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Published in:
Chinese journal of international law

DOI:
[10.1093/chinesejil/jmz005](https://doi.org/10.1093/chinesejil/jmz005)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2019

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Qi, X. (2019). Reflections on the Presence of Third States in International Maritime Boundary Delimitation. *Chinese journal of international law*, 18(1), 91-128. <https://doi.org/10.1093/chinesejil/jmz005>

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Reflections on the Presence of Third States in International Maritime Boundary Delimitation

XU Qi*

Abstract

The presence of third States occurs when two countries delimit their maritime boundary in a maritime area where there are more than two coastal States. The bilateral nature of maritime delimitation between two States requires the delimitation process not to prejudice the legal rights and interests of third States. On the one hand, at the procedural stage of international adjudication, third States may file an application for permission to intervene in the proceedings before a court or tribunal; at the merits stage, a third-party judicial organ may leave undecided the endpoint of a final boundary line to be delimited, so as not to affect the rights of a third State. On the other hand, in interstate maritime boundary agreements through international negotiation, in order to take care of third States' legal rights and interests, States may adopt several ways of addressing the existence of tripoints. This paper, in four parts, discusses the presence of third States in international maritime boundary delimitation. The first part gives a definition of a third State in the framework of maritime delimitation. The second part reflects on international adjudication relating to the presence of third States. The third part provides some observations on State practices relating to the existence of tripoints. The conclusion points out that there is a widening gap between maritime delimitation in theory

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and in practice, since recent case law particularly confines the delimitation to a purely bilateral status, without enough focus on the presence of third States, resulting in procedurally prejudicial impacts upon the legal rights and interests of third States.

I. Introduction

1. In the international community, modern international relations have not been confined to traditionally bilateral relationships.¹ Instead, they are characterized by a trend of multilateralization; international activities between two States may have an impact on the interests of other States. This is particularly salient in international adjudications and negotiations relating to maritime boundary delimitation. The presence of third States has evolved into a relevant factor in the delimitation process, and it may affect the direction of the final maritime boundary to be delimited.² Indeed, as Thomas Cottier asserts, “third party rights and expectations should therefore be considered as a part of the legal environment of delimitation”.³

2. To begin, it is necessary to provide a definition of a third State in the context of maritime delimitation. When two or more States have maritime boundary disputes and seek settlement via international adjudication or negotiation, there are States which have coasts adjacent or opposite to those of the disputing parties but are not parties to that particular dispute. Thus, these non-disputing countries are defined as third States in maritime delimitation.

1 Christine Chinkin, *Third Parties in International Law* (1993), 2.

2 Naomi Burke O’Sullivan, *The Case Law’s Handling of Issues Concerning Third States*, in: Alex G. Oude Elferink, Tore Henriksen, and Signe Veierud Busch (eds.), *Maritime Boundary Delimitation: The Case Law—Is It Consistent and Predictable?* (2018), 262-290. Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (2015), 491-510. Yoshifumi Tanaka, *The International Law of the Sea* (2nd ed. 2015), 218-220. Alain Pellet, *Land and Maritime Tripoints in International Jurisprudence*, in: Holger P. Hestermeyer et al (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (2011), 245-263. Alex G. Oude Elferink, *Third States in Maritime Delimitation Cases: Too Big a Role, Too Small a Role, or Both?* in: Aldo Chircop, Ted McDorman, and Susan Rolston (eds.), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (2009), 611-641. Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2006), 241-257. Coalter G. Lathrop, *Tripoint Issues in Maritime Boundary Delimitation*, in: D. A. Colson and R. W. Smith (eds.), *International Maritime Boundaries* (2005), 3305-3375.

3 Cottier, *ibid.*, 494.

In this process, the extension of a final maritime boundary line may enter into maritime areas claimed by the non-involved States, consequently directly affecting the legal interests and rights of third States. Further, there are also third States whose legal interests and rights may not be directly affected in the delimitation. For example, since New Zealand filed a submission to the Commission on the Limits of Continental Shelf (CLCS) concerning the outer limits of its continental shelf beyond 200 nautical miles (NM),⁴ both Japan and the Netherlands sent notes verbales to the CLCS, in order to present their concerns. Japan and the Netherlands are parties to the Antarctic Treaty, asserting that “the balance of rights and obligations in the Antarctic Treaty should not be affected in any way” by New Zealand’s submission to the CLCS.⁵ At this point in time, Japan and the Netherlands do not geographically abut New Zealand or the Antarctic, which demonstrates that although they are not directly affected in the delineation, they still consider that they have some interests there. However, this paper will mainly focus on instances where maritime delimitation directly affects the interests and rights of third States.

3. At the procedural stage of international adjudication, third parties may decide to file an application for permission to intervene in the proceedings

4 New Zealand Submission to the Commission on the Limits of the Continental Shelf pursuant to article 76(8) of the United Nations Convention on the Law of the Sea, Executive Summary (2016), (www.un.org/depts/los/clcs_new/submissions_files/nzl06/nzl_exec_sum.pdf).

5 “Japan does not recognize any State’s right of or claim to territorial sovereignty in the Antarctic, and consequently does not recognize any State’s rights over or claims to the water, seabed and subsoil of the submarine areas adjacent to the continent of Antarctica.” Note Verbale from the Permanent Mission of Japan to the Secretary-General of the United Nations, SC/06/459 (28 June 2006), (www.un.org/depts/los/clcs_new/submissions_files/nzl06/japan_e.pdf).

“The Netherlands does not recognize any claim to territories in Antarctica and consequently does not recognize that a claim to territorial sovereignty in Antarctica is capable of creating any sort of rights over continental shelf adjacent to Antarctic.” “The Netherlands does not consider that the continental shelf adjacent to Antarctica is subject to the sovereign rights of any State.” Note Verbale from the Permanent Mission of Japan to the Secretary-General of the United Nations, DJZ-IR 178/2006 (19 December 2006), (www.un.org/depts/los/clcs_new/submissions_files/nzl06/clcs_07_2006_nld.pdf).

The Antarctica Treaty does not recognize that any contracting party has either territorial sovereignty or “any other State’s right of or claim or basis of claim to territorial sovereignty” in Antarctica. The Antarctic Treaty, UNTC 5778 (1 December 1959), (<https://treaties.un.org/doc/Publication/UNTS/Volume%20402/volume-402-I-5778-English.pdf>).

before the International Court of Justice (the ICJ) or the International Tribunal for the Law of the Sea (ITLOS), in order to present their legal interests and rights that may be affected by the final decision or the construction of a convention to which third States other than original litigants are parties.⁶ Christine Chinkin illuminates that third States are one category of third parties, since “third parties to international adjudication are all States other than the applicant or respondent”.⁷ So, in cases of maritime boundary delimitation third States may apply before a court or tribunal for permission to intervene in the proceedings.

At the merits stage, third-party judicial organs may leave the precise endpoint of a final boundary line undecided, given the presence of third States. However, the ICJ seems to give insufficient weight to the rights and interests of third States due to the lower rates of success regarding permission to intervene in the case. In addition, as will be elaborated below, with the development of the delimitation of the continental shelf beyond 200 NM, the rights and interests of third States represent new features to be tackled in the future. With regard to State practice in maritime delimitation, as Coalter Lathrop observes, “approximately one half of all maritime boundary delimitations

6 Article 62 of the ICJ Statute provides that: “1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request”. Article 63 of the ICJ Statute stipulates that: “1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.” Article 31 of the ITLOS Statute provides that: “1. Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene. 2. It shall be for the Tribunal to decide upon this request. 3. If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.” Article 32 of the ITLOS Statute stipulates: “1. Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith. 2. Whenever pursuant to article 21 or 22 of this Annex the interpretation or application of an international agreement is in question, the Registrar shall notify all the parties to the agreement. 3. Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.”

7 Chinkin, above n.1, 9.

worldwide involve a tripoint issue”.⁸ In general, a tripoint can be an established one or a notional or hypothetical one. Different forms of tripoints result from States’ choices regarding delimitation methods in practice, and they produce different effects on the rights and interests of third States.

4. This paper will look at how third States exert their influence on the delimitation process, and it will make observations on the legal effects of actions undertaken by third-party judicial organs and States against third States. The paper will be divided into the three following sections. The first concerns international judicial practice regarding the presence of third States in maritime delimitation cases and makes observations on it. Second, the paper will examine how interstate maritime boundary agreements address the issue of third States and will also comment on this issue. Finally, the paper will give some concluding remarks.

II. The presence of third States in international maritime delimitation in the context of international adjudication

5. Before analyzing legal jurisprudence addressing the issue of third States at the procedural or merits phase in maritime delimitation, one could briefly look back at two earlier cases where the presence of third States actually appeared. Based on the ICJ’s ruling in the *North Sea Continental Shelf* cases, the goal of the Federal Republic of Germany (FRG) to prolong its border to the center of the North Sea and extend its continental shelf had been achieved in two maritime boundary agreements.⁹ As a result, the rights and interests of the FRG were accorded respect and protection by subsequent delimitation with the Netherlands and Denmark implementing the Court’s prior decision. In the *Anglo-French* case, the Court of Arbitration found that the French

8 Lathrop, above n.2, 3305.

9 After concluding boundary agreements with Denmark and the Netherlands by further bilateral negotiations in terms of the Court’s ruling, the FRG’s continental shelf “extended to the center of the North Sea in such a way as to meet that of the UK”, as observed by D. H. Anderson. In conjunction with maritime boundaries between the UK and Denmark or the Netherlands, the Court’s judgment had in fact influenced the establishment of tripoints among the FRG, the UK, the Netherlands, or Denmark. *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands), ICJ Reports 1969, 3-56. D.H. Anderson, Denmark-Federal Republic of Germany, Report Number 9-8, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1805. D.H. Anderson, Federal Republic of Germany-The Netherlands, Report Number 9-11, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1839.

argument regarding a third State was a hypothetical issue.¹⁰ Even if there are some overlapping maritime zones among three States, “that problem would normally find its appropriate solution by negotiations directly between the three States concerned”.¹¹ Notably, in 2013, the UK and Ireland delimited a single maritime boundary over the exclusive economic zone and continental shelf in the area of the Celtic Sea.¹² However, this boundary extended further than the boundary of the continental shelf between the UK and France in the *Anglo-French* case.¹³ Consequently, as observed by Stephen Fietta and Robin Cleverly, the UK’s exclusive economic zone and the continental shelf “potentially overlaps with the EEZ and continental shelf entitlements of France in that area”.¹⁴ In summary, two cases at the early stage of the development of international maritime delimitation do not explicitly refer to the legal interests and rights of third States, as the ICJ has done afterwards. Nevertheless, both decisions provide guidance for future delimitation among original litigating parties and neighboring countries as third States. Jurisprudence concerning the role of third States in maritime delimitation becomes more fruitful with the development of international adjudication and has showcased some features to be taken into account, as will be shown below.

II.A. The scope of legal rights and interests of third States in maritime delimitation when the procedure of intervention is sought

6. An overview of international case law regarding maritime delimitation reveals that only Article 62 of the ICJ Statute has been invoked by third States to apply for permission to intervene. Although no State has ever invoked Article 63 to use the right to intervene in maritime delimitation disputes, this does not mean such an invocation is impossible. The drafting history of Article 62 shows that the drafters did not adopt the meaning of “interest” or “right” based on their general notions; instead, they used the phrase “an

10 Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (*Anglo-French Arbitration*), Award (1977, 1978), 18 RIAA, 3, 27, para.28.

11 Ibid.

12 David Anderson, *Ireland-United Kingdom*, Report Number 9-5 (3), in: Coalter Lathrop (ed.), *International maritime boundaries* (2016), 5151-5166.

13 Ibid.

14 Stephen Fietta and Robin Cleverly, *A Practitioner’s Guide to Maritime Boundary Delimitation* (2016), 209.

interest of legal nature”.¹⁵ As stated by Judges Cançado Trindade and Yusuf, the definition of “interest of a legal nature” could be considered as “a hybrid compromise between distinct proposals by some of the members of the Advisory Committee of Jurists”.¹⁶ Tania Licari stated that it means that “the desire to accommodate opposing views prevailed over the need for clarity and precision”.¹⁷ In the *Nicaragua v. Colombia* case, the Court stated that “the interest of a legal nature has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature”.¹⁸ In addition, the Court declared that a would-be intervener did not necessarily have to show that “one of its rights may be affected”, only that “its interest of a legal nature may be affected”.¹⁹ Hence, the threshold to have the “right” to be possibly affected is higher than that of a legal interest.

7. In the *Tunisia/Libya* case, Malta, the applicant for intervention, contended that its legal interests and rights existed in the general principles and rules of international law concerning the delimitation of continental shelf between two disputing parties.²⁰ But this was rejected by the Court since they did not “relate to any legal interest of its own directly in issue between Tunisia and Libya in the present proceedings or as between itself and either one of those countries”.²¹ In the *Libya/Malta* case, Italy claimed its legal interests as its “sovereign rights over certain areas of continental shelf in issue in the present case”, and Italy presented specific and concrete areas that may be affected by a decision of the Court.²² Nevertheless, the Court considered that addressing Italy’s request would require it to address potentially separate maritime boundary disputes between Italy and the original litigant States, which

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- 15 Territorial and Maritime Dispute (*Nicaragua v. Colombia*), Application by Costa Rica for Permission to Intervene, Judgment, ICJ Reports 2011, 348, 381, paras.22-23 (diss. op. Al-Khasawneh).
 - 16 *Ibid.*, 405, para.10 (diss. op. Cançado Trindade and Yusuf).
 - 17 Tania Licari, Intervention under Article 62 of the Statute of the ICJ, Brooklyn JIL (1982), 271.
 - 18 *Nicaragua v. Colombia*, above n.15, Application by Costa Rica for Permission to Intervene, 358, para.26.
 - 19 *Ibid.*
 - 20 Continental Shelf (*Tunisia/Libyan Arab Jamahiriya*), Application by Malta for Permission to Intervene, Judgment, ICJ Reports 1981, 17, para.30.
 - 21 *Ibid.*, 12, para.19.
 - 22 Continental Shelf (*Libyan Arab Jamahiriya/Malta*), Application by Italy for Permission to Intervene, Judgment, ICJ Reports 1984, 3, 10, para.15.

would go beyond its judicial competence.²³ Two observations can be made with regard to two cases. On the one hand, interests in the development of the generally applicable legal rules and principles relating to maritime delimitation, including delimitation methods and relevant circumstances, can hardly constitute justifications to prove the legal interests and rights of third States may be affected, since they are too general to show specific and direct interests of third States in maritime delimitation cases. In light of the *Palau Ligitan and Pulau Sipadan* case, the “interest” itself should not be “such a generalized interest”.²⁴ On the other hand, the *Libya/Malta* case indicates that the scope of legal rights and interests of third States, if allowed to intervene, should not affect the nature of a dispute before the Court. Given that a third State invokes specific areas to verify the existence of legal interests which may be affected by the case, maritime boundary disputes between a third State and each of the principal parties may possibly arise in the same disputed maritime area. This poses a risk of modifying the subject matter of a judicial dispute as well as questions as to the competence of the court or tribunal over the dispute before it. Be that as it may, it should be pointed out that this latter argument has not been followed in subsequent judicial decisions.

II.B. To what extent legal rights and interests of third States may be affected in maritime delimitation

8. In theory, as the Special Chamber (the Chamber) in the *El Salvador/Honduras* case observed, a would-be intervener “has only to show that its interest ‘may’ be affected, not that it will or must be affected”.²⁵ The word “may” rather than “must” or “will” indicates a lower standard for third States to meet. At the intervention stage, the Court is not allowed to make any decision on the merits, nor can a third State be certain of the consequences of the Court’s decision. It is argued that the word “may” might properly demonstrate the limit of the Court’s competence as well as the capability of a third State to provide the Court with relevant information. Nonetheless, in

23 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports 1985, 3, 26-28, para.22.

24 *Sovereignty over Palau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application by the Philippines for Permission to Intervene, Judgment, ICJ Reports 2001, 575, 597, para.52.

25 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports 1990, 92, 117, para.61.

practice, the interpretation and application of the word “may” by international courts and tribunals seem to be inconsistent and controversial. The Court in the *Palau Ligitan and Pulau Sipadan* case stated that a third State “bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have”, and that how such interests may be affected by the reasoning of the Court must be declared “with adequate specificity”.²⁶ However, this observation does not sufficiently clarify the standards of “adequate specificity” to be met for third States which intend to seek intervention in a pending case.

9. In maritime delimitation, one could argue that the scope of a particular area indicated by third States should be considered to correspond to the requirement of “adequate specificity”, since it is determined by mathematical calculations based on certain geographic coordinates regarding that specific area. For instance, in the *Libya/Malta* case, Italy as required by the Court showed at the hearing two parts of the maritime zones which might be affected by the decision.²⁷ In the *Nicaragua v. Colombia* case, both Costa Rica’s proposal of a “minimum area of interest” and Honduras’s claim of “a roughly rectangular area” clarified specific areas which might be affected by the judgment.²⁸ The Court’s rejection of the applications to intervene was primarily driven by concerns about exceeding the limit of judicial competence conferred by the original litigants to the dispute. Nevertheless, concrete areas claimed by third States really imply such a possibility of being affected, just as Judge Oda pointed out, “the possibility or probability of an adverse effect upon a third State accordingly is not excluded and cannot be so”.²⁹ The Court thus cannot avert the possibility of infringing on the rights and interests of a third State, since a boundary line to be delimited in this case would probably encroach upon the maritime zones of third States. Precluding third States from intervening in the procedure to express their views may protect the integrity of

26 *Palau Ligitan and Pulau Sipadan*, above n.24, Application by the Philippines for Permission to Intervene, 598, paras.59-60.

27 *Libyan/Malta*, above n.22, Application by Italy for Permission to Intervene, Written answers of Italy to the questions posed by Judges Oda and Lacharrière at the hearing held on 30 January 1984, 507, para.6.

28 *Nicaragua v. Colombia*, above n.15, Application by Costa Rica for Permission to Intervene, 364, para.55. Territorial and Maritime Dispute (*Nicaragua v. Colombia*), Application by Honduras for Permission to Intervene, Judgment, ICJ Reports 2011, 420, 439, para.57.

29 *Libyan/Malta*, above n.22, Application by Italy for Permission to Intervene, 110, para.39 (sep. op. Oda).

bilateral maritime delimitation, but it may not help resolve conflicting maritime rights and interests between two Parties to the dispute and third States.

II.C. The sufficiency or insufficiency of Article 59 of the ICJ Statute in the protection of rights and interests of third States in maritime delimitation cases

10. It is clear that the purpose of Article 62 of the ICJ Statute is to provide a third State which is not a party to the proceedings an opportunity to safeguard its rights and interests in a pending case. The aim of Article 59 of the ICJ Statute is to preclude a third State as a non-party from being affected by the *res judicata* of the merits decision.³⁰ In the *Anglo-French Arbitration*, the Court of Arbitration determined that its decision “will be *res inter alios acta*” and only binding upon the two States to the dispute before it.³¹ As observed by Naomi Burke O’Sullivan, “the consensual nature of international dispute settlement mechanisms is reflected in the fact that a decision of an international court or tribunal delimiting a maritime boundary has no binding force for states not party to the dispute”.³² As a result, this article is confined to the phase of the merits, whereas Article 62 pertains to a prior stage and “constitutes a means whereby the Court can be alerted to the broader interests of a legal nature which may be involved in the case besides the positions of the main parties to the dispute”, as elaborated by Judges Cançado Trindade and Yusuf.³³ Shabtai Rosenne observes that Article 59 “may not always be sufficient protection for third States, especially in disputes involving sovereignty or sovereign rights over portions of the earth’s surface, in particular disputes relating to overlapping claims to maritime areas; and that situations exist in which something more definite may be required”.³⁴ Hugh Thirlway also argues, “in maritime delimitation cases it is not sufficient for the Court to rely on Article 59, and recklessly indicate a maritime delimitation between the parties before it which might extend too far, so as to encroach on areas

30 Article 59 of the ICJ Statute provides: “The decision of the Court has no binding force except between the parties and in respect of that particular case”.

31 *Anglo-French Arbitration*., above n.10, para.28.

32 O’Sullivan, above n.2, 263.

33 *Nicaragua v. Colombia*, above n.15, Application by Costa Rica for Permission to Intervene, 413, para.28 (diss. op. Cançado Trindade and Yusuf).

34 Malcolm N. Shaw, *Rosenne’s Law and Practice of the International Court: 1920-2015* (5th ed. 2016), 1548.

appertaining to a third State”.³⁵ In the *Cameroon v. Nigeria* case, it was admitted that Article 59 of the Statute might not be sufficient to protect the interests and rights of third States, especially “in the case of maritime delimitation where the maritime areas of several States are involved”.³⁶ Accordingly, this decision of the Court was opposite to its previous decision in the *Libya/Malta* case, where Article 59 was considered able to accord sufficient protection to Italy as a third State. The extent to which Article 59 can provide legal protection for third States in maritime delimitation remains inconsistent.

11. In the *Nicaragua v. Colombia* case, the Court observed that “a third State’s interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play”.³⁷ According to the Court, Costa Rica had to “show that its interest of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute”.³⁸ Therefore, Costa Rica is required to verify the presence of an additional protection required, apart from Article 59, but such a point had not appeared in previous cases. In addition, since “the Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved”, Costa Rica’s request to intervene was rejected.³⁹ However, after the merits decision was issued, the final delimitation line “follows the parallel of latitude until it reaches the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured”.⁴⁰ Consequently, as Judge *ad hoc* Cot observes, bilateral delimitation agreements between Colombia and other third States do not exist anymore, nor are they valid, “since their object disappears with the substitution of Nicaragua for

35 Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (2013), 1049.

36 *Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, 303, 421, para.238.

37 *Nicaragua v. Colombia*, above n.15, Application by Costa Rica for Permission to Intervene, 372, para.86.

38 *Ibid.*, para.87.

39 *Ibid.*, para.89.

40 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624, 713, para.237.

Colombia as the holder of sovereignty or of sovereign rights in the spaces concerned”.⁴¹ In addition, since the Court’s ruling has no binding force upon Nicaragua’s delimitation with third States which have agreements with Colombia, Nicaragua may use its own base points and baselines to reach maritime boundary agreements with other third States in the maritime zones which belong to Nicaragua, not Colombia, after the judgment.⁴² As a result, base points and baselines of third States, if they agree to negotiate with Nicaragua for new boundaries, may be modified to some extent and affect their rights and interests. Naomi Burke O’Sullivan sees that “there is the possibility that the scope of Panama and Costa Rica’s entitlements may be reduced (in comparison with the situation existing before the delimitation) in any future negotiations or judicial settlements with Nicaragua”.⁴³ In spite of the principle of *res inter alios acta*, Colombia has to face conflicting legal obligations both from the judgment and prior established bilateral maritime delimitation with other third States.

12. Judge Xue also recognizes that the boundary line will enter into the area where “potentially the maritime entitlements of three or even four States may overlap”, including Costa Rica.⁴⁴ In addition, Judge Xue is also concerned with “the cut-off effect” generated by the Court’s decision in the south of the Caribbean Sea, since the delimitation line may cut off the coastal projections of Costa Rica and Panama.⁴⁵ The extent of the effect produced “depends on the maritime delimitation between Nicaragua and its adjacent neighbour(s)”.⁴⁶ Therefore, Judge Xue suggests that “the boundary should stop at Point 8 with an arrow pointing eastward”.⁴⁷ As also commented by Serena Forlati, the Court’s ruling gives an impression that “in 2011, the Court had already envisaged the outcome of the merits phase, namely, that as a result of the demarcation line no maritime border would exist any longer between Colombia and Costa Rica in the area in question, and hence there would be no need to safeguard the interests of Costa Rica”.⁴⁸

41 Ibid., 769, paras.10-11 (decl. Cot).

42 Ibid., 769-770, paras.12-13. Fietta and Cleverly, above n. 14, 529.

43 O’Sullivan, above n.2, 275.

44 Nicaragua v. Colombia, above n. 40, Judgment, 749, para. 12 (decl. Xue).

45 Ibid., 750, para.14.

46 Ibid.

47 Ibid., 749, para.11.

48 Serena Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?* (2014), 195.

13. In the *Costa Rica v. Nicaragua* case regarding the delimitation of exclusive economic zone and continental shelf, the Court discussed the “relevance of bilateral treaties and judgments involving third States”.⁴⁹ In the view of the Court, “treaties concluded between one of the Parties and a third State or between third States” “cannot *per se* affect the maritime boundary between the Parties”.⁵⁰ Costa Rica as one of the Parties to the dispute had concluded treaties with Colombia and Panama, respectively. Nevertheless, the Court found that these treaties were not “considered relevant for the delimitation between the Parties” in this case.⁵¹ As a consequence, the Court straightforwardly concluded that the construction of this line would not impair the rights and interests of third States. Nevertheless, this conclusion deserves further discussion. The western sector of the 1976 Colombia-Panama boundary and the overall 1977 Colombia-Costa Rica Treaty are delimited between the insular features over which Colombia exercises sovereignty in the West Caribbean Sea and the coasts of Costa Rica and Panama. In the *Costa Rica v. Nicaragua* case, Costa Rica in 2013 had informed Colombia that the 1977 Treaty was rendered “impracticable and ineffective” by the Judgment of 2012, and no overlapping zones would exist between Costa Rica and Colombia; therefore, Costa Rica can claim a 200-NM exclusive economic zone and continental shelf.⁵² Costa Rica’s position amounts to unilateral termination of the boundary agreement with Colombia. However, in light of Article 62(2)(a) of the Vienna Convention on the Law of Treaties (VCLT), “a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary”.⁵³ Therefore, one could argue that the 2012 Judgment may not be referred to as grounds for terminating the 1977 Costa Rica-Colombia Treaty for the purpose of

49 Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (*Costa Rica v. Nicaragua*), Judgment, ICJ Reports 2018, para.123.

50 The Court observed that “a judgment rendered by the Court between one of the Parties and a third State or between two third States cannot *per se* affect the maritime boundary between the Parties. The same applies to treaties concluded between one of the Parties and a third State or between third States”. Ibid.

51 It is stated that “with regard to the 1977 Treaty between Costa Rica and Colombia, there is no evidence that a renunciation by Costa Rica of its maritime entitlements, if it had ever taken place, was also intended to be effective with regard to a State other than Colombia”. Ibid., para.134.

52 Memorial of Costa Rica, *ibid.*, paras.2.13-2.14.

53 VCLT, 888 UNTS 999, art. 62. O’Sullivan, above n.2, 275.

claiming maritime entitlements appertaining to Colombia. Furthermore, Nicaragua admitted that in the South-Western Caribbean Sea, “following the Court’s Judgment of 2012, some of those areas now belong to Nicaragua”.⁵⁴ In other words, after the Judgment of 2012, some of those areas still belong to Colombia. It is still likely that the presence of Colombia as a third State may affect the determination of a final boundary line in this case.

14. According to the Court, to simplify the delimitation line, the Court selected some “most significant turning points on the adjusted equidistance line”, “which indicate a change in the direction of that line”.⁵⁵ Notably, beyond Point Q, the line may enter into maritime zones attributed to Colombia in light of the 1977 Colombia-Costa Rica Agreement.⁵⁶ It further prolongs beyond Point T and may extend to maritime zones attributed to Colombia in terms of the 1976 Colombia-Panama Agreement.⁵⁷ As a result, the Costa Rica-Nicaragua boundary beyond Point Q may not take two boundary agreements involving Colombia as a third State into consideration. The course of this boundary may possibly encroach upon maritime entitlements of Colombia in this case. However, the Court emphasized that, “this line is constructed without prejudice to any claims that a third State may have on part of the area crossed by the line”.⁵⁸ This conclusion followed from the *Nicaragua v. Colombia* case that the Court’s judgment is “without prejudice to any claim of a third State or any claim which either Party may have against a third State”.⁵⁹ A previous analysis on the *Nicaragua v. Colombia* judgment has articulated that such an assurance cannot prevent the rights and interests of third States from being potentially prejudiced. The same assertion also cannot exclude the possibility that the rights and interests of a third State may be affected by the *Costa Rica v. Nicaragua* judgment. In short, one could briefly conclude that Article 59 of the Statute appears to be insufficient in giving weight to the rights and interests of third States in international adjudication relating to maritime boundary delimitation.

54 *Costa Rica v. Nicaragua*, above n.49, Counter-Memorial of the Republic of Nicaragua, para.3.29.

55 *Costa Rica v. Nicaragua*, above n.49, para.158.

56 *Ibid.*, Sketch-map No. 11: The simplified adjusted line.

57 *Ibid.*

58 *Ibid.*, para.157.

59 *Nicaragua v. Colombia*, above n.40, Judgment, 707, para.228.

II.D. An evaluation of the role of third States seeking to intervene in the proceedings in cases of international maritime delimitation

15. In the *Tunisia/Libya* and *Libya/Malta* cases, although the applications of third States to seek intervention were not permitted, the Court did recognize the presence of the rights of third States, either by leaving the ending point of a final maritime boundary undecided or by determining the scope of the geographic area to be delimited.⁶⁰ In *Tunisia/Libya*, the relevant areas for the purpose of delimitation were established in a way that would not prejudice the rights of third States.⁶¹ In *Libya/Malta*, the scope of continental shelf claimed by Italy as a third State served to limit the extent of Libya's relevant coast and relevant area as well as the extension of a final maritime boundary.⁶² Judge Schwebel observes that such a narrow delimitation line tacitly and fully acknowledges the existence of rights and interests of a third State, but it is questionable whether a third State is fully entitled to the continental shelf as it has claimed under international law.⁶³ Moreover, Judge Schwebel points out that the Court's jurisdiction entrusted by two principal parties was actually "ousted to the extent of the claims of third States".⁶⁴ Judge Mosler's opinion, which suggests "mark[ing] both ends with arrows in the direction in which the line should continue", seems more constructive and pragmatic.⁶⁵ It is clear that third States' acts of seeking to intervene may assist the Court in establishing a final maritime boundary by taking their rights and interests into account. However, such a role is not always played well. In the *Nicaragua v. Colombia* case, Judge *ad hoc* Cot indicates that "Costa Rica had fully asserted its legal interests during the proceedings relating to the Application for permission to intervene, and that the Court had been sufficiently informed to rule with a full knowledge of the facts and with respect for Costa Rica's rights".⁶⁶ Accordingly, attending a hearing before allowing intervention by

60 The Court made clear that, "the extension of this line will depend on the delimitation to be agreed with third States". Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, 93-94, paras.133 B(1) and C(3). *Libya/Malta*, above n.23, Judgment, 25-26, paras.21-22.

61 *Tunisia/Libya*, Judgment, *ibid.*, 93, para.133B(1).

62 *Libya/Malta*, above n.23, Judgment, 50, paras.68-69.

63 *Libya/Malta*, above n.22, Application by Italy for Permission to Intervene, 135, para.12 (diss. op. Schwebel).

64 *Libya/Malta*, above n.23, Judgment, 175 (diss. op. Schwebel).

65 *Libya/Malta*, above n.23, Judgment, 118 (diss. op. Mosler).

66 *Nicaragua v. Colombia*, above n.40, Judgment, 769, para.8 (decl. Cot).

third States is already sufficient to show their potentially affected rights and interests, in the event that a third State has already pointed out those affected specific areas. If so, the judicial function of the intervention in the ICJ's Statute, in so far as further participation in the proceedings is concerned, may be detrimentally insignificant. In the view of Judge Donoghue, such a hearing "gives rise to a *de facto* means of third-State participation that is not currently a feature of the Statute or the Rules of Court".⁶⁷ It should be noted that the Court has frequently highlighted that the ultimate goal of maritime delimitation is to achieve an equitable result for the two Parties to the dispute.⁶⁸ Nevertheless, such a purpose cannot be achieved at the expense of the rights and interests of third States.

16. According to Judge Xue, regardless of whether a third State's request to seek intervention is allowed or not, the Court should take "the public order and stable legal relations" into consideration and must not sacrifice third States' rights and interests to satisfy the need of two parties to the case.⁶⁹ In the same case, the Court did not permit third States to intervene in the proceedings, and the final boundary line encroached upon maritime zones claimed by third States, "drastically changing the maritime relations in the area", as emphasized by Judge Xue.⁷⁰ Such a decision concerning third States seeking to intervene does not seem to signal the maintenance of regional stability and security as well as public order in the Caribbean Sea. It is clear that at the intervention stage the Court is unable to reach a final maritime boundary line for both Parties. A further question is how to evaluate potentially overlapping maritime zones between each of the parties and a third State. Judge Donoghue argues that the Court would take the rights and interests of third States into account by presuming that "the Court would adopt a line that is identical or close to the line" proposed by one of the parties and would

67 *Nicaragua v. Colombia*, above n.28, Application by Honduras for Permission to Intervene, 491, para.57 (diss. op. Donoghue).

68 In the *Bangladesh/Myanmar* case, the Tribunal declares that "the goal of achieving an equitable result must be the paramount consideration guiding the action of the Tribunal in this connection". Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Case No. 16 (2012), 67, para.235.

In the *Nicaragua v. Colombia* case, the Court also observes that "the ultimate solution must be designed to achieve an equitable result". *Nicaragua v. Colombia*, above n.40, Judgment, 697, para.196.

69 *Nicaragua v. Colombia*, above n.40, Judgment, 750, para.15 (decl. Xue).

70 *Ibid.*

see that line's consequences for third States.⁷¹ Accordingly, it is suggested that the possibility of the rights and interests of third States being affected can hardly be eliminated.

17. The *Cameroon v. Nigeria* case is the only case which allows a third State to intervene in the delimitation dispute, since a potential boundary line may affect the rights and interests of Equatorial Guinea. What is more, the *Cameroon v. Nigeria* case also presents another issue concerning what difference the legal effects of intervention make regarding the rights and interests of third States. As commented by Christine Chinkin, Equatorial Guinea as an intervening State and São Tomé and Príncipe as a non-intervening State were "accorded the same consideration"; an intervening State did not prevail over a non-intervening State; the Court actually provided them the same protections.⁷² In other words, when a third State is allowed to intervene in a delimitation dispute, it does not seem to gain much advantage, compared with what a non-intervening third State may get.

18. In international case law, outside a third State's application for permission to intervene, the presence of third States is linked to the definition of relevant areas in the delimitation process and exerts influence upon the delimitation of a final maritime boundary. The *Romania v. Ukraine* case specifies relevant areas to be demarcated. The Court pointed out that:

Where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected. Third party entitlements would only be relevant if the delimitation between Romania and Ukraine were to affect them.⁷³

Therefore, when determining the scope of the relevant area for delimitation, the Court held the view that entitlements of third States could not be affected

71 *Nicaragua v. Colombia*, above n.28, Application by Honduras for Permission to Intervene, 487, paras.44-48 (diss. op. Donoghue). *Nicaragua v. Colombia*, above n.15, Application by Costa Rica for Permission to Intervene, 415, para.6 (diss. op. Donoghue).

72 Christine Chinkin, Article 62, in: Andreas Zimmerman et al (eds.), *The Statute of the International Court of Justice: A commentary* (2nd edition. 2012), 1568.

73 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Reports 2009, 61, 100, para.114.

even though their entitlements may be involved in overlapping maritime entitlements of original litigants to the dispute. In the *Nicaragua v. Colombia* case, the Court contended that “the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap”.⁷⁴ It implies that maritime entitlements of third States may not be contained therein for defining the relevant area, and this decision deviates slightly from the *Romania v. Ukraine* case. Nonetheless, in the *Costa Rica v. Nicaragua* case, the Court went back to the *Romania v. Ukraine* case, stating that “the spaces where third States have a claim may be included” in the relevant area.⁷⁵ The Court’s decision ultimately resulted in imprecise calculations of “the part of the relevant area of each party”, “since the maritime space appertaining to third States cannot be identified in the present proceedings”.⁷⁶ Thus, one could argue that marine entitlements of third States can be included in the determination of relevant area to be delimited in a delimitation dispute.

19. In maritime delimitation cases where third States are involved, the final decision of a court or tribunal as regards the delimitation line tilts toward adopting a similar approach. This is well summarized in the *Nicaragua v. Honduras* case. As for “a precise seaward end to the boundary” between Nicaragua and Honduras, “the Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined”.⁷⁷ “Accordingly, it is usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States”.⁷⁸ In some cases, the approach adopted by third-party judicial organs may be distinct in light of specific circumstances. In the *Guinea/Guinea-Bissau* case, the Arbitral Tribunal regarded the coastline of West Africa as a relevant circumstance to determine a relevant coast for delimitation.⁷⁹ Consequently, as a part of the whole maritime boundary to be delimited, a straight line connected by coastal points in two third States

74 *Nicaragua v. Colombia*, above n.40, Judgment, 685, para.163.

75 *Costa Rica v. Nicaragua*, above n.49, para.121.

76 *Ibid.*, para.164.

77 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), Judgment, ICJ Reports 2007, 659, 756, para.312.

78 *Ibid.*

79 Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Award (1985), 19 RIAA, 149, 187, para.103.

(Senegal and Sierra Leone) was established.⁸⁰ The Tribunal delimited a line perpendicular to the straight line at a certain azimuth to the limit of 200 NM as a final maritime boundary.⁸¹ Andronico O. Adede comments that the Tribunal's ruling "aimed at removing potential delimitation disputes in the area, including the dispute between Guinea-Bissau and Senegal to which the Tribunal specifically referred".⁸² In the *El Salvador/Honduras* case, although Nicaragua was allowed to intervene in the case, as it had shown that its legal interest may be affected by the decision on the legal regime of the waters of the Gulf of Fonseca, the scope of intervention proved to be quite limited.⁸³ Nicaragua's submission to intervene in the dispute concerning maritime delimitation within and outside of the Gulf of Fonseca was rejected by the Chamber. The Chamber observed that:

It occurs frequently in practice that a delimitation between two States involves taking account of the coast of a third State; but the taking into account of all the coasts and coastal relationships within the Gulf as a geographical fact for the purpose of effecting an eventual delimitation as between two riparian States—El Salvador and Honduras in the instant case—in no way signifies that by such an operation itself the legal interest of a third riparian State of the Gulf, Nicaragua, may be affected.⁸⁴

Furthermore, the Chamber declared that:

Setting aside for the moment the question of the "adjacent maritime areas", the essential difficulty in which the Chamber finds itself, on this matter of a possible delimitation within the waters of the Gulf, is that Nicaragua did not in its Application indicate any maritime spaces in which Nicaragua might have a legal interest which could be said to be affected by a possible delimitation line between El Salvador and Honduras.⁸⁵

80 Ibid., 189-190, paras.108-110.

81 Ibid., 190, para.111.

82 Andronico O. Adede, Guinea-Guinea-Bissau, Report Number 4-3, in: J. I. Charney and L. M. Alexander (eds.), *International Maritime Boundaries* (1993), 859.

83 *El Salvador/Honduras*, above n.25, Application by Nicaragua for Permission to Intervene, 125, para.79.

84 Ibid., 124, para.77.

85 Ibid., 125, para.78.

Just as observed by Alex G. Oude Elferink, the Court regarded “the coast of a third State” as “only a finding of fact”, without any legal effects produced by Nicaragua upon the delimitation issue.⁸⁶

II.E. Impact of international adjudication concerning the presence of third States upon international negotiation between States in maritime delimitation

20. In the presence of third States, the extension of a maritime boundary to be delimited should be confined when establishing the terminus of that boundary. International judicial decisions in which third States are taken into account may exert influence upon the future delimitation of maritime boundaries between neighboring States. This has been preliminarily remarked in the *North Sea Continental Shelf* case.⁸⁷ In the *Eritrea/Yemen* Arbitration, with regard to the presence of third States, including Saudi Arabia and Djibouti, the Tribunal recognized that “it will be necessary to terminate either end of the boundary line in such a way as to avoid trespassing upon an area where other claims might fall to be considered”.⁸⁸ There are two steps to reaching such a result: the first, to select “base points controlling the median line”, and the next, to “look at the cautionary termination matter when the line to be thus terminated at its ends has been produced”.⁸⁹ Indeed, in this case, the Tribunal cautiously selected the ending points for two States, on the basis that they “are well short of where the boundary line might be disputed by any third State”.⁹⁰ Thus, when the terminus of a maritime boundary between one of two parties and third States remained uncertain, the final boundary stopped at a point at which third States’ interests would not be affected at all. In 2000, Saudi Arabia and Yemen reached a maritime boundary agreement, and “the latitude of the western segment is approximately 34 nautical miles north of the northern end” of the Eritrea-Yemen maritime boundary decided by the Tribunal, as demonstrated by David A. Colson.⁹¹ Although it is possible that

86 Oude Elferink, *Third States in Maritime Delimitation Cases: Too Big a Role, Too Small a Role, or Both?*, above n.2, 631.

87 *North Continental Shelf* case, above n.9.

88 *Eritrea/Yemen*, Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award (1999), 22 RIAA, 335, 366, para.136.

89 *Ibid.*

90 *Ibid.*, 372, para.164.

91 The northern ending point of the Tribunal’s decision is at 15°43’10”N. The western part of Saudi Arabia-Yemen maritime boundary is paralleled with 16°17’24”N,

the Eritrea-Yemen boundary may extend northward to intersect with the Saudi Arabia-Yemen boundary and constitute a tripoint among the three States, the construction of such a point is yet to be decided, since Eritrea has not expressed its view on the prolongation of that boundary.⁹²

21. Before the *Qatar v. Bahrain* case, Bahrain reached agreements on maritime boundaries with Saudi Arabia and Iran in 1958 and 1971, respectively, while Qatar delimited maritime boundaries with Saudi Arabia and Iran in 1965 and 1969, respectively.⁹³ After the ruling was issued, at the northern end of the Qatar-Bahrain boundary, a tripoint with Iran would automatically be established when the Court's decision and previous maritime boundary agreements were combined.⁹⁴ Meanwhile, a maritime feature that was selected to establish the southern end of the Qatar-Bahrain boundary by the Court was not taken into account in the Saudi Arabia-Bahrain boundary; as a result, two maritime boundaries did not automatically intersect with each other to establish a tripoint.⁹⁵ In the *Barbados v. Trinidad and Tobago* Arbitration, both the 1990 Trinidad-Venezuela Agreement and the France (Guadeloupe and Martinique)-Dominica Agreement claimed by Trinidad and Tobago, and the Barbados-Guyana Joint Cooperation Zone Treaty referred to by Barbados were argued as limitations on the Tribunal's jurisdiction to undertake the delimitation between two States. In the end, the Tribunal only took the Trinidad-Venezuela Agreement into account as a relevant circumstance, since "the maximum extent of overlapping areas between the Parties is determined in part" by that treaty.⁹⁶ On the one hand, the boundary

but no terminus was determined. David A. Colson, Saudi Arabia-Yemen, Report Number 6-16, in: J.I. Charney and R.W. Smith (eds.), *International Maritime Boundaries* (2002), 2803-2804.

92 Ibid.

93 Robert F. Pietrowski, Jr., Bahrain-Iran, Report Number 7-2, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1481-1488. Robert F. Pietrowski, Jr., Bahrain-Saudi Arabia, Report Number 7-3, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1489-1497.

94 David A. Colson, Bahrain-Qatar, Report Number 7-13, in: J.I. Charney and R.W. Smith (eds.), *International Maritime Boundaries* (2002), 2854.

95 The feature is called Al-Hul which lies south of Ras al Barr on the southern tip of Bahrain. Ibid., 2855.

96 The Barbados-Guyana Joint Cooperation Zone Treaty invoked by Barbados is "*res inter alios acta* in respect of Trinidad and Tobago" and did not create legal rights and obligations upon Trinidad and Tobago, thus, "could not influence the delimitation in the present dispute". No comments were given by the Tribunal on the role

line extends in the southeastern direction and intersects with the Trinidad-Venezuela boundary, which establishes the southern end of the boundary to be delimited, and results in a Barbados-Trinidad and Tobago-Venezuela tri-point.⁹⁷ On the other hand, the Tribunal did not determine the northwestern terminus of the boundary, because, when the Court issued the award, no maritime boundary had been agreed upon between Trinidad and Tobago and two third States (Grenada, and Saint Vincent and the Grenadines).⁹⁸ Therefore, the Tribunal decided to extend the delimitation line at a certain azimuth until it met “the junction with the maritime zone of a third State”.⁹⁹ In spite of potentially negative impacts upon third States in the *Nicaragua v. Colombia* case, this decision consolidates the view that international judicial decisions relating to third States may directly influence the determination of maritime boundaries between third States and one or two conflicting parties to the dispute.

II.F. Rights and interests of third States in the delimitation of continental shelf beyond 200 NM: An unsettled issue

22. In the *Bangladesh/Myanmar* case, regarding the boundary of the continental shelf beyond 200 NM between two States, the ruling prolonged the boundary of exclusive economic zone and continental shelf within 200 NM having a certain azimuth until the rights and interests of third States might be affected, without providing definite ending points.¹⁰⁰ In the *Bangladesh v. India* case, the boundary of continental shelf beyond 200 NM between two States continued the same boundary of exclusive economic zone and continental shelf within 200 NM having a certain azimuth until it met the maritime boundary established in the *Bangladesh/Myanmar* case.¹⁰¹ Therefore, a tripoint would automatically be established implicating the continental shelf beyond 200 NM. It should be noted that since that case, international courts

of France (Guadeloupe and Martinique)-Dominica Agreement claimed by Trinidad and Tobago. Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award (2006), 27 RIAA, 147, 237-239, paras.339-349.

97 *Ibid.*, 243, para.374.

98 *Ibid.*, 244-245, para.381.

99 *Ibid.*, 244-245, paras.381-382.

100 *Bangladesh/Myanmar*, above n.68, 118, para.462.

101 *The Bay of Bengal Maritime Boundary Arbitration between The People's Republic of Bangladesh and The Republic of India (Bangladesh v. India)*, Award (2014), Permanent Court of Arbitration, 165, para.509.

and tribunals have not established a tripoint beyond 200 NM; the Arbitral Tribunal's ruling is a novel decision in this regard. In both cases, two decisions result in some overlapping maritime entitlements between two grey areas. Bangladesh's continental shelf beyond 200 NM simultaneously overlaps with Myanmar's and India's respective exclusive economic zones. In other words, when Bangladesh's continental shelf beyond 200 NM overlaps with India's exclusive economic zone, Myanmar as a third State has an overlapping exclusive economic zone with India. Accordingly, based on Articles 56(3) and 76(3) of the United Nations Convention on the Law of the Sea (UNCLOS), Bangladesh exercises exclusive sovereign rights over the seabed and subsoil, while India and Myanmar separately exercise exclusive sovereign rights over the superjacent water or the water column.¹⁰² As to the overlap between India and Myanmar, it is argued by the Tribunal that the rights of India vis-à-vis Myanmar were not prejudiced.¹⁰³ Furthermore, India and Myanmar may take measures to conclude specific agreements or establish appropriate cooperation arrangements.¹⁰⁴

23. In the grey area the issue of third States arises as well, which poses some judicial challenges for current international legal principles to be applied in maritime delimitation.¹⁰⁵ The Tribunal in the *Bangladesh v. India* case arguably did not take the scope of Myanmar's exclusive economic zone, which was determined by the ITLOS in the *Bangladesh/Myanmar* case, into account, and part of the maritime area that had previously been determined to be Myanmar's was allocated to India, resulting in an overlap between Myanmar and India. This indeed prejudices Myanmar's exclusive rights in its exclusive economic zone. The Tribunal should adopt an alternative delimitation method to circumvent such an overlap. What is more, in accordance with the principles of *res judicata* and *res inter alios acta*, Myanmar may decide not to

102 Article 56(3) provides: "The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI". Article 76(3) stipulates: "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

103 *Bangladesh v. India*, above n.101, 156, para.506.

104 *Ibid.*, 156-157, paras.507-508.

105 Shaun Lin and Clive Schofield, *Lessons from the Bay of Bengal ITLOS Case: Stepping Offshore for a "Deeper" Maritime Political Geography*, *The Geographical Journal* (2014), 260. Tafsir Malick Ndiaye, *The Judge, Maritime Delimitation and the Grey Areas*, *Indian JIL* (2015), 507.

be bound by the 2014 award, and thus carry out fishery activities unilaterally based on the 2012 ITLOS judgment. So far, as pointed out by Bjarni Már Magnússon, “no negotiations are taking place concerning the interplay between the rights of Bangladesh to the continental shelf beyond 200 NM and the overlapping right of Myanmar and India”.¹⁰⁶ It seems highly likely that if India and Myanmar do not forge an agreement regarding the allocation of fisheries, there will be potential conflicts between India and Myanmar in the overlapping grey zones. As Pemmaraju S. Rao in his dissenting opinion argues, “the grey area created by the Award will not only divide the single maritime zone (i.e. the EEZ) between two parties as in the case of ITLOS decision but among three States”.¹⁰⁷

24. Another example may be the ongoing case before the ICJ between Nicaragua and Colombia concerning the delimitation of the continental shelf beyond 200 NM from the Nicaraguan coast.¹⁰⁸ One might recall that Nicaragua filed an application to the CLCS in 2013, but this attracted objections from other neighboring States, including Costa Rica, Jamaica, Colombia, and Panama, in the Caribbean Sea, since the Nicaraguan application had encroached upon maritime areas claimed by these respective States.¹⁰⁹ These objections in fact inform the Court that looking at

106 Bjarni Már Magnússon, *The Grey Areas in the Bay of Bengal*, *Indian JIL* (2016), 55.

107 *Bangladesh v. India*, above n.101, 19, para.36 (conc. and diss. op. Dr. Pemmaraju S. Rao).

108 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*), International Court of Justice, (www.icj-cij.org/en/case/154).

109 The Republic of Nicaragua Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive Summary (June 2013), (www.un.org/depts/los/clcs_new/submissions_files/nic66_13/Executive%20Summary.pdf). Note Verbale from the Permanent Mission of Costa Rica to the Secretary-General of the United Nations, MCRONU-438-2013 (15 July 2013), (www.un.org/depts/los/clcs_new/submissions_files/nic66_13/cr_re_nic_15_7_2013e.pdf). Note Verbale from the Permanent Mission of Jamaica to the Secretary-General of the United Nations, LOS/15 (12 September 2013), (www.un.org/depts/los/clcs_new/submissions_files/nic66_13/jam_re_nic_12_9_2013.pdf). Note Verbale from the Permanent Mission of Panama to the Secretary-General of the United Nations, DGPE/FRONT/082/14 (3 February 2014), (www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2014_02_03_e.pdf). Note Verbale from the Permanent Mission of Republic of Colombia to the Secretary-General of the United Nations, S-DM-13-035351 (2 September 2013), (www.un.org/depts/los/clcs_new/submissions_files/nic66_13/col_re_nic_2013_09_24.pdf). Note Verbale from the

Nicaragua's claim to delimit the continental shelf beyond 200 NM, the Court has to ensure the delimitation line does not affect the rights and interests of other States. Nevertheless, one must highlight that the maritime boundary concerning Nicaraguan maritime entitlements within 200 NM and maritime entitlements of Colombian islands in the Western Caribbean Sea has potentially encroached upon maritime areas of Costa Rica and Panama. If the further delimitation is based on the 2012 Judgment, one would expect that the rights and interests of third States may be affected as well. This may pose challenges to the competence of a third-party dispute settlement body to deal with the rights and interests of third States. However, it remains to be seen how the Court will determine the direction of this line. In summary, the number of cases concerning the delimitation of continental shelf beyond 200 NM is quite limited, and the cases are solely concerned with adjacent States.¹¹⁰ It is unclear whether the jurisprudence relating to States with adjacent coasts can be applicable between States with opposite coasts. Thus, it remains to be seen how the Court may decide the delimitation of continental shelf beyond 200 NM between States with opposite coasts.¹¹¹ In short, it is uncertain as to how international courts and tribunals will dispose of such new overlapping exclusive economic zones in the grey area, as well as potential situations of overlap between the continental shelf of a State beyond 200 NM and the continental shelf of a third State within 200 NM.

Permanent Missions of Colombia, Costa Rica, and Panama, 13.48845 (23 September 2013), (www.un.org/depts/los/clcs_new/submission_files/nic66_13/col_cri_pan_re_nic_2013_09_23e.pdf). Note Verbale from the Permanent Missions of Colombia, Costa Rica, and Panama (5 February 2014), (www.un.org/depts/los/clcs_new/submissions_files/nic66_13/col_cri_pan_re_nic_2014_02_05_e.pdf).

- 110 There are currently three adjudicated cases regarding maritime delimitation beyond 200 NM addressed by international courts and tribunals. They are the *Bangladesh/Myanmar* case, the *Bangladesh v. India* case, and the *Ghana/Côte d'Ivoire* case. Three disputes all occurred between adjacent States. The pending case between Nicaragua and Colombia concerns States with opposite coasts. Delimitation of the Maritime Boundary in the Atlantic Ocean (*Ghana/Côte d'Ivoire*), Judgment, ITLOS Case No. 23 (23 September 2017), (www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf).
- 111 Signe Veierud Busch, Opposite or Adjacent—Does it Make a Difference? Delimiting the Continental Shelf beyond 200 NM, The JCLOS Blog (1 December 2017), (http://site.uit.no/jclos/files/2017/12/JCLOS-Blog-011217_Blogpost-ghana-cote-divoire.pdf).

III. State practices regarding third States in international maritime delimitation

25. The last section is an examination of international case law that concerns the presence of third States, which shows a legal complexity in maritime delimitation. In addition, interstate maritime boundary agreements also present a picture of how the rights and interests of third States are taken into account. Tripoints are actually formed in the delimitation of associated maritime zones within 200 NM between States, but also those beyond 200 NM. Therefore, it would be worthwhile to take a closer look at how States bilaterally delimit maritime boundaries potentially involving third States, and how third States respond to this operation. This section will first explore approaches made in negotiated maritime boundary agreements to take the rights and interests of third States into account, and then give some observations on these methods, as well as examine the potential impacts of such practices upon bilateral maritime delimitation.

III.A. An overview of State practices in the disposal of rights and interests of third States

26. In general, maritime boundary agreements by bilateral negotiations between States are characterized by practicability and flexibility, when taking the presence of third States into account. On the one hand, in accordance with the principle of *res inter alios acta*, these agreements normally cannot, under Article 34 of VCLT, impose rights and obligations on third States.¹¹² As a result, as will be outlined below, in a maritime area surrounded by more than two States, specific methods have been undertaken to establish tripoints, so as to pay due regard to the rights and interests of third States. On the other hand, due to distinct geographic characteristics in different regions, States also make some flexible arrangements to provide third States with certain protections. Nevertheless, in some instances, third States' rights and interests are prejudiced by such agreements.

112 VCLT, 888 UNTS 999, art. 34: "A treaty does not create either obligations or rights for a third State without its consent".

III.A.i. A maritime boundary stops short of a potential or notional tripoint between contracting States and third States

27. When determining ending points of a delimitation line, States as parties to boundary agreements may prefer to delimit a boundary line stopping short of a tripoint which is equidistant from the nearest points of three respective States. The distance between the terminus of a boundary to be delimited and an equidistant tripoint is not far but close; the length of that distance varies from case to case. With regard to the Agreements of Italy-Yugoslavia, Italy-Spain, Greece-Italy, Albania-Italy, and Albania-Greece on the delimitation of continental shelf, as observed by Tullio Scovazzi and Giampiero Francalanci, these boundaries actually “stopped before reaching the tripoint and reserved the completion of the line to later agreements with the respective interested parties”.¹¹³ This is apparently intended to protect third States from being affected by the boundary between contracting States. In the Greece-Italy Agreement, it is provided that “this delimitation shall subsequently extend in both directions to the points of intersection with the zones of the continental shelf belonging to the respective neighboring countries”.¹¹⁴ In the Albania-Greece Agreement, it is required that “the delimitation shall subsequently be extended until it meets the equidistant tripoint” among three States.¹¹⁵ However, one could regard two provisions as unilateral actions from contracting parties without consent being sought from third States, since any agreements on whether a tripoint shall be an intersectional or equidistant point and on how to determine it must be decided with the participation of the third States concerned. Otherwise, it may risk encroaching upon maritime zones of third States, and their rights and interests may be affected, in instances where third States have not acceded to the agreement.

113 Tullio Scovazzi and Giampiero Francalanci, Albania-Italy, Report Number 8-11, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1998), 2448. Other maritime boundaries are as follows: Tullio Scovazzi and Giampiero Francalanci, Greece-Italy, Report Number 8-4, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1592, 1594. Tullio Scovazzi and Giampiero Francalanci, Italy-Spain, Report Number 8-5, in: J.I. Charney and L.M. Alexander (eds.), in: *International Maritime Boundaries* (1993), 1602. Tullio Scovazzi and Giampiero Francalanci, Italy-Yugoslavia (Continental Shelf), Report Number 8-7(1), in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1628. Tullio Scovazzi, Irini Papanicopolulu and Giampiero Francalanci, Albania-Greece, Report Number 8-21, in: D.A. Colson and R.W. Smith (eds.), *International Maritime Boundaries* (2011), 4464.

114 Scovazzi and Francalanci, *ibid.*, 1599.

115 Scovazzi, Papanicopolulu and Francalanci, above n.113, 4464, 4474.

III.A.ii. A maritime boundary takes the form of an arrowheaded directional line

28. Similar to international case law, contracting States in maritime boundary agreements may leave the terminus undetermined, set up a directional arrow at a certain point, and extend that delimitation line at a certain azimuth until maritime areas where the rights and interests of third States are involved. This constitutes a preventive method for third States to have their rights and interests safeguarded where one or two contracting parties have unsettled maritime boundary disputes. Specifically, in the Agreements of Iran-Qatar and Bahrain-Iran on the delimitation of continental shelf, the western terminus of the Iran-Qatar maritime boundary and the eastern terminus of Bahrain-Iran are located in a certain azimuth—in other words, a geodetic line extending at a certain directional angle, since the dispute between Qatar and Bahrain at the time of conclusion was still pending and undefined.¹¹⁶ In the third segment of the Saudi Arabia-Yemen Agreement, the delimitation line is “a straight line parallel to the latitudes in the direction of the west until the terminus of the maritime boundaries between the two countries”.¹¹⁷ The Saudi Arabia-Yemen boundary can form a tripoint with the Eritrea-Yemen boundary if Eritrea and Yemen agree to extend their maritime boundary to intersect with the prior boundary, but to date no further actions have been taken by three States, and the tripoint remains a presumed one.

29. In the Caribbean Sea, the approach to determining an open terminus in bilateral maritime delimitation is frequently adopted. In the Colombia-Panama Agreement, the delimitation line extends along a straight line by a certain azimuth “until a point where the maritime limits with a third State should be made”.¹¹⁸ In the Colombia-Dominican Republic Agreement, as described by Kaldone G. Nweihed, the eastern segment of the boundary line is “an arrowheaded directional line which stops at the probable trijunction with Venezuela”.¹¹⁹ In the Colombia-Honduras Agreement, the delimitation

116 Robert F. Pietrowski, Jr., Iran-Qatar, Report Number 7-6, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1512. Pietrowski, above n.93, 1482.

117 Colson, above n.91, 2807.

118 Kaldone G. Nweihed, Colombia-Panama, Report Number 2-5, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 533.

119 Kaldone G. Nweihed, Colombia-Dominican Republic, Report Number 2-2, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 483.

line continues in the eastern direction by a straight line in parallel with a latitude “up to the point where a delimitation must be made with a third State”.¹²⁰ In the Grenada-Trinidad and Tobago Agreement, the delimitation line also extends along a geodetic line at a certain azimuth “until it meets the jurisdiction of a third state”.¹²¹ In the Dominican Republic-Venezuela Agreement, Kaldone G. Nweihed observes that the delimitation method is to “indicate its final prolongation, up to the jurisdiction of a third state”.¹²² Last but not least, in two sections of the delimitation line of the Dominica-France (Guadeloupe and Martinique) Agreement, this line extends along a geodetic line at a certain azimuth until maritime areas where third States are involved.¹²³ In brief, previous maritime boundaries situated in areas where more than four States are involved and conflicting interests among States regarding fisheries or the exploration or exploitation of oil and natural gas are intertwined. Such a method aims to assist contracting States in reaching agreed-upon maritime boundaries without infringing on the rights and interests of third States.

III.A.iii. States in the same maritime domain agree to collectively establish tripoints

30. It should be noted that trilateral or multilateral delimitation remains possible given relevant States’ consent to do it. According to an examination of negotiated maritime boundaries between States, there are several issues relating to the construction of tripoints. Firstly, based on existing bilateral delimitation agreements, three States agree to reach an agreement and establish a tripoint which is situated equally distant from the coastlines of three States. Given two maritime boundary agreements applying the equidistant method, a tripoint constitutes a common connection point which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of three States are measured. In detail, the Seabed Boundary Tripoint

120 Kaldone G. Nweihed, Colombia-Honduras, Report Number 2-4, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 517.

121 Carlyle Mitchell, Grenada-Trinidad Tobago, Report Number 2-31, in: Coalter Lathrop (ed.), *International Maritime Boundaries* (2016), 4713, 4717.

122 Kaldone G. Nweihed, Dominican Republic-Venezuela, Report Number 2-9, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 584.

123 Kaldone G. Nweihed, Dominica-France (Guadeloupe and Martinique), Report Number 2-15, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 710.

Agreement among Azerbaijan, Kazakhstan, and Russia formed a tripoint among the States, on the basis of three prior bilateral agreements between the respective States.¹²⁴ This tripoint agreement concerns the utilization of seabed and subsoil resources. In the Estonia-Finland-Sweden Agreement, three existing bilateral treaties falling short of a notional tripoint led to the establishment of a real tripoint through trilateral negotiations.¹²⁵ Quite unlike two previous agreements, in the Estonia-Latvia-Sweden Agreement the tripoint is not constructed on the Estonia-Sweden Agreement, because the Estonia-Sweden maritime boundary was demarcated later, with references to that tripoint Agreement among three States.¹²⁶ Similarly, the India-Maldives-Sri Lanka Tripartite Agreement established an equidistant tripoint before the conclusion of India-Maldives Agreement.¹²⁷ This agreement was deemed as a facilitation to later resolve the India-Maldives boundary. The issue of a tripoint also appears on the African area. The Comoros-Mozambique-Tanzania Agreement and the Comoros-Seychelles-Tanzania Agreement were concluded immediately after bilateral agreements between the respective States were reached, and prior bilateral boundary agreements were revised as well.¹²⁸ The terminus in an existing agreement—for instance, the Seychelles-Tanzania Agreement—was consequently modified and extended to the tripoint agreed upon by three States, prolonging that boundary.¹²⁹ It should be emphasized that contracting States intend to use this method to reduce potential maritime

124 Robert W. Smith, J. Ashley Roach, Azerbaijan-Kazakhstan-Russia, Report Number 11-4, in: D.A. Colson and R.W. Smith (eds.), *International Maritime Boundaries* (2005), 4055-4056.

125 Erik Franckx, Estonia-Finland-Sweden, Report Number 10-21, in: J.I. Charney and R.W. Smith (eds.), *International Maritime Boundaries* (2002), 3134.

126 Erik Franckx, Estonia-Sweden, Report Number 10-19, in: J.I. Charney and R.W. Smith (eds.), *International Maritime Boundaries* (2002), 3098-3099. Erik Franckx, Estonia-Latvia-Sweden, Report Number 10-17, in: J.I. Charney and R.W. Smith (eds.), *International Maritime Boundaries* (2002), 3050-3052.

127 Victor Prescott, India-Maldives-Sri Lanka, Report Number 6-9, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1401-1408. Victor Prescott, India-Maldives, Report Number 6-8, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1389-1399.

128 Martin Pratt, Comoros-Mozambique-Tanzania, 6-27, in: Coalter Lathrop (ed.), *International Maritime Boundaries* (2016), 5033-5037. Martin Pratt, Comoros-Seychelles-Tanzania, Report Number 6-29, in: Coalter Lathrop (ed.), *International Maritime Boundaries* (2016), 5053-5058.

129 J. R. V. Prescott, Seychelles-Tanzania, Report Number 6-19, in: D.A. Colson and R.W. Smith (eds.), *International Maritime Boundaries* (2005), 3795-3804.

boundary conflicts arising out of separate operations of maritime delimitation. In the context of the African Union Border Programme, two tripoint agreements serve to strengthen border cooperation and maintain the peace and security of Africa.¹³⁰

31. Secondly, where two contracting States have previously reached an agreed maritime boundary, the terminus of that boundary line is regarded by the third State as a starting or ending point in a maritime boundary between one of contracting States and a third State. As a consequence, a factual tripoint is established among three States. In the northern part of the Colombia-Costa Rica Boundary, the delimitation line starts from the end of the Costa Rica-Panama maritime boundary in the Pacific Ocean.¹³¹ So, there is a tripoint among Costa Rica, Colombia, and Panama. In the Colombia-Dominican Republic Agreement, a point on the coastline of Haiti is used as a basepoint to set up an equidistant tripoint from Colombia, the Dominican Republic, and Haiti.¹³² Nevertheless, it seems that the tripoint constitutes the terminus of the Colombia-Dominican Republic boundary without consent from Haiti as a third State. Later, in the Colombia-Haiti Agreement, Haiti accepted the equidistant tripoint as the terminus of the boundary line between States; therefore, a tripoint was formally established.¹³³ In the Honduras-Mexico Agreement, two States determined an equidistant point from Cuba, Mexico, and Honduras as the terminus of their bilateral delimitation line.¹³⁴ Additionally, another tripoint which is equidistant from Mexico, Honduras, and Belize was proposed and fixed by Mexico and Honduras as the ending terminus of the Honduras-Mexico boundary, without Belize's consent.¹³⁵

130 African Union Peace and Security, African Union Border Programme (AUBP)—Uniting and Integrating Africa through Peaceful, Open and Prosperous Borders (8 June 2017), (www.peaceau.org/en/page/27-au-border-programme-aubp).

131 Kaldone G. Nweihed, Costa Rica-Panama, Report Number 2-6, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 537-549. Eduardo Jiménez de Aréchaga, Colombia-Costa Rica, Report Number 3-6, J.I. Charney and L.M. Alexander (eds.), in: *International Maritime Boundaries* (1993), 802-803.

132 The point is l'Abacou, which is located in Haiti. Nweihed, above n.119, 484.

133 Kaldone G. Nweihed, Colombia-Haiti, Report Number 2-3, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 495.

134 Carlos López Contreras, Honduras-Mexico, Report Number 2-28, in: D.A. Colson and R.W. Smith (eds.), *International Maritime Boundaries* (2011), 4202, 4205-4206.

135 Ibid, 4205-4206.

One could argue that Belize's rights and interests may be affected. Following from that, the Cuba-Honduras Agreement directly used a starting and equidistant point among Cuba, Honduras, and Mexico in the Honduras-Mexico boundary to mark an end of the Cuba-Honduras boundary.¹³⁶ Apart from that, bilateral delimitation can make flexible arrangements to revise States' agreements and to establish tripoints in the future. In the Agreements of Cyprus-Egypt, Cyprus-Lebanon, and Cyprus-Israel, graphical coordinates of terminal points in these separate boundaries "could be reviewed and/or extended as necessary" to potential equidistant tripoints from the coasts of respective States, "in the light of future delimitation with other neighbouring States and in accordance with an agreement to be reached in this matter by the neighbouring States concerned".¹³⁷ Therefore, such provisions leave open the possibility of constructing tripoints for future delimitation among those States.

32. Thirdly, international judicial decisions in maritime boundary disputes create tripoints to facilitate bilateral delimitation with third States. In the *North Sea Continental shelf* cases, the ICJ decided not to use the equidistance method and supported the natural prolongation of the continental shelf of the FRG to the North Sea. Subsequent boundary agreements between three parties respectively ensured that the FRG could extend its maritime boundary to the center of the North Sea and intersect with the UK's maritime boundary. As a result, the Netherlands-FRG-UK tripoint and the Denmark-FRG-UK tripoint have been automatically established. The decision in the *Qatar v. Bahrain* case requires the delimitation line to meet existing boundaries between Iran and Qatar, between Bahrain and Iran, and between Bahrain and Saudi Arabia. The Iran-Qatar-Bahrain tripoint in the north and the Qatar-Bahrain-Saudi Arabia tripoint in the south are automatically produced.¹³⁸ By the same token, the Tribunal's decision in the *Barbados v. Trinidad and Tobago* case delimits a line which extends southward until it meets the

136 Carlos López Contreras, Cuba-Honduras, Report Number 2-33, in: Coalter Lathrop (ed.), *International Maritime Boundaries* (2016), 4735.

137 Tullio Scovazzi and Giampiero Francalanci, Cyprus-Egypt, Report Number 8-15, in: Coalter Lathrop (ed.), *International Maritime Boundaries* (2016), 3918, 3924. Tullio Scovazzi, Irini Papanicolopulu and Giampiero Francalanci, Cyprus-Lebanon, Report Number 8-19, in: Coalter Lathrop (ed.), *International Maritime Boundaries* (2016), 4454. Haim Srebro, Sarah G. Weiss Ma'udi and Christos Zenonos, Cyprus-Israel, Report Number 8-22, in: Coalter Lathrop (ed.), *International Maritime Boundaries* (2016), 5097, 5101, 5102.

138 The southern tripoint may not be formed in reality. Colson, above n.94, 2855.

Trinidad and Tobago-Venezuela Agreement; thus, the Barbados-Trinidad and Tobago-Venezuela tripoint is automatically established as well. To summarize briefly, in conjunction with prior established maritime boundaries, international adjudication has a middling role to play in the formulation of tripoints, and it may take the rights and interests of third States into account.

33. Fourthly, boundary lines are required to simultaneously extend respective terminal points at a certain azimuth to converge on a tripoint among three States. In this case, such a tripoint might not be located equidistantly from the nearest points of each coast from three States. According to the Indonesia-Malaysia-Thailand Agreement in the northern part of the Strait of Malacca, the Indonesia-Malaysia boundary concerning continental shelf and the Indonesia-Thailand boundary in the Strait of Malacca as earlier established lines are actually mildly modified and extended at different distances to converge at a tripoint which is no longer equidistant from their respective coasts.¹³⁹ Concurrently, the Malaysia-Thailand boundary in the delimitation of continental shelf in the northern part of the Strait of Malacca is also constructed.¹⁴⁰ As a result, contracting States are entitled to a different jurisdictional scope of maritime entitlements at such a common point, compared with equally shared portions of marine areas at an equidistant tripoint. The same situation falls within the India-Indonesia-Thailand boundary in the Andaman Sea as well.¹⁴¹

III.B. Observations on State practice addressing the rights and interests of third States in maritime delimitation

34. The previous section mainly discussed three methods by which States in the delimitation process address the rights and interests of third States. In contrast with how international courts and tribunals deal with the presence of third States, State practices are able to achieve an equitable result by making

139 Choon-ho Park, *Indonesia-Malaysia (Continental Shelf)*, Report Number 5-9(1), in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1019-1027. Victor Prescott, *Indonesia-Thailand (Malacca Strait and Andaman Sea)*, Report Number 6-13(1), in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1455-1463. Victor Prescott, *Indonesia-Malaysia-Thailand*, Report Number 6-12, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1443.

140 Prescott, *ibid.*, 1448-1449, 1453.

141 Victor Prescott, *India-Indonesia-Thailand*, Report Number 6-7, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 1379.

use of the practicality and flexibility of negotiations. Firstly, the principle of *res inter alios acta* confines the scope of a final boundary line of States. Without the participation of third States, a bilateral boundary line in principle should stop before it reaches maritime areas where third States are involved, or it should not determine the terminal point but only draw a directional and arrowheaded line at a certain azimuth. This method indeed reflects a respect for and protection of the rights and interests of third States. International courts and tribunals follow such a self-restrained approach, in order not to give rise to unexpected prejudice. Therefore, in the general sense, States and international adjudication bodies insist on the bilateral nature of maritime delimitation. Secondly, international adjudication in maritime delimitation has its own procedure to allow a third State to intervene in the proceedings, via which a third State can possibly present its rights and interests in the pending dispute. However, the previous analysis represents some limitations; in particular, third States resorting to that procedure have been less successful, and no distinctions have been made in the protection of intervening States and non-intervening States.

35. On the other hand, negotiations between States in the delimitation process are more inclusive. In the semi-closed or enclosed sea area, it is usually found that single bilateral agreements incrementally have divided the same maritime zone into many separate and individual parts. Accordingly, the whole region will be fragmented into various junctions. Even if overlapping maritime zones are delimited bilaterally and avoid touching upon possible maritime areas of third States, a small portion of maritime zone may exist and go beyond the maritime jurisdiction of any State. Under the Convention, such an area constitutes the high seas or the Area. Nevertheless, to avoid generating a small part of the high seas/Area that is subject to different institutional arrangements, in light of existing negotiated agreements, three States may agree to establish a trilateral maritime boundary around a common connection point as a tripoint. This approach intends to tidy up unfinished parts of bilateral boundaries between one of the contracting parties and neighboring third States. Furthermore, for the purpose of the utilization of living or non-living resources, three States may decide to simplify and connect individual boundaries into a tripoint boundary.

36. Nevertheless, when two States unilaterally delimit a maritime boundary or agree to establish the zone for joint development or cooperation, it is possible that this boundary may potentially encroach upon the rights and interests of third States. In the Colombia-Jamaica Agreement, two States not only

delimited the boundary line in the south but also drew two circular areas as a Joint Regime Area (JRA).¹⁴² However, in the southern area to be delimited, from a defined point (Point 4) that also constitutes the terminus of the Colombia-Haiti boundary, “the delimitation line proceeds by a geodesic line in the direction to another point (Point 5)”, which is the Colombia-Dominican Republic-Haiti tripoint, “as far as the delimitation line between Colombia and Haiti is intercepted by the delimitation line to be decided between Jamaica and Haiti”.¹⁴³ Therefore, one segment of the Colombia-Jamaica boundary may partially overlap with the Colombia-Haiti boundary. If this is the case, Haiti’s maritime entitlement may potentially overlap with Jamaica’s, and might be affected if Jamaica and Haiti do not have a boundary agreement at that moment.¹⁴⁴ In addition, third States’ rights and interests are affected in the Barbados-Guyana and the Trinidad and Tobago-Venezuela boundaries.¹⁴⁵ In short, State practices of maritime delimitation with respect to the presence of third States present a practical and flexible picture of how the rights and interests of third States are taken into account. Stopping shortly in front of a potential tripoint, leaving a terminal point of the boundary line undefined, or establishing tripoints accords protection to third States, but it is still likely that bilateral delimitation would potentially prejudice third States’ rights and interests and require further negotiations between contracting parties in the delimitation agreement and third States to address underlying detrimental effects.

IV. Concluding Remarks

37. This paper’s core issue is the role of third States solely in the field of maritime boundary delimitation. In the context of a region where more than two States are involved, the presence of third-party States may constitute a relevant circumstance in the process of delimitation, which has been specifically

142 Kaldone G. Nweihed, Colombia-Jamaica, Report Number 2-18, in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1998), 2179-2204.

143 *Ibid.*, 2200.

144 *Ibid.*, 2195.

145 Carl W. Dundas, Barbados-Guyana, Report Number 2-27, in: D.A. Colson and R.W. Smith (eds.), *International Maritime Boundaries* (2005), 3578-3597. Kaldone G. Nweihed, Trinidad and Tobago-Venezuela, Report Number 2-13(3), in: J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries* (1993), 675-689.

discussed in international case law and State practice.¹⁴⁶ In international adjudication, the discussions above have made clear that procedural impacts of third States in maritime delimitation cases are concerned with Article 62 of the ICJ Statute, although Article 63 of the Statute cannot be excluded. Furthermore, substantial effects produced by third States have been actually reflected by cases adjudicated by international courts and tribunals. A court or tribunal usually leaves terminal point(s) of the delimitation line undefined and extending in a certain direction, having a certain azimuth, until the rights and interests of third States are affected. Alternatively, based on the practice of the ICJ, a third State can invoke the procedure of intervention to inform the Court as to how those interests and rights may be affected by the final boundary to be delimited. It is argued that the ICJ holds a high and stringent standard in the identification of third States' rights and interests, and seldom allows third States to intervene.¹⁴⁷ It should be recalled that in the *Libya/Malta* case, even though Italy submitted two specific areas, the areas were still considered not to involve Italy's potentially affected rights and interests. In the *El Salvador/Honduras* case, the primary reason for the Court to reject Nicaragua's application for permission to intervene as a third State was that no specific areas were indicated by Nicaragua as involving its interests that may be affected. In the *Cameroon v. Nigeria* case, Equatorial Guinea pointed out possible areas which may be affected by the Court's decision. Although the scope was not delineated as exactly as in Italy's submissions, it was still accepted by the Court. In the *Nicaragua v. Colombia* case, in spite of two definite areas submitted by Costa Rica and Honduras as third States, the Court did not accord sufficient protection to the areas submitted, and their interests and rights were indeed affected by the final boundary line given their bilateral respective agreements with Colombia. Such a comparative illustration gives rise to a question regarding to what extent the ICJ in maritime delimitation

146 As observed by Alex G. Oude Elferink, Tore Henriksen, Signe V. Busch, "third states may impact on the delimitation process mainly in two ways. Their presence may limit the area in which a court or tribunal considers it possible to effect a delimitation. Second, the coast of a third state may be part of the relevant circumstances that need to be taken into consideration in arriving at a final boundary". Alex G. Oude Elferink, Tore Henriksen, Signe V. Busch, *The Judiciary and the Law of Maritime Delimitation: Setting the Stage*, in: Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch (eds.), *Maritime Boundary Delimitation: The Case Law—Is It Consistent and Predictable?* (2018), 26.

147 O'Sullivan, above n.2, 264.

cases may define the legal interests and rights of third States as possibly being affected. Such a high threshold keeps things blurry at the procedural stage.

38. What is more, States are inclined to adopt several ways of dealing with the existence of tripoints in interstate maritime boundary agreements. A maritime boundary line may stop short of reaching a potential tripoint between contracting States and third States; a delimitation line may only be drawn as an arrowheaded directional line until the maritime areas of third States are reached; or States may agree to establish tripoints through direct negotiation or adjudication for the purpose of allocating overlapping maritime space. Compared with international judicial practice, it is argued that State practices may be labelled as being more flexible and practical with regard to taking care of the rights and interests of third-party States.

39. One should note that there is a widening gap between methods of maritime delimitation in theory and in practice. In the *Bangladesh v. India* case, new overlapping exclusive economic zones were generated by the Tribunal's decision and resulted in practical difficulty which had to be overcome through negotiation or adjudication between India and Myanmar as a third State, although the Tribunal considers that no interests and rights of third States will be affected given the confinement of the delimitation purely to the two Parties to the dispute. In the *Nicaragua v. Colombia* and *Costa Rica v. Nicaragua* cases, one could argue that the Court simply assumed a merely bilateral delimitation between two Parties by observing that no interests and rights of third States would be affected. However, the *Nicaragua v. Colombia* judgment conflicts with Colombia's boundary agreements with third States and the delimitation line may make the Colombia-Costa Rica and Colombia-Panama boundaries unstable. Because the course of the boundary runs the risk of extending to Colombian waters in two existing boundary treaties with Costa Rica and Panama, the *Costa Rica v. Nicaragua* decision cannot exclude the possibility that the rights and interests of Colombia may suffer from prejudice. Such a practical difficulty does exist when the delimitation task is carried out. Nevertheless, in order to undertake a judicial task to resolve the delimitation dispute, what the court or tribunal has done in the three cases in question mentioned here may be adopted in future adjudication. As a guiding principle to effect maritime delimitation, an equitable result should be achieved. In a legal environment where more than two States are involved, the equity to be pursued should be applicable not only to the two parties to the dispute but also to third States, in order to prevent the rights and interests of third States from being prejudiced. But, from the third States' perspective, the ICJ does

not sufficiently accord with this principle when addressing the issue of third States' intervention at the procedural stage. With regard to substantial matters, international courts and tribunals adopt a consistent method in resolving how a final maritime boundary between disputing parties may extend in order not to prejudice the rights and interests of third States. What is more, to improve the submission procedure for third States whose rights and interests may be affected, Judge *ad hoc* Gaja proposes "a new procedural mechanism short of intervention that would allow third States to submit information which they consider useful in order to protect their interests of a legal nature".¹⁴⁸ Both Judge Donoghue and Thomas Cottier suggest allowing third States to present views as *amici curiae*.¹⁴⁹ Alina Miron also argues that "a revision of the Rules appears more desirable and more fruitful".¹⁵⁰ However, so far, such innovative proposals have not been put into practice by third-party litigation bodies, such as the ICJ, and substantial legal remedies for third States in maritime delimitation cases remain to be determined.

148 *Nicaragua v. Colombia*, above n.15, Application by Costa Rica for Permission to Intervene, 418, para.5 (decl. Gaja).

149 *Nicaragua v. Colombia*, above n.28, Application by Honduras for Permission to Intervene, 491-492, para.59 (diss. op. Donoghue). Cottier, above n.2, 504-510.

150 Alina Miron, Intervention, in: Edgardo Sobenes Obregon and Benjamin Samson (eds.), *Nicaragua Before the International Court of Justice: Impacts on International Law* (2018), 396.