

International rules on the continental shelf delimitation

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ABSTRACT

The continental shelf delimitation is a distinct type of delimitation, and the legality of the single maritime delimitation is based upon the agreement of the states concerned, expressly or tacitly. Where one of the parties expressly objects to the single delimitation, the international tribunal to which the particular dispute has been submitted, will have no competence to undertake a single delimitation. The international rules on the continental shelf delimitation consist of delimitation by agreement, delimitation on the basis of international law, and achieving an equitable solution. Maritime delimitation, including the establishment of the provisional arrangements, must be effected through the agreement of the states concerned. One basic requirement of equity is to giving equal treatment to states with equal natural situations, while giving unequal treatment to states with unequal natural situations. An equidistance line is not appropriate for the delimitation of a disrupted continental shelf, for it will cause areas which are the natural prolongation of the territory of the wide-margin state to be attributed to the narrow-margin state, thus violating the non-encroachment principle. Coastal geography is the most important relevant circumstance and the geological and geomorphological factors of the relevant seabed area should be considered in the continental shelf delimitation. In order to demonstrate the equity of the delimitation line, the test of proportionality may be a useful means.

Key words: continental shelf, exclusive economic zone, EEZ, coastal geography, proportionality

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1. Introduction

“Delimitation of the continental shelf between States with opposite or adjacent coasts” is provided for in Article 83 of the United Nations Convention on the Law of the Sea (LOS Convention),¹ standing side by side with the delimitation of the exclusive economic zone (EEZ) which is governed by Article 74. Although the wordings of these two articles are virtually identical, the rules relating to the EEZ delimitation and those relating to the continental shelf delimitation are not naturally the same, because, as the International Court of Justice (ICJ) commented in the 1985 *Libya/Malta* case, “The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it.”² Therefore, a boundary that might be equitable for EEZ purposes might not be equitable for continental shelf purposes because of, *inter alia*, the different considerations that are relevant to achieving an equitable solution in each case. For example, the fish stocks in the case of EEZ and the geological characteristics of the seabed in the case of continental shelf.³ It follows that, in principle, states concerned will normally effect separate delimitations for the continental shelf and the EEZ respectively. Of course, where distinct lines result from the separate delimitations, the parties have to resolve the jurisdiction issue within the areas of one party’s EEZ overlapping the seabed of the other.⁴

However, with the emergence of the so-called single maritime delimitation, it has been argued that the continental shelf should not be delimited in isolation,⁵ and the rules on the continental shelf delimitation have been taken as similar to those for the single delimitation.⁶ Meanwhile, the rules on the continental shelf tend to be ignored by international lawyers in their recent research. In the view of the author, these arguments are not correct. The purposes of this paper are to establish that the continental shelf delimitation

1 Opened for signature on 10 December, 1982 and entered into force on 16 November, 1994 (www.UN.org/depts/los).

2 Continental Shelf (*Libya/Malta*), 1985. *ICJ Reports* 13 [*Libya/Malta*], para. 28.

3 Churchill, R. R. and A. V. Lowe, 1999. *The Law of the Sea* (Juris Publishing, Manchester University Press, 3rd edition), p.196.

4 Faraj Abdullah Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Clarendon Press, 1993), p.139.

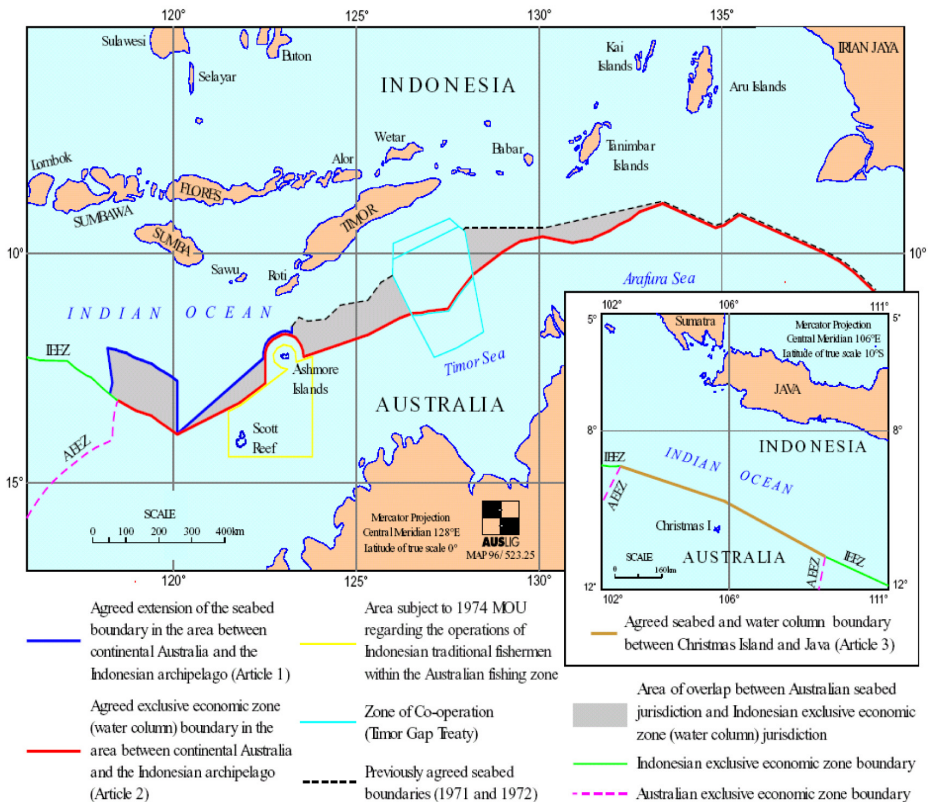
5 For example, the ICJ held in the *Libya/Malta* case that “even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 Convention demonstrates, the two institutions - continental shelf and exclusive economic zone - are linked together in modern law [...], one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State.” *Libya/Malta*, para. 33.

6 For example, the ICJ declared in the *Black Sea* case that “When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages”. Case concerning Maritime Delimitation in the Black Sea (*Romania v. Ukraine*), Judgment of 3 February, 2009 (www.icj-cij.org) [*Black Sea*], para. 115. Note that the ICJ did not intend to differentiate the rules on the continental shelf delimitation from the rules on the EEZ delimitation or for the single delimitation.

is still a distinct type of maritime delimitation and to expound the rules on the continental shelf delimitation by interpreting Article 83, paragraph 1 of the LOS Convention, taking the relevant jurisprudence of the international court and tribunal into account.

2. Continental shelf delimitation has not been absorbed by the single maritime delimitation

In order to “avoid as far as possible the disadvantages inherent in a plurality of separate delimitations,” the concept of single maritime delimitation has come into being.⁷ The “single maritime delimitation” is a delimitation procedure by which different kinds



Source : Margaret Hanlon, Australia-Indonesia Maritime Boundaries (<http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/international-relations/hanlon.pdf>).

Figure1. Australia-Indonesia maritime boundaries

7 Delimitation in the Gulf of Maine (Canada/U.S.), 1984. *ICJ Reports* 246 (Gulf of Maine), para. 194.

of delimitations otherwise should be carried out separately are put into one “integrated, comprehensive and synthetic” operation.⁸ It is worth noting that not all the delimitations with only one line drawn belong to the single maritime delimitation. The term “single” refers to both the delimitation process and the delimitation result, rather than the result only. Thus, the drawing of a single line for sea-bed, subsoil and superjacent waters and the drawing of two coincident lines for sea-bed and subsoil on the one hand and superjacent waters on the other, amounts in practical terms to the same thing, but there is important difference between them, that is, while the single line results from one delimitation operation, “the two lines, even if coincident in location, stem from different strands of the applicable law”.⁹ Compared with separate delimitations the advantages of single delimitation are obvious. However, different from the delimitation of the continental shelf and the EEZ, “the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various-partially coincident-zones of maritime jurisdiction appertaining to them.”¹⁰ It is true that state practice exhibits an overwhelming trend towards the single maritime delimitation, but there is no provision in the LOS Convention or the customary international rule prescribing such a course of action. Therefore, states concerned can choose to delimit their continental shelf boundary and their EEZ boundary separately and to delimit the seabed line alone. The recent examples in this regard are, in 2003, Russia, Azerbaijan and Kazakhstan divided their continental shelves in the Caspian Sea,¹¹ while Vietnam and Indonesia delimited their continental shelf boundary in the South China Sea.¹² Furthermore, states can delimit two different boundaries for the seabed and the superjacent waters, such as the 1978 delimitation between Australia and Papua-New Guinea in the Torres Strait,¹³ and the 1997 Australia-Indonesia delimitation

8 Delimitation of the Maritime Areas between Canada and France, Award of 10 June, 1992, reprinted in 31 ILM 1145 (1992) (St. Pierre and Miquelon), Dissenting Opinion of Mr. Prosper Weil, para. 39.

9 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), 1993. *ICJ Reports* 38 (Jan Mayen), para. 42.

10 Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001. *ICJ Reports* 40 (Qatar v. Bahrain), para. 173.

11 The texts of the agreements between Kazakhstan-Russia, Azerbaijan-Russia, Azerbaijan-Kazakhstan, as well as the agreement of Azerbaijan-Kazakhstan-Russia are available in David A. Colson & Robert W. Smith (eds.), *International Maritime Boundaries* (Martinus Nijhoff Publishers, 2005), Vol. V, pp.4009-4056.

12 Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Indonesia concerning the Delimitation of the Continental Shelf Boundary, signed on 26 June, 2003 and entered into force on 29 May, 2007 (http://en.wikipedia.org/wiki/Indonesia-Vietnam_border).

13 Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the two Countries, including the Area known as Torres Strait and related Matters, signed on 18 December 1978 and entered into force on 15 February, 1985 (www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-PNG1978TS.PDF). For analysis, H. Burmester, *The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement*, 76 *AJIL* 321 (1982).

in the Indian Ocean.¹⁴

This conclusion has also been evidenced by the judicial practices of the ICJ, for its decisions on the single delimitation have always been based on “the wish” of the parties, especially the agreement between them. Thus, though a single boundary has always been the result in all of the cases concerning maritime delimitation decided by the ICJ since 1984, with the exception of the *Libya/Malta* case, however, when such agreement existed, the Court would undertake a single maritime delimitation because it had the competence to do so, such as the 1984 *Gulf of Maine* case,¹⁵ the 2001 *Qatar v. Bahrain* case,¹⁶ the 2002 *Cameroon v. Nigeria* case,¹⁷ and the 2007 *Nicaragua v. Honduras* case.¹⁸ On the contrary, if no such agreement existed, the Court would delimit the continental shelf and the superjacent waters separately. Of course, in the latter case, the ICJ could use its discretion to determine two lines that are theoretically separate but in fact coincident, just as the 1993 *Jan Mayen* case. In that case, although Denmark asked for “a single line of delimitation of the fishery zone and continental shelf area,”¹⁹ Norway emphasized the absence of any such agreement of the parties for a single delimitation as in the *Gulf of Maine* case and contended that even the boundary for delimitation of the continental shelf and the boundary for the delimitation of the fishery zone would coincide, “the two boundaries would remain conceptually distinct”.²⁰ In this circumstance, the ICJ declared that “There is no agreement between the Parties for a single maritime boundary; the situation is thus quite different from that in the *Gulf of Maine* case. [...] The Court in the present case is not empowered-or constrained-by any such agreement for a single dual-purpose boundary.”²¹ On the other hand, the agreement between the parties for a single maritime boundary can be deemed to exist as long as no party put forward express objection to it. For example, in the 2009 *Black Sea* case (*Romania v. Ukraine*), Romania requested the ICJ to draw a single maritime boundary dividing the continental shelf and the EEZ of these two parties in the Black Sea.²² Though Ukraine did not mention the term “single maritime boundary”, it “submits that the Court adjudge and declare that the delimitation of the continental shelf and exclusive

14 Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing An Exclusive Economic Zone Boundary and Certain Seabed Boundaries, signed on 14 March, 1997 (www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-IDN1997EEZ.pdf). For analysis, Max Herriman & Martin Tsamenyi, *The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?* 29 ODIL 361 (1998).

15 *Gulf of Maine*, p.246.

16 *Qatar v. Bahrain*, p.40.

17 *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, ICJ Reports, 2002, 303 [*Cameroon v. Nigeria*], para. 286.

18 *Territorial and Maritime Dispute (Nicaragua v. Honduras)*, Judgment of 8 October, 2007 (www.icj-cij.org) [*Nicaragua v. Honduras*], para. 261.

19 *Jan Mayen*, para. 41.

20 *Ibid.*

21 *Ibid.*, para. 43.

22 *Black Sea*, para. 12.

economic zones between the Parties is a delimitation line”²³ (emphasis). Thus, the ICJ decided that the subject-matter of the dispute “concerns the establishment of a single maritime boundary delimiting the continental shelf and exclusive economic zones between the two States in the Black Sea”.²⁴ The arbitral tribunals in the 1992 *St. Pierre and Miquelon* case²⁵ and the 2007 *Guyana v. Suriname* case²⁶ also followed this approach. In the 1985 *Guinea/Guinea-Bissau* case, the two parties requested the Tribunal to decide “the course of the boundary between the maritime territories appertaining respectively to” them,²⁷ while the Tribunal observed that “It is not disputed by the Parties that the maritime territories concerned are the territorial sea, exclusive economic zone and continental shelf; that these territories must be delimited by a single line”.²⁸ Similarly, in the 1999 *Eritrea/Yemen* case, the Tribunal, who was requested to provide rulings “delimiting maritime boundaries”,²⁹ decided that “the international boundary shall be a single all-purpose boundary”.³⁰

However, in the 2006 *Barbados v. Trinidad and Tobago* case, though Barbados sought a “single unified maritime boundary line, delimiting the exclusive economic zone and continental shelf between it and the Republic of Trinidad and Tobago,”³¹ Trinidad and Tobago expressly objected to this request on the basis that the continental shelf and the EEZ are separate and distinct institutions, that there may therefore be different lines of delimitation for each.³² Furthermore, Trinidad and Tobago argued that the parties had not agreed to request delimitation by means of a single maritime boundary, as in its view was required.³³ However, though recognized that Trinidad and Tobago had “conceptual reservations” in this regard,³⁴ the Tribunal, without any explanation, decided that “it has jurisdiction to delimit, by the drawing of a single maritime boundary, the continental shelf and EEZ appertaining to each of the Parties in the waters where their claims to these

23 *Ibid.*

24 *Ibid.*, para. 17.

25 *St. Pierre and Miquelon*, para. 1.

26 Arbitration between Guyana and Suriname (*Guyana v. Suriname*), Arbitral Tribunal constituted pursuant to Article 287 and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea, Arbitration Award of 17 September, 2007 (www.pca-cpa.org) [*Guyana v. Suriname*], paras. 157, 161.

27 Article 2 of the Special Agreement, *Guinea/Guinea-Bissau Maritime Delimitation Case*, Decision of 14 February, 1985, reprinted in 77 *International Law Reports* (1988) [*Guinea/Guinea-Bissau*], para. 1.

28 *Guinea/Guinea-Bissau*, para. 42.

29 Permanent Court of Arbitration: *Eritrea-Yemen Arbitration*, Award of 17 December 1999 (Second Stage: Maritime Delimitation), reprinted in XL *ILM* 983 (2002) [*Eritrea/Yemen*], para. 6.

30 *Ibid.*, para. 132.

31 Barbados’ Statement of Claim and the Grounds on which It Is Based (www.pca-cpa.org/upload/files/SOC%20Barbados.pdf), para.15.

32 Case between Barbados and the Republic of Trinidad and Tobago (*Barbados v. Trinidad and Tobago*), Arbitral Tribunal constituted pursuant to Article 287 and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea, Arbitration Award of 11 April, 2006 (www.pca-cpa.org) [*Barbados v. Trinidad and Tobago*], para. 296.

33 *Ibid.*, para. 296.

34 *Ibid.*, para. 297.

maritime zones overlap.”³⁵ In the latter part of the Award, the Tribunal tried to defend its decision by pointing to the fact that “it is evident that State practice with very few exceptions [...] has overwhelmingly resorted to the establishment of single maritime boundary lines and that courts and tribunals have endorsed this practice.”³⁶ As mentioned above, the single maritime delimitation has not become compulsory under the international customary rule. So, it is obvious that in the present case, the Tribunal had no competence to undertake a single delimitation in the light of the serious objections from Trinidad and Tobago. Indeed, the Tribunal could delimit the boundary of the continental shelf and the boundary of the EEZ separately, but, where appropriate, the two boundaries would coincide in location.

3. Interpretation of Article 83(1) of the LOS Convention

Article 83, paragraph 1 provides that delimitation of the continental shelf “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.” This simple provision lays down the path, means and goal of the delimitation, that is, delimitation by agreement, delimitation on the basis of international law and achieving an equitable solution.

3.1 *Delimitation by agreement*

The Chamber of the ICJ stated in the *Gulf of Maine* case that “delimitation must above all be sought, while always respecting international law, through agreement between the parties concerned.”³⁷ The delimitation by agreement rule, reflecting the general principle of the relationship between states, is the “primary rule” which has been accorded priority over all other delimitation rules.³⁸ According to this rule, “delimitation must be the object of agreement between the States concerned.”³⁹ That is to say, maritime delimitations have to be effected through agreements, “an attempt by a unilateral act to establish international maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law.”⁴⁰ It should be noted that this rule applies not only

³⁵ *Ibid.*, para. 217(i).

³⁶ *Ibid.*, para. 235.

³⁷ *Gulf of Maine*, paras. 22, 154.

³⁸ *Ibid.*, para. 22.

³⁹ *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), ICJ Reports, 1969, 3 [North Sea Continental Shelf], para. 85.

⁴⁰ *Continental Shelf* (Tunisia/Libya), ICJ Reports, 1982, 18 [Tunisia/Libya], para. 87.

to the delimitation of the boundary line, but also to the establishment of the “provisional arrangements” pending delimitation in the sense of Article 83(3) of the LOS Convention.⁴¹ The “provisional arrangements” entered into under Article 83 are agreements concluded between the states concerned.⁴² This means that such provisional arrangements must be reached by mutual consent between two or more states concerned and therefore excludes any possibility that such arrangements could be the result of a unilateral conduct of one party to the dispute, or the automatic application of some line.

In order to reach an agreement, the states concerned have obligation to carry out negotiation. Negotiators must conduct “in good faith and with the genuine intention of achieving a positive result.”⁴³ “They are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.”⁴⁴ According to paragraph 2 of Article 83, “[i]f no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.”⁴⁵ Part XV of the LOS Convention stipulates four kinds of compulsory procedures entailing binding decisions.⁴⁶ However, the possibility of resorting to these procedures to resolve the delimitation disputes is restricted, given the option available to states under Article 298 of the LOS Convention. According to paragraph 1 of the article, “When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a) (i) disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations [...]”⁴⁷ It is worth noting that though this article just provides for the delimitations of the territorial sea, the continental shelf

41 Article 83(3) provides that : “Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.” The Tribunal in the *Guyana v. Suriname* case held that the obligation to make every effort to enter into provisional arrangements of a practical nature contained in Article 83(3) “is designed to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation” and “[t]here have been a number of examples of arrangements for the joint exploration and exploitation of maritime resources, often referred to as joint development agreements.” *Guyana v. Suriname*, paras. 460, 462.

42 Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 *AJIL* (1984), p.358.

43 *Gulf of Maine*, para. 112.

44 *North Sea Continental Shelf*, para. 85(a).

45 In the view of the ICJ, “Recourse to delimitation by arbitral or judicial means is in the final analysis simply an alternative to direct and friendly settlement between the parties.” *Gulf of Maine*, para. 22.

46 According to Article 287 of the LOS Convention, these procedures include: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the ICJ; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

47 LOS Convention, Article 298 (1) (a) (i).

and the EEZ which states parties can opt out of the compulsory procedures and does not mention the delimitations of the contiguous zone and the fishery zone, as well as the single maritime delimitation all of which the LOS Convention does not provide for, once a state party declares that it does not accept the compulsory procedures entailing binding decisions with respect to the delimitation disputes in Article 298 (1)(a)(i), it should be deemed that this state party has opted out of the compulsory procedures of the LOS Convention for all of the delimitation disputes to which it is a party.⁴⁸

3.2 *Delimitation on the basis of international law*

The ICJ observed in the 1951 *Fisheries* case that “The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. [...] the validity of the delimitation with regard to other States depends upon international law.”⁴⁹

3.2.1 The equidistance/special circumstances rule

As far as the treaty law on the continental shelf delimitation is concerned, Article 6 of the 1958 Convention on the Continental Shelf provides for a clear rule, that is, the “equidistance/special circumstances rule.” According to this rule, in the absence of agreement and unless another boundary line is justified by special circumstances, the boundary is a median line in the case of delimitation between opposite coasts and an equidistance line in the case of delimitation between adjacent coasts.⁵⁰ No legal consequences flow from the use of the terms “median line” and “equidistance line” since “the method of delimitation is the same for both”- the equidistance method.⁵¹ It should be noted that what Article 6 provides for is not an independent equidistance rule, but an equidistance rule conditioned by the special circumstances rule, that is, “a combined equidistance-special circumstances rule.”⁵² The reason why the “special circumstances” condition was introduced

48 Until March, 2009, sixteen states have made such declarations. United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter (www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

49 *Fisheries Case* (United Kingdom v. Norway), ICJ Reports, 1951, 116, p.132.

50 Article 6 of the 1958 Convention on the Continental Shelf provides that “1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.”

51 *Black Sea*, para. 116.

52 Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and

into Article 6 is, “owing to particular geographical features or configurations, application of the equidistance principle might not infrequently result in an unreasonable or inequitable delimitation of the continental shelf. In short, the role of the ‘special circumstances’ condition in Article 6 is to ensure an equitable delimitation.”⁵³ Therefore, only where no another boundary line is justified by special circumstances, can the equidistance line be used as the delimitation line. Furthermore, the ICJ in the *Nicaragua v. Honduras* case, when dealing with the delimitation of the territorial sea, declared that “Nothing in the wording of Article 15 suggests that [...] ‘special circumstances’ may only be used as a corrective element to a line already drawn” on the basis of equidistance.⁵⁴ Article 15 of the LOS Convention concerns the delimitation of the territorial sea,⁵⁵ and the rule provided for in it is also referred to as the “equidistance/special circumstances” rule and regarded as having a customary character.⁵⁶ The findings of the ICJ imply that the existence of special circumstances may justify precluding the application of equidistance at the outset.⁵⁷ Anyway, as far as the continental shelf delimitation is concerned, the equidistance/special circumstances rule is a treaty law, therefore can only binds the state parties to the 1958 Convention and is not applicable in the delimitation involving non-states parties.

3.2.2 The equitable principles/relevant circumstances rule

As regards the customary rules on the continental shelf delimitation, they are expressed in the so-called “equitable principles/relevant circumstances rule”, which “has been developed since 1958 in case-law and State practice”.⁵⁸ This rule is based upon equitable principles and relevant circumstances,⁵⁹ and requires that “the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances.”⁶⁰

About the equitable principles for the continental shelf delimitation, the ICJ listed some “well-known examples” in the *Libya/Malta* case and observed that “The nature of equity is nowhere more evident than in these well-established principles”.⁶¹ They are: “the

Northern Ireland and the French Republic, Decision of 30 June, 1977, reprinted in 18 ILM 397 (1979) [Anglo-French], para. 68.

⁵³ *Ibid.*, para. 70.

⁵⁴ *Nicaragua v. Honduras*, para. 280.

⁵⁵ Article 15 of the LOS Convention 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 point 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 other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

⁵⁶ *Qatar v. Bahrain*, para. 176.

⁵⁷ *Nicaragua v. Honduras*, para. 281.

⁵⁸ *Qatar v. Bahrain*, para. 231.

⁵⁹ *Jan Mayen*, para. 56.

⁶⁰ *Libya/Malta*, para. 79(A).

⁶¹ *Ibid.*, paras. 46, 47.

principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, ‘equity does not necessarily imply equality’ [...], nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice”.⁶² Regarding the non-refashioning nature principle, the ICJ declared in the *North Sea Continental Shelf* cases that “There can never be any question of completely refashioning nature and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline [...] and it is not such natural inequalities as these that equity could remedy. [...] It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.”⁶³ What one can learn from these findings is that the essential requirement of equity is, giving equal treatment to states with equal geographical situations, while giving unequal treatment to states with unequal natural situations. Concerning the non-encroachment by one party on the natural prolongation of the other principle, the ICJ declared that “delimitation is to be effected [...] in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other”.⁶⁴ It is worth noting that while most of these equitable principles mentioned above can be applicable for the EEZ delimitation, the non-encroachment principle is obviously exclusive to the continental shelf delimitation.

Similar to the LOS Convention, the equitable principles/relevant circumstances rule provides “no single obligatory method of delimitation.”⁶⁵ Moreover, the ICJ and the arbitral tribunals repeatedly emphasized that “equidistance is not [...] either a mandatory legal principle, or a method having some privileged status in relation to other methods.”⁶⁶ The ICJ declared in the *Libya/Malta* case that it “is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method

62 *Ibid.*, para. 46.

63 *North Sea Continental Shelf*, para. 91.

64 *Ibid.*, para. 101 (C).

65 *Tunisia/Libya*, para. 111.

66 *Ibid.*, para. 110.

is one which must be used, or that the Court is required, as a first step, to examine the effects of a delimitation by application of the equidistance method.”⁶⁷ The application of equidistance depends on the “appreciating the appropriateness of the equidistance method as a means of achieving an equitable solution,”⁶⁸ and “[t]he application of equitable principles in the particular relevant circumstances may [...] require the adoption of another method, or combination of methods, of delimitation, even from the outset.”⁶⁹ It is true that since the 1993 *Jan Mayen* case the ICJ has changed its attitude towards equidistance dramatically and tended to “begin the process of delimitation by a median line provisionally drawn”.⁷⁰ However, the two litigants in the *Jan Mayen* case are parties to the 1958 Continental Shelf Convention and the following cases all concerned the single delimitation, instead of the delimitation of the continental shelf. What’s more important is, “the essence of the method normally followed in international practice is that the equidistance line is only a provisional line which serves as the starting point for the consideration of relevant circumstances that might require its adjustment in order to achieve the equitable solution that the law requires.”⁷¹ For the purpose of equity, the provisional equidistance line is subject to modification or adjustment,⁷² since “under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question.”⁷³ Until now, among the nine delimitation cases heard by the ICJ, the strict equidistance line was used as the delimitation line only in two cases.⁷⁴ Third, though widely applied in the single maritime delimitation, the status of equidistance as a delimitation method has not changed. As the Tribunal in the 2006 *Barbados v. Trinidad and Tobago* case put it, “no method of delimitation can be considered of and by itself compulsory and no court or tribunal has so held,” and if “a well-founded justification” exists, “A different method” would be applied.⁷⁵ It is worth noting that in the 2007 *Nicaragua v. Honduras* case, the ICJ not only repeated that “the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate,”⁷⁶ but also applied the method of bisector from the outset in the delimitation between the adjacent coasts of the parties’ mainland.⁷⁷

67 Libya/Malta, para. 43.

68 Anglo-French, para. 97.

69 Libya/Malta, para. 43.

70 Jan Mayen, para. 53.

71 Barbados v. Trinidad and Tobago, para. 317.

72 Cameroon v. Nigeria, para. 295.

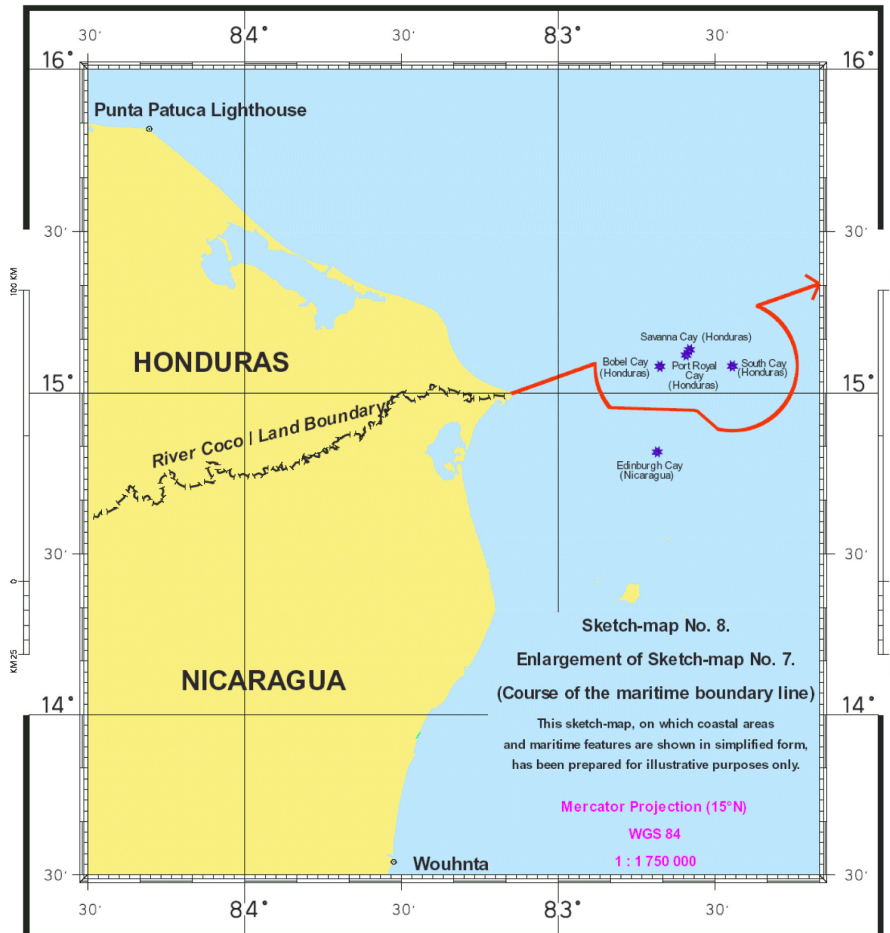
73 Libya/Malta, para. 63.

74 They are: the 2002 Cameroon v. Nigeria case and the 2009 Black Sea case.

75 Barbados v. Trinidad and Tobago, para. 306.

76 Nicaragua v. Honduras, para. 272.

77 *Ibid.*, paras. 287-298. But the ICJ used an equidistance line to delimit the territorial sea boundary between the opposite-facing islands of these two parties. *Ibid.*, paras. 304-305.



Source : Nicaragua v. Honduras case, ICJ Judgment, p.92.

Figure 2. The maritime delimitation in the 2007 Nicaragua v. Honduras case

The reason why equidistance can not be granted the status of compulsory method for the continental shelf delimitation is that the use of this method can “under certain circumstances” produce inequitable results,⁷⁸ in the sense that an equidistance line would give equal treatment to states with unequal natural situations, or give unequal treatment to states with equal situations, thus leaving “one of the States concerned areas that are a natural prolongation of the territory of the other”.⁷⁹ These circumstances may particularly occur in the case where the continental shelf area to be delimited consists of not one unitary natural prolongation common to both parties, but “two separate natural prolongations”.⁸⁰

78 North Sea Continental Shelf, paras. 22, 24.

79 *Ibid.*, paras. 57–58.

80 Tunisia/Libya, para. 66.

Because the construction of the equidistance line is “heavily dependent on the physical geography”,⁸¹ and does not consider the geology and geomorphology of the seabed and subsoil, the use of the equidistance method in this situation would cause areas which are the natural prolongation of the territory of the wide-margin state to be attributed to the narrow-margin state. Indeed, the notion of equidistance is not “an inescapable a priori accompaniment of basic continental shelf doctrine”.⁸² Equidistance is based upon the notion of proximity and will leave “to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party”,⁸³ while “continental shelf doctrine from the start [...] does not imply any fundamental or inherent rule the ultimate effect of which would be to prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State”.⁸⁴ By contrast, “whenever a given submarine area does not constitute a natural-or the most natural-extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; -or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.”⁸⁵ Of course, the introduction of the distance criterion into the concept of continental shelf “departs from the principle that natural prolongation is the sole basis of the title” to the continental shelf and “The legal concept of the continental shelf as based on the ‘species of platform’ has thus been modified by this criterion.”⁸⁶ However, the concept of natural prolongation remains “essential [element] in the juridical concept of the continental shelf”.⁸⁷ Thus, where the continental shelf to be delimited consists of two separate natural prolongations, one exceeds beyond the distance of 200 nautical miles and the other does not, it is not appropriate to use equidistance.

3.2.3 Relevant circumstances

The concept of relevant circumstance “can be described as a fact necessary to be taken into account in the delimitation process”.⁸⁸ According to the ICJ, “Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent

81 Black Sea, para. 118.

82 North Sea Continental Shelf, para. 46.

83 *Ibid.*, para. 6.

84 *Ibid.*, para. 42.

85 *Ibid.*, para. 43.

86 Tunisia/Libya, paras. 47–48.

87 Libya/Malta, para. 34.

88 Jan Mayen, para. 55.

to the institution of the continental shelf as it has developed within the law and to the application of equitable principles to its delimitation, will qualify for inclusion.”⁸⁹ In practice, coastal geography is the most important relevant circumstance, mainly including islands, coastal configuration and the marked disparity between the lengths of the coastlines belonging to the states concerned.

Islands are the most frequently emerged relevant circumstances in the practice of maritime delimitation.⁹⁰ As the jurisprudence has indicated, the ICJ may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration.⁹¹ Generally speaking, the effect of a given island in a specific delimitation primarily depends upon the following considerations, though no uniform standard in this regard has come into being. First of all, the factual status of the relevant island in the delimitation should be considered, that is to say, whether the island itself constitutes one indispensable component of the delimitation area,⁹² or just an incidental physical feature appearing in the delimitation. The dividing criterion for these two situations is whether the particular island constitutes the primary components of the geographical region relevant to the delimitation, in a sense that if it were not exist, the delimitation in the region would be substantially different. For example, in the *Jan Mayen* case, if the island of Jan Mayen had not existed, there would be no delimitation at all. Therefore, in responding to Denmark’s claim that Jan Mayen was a special circumstance, Norway contended that Jan Mayen was not an incidental physical feature but was itself one of the components of the delimitation area.⁹³ In addition, the ICJ in the *Libya/Malta* case also noted that the relationship of Malta’s coasts with the coasts of its neighbors was different from what it would be if it were a part of the territory of one of them. In other words, it might well be that the sea boundaries in this region would be different if the islands of Malta did not constitute an independent state, but formed a part of the territory of one of the surrounding countries.⁹⁴ Where the island concerned itself constitutes the primary component of the delimitation area, it cannot be regarded as a special circumstance and its effect in the delimitation therefore cannot be reduced for this reason, because no feature can become a special circumstance in the delimitation of its own coastal projections.⁹⁵ While in the latter case, any island may be considered as a special circumstance, regardless

89 *Libya/Malta*, para. 48.

90 generally, Derek Bowett, *Islands, Rocks and Low-Tide Elevations in Maritime Boundary Delimitation*, in 1 Jonathan I. Charney & Lewis M. Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff Pub. 1993), pp.131-151.

91 *Black Sea*, para. 185.

92 Whether the island in question is independent or not does not matter for the purpose of maritime delimitation. For example, *St. Pierre and Miquelon*, para. 42.

93 *Jan Mayen*, (Shahabuddeen, J., sep. op.).

94 *Libya/Malta*, para. 59.

95 *Jan Mayen*, (Shahabuddeen, J., sep. op.).

of its population and size. The Saint Pierre and Miquelon islands in the 1992 arbitration between Canada and France and the Channel Islands in the 1977 *Anglo-French* case provide good examples for these two situations respectively. While in the former case there is no French coast opposite Newfoundland, in the latter the mainland coasts of France and the United Kingdom are opposite each other.⁹⁶ The Tribunal in the 1977 case just left to the Channel Islands a 12-nautical-mile zone of seabed and subsoil,⁹⁷ while the 1992 Tribunal granted to Saint Pierre and Miquelon an additional twelve nautical miles from the limit of its territorial sea, for its EEZ in the western sector,⁹⁸ and a full 200 nautical miles EEZ in the southern sector, though Saint Pierre and Miquelon is much smaller and less developed than the Channel Islands,⁹⁹ for the situation of the Channel Islands was substantially different from that of the Saint Pierre and Miquelon, “because of the proximity of the English coast. The Channel Islands were seen [...] as an incidental feature in a delimitation between two mainland and approximately commensurate, coasts.”¹⁰⁰

Second, for those islands which are regarded as incidental features, the effect of them in delimitation is up to the balance between their importance and their potential influence on the delimitation line. That is to say, in the light of their importance, if given certain effect, whether they will distort the boundary line disproportionately. The ICJ in the *Libya/Malta* case said that “the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain ‘islets, rocks and minor coastal projections’.”¹⁰¹ The importance of an island includes such elements as its population, size and economic development. The location of the island in relation to the delimitation line fixed by reference to the primary components of the relevant geographical region determines the influence it could exert on the line. According to the distance between the islands and the coasts of the mainland which they belong to, islands can roughly be divided into four groups from near to far: 1) offshore islands within 24 nautical miles away of the mainland; 2) offlying islands beyond 24 nautical miles away of the mainland; 3) “islands in the median zone”, including Island on the right side, Island astride and Island on the wrong side; and 4) detached islands.¹⁰² Under international jurisprudence and state practice, the nearer an island closes to the delimitation line, the higher requirement it has to satisfy in order to be granted some effect. Therefore, the effect of these four groups

96 The Tribunal in the 1977 case referred to the islands of St. Pierre and Miquelon and declared that case differed from the present case “in important respects. First, that case is not one of islands situated [...] between the coasts of opposite States, so that no question arises there of a delimitation between States, whose coastlines are in an approximately equal relation to the continental shelf to be delimited.” *Anglo-French*, para. 200.

97 *Ibid.*, paras. 202~203.

98 *St. Pierre and Miquelon*, para. 69.

99 It has an area of 237 square kilometres and consists of two main islands, Miquelon and Saint Pierre, several smaller islands and islets and many drying rocks. *Ibid.*, para. 22.

100 *St. Pierre and Miquelon*, para. 42.

101 *Libya/Malta*, para. 64.

102 Hiran W. Jayewardene, *The Regime of Islands in International Law* (Martinus Nijhoff Pub. 1990), p.354.

of islands in delimitation is usually reduced in subsequence and the islands in the median zone as well as the detached islands have generally been given very reduced or no effect.¹⁰³ Besides, the sovereign status of the island should also be taken into account and the fact that the sovereignty over the island in question is subject to dispute usually reduces the effect of the island in delimitation or even makes it disregard completely.¹⁰⁴ For examples, the disputed Al Baina and Al Kabir were used as the turning points of the boundary in the 1958 delimitation between Bahrain and Saudi Arabia, therefore have no maritime area at all and the Farsi and Arabi in the delimitation between Iran and Saudi Arabia of 1968 were given only 12 nautical miles territorial sea.¹⁰⁵ This approach is more obvious in the cases where the disputed islands are completely taken by one party. For example, in the *Eritrea/Yemen* case, the Tribunal, on the one hand, gave all of the disputed islands to Yemen;¹⁰⁶ on the other hand, gave them only 12 nautical miles territorial sea in the delimitation.¹⁰⁷

Third, the overall geography of the delimitation area has to be taken into consideration as well. Within the enclosed sea or relatively narrow waters, the effect of islands in delimitation is apt to be limited, for in the narrow waters, there is less scope for redressing inequities than in the open waters.¹⁰⁸

In this context, it is worth noting that the legal character of a maritime feature as “island” or “rock” in terms of Article 121 of the LOS Convention and its effect in the maritime delimitation are two different though related issues. The legal character is only one factor among those relevant to determining the effect of a feature in delimitation. As long as it is taken as exerting disproportionate effect on the boundary line, it will become a relevant circumstance and its effect in delimitation will be cut down accordingly. These are the reasons why Kerkennahs Islands, which have an area of 180 square kilometers, population of 15,000 and lie some 11 nautical miles east of the Tunisian coast, were given half effect in the *Tunisia/Libya* case.¹⁰⁹ Another example is the Channel Islands in the *Anglo-French* case. In order to support its arguments that the Channel Islands themselves constitute the relevant opposite coast for the purpose of delimiting the median line, the Britain emphasized the importance of the Channel Islands, including the total area of the

103 For details, GAO Jianjun, *International Maritime Delimitation* (in Chinese) (Peking University Press, 2005), pp.144~150.

104 Hiran W. Jayewardene, *The Regime of Islands in International Law*, p.487.

105 Agreement between Qatar and Abu Dhabi on the Settlement of Maritime Boundaries and Ownership of Islands, signed on 20 March, 1969 and entered on the same day (www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/QAT-ARE1969MB.PDF).

106 Permanent Court of Arbitration: *Eritrea-Yemen Arbitration*, Award of 9 October, 1998 (First Stage: Territorial Sovereignty and Scope of Dispute), reprinted in XL ILM 900 (2002), paras. 124, 475, 482, 508, 524.

107 *Eritrea/Yemen*, para. 160.

108 Faraj Abdullah Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea*, p.378. Also *Anglo-French*, para. 200.

109 *Tunisia/Libya*, paras. 128~129.

Islands is approximately 75 square miles, their total population is about 130,000, the volume of their sea and air traffic and their commerce is substantial, they are highly developed, busy territories which provide financial facilities of international repute, they have their own legislative assemblies, fiscal and legal systems, Courts of law and systems of local administration, as well as their own coinage and postal service and legally, they are part neither of the United Kingdom nor of the Colonies but have for several hundred years been direct dependencies of the Crown. However, the Tribunal found that for the purpose of delimitation, it must treat the Channel Islands only as islands of the United Kingdom, not as semi-independent states entitled in their own right to their own continental shelf vis-a-vis France,¹¹⁰ and decided to enclose them in an enclave of 12 nautical miles.¹¹¹ A more recent example comes from the Black Sea case, where the parties disagreed as to the proper characterization of Serpents' Island and the role this maritime feature should play in the delimitation. Serpents' Island is a natural feature situated in the north-western part of the Black Sea, approximately 20 nautical miles to the east of the Danube delta. Serpents' Island, with the highest point is 41 m above sea level,¹¹² is above water at high tide, has a surface area of approximately 0.17 square kilometres and a circumference of approximately 2,000 m.¹¹³ Romania maintained that Serpents' Island was a rock incapable of sustaining human habitation or economic life of its own and therefore had no EEZ or continental shelf, as provided for in Article 121, paragraph 3, of the LOS Convention,¹¹⁴ and should play no role in the delimitation beyond 12 nautical miles.¹¹⁵ On the contrary, Ukraine argued that Serpents' Island was indisputably an "island" under Article 121, paragraph 2, of the LOS Convention, rather than a "rock",¹¹⁶ and should be taken into account as one of the relevant base points for the construction of the provisional equidistance line.¹¹⁷ The conclusion of the ICJ was that "Serpents' Island should have no effect on the delimitation in this case, other than that stemming from the role of the 12-nautical-mile arc of its territorial sea".¹¹⁸ Meanwhile, the ICJ held that it did not need to consider whether Serpents' Island falls under paragraphs 2 or 3 of Article 121 of the LOS Convention nor their relevance to this case.¹¹⁹ Indeed, in such situations as the present case, whether

110 Anglo-French, para. 186.

111 *Ibid.*, paras. 171, 202.

112 Snake Island (Black Sea), available at Wikipedia website: [en.wikipedia.org/wiki/Snake_Island_\(Black_Sea\)](http://en.wikipedia.org/wiki/Snake_Island_(Black_Sea)).

113 Black Sea, para. 16.

114 *Ibid.*, para. 180. Article 121 (3) provides that "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

115 Black Sea, paras. 181~182.

116 *Ibid.*, para. 184. Article 121(2) provides that "Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory."

117 Black Sea, paras. 183, 125~126.

118 *Ibid.*, para. 188.

119 *Ibid.*, para. 187.

Serpents' Island falls under paragraph 2 or paragraph 3 of Article 121, the decision of the ICJ that it should be ignored in the delimitation will not be affected. First, because the delimitation is to be effected between the coasts of the mainland of the two parties, Serpents' Island is not one indispensable component of the delimitation area but an incidental physical feature. Second, though Serpents' Island is situated approximately 20 nautical miles to the coast of Ukraine and therefore belongs to the group of offshore islands, the distance between the island and the equidistance line fixed by reference to the general configuration of the coasts of the parties is less than 12 nautical miles, which means that Serpents' Island should be regarded as the island in the median zone. If Serpents' Island had been used as the base point, the equidistance line would have been suppressed much to the coast of Romania. On the other hand, though the two parties took different views as to the legal character of Serpents' Island, they did not dispute that it was a tiny feature with small population on it.¹²⁰ Thus, Serpents' Island, if given some effect, would "distort the boundary and have disproportionate effects".¹²¹ Moreover, according to Romania, the two states agreed in 1997 that Ukraine accepted that Serpents' Island could receive no effect in the maritime delimitation in exchange for the fact that Romania formally confirmed that Serpents' Island belonged to Ukraine.¹²² If it is true, it will be a typical arrangement for the effect of disputed islands in the maritime delimitation. Third, the Black Sea, where the delimitation in the present case is to be carried out, is an enclosed sea and consists of the territorial seas and EEZs of the coastal states which border it.¹²³

As far as the Diaoyu Islands (Senkaku Islands in Japanese) in the delimitation between China and Japan,¹²⁴ and the Dokdo in the delimitation between Korea and Japan

120 About 100 inhabitants live on the island, mostly frontier guard servicemen with their families and technical personnel. Snake Island (Black Sea).

121 Qatar v. Bahrain, para. 247.

122 Black Sea, para. 33. Also The Additional Agreement concluded with reference to Article 2 of the Treaty on the Relations of Good Neighbourliness and Co-operation between Romania and Ukraine, 2 June, 1997, paragraph 4, in Black Sea, para. 35.

123 *Ibid.*, para. 15. Romania argued that the Black Sea's nature as an enclosed sea constituted a relevant circumstance which must be taken into account in the delimitation. *Ibid.*, para. 171.

124 Besides, China and Japan are arguing over the legal status of the Japanese maritime feature Okinotori Shima, which consists of two tiny rocks. In the view of Japan, Okinotori is an island and therefore is entitled to its own EEZ and continental shelf. In 2008, Japan submitted the information concerning the outer limits of its continental shelf beyond 200 nautical miles, including those beyond 200 nautical miles measured from the Okinotori, to the Commission on the Limits of the Continental Shelf. However, China challenges the view of Japan. According to China, Okinotori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, so is in fact a rock as referred to in the Article 121(3) of the LOS Convention and therefore shall have no EEZ or continental shelf, even less shall it have the right to the extended continental shelf beyond 200 nautical miles. Accordingly, China requires the Commission take no action on the portions concerning Okinotori. the Note of China in relation to the Japanese Submission, available at (http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf). Also Leticia Diaz, Barry Hart Dubner and Jason Parent, according to them, Okinotori is a rock and the Japanese behavior "is out of conformity with the intention and purpose of the 1982 LOS Convention". Leticia Diaz, Barry Hart Dubner

are concerned, both of them should be given no effect for the following reasons. First, these islands are not indispensable components of the relevant areas where the delimitations are to be effected, but only incidental physical features, therefore have no independent status in the delimitation concerned. Second, these islands belong to the so-called “islands in the median zone”.¹²⁵ Since islands of this kind will influence the boundary line very much, they are usually disregarded or given nominal effect in state practice and jurisprudences. In few cases where they were given full or major effect, the islands concerned normally have large areas and big population. However, none of the Diaoyu Islands or the Dokdo is densely inhabited or reportedly has much human economic activity. What’s more important is, the sovereignty over these islands is under serious dispute between the states concerned. Third, the maritime area where the delimitation is to be carried out is an enclosed sea (for the Dokdo) or a semi-enclosed sea (for the Diaoyu Islands). In sum, because of their small area, abominable natural circumstances, midway location, as well as their sovereignty being sharply disputed, in order to achieve an equitable solution, Diaoyu Islands and the Dokdo should be disregarded in the relevant maritime delimitations.

Besides the islands, the marked disproportion between lengths of the parties’ coasts is another relevant circumstance that has been frequently taken into account in the construction of a delimitation line. Indeed, whenever there existed marked disparity between the lengths of the coastlines belonging to the parties, the ICJ and arbitral tribunals would take it into consideration as an important or even decisive circumstance and modify the preliminary line in favor of the party who had a longer coastline. The Chamber of the ICJ in the *Gulf of Maine* case considered that “in certain circumstances, the appropriate consequences may be drawn from any inequalities in the extent of the coasts of two States into the same area of delimitation.”¹²⁶ It then further elaborated on this point by stating “that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction.”¹²⁷ In that case, although the ratio between the coastal fronts of the United States and Canada on the Gulf of Maine is only 1.38:1, however, in the Chamber’s view, “This difference in length is a special circumstance of some weight, which [...] justifies a correction of the equidistance line.” At last, the Chamber adjusted the provisional median line in favor of the America.¹²⁸ In the *Libya/Malta* case, the ICJ considered that “a considerable disparity” between the coastal lengths of the parties “constitutes a relevant circum-

and Jason Parent, When is a “Rock” an “Island”- Another Unilateral Declaration Defies “Norms” of International Law, 15 Michigan State Journal of International Law 519 (2007).

125 The Diaoyu Islands are located approximately midway between the Chinese island of Taiwan and Japanese Ryukyu Islands. The shortest distance between these islets and Japanese territory as well as China’s Taiwan is some 90 nautical miles.

126 *Gulf of Maine*, para. 157.

127 *Ibid.*, para. 185.

128 *Ibid.*, paras. 184, 222.

stance which should be reflected in the drawing of the delimitation line.”¹²⁹ In this case, the relevant coast of Libya is 192 miles long, while the relevant coast of Malta (excluding the islet of Filfla) is 24 miles long. “In the view of the Court, this difference is so great as to justify the adjustment of the median line so as to attribute a larger shelf area to Libya; the degree of such adjustment does not depend upon a mathematical operation”.¹³⁰ In the *Jan Mayen* case, the ICJ found that the disparity between the lengths of the coasts of Jan Mayen and Greenland (approximately 1:9) constituted a “special circumstance” requiring modification of the provisional median line, by moving it closer to the coast of Jan Mayen.¹³¹ In the *Cameroon v. Nigeria* case, the ICJ acknowledged “that a substantial difference in the lengths of the parties’ respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line”.¹³² In the *Black Sea* case, the ICJ repeated that “Where disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made.”¹³³ In this case, the ratio of the coastal lengths of the parties is approximately 1:2.8 (Romania: Ukraine), but the ICJ “sees no such particularly marked disparities between the relevant coasts of Ukraine and Romania that would require it to adjust the provisional equidistance line”, because “Although there is doubtless a difference in the length of the relevant coasts of the Parties, the Court [...] cannot disregard the fact that a good portion of the Ukrainian coast which it considers as relevant projects into the same area as other segments of the Ukrainian coast, thus strengthening but not spatially expanding the Ukrainian entitlement”.¹³⁴ According to the Tribunal in *Barbados v. Trinidad and Tobago* case, the “reason for coastal length having a decided influence on delimitation is that it is the coast that is the basis of entitlement over maritime areas and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria. To the extent that a coast is abutting on the area of overlapping claims, it is bound to have a strong influence on the delimitation, an influence which results not only from the general direction of the coast but also from its radial projection in the area in question.”¹³⁵

Regarding the general configuration of the coasts of the parties, the ICJ in the North Sea *Continental Shelf* cases took it as one of “the factors to be taken into account” in the course of the delimitation negotiations.¹³⁶ The particular coastal configuration of this case is that three adjoining states situated on a concave coast, it follows that the two

129 Libya/Malta, para. 68.

130 *Ibid.*

131 Jan Mayen, paras. 68–69.

132 Cameroon v. Nigeria, para. 301.

133 Black Sea, para. 164.

134 *Ibid.*, paras. 215, 168.

135 Barbados v. Trinidad and Tobago, para. 239.

136 North Sea Continental Shelf, para. 101(D).

equidistance lines between Germany and its neighbors will inevitably meet at a relatively short distance from the coast of Germany, thus cutting off Germany from the further areas of the continental shelf in the North Sea.¹³⁷ Another example comes from the 2007 *Nicaragua v. Honduras* case, where the end of the parties' land boundary is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west, with the consequence that the pair of base points to be identified would assume a considerable dominance in constructing an equidistance line, and, given the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line. Moreover, the sediment carried to and deposited at sea by the River Coco has caused this part of coastline to exhibit a very active morpho-dynamism, which "might render any equidistance line so constructed today arbitrary and unreasonable in the near future".¹³⁸ In such a situation, the ICJ held that "a special configuration of the coast might require a different method of delimitation".¹³⁹ Finally, the Court decided to use the bisector method and found that "The justification for the application of the bisector method in maritime delimitation lies in the configuration of and relationship between the relevant coastal fronts and the maritime areas to be delimited. In instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method."¹⁴⁰

In addition to the coastal geography, the geological and geomorphological factors of the continental shelf area to be delimited are qualified for the inclusion of the list of relevant circumstances, because they are "pertinent to the institution of the continental shelf as it has developed within the law".¹⁴¹ In practice, the international tribunals have considered the geophysical factors in all of the continental shelf delimitations, though none of the tribunals has accepted the arguments based upon these factors on the ground that they were unpersuasive.¹⁴² Besides, the ICJ acknowledges that "the legitimate security considerations of the parties may play a role in determining the final delimitation line".¹⁴³

3.3 *An equitable solution*

Equitable solution "is the objective of every maritime delimitation based on law."¹⁴⁴

137 *Ibid.*, para. 8.

138 *Nicaragua v. Honduras*, para. 277.

139 *Ibid.*, para. 280.

140 *Ibid.*, para. 287.

141 *Libya/Malta*, para. 48.

142 For example, *Anglo-French*, para. 107; *Tunisia/Libya*, para. 66; *Gulf of Maine*, para. 46; *Libya/Malta*, para. 41.

143 *Black Sea*, para. 204. Also *Libya/Malta*, para. 51.

144 *Jan Mayen*, para. 70.

In order to demonstrate the equity of the delimitation line, the international tribunals often resort to the test of proportionality and use it “check the line of delimitation that might have been arrived at in consideration of various other factors.”¹⁴⁵ This test stemmed from the findings of the ICJ in the *North Sea Continental Shelf* cases, where the Court emphasized that a delimitation effected according to equitable principles ought to bring about “a reasonable degree of proportionality” between the extent of the maritime areas appertaining to the states concerned and the lengths of their respective coastlines.¹⁴⁶ Though the Tribunal in the Anglo-French case made some reservations to these findings,¹⁴⁷ the ICJ expressly put forward the concept “test of proportionality” in the *Tunisia/Libya* case and treated it “as an aspect of equity”.¹⁴⁸ Later, the emphasis of the checking shifted from whether the delimitation line brings about “a reasonable degree of proportionality” to whether the line leads to “any significant disproportionality”.¹⁴⁹ The ICJ considered in the Black Sea case that “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.”¹⁵⁰ Meanwhile, the Court emphasized that

“This checking can only be approximate. Diverse techniques have in the past been used for assessing coastal lengths, with no clear requirements of international law having been shown as to whether the real coastline should be followed, or baselines used, or whether or not coasts relating to internal waters should be excluded. The Court cannot but observe that various tribunals and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable and still required adjustment. This remains in each case a matter for the Court’s appreciation, which it will exercise by reference to the overall geography of the area.”¹⁵¹

Besides the test of proportionality, the tribunals have ascertained the equity of the delimitation line by proving that the overall result was not “likely to entail catastrophic

145 *Barbados v. Trinidad and Tobago*, para. 240.

146 *North Sea Continental Shelf*, para. 98. The ICJ in these cases called it as “[a] final factor to be taken account of.” *Ibid.*

147 The Tribunal “does not consider that the adoption in the *North Sea Continental Shelf* cases of the criterion of a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines means that this criterion is one for application in all cases. On the contrary, it was the particular geographical situation of three adjoining States situated on a concave coast which gave relevance to that criterion in those cases”. *Anglo-French*, para. 99.

148 *Tunisia/Libya*, para. 131.

149 *Black Sea*, para. 210.

150 *Ibid.*, para. 122.

151 *Ibid.*, paras. 212-213.

repercussions for the livelihood and economic well-being of the population of the countries concerned”,¹⁵² or “that the proposed demarcation will not have a radical impact on the existing pattern of fishing in the area”.¹⁵³

4. Conclusions

The continental shelf delimitation is a distinct type of delimitation, standing side by side with the EEZ delimitation and not absorbed by the latter. The legality of the so-called single maritime delimitation is based upon the agreement of the states concerned, expressly or tacitly. Where one of the parties expressly objects to the single delimitation, the international tribunal to which the particular dispute has been submitted, will have no competence to undertake a single delimitation, but it has discretion to delimit two lines that are theoretically separate but in fact coincident for the seabed and the superjacent waters respectively.

Maritime delimitation, including the establishment of the provisional arrangements, must be effected through the agreement of the states concerned. Though having been used widely, equidistance is a delimitation method, not a binding or appropriate starting point for all delimitations. Equitable result is superior to the application of the equidistance method. One basic requirement of equity is to giving equal treatment to states with equal natural situations, while giving unequal treatment to states with unequal natural situations. An equidistance line is not appropriate for the delimitation of a disrupted continental shelf, for it will cause areas which are the natural prolongation of the territory of the wide-margin state to be attributed to the narrow-margin state. Coastal geography is the most important relevant circumstance, mainly including islands, coastal configuration and the marked disparity between the lengths of the coastlines belonging to the states concerned. Besides, the geological and geomorphological factors of the relevant seabed area should also be considered. In order to demonstrate the equity of the delimitation line, the test of proportionality may be a useful means.

152 Gulf of Maine, paras. 237–238.

153 St. Pierre and Miquelon, para. 85.

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