

THE ROLE OF ISLANDS ON MARITIME BOUNDARIES DELIMITATION: A LOOK AT THE RECENT DECISION OF ITLOS

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I. INTRODUCTION

The existing jurisprudence on the effect of islands in the delimitation of maritime zones is not clear. Article 121(2) of the United Nations Convention on the Law of the Sea (the ‘Convention’ or ‘UNCLOS’)¹ provides for the treatment of islands as any other land territory for the purpose of delimiting the territorial sea, contiguous zone, exclusive economic zone (‘EEZ’) and continental shelf. Thus, an island can generate a huge area of EEZ up to 200 nautical miles (‘nm’). This means that if an island had no maritime neighbour within 400 nm, it could generate 125,664 nm² (431,014 km²) of territorial sea, EEZ and continental shelf.² Although during the negotiation of the text of Article 121 of UNCLOS it was decided that any provisions on the effect of islands on the delimitation of maritime zones would be excluded, most States agreed that islands are a special circumstance in the delimitation of maritime zones.³ This effectively left it to State practice and international tribunals or courts to provide the principles of delimitation involving islands, in order to achieve an equitable solution.⁴

This paper will focus on the contribution of the International Court of Justice (‘ICJ’), and other arbitral tribunals, especially the latest decision of the International Tribunal of the Law of the Sea (the ‘Tribunal’ or ‘ITLOS’) in the *Bangladesh/Myanmar Case*,⁵ in developing the jurisprudence on the effect of islands on maritime delimitation. Various maritime delimitation cases involving islands will be discussed throughout the paper, from the Anglo-French Channel

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¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, UNTS 1833 at 3 (entered into force 16 November 1994).

² Robert Beckman and Clive Schofield, “Moving Beyond Disputes Over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait”, (2009) 40 *Ocean Devel & Int’l L* 1, at 9.

³ See *The Law of the Sea: Legislative History of Part VIII (Article 121) of the United Nations Convention of the Law of the Sea. Regime of Islands* (Boston: Office for Ocean Affairs and the Law of the Sea, 1988).

⁴ In 2001 the ICJ expressly stated that Article 121(2) reflects customary international law, and that islands, regardless of their size, enjoy the same status, and therefore generate the same maritime rights as land territory; see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment (2001) ICJ Reports 40 [*Qatar/Bahrain*], at para 185; see also *Territorial and Maritime Dispute between Nicaragua and Colombia (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, at para 139.

⁵ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (2012) Judgment, ITLOS Case No 16 [*Bangladesh/Myanmar*] at para 455, online: ITLOS <http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.140-E.pdf>.

Islands Arbitration in 1977⁶ to the most recent judgment of ICJ in the maritime delimitation case between Romania and Ukraine involving the effect of Serpent Island.

This paper makes a distinction between the role of islands in the delimitation of territorial sea and the delimitation of EEZ and continental shelf. The jurisprudence on the effect of islands in delimitation of territorial sea displays more consistency, and generally islands were given full 12 nm territorial sea.⁷ In contrast, the jurisprudence on the effect of islands in the delimitation of the EEZ and continental shelf is not always consistent. In some instances, islands were given a reduced EEZ and continental shelf; while in other instances, no EEZ and continental shelf was given to islands at all.

In discussing the effect of islands in the delimitation of EEZ and continental shelf, the paper distinguishes delimitation between a mainland coast and an offshore island; and delimitation between two mainland coasts, where small insular islands are located between the main coasts. In the first case, a strict equidistance line drawn from the mainland coast and the offshore island is generally used before being adjusted to take into account the length of the relevant coasts. In the latter case, an equidistance line is often drawn between the two mainland coasts, ignoring the existence of the islands between the coasts.

The paper will also look into the question of whether the size of the island plays a role in the decisions of the courts or tribunals to give the island full, partial or no effect in maritime delimitation. It should be noted however, that this paper will not deal with the question of ‘rocks or islands’ under Article 121(3) of UNCLOS.⁸ The paper will only deal with islands that are entitled to their own territorial sea, EEZ and continental shelf, and will only focus on whether islands should be given full effect in the delimitation of territorial sea, EEZ and continental shelf.

II. ROLE OF ISLANDS ON DELIMITATION OF TERRITORIAL SEA

Delimitation of territorial seas between States is regulated under Article 15 of UNCLOS, which provides that in the case of the delimitation of the territorial sea between two States that are opposite or adjacent to each other, each State can extend its boundary to the median line in which every point is equidistant from the nearest points on the baselines of each of the two States. Article 15 goes on to provide that before the equidistance method is applied, consideration should be given to the possible existence of special circumstances that may justify variation of the equidistance method. This provision suggests that all land territory, including islands, are entitled to a full 12 nm territorial sea, and if the territorial seas of two States overlap, then the boundary should be the median line between the two States. This was supported by State practice that developed prior to the negotiation of UNCLOS, where agreements on delimitation between States showed that although small islands were ignored for the purpose of delimitation of

⁶ *Anglo-French Continental Shelf Arbitration* (1979) 18 ILM 397 [*Anglo-French Arbitration*].

⁷ The ICJ stated that even the smallest island generates a 12-nautical-mile territorial sea; see *Territorial and Maritime Dispute between Nicaragua and Colombia (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012 [Nicaragua/Colombia], at para 36; see also *Qatar/Bahrain*, *supra* note 4, at para 205; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007 (II) [Nicaragua/Honduras], at para 302.

⁸ For a review of different views on this issue, see Victor Prescott and Clive Schofield, *Maritime Political Boundaries of the World* (Leiden/Boston: Martinus Nijhoff, 2005), at 137-164.

continental shelf, they were given continental shelf rights in a maritime zone not exceeding 12 nm in width.⁹

The notion that a territorial sea is the minimum maritime area to be allocated to an island is driven by the fact that sovereignty that attached to the territorial sea is essential to the integrity of a State as a whole than the rights which are exercised in other maritime jurisdictional zones.¹⁰ Thus, unless a lesser area is agreed to by the State which owns the island,¹¹ a full territorial sea must be accorded to an island. An inevitable consequence of this is that no State is entitled to extend its EEZ or continental shelf into the territorial sea of an island belonging to another State. This was explicitly recognized in the judgment of ITLOS in the Bangladesh/Myanmar case.

In the Bangladesh/Myanmar judgment,¹² ITLOS clearly distinguished the effect of islands in the delimitation of the territorial sea from the effect of islands in the delimitation of the EEZ and continental shelf. The Tribunal decided to give full effect to St. Martin's Island in the delimitation of the territorial sea, and rejected Myanmar's argument that the equidistance line between Myanmar's mainland and the island's coast should be adjusted closer to St. Martin's Island due to the size of the island and its geographic location in front of Myanmar's mainland. The Tribunal was of the view that if the equidistance line was adjusted closer to St. Martin's Island, this would result in more weight being given to Myanmar's sovereign rights over its EEZ and continental shelf than to Bangladesh's sovereignty over the territorial sea of St. Martin's Island. Thus the Tribunal concluded that an island is entitled to a territorial sea even when the island has been ignored or given partial effect in the delimitation of EEZ and continental shelf.

Myanmar argued that St. Martin's Island, situated opposite the mainland of Myanmar, should not be given full effect in the delimitation of the territorial sea between the two parties. Myanmar also argued that the presence of St. Martin's Island on the 'wrong' side of the equidistance line between the coasts of Myanmar and Bangladesh, is an important special circumstance which necessitates a departure from the median line.

Myanmar did not dispute the fact that St Martin's Island is an island pursuant to the definition provided in Article 121(1) and (2) of UNCLOS and that, consequently, it is capable of generating maritime areas. It argued, however, that St. Martin's Island is not entitled to be given full effect in relation to the territorial sea, as this would lead to a considerable distortion of the general configuration of the coastline. Myanmar observed that small or middle-size islands are usually ignored or given little or no effect in maritime delimitation. Myanmar quoted, *inter alia*, the Agreement between the Government of the Italian Republic and the Government of the Tunisian Republic Relating to the Delimitation of the Continental Shelf between the Two Countries of 1971, which disregarded the Italian islands *Pantelleria, Linosa, Lampedusa*, and

⁹ Northcutt Ely, 'Seabed Boundaries Between Coastal States: The Effect to be Given Islets as "Special Circumstances"', (1972) 6 Int Lawyer 219, at 235-36; although Ely accorded this maritime zone as 'contiguous zone' due to the fact that at that time, the contiguous zone was clearly defined at 12 nm, while the breadth of territorial sea was unspecified. See Donald E Karl, "Islands and the Delimitation of the Continental Shelf: A Framework for Analysis", (1977) 71 Am J Int'l L 642, at 653.

¹⁰ Donald E Karl, *ibid*.

¹¹ It is worth to note that in the rare occurrence when an island is located in a strait or other narrow body of water less than 24 nm between two coastal States, courts and tribunals may choose to ignore the island to ensure that both States enjoy proportionate territorial seas; see *Qatar/Bahrain*, *supra* note 4, at para 219.

¹² *Bangladesh/Myanmar*, *supra* note 5.

Lampione for the purposes of drawing an equidistance median line; the Australian islands of *Boigu* and *Saibai*, which were awarded only three-mile belts of territorial sea; and the Agreement between Qatar and Abu Dhabi of 1969, in which the equidistant line between the two adjacent coasts was diverted around a three-mile arc surrounding the island of *Daiyina*, which was otherwise given no effect at all. Thus, Myanmar concluded that St. Martin's Island must be considered as constituting in itself a special circumstance which calls for shifting or adjusting the median line which would otherwise have been drawn off the coasts of the parties.

Bangladesh countered Myanmar's argument by stating that a number of cases identified by Myanmar in support of its argument for giving less than full effect to St. Martin's Island do not deal with the delimitation of the territorial seas, but rather are concerned with the delimitation of the EEZ and the continental shelf. Bangladesh argued that State practice relevant to maritime delimitation clearly indicates that an island adjacent to the coast may have an important bearing on the delimitation of a maritime boundary. As Myanmar did not object to the fact that St. Martin's Island is an island pursuant to Article 121(1) UNCLOS, it is therefore entitled to a 12 nm territorial sea and an EEZ and continental shelf of its own. Bangladesh further noted that the right of States to claim a territorial sea around islands is also a well-established principle of customary international law and is recognized by Myanmar. Indeed, in its 1972 article, Northcutt Ely surveyed State practice up to 1971 and found that the presence of small islands has generally been ignored for the purpose of delimitating continental shelves, *but* that these small islands have often been given a maritime zone not exceeding 12 nm (which at the time he equated with the contiguous-zone).¹³

In its judgment the Tribunal agreed with Bangladesh, and recognized that Bangladesh has the right to a 12 nm territorial sea around St. Martin's Island in the area where such territorial sea does not overlap with Myanmar's territorial sea. The Tribunal further stated that any conclusion to the contrary would result in more weight being given to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea. By stating this, the Tribunal made it clear that the sovereignty attached to the territorial sea is much more basic to the integrity of a State as a whole than the rights which are exercised in other maritime jurisdictional zones. Therefore, a standard 12 nm territorial sea is the minimum area that must be accorded an island, unless otherwise agreed by the State to which the island belongs.

Interestingly enough, the final delimitation line drawn by the Tribunal is very similar to the delimitation line recorded in the Minutes of negotiation between the two parties in 1974, as proposed by Bangladesh as being the final delimitation line. The Tribunal declared that the 1974 Agreement is not an agreement within the meaning of Article 15 of UNCLOS, and found that despite Bangladesh and Myanmar conducting themselves in accordance with the agreed provisional delimitation for over three decades, this did not demonstrate the existence of a tacit or *de facto* agreement as to the boundary line in the territorial sea. Notwithstanding these findings, it seems that in the end the Tribunal still respected the original provisional delimitation line '*agreed*' by the parties and drew a delimitation line that is largely similar to that agreed upon by the parties in their negotiations.

It is clear that in delimitation of territorial sea, the size of an island generally is not relevant, as all islands – no matter the size or geological composition – are entitled for a full 12

¹³ Northcutt Ely, *supra* note 9.

nm territorial sea.¹⁴ The jurisprudence of ICJ and other tribunals is also clear in that the neither the ICJ nor other tribunals have ever restricted the right of a State to establish a territorial sea of 12 nm around an island on the basis of an overlap with the continental shelf and EEZ entitlements of another State.¹⁵

III. ROLE OF ISLANDS ON DELIMITATION OF EEZ AND CONTINENTAL SHELF

UNCLOS provisions on the delimitation of boundaries in overlapping maritime zones in the EEZ and continental shelf are set out in Articles 74 and 83.¹⁶ The general principle is that boundaries are to be delimited by agreement on the basis on international law in order to reach an equitable solution.¹⁷ The lack of specific method of delimitation of the EEZ and continental shelf in UNCLOS was partially influenced by the decision of the ICJ in the *North Sea Continental Shelf Cases* in 1969, which had a huge impact on the development of the method for delimitation of the continental shelf. In its judgment, the ICJ rejected the use of the median line principle, stating that the median line principle was not a customary rule since it was not used in the Truman Proclamation (which used the equitable principle),¹⁸ and that its inclusion in the delimitation provisions of the 1958 Continental Shelf Convention was subject to reservations.¹⁹ The ICJ also stated that the use of the median line/equidistance principle in certain circumstances (in this case Germany's concave coastline) could lead to unnatural or unreasonable results.²⁰ The ICJ, thus, came up with new criteria, and stated that the delimitation of the continental shelf between adjacent States should be equitable and take into account relevant circumstances.²¹

This regime, however, has further developed since the conclusion of UNCLOS in 1982. In the *Libya/Malta* decision, ICJ explained that equidistance may be applied if it leads to an equitable solution.²² The ICJ went further in the *Qatar/Bahrain* decision, stating that for the delimitation of maritime zones beyond 12 nm, it would first draw the provisional equidistance

¹⁴ The ICJ stated that international law does not prescribe any minimum size which a feature must possess in order to be considered an island; see *Nicaragua/ Colombia*, *supra* note 7, at para 37; see also *Qatar/Bahrain*, *supra* note 4, at para 197.

¹⁵ *Nicaragua/ Colombia*, *supra* note 7, at para 178; *Nicaragua/Honduras*, *supra* note 7, at para 302; see also *Bangladesh/Myanmar*, *supra* note 2, at para 169.

¹⁶ The ICJ has recognized that the principles of maritime delimitation enshrined in Articles 74 and 83 of UNCLOS reflect customary international law; see *Nicaragua/ Colombia*, *supra* note 7, at para 139; see also *Qatar/Bahrain*, *supra* note 4, at para 167.

¹⁷ See *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* (1985) ICJ Rep. 13 [*Libya/Malta*], at 51; *Eritrea v Yemen* (1999) Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation) at 116; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (2009) ICJ Rep 61 [*Black Sea Case*], at 120.

¹⁸ *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands)* (1969) ICJ Rep 3 [*North Sea Continental Shelf Cases*], at paras 86-87.

¹⁹ *Ibid.*, at para 63.

²⁰ *North Sea Continental Shelf Cases*, *supra* note 18, at para 63.

²¹ *North Sea Continental Shelf Cases*, *supra* note 18, at paras 92 - 94.

²² *Libya/Malta*, *supra* note 17, at para 62.

line before considering whether there are circumstances that lead to an adjustment of that line.²³ More recently, in the 2009 *Black Sea Case* between Romania and Ukraine, the ICJ introduced a three stage approach to maritime delimitation: (i) establish provisional equidistance line; (ii) consider whether there any factors which call for an adjustment of the equidistance line to reach an equitable result; and (iii) verify that that line does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coast lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line.²⁴ ITLOS also confirmed this approach as the preferred method of delimitation of the EEZ and continental shelf in its recent decision of the delimitation of EEZ and outer continental shelf between Bangladesh and Myanmar.²⁵

The ICJ has thus clarified the preferred method for delimitation of maritime zones, including the continental shelf and the EEZ. However, it is not clear what effect should be given to islands in any maritime boundary delimitation. International courts and tribunals have consistently held that small islands should not be given full effect in delimiting maritime boundaries against the mainland of a large mainland State.²⁶

This issue of delimitation methodology was also discussed in the *Bangladesh/Myanmar Case*. In that case, Bangladesh and Myanmar agreed that the provisions of UNCLOS concerning the delimitation of the EEZ and the continental shelf constitute the law applicable to the dispute between them. However, the parties disagreed as to the appropriate method to be employed for delimitation. Unlike Article 15 (regarding delimitation of the territorial sea), Articles 74 and 83 of UNCLOS on the delimitation of the EEZ and continental shelf do not provide for the use of the median line / equidistance method, but rather state that delimitation of the EEZ or continental shelf should be undertaken on the basis of international law to achieve an equitable solution, without specifying the method to be applied. This distinction was not unintentional. During negotiations for the Convention, the issue of the weight to be given to islands in delimitation, and whether small or uninhabited islands should be entitled to an EEZ at all, had hindered the progress of the negotiations. Thus, the text of the Convention represents a compromise whereby no particular method of delimitation is specified, and States are left to use ‘international law’ to achieve an equitable result

Bangladesh argued that the equidistance method does not produce an equitable solution, and that the angle-bisector method should be used instead. Conversely, Myanmar argued that the equidistance method should be used to achieve an equitable result. In its judgment, the Tribunal agreed with Myanmar that the equidistance method is the appropriate method to be applied for delimiting the EEZ and continental shelf between the parties. The Tribunal was of the view that the equidistance method can result in an equitable result by taking into account any relevant circumstances that may require an adjustment of the equidistance line.

Unlike its approach in deciding the delimitation of territorial sea between the two countries, however, ITLOS relied on different considerations and reached different conclusions

²³ *Qatar/Bahrain*, *supra* note 4, at para 176.

²⁴ *Black Sea Case*, *supra* note 17, at paras 116 - 122.

²⁵ *Bangladesh/Myanmar*, *supra* note 5, at para 455.

²⁶ See *Anglo-French Continental Shelf Arbitration*, *supra* note 6, at 251; *Libya/Malta*, *supra* note 17, at 129; *Eritrea v Yemen*, *supra* note 17, at 147; *Maritime Delimitation in the Black Sea*, *supra* note 17, at 187-188.

on the effect of St Martin's Island when addressing the issue of delimitation of the EEZ and continental shelf. It found that in this case, if St Martin's Island was to be given full effect, the equidistance line would unfairly cut Myanmar off from any access to its outer continental shelf. This indicates that the Tribunal is more willing to give full effect to an island in the delimitation of the territorial sea (in circumstances where the island is not a rock under Article 121(3) UNCLOS), but is less inclined to do so in the delimitation of EEZ and continental shelf. In comparing the EEZ and continental shelf generated by an island with the EEZ and continental shelf generated by the mainland coast, more weight can be given to the latter.

The judgment, however, did not provide any reasoning as to the factors that were considered by the Tribunal, or that were viewed as being determinative in deciding not to give full effect to St. Martin's Island in the delimitation of EEZ and continental shelf. Thus, the Tribunal missed an opportunity to establish clear principles on the effect of islands in delimitation of territorial sea and whether any exceptions to these principles may exist. The *Bangladesh/Myanmar Case* is unique, in that in the delimitation of territorial sea, St Martin Island is opposing the coast of Myanmar, but in the delimitation of EEZ and continental shelf, St Martin is adjacent to the coast of Myanmar. Both situations will be discussed separately below.

A. *Delimitation between a Single Insular Island and a Mainland Coastal Territory*

The jurisprudence for cases of delimitation of EEZ and continental shelf between a single insular island and a mainland coastal State is quite consistent. Generally, the island will only be given partial effect compared to the opposing mainland. In these cases, the courts or tribunals usually started by drawing a provisional equidistance line between the mainland and island in question, and then adjusting it in light of relevant circumstances. The size of the island and the length of the relevant coasts are almost always the main consideration for the court or tribunal in adjusting the median line.²⁷

In the *Libya/Malta* case, Malta argued that the EEZ boundary between Libya and Malta should be a strict median line between the two countries. Libya argued that the length of the relevant coasts should be taken into account, and that the median line should be adjusted accordingly in the proportion of the difference in coastal length.²⁸ The ICJ, to a certain extent, agreed with Libya's argument that Malta should be given partial effect, but felt that Libya's 8:1 ratio approach would lead to a disproportionate result to Malta. In a stroke of ingenuity, the court drew another median line between Libya and the island of Sicily that belongs to Italy, ignoring Malta that is situated between them. The court then shifted the median line around three-quarters of the distance between the median line between Libya and Malta and between Libya and Italy.²⁹ Although the court was careful not to directly link the ratio of the relevant coasts with the actual

²⁷ *Nicaragua/ Colombia*, *supra* note 7, at para 140; see also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, (1982) ICJ Reports [*Tunisia/Libya*], at para 73; *Black Sea Case*, *supra* note 17, at para 78.

²⁸ The ratio of relevant coastal lengths was approximately 8:1 to Libya's advantage. Libya was basing its argument on an earlier decision of the chamber of the court in the *Gulf of Maine* case, where the chamber adjusted the boundary in proportionality with the ration of relevant coastal length between USA and Canada, see *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (1984) ICJ Rep 246.

²⁹ *Libya/Malta*, *supra* note 17, at paras 71-72.

location of the boundary line, this comparison has been repeatedly used to test the proportionality of the delimitation line.³⁰

The ICJ took a slightly different approach in the *Jan Mayen Case*, where the court did not hesitate to make a direct link between the ratio of the relevant coasts and adjusting the median line.³¹ The ratio of the relevant coasts in this case was even more extreme than Libya/Malta, with the relevant part of Greenland's coast being over 9:1 longer than that of Jan Mayen. After drawing the provisional median line, the court shifted the line toward Jan Mayen based on the significantly shorter coast of Jan Mayen. Although the disparity in relevant coast lengths had a direct impact on the actual location of the boundary line, the court still made it clear that there was a 'direct and mathematical application of the relationship' between the relevant coastal fronts and the location of the boundary line.³²

The courts and tribunals are quite consistent in giving partial effect to islands in delimitation between a single insular island and a mainland coast. In those cases, the courts and tribunals mostly started the delimitation by drawing a provisional equidistance line, before adjusting it by taking into account relevant circumstances, with length of the coast being the most prominent factor to be considered.

B. *Delimitation between Two Mainland Coastal Territories*

The jurisprudence on the effect of islands in maritime boundary delimitation between two mainland territories is less consistent. This, however, is largely due to the fact that there are various scenarios of delimitation between two mainland territories that distilling a rule on the effect of islands in such delimitation is almost impossible. Courts and tribunals have tried to apply consistent rules and principles in such delimitation cases, but when those rules and principles were applied to the facts of a particular case, the considerations and results understandably differed from one another.

³⁰ Beckman and Schofield, *supra* note 2; see also *Tunisia/Libya*, *supra* note 27; *Gulf of Maine*, *supra* note 28; *Barbados v Trinidad & Tobago*, Award of the Arbitral Tribunal (2006) 45 ILM 798 [*Barbados/Trinidad and Tobago*].

³¹ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (1993) ICJ Report 38 [*Jan Mayen Case*], at paras 61-69.

³² *Ibid.*, at paras 67 & 69.

1. *Opposite Coasts*

In delimitation cases between two opposing mainland coasts with islands in between, courts and tribunals have developed a slightly different approach of drawing a provisional line. Instead of drawing a strict equidistance line as the provisional line, courts and tribunals have tended to draw an equidistance line from the mainland coasts, ignoring all the islands in between. The existence of islands in between is considered as special circumstances that may be taken into account to adjust the equidistance line. It is interesting to note that in this situation, it is common for the courts and tribunal to partially or wholly enclave the islands in question, thus not shifting the equidistance line.

A classic example of this approach is the *Anglo-French Arbitration*, where the Channel Islands belonging to the UK are located nearer to the mainland coast of France than to the UK's mainland coast.³³ In that case, the tribunal observed that the Channel Islands fall on the 'wrong side' of the median line between UK's and France's mainland coasts,³⁴ and thus decided to ignore the Channel Islands for the purposes of constructing the boundary line (even though the Channel Islands are populated islands entitled to their own continental shelf). The tribunal decided to give the islands a reduced effect and enclave them, effectively giving the islands a full 12 nm territorial sea projection to the north and west of the islands.³⁵

A more recent example is the decision of the arbitral tribunal in *Eritrea/Yemen*. The tribunal was faced with the issue of small islands in the central area between Eritrea and Yemen, creating a challenge in drawing a boundary line.³⁶ The tribunal decided to give no effect to the small groups of islands of al-Tayr and Zubayr, and instead constructed a boundary line based on a median line drawn from the mainland coasts of the two States.³⁷ The Hanish Islands were also ignored for the purposes of constructing the EEZ boundary between the mainland coastlines of Eritrea and Yemen, but were given full effect in the delimitation of a territorial sea boundary.³⁸ However, islands in close proximity to the coasts, such as the Dahlak archipelago and Yemen's Kamaran Island were given effect in drawing the EEZ boundary.³⁹ Thus, courts and tribunals appeared to have drawn a distinction in the effect given to islands straddling the median line between two opposing coastal States, in which the islands tend to be ignored, and the islands located in close proximity to the mainland coasts, in which they may be taken into account in constructing the median line.

2. *Adjacent Coasts*

³³ *Anglo-French Arbitration*, *supra* note 6.

³⁴ *Anglo-French Arbitration*, *supra* note 6, at para 199.

³⁵ Beckman and Schofield, *supra* note 2, at 15.

³⁶ *Eritrea v Yemen*, *supra* note 17.

³⁷ *Eritrea v Yemen*, *supra* note 17, at para 152.

³⁸ *Eritrea v Yemen*, *supra* note 17, at paras 154-162.

³⁹ *Eritrea v Yemen*, *supra* note 17, at para 150.

Similar to the approach taken in delimiting EEZ and continental shelf between two opposing coastal States, the courts and tribunals also tend to delimit overlapping EEZ and continental shelf claims between adjacent coastal States by first drawing a provisional median line ignoring the existence of islands in the vicinity. This median line is then adjusted to take into account the effect of islands, if any. The *Anglo-French Arbitration* again provide a classic example of this situation, where the delimitation of the continental shelf between France and the UK changed from delimitation between opposing coasts in the English Channel, to delimitation between adjacent coasts once the median line continued on to the Atlantic Ocean. In that case, the UK's Isles of Scilly pushed the median line disproportionately towards France's side.⁴⁰ The tribunal constructed two median lines, one giving the Isles of Scilly full effect and the other one giving them no effect. The tribunal then continued to draw a line bisecting the angle between the two median lines as the boundary line, effectively giving the Isles of Scilly half effect.

In the *Black Sea Case*, the ICJ decided to ignore Serpent Island in drawing a median line in the delimitation of EEZ between Romania and Ukraine. Ukraine's Serpent Island is situated in close proximity of Romania, but far from the coast of Ukraine's mainland. The existence of Serpent Island changed the nature of the EEZ delimitation between the two States, similar to the *Bangladesh/Myanmar Case*, in that Romania and Ukraine are opposing coastal States, but the existence of Serpent Island means that Ukraine is also an adjacent State to Romania. In its decision, the ICJ decided to ignore Serpent Island in delimiting the EEZ. The ICJ reasoned that the existence of Serpent Island disproportionately distorted the median line in a manner that was disadvantageous to Romania and consequently decided that it should not be taken into account as a base point in drawing the median line. The ICJ, however, still gave Serpent Island full entitlement of a 12 nm territorial sea. This is consistent with the approach of giving full effect to islands in the delimitation of the territorial sea as discussed above.

In the *Bangladesh/Myanmar Case*, following its argument on the effect of St. Martin's island on the delimitation of territorial sea, Bangladesh maintained that St Martin's Island must be given full weight in any solution based on an equidistance line, and 'that even this is not enough to achieve the equitable solution that is required by the 1982 Convention'. It argued that by not giving consideration to St. Martin's Island, the delimitation between the two parties would be disproportionate for Bangladesh, and this would render the result inequitable.

Myanmar pointed out that giving full effect to St. Martin's Island in the delimitation of the EEZ and continental shelf would produce a disproportionate result, in that St. Martin's island, which is 5 kilometres long, would in itself generate at least 13,000 square kilometres of maritime area for Bangladesh. In support of its argument, Myanmar relied on various delimitation decisions such as the *Gulf of Maine*, *Dubai/Sharjah* and *Tunisia/Libya* cases, where the use of islands in adjacent coastal configurations almost always presented a problem, as it generated such an angular displacement. This would be true in the present case if St. Martin's Island were given full effect, as it would result in a significant angular displacement of the delimitation line.

The Tribunal observed that due to its location, giving effect to St. Martin's Island in the delimitation of the EEZ 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 increase

⁴⁰ *Anglo-French Arbitration*, *supra* note 6, at paras 201-203.

substantially as the line moves beyond 12 nm from the coast. For these reasons, the Tribunal concluded that St. Martin's Island does not constitute 'a relevant circumstance' and, accordingly, decided not to give any effect to it in drawing the delimitation line of the EEZ and the continental shelf.

IV. CONCLUSION

The jurisprudence of international courts and tribunal has been consistent in giving small islands partial effect in EEZ and continental shelf boundary delimitation, especially in situations where such islands are pitted against mainland territories or a larger island where the disparity of the coastal length is significant. There are numerous cases where small islands were either given partial effect, enclaved or ignored all together in the delimitation of EEZ and continental shelf. The jurisprudence on the effect of islands in the delimitation of the territorial sea is even more consistent, where generally islands are given a full 12 nm territorial sea, unless the islands are situated in a narrow body of water less than 24 nm wide.⁴¹

The latest decision of ITLOS in the *Bangladesh/Myanmar* case adds to this jurisprudence on the effect of islands in the delimitation process. In that case, the Tribunal concluded that in circumstances where the territorial waters of St. Martin's Island do not overlap with the territorial waters of the mainland coast of Myanmar then St. Martin's Island should have a right to a full 12 nm territorial sea. However, in respect of the delimitation of the EEZ and the continental shelf, St. Martin's Island was not given any relevance. Thus, the Tribunal established that although full effect should be given to islands in the delimitation of the territorial sea, the effect of islands on the delimitation of the EEZ and continental shelf depends on the geographic circumstances of the case, and that there is no general rule in this respect.

However, Judge Wolfrum in his Declaration stated that the Tribunal had missed the opportunity to formulate its reasoning and establish a general principle for the effect of islands in delimitation and whether exceptions may exist. The Tribunal was of the view that if the equidistance line was adjusted closer to St. Martin's Island, it would mean that more weight was given to Myanmar's sovereign rights over its EEZ and continental shelf, compared with Bangladesh's sovereignty of its island's territorial sea. The Tribunal, according to Judge Wolfrum, should have formulated this as a general principle, and provided for possible exceptions, if any.

With regard to the effect of St. Martin's Island on the delimitation of the EEZ and the continental shelf, the Tribunal largely justified its decision by relying on the ICJ judgment in the *Black Sea* case.⁴² In this regard, the Tribunal stated that giving effect to St. Martin's Island would result in a line blocking the seaward projection from Myanmar's coast and that this would result in an unwarranted distortion of the delimitation line. However, the Tribunal again failed to provide any objective grounds as to why the so-called distortion would be unwarranted. This is surprising, especially after the Tribunal went the opposite direction by giving full effect to the

⁴¹ State practice, on the other hand, has been more diverse, both in the case of delimitation of territorial sea and EEZ or continental shelf, where there were cases of even extremely small features given considerable effect in the negotiation of delimitation of maritime boundary. This, however, is more an exception to the rule rather than the general trend. See Beckman and Schofield; *supra* note 2, at 16.

⁴² *Black Sea Case*, *supra* note 17.

island in the delineation of the territorial sea. Judge Wolfrum again declared that the Tribunal should have further discussed whether, in a situation such as this, the feature governing delimitation was the mainland or the island; whether the proportion of the size of the island in comparison to the size of the maritime area in question was relevant; and whether, and to what extent, the freedom of access to the seas should also be a determining factor. The Tribunal should have established which considerations it took into account and which it did not in reaching its conclusions. If it had done so, it would have added to the development of general principles on the effect given to islands in delimitation. These general principles are presently missing from the international jurisprudence on delimitation.

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