

International maritime delimitation process

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ABSTRACT

International maritime delimitation is a process consists of several stages. Recently, international tribunals tend to follow a uniform process for delimitation, that is, first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line. However, the ultimate goal of maritime delimitation is to achieve an equitable solution, which is the requirement of the governing rule and is of higher rank than the application of equidistance. Where equidistance can not contribute to effecting an equal division of the area of overlapping entitlements, which would happen in some continental shelf delimitation, it is not appropriate to start the delimitation by a provisional equidistance line. The role of the relevant circumstances in delimitation has shifted from indicating the delimitation method to verifying that the result of the application of the provisional equidistance line, is not, in light of the particular circumstances of the case, perceived as inequitable, and, if necessary, to modifying the provisional line.

Key words: maritime delimitation, equidistance, relevant circumstances, disproportionality test

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1. Introduction

According to the United Nations Convention on the Law of the Sea (LOS Convention),¹ the delimitation of the continental shelf/exclusive economic zone (EEZ) between states with opposite or adjacent coasts “shall be effected by agreement on the basis of international law [...], in order to achieve an equitable solution”.² On the other hand, the rule of customary law in this regard, which “has been developed since 1958 in case-law and State practice”,³ is based upon equitable principles and relevant circumstances,⁴ and thus called “equitable principles/relevant circumstances rule”.⁵

The International Court of Justice (ICJ) has repeated that maritime “[d]elimitation is a process”.⁶ The recent decisions in this regard indicate that the international tribunals tend to pay much more attention to the process of delimitation than before. Particularly, in its latest decision on maritime delimitation dispute, the *Black Sea* case (Romania v. Ukraine),⁷ the ICJ expounded the process of delimitation in the name of “delimitation methodology”, and declared 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*”⁸ (emphasis added). From the perspective of the development of international rules on maritime delimitation, it is certainly important to examine the delimitation stages that the ICJ indicated in this case. Meanwhile, it is equally important to reveal how the delimitation process has evolved within the jurisprudence of the international tribunals, as well as the reasons hidden behind this evolution. These are the purposes of this paper. Indeed, the international tribunals have applied three different kinds of process in the maritime delimitation until now. The first three parts of the paper are devoted to the three processes that have been followed by the international tribunals in consequence, while the fourth part will focus on the reasons behind the evolution, and suggest what delimitation process should be followed in the future.

1. Opened for signature on 10 Dec. 1982 and entered into force on 16 Nov. 1994. <http://www.UN.org/depts/los>.

2. LOS Convention, arts. 74(1) and 83(1)

3. Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), *ICJ Reports* 2001, p.40 [Qatar v. Bahrain], para.231.

4. See Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), *ICJ Reports* 1993, p.38 [Jan Mayen], para.56.

5. Qatar v. Bahrain, para.231.

6. North Sea Continental Shelf (FRG/Den.; FRG/Neth.). *ICJ Reports* 1969, p.3 [North Sea Continental Shelf], para.18. See also *ibid.*, para.20; Continental Shelf (Tunisia/Libya), *ICJ Reports* 1982, p.18 [Tunisia/Libya], paras.44&106; Delimitation in the Gulf of Maine (Canada/U.S.), *ICJ Reports* 1984, p.246 [Gulf of Maine], paras.115&215; Continental Shelf (Libya/Malta), *ICJ Reports* 1985, p.13 [Libya/Malta], para.65.

7. Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 Feb. 2009, *ICJ Reports* 2009, p.61 [Black Sea].

8. Black Sea, para.115.

2. “Relevant circumstances → delimitation method (delimitation line) → proportionality test or other considerations”

In order to delimit an equitable boundary, a court has to resort to a method or combination of methods. Before the 1985 *Libya/Malta* case, the ICJ had always emphasized that “each specific case is, in the final analysis, different from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined *in relation to each particular case and its specific characteristics*”⁹ (emphasis added). It followed that in international law there would be no single method of delimitation that may be applied to all or most delimitations. In order to find out a method which can result in an equitable solution in a given delimitation case, one should have regard for “its peculiar circumstances”,¹⁰ because “the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case [...] has therefore to be determined in the light of those circumstances.”¹¹ Thus, examination of the relevant circumstances of a particular case is bound to be the first stage in such maritime delimitation process as dominated by the “monotypic” doctrine, with the view to determine the appropriate method of delimitation. The second stage is to draw a delimitation line by the use of the method determined in the first stage. Finally, proportionality test and/or other circumstances may be resorted to, in order to make sure that the delimitation line as constructed is equitable. In short, this kind of delimitation process can be summarized as follows: “relevant circumstances → delimitation method (delimitation line) → proportionality test or other considerations”.

Before the 1993 *Jan Mayen* case, the ICJ followed this three-stage process in maritime delimitation by large. Thus, in the 1982 *Tunisia/Libya* case, after examining the relevant circumstances which characterize the delimitation in the case, the ICJ decided that it should divide the delimitation area into two sectors and apply a specific method of delimitation in each sector to achieve an overall equitable solution. In the sector closer to the coast of the parties, influenced by the conducts of the parties in respect of their petroleum concessions, the ICJ selected a straight line that run at a bearing of approximately 26 degrees east of north; while in the second sector, the delimitation line was to run parallel to a

9. Gulf of Maine, para.81.

10. Tunisia/Libya, para.132.

11. Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 Jun. 1977, reprinted in 18 ILM 397 (1979) [Anglo-French], para.97.

line drawn from the most westerly point of the Gulf of Gabes bisecting the angle formed by a line from that point to Ras Kaboudia on the Tunisian coast and a line drawn from that same point along the seaward coast of the Kerkennah Islands (Tunisia).¹² Finally, the ICJ calculated the ratio between the relevant coastlines of the parties and the ratio between the sea-bed areas appertaining to each party following the method indicated by the Court, and concluded that “This result [...] seems to the Court to meet the requirements of the test of proportionality as an aspect of equity.”¹³

In the 1984 *Gulf of Maine* case between the US and Canada, the Chamber of the ICJ, having considered the relevant circumstances of the case, decided that the delimitation line should consist of three segments.¹⁴ As regards the first segment, the one belonging to the innermost sector of the Gulf, the Chamber drew from point A, the obligatory point of departure for the delimitation line chosen by the parties, two lines respectively perpendicular to the two basic coastal lines of the parties, and selected the bisector of the reflex angle formed by these perpendiculars as the course of the delimitation line.¹⁵ Regarding the second segment close to the mouth of the Gulf, the Chamber delimited an adjusted median line.¹⁶ As for the third segment outside of the Gulf, the Chamber drew a perpendicular to the closing line of the Gulf.¹⁷ Finally, the Chamber ascertained the equity of the third segment of the delimitation line by proving that the overall result of this sector was not “likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned”.¹⁸ However, the Chamber thought that “such verification is not absolutely necessary where the first two segments of the line are concerned.”¹⁹ Thus, for the first segment of the delimitation line, the Chamber followed a two-stage process: “relevant circumstances → delimitation method (delimitation line)”. Attention should be paid to the second segment of the delimitation line, where the Chamber considered that a “two-stage operation” was entailed: “it has first to make its choice of an appropriate practical method for use in provisionally establishing a basic delimitation, and [...] it must then ascertain what corrections to it are rendered indispensable by the special circumstances of the case”.²⁰ In fact, the Chamber applied a three-stage process in this segment: having emphasized the geographic situation that the coasts of the two parties were opposite in this sector, the Chamber delimited a median line, and then made a correction to the line, taking the “difference in length between the respective coastlines

12. Tunisia/Libya, para.133.

13. *Ibid.*, para.131.

14. Gulf of Maine, paras.207-208.

15. *Ibid.*, para.213.

16. *Ibid.*, para.222.

17. *Ibid.*, para.224.

18. Gulf of Maine, paras.237-238.

19. *Ibid.*, para.231.

20. *Ibid.*, para.215.

of the two parties which border on the delimitation area” and the location of the small Seal Island (Canada) into account.²¹ Thus, to some extent, the process of “provisional equidistance line → special circumstances → delimitation line” was followed in the delimitation of the second segment. Of course, provisionally drawing an equidistance line had not been granted the status of the starting point of the delimitation process until then.

In the 1985 *Libya/Malta* case, the ICJ, having considered the arguments of the parties, declared that “the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.”²² Accordingly, a provisional median line was drawn as the first step in the process of delimitation, then this median line was adjusted by being transposed northwards through 18' of latitude due to the marked difference between the length of the coastlines of the parties,²³ and finally, the Court resorted to the test of proportionality to prove the equity of the result.²⁴ Thus, the ICJ followed a four-stage process in this case: “relevant circumstances → provisional equidistance line → special circumstances → delimitation line → proportionality test”. Except for the last stage concerning the proportionality test, the delimitation process in this case is almost the same as the process that the Chamber followed in the *Gulf of Maine* case for the delimitation of the second segment. However, though an equidistance line was used as the provisional delimitation line in both of these two cases, there exist some fundamental differences between them in the sense that, the ICJ in the *Libya/Malta* case emphasized the close relationship between the entitlement to the maritime area and the delimitation rules, while the Chamber did not pay much attention to this issue in the *Gulf of Maine* case. According to the ICJ in the *Libya/Malta* case, “It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.”²⁵ On the other hand, the ICJ pointed out in the last part of the Judgment that “The fact that the Court has found that, in the circumstances of the present case, the drawing of a median line constitutes an appropriate first step in the delimitation process, should not be understood as implying that an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite States.”²⁶ In other words, equidistance is not “the only permissible point of departure. The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation, even from the outset.”²⁷ In this sense, the process

21. *Ibid.*, paras.218&222.

22. *Libya/Malta*, para.62.

23. *Ibid.*, para.79.

24. *Ibid.*, paras.74-75.

25. *Ibid.*, para.61.

26. *Ibid.*, para.77.

of delimitation in the *Libya/Malta* case continued to be dominated by the “monotypic” doctrine, though the ICJ has for the first time emphasized that the application of equity “should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.”²⁸

The arbitral tribunals generally adhered to the same delimitation process during this period of time too. In the 1977 *Anglo-French* case, the arbitral court declared that it “will begin by identifying the geographical and other features which establish the legal framework for its decision regarding the course of the continental shelf boundary”.²⁹ Having considered the actual circumstances of the Channel Islands region, the arbitral court decided that “the situation demands a twofold solution. First, in order to maintain the appropriate balance between the two States in relation to the continental shelf as riparian States of the Channel with approximately equal coastlines, [...] the primary boundary between them shall be a median line, [and] [...] the Channel Islands themselves are to be disregarded”.³⁰ The second part of the solution is to delimit a second boundary to the north and west of the Channel Islands, thus leaving to the Channel Islands a 12- nautical-mile zone of seabed and subsoil.³¹ However, the arbitral court did not resort to the proportionality test as the last step of delimitation. So the tribunal court applied a two-stage process in this case: “relevant circumstances → delimitation method (delimitation line)”.

In the 1985 *Guinea/Guinea-Bissau* case, the arbitral tribunal, by referring to circumstances which it considered relevant in the present case, particularly the nature of the coastlines of the parties and the general configuration of the West African coast, delimited a line.³² Then the tribunal, by considering other circumstances, including, *inter alia*, the structure and nature of the continental shelf, the proportionality of the surfaces to be attributed to the lengths of the coasts, the economic and security circumstances, established whether the chosen line effectively led to an equitable result.³³ So the process of delimitation in this case can be summarized as: “relevant circumstances → delimitation method (delimitation line) → proportionality and other circumstances”.

In the 1992 *St. Pierre and Miquelon* case between Canada and France, the arbitral tribunal declared that “The delimitation process begins, as a rule, by identifying [...] the geographical context of the dispute”.³⁴ After examining the geographical factors and the

27. *Ibid.*, para.43.

28. *Ibid.*, para.45.

29. *Anglo-French*, para.232.

30. *Ibid.*, para.201.

31. *Ibid.*, paras.202-203.

32. *Guinea/Guinea-Bissau Maritime Delimitation Case*, Decision of 14 Feb. 1985, reprinted in 77 *International Law Reports* 636 (1988) [*Guinea/Guinea-Bissau*], paras.90-112.

33. *Ibid.*, paras.113-129.

34. *Delimitation of the Maritime Areas between Canada and France*, Award of 10 Jun. 1992, reprinted in 31 *ILM* 1145 (1992) [*St. Pierre and Miquelon*], para.25.

arguments of the parties, the tribunal decided that, in order to reach an equitable result, it was necessary to examine separately two different sectors of the delimitation area.³⁵ With respect to the western seaward projection of the French islands' coasts, the tribunal thought "A reasonable and equitable solution for the western sector would be to grant to Saint Pierre and Miquelon an additional twelve nautical miles from the limit of its territorial sea, for its exclusive economic zone".³⁶ In the second sector towards the south and the southeast, the French islands were granted a corridor- shaped maritime zone, extending to the distance of 200 nautical miles with approximately 10.5 nautical miles in breadth.³⁷ Then, the tribunal examined the relevance of the fishery and mineral resources to assure itself that the solution reached was not "radically inequitable".³⁸ Finally, the tribunal checked the result by resorting to the proportionality test and concluded that the requirements of this test had been satisfied.³⁹ Therefore, the delimitation process in this case is: "relevant circumstances → delimitation method (delimitation line) → resources considerations → proportionality test".

The following table is the summary of the delimitation processes that were followed by the international tribunals before the 1993 *Jan Mayen* case. One can learn from it that within all of these delimitation processes, the first stage is to examine the relevant circumstances of the particular case in order to determine the method which can be used to establish a delimitation line. On the other hand, these processes show some variance over the stages following the establishment of the line. While in five operations of delimitation the international tribunals continued to resort to the proportionality test or other considerations,⁴⁰ they did not do so in the other three delimitations.⁴¹ Furthermore, while the test of proportionality was the final check in three delimitations,⁴² it was not assigned to play this role in other cases.

35. St. Pierre and Miquelon, para.66.

36. *Ibid.*, para.69.

37. *Ibid.*, para.71.

38. *Ibid.*, para.88.

39. *Ibid.*, para.93.

40. They are: the Tunisia/Libya case; the third segment of delimitation in the Gulf of Maine case; the Libya/Malta case; the Guinea/Guinea-Bissau case, and the St. Pierre and Miquelon case.

41. They are: the first two segments of delimitation in the Gulf of Maine case, and the Anglo-French case.

42. They are: the Tunisia/Libya case; the Libya/Malta case, and the St. Pierre and Miquelon case.

Table 1. The delimitation process before 1993

Cases		Delimitation process
<i>Tunisia/Libya</i>		"relevant circumstances → delimitation method (delimitation line) → proportionality test"
<i>Gulf of Maine</i>	segment 1	"relevant circumstances → delimitation method (delimitation line)"
	segment 2	"relevant circumstances → delimitation method (provisional equidistance line) → special circumstances → delimitation line"
	segment 3	"relevant circumstances → delimitation method (delimitation line) → resource"
<i>Libya/Malta</i>		"relevant circumstances → provisional equidistance line → special circumstances → delimitation line → proportionality test"
<i>Anglo-French</i>		"relevant circumstances → delimitation method (delimitation line)"
<i>Guinea/Guinea-Bissau</i>		"relevant circumstances → delimitation method (delimitation line) → proportionality and other circumstances"
<i>St. Pierre and Miquelon</i>		"relevant circumstances → delimitation method (delimitation line) → resources considerations → proportionality test"

Source: made by the author.

3. "Provisional equidistance line → special circumstances → delimitation line"

This delimitation process stemmed from the provisions of Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone,⁴³ which concerns the delimitation of the territorial sea and has been regarded as having a customary character.⁴⁴ Article 15 of the LOS Convention is virtually identical to it, providing 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." This provision is often referred to as the "equidistance/special circumstances" rule. In the view of the ICJ, "The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances".⁴⁵ Thus, the

43. Done on 29 Apr. 1958 and entered into force on 10 Sep. 1964. United Nations, Treaty Series 516, p.205.

44. Qatar v. Bahrain, para.176.

45. *Ibid.*

delimitation process of the territorial sea governed by this rule is: “provisional equidistance line → special circumstances → delimitation line”.

As far as the delimitation of the continental shelf is concerned, the “equidistance/special circumstances” rule was also contained in Article 6 of the 1958 Convention on the Continental Shelf.⁴⁶ The ICJ held in the 1969 *North Sea Continental Shelf* cases that “A rule was of course embodied in Article 6 of the Convention”, “according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis”.⁴⁷ In the *Anglo-French* case, the arbitral tribunal clearly declared that “Article 6 [...] does not formulate the equidistance principle and ‘special circumstances’ as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance-special circumstances rule.”⁴⁸ In the delimitation concerning the Atlantic region, which was governed by Article 6 of the 1958 Convention, the tribunal began by employing the equidistance method, and then adjusted the result in the light of special circumstances, namely the existence of the Scilly Isles.⁴⁹ This was the first time that the process of “provisional equidistance line → special circumstances → delimitation line” had been followed by the international tribunal in the continental shelf delimitation.

In the 1993 *Jan Mayen* case, the ICJ was asked to delimit the continental shelf boundary and the fishery zone boundary between Denmark and Norway: while Article 6 of the 1958 Convention was applicable to the delimitation of the continental shelf, the customary law governed the delimitation of the fishery zone.⁵⁰ In this case, the Court not only accepted the expression of “equidistance/special circumstances rule” contained in Article 6 of the 1958 Convention, but also found that “It cannot be surprising if an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary.”⁵¹

46. Article 6 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”. The Convention on the Continental Shelf was adopted on 29 Apr. 1958 and entered into force on 10 Jun. 1964. United Nations, *Treaty Series* 499, p.311.

47. *North Sea Continental Shelf*, para.69.

48. *Anglo-French*, para.68.

49. *Ibid.*, para.248.

50. *Jan Mayen*, para.44.

51. *Ibid.*, para.56.

As regards the delimitation of the continental shelf, the Court held that “since it is governed by Article 6 of the 1958 Convention, and the delimitation is between coasts that are opposite, it is appropriate to begin by taking provisionally the median line between the territorial sea baselines, and then enquiring whether ‘special circumstances’ require ‘another boundary line’. *Such a procedure is consistent with the words in Article 6*, ‘In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line’”⁵² (emphasis added). The Court continued to add that “even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether ‘special circumstances’ require any adjustment or shifting of that line”.⁵³ As regards the delimitation of the fishery zone, in the view of the Court, it was also “proper to begin the process of delimitation by a median line provisionally drawn.”⁵⁴ Then, having completed its examination of the geophysical and other circumstances, the ICJ decided to adjust the provisional median line such as to attribute a larger area of maritime space to Denmark, in the light of the disparity of coastal lengths between the parties as well as the need to ensure an equitable access to the resources in this region.⁵⁵ Compared with the process of delimitation in the *Libya/Malta* case, the ICJ in this case did not examine the relevant circumstances prior to its decision that a provisional equidistance line should be employed as the starting point for the delimitation, nor did the Court repeat the warning it made in 1985 that one should not understand that “an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite States”.⁵⁶ By contrast, the ICJ in the present case emphasized that “it is in accord with precedents to begin with the median line as a provisional line”,⁵⁷ because “in the case of opposite coasts [...], the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading prima facie to an equitable result.”⁵⁸ Besides, the Court, after adjusting the provisional median line in the light of the special circumstances of the case, did not resort to the proportionality test as the final check. Thus, the *Jan Mayen* case is the first case where the international tribunal applied the “provisional equidistance line → special circumstances → delimitation line” process in such maritime delimitation as governed by the customary law,⁵⁹ though limited to the delimitation between the opposite coasts.

52. *Ibid.*, para.49.

53. *Ibid.*, para.51.

54. *Ibid.*, para.53.

55. *Ibid.*, paras.90-92.

56. *Libya/Malta*, para.75.

57. *Jan Mayen*, para.51.

58. *Ibid.*, para. 56.

59. The applicable law to the delimitation of the fishery zone in the *Jan Mayen* case was customary rule. See *Jan Mayen*, para.52.

In the 2001 *Qatar v. Bahrain* case, where the ICJ was required to draw “a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to” the parties,⁶⁰ the Court followed the same process as in the *Jan Mayen* case, expressly stating that “For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.”⁶¹ The Court further noted that “the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule [...] with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated”.⁶² It is worth noting that, compared with the *Jan Mayen* case where the delimitation was to be effected between opposite coasts, the coasts of the parties in the northern sector of the present case “are no longer opposite to each other but are rather comparable to adjacent coasts”.⁶³ Thus, the presumption in favour of equidistance, established in the case law relating to states with opposite coasts, began to apply in the case of states with adjacent coasts.⁶⁴

One year later, the ICJ followed the same process again in the *Cameroon v. Nigeria* case to determine “a single line of delimitation for the coincident zones of jurisdiction”,⁶⁵ where the coasts of the parties are adjacent.⁶⁶ The Court declared that it “has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’”.⁶⁷ At last, the ICJ for its first time delimited a strict equidistance line as the boundary between the respective maritime areas of the parties.⁶⁸

However, in the 2007 *Nicaragua v. Honduras* case, the ICJ did not follow the process of “provisional equidistance line → special circumstances → delimitation line” in the single maritime delimitation between the adjacent coasts of the parties’ mainland,

60. *Qatar v. Bahrain*, *ibid.*, paras.31&168.

61. *Ibid.*, para.230.

62. *Ibid.*, para.231.

63. *Ibid.*, para.170.

64. See 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 Sep. 2007 [*Guyana v. Suriname*], para.338.

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

66. *Cameroon v. Nigeria*, para.30.

67. *Ibid.*, paras.288&290.

68. *Ibid.*, paras.305-307.

because “[g]iven the set of circumstances in the current case it is impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties’ mainland coasts”.⁶⁹ The particular circumstances of the case are, Cape Gracias a Dios, where the Nicaragua-Honduras land boundary ends, 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 on either bank of the River Coco at the tip of the Cape 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 the coastline to the north and south of the Cape to exhibit a very active morpho-dynamism, which “might render any equidistance line so constructed today arbitrary and unreasonable in the near future”.⁷⁰ Therefore, it was the physical geography that made the ICJ give up the application of a provisional equidistance line, though it also noted that neither party had as its main argument a call for an equidistance line as the most suitable method of delimitation.⁷¹ At last, the ICJ applied the bisector method to bisect “the angle created by the linear approximations of coastlines”.⁷² It is worth noting that, the ICJ not only emphasized that “equidistance remains the general rule”,⁷³ but also explained the reason why the bisector method was chosen in the following words: this method “has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate”, and “may be seen as an approximation of the equidistance method” in instances where any base points that could be determined by the Court are inherently unstable.⁷⁴ Thus, the ICJ more complemented the process of “provisional equidistance line → special circumstances → delimitation line” than betrayed it in this case.

69. Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 Oct. 2007, *ICJ Reports* 2007, p.659 [Nicaragua v. Honduras], para.280.

70. *Ibid.*, para.277.

71. *Ibid.*, para.275. The ICJ noted in the Tunisia/Libya case that “The Court must take this firmly expressed view of the Parties into account. If however the Court were to arrive at the conclusion, after having evaluated all relevant circumstances, that an equidistance line would bring about an equitable solution of the dispute, there would be nothing to prevent it from so finding even though the Parties have discarded the equidistance method.” Tunisia/Libya, para.110.

72. Nicaragua v. Honduras, paras.287-298.

73. *Ibid.*, para.281.

74. *Ibid.*, para.287. In the view of the ICJ, the equidistance method approximates the relationship between two parties’ relevant coasts by taking account of the relationships between designated pairs of base points, while the bisector method comparably seeks to approximate the relevant coastal relationships, but does so on the basis of the macro-geography of a coastline as represented by a line drawn between two points on the coast. *Ibid.*, para.289. The Court added that one of the practical advantages of the bisector method is that a minor deviation in the exact position of endpoints, which are at a reasonable distance from the shared point, will have only a relatively minor influence on the course of the entire coastal front line. *Ibid.*, para. 294.

4. “Provisional equidistance line → relevant circumstances → delimitation line → disproportionality test”

In the 2009 *Black Sea* case, the ICJ changed its process of delimitation that it had consistently followed since the *Jan Mayen* case, and expounded a three-stage process for maritime delimitation: “provisional equidistance line → relevant circumstances → delimitation line → disproportionality test”. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. “So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case [...]”. So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts.⁷⁵ The construction of the provisional equidistance line is “heavily dependent on the physical geography”, and at this initial stage the Court is not yet concerned with any relevant circumstances that may obtain.⁷⁶ In the view of the ICJ, such an approach is “[i]n keeping with its settled jurisprudence on maritime delimitation”.⁷⁷ At the second stage, the Court will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result, because the course of the final line should result in an equitable solution.⁷⁸ Within this context, the ICJ noted that “the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result”.⁷⁹ 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.⁸⁰

Compared with the delimitation practice of the ICJ during the period from the *Jan Mayen* case till the *Nicaragua v. Honduras* case, the delimitation process defined by the ICJ in the *Black Sea* case resumed resorting to the disproportionality/proportionality test as the final stage, which had been applied by the ICJ before the *Jan Mayen* case as well as the arbitral tribunals. Moreover, though the ICJ has tended to start the delimitation process by a provisional equidistance line since the *Jan Mayen* case, it remained to treat the “equitable principles/relevant circumstances” as the basic rule or method of the delimitation,

75. *Black Sea*, para.116.

76. *Ibid.*, para.118.

77. *Ibid.*

78. *Ibid.*, para.120.

79. *Nicaragua v. Honduras*, para.271.

80. *Black Sea*, para.122.

thus usually mentioned it before the commencement of the delimitation operation.⁸¹ According to the ICJ, the “equitable principles/relevant circumstances” “involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’”.⁸² However, in the *Nicaragua v. Honduras* case, because the ICJ could not construct a provisional equidistance line as the starting point of the delimitation due to the physical geography of the case,⁸³ the ICJ retreated back from its previous position and stated that “As to the plotting of a single maritime boundary [...], the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result”⁸⁴ (emphasis added). The words “may” and “also” imply that the ICJ here listed the equitable principles/relevant circumstances method, on the one hand, and the other methods more than the equidistance, such as the bisector used in this case, on the other hand, side by side. Since equidistance, which is the first step in the equitable principles/relevant circumstances method, “remains the general rule”,⁸⁵ the equitable principles/relevant circumstances method remains the basic method in the single maritime delimitation. In the *Black Sea* case, the ICJ repeated its views concerning the equitable principles/relevant circumstances method that it made two years earlier in the *Nicaragua v. Honduras* case, however, it did so only in the second stage of the delimitation process which it indicated in this case, instead of in the general part, as it did before.⁸⁶ Thus, the ICJ in this case did not treat the equitable principles/relevant circumstances method as the general rule for maritime delimitation. Furthermore, the way in which the ICJ mentioned the equitable principles/relevant circumstances method seemed that it listed this method side by side with equidistance that it mentioned in the first stage. Thus, it can be argued that the ICJ seemingly intended to replace the equitable principles/relevant circumstances method with the new one that it put forward in this case, which can be called “equidistance/relevant circumstances” method. Though the ICJ did not use this term officially in the *Black Sea* case, the arbitral tribunal in the *Barbados v. Trinidad and Tobago* case did use it,⁸⁷ and the arbitral tribunals had already followed the process of delimitation mentioned by the ICJ in the *Black Sea* case since 1999.

81. *Qatar v. Bahrain*, para.230; *Cameroon v. Nigeria*, para.288.

82. *Cameroon v. Nigeria*, para.288; *Nicaragua v. Honduras*, para.271.

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

84. *Ibid.*, para.271.

85. *Ibid.*, para.281.

86. *Black Sea*, paras.120&115-116.

87. 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 Apr. 2006, reprinted in XXVII RIAA 147 (2008) [*Barbados v. Trinidad and Tobago*], para.242.



Source: *Black Sea case*, ICJ Judgment, p.133.

Figure 1. The maritime delimitation in the 2009: *Black Sea case*

In the 1999 *Eritrea/Yemen* arbitration, the arbitral tribunal declared that “It is a generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention”,⁸⁸ so “the Tribunal has taken as its starting point, as its fundamental point of departure, that, as between opposite coasts, a median line obtains.”⁸⁹ After a careful consideration of the arguments of the parties, the general question of fishing in the Red Sea, the petroleum agreements, and the traditional fishing regime in this area, the tribunal

88. *Eritrea-Yemen Arbitration (Second Stage: Maritime Delimitation)*, Permanent Court of Arbitration, Award of 17 Dec. 1999, reprinted in XL ILM 983 (2002) [*Eritrea/Yemen*], para.131.

89. *Ibid.*, para.83.

decided that “the international boundary shall be a single all-purpose boundary which is a median line and that it should, as far as practicable, be a median line between the opposite mainland coastlines. This solution is not only in accord with practice and precedent in the like situations but is also one that is already familiar to both Parties”.⁹⁰ Having determined the effect of islands present in the delimitation area upon the median line, the tribunal delimited the boundary line. Finally, the tribunal resorted to the proportionality test and concluded that “the line of delimitation it has decided upon results in no disproportion.”⁹¹ Therefore, the process of delimitation in this case is: “provisional equidistance line → circumstances → delimitation line → proportionality test”.

In the 2006 *Barbados v. Trinidad and Tobago* case, the arbitral tribunal stated in the section titled “The delimitation process” that, “The determination of the line of delimitation [...] normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result [...]. This approach is usually referred to as *the ‘equidistance/relevant circumstances’ principle*”⁹² (emphasis added). And the tribunal decided that it would undertake this process of delimitation in this case.⁹³ Having drawn the delimitation line, the tribunal stated that “it remains to examine the outcome in the light of proportionality, as the ultimate test of the equitableness of the solution”.⁹⁴ However, the tribunal did not calculate the ratio of the lengths of the coasts and the ratio of the areas appertaining to parties, but emphasized that “proportionality is not a mathematical exercise that results in the attribution of maritime areas as a function of the length of the coasts of the Parties or other such ratio calculations, an approach that instead of leading to an equitable result could itself produce inequity. Proportionality is a broader concept, it is a sense of proportionality, against which the Tribunal can test the position resulting from the provisional application of the line that it has drawn, so as so avoid gross disproportion in the outcome of the delimitation”.⁹⁵ So the process of delimitation in this case is: “provisional equidistance line → relevant circumstances → delimitation line → proportionality test”.

90. *Ibid.*, para.132.

91. *Ibid.*, para.168.

92. *Barbados v. Trinidad and Tobago*, para.242. The arbitral tribunal here referred to the *Qatar v. Bahrain* case and the *Cameroon v. Nigeria* case.

93. *Barbados v. Trinidad and Tobago*, para.245.

94. *Ibid.*, para.376.

95. *Ibid.* See also *ibid.*, paras.238-240.

In the 2007 arbitration between Guyana and Suriname, the tribunal declared that “In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance. The process of delimitation is divided into two stages. First the court or tribunal posits a provisional equidistance line which may then be adjusted to reflect special or relevant circumstances.”⁹⁶ It went on to add that “Articles 74 and 83 of the Convention require that the Tribunal achieve an ‘equitable’ solution. The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution. The Tribunal will follow this method in the present case.”⁹⁷ Finally, the tribunal checked the relevant coastal lengths for proportionality and came up with nearly the same ratio of relevant areas as it did for coastal frontages.⁹⁸ Thus, the process of delimitation in this case is: “provisional equidistance line → relevant circumstances → delimitation line → proportionality test”.

5. The future: “provisional equidistance line → relevant/special circumstances → delimitation line”

5.1 *Relevant/special circumstances*

Compared with the delimitation process of “relevant circumstances → delimitation method (delimitation line) → proportionality test” that was generally followed by the international tribunals before the 1993 *Jan Mayen* case, the most distinguishing change in the delimitation methodology indicated by the ICJ in the *Black Sea* case is the exchange of the places between “relevant circumstances” and “delimitation method (equidistance)” in the process of delimitation. It reflects the change of the roles that the relevant circumstances are designed to play in achieving an equitable solution.

In the past, the relevant circumstances- “This concept can be described as a fact necessary to be taken into account in the delimitation process”,⁹⁹ was used to indicate what the delimitation method is to be.¹⁰⁰ In the words of the arbitral court of the *Anglo-French*

96. *Guyana v. Suriname*, para.335.

97. *Ibid.*, para.342.

98. *Ibid.*, para.392. Besides, the tribunal observed that as the parties had not chosen to argue the relative distribution of living and non-living natural resources throughout these zones, the tribunal did not take these matters into account. *Ibid.*

99. *Jan Mayen*, para.55.

case, “whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances.”¹⁰¹ Therefore, “it is the geographical and other circumstances of any given case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation.”¹⁰² And if the evaluation of relevant circumstances “leads the Court to an equitable delimitation on a different basis, there is no need for it to give any further consideration to equidistance”.¹⁰³ In this sense, relevant circumstances under customary law refer to those circumstances “which are ‘relevant’ to the choice of the most equitable method of delimitation (including equidistance as a possible method)”,¹⁰⁴ rather than to those modifying the application of the prescribed method,¹⁰⁵ therefore different from “special circumstances” of Article 6 of the 1958 Convention, which “are those circumstances which might modify the result produced by an unqualified application of the equidistance principle”.¹⁰⁶ Thus, though the two concepts both are intended to enable the achievement of an equitable result,¹⁰⁷ the ways in which they function are different: while the “relevant circumstances” positively pursue the equitable solution, the “special circumstances” passively avoid the inequitable result.

However, under the process of “provisional equidistance line → relevant circumstances → delimitation line → disproportionality test”, the ICJ “is not yet concerned with any relevant circumstances that may obtain” at the initial stage of delimitation,¹⁰⁸ and the function of the relevant circumstances “is to verify that the provisional equidistance line, drawn by the geometrical method from the determined base points on the coasts of the Parties *is not*, in light of the particular circumstances of the case, *perceived as inequitable*. If such would be the case, the Court should adjust the line in order to achieve the ‘equitable solution’”¹⁰⁹ (emphasis added). Thus, “Although it is a matter of categories which are different in origin and in name”, the relevant circumstances under customary law tend to be assimilated to the special circumstances under Article 6 of the 1958 Convention.¹¹⁰

100. Evans, M. D. (1989) *Relevant Circumstances and Maritime Delimitation*, p.80.

101. *Anglo-French*, para.70.

102. *Ibid.*

103. *Tunisia/Libya*, para.110.

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

105. Evans, M. D. *ibid.*, p.80.

106. *Jan Mayen*, para.55.

107. *Ibid.*, para.56.

108. *Black Sea*, para.118.

109. *Ibid.*, para.155.

110. *Jan Mayen*, para.56. See also the *Nicaragua v. Honduras* case, where the ICJ used the term “legally relevant ‘special circumstances’”, *Nicaragua v. Honduras*, para.304.

5.2 Equidistance

The direct reason behind the change of the function of the relevant circumstances in the maritime delimitation is that, a provisional equidistance line has been recognized as the starting point for most of maritime delimitations, so it is not necessary, before the choice of the delimitation method in a given case, to evaluate the relevant circumstances of this case anymore. In the light of the requirement that the maritime delimitation should achieve an equitable solution, such delimitation processes imply that the international tribunals accept that the application of equidistance will contribute to the achievement of this ultimate goal. However, though the international tribunals recognize that equidistance “has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied,”¹¹¹ they have not acknowledged that equidistance has inherent equity. This may be due to the fact that, as the ICJ rightly observed in its first decision regarding the maritime delimitation, the 1969 *North Sea Continental Shelf* cases, the equidistance “constitutes a method capable of being employed in almost all circumstances,” but the use of this method can “under certain circumstances” produce inequitable results.¹¹² In this sense, “the equidistance method is just one among many and [...] there is no obligation to use it or give it priority”.¹¹³ About forty years later, the above-mentioned judgments of the equidistance remain true, and “in particular circumstances, there may be factors which make the application of the equidistance method inappropriate”.¹¹⁴ Then why an equidistance line has been accepted by the international tribunals as the starting point of the delimitation in most cases?

This change was attributable to the alteration of the attitudes of the international tribunals to the certainty of the rules on maritime delimitation in general, and the role of the equidistance method in achieving an equitable solution in particular.

As mentioned above, before the 1985 *Libya/Malta* case, the ICJ and arbitral tribunals emphasized the peculiar circumstances of each specific case, but ignored the general application of delimitation rules.¹¹⁵ In a much quoted passage, the ICJ declared

111. *Nicaragua v. Honduras*, para.272. The ICJ here quoted the statements of the arbitral tribunal in the *Guinea/Guinea-Bissau* case, *Guinea/Guinea-Bissau*, para.102. See also the *North Sea Continental Shelf* cases, where the ICJ held that “It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It [...] has the virtue that if necessary, [...] any cartographer can de facto trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree.” *North Sea Continental Shelf*, para.22.

112. *North Sea Continental Shelf*, paras.22&24.

113. *Guinea/Guinea-Bissau*, para.102.

114. *Nicaragua v. Honduras*, para.272.

115. *Gulf of Maine*, para.81. The ICJ stated in the *Tunisia/Libya* case that “Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to overconceptualize the application of the principles and rules

that “It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution.”¹¹⁶ Thus, customary international law is expected to “only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective. It cannot also be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used for attaining that objective”, both of which “can only be determined in relation to each particular case and its specific characteristics.”¹¹⁷ Since “each case of delimitation is a *unicum*”, it is certain that none method is applicable for all maritime delimitation.¹¹⁸ Thus, any recourse to a method chosen beforehand is excluded, and the method to be used can come only as a result of objective legal reasoning.¹¹⁹ In the light of the requirement that any delimitation must achieve an equitable result, such an approach is not wrong, but absent of consistency and predictability, and thus has given rise to serious criticism.¹²⁰ In the *Libya/Malta* case, the ICJ turned to emphasize the certainty of the delimitation rules, and declared that “While every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained.”¹²¹ Compared with the other methods of delimitation, the practical convenience and certainty of application undoubtedly are the advantages of equidistance. In the words of the ICJ, “no other method of delimitation has the same combination of practical convenience and certainty of application.”¹²² However, these practical advantages of the equidistance method still cannot suffice of themselves to convert it into the starting point of the delimitation.

As far as the relationship between equity and equidistance is concerned, although the ICJ held in the *North Sea Continental Shelf* cases that “Equity does not necessarily imply equality”,¹²³ it did not say that “Equity does not imply equality”. By contrast, the Chamber of the ICJ in the 1986 *Frontier Dispute* case declared that “Although ‘Equity does not necessarily imply equality’ [...], where there are no special circumstances the

relating to the continental shelf.” Tunisia/Libya, para.132.

116. Tunisia/Libya, para.70.

117. Gulf of Maine, para.81.

118. See Guinea/Guinea-Bissau, para.89.

119. *Ibid.*, para.102.

120. See e.g., Bravender-Coyle, P. The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries between States, 19(3) Ocean Development and International Law (1988), p.199; Jan Mayen, (Schwerbel, J., sep. op.); Dallmeyer, D. G., and DeVorse, L. Jr. (eds.), Rights to Oceanic Resources: Deciding and Drawing Maritime Boundaries (Martinus Nijhoff Pub. 1989), p.149.

121. Libya/Malta, para.76. See also *Ibid.*, para.45; Jan Mayen, para.58.

122. North Sea Continental Shelf, para.23.

123. *Ibid.*, para.91.

latter is generally the best expression of the former”.¹²⁴ This may explain why judicial decisions on the basis of the customary law governing maritime delimitation between opposite coasts have likewise regarded the median line as a provisional line that may then be adjusted or shifted in order to ensure an equitable result, because in the case of delimitation between opposite coasts, the effects of irregularities in the coastline of each state are, broadly, offset by the effects of irregularities in the coastline of the other, therefore a median line, by dividing equally the distance between the coasts of the parties, will result in a generally equal division of the maritime area between the parties,¹²⁵ thus creating an impression of equity. On the other hand, in the case of laterally adjacent states, the distorting effects of certain factors on the course of the line, under certain conditions of coastal figuration, will “produce their maximum effect in the localities where the main continental shelf areas lie further out”,¹²⁶ and “the further from the coastline the area to be delimited, the more unreasonable are the results produced”.¹²⁷ Therefore, the international tribunals have always tended to take more prudent attitude towards the applicability of the equidistance method in the delimitation between adjacent coasts. The latest example in this regard was provided by the ICJ in the *Black Sea* case. While the Court accepted that there maybe exist “compelling reasons that make” the drawing of an equidistance line “unfeasible” in the delimitation between adjacent coasts, it did not mention any exceptions to the applicability of equidistance in the delimitation between opposite coasts.¹²⁸ But those compelling reasons that make the drawing of an equidistance line unfeasible in the delimitation between adjacent coasts may well occur in the delimitation between opposite coasts. For example, in the second segment of the delimitation in the *Tunisia/Libya* case, “The major change in direction undergone by the coast of Tunisia seems to the Court to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States”,¹²⁹ however, the equidistance method was not used because the segment was to begin at a point not on any possible equidistance line.¹³⁰

Indeed, there is no essential difference in the process of delimiting the maritime areas between opposite states and that of delimitations between adjacent states, because the rules of delimitation prescribed, whether in paragraph 1 and paragraph 2 of Article 6 of the 1958 Convention, or in Articles 74 and 83 of the LOS Convention, are the same.¹³¹ Under these rules, it is the appropriateness to achieve an equitable solution in a particular

124. Frontier Dispute Case (Burkina Faso/Mali), *ICJ Reports* 1986, p.554, para.150.

125. Anglo-French, para.103.

126. North Sea Continental Shelf, para.59.

127. *Ibid.*, para.89(a)

128. Black Sea, para.116.

129. Tunisia/Libya, para.126.

130. Nicaragua v. Honduras, para.288.

131. Anglo-French, para.242.

case that determines the applicability of equidistance, instead of the case being legally considered the delimitation between “opposite” or between “adjacent” states.¹³² Furthermore, it is worth noting that the object of delimitation is not the maritime areas between the coasts concerned, but the so-called “area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State”,¹³³ because unless there is an area over which all parties have an equally legitimate claims, there would be no maritime delimitation dispute.¹³⁴ It is in this sense that the ICJ held in the *North Sea Continental Shelf* cases that “The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; [...], such a line must effect an equal division of the particular area involved.[...] This type of case is therefore different from that of laterally adjacent States [...], whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other”.¹³⁵ It is also in this sense that the Chamber of the ICJ declared that the equidistance method “is inspired by and derives from a particular equitable criterion: namely, that the equitable solution, at least prima facie, is an equal division of the areas of overlap of the continental shelves of the two litigant States.”¹³⁶ Thus, the equitable criterion “that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States [...] converge and overlap”¹³⁷ is the object, while “equidistance [...] is a geometrical approach that can be used to give legal effect to this ‘criterion long held to be as equitable as it is simple’”.¹³⁸ It follows that the equity of equidistance depends upon whether it can achieve an equal division of the area of overlapping entitlements, referring to the area bounded by the outer limits of maritime areas to which all of the parties have entitlements on the basis of international law,¹³⁹ instead of the maritime areas between the coasts concerned.

However, where the continental shelf area to be delimited consists of two separate natural prolongations, one exceeds 200 nautical miles from the coast and the other does not, a provisional equidistance line between the coasts concerned can not effect an equal

132. *Ibid.*, para.240.

133. Jan Mayen, para.59. In this judgment, the ICJ also referred to this area as the “area of overlapping potential entitlement”. *Ibid.*, para.19.

134. Evans, M. D. *ibid.*, pp.65-66.

135. *North Sea Continental Shelf*, paras.57-58.

136. *Gulf of Maine*, para.115.

137. *Ibid.*, para.195

138. *Nicaragua v. Honduras*, para.287.

139. Note that, the area of overlapping entitlements is different from the “area of overlapping claims”, which refers to the area between the two lines representing the parties’ claims. See *Jan Mayen*, paras.18&59.

division of the area of overlapping entitlements,¹⁴⁰ which is bound by the 200 nautical miles limit of the narrow-margin state, and the natural prolongation limit of the wide-margin state,¹⁴¹ but “leaves to one of the States concerned areas that are a natural prolongation of the territory of the other”.¹⁴² It should be pointed out that this type of case would occur in the continental shelf delimitation not only between the adjacent coasts, but also between the opposite coasts. It is obvious that there can be no basis for the use of a provisional equidistance line as a starting point in any such delimitation, whether the delimitation is to be effected between opposite coasts or between adjacent coasts, because there is no point in beginning the process with a method that shows no *prima facie* likelihood of success in the achieving an equitable solution as required by international law.¹⁴³

5.3 Proportionality

According to the process of delimitation indicated by the ICJ in the Black Sea case, at the final stage, the Court will resort to the disproportionality test.¹⁴⁴ The requirement of proportionality stems from the observations of the ICJ in the *North Sea Continental Shelf* cases, where it declared that “A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines”.¹⁴⁵ It is worth noting that, at that time, proportionality was only one of the three “factors” that should be taken into account in the course of delimitation, side by side with the general configuration of the coasts of the parties, as well as the physical and geological structure of the continental shelf areas involved, but not included in “the principles and rules of international law applicable to the delimitation”.¹⁴⁶ However, the ICJ in the *Tunisia/Libya* case singled proportionality out of the relevant circumstances, and expressly put forward the concept

140. For more discussion, see Gao, J.-J. (2009) International Rules on the Continental Shelf Delimitation, *KMI International Journal of Maritime Affairs and Fisheries*, pp.91-116.

141. Article 76, paragraph 1, of the LOS Convention provides that “The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

142. *North Sea Continental Shelf*, para.58.

143. See the arguments of Canada against the application of the equidistance method in the *St. Pierre and Miquelon* case. *St. Pierre and Miquelon*, para.62. However, “the physical structure of the sea-bed ceases to be important when the object [...] is to establish a single, all purpose delimitation both of the sea-bed and the superjacent waters”. *Ibid.*, para.47.

144. *Black Sea*, para.122.

145. *North Sea Continental Shelf*, para.98.

146. *Ibid.*, para.101(D).

“test of proportionality” and treated it “as an aspect of equity”.¹⁴⁷ It follows that if the delimitation line does not bring about “a reasonable degree of proportionality” between the maritime areas appertaining to the parties and the lengths of their respective coastlines, or if the line leads to “any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue”,¹⁴⁸ it would be regarded as an inequitable result. Thus, “proportionality becomes the last stage of the test of the equity of a delimitation. It serves to check the line of delimitation that might have been arrived at in consideration of various other factors.”¹⁴⁹

Until now, in all of the cases where the proportionality test was resorted to, the conclusions of the international tribunals have always been that the requirements of this test had been met. This fact was mainly attributable to the flexibility of the operation concerning the proportionality test. First of all, “the identification of the relevant coasts and the relevant areas is so much at large that virtually any variant could be chosen, leading to widely different results”.¹⁵⁰ Diverse techniques have in the past been used for assessing coastal lengths, and no clear requirements of international law have been shown in this respect.¹⁵¹ Moreover, the international tribunals sometimes even did not endeavour to achieve a predetermined arithmetical ratio in the relationship between the relevant coasts and the maritime areas, but just made a broad assessment of the equitableness of the result.¹⁵² Second, various international tribunals have drawn different conclusions over the years as to what disparity between these two ratios would constitute a significant disproportionality which suggested the delimitation line was inequitable.¹⁵³ In the light of these uncertainties, one scholar has seriously criticized that the test of proportionality is “a procedure that pretends to be scientific” from which anyone can draw “almost whatever inferences one wishes”, and the figures indicated by the international tribunals “are no more and no less convincing than those put forward by the Parties”.¹⁵⁴ He added that “It may perhaps be said that an unfavourable test is unlikely and has never occurred, but is not this precisely because the data on which the arithmetical test is based are in reality selected so as to confirm a predetermined result?”¹⁵⁵ And in the view of the tribunal in the *Barbados v.*

147 Tunisia/Libya, para.131.

148. Black Sea, para.210.

149. Barbados v. Trinidad and Tobago, para.240.

150. Libya/Malta, para.74.

151. Black Sea, para.212.

152. See *e.g.*, Libya/Malta, para.75; Barbados v. Trinidad and Tobago, para.376.

153. In the Tunisia/Libya case, the two ratios are 1:1.94(coastline lengths) and 1:1.5(areas), para.131; in the St. Pierre and Miquelon case, the two ratios are 1:15.3(coastline lengths) and 1:16.4(areas), para.93; in the Eritrea/Yemen case, the two ratios are 1:1.31(coastline lengths) and 1:1.09(areas), para.168; in the Guyana v. Suriname case, the two ratios are 1:1.17(coastline lengths) and 1:1.04(areas), para.392; in the Black Sea case, the two ratios are 1:2.8(coastline lengths) and 1:2.1(areas), para.215. So the variance between the two ratios ranges from 0.13 (Guyana v. Suriname) to 1.1(St. Pierre and Miquelon).

154. St. Pierre and Miquelon, (Prosper Weil, dis. op. para.24).

Trinidad and Tobago case, proportionality is “a sense of proportionality”.¹⁵⁶ It is worth noting that even the ICJ recognized that “This checking can only be approximate,”¹⁵⁷ but it emphasized that “These measurements are necessarily approximate given that the purpose of this final stage is to make sure there is no significant disproportionality.”¹⁵⁸

Another more embarrassing question concerning the test of proportionality is what would happen if the test indicated a great disproportion between the ratio of coastline lengths and those of areas? “Would the judge or arbitrator then be bound, in order to arrive at a more proportionate result, to adjust the line which he states he has arrived at by other methods? A negative reply would deprive the proportionality test of all significance. An affirmative reply would be tantamount to converting proportionality into the dominant principle of delimitation”.¹⁵⁹ In the *Black Sea* case, the ICJ, having calculated the ratios of the respective coastal lengths and the relevant areas, stated that “The Court is not of the view that this suggests that the line as constructed [...] requires any alteration”.¹⁶⁰ Thus, it seems that the ICJ would adjust the delimitation line constructed through the first two stages in the case the line, “as it stands, lead to an inequitable result by reason of any marked disproportion”.¹⁶¹ Meanwhile, the Court emphasized that “The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines.”¹⁶² It appears that the ICJ tries to remove the doubt on the role of proportionality in the delimitation by designing the disproportionality test as an *ex post facto* means to make sure that the delimitation line leads to no great disproportionality, rather than any reasonable degree of proportionality.¹⁶³ However, the question remains that how the Court is going to adjust the delimitation line constructed through the first two stages if the test of disproportionality fails. As mentioned above, until now no such a case has occurred and the ICJ has not tackled this issue either. Indeed, the fact that the test of disproportionality is designed by the ICJ as the “final stage” of delimitation¹⁶⁴ indicates that the Court has never envisaged that the test of disproportionality may fail in certain cases. Thus, the real role of the test of disproportionality is to evidence, rather than to “check on”¹⁶⁵ the equitableness of the delimitation line constructed through the first two

155. *Ibid.*, para.25.

156. *Barbados v. Trinidad and Tobago*, para.376.

157. *Black Sea*, para.212.

158. *Ibid.*, para.214.

159. *St. Pierre and Miquelon*, (Prosper Weil, dis. op. para.25).

160. *Black Sea*, para.216.

161. *Ibid.*, para.122.

162. *Ibid.*, para.211.

163. The ICJ stated that “This is not to suggest that these respective areas should be proportionate to coastal lengths” (*ibid.*, para.22), and agreed with the observation that “it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor” (*ibid.*, para.210).

164. *Black Sea*, para.214.

165. *Ibid.*, para.211.

stages.

Under the delimitation process of “relevant circumstances → delimitation method (delimitation line) → proportionality test”, the test of proportionality, as a means of proving that the delimitation line established by the method indicated by the relevant circumstances can be considered satisfactory, may be necessary, because this process pays all of its attention to the result and does not believe in the equitable character of the method or the delimitation process, therefore confirming the equitableness of the delimitation line naturally becomes the key element for the whole delimitation operation. The reason why “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”,¹⁶⁶ is mainly because the coast is “the basis of entitlement over maritime areas”¹⁶⁷ and equity requires that a state with an extensive coastline should not be rendered similar to a state with a restricted coastline.¹⁶⁸ However, under the process of “provisional equidistance line → special/relevant circumstances → delimitation line”, the emphasis has been transferred from the delimitation result to the delimitation process *per se*, the resulting line is deemed to be equitable because “the equitable solution is the *result* of a delimitation process. To say that result can be changed by reference to a set of considerations by which the result alone is judged to be inequitable denies the legal nature of the process”.¹⁶⁹ In practice, the equitableness of the delimitation line constructed under this process has been checked carefully for any relevant circumstances that might have warranted adjustment, and therefore need not be proven by the means of the proportionality or disproportionality test any more.¹⁷⁰

It is worth noting that to say that the test of proportionality/disproportionality is not necessary under the process of “provisional equidistance line → special/relevant circumstances → delimitation line”, is not to suggest that this delimitation process should not consider the disproportion between the lengths of the coasts of the parties. In fact, decisions of international courts and tribunals have shown that, where disparities in the lengths of coasts are particularly marked, they may “treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made”.¹⁷¹ And this may be one reason why the ICJ in the *Libya/Malta* case, having

166. *Ibid.*, para.122.

167. *Barbados v. Trinidad and Tobago*, para 239. The tribunal in the *Guinea/Guinea-Bissau* case stated that the rights which a State may claim to have over the sea are related to the coasts and to the manner in which they border this territory. *Guinea/Guinea-Bissau*, para 119.

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

169. Evans, M. D. *Relevant Circumstances and Maritime Delimitation*, pp.86-87.

170. In this context, one may recall the statements of the arbitral court in the *Anglo-French case*, where the court did not consider that the adoption in the *North Sea Continental Shelf* cases of the criterion of a reasonable degree of proportionality “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.

171. See *Black Sea*, para.164. Note that various international tribunals have drawn different conclusions over

moved the provisional median line northwards through 18' of latitude due to the marked disparities between the coastal lengths of the parties, could conclude that the delimitation result "met the requirements of the test of proportionality".¹⁷²

6. Conclusions

The essence of the maritime delimitation process is the delimitation methodology, and the evolution of the delimitation process reflects the development of international rules on maritime delimitation. Recently, international tribunals tend to follow a uniform process for delimitation, that is, first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an equitable result, whether they are called upon to delimit the continental shelf or EEZ, or to draw a single delimitation line, whether the delimitation is to be effected between opposite coasts or between adjacent coasts, or whether the delimitation is governed by the customary law, Articles 74/83 of the LOS Convention, or by Article 6 of the 1958 Convention. However, the ultimate goal of maritime delimitation is to achieve an equitable solution, which is the requirement of international law and is of higher rank than the application of equidistance. Where equidistance can not contribute to effecting an equal division of the area of overlapping entitlements, which would happen in some continental shelf delimitation, it is not appropriate to start the delimitation by a provisional equidistance line, because this line will leave to one of the states concerned areas that are a natural prolongation of the territory of the other. This type of case may occur in the delimitation between adjacent coasts as well as between opposite coasts. Besides, the physical geography in a particular case may also make the application of a provisional equidistance line unfeasible.

The role of the relevant circumstances in delimitation has changed from indicating the delimitation method to verifying that the result of the application of the provisional equidistance line is not, in light of the particular circumstances of the case, perceived as inequitable, and, if necessary, to modifying the provisional line. Thus, the relevant circumstances under customary law tend to be assimilated to the special circumstances of

the years as to what disparity in coastal lengths would constitute a marked disparity. *Ibid.*, para.213. For example, in this case, though the ratio of the coastal lengths of the parties is approximately 1:2.8 (Romania: Ukraine), "however, the Court sees no such particularly marked disparities between the relevant coasts of Ukraine and Romania that would require it to adjust the provisional equidistance line at this juncture. 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". Black Sea, paras.215&168.

172. Libya/Malta, para.78. In this case, the ratio of the coastal lengths of the parties is 1:8 (Malta:Libya). *Ibid.*, para.68.

Article 6 of the 1958 Convention.

The role of the test of proportionality or disproportionality is to prove, rather than to check, the equitableness of the delimitation line constructed upon other factors. Where an equidistance line is used as the starting point of the delimitation, it is not necessary to resort to the test of proportionality at the final stage, because the equitableness of the delimitation line constructed upon equidistance has been checked carefully for any relevant circumstances that might have warranted adjustment, though the marked disparities in the lengths of coasts may be treated as a relevant circumstance.

To sum up, the general process of international maritime delimitation should be: “provisional equidistance line → relevant/special circumstances → delimitation line”.

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