

**REFINING THE MARITIME BOUNDARY DELIMITATION  
METHODOLOGY:  
THE SEARCH FOR PREDICTABILITY AND CERTAINTY**

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**ABSTRACT**

For decades, the maritime boundary delimitation methodology remains uncertain and confusing. This is as a result of the sole reliance on equitable principles, total disregard of the equidistance method in the North Sea Continental Shelf cases and vague provisions of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 in particular on the delimitation of the exclusive economic zone and the continental shelf. The main objective of the present article is to investigate how the delimitation methodology could be refined to be more predictable and certain through the flexible interpretation of the conventional law by the decisions of international courts and tribunals. The article first of all traces the codification history of the UNCLOS 1982 in order to ascertain the view of States expressed during the drafting process, which reflected the bitter rivalry between the two camps of equidistance and equitable principles. The article then makes a painstaking analysis of the decisions of international courts and tribunals since the 1990s to the most recent decision and finds that the equidistance principle has been reinstated as a basic methodology in maritime boundary delimitation, supplemented by relevant circumstances, in order to achieve an equitable solution. The article concludes that the search for predictability and certainty in maritime boundary delimitation has, to some extent, been achieved in the form of the recent three-stage approach, although there are still grey areas where significant uncertainty remains.

**Keywords:** maritime boundary delimitation, methodology for delimitation, predictability and certainty, equidistance principle, equitable principles

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## MEMPERHALUSI METODOLOGI DELIMITASI SEMPADAN MARITIM: MENCARI KETENTUAN DAN KEPASTIAN

### ABSTRAK

Sejak berdekad, metodologi delimitasi sempadan merupakan suatu metod yang dikelilingi ketidak pastian serta mengelirukan. Ini terjadi kerana metodologi ini hanya berdasarkan prinsip-prinsip ekuiti, yang tidak mengambil kira metod “equidistance” yang telah di kenal pasti di dalam kes-kes Pelantar Benua Laut Utara dan peruntukan Konvensyen Bangsa-bangsa Bersatu mengenai Undang-undang Laut (UNCLOS) 1982 yang agak samar apabila membincangkan delimitasi pada zon ekonomi eksklusif dan pelantar benua. Objectif utama makalah ini ialah untuk menyiasat bagaimana metod delimitasi boleh di perhalusi bagi memastikan ketentuan dan kepastian melalui interpretasi yang lebih anjal dengan melihat keputusan mahkamah antarabangsa dan tribunal. Makalah ini dimulakan dengan menjejaki sejarah penggubalan Konvensyen Undang-Undang Laut (UNCLOS) 1982. Ini bagi menegnal pasti pandangan negara-negara yang di utarakan ketika proses merangka undang-undang tersebut. Sejarah menunjukkan bahawa terdapat perbezaan pendapat yang teruk diantara para pengamal ekuiti dengan para ilmuan yang menjauhkan diri dari ekuit (equidistance). Makalah ini kemudian membuat analisa yang teliti mengenai keputusan mahkamah antarabangsa dan tribunal dari tahun 1990an sehingga yang terkini. Analisa ini menunjukkan bahawa prinsip penjahuan ekuiti (equidistance) telah di guna pakai semula sebagai metodologi utama dalam delimitasi sempadan maritim, ditambah dengan keadaan-keadaan tertentu. Ini perlu bagi mencapai pencapaian yang saksama. Makalah ini menyimpulkan bahawa pencarian untuk penyelesaian yang lebih pasti dalam delimitasi sempadan setakat ini telah tercapai melalui pendekatan tiga tingkat, walaupun terdapat kawasan yang masih samar.

**Kata kunci:** delimitasi sempadan maritime, metod yang lebih pasti, prinsip penjahuan ekuit, prinsip ekuiti

## INTRODUCTION

The law of maritime boundary delimitation is regarded as one of the toughest areas of the law of the sea and the major part of its development was uncertain, vague and confusing. This phenomenon is due to two main factors:

- (i) The International Court of Justice in the celebrated *North Sea Continental Shelf* cases<sup>1</sup> ruled in favour of “*equitable principles*” in total disregard of the “*equidistance principle*,” which was established in the Geneva Conventions on the Law of the Sea 1958<sup>2</sup> and attracted considerable adherence in State practice in particular in bilateral maritime delimitation agreements.
- (ii) Due to the bitter rivalry between advocates of equidistance and equitable principles in the Third United Nations Conference on the Law of the Sea (UNCLOS III),<sup>3</sup> the end result was a compromise formula of the identical Article 74 (delimitation of the exclusive economic zone) and Article 83 (delimitation of the continental shelf) of the United Nations Convention on the Law of the Sea (UNCLOS) 1982.<sup>4</sup> The two common articles provide a vague and water-downed conciliatory provision in these terms: “Delimitation to be effected by agreement ....., in order to achieve an *equitable solution*.”<sup>5</sup> Therefore, neither equidistance nor equitable principles is recognized as methodology for maritime delimitation. How can an equitable solution be achieved when it is not enunciated anywhere in

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<sup>1</sup> *North Sea Continental Shelf cases* (Federal Republic of Germany v Denmark/The Netherlands) 1969 ICJ Rep 3.

<sup>2</sup> Convention on the Territorial Sea and Contiguous Zone, adopted in Geneva on 29 April 1958 and entered into force on 10 September 1964, Article 12; Convention on the Continental Shelf, adopted in Geneva on 29 April 1958 and entered into force on 10 June 1964, Article 6.

<sup>3</sup> Third United Nations Conference on the Law of the Sea (UNCLOS III), 1973-1982. The Conference, in which 160 states participated, held eleven sessions between 1973 and 1982.

<sup>4</sup> United Nations Convention on the Law of the Sea, adopted at Montego Bay, Jamaica, on 10 December 1982, and entered into force on 16 November 1996; United Nations, *Treaty Series*, vol. 1833, 3 (hereinafter UNCLOS 1982). There are 168 States parties to the convention.

<sup>5</sup> Articles 74 and 83 of the UNCLOS 1982.

the convention and there is also no other meaningful pronouncement of any methodology for maritime delimitation.

The primary objective of the present work, therefore, is to investigate how the law of maritime boundary delimitation could be refined to be more predictable and certain through the flexible interpretation of the conventional law by the successive decisions of international courts and tribunals.

The research methodology used was mainly doctrinal, supplemented by analytical method. Relevant provisions of the law of the sea conventions were analysed and interpreted on the basis of textual approach confirmed by their respective drafting history. In-depth case analysis was conducted to demonstrate the delimitation methodology development in successive decisions of the International Court of Justice and other international courts and tribunals.

The article first of all traces the attempts to codify the law of maritime delimitation in UNCLOS I<sup>6</sup> and UNCLOS III, together with their *travaux préparatoires*, to show how protagonists of the two differing views fought tooth and nail during the UNCLOS III to gain the upper hand and how a compromise formula was finally reached in the UNCLOS 1982. The article then makes a critical analysis of the ruling of the International Court of Justice in the *North Sea Continental Shelf* cases, which attracted criticism of commentators<sup>7</sup> who believe it as the root cause of the chaotic condition of the law governing maritime delimitation. The article finally concludes with the synthesis of the more recent international decisions on maritime delimitation, which somewhat deviate from the strict adherence of the *North Sea* decision to the equitable principles, by reinstating the equidistance principle as the primary delimitation rule to be adjusted by relevant circumstances in order to achieve equitable results.

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<sup>6</sup> First United Nations Conference on the Law of the Sea (UNCLOS I) was held in Geneva, Switzerland, from 24 February to 27 April of 1958, which resulted in the adoption of the four Geneva Conventions on the Law of the Sea 1958. Eighty-six states participated in the conference.

<sup>7</sup> See, for example, Wolfgang Friedmann, "The North Sea Continental Shelf Cases - A Critique," *The American Journal of International Law*, 64:2 (Apr., 1970): 229-240; see also dissenting opinion of Judge Tanaka, *The North Sea Continental Shelf cases*.

## **CODIFICATION OF THE LAW OF MARITIME BOUNDARY DELIMITATION**

The development of the law of maritime boundary delimitation can be appraised through the two lenses: first, its codification under conventional law and secondly, the gradual establishment of the international judicial precedent. There are two stages of codification of conventional law: Geneva Conventions adopted by the first UN Conference on the Law of the Sea (UNCLOS I) in 1958 and the UN Convention on the Law of the Sea adopted by the Third UN Conference on the Law of the Sea (UNCLOS III) in 1982.

### **The 1958 Geneva Conventions: The dominance of equidistance rule**

Article 12(1) of the Convention on the Territorial Sea and the Contiguous Zone 1958 provides that:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, *failing agreement* between them to the contrary, to extend its territorial sea beyond *the median line every point of which is equidistant* from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of *historic title or other special circumstances* to delimit the territorial seas of the two States in a way which is at variance with this provision.”<sup>8</sup>

The above is the “agreement – equidistance – special circumstances” rule, which is applicable to the delimitation of the territorial sea. In the event that there is no agreement, it is commonly known as “*equidistance/special circumstances*” rule. The same rule can also be found in Article 6 of the 1958 Geneva Convention on the Continental Shelf.<sup>9</sup> Article 6(1), which governs the delimitation of the opposite coasts, provides that:

“Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other,

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<sup>8</sup> 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Article 12(1).[Emphasis added.]

<sup>9</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, (Oxford: Hart Publishing, 2006), 38.

the boundary of the continental shelf appertaining to such States shall be determined *by agreement* between them. In the absence of agreement, and unless another boundary line is justified by *special circumstances*, the boundary is *the median line, every point of which is equidistant* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.”<sup>10</sup>

Article 6(2) of the same convention, which concerns the delimitation of the adjacent coasts, stipulates:

“Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined *by agreement* between them. In the absence of agreement, and unless another boundary line is justified by *special circumstances*, the boundary shall be determined by *application of the principle of equidistance* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.”<sup>11</sup>

The only difference is that the words ‘the medium line’ is used for opposite coasts and ‘the principle of equidistance’ for adjacent coasts. The two Geneva Conventions, therefore, in essence, adopts a methodology based on “equidistance/special circumstances” rule, which was to apply in the absence of an agreement. In light of *travaux preparatoires*, it is generally accepted that the equidistance line, which has the merit of certainty and predictability, is the general rule whereas special circumstances are the exception.<sup>12</sup> In the commentary on Article 12, the International Law Commission mentioned that:

“Although the Commission noted that special circumstances would probably necessitate frequent departure from the mathematical median

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<sup>10</sup> 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Article 6(1). [Emphasis added].

<sup>11</sup> *Ibid.*, Article 6(2). [Emphasis added]

<sup>12</sup> Tanaka, *Predictability and Flexibility*, 40; see also Jonathan I. Charney, “Progress in International Maritime Boundary Delimitation Law,” *American Journal of International Law* 88:2 (April 1994): 227-258, at 244. Most of the bilateral maritime delimitation treaties are based on one form or the other of equidistance rule.

line, it thought it advisable to adopt, as a general rule, the system of the median line as a basis for delimitation.”<sup>13</sup>

However, the privileged role of equidistance was strongly objected and side-lined by the International Court of Justice in its decision in the *North Sea Continental Shelf* cases. The discrediting of the equidistance principle went so far that the text of Articles 74 and 83 of the UNCLOS 1982 entirely omit the terms “equidistance” and “median line.” For some commentators, it was “a holy war against equidistance.”<sup>14</sup>

### **The United Nations Convention on the Law of the Sea 1982**

The UNCLOS 1982 maintains the equidistance/special circumstances rule in so far as the delimitation of the territorial sea is concerned<sup>15</sup> but improvises a compromise formula of “to achieve an equitable solution” in the case of delimitation of the exclusive economic zone (EEZ) and the continental shelf (CS).

#### ***Delimitation of the territorial sea: reaffirming equidistance/ special circumstances rule***

The ‘*equidistance/special circumstances*’ rule is continued to be followed in the delimitation of the territorial sea in Article 15 of UNCLOS 1982 as follows:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or

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<sup>13</sup> *YBILC*, Vol. 2 (1956): 271.

<sup>14</sup> Prosper Weil, *The Law of Maritime Delimitation - Reflections*, Maureen Macglashan (trans.) (Cambridge: Grotius, 1989) 205.

<sup>15</sup> It was not challenged at all at UNCLOS III. Caflisch considers the equidistance/special circumstances rule to be customary law as regards the delimitation of the territorial sea. See L. Caflisch, “The Delimitation of Marine Spaces between States with Opposite and Adjacent Coasts” in *A Handbook on the New Law of the Sea*, R J Dupuy and D Vignes (eds) (Dordrecht, Nijhoff, 1991) 442.

other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”<sup>16</sup>

In so far as the delimitation of the territorial sea is concerned, the methodology is clear and straightforward. First, an equidistance line has to be drawn. This will be the maritime boundary between the two States unless departure from it is justified by the existence of a “historic title or other special circumstances” within the area to be delimited. Article 15 is silent as to what is meant by “special circumstances.” Looking back to the drafting history of UNCLOS III, “*the United Kingdom suggested that examples of special circumstances might include the presence of a navigational channel or the presence of small islands.*”<sup>17</sup> International courts and tribunals named this approach as the “*equidistance/special circumstances*” method of delimitation.<sup>18</sup> According to the International Court of Justice, Article 15 “*is part of customary international law.*”<sup>19</sup>

### ***Delimitation of EEZ and CS: to achieve an equitable solution***

With regard to the delimitation of the exclusive economic zone and the continental shelf, however, the equidistance/special circumstances rule was strongly challenged. The confrontation between States advocating equidistance and proponents of equitable principles was a hard-core issue during UNCLOS III and it seriously impeded the negotiations. The rivalry between the two camps could be seen by the two contrasting proposals made during the Conference. The following is the proposal based on “*equidistance rule,*” proposed by twenty States:

“The delimitation of the exclusive economic zone/continental shelf between adjacent and opposite States shall be effected by agreement employing, as a general principle, the median or

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<sup>16</sup> Article 15, the UN Convention on the Law of the Sea, 1982.

<sup>17</sup> N. Nandan, & S. Rosenne (eds), *United Nations Convention on the Law of the Sea: A Commentary*, (The Netherlands: Springer, 1993) Vol. II, 135.

<sup>18</sup> See, for example, the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, 2002 ICJ Rep 303, para. 288.

<sup>19</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)* 2001 ICJ Rep 40, para.175.

equidistance line, taking into account any special circumstances where this is justified.”<sup>20</sup>

A total of 27 States submitted the following proposal based on “*equitable principles*”:

“The delimitation of the exclusive economic zone/continental shelf between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution.”<sup>21</sup>

As graphically displayed in figure 1, the first formula adopted “*equidistance/special circumstances*” model is to ensure predictability while the second one followed “*equitable principles/relevant circumstances*” model emphasizes flexibility. In this sense, “the marked difference between two groups reflected the dilemma between predictability and flexibility of law.”<sup>22</sup>

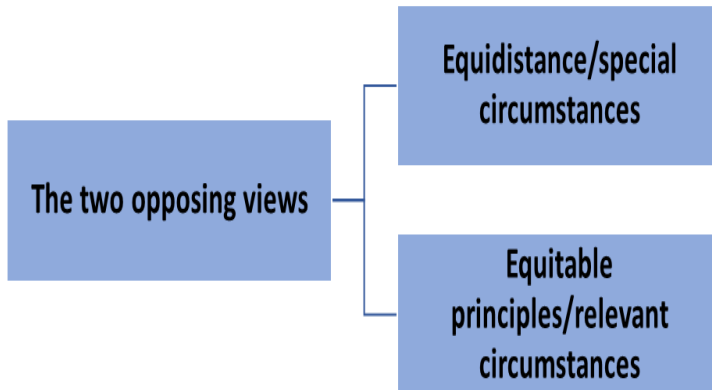


Figure 1: Delimitation formula and opposing views

Of course, the proponents of the equidistance principle, relying on Article 6 of the Convention on the Continental Shelf 1958, considered

<sup>20</sup> UN Doc NG7/2, 20 April 1978, R Platzoder, *Third UN Conference on the Law of the Sea: Documents*, vol. IX (New York, NY: Oceana, 1986) 392-93.

<sup>21</sup> UN Doc NG7/10, 1 May 1978, *ibid.* 402.

<sup>22</sup> Tanaka, *Predictability and Flexibility*, 45.

“the equidistance/median line” as a basic norm of maritime delimitation. According to them, the methodology of applying “equitable principles was vague and subjective.”<sup>23</sup> On the other hand, the advocates of the equitable principles primarily relied on the decision of the ICJ in the *North Sea Continental shelf cases*, and squarely rejected the application of the equidistance/median line as basic norm for maritime delimitation.<sup>24</sup> Thus there were two opposing and competing views on maritime delimitation during UNCLOS III.

A compromise and watered-down formula for the delimitation was finally reached only after long and difficult negotiations. The compromise text was eventually incorporated in UNCLOS 1982 in Article 74 for the exclusive economic zone and Article 83 for the continental shelf.<sup>25</sup> The identical provision of Articles 74 and 83 reads as follows:

“The delimitation of the *exclusive economic zone/continental shelf* between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”<sup>26</sup>

The only guideline that one can find in these provisions is that the end result of a maritime delimitation must be equitable.<sup>27</sup> Apart from that, they lack any reference to a method of delimitation and thus remain meaningless in specific situations.<sup>28</sup> Since a clear methodology for the

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<sup>23</sup> Adede AO, “Toward the Formulation of the Rule of Delimitation of Sea Boundaries between States with Adjacent or Opposite Coasts”, *Virginia Journal of International Law* 19 (1979): 214.

<sup>24</sup> *Ibid.* 213; 215. See also the *North Sea Continental Shelf cases*, (*Federal Republic of Germany/Denmark, The Netherlands*) [1969] ICJ Rep. 3.

<sup>25</sup> M. Kawano, “International Courts and Tribunals and the Development of the Rules and Methods Concerning Maritime Delimitation,” *Journal of International Law and Diplomacy*, 112:3 (2013): 434-435.

<sup>26</sup> Articles 74 and 83, the UN Convention on the Law of the Sea, 1982; emphasis added.

<sup>27</sup> Satya N. Nandan & Shabtai Rosenne (eds.), 1993. *The United Nations Convention on the Law of the Sea: A Commentary*, Vol II (The Hague: Martinus Nijhoff Publishers, 1993) 980.

<sup>28</sup> Judge Gros, Dissenting Opinion in the *Gulf of Maine case*, (1984) ICJ Rep 365, para 8.

delimitation is absent, international courts and tribunals would have wider discretionary powers in addressing maritime delimitation disputes.

## **THE EVOLUTION OF CASE LAW ON MARITIME BOUNDARY DELIMITATION**

Although conventional law on maritime boundary delimitation developed through the 1958 Geneva Conventions and the 1982 UNCLOS, the simultaneous developments of the law could be found through decisions of international courts and tribunals.

### **The emergence of equitable principles**

Prior to the adoption of the 1982 UNCLOS, the application of equity in maritime boundary delimitation could not be found in any conventional law. It started with decisions of courts.

#### ***North Sea Continental Shelf cases (1969): advocating equitable principles***

In *North Sea Continental Shelf cases*, “the Court rejected the contention of Denmark and the Netherlands to the effect that the delimitations in question had to be carried out in accordance with the ‘equidistance principle’ as defined in Article 6 of the 1958 Geneva Convention on the Continental Shelf. It held that the Federal Republic of Germany (FRG), which had not ratified the Convention, was not legally bound by the provisions of Article 6.”<sup>29</sup>

Another serious contention made by Denmark and the Netherlands was that FRG was bound by the “equidistance principle” as enshrined in Article 6 of the Convention because the principle was established as customary international law binding on all States including FRG. In the first place, they argued that “the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission. Also considered are the reaction of governments to that work and the proceedings of the Geneva Conference; thus this emerging customary law became crystallized in the

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<sup>29</sup> *North Sea Continental Shelf cases* ((Federal Republic of Germany v Denmark/The Netherlands) 1969 ICJ Rep 3, para 27.

adoption of the Continental Shelf Convention by the Conference.”<sup>30</sup> The Court again rejected this argument on the grounds that “the equidistance principle in Article 6 of the Convention had not been proposed by the International Law Commission as an emerging rule of customary international law and that this article could not be said to have reflected or crystallized such a rule. This was confirmed by the fact that any State might make reservations to Article 6, unlike Articles 1, 2 and 3”<sup>31</sup>

Secondly, Denmark and the Netherlands argued that “even if at the date of the Geneva Convention no rule of customary international law existed in favour of the equidistance principle, such a rule had nevertheless come into being since the Convention, partly because of its own impact and partly on the basis of subsequent State practice.”<sup>32</sup> This contention was also rejected by the Court stating that “while a very widespread and representative participation in the Convention might show that a conventional rule had become a general rule of international law, in the present case the number of ratifications and accessions so far was hardly sufficient.”<sup>33</sup>

After rejecting the equidistance principle as a method of maritime delimitation, the majority in the *North Sea* cases found that there was law applicable to the continental shelf delimitation other than the equidistance method. It was “*equitable principles*” which was applicable to these delimitations. According to the Court, “delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.”<sup>34</sup> After this ruling of the ICJ in the *North Sea Continental Shelf cases*, the equitable principles became the core of the law of maritime boundary delimitation.<sup>35</sup>

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<sup>30</sup> *Ibid.*, para 61.

<sup>31</sup> *Ibid.*, para 69.

<sup>32</sup> *Ibid.*, para 70.

<sup>33</sup> *Ibid.* para 73.

<sup>34</sup> *North Sea Continental Shelf cases (FRG v Denmark; FRG v Netherlands)* 1969 ICJ Rep 3, para. 85.

<sup>35</sup> See Masahiro Miyoshi, “Consideration of Equity in Maritime Boundary Cases before the ICJ”, in *Liber Amicorum Judge Shigeru Oda*, Nisuke Ando, Edward McWhinney, and Rudiger Wolfrum (eds.) (The Hague; Netherlands: Kluwer Law International, 2002) 1087- 1101, 1092.

According to the Court, equitable principles specifically include “*the principle of natural prolongation of the land territory, the principle of non-encroachment of the territory of another State and the principle of proportionality.*”<sup>36</sup> In other words, the strategy of equity is to conduct maritime delimitation on case-by-case basis, relying only to equitable principles may promote flexibility but devoid of predictability and certainty.

The ICJ ruling in the *North Sea cases* attracted much criticism. It was argued that the court took a rigid approach to evaluating *opinio juris* in the application of the equidistance method as enshrined in Article 6 of the Convention on the Continental Shelf. As Thirlway points out, successive acts of the parties to the Convention are relevant in an examination of the status of an alleged customary rule, for they show consistency of state practice and the presence of *opinio juris*.<sup>37</sup> In fact, several dissenting judges also reached a contrary conclusion, affirming the mandatory character of Article 6 after having examined State practice and *opinio juris*. For instance Judge Tanaka was of the view that the fact that “46 States have signed and 39 States ratified or acceded to the Convention [on the Continental Shelf] is already an important achievement towards the recognition of customary International law on the matter of the continental shelf.”<sup>38</sup> Judge Lachs, Vice-President Koretsky, and Judge *ad hoc* Sorensen followed the same line of argument and reached the same conclusion. The difference between the majority and the Dissenting Opinions appears to lie in the degree of flexibility for evaluating State practice and *opinio juris*.<sup>39</sup>

There are again criticism against the Court’s ruling in relation to the question of: what is the legal basis of equitable principles? Since there are no treaty provisions requiring equitable principles, the only legal

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<sup>36</sup> *North Sea Continental Shelf cases*, paras 46-47.

<sup>37</sup> HWA Thirlway, *International Customary Law and Codification*, (Leidin: Sijthoff, 1972) 91.

<sup>38</sup> *North Sea Continental Shelf cases*, Dissenting Opinion of Judge Tanaka, (1969) ICJ Rep 174.

<sup>39</sup> Dissenting Opinion of Judge Lachs, *ibid.*, 228; Dissenting Opinion of Vice-President Koretsky, *ibid.*, 158; Dissenting Opinion of Judge *ad hoc* Sorensen, *ibid.*, 247. Altogether five judges argued in favour of the equidistance method in their Dissenting Opinions.

basis on which these principles can be based is none other than customary international law. However, the essential problem is: from where did the relevant customary law derive? In this respect, the ICJ relied on the Truman Proclamation of 1945, which reads:

“In cases where the continental shelf extends to the shores of another States, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with *equitable principles*.”<sup>40</sup>

Nevertheless, the Court failed to find sufficient examples of State declarations apart from the USA. Furthermore, there were arguments by commentators to the effect that: “Since these proclamations were unilateral, they do not constitute State practice in the context of continental shelf delimitation, which are effected between two or more States. How then can such unilateral State proclamations be transformed into customary law?”<sup>41</sup>

One commentator comments:

“Contrary to what it did when examining the equidistance method, the Court did not apply to equitable principles the rigid test of the two elements of custom. This is clearly a double standard. If the rigid test had been applied it seems doubtful that the customary law character of equitable principles could have been proved.”<sup>42</sup>

The much-criticised ruling in the *North Sea cases*, exacerbated by the hollow provisions of Articles 74 and 83 of the 1982 UNCLOS, had made the law of maritime delimitation chaotic and problematic. However, the momentum to accept the equitable principles as the primary rule for maritime delimitation declined in the beginning of the 1990’s. The international courts and tribunals in later cases have reaffirmed the importance of equidistance rule in maritime delimitation and merged the equidistance rule with the relevant circumstances, which are based on equitable principles, to develop “*equidistance/ relevant circumstances*” approach of maritime delimitation.

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<sup>40</sup> Harry S., Truman, “Presidential Proclamation on the Continental Shelf (No 2667)” (speech, New York, September 28, 1945) [Emphasis added.]

<sup>41</sup> Tanaka, *Predictability and Flexibility*, 58.

<sup>42</sup> DP O’Connell, I A Shearer (ed.), *The International Law of the Sea*, vol. II (Oxford: Clarendon Press, 1984) 696.

### **The rise of equidistance/relevant circumstances: the two-stage approach**

The equidistance/relevant circumstances approach is in fact the merger of two competing rules: the equidistance rule founded in treaty law and the equitable principles (special or relevant circumstances) founded in customary law. Drawing equidistance lines has been extremely popular as a method for maritime delimitation in practice, as evidenced in numerous bilateral maritime delimitation treaties.<sup>43</sup> It has the advantage of mathematical certainty and objectivity.

What are the ‘*relevant circumstances*’? The ICJ defined the term in the *Tunisia/Libya* case as: “all the circumstances that a tribunal considered capable of having any kind of influence on the drawing of a line of delimitation.”<sup>44</sup> The concept is indeed closely related to the principle of equity. The relevant court or tribunal is not compelled to follow any stringent legal norm but entitled to exercise wide discretionary power to take into consideration all the circumstances that are relevant in order to achieve an equitable result.

Relevant circumstances may be geographical or non-geographical. Geographical factors, for example, are the configuration of the coasts, the coastal lengths, and the impact of maritime features such as islands and low tide elevations. Non-geographical factors include socio-economic circumstances, interests of third States, security consideration, and so on.

### **The *Greenland/Jan Mayen* case (1993):<sup>45</sup> the beginning of the two-stage approach**

This is a dispute over “delimitation for the fishery zone (FZ) and the continental shelf (CS) between Greenland (Denmark) and Jan Mayen

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<sup>43</sup> See Maritime Space: Legislation and Treaties (database), United Nations Division for Ocean Affairs and Law of the Sea, accessed 23 March 2019, <https://www.un.org/depts/los/>.

<sup>44</sup> *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* 1982 ICJ Rep. 18, para. 72.

<sup>45</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* 1993 ICJ Rep. 38.

(Norway). For the delimitation of the CS, the court applied specifically article 6 of the 1958 Convention on the CS,<sup>46</sup> which requires application of the *equidistance/special circumstances* rule.<sup>47</sup> The court decided to apply the customary law of the EEZ (that is, *equidistance/ relevant circumstances* rule) to the delimitation of the FZ.

The court found necessary “to start the process of delimitation by a *provisional equidistance line*.”<sup>48</sup> Then, “the Court considered if there are factors calling for *an adjustment of this equidistance line: special circumstances for the continental shelf and relevant circumstances for the fishery zone*; the aim in each situation being to correct the disproportionate effect of the median line in order *to achieve an equitable result*.”<sup>49</sup>

The rationale behind the rise and popularity of equidistance principle in conventional law is the objectivity and predictability of the process. However, although the use of equidistance is objective and precise, an equitable solution could not be achieved in each and every case by applying it alone. A true method of delimitation must have the combined effect of both predictability and flexibility. That is why in *Greenland/ Jan Mayen*, the ICJ initiated the idea of dividing the delimitation process into two stages: first to draw a provisional equidistance line (for the purpose of predictability) and then see whether “special or relevant circumstances” require any adjustment or shifting of that line (for the purpose of flexibility).

In this way, the equidistance/ relevant circumstances principle has come to be known also as the two-stage approach. After *Greenland/ Jan*

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<sup>46</sup> The two parties to the dispute were at that time not yet parties to UNCLOS 1982.

<sup>47</sup> *Greenland/Jan Mayen case*, paras 49-50.

<sup>48</sup> *Ibid.* para. 51.

<sup>49</sup> *Ibid.* para. 54. The concept of *special circumstances* is the creation of the conventional law, namely: “Article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 6 of the Geneva Convention on the Continental Shelf,” whereas the concept of *relevant circumstances* is the creation of customary international law, developed through the case law of international courts and tribunals and through the work of UNCLOS III. “Although the two terms are different in origin, there is a tendency towards the assimilation between the two.” See *ibid.* paras. 55-56.

*Mayen*, the two-stage approach has been consolidated in the later cases of *Qatar/Bahrain* (2001),<sup>50</sup> *Cameroon/Nigeria* (2002),<sup>51</sup> *Barbados/Trinidad and Tobago* (2006),<sup>52</sup> and *Guyana/Suriname* (2007).<sup>53</sup>

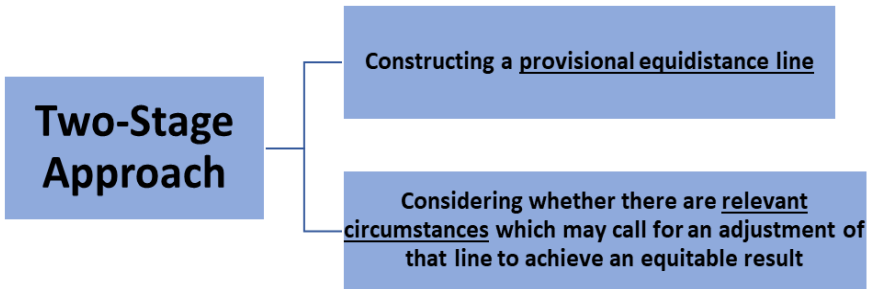


Figure 2: The Two-Stage Approach

### Further refining the methodology: the three- stage approach

In *the Black Sea* (2009) and other more recent cases, the ICJ has further refined equidistance/relevant circumstances methodology by articulating the three-stage approach.

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<sup>50</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, 2001 ICJ Rep. 40.

<sup>51</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, 2002 ICJ Rep 303.

<sup>52</sup> *Delimitation of the Exclusive Economic Zone and the Continental Shelf between Barbados and the Republic of Trinidad and Tobago*, Arbitral Award of 11 April 2006, Permanent Court of Arbitration (PCA), (2006) 27 RIAA 147-251.

<sup>53</sup> *Guyana/Suriname*, Arbitral Award of 17 September 2007, Permanent Court of Arbitration (PCA), ICGJ 370 (PCA 2007).

***Maritime Delimitation in the Black Sea (Romania v Ukraine)(2009):<sup>54</sup> cementing the three-stage approach***

The notable development in this case is that the ICJ introduced a three-stage approach for maritime delimitation. The following is the ruling of the ICJ in the *Black Sea case*:

“In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court’s approach is to establish the *provisional equidistance line*. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.”<sup>55</sup>

“The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the second stage consider whether there are *relevant circumstances* calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result.”<sup>56</sup>

“Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line. A final check for an equitable outcome entails a confirmation that no *great disproportionality* of maritime areas is evident by comparison to the ratio of coastal lengths. This is not to suggest that these respective areas should be proportionate to coastal lengths.”<sup>57</sup>

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<sup>54</sup> *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, 2009 ICJ Rep, 61.

<sup>55</sup> *Ibid.*, para 118. [Emphasis added]

<sup>56</sup> *Ibid.*, para 120.

<sup>57</sup> *Ibid.*, para 121. [Emphasis added]

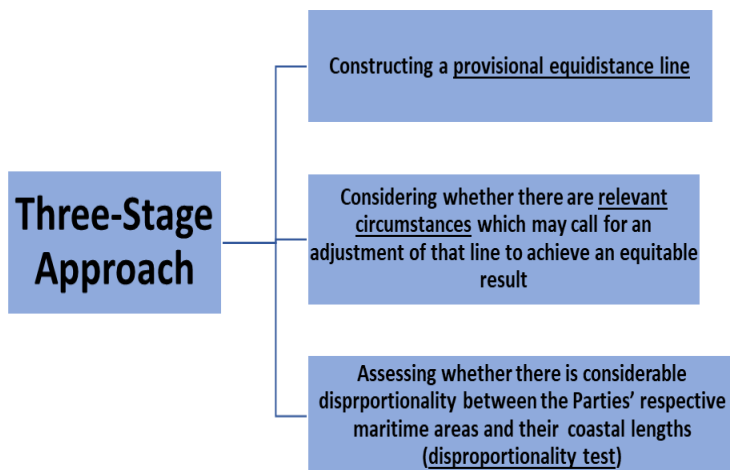


Figure 3: The Three-Stage Approach

***Delimitation of Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (2012)***<sup>58</sup>

This is the first maritime delimitation case decided by the International Tribunal for the Law of the Sea (ITLOS), a specialized court established by the UNCLOS 1982 to deal specifically with law of the sea disputes. The delimitation of the single maritime boundary between Bangladesh and Myanmar followed very much the trend in recent delimitation cases, in particular the three-stage approach.

In respect of the delimitation of EEZ and CS between Bangladesh and Myanmar, it was the view of the ITLOS that the appropriate method to be applied was the *equidistance/relevant circumstances* method.<sup>59</sup> Taking into account the jurisprudence of international courts and tribunals, the ITLOS followed *the three stage-approach*, as developed in the most recent case law on the subject. At the first stage, the Tribunal

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<sup>58</sup> *Dispute Concerning Delimitation of Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS, Case No. 16, (14 March 2012), Judgment, *ITLOS Reports* 2012, 4.

<sup>59</sup> *Ibid.*, para. 239.

“constructs a *provisional equidistance line*, based on the geography of the Parties’ coasts and mathematical calculations.”<sup>60</sup>

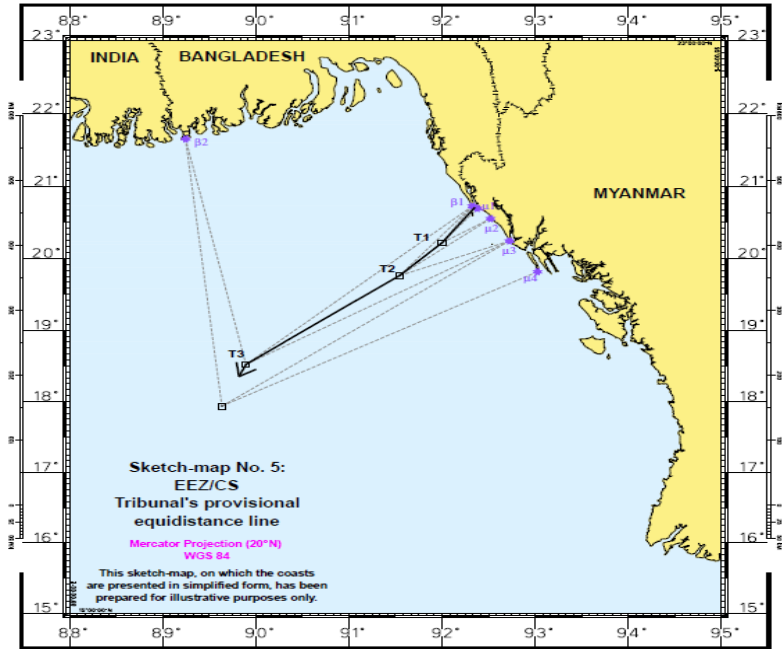


Figure 4: Bay of Bengal Sketch Map  
[Source: *Bay of Bengal case* ITLOS, Case No 16, 2012<sup>61</sup>]

In the next step, the Tribunal considered that, “*whether there are factors in the present case that may be considered relevant circumstances, calling for an adjustment of that line with a view to achieving an equitable solution.*”<sup>62</sup> The Tribunal found that “*the concavity of the coast of Bangladesh is a relevant circumstance in the*

<sup>60</sup> *Ibid.*, para. 240.

<sup>61</sup> *Ibid.*, p. 77, para. 274.

<sup>62</sup> *Ibid.*, para. 275.

*present case, because the provisional equidistance line as drawn produces a cut-off effect on that coast requiring an adjustment of that line.*<sup>63</sup> After that the Tribunal considered whether St. Martin's Island was a relevant circumstance. The Tribunal, however, found that "because of its location, giving effect to St. Martin's Island in the delimitation of the EEZ and the CS would result in a line blocking the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line"<sup>64</sup> and concluded that, "St. Martin's Island is not a relevant circumstance and, accordingly, decides not to give any effect to it in drawing the delimitation line of the EEZ and the CS."<sup>65</sup> Taking into account the concavity of the coast of Bangladesh as a relevant circumstance, the tribunal drew an *adjusted equidistance line*.

Finally, the Tribunal applied the *disproportionality test* by checking whether there was a significant disproportion between coastal lengths and shared maritime areas of the two parties. According to the Tribunal's calculation, "the ratio of the length of the relevant coasts of the Parties is 1:1.42 in favour of Myanmar and the ratio of the allocated maritime areas is approximately 1:1.54 in favour of Myanmar."<sup>66</sup> The Tribunal concluded that "this ratio does not lead to any significant disproportion in the allocation of maritime areas to the Parties relative to the respective lengths of their coasts that would require the shifting of the adjusted equidistance line in order to ensure an equitable solution."<sup>67</sup>

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<sup>63</sup> *Ibid.*, para. 297.

<sup>64</sup> *Ibid.*, para. 318.

<sup>65</sup> *Ibid.*, para. 319.

<sup>66</sup> *Ibid.*, paras. 498-499.

<sup>67</sup> *Ibid.*, para. 499.

*Territorial and Maritime Dispute (Nicaragua v. Colombia)* (2012)<sup>68</sup>

To effect the delimitation of continental shelf between the two countries, the Court followed the three-stage approach as follows:

“First, it selected the base points and constructed a *provisional equidistance line*. Second, the Court considered any *relevant circumstances* which might have called for an adjustment or shifting of the provisional equidistance line so as to achieve an equitable result. Third, and finally, the Court checked that, taking account of all the circumstances of the case, the delimitation thus obtained did not create a disproportionality that would render the result inequitable.”<sup>69</sup>

In the *Barbados/Trinidad and Tobago case*, the Tribunal defined the disproportionality test as “a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion.”<sup>70</sup> The check for “significant disproportion” was emphasized by ITLOS in the *Bay of Bengal case*.<sup>71</sup> In the same vein, the Court in *Nicaragua/Colombia case* discussed at length on the “disproportionality test.” According to the Court,

“in carrying out this third stage, the Court notes that it is not applying a principle of strict proportionality. Maritime delimitation is not designed to produce a correlation between the lengths of the Parties’ relevant coasts and their respective shares of the relevant area.... The Court’s task is to check for a significant disproportionality.”<sup>72</sup>

“It is, rather, to ensure that there is not a disproportion

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<sup>68</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)*, (2012) ICJ Rep. 624.

<sup>69</sup> See *Ibid.* paras 190-193.

<sup>70</sup> *Barbados/Trinidad and Tobago case*, Arbitral Tribunal Award of 11 April 2006, RIAA, Vol. XXVII, p. 214, para. 238.

<sup>71</sup> *Delimitation of Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal case*, para. 499.

<sup>72</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)*, para. 240.

so gross as to “taint” the result and render it inequitable.”<sup>73</sup>

The Court observed that

“the adjusted equidistance line has the effect of dividing the relevant maritime area between the Parties in a ratio of approximately 1:3.44 in Nicaragua’s favour, while the ratio of relevant coasts was approximately 1:8.2.

The question, therefore, is whether, in the circumstances of the present case, this disproportion is so great as to render the result inequitable.”<sup>74</sup> The Court recalled that “*its selection of that line was designed to ensure that neither State suffered from a cut-off effect.*”<sup>75</sup> The Court finally concluded that “*taking account of all the circumstances of the present case, the result achieved by the application of the line provisionally adopted does not entail such a disproportionality as to create an inequitable result.*”<sup>76</sup>

### ***Maritime Dispute (Peru v Chile) (2014)***<sup>77</sup>

*Peru-Chile case* also reaffirms the three-stage approach for maritime delimitation. The Court first refers to the identical provisions of Articles 74 and 83 of UNCLOS on the delimitation of EEZ and CS whose main objective is “in order to achieve an equitable solution.” The Court then observes: “*The methodology which it usually employs in seeking an equitable solution involves three stages. In the first, it constructs a provisional equidistance line unless there are compelling reasons preventing that. At the second stage, it considers whether there are relevant circumstances which may call for an adjustment of that line to achieve an equitable result. At the third stage, the Court*

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<sup>73</sup> *Ibid.*, para. 242.

<sup>74</sup> *Ibid.*, para 243.

<sup>75</sup> *Ibid.*, para. 244.

<sup>76</sup> *Ibid.*, para. 247.

<sup>77</sup> *Maritime Dispute (Peru v Chile)*, 2014 ICJ Rep. 3.

conducts a *disproportionality test*, in which it assesses whether the effect of the line, as adjusted, is such that the Parties' respective shares of the relevant area are markedly disproportionate to the lengths of their relevant coasts."<sup>78</sup>

*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) (2018)*<sup>79</sup>

This is the most recent case decided by the ICJ that reaffirms the application of the *three-stage approach*. With regard to the delimitation of the territorial sea, the ICJ refers to Article 15 of UNCLOS, which is applicable between the Parties as both of them are parties to the Convention. In pursuance of its established jurisprudence, the Court proceeded in two stages: "*first, the Court draws a provisional equidistance line; second, it considers whether any special circumstances which justify adjusting such a line.*"<sup>80</sup>

As is the usual practice, the Court first of all reaffirmed that in order to delimit the single maritime boundary concerning EEZ and CS, the Court had to "*achieve an equitable solution according to Articles 74 and 83 of UNCLOS.*" The Court delimited EEZ and CS of the two countries following its *established methodology in three stages*:

"First, it provisionally draws an equidistance line using the most appropriate base points on the relevant coasts of the Parties. Second, it considers whether there exist relevant circumstances which are capable of justifying an adjustment of the equidistance line provisionally drawn. Third, it assesses the overall equitableness of the boundary resulting from the first two stages by checking whether there exists a marked disproportionality

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<sup>78</sup> *Ibid.*, para. 180.

<sup>79</sup> *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) (2018)* ICJ Judgment of 2 February 2018.

<sup>80</sup> *Ibid.*, para 98.

between the length of the Parties' relevant coasts and the maritime areas found to appertain to them."<sup>81</sup>

The Court finally found that it was not necessary to revise the adjusted equidistance line as there was no marked disproportionality in "*the ratio of the relevant maritime areas, which is 1:2.4 in favour of Nicaragua, and the ratio of the length of the Parties' coasts, which is 1:2.04 also in favour of Nicaragua.*"<sup>82</sup>

## THE FINDINGS

The following are the major findings of the present work:

- (1) The methodology for the delimitation of the territorial sea is reasonably consistent and the *equidistance/special circumstances* rule has been well established in both conventional and customary international law.
- (2) In so far as the delimitation of exclusive economic zone and continental shelf is concerned, although the Geneva Convention on the Continental Shelf 1958 follows the *equidistance/ special circumstances* approach. The ICJ in the *North Sea* cases discredited the use of equidistance principle as the basic rule and decided that it was not established as a rule of customary international law. In addition to that, the *North Sea cases* elevated 'equitable principles' to the status of customary international rule governing the delimitation of EEZ and CS. This ruling of the ICJ attracted criticism by dissenting judges as well as commentators. The main short-coming of the equitable principles is that although it promotes flexibility, it is indeed devoid of predictability and certainty.
- (3) The UNCLOS III was mired in serious rivalry between advocates of equidistance principle and equitable principles. After long and difficult negotiations, a watered-down and compromised conclusion was reached in the form of identical Articles 74 and 83 of the UNCLOS 1982. The formula "to achieve an equitable result"

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<sup>81</sup> *Ibid.*, para 135.

<sup>82</sup> *Ibid.*, para 165.

nevertheless is vague and regrettably fails to provide any method of maritime delimitation.

- (4) The combined effect of the controversial *North Sea* cases and the hollow provisions of Articles 74 and 83 of the UNCLOS 1982 made the law relating to the delimitation of EEZ and CS chaotic and problematic for nearly a couple of decades.
- (5) Since the 1990s, however, international courts and tribunals have played a pivotal role in the search for “normativity” in maritime delimitation, that is, incorporating a specific method of delimitation, which has the advantage of predictability and certainty. The ICJ in the seminal *Greenland/ Jan Mayen* case (1993) reinstates the “*equidistance principle*” as the basic rule of maritime delimitation and merges it with “*relevant circumstances*”, which is an epitome of equitable principles. This new methodology is commonly known as “*equidistance/relevant circumstances*” or the *two-stage approach*.
- (6) The ICJ in the *Black Sea* case (2009) further refines the maritime delimitation methodology by introducing the *three-stage approach: equidistance/ relevant circumstances/ disproportionality test*. Although the world court added one more stage of “disproportionality test”, it is actually not a new creation but, like relevant circumstances, part and parcel of equitable principles.
- (7) Due to the consistent jurisprudence of the ICJ and other international tribunals in recent years, maritime delimitation methodology has become stable and to some extent achieved the objective of predictability and certainty.
- (8) There are, however, grey areas where courts can still exercise considerable discretionary power that negates predictability and certainty. These areas include the identification of the base points before drawing the provisional equidistance line, and the determination of the impact of certain relevant circumstances, such as configuration of the coast (for example, their concavity or convexity) and the existence of islands and other maritime features (whether to give full effect, half effect or no effect at all).

## CONCLUSION

The ruling to rely entirely on equity or equitable principles for the maritime boundary delimitation in the celebrated *North Sea Continental Shelf* cases (1969) attracted considerable disappointment among states and scholars alike due to its lack of predictability and certainty and too much dependency on the discretionary power of courts and tribunals. Nevertheless, the last three decades have witnessed significant developments first in the form of a two-stage approach and more recently a three-stage approach to maritime boundary delimitation. The *equidistance principle* has been reinstated as a basic methodology, supplemented by *relevant circumstances* (which are based on equitable principles) in order to achieve an equitable result.

Although these are positive developments that enhance clarity and consistency in maritime boundary delimitation, a certain degree of uncertainty remains. These include the emerging trend towards selectivity in choice of base points prior to constructing the provisional equidistance line and the determination of the impact of coastal configuration and certain maritime features. It is believed that with time, jurisprudence of international courts and tribunals will become more matured and establish clear and consistent rules in these grey areas as well.