indicating the endpoint of the maritime boundary.[229] The delimitation exercise in *Somalia v. Kenya* was thus similar to the one adopted by ITLOS in *Bangladesh/Myanmar*.

3. Parting Ways: *Nicaragua v. Colombia II* and Its Implications

Two months before the scheduled hearings for *Nicaragua v. Colombia II*, the ICJ, unprecedentedly, issued an order and asked

[227] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Preliminary Objections) [2017] ICJ Rep 3 [94] (emphasis added).
[228] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya),* Judgment of 12 October 2021, [2021] ICJ Rep 206 [189] (emphasis added).
[229] ibid [198].

the parties to present arguments exclusively with regard to the following two questions:

> (1) Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?
>
> (2) What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?[230]

These two questions were identified earlier in the context of explaining the differences between *Nicaragua v. Colombia* and the cases before UNCLOS tribunals. In the view of the Court, the first question had a 'preliminary character' because 'it must be answered in order to ascertain whether the Court may proceed to the delimitation requested by Nicaragua and, consequently, whether it is necessary to consider the scientific and technical questions that would arise for the purposes of such a delimitation'.[231] Indeed, the Court answered the first question negatively, and thereby rejected all of Nicaragua's submissions.

Although the task of the Court was to identify the existence of a customary international rule under the first question, the reasoning of the ICJ largely focused on interpretation of UNCLOS, especially the relationship between the EEZ and the continental shelf. The

[230] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia),* Order of 4 October 2022, [2022] ICJ Rep 563, 565.
[231] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia),* Judgment, [2023] ICJ Rep 413 [43].

Court considered that UNCLOS was negotiated as a package-deal, whose 'integrated character' was 'particularly evident' in relation to Part V and Part VI, which govern the regimes of the EEZ and the continental shelf respectively.[232]

The Court then analyzed the relationship between the EEZ and the continental shelf. In its view, Art.56(3) of UNCLOS specified the relationship between the two régimes, which was interrelated.[233] The ICJ invoked an observation in *Libya/Malta*:

> Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.[234]

Then the Court proceeded to distinguish the 'grey area' issue in *Bay of Bengal* from the question under consideration. In both *Bangladesh/Myanmar* and *Bangladesh v. India*, the tribunals' adjustment of the provisional equidistance lines resulted in the creation of two small areas of limited size that were located beyond 200 nm from the coast of Bangladesh but within 200 nm from the coast of Myanmar and India, respectively, yet on the Bangladesh side of the delimitation line. In both cases, the tribunals specified that within the 'grey area' the maritime boundaries determined the continental shelf rights of the relevant parties, though the boundaries would not limit the EEZ rights of Myanmar or India. According to ITLOS:

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[232] ibid [49].
[233] Art.56(3) of UNCLOS provides: 'The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.'
[234] *Libya/Malta* (n 26) [34].

> The Tribunal notes that the boundary delimiting the area beyond 200 nm from Bangladesh but within 200 nm of Myanmar is a boundary delimiting the continental shelves of the Parties, since in this area only their continental shelves overlap. There is no question of delimiting the exclusive economic zones of the Parties as there is no overlap of those zones.[235]

Given the vertical co-existence of the continental shelf rights of one country and EEZ rights of another country, the tribunals left the parties to take cooperative measures in the 'grey area'.[236] The ICJ, however, considered that the 'grey area' in *Bay of Bengal* was an 'incidental result' of the adjustment of the provisional equidistance. Highlighting the fact that in the present case Nicaragua claimed a continental shelf beyond 200 nm within Colombia's 200-nm limits, the Court found that the decisions of *Bay of Bengal* 'are of no assistance in answering the first question posed in the present case'.[237]

Eventually, the Court referred to UNCLOS States parties' submissions to the CLCS to identify the existence of a customary international rule. The Court found that the vast majority of States parties had chosen not to assert outer limits of the continental shelf within the 200 nm limits of another State. The Court considered that 'the practice of States before the CLCS is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation'.[238] 'Taken as a whole', the Court found that the practice was sufficiently widespread and uniform, and concluded that there was a customary rule under which States cannot extend their continental shelf beyond 200 nm into another State's 200 nm.[239]

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[235] *Bangladesh/Myanmar* (n 120) [471]; see also *Bangladesh v. India* (n 121) [504–505].
[236] *Bangladesh/Myanmar* (n 120) [476]; *Bangladesh v. India* (n 121) [508].
[237] 2023 *Nicaragua v. Colombia II* (n 231) [72].
[238] ibid [77].
[239] ibid [77–78].

Two observations can be made with regard to the implications of *Nicaragua v. Colombia II*. First, by emphasizing the linkage between the continental shelf and the EEZ, the ICJ appeared to regard the continental shelf within 200 nm having been absorbed into the EEZ, otherwise one cannot explain why and how the ICJ could have inferred from the negotiations of UNCLOS an assumption that 'the extended continental shelf would only extend into maritime areas that would otherwise be located in the Area'.[240] This observation ran counter to the jurisprudence. In *Libya/Malta*, the ICJ maintained that 'the institutions of the continental shelf and the exclusive economic zone are different and distinct'.[241] Subsequently, in *Barbados v. Trinidad and Tobago Arbitration* the tribunal observed that 'the continental shelf and the EEZ coexist as separate institutions, as the latter has not absorbed the former [...] and as the former does not displace the latter'.[242] Moreover, as pointed out by Judge Tomka, the distinction made by the Court between the 'grey area' in *Bay of Bengal* and the problem of the present case was unconvincing, because in the former the 'grey area' was premised on the overlap between a State's continental shelf beyond 200 nm with another State's continental shelf within 200 nm.[243] The ICJ's perception of the relationship between the EEZ and the continental shelf was thus in tension, if not in conflict, with that of UNCLOS tribunals in *Bay of Bengal*.

Second, the identification of customary international law was flawed in methodological terms, especially in respect of the identification of *opinio juris*. It is the existence of *opinio juris* that distinguishes customary international law from mere habit or courtesy. If, as acknowledged by the Court, the practice

[240] ibid [76].
[241] *Libya/Malta* (n 26) [34].
[242] *Barbados v. Trinidad and Tobago* (n 115) [234].
[243] See Dissenting Opinion of Judge Tomka, 2023 *Nicaragua v. Colombia II* (n 231) [465].

was motivated by other considerations than a sense of legal obligation, the basis for establishing the existence of *opinio juris* was significantly undermined.[244] Indeed, since under the CLCS Rules of Procedure States could object to the Commission's consideration of other States' submissions, it is very likely that the parties refrained from making expansive claims for fear of their submissions being blocked by unhappy neighbours.

To conclude, *Nicaragua v. Colombia II* marks the end of a series of cases submitted to the ICJ and UNCLOS tribunals concerning the continental shelf beyond 200 nm. Within this now cumulated body of jurisprudence, the ICJ and UNCLOS tribunals achieved certain common ground, which includes:

(1) a court or tribunal is competent to proceed to delimit the continental shelf beyond 200 nm in the absence of CLCS recommendations, as delimitation and delineation are two separate processes governed by different rules;

(2) in cases of delimiting the continental shelf beyond 200 nm between adjacent coasts, the delimitation methodology does not differ within and beyond 200 nm, and the three-stage approach as developed in maritime delimitation continues to apply in delimiting the areas beyond 200 nm.

However, the ICJ and UNCLOS also parted ways in some important respects. First, while the ICJ considered a State's submission to the CLCS a precondition to delimitation beyond 200 nm by the international judiciary, UNCLOS tribunals denied the existence of such a rule. Second, *Nicaragua v. Colombia II*, by denying the possibility of one State's continental shelf beyond 200 nm to overlap with another State's continental shelf within 200 nm, came in contradiction with UNCLOS tribunals' understanding of the relationship between the continental shelf and the EEZ, as

[244] See Dissenting Opinion of Judge Robinson, ibid 520–523.

reflected in the latter's treatment of 'grey area' issue. Finally, the ICJ indirectly rejected the concept of 'single continental shelf' that was consistently held by UNCLOS tribunals, as the ICJ suggested that the entitlement to the continental shelf within 200 nm prevailed over that beyond 200 nm.

CONCLUSION

We finally reach the end of our lectures as we have marched from *1969 North Sea Continental Shelf* to 2023 *Nicaragua v. Colombia II*, surveying the development of the law of maritime delimitation over the past 5 decades. Some final remarks can be made.

As the first remark, the law of maritime delimitation concerning the continental shelf and the EEZ within 200 nm was primarily developed by the ICJ, and UNCLOS tribunals contributed to consolidating the stability of this body of law. The delimitation methodology for the single maritime delimitation of the continental shelf and the EEZ has been unified by international courts and tribunals' consistent application of the step-by-step approach, which currently consists of a provisional equidistance line, consideration of relevant circumstances, and a disproportionality test. UNCLOS tribunals started to become important actors in maritime delimitation until the latter half of 2000s, but they were pioneers in developing the law concerning the continental shelf delimitation beyond 200 nm. Their contribution lies in systematically theorizing the jurisdictional and admissibility issues in the delimitation beyond 200 nm and setting the tone for using the same methodology for the continental shelf beyond 200 nm. While the ICJ shared the position of UNCLOS tribunals in many respects, it also departed from the jurisprudence of UNCLOS tribunals (as well as its own jurisprudence) by denying the overlap between a State's continental shelf beyond 200 nm with another State's 200-nm shelf on the ground of a flawed understanding of the relationship between the continental shelf and the EEZ. Therefore, UNCLOS tribunals differ from the ICJ over the relationship between the continental shelf and the EEZ as well as the nature of the continental shelf beyond 200 nm, as reflected in their decisions on 'grey area' issues. It remains to be seen whether

in the future UNCLOS tribunals will correct their understanding to be aligned with the ICJ or opt for a blunt conflict on this point.

A second point relates to the evaluation of the landscape of the law of maritime delimitation as developed by international judiciary from the perspective of judicial competition. Competition is a built-in character of Art.287 of UNCLOS because it offers States parties to choose from multiple fora including the ICJ, ITLOS, and Annex VII tribunal. There is certainly competition between the ICJ and ITLOS as both of them are permanent institutes. However, they differ in that the ICJ is much more experienced in maritime boundary delimitation whereas the jurisprudence of ITLOS is rather modest. As a result, the ICJ offers more predictability for litigating States. On the other hand, ITLOS has freedom to decide differently from that of the ICJ, as it is not obliged to follow the jurisprudence of the ICJ as a matter of law. This may also be considered an advantage as lack of cases may also mean lack of historical burden. It is thus not surprising that it was ITLOS that delimited the continental shelf beyond 200 nm between coastal States for the first time.

Similarly, there exists competition between the ICJ and ITLOS on the one hand, and arbitration on the other. This is a choice between permanent and *ad hoc* institutions. Annex VII arbitration has the advantage of having a much smaller bench, whose composition is largely controlled by the parties, and a more flexible procedure. But it incurs more financial and organizational costs. It is thus interesting to note that the procedure of *ad hoc* chambers under ITLOS Statute has been mobilized in maritime delimitation cases.[245] This procedure has combined the institutional advantages of judicial bodies

[245] Art.15(2) of Annex VI 'Statute of the International Tribunal for the Law of the Sea' provides: 'The Tribunal shall form a chamber for dealing with a particular dispute submitted to it if the parties so request. The composition of such a chamber shall be determined by the Tribunal with the approval of the parties.' Art.15(5) further provides that a judgment given by such a chamber 'shall be considered as rendered by the Tribunal'.

and the flexibility of arbitration procedures, as it allows the parties' control over the composition of arbitrators and at the same time guarantees the authority of its decisions. Both *Ghana/Côte d'Ivoire* case and *Mauritius/Maldives*, two out of the three maritime boundary delimitation cases submitted to ITLOS, were submitted to *ad hoc* chambers. This phenomenon is remarkable as it signifies a revival of the use of *ad hoc* chambers before ITLOS, whereas for the ICJ the latest use of *ad hoc* chamber procedure was 2003 *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras.

It is suggested that competition among the judiciary may promote convergence *or* differentiation. Some argue that international courts and tribunals with overlapping jurisdictions are forced to compete for business and are thus motivated to provide customer-friendly service, promoting procedural or substantive convergence through the market of international legal services.[246] Others, however, question the premise of this theory and argue instead that courts may respond to competition through product differentiation, offering litigants procedures, or even substantive doctrines, that distinguish one court from its competitors.[247] While it remains to be tested which theory is empirically sound, the existence of competition may at least encourage a preference for expansive jurisdiction simply because a court needs cases.[248] This explains, at least partly, the activism of ITLOS in cases concerning

[246] See Jacob Cogan, 'Competition and Control in International Adjudication' (2008) 48 Virginia Journal of International Law 411, 440–441.

[247] See Chiara Giorgetti and Mark Pollack, 'Beyond Fragmentation:Cross-Fertilization, Cooperation, and Competition among International Courts and Tribunals' in Chiara Giorgetti and Mark Pollack (eds), *Beyond Fragmentation:Cross-Fertilization, Cooperation, and Competition among International Courts and Tribunals* (Cambridge University Press 2022) 15.

[248] See Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 International Organization 457, 482.

the continental shelf beyond 200 nm. In fact, it is observed that UNCLOS tribunals have shown a discernible preference for interpretations that facilitate the exercise of jurisdiction every time their jurisdiction was challenged.[249] That said, so long as there is no general or compulsory jurisdiction in the international law system, the durability of UNCLOS dispute settlement mechanism rests on the willingness of States to participate in the system, which includes not only the obligation to accept compulsory procedures under Part XV of UNCLOS but also the carefully crafted exceptions and limitations to the compulsory procedures.[250]

Finally, while the development of the law of maritime delimitation attests to the contribution of courts and tribunals to peacefully settling interstate disputes as well as the development of international law in general, it does not follow that every point of ambiguity has been eliminated from this body of law, or that judicial or arbitral proceedings exhaust all the legal questions concerning maritime delimitation. For example, at the end of 2023, the United States, a non-party to UNCLOS, made claims to the continental shelf beyond 200 nm, raising difficult questions about the relationship between UNCLOS and customary international law and the access of non-parties to UNCLOS procedures.[251] The judicial process, however important it is, is part of the field where other actors of international law are equally important in promoting the growth of the law of the sea.

[249] See Natalie Klein and Kate Parlett, *Judging the Law of the Sea* (Oxford University Press 2022) 44.
[250] See Miron (n 175) 131-132.
[251] See 'Announcement of the US Extended Continental Shelf Outer Limits', 19 December 2023, available at: https://www.state.gov/announcement-of-u-s-extended-continental-shelf-outer-limits-2/.

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в его развитии международными судебными органами

The Law of Maritime Delimitation as Developed
by International Judiciary

На английском языке

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