

IFLOS Summer Academy
25 July 2017

Rules and Methods for Maritime Boundary Delimitation

Judge Jin-Hyun Paik
(International Tribunal for the Law of the Sea)
jhpaik@snu.ac.kr, jhpaik@itlos.org

1. Background: Needs for delimitation

- Consequence of the extension of national maritime jurisdictions → overlaps of jurisdictions → needs for boundary delimitation
- Particularly serious in case of the CS/EEZ
- Delimitation of Outer CS: emerging issue
 - 77 submissions plus 4 revised submissions
 - 45 preliminary information
 - Total number estimated to approach 120
- Situations: adjacent or/and opposite coasts

2. Rules for Delimitation of the CS

(1) Quest for Rules for Delimitation: ILC Debates

- Two main thoughts on the rules for delimitation: Individual justice v. Judicial certainty
- Rules should allow maximum flexibility in order to accommodate the diversity of geographical situations

“The boundaries of the continental shelf contiguous to the territories of two or more States shall be established by agreement between those States. Failing such agreement, a dispute between them shall be resolved by one of the methods for the joint peaceful settlement of disputes.”
(Kozhevnikov)

- An individualized approach to maritime delimitation should entail legal uncertainty and may stimulate dispute.

“It is the business of the law and of the International Law Commission to provide for situations in which no such agreement or goodwill was forthcoming.” (Lauterpacht)

“the clearer the rule, and the more automatic its application, the less seed of discord is sown.” (Sørensen)

(2) Art. 6 of the Geneva Convention on Continental Shelf (1958)

- Art. 6 (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.

- Art. 6 (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.
 - Agreement
 - Median line/equidistance principle
 - Special circumstances

(3) North Sea Continental Shelf Case (ICJ, 1969)

– Art. 6 of the Geneva Convention was not customary international law

– Customary rule for delimitation:

Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other (North Sea Continental Shelf case, ICJ 1969)

- Agreement
- Equitable principles, taking into account all the relevant circumstances
- No encroachment on natural prolongation of land territory

– Criticisms: neither equitable principles nor natural prolongation were clear enough to be applied consistently

(4) UNCLOS III

- Efforts to find a new conventional rule
 - Confrontation between the equity group and equidistance group
- Informal Single Negotiating Text (ISNT): art 61/70 (later art 74/83 of ICNT)

“1. The delimitation of the exclusive economic zone/the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances...”

 - However, this formula was not acceptable to both groups

- Two competing proposals by G-29 and G-22
 - Proposal by G-29

“1. The delimitation of the exclusive economic zone/continental shelf between adjacent or/and opposite coasts shall be effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and *employing any methods*, where appropriate, to lead to an equitable solution.”
 - Proposal by G-22

“1. The delimitation of the EEZ/continental shelf between adjacent or opposite States shall be effected by agreement employing, *as a general principle, the median or equidistance line*, taking into account any special circumstances where this is justified.”
(emphasis added)
- Search for a formula which could accommodate the two competing proposals
 - Initiative of the President of the Conference to delete specific reference to either equidistance or equitable principles
 - The initiative received broad support from both groups

(5) Art. 74/83 (1) of the UNCLOS

- Art. 74/83 (1): The delimitation of the EEZ / 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*.

(a) Rule

- Agreement
- Delimitation based on international law to achieve an equitable solution

(b) Assessment

- A compromise formula to evade the disagreement between equidistance group and equity group at the UNCLOS III
- It states the goal to be achieved, “equitable solution”, but silent about the methods to achieve it
- However, emphasis of “equitable solution” may be understood not to over-conceptualize delimitation

(6) Judicial Decisions since 1969

(a) Role of judicial decisions in boundary delimitation

- Approximately 20 such decisions by the ICJ, ITLOS or arbitral tribunals;

North Sea Continental Shelf case (1969);

Anglo-French Channel arbitration (1977);

Libya/Tunisia case (1982); Gulf of Maine case (1984);

Libya/Malta case (1985);

Guinea/Guinea Bissau arbitration (1985);

St. Pierre et Michelon arbitration (1992);

the Greenland/Jan Mayen case (1993);

Eritrea/Yemen arbitration (1999);

Qatar v. Bahrain case (2001);

Cameroon v. Nigeria case (2002);

Barbados/Trinidad and Tobago arbitration (2006);

the Guyana and Suriname arbitration (2007);

Nicaragua v. Honduras case (2007);

The Romania v. Ukraine case (2009);

Bay of Bengal case (2012);

Nicaragua v. Colombia case (2012)

Bangladesh/India case (2014)

Peru v. Chile (2014)

- “the legal conquest of maritime delimitation is not the work of either treaty or custom but of the courts, which . . . play the role of primary and direct source of law . . .”

–P. Weil

(b) Trends in judicial decisions on maritime delimitation

- Equity (equitable principles) is prime principle of delimitation but the content of equity is circumstance-dependent
 - From “the result-oriented equity approach” to “the corrective-equity approach”
- There is no single mandatory method of delimitation but jurisprudence has developed in favor of equidistance/relevant circumstances method
 - Greenland/Jan Mayen case (1993) as a turning point
- There is no clear list of relevant circumstances and how much weights to be accorded to them
- Geographical factors such as costal configuration, the length of coasts, selection and location of base points, presence of islands matter most

- Natural prolongation as a delimitation rule (in the sense that seabed irregularities can constitute a natural boundary) has become largely irrelevant
(cf. Meaning of “natural prolongation” under article 76 of the Convention in the Bay of Bengal Case)
- Non-geographical factors such as resource interests, defense and security, or socio-economic considerations may be relevant but rarely accepted
- A single boundary for both continental shelf and the EEZ is requested and drawn in most cases although it is not required

3. Entitlement and Delimitation

(1) Concept of Entitlement and Delimitation

- Continental shelf entitlement is a question of what confers national jurisdiction over an area of seabed and subsoil. A logical corollary is a seaward limit of continental shelf jurisdiction, that is, how far coastal States are entitled to extend their continental shelves.
- On the other hand, continental shelf delimitation is concerned with determining a boundary line with precision between continental shelves of two more States whose coasts are opposite or adjacent to each other.
- Therefore, the rules governing a State's entitlement to the continental shelf should be distinguished from the rules governing the delimitation of the continental shelf between States with opposite or adjacent coasts.
 - Article 1 and Article 6 of the 1958 Convention on the Continental Shelf
 - Article 76 and Article 83 of the UNCLOS
 - “. . . the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundary . . .” (North Sea Cases, ICJ Reports, 1969, para. 46).

(2) Relationship between Entitlement and Delimitation

- However, the fact that the concepts of entitlement and delimitation are distinct does not necessarily imply that they have no correlation. On the contrary, the two concepts are inherently interrelated, because delimitation presupposes an area of overlapping entitlements; the question of delimitation arises only where the respective areas of States' entitlements overlap
 - "While entitlement and delimitation are two distinct concepts addressed respectively in articles 76 and 83 of the Convention, they are interrelated" (Bay of Bengal case, ITLOS Reports, 2012, para. 398)

(3) Delimitation Process: A Two–Stage Operation

- Thus the first or preliminary step for delimitation is to determine the entitlement and whether the entitlements overlap or not. Then, on the basis of this finding, delimitation will be carried out in the area of overlap, if any, but never outside of it.
- “. . . 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” (North Sea Cases, ICJ Reports, 1969, para. 18).

(4) Delimitation of the CS beyond 200 M before establishing the outer limits

Bay of Bengal Case (2012)

- Determination of whether an international court or tribunal should exercise its jurisdiction (to delimit the continental shelf beyond 200 M) depends on the procedural and substantive circumstances of each.
 - Submissions; notification of the presence of a dispute; and subsequent decisions by the CLCS to defer the consideration of the submissions
- Determination of Entitlement: whether the Tribunal can and should determine the entitlements of the Parties
 - The fact that the outer limits of the continental shelf beyond 200 M have not been established does not imply that the T must refrain from determining the existence of entitlement; the Parties do not differ on the scientific aspects of the seabed and subsoil of the Bay of Bengal; they differ on the interpretation of article 76, in particular the meaning of natural prolongation

- Para. 443. . . . 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
- Para. 444. . . the Bay of Bengal presents a unique situation as acknowledged in the course of negotiations at the Third UNCLOS.
- Para. 446. In view of uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information submitted during the proceedings, the Tribunal is satisfied that there is a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nm.

Nicaragua v. Colombia I (2012)

- Final submission I (3) of Nicaragua: . . . the Court to adjudge and declare that “the appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties”
- Subparagraph 3 of the operative clause of the 2012 Judgment: “The Court , , , finds that it cannot uphold the Republic of Nicaragua’s claim contained in its final submission I (3)”
- Para. 129. Since Nicaragua, in the present proceedings, has not established it has a continental margin that extends far enough to overlap with Colombia’s 200nm entitlement to the continental shelf, . . . , 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 provided by it

Nicaragua v. Colombia II: Preliminary Objections (17 March 2016)

- First request of Nicaragua (in its application): . . . the Court to adjudge and declare “the precise course of maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012”
- Submissions of Colombia in the preliminary objections: . . . requests the Court to adjudge and declare that it lacks jurisdiction over the proceedings brought by Nicaragua . . . ; or, in the alternative, that the claims brought against Colombia . . . are inadmissible
- Para. 47. . . Colombia contends that the Court has already adjudicated on Nicaragua’s requests in its 2012 Judgment and therefore the principle of *res judicata* bars the Court from examining Nicaragua’s requests
- Para. 97. . . Colombia maintains that the Court cannot consider Nicaragua’s Application because CLCS has not made a recommendation

– Decision of the Court

- The Court has to decide whether subparagraph 3 of the operative part must be understood as “a straightforward dismissal of Nicaragua’s request for lack of evidence, as Colombia claims, or a refusal to rule on the request because a procedural and institutional requirement had not been fulfilled” (para. 74)
- The Court decided not to uphold Nicaragua’s claim because the latter had yet to discharge its obligation to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles. (para. 84)

- Submission of Nicaragua on 24 June 2013; The Court thus considers that the condition imposed by it in its 2012 Judgment has been fulfilled in the present case; it is not precluded by the *res judicata* principle from ruling on Nicaragua's Application (Paras. 87–88)
- Since the delimitation of the continental shelf can be undertaken independently of a recommendation from the CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to the UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation. (Para. 114)

4. Method of Delimitation

- Specific method to be applied in the process of delimitation
- Which method should be applied depends on the circumstances of each case; the goal of achieving an equitable solution is paramount
- No specific method of delimitation mentioned in arts. 74/83 (1) of the Convention.
- However, the equidistance/relevant circumstances method has been widely adopted by international courts and tribunals at least since the Greenland/Jan Mayen case (1993)
 - This method has developed from the two-stage approach to the three-stage approach (Romania v. Ukraine case)

– Three–stage approach

- First stage: Construction of a provisional equidistance line, based on the geography of coasts and geometric calculations
- Second stage: Determination of the relevant circumstances and adjustment, if necessary, of the provisional line
- Third stage: Checking whether the line results in any significant disproportion between the ratio of the respective coastal lengths and that of the relevant maritime areas allocated to each party

(1) First stage: Selection of base points and establishment of the provisional equidistance line

- While coastal States are entitled to determine their base points, international courts or tribunals are not obliged to accept them
- Courts adopt strict approach to the selection of base points (islets, low-tide elevations, dyke, reefs, etc.)
- Base points are selected in such a way not to amount to “a judicial refashioning of geography”
 - Islands are often not selected as a base point due to its distorting effect (combined with equidistance method)

(2) Second stage: Consideration of relevant circumstances and adjustment

- There is no settled list or general formula of relevant circumstances and the weight to be given to them
- However, relevant circumstances to be taken into account should not be arbitrarily chosen but the factors found relevant to “equitable delimitation”
 - “. . . 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 its developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion.” (*Libya/Malta case*, para. 48)

- Relevant circumstances may be divided into three categories:
 - (a) Conduct of the parties
 - Conduct of the parties amounting to tacit or *de facto* agreement, acquiescence or estoppel
 - Were they to be proved to exist, their legal effect would be conclusive in themselves
 - By the same token, if the conduct of the parties falls short of them, it may be ignored in delimitation
 - Due to its nature, the conduct of the parties needs to be examined preliminarily because its effect is conclusive, thus rendering other consideration unnecessary (delimitation by agreement)
 - However, argument for tacit agreement, acquiescence or estoppel is rarely accepted in delimitation due to the stringent standard required to establish their existence

(b) Geographical or geophysical factors

- Maritime delimitation is effected by international courts or tribunals on the basis, in essence, of geographical considerations (Primacy of geography)
- As the legal basis of the continental shelf jurisdiction is a geographical criterion of distance or a geological or geomorphological criterion of natural prolongation, it follows that geographical or geophysical factors are relevant to delimitation
- Coast, as a starting point for measuring a State's shelf entitlement and consequently for delimitation with neighboring States, dominates delimitation
 - coastal configuration (convex or concave)
 - coastal length
 - presence of island: entitlement to continental shelf and the effect of island in delimitation
- Geological or geomorphological considerations may be relevant in the delimitation of the continental shelf beyond 200 nautical miles in certain situations

(c) Non-geographical factors

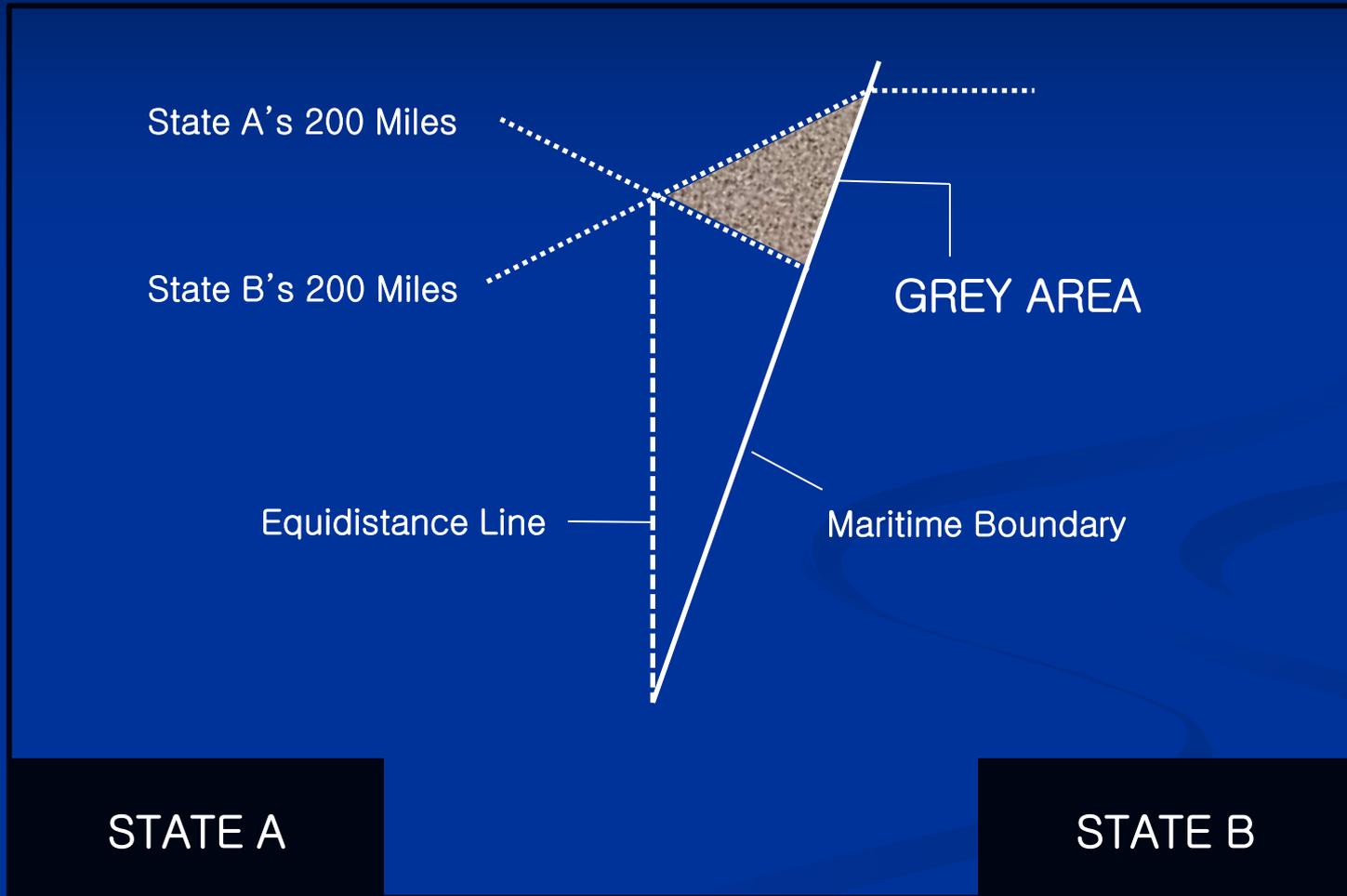
- As the legal basis of the continental shelf entitlement is distance or natural prolongation, it could be argued that factors extraneous to its entitlement may not be relevant to delimitation
- However, if delimitation appears to negate or endanger the purposes for which the jurisdiction was established, such delimitation may not be regarded as equitable
- Thus the factors related to the function or purposes of jurisdiction may be considered relevant in delimitation
 - resources interests: presence of mineral resources or unity of deposit, or access to fisheries (in the EEZ delimitation)
 - ecological or marine environmental consideration
 - security or defense interests: related to prevention of foreign States from exploiting the seabed or erecting fixed installation for that purpose in offshore areas
 - socio-economic consideration: the impact of delimitation on the community

- However, these factors may not dictate delimitation but be relevant only in assessing the equitableness of the result arrived at
- In addition, these factors may be relevant only in case of an exceptionally inequitable result
 - The acceptance of these considerations (socio-economic considerations) would be legitimate only when “the overall result . . . should unexpectedly be revealed as radically inequitable, that is to say, likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned.” (*Gulf of the Maine case*, para. 237)
- On the other hand, economic considerations such as the relative wealth or the economic positions of the parties, the absence of natural resources and other related considerations, have been rejected as irrelevant in delimitation

(3) Disproportionality test

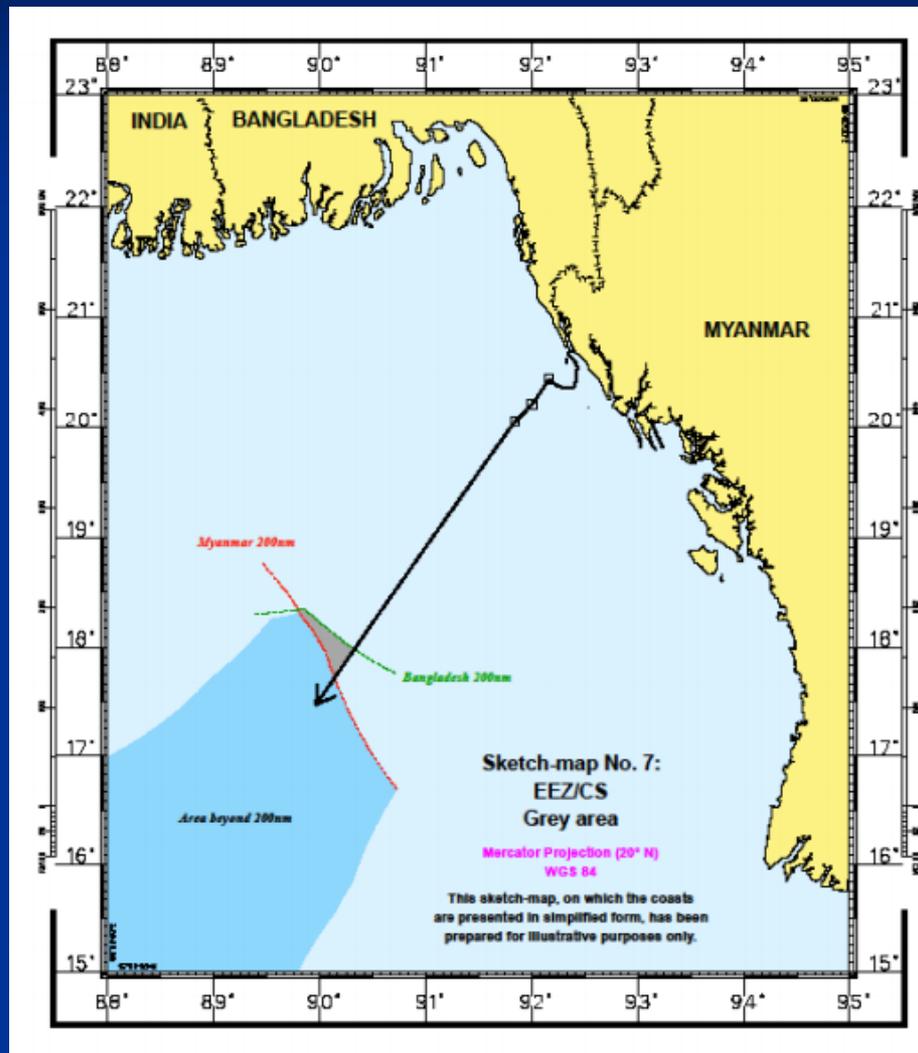
- to check whether a boundary line causes a “significant disproportion” by reference to the ratio of the length of the coastlines of the parties and the ratio of the relevant maritime area allocated to each party
- checking can only be approximate
- Relevant coast and relevant area: for a coast to be relevant, it must generate projections which overlap with those of the coast of another party

5. Related Problems: grey area and others



- A small-wedge-shaped area beyond the 200-mile limit of one State but within that of the other State yet on the side of the former State of the delimitation line
- A grey area arises whenever a delimitation line deviates from equidistance
- “Grey” area due to the uncertainty of its legal status
(in terms of the allocation of rights and obligations in the area)

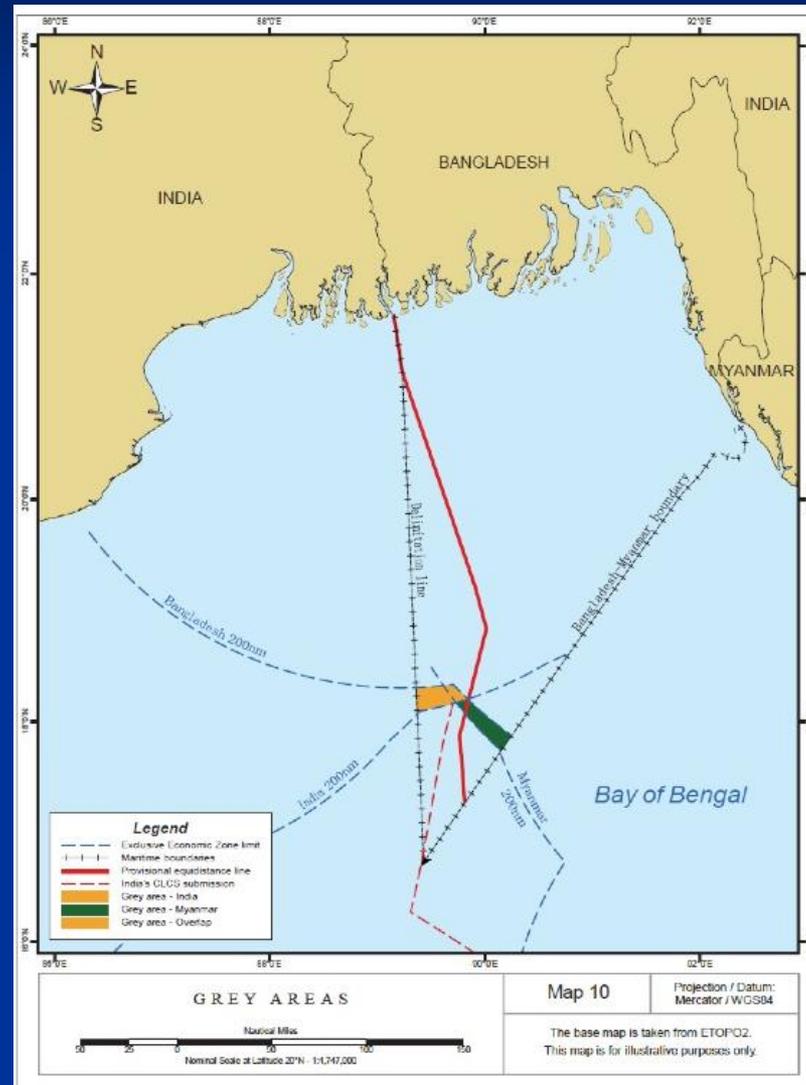
Grey area in the Bay of Bengal (Bangladesh/ Myanmar) Case



Findings of the Tribunal

- The boundary abutting the grey area is a boundary delimiting the continental shelves of the two Parties since in this area only their continental shelves overlap
- The problem of grey area arises as a “consequence” of delimitation that must be effected to achieve an equitable solution
 - Thus, this problem can neither be reason for adhering to an equidistance line nor be considered relevant circumstance that should be taken into account in delimitation
- In the grey area, there is an overlay of one Party’s (Bangladesh) continental shelf and another party’s (Myanmar) EEZ rights (notably with respect to the superjacent waters)
- Any practical or other difficulties that may arise from the overlap of rights can be resolved in accordance with principle reflected in the relevant articles in the Convention, including the principle of due regard

Grey area in the Bay of Bengal (Bangladesh/India) Case



Cooperative arrangements for shared resources or overlay of jurisdictions

- While boundary delimitation can reduce or eliminate any dispute or uncertainties, it is not a panacea where natural resources, living and non-living, straddle the potential boundary
- Where a single boundary (for EEZ and the continental shelf) is drawn, “a grey area” could be created
- In such cases, more innovative and cooperative approach need to be considered for optimal utilization of resources
 - Joint development zone
 - Special areas for fisheries purposes
 - Cooperative arrangements
(e.g., 1997 Maritime Boundary Agreement between Australia and Indonesia)

Maritime Boundaries in the Bay of Bengal

