



GEOMETRY OF EQUITABLE PRINCIPLES: THE ROLE OF APPROPRIATE BASE POINTS IN THE THREE-STAGE DELIMITATION PROCESS*

*HAKKANİYET İLKELERİNİN GEOMETRİSİ: ÜÇ AŞAMALI
SINIRLANDIRMA SÜRECİNDE UYGUN ESAS NOKTALARIN ROLÜ*

Dr. Murat SÜMER*

ABSTRACT

UNCLOS neither indicates nor necessitates any specific methodology for the delimitation of the Continental Shelf and Exclusive Economic Zone. The Convention suffices to enshrine the ultimate goal of achieving an equitable result. Thus, the tedious task of developing methodological approaches is left to the international judicial bodies. The decisions of the ICJ, ITLOS and arbitral tribunals have indeed played a crucial role in the formation and elucidation of the methods of maritime boundary delimitation law.

In this context, the 2009 Black Sea judgment marked a significant evolution in maritime boundary delimitation by extending the two-stage process to a three-stage approach. The said approach has been favoured as it offers more clarity and consistency. However, there seems to be a risk of treating this useful methodological approach for disguising the equidistance line as the mandatory methodology which has been consistently rejected by both the case and treaty law since 1969 North Sea Continental Shelf cases. The prioritization of the strict equidistance method as a mandatory delimitation line is problematic and it would not be compatible with the objective and purposes of Articles

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* PhD, The Nippon Foundation Lecturer in International Maritime Law, IMO International Maritime Law Institute (IMLI). The views expressed herein are strictly personal.



74 and 83. Otherwise, the compromise and balance offered by UNCLOS would be undermined by giving equidistance methodology a more dominant role.

Against this backdrop, this article underscores the crucial role of the selection of the most appropriate base points as an initial step in the construction of provisional delimitation line. Such a selection is indeed instrumental in mitigating the any inequitable outcome that may result from the employment of strict equidistance method.

Keywords: •Three-Stage Delimitation •Appropriate Base Points •Provisional Delimitation Line •Equidistance Method •Equitable Principles

ÖZ

BMDHS, Kıta Sahanelığı ve Münhasır Ekonomik Bölge sınırlandırması için herhangi bir belirli yöntem öngörmez veya zorunlu kılmaz. Sözleşme, nihai hedef olan hakkaniyete uygun bir sonuca ulaşılmasını sağlamakla iktifa eder. Bu nedenle, deniz sınırlandırması yöntemlerinin geliştirilmesi gibi meşakkatli bir görev uluslararası yargı organlarına bırakılmıştır. Nitekim UAD, ITLOS ve tahkim mahkemelerinin kararları, deniz sınırlarının belirlenmesinde kullanılan yöntemlerin şekillenmesinde ve açıklığa kavuşturulmasında hayati bir rol oynamıştır.

Bu bağlamda, UAD'nin 2009 tarihli Karadeniz kararı, iki aşamalı süreçten üç aşamalı yaklaşıma geçiş bakımından deniz sınırlandırma hukukunda önemli bir tekamüldür. Bu yaklaşım, daha fazla netlik ve istikrar sunduğu için tercih edilmiştir. Ancak, bu faydalı metodolojik yaklaşımın, 1969 tarihli Kuzey Denizi Kıta Sahanelığı davalarından bu yana hem içtihat hem de sözleşme hukuku tarafından sürekli olarak reddedilmiş olan eşit uzaklık hattını örtük şekilde zorunlu bir yöntem olarak kabul etme riskini de taşıdığı görülmektedir. Mutlak eşit uzaklık yönteminin zorunlu bir sınırlandırma hattı olarak önceliklendirilmesi ziyadesiyle sorunlu olup, 74. ve 83. maddelerin amacı ve hedefleriyle de uyumlu değildir. Aksi takdirde, UNCLOS'un mevcut tutumu, eşit uzaklık yöntemine daha baskın bir rol verilerek zedelenmiş olur.

Bu çerçevede, bu makale, geçici sınırlandırma hattının oluşturulmasında ilk adım olarak en uygun esas noktaların seçilmesinin hayati önemini vurgulamaktadır. Bu tür bir seçim, katı eşit uzaklık yönteminin kullanılmasından kaynaklanabilecek hakkaniyetsiz bir sonucu önlemek bakımından önem arz etmektedir.

Anahtar Kelimeler: •Üç Aşamalı Sınırlandırma •Uygun Esas Noktalar •Geçici Sınırlandırma Hattı •Eşit Uzaklık Yöntemi •Hakkaniyet İlkeleri

INTRODUCTION

The modern law of the sea regime divides the world's seas into various maritime jurisdiction zones and confers specific sovereign rights to coastal States therein. Before 1945, States typically claimed jurisdiction over relatively narrow coastal areas. With the advent of the Continental Shelf (CS) and the Exclusive Economic Zone (EEZ) concepts in the post-World War II era, States have aimed to maximise their respective maritime zones to have access to more resources. The

further expansion of the limits of the maritime zones with the introduction of the United Nations Convention on the Law of the Sea (UNCLOS)¹ and the developments in offshore drilling technology led to the increasing appetite of coastal States for broader maritime zones. Unsurprisingly, this led to numerous maritime boundary disputes globally. The very essence of maritime boundary delimitation law lies in resolving disputes where overlapping claims exist².

Delimitation, in its essence, pertains to the establishment of a maritime boundary in cases where multiple States are faced with competing titles. As Judge Yania aptly observes every boundary dispute emerges within the context of complex geographical, geological, and historical factors. In the absence of overlapping titles or claims, the need for delimitation does not arise, as there is no dispute to resolve³.

In the doctrine and practice, two divergent views stand out: the former rejects any mandatory delimitation method which is applicable in all cases, and the latter approach favours the equidistance method subject to relevant circumstances. This latter method initially applies the equidistance principle and subsequently adjusts the provisional equidistance line by considering relevant equitable factors. The evolution of maritime delimitation law has been notably influenced by the above-mentioned contrast. The International Court of Justice (ICJ) in the 1969 North Sea Continental Shelf Cases, by rejecting the presence of any mandatory equidistance method, favoured the more flexible approach, advocating for a goal-based approach rather than a prescribed method of delimitation⁴.

¹ United Nations Convention on the Law of the Sea, 1982 - UNCLOS (adopted on 10 December 1982, entered into force on 1 November 1994) 1833 UNTS 397.

² Collins, E. and Rogoff, M. "The International Law of Maritime Boundary Delimitation" 34 *Maine Law Review* 1. Available at: <https://mainelaw.maine.edu/faculty/wp-content/uploads/sites/4/rogoff-mlr-34.pdf> (Accessed: 31 October 2023); Papanicolopulu, I., "The Note on Maritime Delimitation in a Multizonal Context: The Case of the Mediterranean", 38 *Ocean Development and International Law* 4, 2007, 382; Proelss A, Maggio A and Tanaka Y, 'Exclusive Economic Zone', *United Nations Convention on the law of the sea (UNCLOS): A commentary* (CH Beck 2017).

³ Stephan Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press 2016), 3; Shunji Yanai, 'International Law Concerning Maritime Boundary Delimitation' in David Joseph Attard and others (eds), *The IMLI Manual on International Maritime Law - Volume I* (Oxford University Press 2014) 304.

⁴ Proelss (n 2) 572-573.



Arguably, modern maritime boundary delimitation law embodies the synthesis of a longstanding tug-of-war between a specific delimitation methodology i.e., the equidistance method and equitable principles. This competition appears somewhat peculiar considering the disparate concepts at play, like comparing apples and oranges, so to speak. Perhaps, it might be more apt to describe this odd comparison as a constant clash between the characteristics of those concepts, namely, the inherent flexibility of equitable principles in contrast to the intrinsic rigidity of the equidistance methodology. In this context, the age-old tension between the two different concepts continues to exist and indeed permeates into newer developments in maritime boundary delimitation law as well. The most recent example is arguably the three-stage delimitation process, which has recently emerged as a preferred methodology, as coined by the ICJ in 2009⁵.

Indeed, the recently emerging three-stage delimitation method appears to be prone to risk as strictly adhering to the strict equidistance method as the mandatory methodology, unless its effects are mitigated, could undermine the integrity of the UNCLOS regime, which is based on equitable delimitation, pertinent to the delimitation of the CS and EEZ.

Against this backdrop, this article will delve into the relevant treaty and case law aspects of maritime boundary delimitation, offering specific recommendations to address the potential shortcomings of strict application of the equidistance methodology in the three-stage delimitation process especially where exist unique geographical context. Moreover, it is anticipated that this approach will aid in bridging the gap between the equidistance methodology and equitable principles by highlighting the significance of selecting appropriate base points for the construction of a provisional delimitation line.

⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, 61.



I. LEGAL SOURCE OF THE DELIMITATION OF CONTINENTAL SHELF AND EXCLUSIVE ECONOMIC ZONE

1. Treaty Law

A. 1958 Convention

Geneva Convention on the Continental Shelf (1958 Convention)⁶ was the first international treaty codifying the regime of the CS. 1958 Convention indeed represents a significant milestone in forming a legal framework for defining the scope of the CS in the law of the sea. 1958 Convention, upon emphasizing the importance of reaching an agreement among the concerned states as the primary means of dispute settlement, prescribes a specific delimitation methodology. If an agreement can't be reached, and in the absence of special circumstances, Article 6 sets out the “equidistance/special circumstances” method as a rule based on the geometrical principles. This method was not widely embraced as the strict application of the equidistance method could lead to inequitable outcomes. In fact, perhaps, the wording of the said provision shows the sensitivity of the issue by way of prioritising the agreement as the most viable solution⁷.

B. UNCLOS

The Third United Nations Conference on the Law of the Sea (UNCLOS III), which took place between 1973-1982, introduced significant changes to the delimitation formula of the 1958 Convention in light of the North Sea Continental Shelf Cases⁸.

Prior to UNCLOS III, the delimitation methods were based largely on equidistance or natural prolongation principles. However, UNCLOS III emphasized an equitable solution, steering away from the strict adherence to equidistance. The Convention calls for delimitation to be achieved by agreement on the basis of international law to ensure an equitable solution. This shift

⁶ Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

⁷ Young R, “The Geneva Convention on the Continental Shelf: A First Impression” (1958) 52 American Journal of International Law 733, 737-738; Fietta and Cleverly (n 3) 15.

⁸ D P O'Connell, *The International Law of the Sea Volume II* (Clarendon Press, Oxford 1984) 689.



underscored the importance of flexibility and fairness taking into account the specific circumstances of each case over any rigid criteria⁹.

Notably, at UNCLOS III, there was a strong tendency that it would be advantageous for the boundaries of the CS and the EEZ to coincide. Thus, the negotiations on the delimitation of both the CS and the EEZ were carried out jointly. Hence, it is unsurprising that the wording used in both provisions mirrors each other¹⁰.

On the other hand, while Article 83 had a predecessor, namely, Article 6 of the 1958 Convention, Article 74 was introduced without any predecessor. During UNCLOS III, negotiations on delimitation were influenced by a significant development in the case law. The delimitation of the CS between States with competing claims was previously litigated in the North Sea Continental Shelf cases before the ICJ. In its judgment, the Court determined that Article 6 of the 1958 Convention neither represented nor crystallised any existing or emerging rule of customary international law¹¹. Thus, UNCLOS provides the modern conventional legal framework that governs maritime jurisdiction areas. Notably, UNCLOS introduced a departure from the equidistance/special circumstances method of the 1958 Convention. In this context, regarding the delimitation of the CS, Article 83 of UNCLOS sets out that CS delimitation must be done by an agreement between the opposite/adjacent States' coasts to reach an equitable outcome. On the other hand, the EEZ does not have any predecessor and was not mentioned in the former law of the conventions. As a matter of fact, its regime was formed by UNCLOS. Unlike CS, the coastal State's sovereign rights in the EEZ are not "ab initio" and "ipso facto", hence, it must be expressly declared by States. Article 55 of UNCLOS defines EEZ and it reflects the balance between the various interests of the coastal and flag States.

The UNCLOS regime also defines the delimitation of the EEZ, almost identical to Article 83 on the CS, in its Article 74 and it also imposes the achievement of an equitable outcome. Drafting of Articles 74(1) and 83(1) proved to be among the most challenging tasks of the Conference. Even a short period before the completion of the UNCLOS III, consensus on the delimitation principles or methods had not been achieved. Let alone the common understanding, there was

⁹ Nordquist, M.H. (1985) *United Nations Convention on the Law of the Sea 1982: A Commentary* (v vols). Dordrecht: Martinus Nijhoff, 801, 953-954.

¹⁰ Churchill R and Lowe V, *The Law of the Sea* (3rd edn, Juris 1999), 195.

¹¹ Nordquist (n 9) 953-954.

a significant and unresolvable disagreement between the two polarised groups of States favouring the equidistance method and equitable principles. The prominence of the equidistance method was subject to considerable debate during the negotiations. One group advocated equidistance as the mandatory method, while the other group supported the use of equitable principles. The said intense divergence between supporters of the said principles during UNCLOS III eventually culminated in a compromise embedded in the UNCLOS framework. Notably, the said formula totally excludes the term equidistance from Articles 74 and 83. Indeed, the UNCLOS regime sufficed to uphold the equidistance/special circumstances method only for the delimitation of the territorial sea, but not for the EEZ and CS¹².

Articles 74 and 83 provide only limited guidance for the delimitation process¹³. Remarkably, both provisions do not prescribe a specific delimitation method but instead, emphasize the need for parties to reach an equitable outcome. In contrast, Article 15, which is germane to the territorial sea, indicates the equidistance method but also incorporates considerations of special circumstances¹⁴. Indeed, the UNCLOS by merely underscoring the desired equitable outcome, simply suffices to entrust a wide discretionary role to the international judiciary to employ the appropriate methodology whilst dealing with the individual cases. The absence of a compulsory methodology in UNCLOS has been creatively and progressively addressed by the case law¹⁵.

Moreover, one should not overlook the fact that UNCLOS was never envisioned, nor could it realistically address every single aspect of ocean governance including maritime boundary delimitation. It was basically designed to contain

¹² Proelss (n 2) 566, 654.; Churchill (n 10) 191; Jiang Yuyao, 'The Development and Legal Status of the Three-Stage Approach: Its Implications for the Sino-Japan Delimitation of the Continental Shelf in the East China Sea' (2014) 2014 *China Oceans L Rev* 161, 162; Abdul Ghafur Hamid and Khin Maung Sein, 'Refining the Maritime Boundary Delimitation Methodology: The Search for Predictability and Certainty' (2019) 27 *IJUM LJ* 35, 37-41; Yanai (n 3) 310.

¹³ Ion Galea, 'Equidistance - Special Circumstances: A Return to the Geneva Convention of 1958 or a Continuing Uncertainty?' (2018) 20 *Romanian J Int'l L* 10.

¹⁴ Teoman Uykur, 'Settlement of Maritime Delimitation Disputes within Complex Geographical Settings' (2014) 20 *ILSA J Int'l & Comp L* 357, 358.

¹⁵ Petros Siousiouras & Georgios Chrysochou, 'The Aegean Dispute in the Context of Contemporary Judicial Decisions on Maritime Delimitation' (2014) 3 *Laws* 12, 17-19.



the fundamental principles and the progressive development of the law of the sea as a framework instrument¹⁶.

Hence, the language of Articles 74 and 83 was intended to be vague given the fact that the delimitation of the CS and EEZ was an intensely contentious matter at UNCLOS III. In this way, instead of focusing on the challenging issue of which methods to employ, the said provisions emphasize the end goal, i.e., achieving an equitable solution. Thus, arguably, drafters of UNCLOS intentionally left it to the international courts and tribunals as well as to States to develop a case law and state practice addressing the methodology problem of the maritime boundary delimitation¹⁷.

2. Case Law

In line with the Statute of the ICJ¹⁸, the judgments of international courts serve as mechanisms for identifying the relevant sources of international law. Judge Wolfrum aptly opines that the actual impact of jurisprudence on the delimitation of the CS and EEZ is beyond identifying the customary international law and in fact contributes to the development of the law as well. The ambiguity of clearly defined methods governing maritime boundary delimitation led the international judiciary to play a significant role in the delimitation process. In this respect, he highlights that the international judicial mechanisms perform a law-making function pursuant to Articles 74 and 83 of UNCLOS¹⁹.

Evidently, in the absence of clear maritime delimitation methods concerning overlapping claims, coastal States face challenges in using their respective maritime zones. Nevertheless, this was inevitable as States could not agree on explicit treaty rules for delimitation. Given this regulatory gap, international courts and tribunals have been compelled to adopt a creative role. The said innovative task is intrinsically linked to the nature of international jurisprudence

¹⁶ Jayakumar S, *The Regulation of Continental Shelf Development* (Brill, 22 August 2013) <<https://brill.com/abstract/title/23834?language=en>> accessed 8 August 2023.

¹⁷ Alex G Oude Elferink, Tore Henriksen and Signe Veierud Busch (eds), *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (Cambridge University Press 2018), 108-111; Fietta and Cleverly (n 3) 25-27; 52-55; Schaller C, 'Hardly Predictable and yet an Equitable Solution: Delimitation by Judicial Process as an Option for Greece and Turkey in the Eastern Mediterranean' (2022) 35 *Leiden Journal of International Law* 549, 558-567.

¹⁸ See Article 38.

¹⁹ *Declaration of Judge Wolfrum, Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, 136-137.

which serves as a formal source of international law²⁰. The Arbitral Tribunal in the Bay of Bengal Maritime Boundary Arbitration highlighted that international case law, which is still developing, already constitutes an “*acquis judiciaire*” thus making it one of the sources of international law pursuant to art 38(1)(d) of the ICJ’s Statute. Moreover, the Tribunal aptly observed that the said case law needs to be read into the relevant delimitation provisions of UNCLOS i.e. art.s 74 and 83²¹.

The ICJ’s judgment on the North Sea Continental Shelf cases²² was the beginning of its much-needed case law on the delimitation issues and they are broadly recognised as the cornerstone of the maritime boundary delimitation law. Remarkably, even though the 1958 Convention set out a delimitation rule for CS, the ICJ did not consider it a reflection of customary international law and rejected any priority role or mandatory nature of the equidistance method mentioned therein. The ICJ rightly stated that the Geneva Convention was not a codification of the customary international rule ordering the use of the equidistance principle. Moreover, the Court noted that the said principle also didn’t crystallize into customary international law even after it entered into force. Furthermore, it was pointed out that there is not sufficient State practice prioritising the equidistance method and therefore it can’t be put forward against non-State Parties. In light of this reasoning, the ICJ concluded that the equidistance method cannot be seen as a “rule of law” and hence it is not mandatory for the delimitation²³.

In comparison to the 1958 Convention, notably the relevant articles of UNCLOS are broadly acknowledged as the codification of customary international law. Within this framework, it may be safe to observe that the UNCLOS formula based its approach on the relevant case law that challenged the equidistance principle²⁴.

²⁰ Yoshifumi Tanaka, *The International Law of the Sea* (4th edn, Cambridge University Press 2023) 257-258; Massimo Lando, *Maritime Delimitation as a Judicial Process* (1st edn, Cambridge University Press 2019) 290-291.

²² The Bay of Bengal Maritime Boundary Arbitration, The People’s Republic of Bangladesh and The Republic of India, The Hague, 7 July 2014, Permanent Court of Arbitration, available at: <https://pcacases.com/web/sendAttach/383>, para 339.

²² *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3.

²³ *Ibid* paras 81- 83.

²⁴ Murat Sumer, ‘Equitable Considerations in the Delimitation of the Continental Shelf’ 100 *Int’l L. Stud. Ser. US Naval War Col.* 752 (2023) 758.



Despite the significant evolution in the law of the sea regime over time, the ICJ introduced fundamental tenets in the North Sea Continental Shelf cases that remain relevant today. Many elements of the said ruling such as the primacy of geography and coastal configuration as well as the absence of mandatory methodology have been embraced by both States and international judicial mechanisms²⁵. The ICJ highlighted in the North Sea Continental Shelf Case that the geographical circumstances could render the equidistance method inequitable²⁶.

As a matter of fact, in the North Sea Continental Shelf cases, the ICJ ruled in favour of equitable principles, bypassing the "privileged role" of the equidistance method. The ICJ, as mentioned above, rejected the customary nature of the equidistance method which was outlined in Article 6 of the 1958 Convention. Moreover, it was established that no single delimitation method should be universally mandatory under all circumstances²⁷.

The ICJ in its Libya/Malta case elegantly explained that the equidistance method is not mandatory, and it is not the only method even at the outset for the construction of the provisional line and highlighted that this was rejected in the North Sea Continental Shelf Cases and by UNCLOS itself. In its judgment, the Court made it clear once again the significant role of the employment of equitable principles in the specific relevant circumstances for selecting the appropriate method²⁸. Significantly, the Court rejected the mandatory nature of the equidistance method even as a provisional/preliminary step for constructing the delimitation line. By referring to the 1969 cases and UNCLOS, it was also observed that there is no necessity to first examine the effects of delimitation employing the equidistance method. Moreover, by underscoring the fact that the equidistance method is not the only delimitation method the Court noted that the equitable principles may necessitate, from the outset, the use of alternative delimitation methods²⁹.

²⁵ Fietta and Cleverly (n 3) 173, 175.

²⁶ Malcolm D. Evans, 'Maritime Delimitation and Expanding Categories of Relevant Circumstances' (1991) 40 Int'l & Comp LQ 1, 5-6.

²⁷ Yuyao (n 12) 162; Hamid and Sein (n 12) 37-41.

²⁸ North Sea Continental Shelf Cases (n 22) para 43.

²⁹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I. C.J. Reports 1985, p. 13., para 43.

Likewise, in the Delimitation of the Maritime Boundary in the Gulf of Maine Area case, the Court held that Article 6 didn't constitute part of international law³⁰. The Court didn't find any justification for applying art. 6 of the 1958 Convention as a general rule for all delimitation cases. Besides, it was stressed that the said treaty provisions are only binding between the contracting parties³¹.

The equitable principles form the core of maritime boundary delimitation law as established by the ICJ³². Indeed, the ICJ has consistently upheld that the equidistance approach is just one among various methods in pursuit of an equitable outcome. Notably, the Court maintains that the equidistance method does not enjoy any automatic precedence or preferential status over alternative delimitation techniques³³. Remarkably, the arbitral award in the Bay of Bengal Maritime Boundary Arbitration stated that Articles 74/83 do not refer to a specific method of delimitation, therefore, the reference in Article 15, which governs the delimitation of the territorial sea, to the median line as a method of delimitation cannot be read into Articles 74/83 of the Convention³⁴.

Indeed, as stated in the Libya/Malta case, the UNCLOS provisions suffice to restrict themselves to setting a standard and it is intentionally left to the Courts and States themselves to endow this objective with specific content. Since Articles 74 and 83 are general, they are silent on the methods to be followed when disputes regarding the delimitation of maritime boundaries arise over the interpretation of delimitation rules and the proper methods. Nonetheless, they explicitly lay down the ultimate objective to be reached which is an equitable solution. Consequently, the maritime boundary delimitation law has also been characterised as judge-made law. In this respect, the maritime boundary delimitation law serves as a good illustration of the ICJ's inherent legislative authority. Many publicists agree that the Court has played a pivotal role in shaping and refining the law on maritime boundary delimitation through its case law. The decisions of the ICJ, International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals have indeed played a crucial role in forming the principles and methods of delimitation as well as in shaping our understanding

³⁰ Fayokemi Olorundami, 'The ICJ and Its Lip Service to the Non-Priority Status of the Equidistance Method of Delimitation' (2015) 4 Cambridge J Int'l & Comp L 53, 56-57.

³¹ Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1. C.J. Reports 1984, p. 246. Paras 124-125.

³² Proelss (n 2) 572.

³³ Olorundami (n 30) 54.

³⁴ *Bay of Bengal* (Bangladesh/Myanmar) Judgment (n 19) para 338-339.



of key concepts in maritime delimitation, including the notion of equitable principles and relevant circumstances³⁵.

Over the years, international courts and tribunals have already developed a body of case law that has significantly reduced the elements of unpredictability and uncertainty in the choice of methods employed for the determination of maritime boundaries³⁶.

II. THREE-STAGE DELIMITATION PROCESS

As discussed above, the appropriate delimitation method, since the relevant delimitation articles of the UNCLOS do not indicate any specific methodology, is left to be determined by the international judicial bodies. However, in addressing the methodology problem, obviously, they do not have a cart blanche, they are indeed restricted by a fundamental objective, namely, that the selected method must produce an equitable outcome³⁷.

In this context, the ICJ initially introduced a two-stage approach for delimitation which has been known as the “equidistance/relevant circumstances” method³⁸. Pursuant to this approach, an equidistance line is initially drawn as a provisional delimitation line. It is then determined if relevant circumstances necessitate a modification to this provisional line to ensure an equitable result. The two-stage approach has evolved over time and the ICJ further systematized it into a more refined three-stage maritime delimitation methodology.

In this vein, the 2009 Black Sea judgment marked a significant evolution in maritime boundary delimitation by extending the two-stage approach to a three-stage process. This approach was distinctly outlined in the Black Sea case and has been reiterated in numerous subsequent cases. Before this decision, the second stage encompassed a final assessment ensuring that the boundary's overall equitableness did not show any significant disproportion which resembles the combination of the second and third stages of the new approach. By adding an extra stage, it seems that the importance of considering equitable

³⁵ Victor Stoica, 'The Development of Maritime Delimitation by the International Court of Justice' (2018) 20 *Romanian J Int'l L* [114], 128; Elferink (n 17) 1-4, 9-10, 40; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (n 29) 28.

³⁶ *Bay of Bengal (Bangladesh/Myanmar)* Judgment (n 19) para 225.

³⁷ *Ibid* 338-339.

³⁸ See *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, 38.

principles and assessment of the relevant circumstances in two different stages has been further highlighted. The ICJ has resolutely championed the three-stage methodology. This reaffirms the predominant role of this methodology in modern international law³⁹.

In the three-stage approach, the initial phase entails establishing a provisional delimitation line. The provisionally set delimitation line serves as a practical starting point. This provisional line is often referred to by various names such as the “provisional delimitation line”, “provisional equidistance line”, or “provisional median line”⁴⁰. Arguably, the term “provisional delimitation line” should be preferred over “provisional equidistance line” as it allows for flexibility, letting the decision in each scenario dictate whether an equidistance line, an angle bisector, or another method is most suitable based on specific geographic conditions. Moreover, almost always this line is subject to changes⁴¹. However, as noted in the Romania/Ukraine case, unless there exist overriding relevant circumstances rendering this approach impractical and inequitable for the given situation such a provisional line can also be drawn in the form of a provisional equidistance line.

The following stage involves the comprehensive consideration of any relevant circumstances. During the second stage, relevant circumstances are considered to see whether they warrant modifications to the provisional delimitation line to produce an equitable result. Naturally, as each case may be surrounded with varying circumstances, their relevance can vary too leading to debates and different interpretations among disputing States as regards the relevance and significance of a specific circumstance. Given that there are different factors to be considered in varying situations, there is no standard method for this assessment. Nonetheless, equitable principles are there to guide and case law seems to showcase that the similar relevant factors are usually assessed similarly. Indeed, international courts and tribunals have demonstrated remarkable consistency in pinpointing relevant circumstances and assessing their impact on a delimitation line. Despite each case having its distinct characteristics, the international judiciary maintained a consistent approach to assessing and legally classifying similar factors. The third stage, which is the final phase, in the delimitation process is particularly important to test and verify that the

³⁹ Fietta and Cleverly (n 3) 528-530, 575-581; Lando (n 20) 21-22; Yanai (n 3) 314-316.

⁴⁰ Elferink (n 17) 200-203.

⁴¹ Ibid 114-116.



delimitation line doesn't produce any inequitable outcome due to a significant disproportion between the ratio of the respective coastal lengths and the ratio of their corresponding relevant maritime areas⁴².

In this regard, the arbitral tribunal defined the third stage as an “*ex post facto*” check of non-disproportionality of the result reached at the previous stage⁴³. The three-stage process has been consistently perceived as the standard method for delimitation since the 2009 judgement except in cases where the specific geographical circumstances render it unsuitable. This refined approach has been favoured as it offers more clarity and consistency in the maritime boundary delimitation process⁴⁴. Notably, it has also gained the endorsement of the ITLOS, which was established by UNCLOS for its interpretation and application, in the Bay of Bengal case, which is its first boundary delimitation case. The said endorsement also prevented the potential fears that after the inception of ITLOS, there would be defragmentation in international law. Subsequently, the said approach was further embraced by the ICJ, ITLOS and arbitration in its other judgements as well⁴⁵.

As a matter of fact, the ICJ has repeatedly indicated that when tasked with delimiting overlapping CS and EEZ claims, it typically uses the three-stage methodology⁴⁶. The ITLOS outlined the three-stage process distinctly and clearly in the Bangladesh/Myanmar case. The Tribunal first constructed a provisional delimitation line based on the geography of the disputing Parties. Then, the Tribunal determined if there were any relevant circumstance that required adjusting the provisional line to achieve an equitable result. Finally, ITLOS checked whether the adjusted line resulted in any significant

⁴² Lando (n 20) 167; Maritime Delimitation in the Black Sea Judgment (n 5) para 116; Tanaka (n 20) 268-271; Fayokemi Olorundami, 'Objectivity versus Subjectivity in the Context of the ICJ's Three-Stage Methodology of Maritime Boundary Delimitation' (2017) 32 Int'l J Marine & Coastal L 36, 43-45; Malcolm Evans, 'Maritime Boundary Delimitation' Donald Rothwell (ed), *The Oxford Handbook of the Law of the Sea* (Oxford 2017), 259-260.

⁴³ The Bay of Bengal Maritime Boundary Arbitration, The People's Republic of Bangladesh and The Republic of India (n 21) para 341.

⁴⁴ Olorundami (n 16) 53.

⁴⁵ Evans (n 16) 259-260.

⁴⁶ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, 624, para 190-191.

disproportion between the ratio of the respective coastal lengths and the ratio of the relevant areas given to each Party⁴⁷.

The arbitral tribunal examined whether there exists a presumption to use a three-stage process. And it affirmed its favourability⁴⁸. Although the recent case law suggests that there might be a tendency to apply the three-stage process, yet the application of it by the judiciary is not always straightforward. Nonetheless, it is also noteworthy that the arbitral tribunal pointed out the fact that international case law is still developing thus the said method could benefit from further improvement and refinement over time⁴⁹. Nevertheless, it appears that the three-stage process has emerged as a preferable method. On the other hand, its sequential approach raised thorny questions about the prominence to be given to the equidistance/median line. For instance, the Tribunal, when deemed more appropriate, prioritised an equitable solution and set the equidistance line aside in favour of a bisector methodology. Likewise, the ICJ's decision on the Nicaragua/Colombia case yielded a result with a tenuous link to the provisional equidistance line. Therefore, it may be safe to emphasize that there may not be a one size fit for a mandatory method for all disputes which are indeed case-sensitive. In certain situations where the equidistance/relevant circumstances method is inappropriate or unfeasible due to geographical characteristics, other methods are used⁵⁰.

In the Nicaragua/Colombia and Nicaragua/Honduras cases the ICJ also observed that the three-stage process cannot be employed mechanically. Significantly, the Court has acknowledged that it would be inappropriate to start with a provisional equidistance/median line in every case⁵¹. The ICJ, in its Black Sea judgment, stated that the equidistance line would be used unless compelling reasons make it impractical for a specific case⁵². Hence, the equidistance method is favourable unless there are relevant factors which make the use of the equidistance method

⁴⁷ Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar) Judgment (n 19) para 240.

⁴⁸ "The ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice and should be read into articles 74 and 83 of the Convention."

⁴⁹ Lando (n 20) 23; Permanent Court of Arbitration (n 2) para 339.

⁵⁰ Evans (n 16) 259-260; Yanai (n 13) 339-340.

⁵¹ Territorial and Maritime Dispute (n 20) para 194.

⁵² Maritime Delimitation in the Black Sea Judgment (n 5) para 116.



inappropriate. This would be indeed very useful, especially in scenarios where complex factors do not exist and where the geographical circumstances are straightforward⁵³.

Although the equidistance method has a certain value due to its simplicity and relative ease, it does not automatically enjoy any privilege over other methods. Indeed, as noted by the ICJ in the Nicaragua/Honduras case there may be certain factors which make the application of the equidistance method inappropriate⁵⁴. Likewise, in the Tunisia/Libya case, the ICJ highlighted its discretionary power as regards methodology and didn't consider it necessary even as a first step to investigate the effects of the equidistance method. Indeed, the ICJ stated that a decision favouring the equidistance method must be based on a thorough evaluation of all relevant circumstances of the case. Moreover, the Court underlined that equidistance is neither a mandatory legal principle nor a method with privileged status over the other delimitation methods⁵⁵.

The separate opinion of Judge Jiménez De Aréchaga in the abovementioned case is noteworthy as it stresses that equidistance is simply one of the methods without any precedence. Thus, it has to be gauged by its success in ensuring an equitable outcome. More importantly, Judge Jiménez De Aréchaga stated the delimitation process must have a simultaneous nature as the employment of equidistance and equitable principles cannot be seen as successive stages. Thus, he strongly opposed the idea of corrective equity only after applying the equidistance method, to correct its result⁵⁶.

In the Bangladesh/Myanmar judgment, ITLOS underscored the paramount importance of the prevailing geographical realities and relevant factors of each case as well as the goal of producing equitable result during the determination of the appropriate method for constructing the delimitation line⁵⁷.

⁵³ The Bay of Bengal Maritime Boundary Arbitration, The People's Republic of Bangladesh and The Republic of India (n 21) para 345; Maciej Gorka, 'Equitable Principles in the Delimitation of the Aegean Continental Shelf' (2022) 11 Polish Rev Int'l & Eur L 199, 211.

⁵⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, para 272.

⁵⁵ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, 18, para 110.

⁵⁶ *Separate Opinion of Judge Jiménez De Aréchaga, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, 18, p. 35.

⁵⁷ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar) Judgment (n 19) 235.*

Having said that, categoric rejection of the equidistance method would not be fair either as it may also serve an equitable outcome. Thus, unless there are relevant circumstances the provisional delimitation line may be based on equidistance. In the absence of disproportion and relevant circumstances, the said provisional equidistance line may become the final boundary. Or else the said provisional line may need to be significantly adjusted or a different line such as an angle bisector can be used. However, the strict prioritization of the equidistance line as a mandatory provisional delimitation line is not compatible with the objective and purposes of the UNCLOS regime⁵⁸.

III. REVIVAL OF EQUIDISTANCE METHOD?

It is only natural that any maritime boundary delimitation exercise necessitates varied expertise, among others, such as maritime law and cartography expertise. This complexity is thus amplified as cartographers naturally seek certainty for precise charting, whereas maritime lawyers endeavour to assess multiple factors in order to reach fair and just as well as sustainable outcome. Yet, it's common for those crucial professionals from each side to lack a full understanding of the other's unique expertise, priorities, and challenges. Moreover, as the ICJ observed in the North Sea Continental Shelf Cases the equidistance method evidently offers convenience. As the Court noted any cartographer can easily construct the maritime boundary delimitation line by employing the equidistance method. Nevertheless, as ICJ highlighted, despite its several inherent advantages such as the “practical convenience” and “certainty of application”, they are not legally sufficient to convert this particular method into “the” mandatory rule in international law⁵⁹. One should bear in mind that the equidistance method can indeed be practical, convenient and provide certainty in a delimitation exercise leading to an equitable result. Having said that, it would be an oversimplification to state that the equidistance method always produces equitable outcome.

Furthermore, given that every dispute has unique characteristics, the maritime boundary delimitation law naturally has a certain level of ambiguity as regards which specific delimitation method should be employed and when adjustments to the provisional delimitation line to be made to achieve a final equitable outcome. This inherent uncertainty is, to some extent, to be expected because the

⁵⁸ Elferink (n 17) 44-45; 114-116; Yurika Ishii, ‘Relevant Coasts and Relevant Area in the Maritime Delimitation of the EEZ and Continental Shelf’ (2020) 51 *Ocean Development & International Law* 307, 314.

⁵⁹ North Sea Continental Shelf Cases (n 22) paras 22-23.



applicable law only refers to achieving an equitable result without indicating suitable methods⁶⁰. Besides, one should not forget the framework character of UNCLOS, thus, it does not comprehensively address every concept.

Remarkably, ITLOS also employed the three-stage delimitation approach in the Bangladesh/Myanmar case in 2012. The Tribunal however preferred to call this process as the “equidistance/relevant circumstances method” for the delimitation of the CS and EEZ between Bangladesh and Myanmar⁶¹. Moreover, Judges Nelson, Chandrasekhara Rao and Cot in their joint declaration in the abovementioned case underscored that priority is given today to the equidistance/relevant circumstances method due to its simplicity.”⁶² The same terminology, the equidistance/relevant circumstances method⁶³, was also used by ITLOS in Case No. 23 – Dispute concerning the delimitation of the maritime boundary between Ghana and Cote D’Ivoire in the Atlantic Ocean in 2017⁶⁴. More recently, in 2023, the Tribunal in Case No. 28 - Dispute concerning the delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean employed the same terminology for the three-stage delimitation method. Nevertheless, the Tribunal seems to feel compelled to note that the use of the equidistance/relevant circumstances method is not mandatory and its application is contingent upon its feasibility and suitability.

Despite a strong but cautious reference to the equidistance/relevant circumstances method, the Tribunal also aptly selected the relevant base points to establish its own delimitation line rather than simply constructing an equidistance line between the two coasts. Accordingly, the Blenheim Reef was not disregarded for establishing the provisional equidistance line. Furthermore, the Tribunal eloquently maintained that not every base points referred by the

⁶⁰ Ion Galea, 'Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica - Nicaragua Case' (2018), 86-87.

⁶¹ Bay of Bengal (Bangladesh/Myanmar) Judgment (n 19) paras 238-239.

⁶² Joint Declaration of Judges Nelson, Chandrasekhara Rao and Cot, Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar) Judgment (n 19) 134.

⁶³ See paras 289, 324 and 360.

⁶⁴ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, ITLOS Reports 2017, p. 4.



disputing States would be relevant to the drawing of the equidistance line even in the first stage⁶⁵.

Arguably, the depiction of the three-stage delimitation methodology as the “equidistance/relevant circumstances” method may be confusing for several reasons. First of all, it might give the wrong impression that the UNCLOS formula and well-established case law, which rejected the mandatory/privileged nature of the equidistance method, is being overlooked. Secondly, the said wording might even perhaps create legal tension with the inherent flexibility needed to ensure equitable outcome. One needs to bear in mind that whereas Articles 74 and 83 of UNCLOS neither specify nor impose a particular method, Article 6 of 1958 did indeed prescribe one: the equidistance/special circumstances method. Evidently, unlike Article 6, the aim of Articles 74 and 83 was not to prioritize equidistance. Instead of the equidistance method as stipulated in Article 6, the principle of equity is enshrined in Articles 74/83. Otherwise, the delicate balance provided by UNCLOS would have been undermined by giving equidistance a more dominant role. In fact, the jurisprudence and the UNCLOS regime by rejecting the customary nature of Article 6 reversed the so-called privileged approach for the equidistance method. Therefore, as aptly maintained by Elferink et al., if the three-stage approach only attaches a privileged role to the equidistance method then this would mean that it will merely serve as a facade for implementing the equidistance method as foreseen by the 1958 Convention⁶⁶. Thus, this would amount to the resurrection of the methodology of the 1958 Convention which was consistently rejected by the jurisprudence as well as by the UNCLOS.

Finally, contrary to popular belief, the term “provisional equidistance line” doesn’t typically mean that a line is drawn between the relevant coasts of disputing States, geometrically equidistant to both coasts. It is, instead, equidistant between the relevant base points selected by the international courts or tribunals. In fact, the very presence of a dispute suggests that this “equidistance line” is almost always a delimitation line between the selected points.

⁶⁵ ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* Judgment, 28 April 2023.

⁶⁶ Elferink (n 17) 44-45; 114-116; Ishii (n 59).



IV. BASELINES AND THE SELECTION OF THE APPROPRIATE BASE POINTS

The extent of maritime zones is determined based on the distance from the coast. Therefore, it is crucial to identify the baseline, the line from which the outer limits of marine zones are measured. However, in many cases, excessive baselines are at the root of excessive maritime claims. For instance, by sketching wide straight baselines to claim more internal water, coastal States often seek to expand their territorial sea and, subsequently, their EEZ and CS claims as well⁶⁷.

Remarkably, under UNCLOS, maritime jurisdiction zones are identified according to the specified distance measured seaward from baselines along the coasts. States have several options when it comes to selecting baselines as stipulated in UNCLOS⁶⁸. Regardless of their type, baselines play a fundamental role and serve as the reference in drawing the outer limits of various maritime zones and determining the legal status of Territorial Sea, CS and EEZ. Moreover, baselines are of paramount importance in establishing delimitation lines.

According to Cot, the base points are instrumental in the delimitation of the maritime boundaries of the Coastal States. Base points are needed as geometrical reference points to construct the delimitation lines. Significantly, they may be also instrumental in measuring the length of relevant coasts. Simply, they are selected to construct a provisional delimitation line. Therefore, they have a mathematical function. It is of paramount importance to note that the aforesaid functions belong to base points not to base lines. Thus, baselines used to calculate the breadth and outer limits of the maritime zones and the base points used as a reference point to delimit the relevant areas between coastal States are not always the same. Sometimes they might coincide, but this is by no means a general rule. The international courts and tribunals make a distinction between the baselines legally qualifying the maritime zones and base points for the delimitation purposes. For instance, the ICJ, in *Tunisia/Libya* case, did not take into account the baselines constructed by Tunisia. The Court made a clear distinguished the baselines and base points. The Court did not fix base points on the important

⁶⁷ James Kraska, *Maritime Power and the Law of the Sea* (Oxford, 2010) 109; Yoshifumi Tanaka, *The International Law of the Sea*, (Cambridge 2012) 43-44.

⁶⁸ See Articles 5, 7 and 46 of UNCLOS.

Island of Djerba. Moreover, the ICJ gave partial effect to the Kerkennah Islands as base points⁶⁹.

In this regard, another technical challenge of the equidistance method may be the possible expectation of States that maritime boundary lines are to be constructed with reference to their individual baselines. Evidently, this causes further issues when the States involved employ different baseline principles which could result in diverging results to the detriment of the other party⁷⁰.

In the Black Sea case, the Court emphasised that an equidistance line to be drawn by considering the most appropriate base points. The ICJ stated that the equidistance and median lines are to be drawn from the most suitable points on the coasts of the disputing parties and the Court is not bound by the base points submitted by them. Moreover, the Court highlighted the importance of the coastlines of the Parties while selecting the most appropriate base points⁷¹.

However, the wording of the Court can be confusing at times. For instance, in the very same case, right after the above paragraph underlying the importance of selecting the most appropriate base points, the ICJ notes that the Court is not yet concerned with any relevant circumstances at the first stage and the provisional delimitation line is drawn based on strictly objective geometrical criteria, which at first sight seems to contradict the preceding paragraph⁷².

A few scholars appear to criticise the international courts and tribunals for selecting the appropriate base points at the first stage as it naturally necessitates discretionary function⁷³. However, considering the fact that the Court indeed selected the appropriate base points and ignored a certain geographical physical reality in fixing the base points at the first stage reveals that what actually Court meant in the above paragraph simply suggests that selected appropriate base

⁶⁹ Hestermeyer HP, Wolfrum R and Cot J-P, 'The Dual Function of Base Points', *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger wolfrum* (Martinus Nijhoff Publishers 2012) 808, 813, 818; C. Schofield, 'Holding back the waves? sea level rise and maritime claims' in O. C. Ruppel, C. Roschmann and K. Ruppel-Schlichting(eds), *Climate Change: International Law and Global Governance: Legal Responses and Global Responsibility Vol.1* (2013) 593-614, available at: <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2239&context=lhapapers>; Fietta and Cleverly (n 3) 20-23; Yanai (n 3) 307-310.

⁷⁰ Young (n 7) 738.

⁷¹ Maritime Delimitation in the Black Sea Judgment (n 5) para 117.

⁷² Maritime Delimitation in the Black Sea Judgment (n 5) para 118.

⁷³ Fietta and Cleverly (n 3) 575-576.



points are used as mathematical reference points to construct the provisional delimitation line without assessing the impact of relevant factors on the said line. Indeed, this does not contradict the well-structured three-stage delimitation process. And the assessment of each and every relevant circumstance are expected to be done in the subsequent stage. Obviously, this is not seen as an obstacle for the Court to select reference points which is by definition needed to construct the provisional line.

In the Black Sea case, the ICJ also made a very important clarification. The Court also pointed out that identifying base points for the delimitation of the CS and EEZ where overlapping claims exist is distinct from determining the baseline for measuring the breadth of the said maritime zones. While the States can determine their own baselines under UNCLOS to identify the breadth of their CS and EEZ, the ICJ does not depend merely on the selection of base points by the disputing States. For delimitation purposes, thus, the Court selects base points by reference to the physical geography⁷⁴. ITLOS has a similar approach. In Bangladesh/Myanmar, the Tribunal also underlined the significance of the abovementioned distinction by noting that it is not bound to accept the base points submitted by the parties and thus the Tribunal may construct its own base points⁷⁵.

Likewise, the Arbitral Tribunal in Bangladesh/India case highlighted the importance of the selection of the appropriate base points. It observed that in order to delimit the territorial sea, EEZ and CS, the Tribunal is tasked to identify the appropriate base points⁷⁶. Furthermore, the Tribunal emphasized its discretion in rejecting the base points indicated by the parties⁷⁷.

Yet, unless there are relevant circumstances necessitating the selection of different base points the provisional delimitation line in the first stage is drawn using all the base points which constructs a strict equidistant line. However, this formula doesn't serve the ultimate outcome of the delimitation process where there exist unique geographical circumstances. Thus, in the context, a new

⁷⁴ Maritime Delimitation in the Black Sea Judgment (n 5) para 137.

⁷⁵ Bay of Bengal (Bangladesh/Myanmar) Judgment (n 19) para. 264.

⁷⁶ Ibid para 212.

⁷⁷ Ibid para 353.



instrumental concept has emerged as the selection of the appropriate base points⁷⁸.

Indeed, drawing a provisional equidistance line even at the first stage might sometimes lead to inequitable results which could be difficult to remedy in the subsequent stages. As a matter of fact, the international courts and tribunals do not restrict the influence of relevant circumstances solely to the second stage by strongly emphasizing the selection of the most appropriate base points which inherently requires the assessment of certain geographical factors as a preliminary step. The decisions as regards the selection of appropriate base points in the first stage might naturally influence the considerations in the subsequent stages up to some extent. Should the relevant geographical circumstances fail to be considered initially, it may be still possible to address those factors during the subsequent stages. Nonetheless, particularly when the employment of equidistance method results in grave inequity, it might be challenging for international courts and tribunals to remedy and rectify the significant inequity substantially by adjusting the provisional equidistance line at later stages. Therefore, the jurisprudence demonstrates that a variety of relevant circumstances are being considered even before constructing its provisional delimitation line, demonstrating a proactive and pre-emptive approach in the early stage of the delimitation process⁷⁹. Thus, the assessment of the relevant circumstances in light of the equitable principles, as introduced by the ICJ in the North Sea Continental Shelf cases, is crucial for international courts and tribunals to respond to such intricate delimitation problems and rectify any inequitable outcome stemming from the equidistance line⁸⁰.

In this respect, the ICJ's approach to the determination of base points for the construction of the provisional delimitation line is noteworthy. Even though the ICJ noted earlier that the initial stage should employ geometrically objective methods, its actual approach in selecting base points was evaluated by some authors as "subjective"⁸¹. Arguably, this can't be depicted as subjective judicial action but to be more precise it can be described as the fulfilment of the essential discretionary role of the judiciary given by the UNCLOS regime to ensure the achievement of an equitable outcome in the delimitation process. Besides, the

⁷⁸ Olorundami (n 16) 43-45.

⁷⁹ Elferink (n 17) 232-243.

⁸⁰ Lando (n 20) 167.

⁸¹ Fietta and Cleverly (n 3) 488-490.



construction of a provisional delimitation line, upon selecting the appropriate base points, is certainly geometrically objective. Therefore, notably, even at the initial preliminary stage of drawing the provisional delimitation line, equitable considerations naturally influence the selection of base points⁸².

Indeed, the case law seems to suggest an emerging trend in this regard. The Romania/Ukraine case highlighted the use of geometrically objective methods. However, this description is somewhat miscomprehended, and it is misconstrued as that paying attention to the baselines is not necessary. Yet, the construction of a provisional line naturally involves prior decisions, especially concerning the location of base points. For instance, in the aforementioned case, the ICJ decided not to consider Serpents' Island for fixing the base points when drawing the provisional equidistance line. Indeed, the Court strongly underlined that considering Serpents' Island as base points would equate to judicial refashioning of geography. The Court underscored that including Serpents' Island as base points would artificially alter Ukraine's coastline, something neither law nor maritime delimitation practice permits. In this vein, the ICJ opted to disregard an island whilst determining the base points for the provisional delimitation line, given an additional base point on the Serpents' Island would have caused an unwarranted effect on the outcome of the delimitation process⁸³.

“...To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes... the Court considers it inappropriate to select any base points on Serpents' Island for the construction of a provisional equidistance line...”⁸⁴

Some commentators initially criticised this approach of selecting appropriate basepoints at the expense of the so-called “objective” approach and argued that the negative impact of the inappropriate base points could have been remedied at the second stage. Furthermore, surprisingly, they asserted that this may complicate the delimitation process. However, arguably, starting on the wrong foot to delimitation exercise in the face of obvious relevant circumstances might not be the best action to take. On the other hand, Olorundami aptly observed this might be a necessity for the international courts and tribunals to produce an

⁸² Tanaka (n 20) 268-271.

⁸³ Paul von Muhlendahl, 'Tiny Land Features in Recent Maritime Delimitation Case Law' (2016) 31 *Int'l J Marine & Coastal L* 1, 28-31.

⁸⁴ *Maritime Delimitation in the Black Sea Judgment* (n 16) para 149.

equitable result. For instance, the suitable base points were chosen in the light of the relevant circumstances, in the Nicaragua/Colombia case and in the Bangladesh/Myanmar Arbitration to ensure an equitable solution⁸⁵. Indeed, the case law seems to showcase that international judicial mechanisms can choose, according to physical geographical circumstances, not to fix base points on certain islands for constructing a provisional delimitation line in order to preemptively prevent an inequitable result⁸⁶.

Similarly, ITLOS observed in its Bangladesh/Myanmar judgment that the Tribunal is not obliged to accept base points provided by disputing parties. In this regard, ITLOS emphasised that it can select the appropriate base points in line with the geographical facts of the case. In this regard, the Tribunal noted that selecting base points on St. Martin's Island would create a cut-off effect blocking the seaward projection from Myanmar's mainland coast. Remarkably, the Tribunal pointed out that this would lead to an unwarranted distortion of the delimitation line which would amount to a judicial refashioning of geography. Accordingly, ITLOS disregarded St. Martin Island whilst determining the base points for drawing the delimitation line⁸⁷. In this case, the Tribunal emphasised the selection of the appropriate base points and constructed its own provisional delimitation line (equidistance). The Tribunal in fact described rightly the first step as the selection of the base points rather than drawing the provisional delimitation line only.

“Tribunal will now proceed with the construction of its own provisional equidistance line. The first step to be taken in this regard is to select the base points for the construction of that line...The Tribunal will first select the base points to be used for constructing the provisional equidistance line.”⁸⁸

Indeed, the state practice and well-established case law show that islands when they compete against the mainland have been given lesser importance, sometimes even being completely ignored in the delimitation process. As such, it would be questionable to grant full effects to remote disadvantaged islands.

⁸⁵ Olorundami (n 16) 43-45.

⁸⁶ Von Muhlendahl (n 83) 17-22.

⁸⁷ Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart 2016) 437-439; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar) Judgment* (n 19) para 264-265.

⁸⁸ Bay of Bengal (Bangladesh/Myanmar) Judgment (n 19) p. 4.



Consequently, selecting base points on them would not serve the equitable outcome which is the ultimate objective of any delimitation exercise⁸⁹.

In the Peru/Chile case, the ICJ also referred to the selection of appropriate base points to construct a provisional delimitation line⁹⁰. It is worth noting that the ICJ in the Nicaragua/Colombia case strongly highlighted the essential role of the most appropriate base points on the coasts of the disputing States in constructing the provisional delimitation line. Moreover, the Court decided to exclude certain islands and not to place base points on them in the construction of a provisional median line which would cause distortion. While determining the appropriate base points the ICJ assessed, among others, the size and location of islands. In this regard, the ICJ noted that their use in the construction of the provisional delimitation line would push that line significantly and disproportionately considering their size and importance⁹¹. Indeed, the ICJ established its own provisional delimitation line by identifying the relevant base points itself, rather than accepting the base points submitted by the parties⁹².

UNCLOS stipulates that islands are entitled to generate maritime zones⁹³. However, the potential entitlement of islands to various maritime zones does not necessarily imply that this would be always the case where overlapping claims exist. Indeed, international courts and tribunals have consistently evaluated their actual significance in delimitation disputes, and islands have had varied impacts in case law⁹⁴. Moreover, it is important to note that, the relevance of islands as opposed to continental mainlands has diminished over time. It is widely observed that the international courts and tribunals no longer treat islands and mainlands as equals. Recent cases, such as Romania/Ukraine, Bangladesh/Myanmar, and Nicaragua/Colombia, have endorsed the said trend. Modern maritime boundary delimitation law positions islands of mainland States in a subordinate role when they compete against the mainland of other States, especially when they are located on the wrong side of the median line, near the mainland of the other

⁸⁹ Clive Schofield 'The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation', *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009) 27-37.

⁹⁰ *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, 3, para 185.

⁹¹ Territorial and Maritime Dispute (n 20) para 191, 202.

⁹² Ibid para 200.

⁹³ See Article 121.

⁹⁴ Petros and Chrysochou (n 15) 17-19.



State⁹⁵. In the Libya/Malta case, the ICJ chose to overlook the Filfla Island in drawing its provision delimitation line, deeming its impact as disproportionate. Similarly, the Eritrea/Yemen Tribunal decided to exclude certain islands due to their far-out positions and the apparent distortion they would introduce to the delimitation line⁹⁶. The jurisprudence clearly reflects the decreasing role of islands in maritime boundary disputes, with a presumption often favouring the mainlands⁹⁷. The Tribunal, by underscoring the uniqueness of every dispute and the absence of a general mandatory rule, noted that the influence of an island on the delimitation of the EEZ and the CS hinges on the geography and relevant circumstances of each case⁹⁸.

In unique geographical contexts, strictly using an equidistance line between islands and the main coast might not be equitable and practical. There have been numerous cases where disadvantaged islands situated closer to other States were either completely disregarded in establishing maritime boundaries or were granted a reduced share compared to the opposite continental mainland⁹⁹. Judge Oda's dissenting opinion in the Tunisia/Libya Judgment is remarkable as it contains important observations and offers practical solutions for addressing the shortcomings of the equidistance method. In this regard, Judge Oda proposed that various factors should always be considered when selecting the baselines from which the equidistance line is to be plotted to address the issue of the equidistance method. Furthermore, he explicitly welcomed the modification of baselines due to special circumstances in the relevant geography¹⁰⁰.

Judge Xue expressed a strong concern, in his Declaration in the Nicaragua/Colombia case, regarding the problem of methodology. In this respect, he emphasised that, despite the attempts of the international judiciary to form a consistent approach, nonetheless the core principle of maritime boundary delimitation as set out by Articles 74 and 83 remains unchanged which is to produce an equitable outcome. Remarkably, he further stated that the

⁹⁵ Heeyong Daniel Jang, 'Diminishing Role of Islands in Maritime Boundary Delimitation: Case Studies of Dokdo/Tajeshima Island and the Senkaku/Diaoyu Islands' (2013) 35 U Haw L Rev 139,140-141.

⁹⁶ Fietta and Cleverly (n 3) 575-581.

⁹⁷ Jang (n 95) 142.

⁹⁸ *Bay of Bengal (Bangladesh/Myanmar)* Judgment (n 19) para 22.

⁹⁹ Gorka (n 53) 220-221.

¹⁰⁰ *Dissenting Opinion of Judge Oda, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, 18, para 169.



determination of the delimitation method should be based on the geographical characteristics and relevant circumstances, therefore, there cannot be a pre-determined methodology. Furthermore, by referring to the Tunisia/Libya Continental Shelf Case, he noted that equidistance is not a mandatory or favoured method¹⁰¹.

Judge Keith, in his Declaration in the abovementioned case, upon underscoring the customary nature of Articles 74 and 83, pointed out their stark contrast to Article 15 which provides a clear delimitation rule, favouring a median line method. Considering the fact that the 1958 Conventions had similar provisions regarding delimitation of both territorial sea and continental shelf, suggesting an equidistance line with exceptions, it is notable that this approach was only reflected in Article 15, but not in Articles 74 and 84 of UNCLOS¹⁰². For instance, the ICJ used the "angle-bisector method" in the Nicaragua/Honduras case, indicating that different methods may be necessary depending on the specific geographic situation. It is important to note that the equidistance method has never been widely embraced as the mandatory or primary method either in case law or treaty law¹⁰³.

CONCLUSIONS

The three-stage approach appears to offer a more structured approach towards achieving an equitable result. This methodological approach is designed to strike a balance between maintaining predictability while also allowing enough flexibility to ensure an equitable outcome¹⁰⁴. In this regard, the selection of appropriate base points might play a crucial role in preventing any inequitable outcomes that could arise from a strict application of the equidistance method¹⁰⁵.

On the other hand, the equidistance method, at times, might also have several advantages such as being simple, straightforward and predictable, especially in the absence of complicated geographical circumstances. However, it is that strict application of the equidistance method could lead to inequitable outcomes. Indeed, simplicity cannot be expected in complicated maritime disputes¹⁰⁶.

¹⁰¹ Territorial and Maritime Dispute (Nicaragua v. Colombia) Judgment (n 46) Declaration of Judge Xue, 746-747.

¹⁰² Ibid 740-741.

¹⁰³ Uykur (n 14) 362-363.

¹⁰⁴ Schaller (n 7) 558-567.

¹⁰⁵ Uykur (n 14) 363-364.

¹⁰⁶ Churchill (n 10) 184.

Furthermore, as it is reflected in the well-established case law and UNCLOS, there is no such mandatory method for maritime boundary delimitation i. e. equidistance method. Thus, the rigidity of the equidistance method needs to be mitigated to ensure an equitable outcome. Arguably, this tedious task can be achieved by selecting the appropriate base points where unique geographical circumstances exist. As a matter of fact, the selection of the base points provides the judiciary with a practical and effective means of alleviating the possible inequitable impact of the equidistance line from the beginning of the delimitation process¹⁰⁷.

It is a truism that Articles 74 and 83 only necessitate that the delimitation process results in an equitable outcome. Hence, there doesn't appear to be any legal basis to limit the adjustment of a provisional delimitation line to the second stage. The discretionary nature of these adjustments doesn't negate the advantages of a standardized delimitation approach¹⁰⁸. The main question is not pertinent to whether to assess the relevant circumstances, but in which phases of the three-stage process they should be addressed. Therefore, essentially this is more of a matter of timing. Despite some scholars prioritizing the importance of the successive distinct stages and not assessing the relevant circumstances in the first stage, there has been a strong inclination of international courts and tribunals towards the idea of “simultaneous” assessment including the first stage and selecting appropriate base points before constructing the provisional delimitation line. The three-stage approach appears to be progressively evolved to allow more adaptability in its first stage. International courts and tribunals are now integrating the evaluation of relevant circumstances directly into the choice of the appropriate base points to draw the delimitation line. Indeed, jurisprudence frequently showcases instances where the first stage of the delimitation process involves the evaluation of the coastal geography for the selection of appropriate base points¹⁰⁹.

Notably, there is a growing trend to select suitable base points before drawing the provisional delimitation line. This has been a commonly employed approach for mitigating the inequitable impact of islands especially for those located on the wrong side of the median line, competing against the continental mainland.

¹⁰⁷ Paul von Muhlendahl (n 83) 20-21.

¹⁰⁸ Lando (n 20) 244-245.

¹⁰⁹ Elferink (n 17) 206-215, 232-238.



Over time, as the rulings of international courts and tribunals increase, this trend is expected to evolve which would perhaps provide more tangible guidelines¹¹⁰.

In light of the above discussion, the terminology as regards the three-stage delimitation methodology should be employed cautiously, in this regard, the terms “equidistance/relevant circumstances” or “provisional equidistance line” should perhaps be avoided or at least should not be depicted as the obligatory components of the said methodological approach which might endanger the balance, finally seems to be, reached between the equitable principles and the use of equidistance method. As discussed above, to prevent, misinterpretations the term “provisional delimitation line” may be preferred over “provisional equidistance line” at the first stage as it allows for flexibility. Moreover, since this line almost always changes during the judicial exercise and is not an equidistance line between the two coasts but rather between the appropriate base points, it may be more appropriate to refer to it as a delimitation line.

Although, it could be proposed to consider this initial selection step as a distinct stage, potentially creating a four-stage delimitation process, such a formulation is not advisable. This is because the selection of base points is intrinsically related to the construction of the provisional delimitation line, and not all the relevant circumstances are thoroughly assessed at this phase. Therefore, it is plausible to argue that the process of constructing the provisional delimitation line in the first stage consists of two distinct steps.

Firstly, selecting the appropriate base points and subsequently drawing the delimitation line. Evidently, the relevant area's physical geography greatly influences the choice of the said base points. Moreover, as discussed above, the ICJ's adherence to the “dual principle of baselines and base points” demonstrates that the base points used for delimitation and baselines for measuring the breadth of the CS and EEZ are totally different concepts.¹¹¹

In conclusion, it may be safe to argue that equitable considerations cannot be restricted just to the second stage. Otherwise, this would be the resurrection of the Article 6 formula of the 1958 Convention and thus it would not be compatible with the UNCLOS and well-established case-law. Therefore, arguably, the three stages aren't strictly limited but they are flexible and interconnected as intended

¹¹⁰ Paul von Muhlendahl (n 83) 19; Hamid and Sein (n 12) 61.

¹¹¹ Salawati Mat Basir & Saidatul Nadia Abd Aziz, 'Undelimited Maritime Areas: Obligations of States under Article 74(3) and 83(3) of UNCLOS' (2020) 18 *Indonesian J Int'l L* 63, 67-68.

under Articles 74 and 83. Considering the absence of a mandatory strict equidistance method in the maritime boundary delimitation law, the selection of the most appropriate base points, where the relevant physical geography necessitates it, would remedy any potential inequitable results that the strict equidistance method might cause while guaranteeing the integrity of the structural three-stage approach and ensuring that the ultimate objective of Articles 74 and 83 is upheld.

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