

The Law of Maritime Delimitation and the Russian–Norwegian Maritime Boundary Dispute

Pål Jakob Aasen



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Abstract

This report examines the law on maritime delimitation under the Law of the Sea Convention (LOS Convention) and the maritime boundary dispute between Norway and the Russian Federation in the Barents Sea. Norway and the Russian Federation have been negotiating over the boundaries of their maritime zones in the Barents Sea since the early 1970s. They have failed to agree about the delimitation of the area, except for a relatively small area in the southernmost part of the Barents Sea through the Varanger Fjord Agreement of 1957 and the succeeding Varanger Fjord Agreement of 2007. Norway has argued for the application of a median line delimiting the boundaries, whereas the Russian Federation argues for the application of sector line, leaving a contentious zone between the opposing views of about 175,000 square kilometres. These legal positions will be investigated in light of the historical development of the law on maritime delimitation, as well as recent judgments from the International Court of Justice and other arbitral tribunals since the entering into force of the LOS Convention. In addition, the procedural obligations of Norway and the Russian Federation under the LOS Convention towards finding a solution to their maritime boundary dispute are examined.

Key Words

International law, maritime delimitation, three-step method, single maritime boundary, sector principle, median line, relevant circumstances, Barents Sea, maritime zones, LOS Convention, ICJ, PCA.

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Polhøgda, February 2010

Pål Jakob Aasen

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2009

Romania/Ukraine case, 2009 ICJ Reports.

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1945

Charter of the United Nations, done in San Francisco, 26 June 1945, in force 24 October 1945, UNTS Vol. 1, No. XVI.

1957

Agreement concerning the Sea Frontier between Norway and the USSR in the Varanger Fjord of 15 February 1957, UNTS Vol. 312, No. 4523.

Descriptive Protocol relating to the Sea Frontier between Norway and the USSR in the Varanger Fjord of 15 February 1957, UNTS Vol. 312, No. 4523.

1958

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1969

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1978

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1982

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2007

Agreement between the Russian Federation and the Kingdom of Norway on the maritime delimitation in the Varanger Fjord Area of 11 July 2007, UNTS No. 45114.

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List of Acronyms and Abbreviations

EEZ	exclusive economic zone
ICJ	International Court of Justice
ICJ Reports	Reports of Judgements, Advisory Opinions and Orders; The International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
LOS Convention	United Nations Convention on the Law of the Sea
nm	nautical mile (= 1.852 km or 1.150779 statute miles)
RIAA	United Nations Reports on International Arbitral Awards
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNLS	United Nations Legislative Series
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background and Objectives of the Study

Norway and the Russian Federation have been negotiating over the boundaries of their maritime zones in the Barents Sea ever since the early 1970s. They have failed to agree about the delimitation of the area, except from a relatively small area in the southernmost part of the Barents Sea through the Varanger Fjord Agreement of 1957¹ and the succeeding Varanger Fjord Agreement of 2007.² The latter agreement should not be underestimated, as it solves the question of the maritime boundary of the territorial sea, and could be read as a compromise that maps out the direction of the remaining part of the boundary in the southern segment of the Barents Sea. Yet, the agreement resolves only the boundary to the junction of the parties' opposing views since the beginning of negotiations. Norway has argued the application of a median line delimiting the boundaries whereas the Russian Federation argues the application of sector line, leaving a contentious zone between the opposing views of about 175,000 square kilometres.³

Against this background, the aims of this study are threefold. The first objective is to examine the law on maritime delimitation, *de lege lata*, in accordance with the United Nations Convention on the Law of the Sea of 10 December 1982 (LOS Convention). The LOS Convention was ratified by Norway on 24 June 1996, and by Russia and by the Russian Federation on 12 March 1997, and entered into force in 1994, and is thus directly applicable as between the parties to the present dispute.⁴ The second objective of this study is to examine the procedural obligations of Norway and the Russian Federation under the LOS Convention towards finding a solution on their maritime boundary dispute. Part XV of the LOS Convention identifies the procedures available to state parties for the settlement of their disputes concerning the interpretation and application of the Convention. These provisions will be examined carefully in order to bring out precisely what kinds of obligations Norway and the Russian Federation have undertaken, as state parties to the LOS Convention, to the dispute in focus here. Through these three separate but yet intertwined examinations, the overall aim is to get behind the law of maritime delimitation and its application to the maritime boundary disputes between Norway and the Russian Federation in the Barents Sea.

The third objective is to apply the law, as found, on the maritime delimitation dispute between Norway and the Russian Federation in the Barents

¹ Agreement concerning the Sea Frontier between Norway and the USSR in the Varanger Fjord of 15 February 1957, UNTS Vol. 312, No. 4523

² Agreement between the Russian Federation and the Kingdom of Norway on the maritime delimitation in the Varanger Fjord Area of 11 July 2007, UNTS No. 45114.

³ Oude Elferink 1994, p. 237.

⁴ The Law of the Sea Convention, done in Montego Bay, 10 December 1982, in force 16 November 1994, UNTS Vol. 1833, No. 31363. As of September 2009 it had 159 state parties.

Sea in order to see what solution it maps out. To determine precisely where the maritime boundary between Norway and the Russian Federation in the Barents Sea lies, legally speaking, is not easy, and perhaps not even possible. Nevertheless, this study aims to present some overall considerations, taking into account the recent judgements from international arbitral tribunals and the International Court of Justice (ICJ).

1.2 Method

A few introductory words are in order as to the sources and interpretation of international law. As international law is not created by any one global legislative body, the sources are to be found elsewhere. Article 38(1) of the Statute of the ICJ is generally considered to be the most authoritative enumeration of the sources of international law:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁵

It is generally held by the international legal community that this list of sources is not exhaustive, and that more sources of law can be used by those applying international law than those listed above, although the exact scope is currently debated.⁶ Without taking sides in this debate, this study will limit itself to the four mentioned contained in Article 38 of the Statute of the ICJ.

As regards the interpretation of treaties, this study is based on the method prescribed by Articles 31–32 of the 1969 Vienna Convention on the Law of Treaties (VCLT).⁷ This method is widely used by states and international tribunals, and is generally accepted in the legal community as a codification of international customary law.⁸

Also national legislation will be examined in order to see how the states concerned have preserved their rights and complied with their obligations in accordance with the relevant international law. In interpreting national legislation, emphasis will be given to the legal text's ordinary meaning in the light of its object and purpose.

⁵ Art. 38 of the Statute of the ICJ, 26 June 1945, 59 Stat. 1055.

⁶ Murphy 2006, p. 65.

⁷ The Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331

⁸ In a series of decisions by the ICJ, and in numerous arbitral tribunal awards, it has been held that Arts. 31–32 of the VCLT reflect customary law. For further reading and references, see Cassese 2005, p. 179.

1.3 Outline

In line with the above-mentioned objectives, this study will be conducted in three parts. The first part, chapter 2, examines the law and legal framework of maritime delimitation. First the maritime zones in the LOS Convention that are relevant to this study, their purpose and definition, are reviewed (2.1). This short review leads naturally to the next point, which is the concept of maritime delimitation (2.2). The aim here is to focus on the concept of maritime delimitation, its definition and purpose. Then follows a presentation of the history of the law of maritime delimitation, focused on how the concept of maritime delimitation came about, what questions arise when dealing with the concept, and the two schools of thought that emerged in the shaping of the law of maritime delimitation and that have remained important to the subsequent development of this law. These two schools represent two fundamentally different approaches to the law of maritime delimitation. The first school favours flexibility in its approach to maritime delimitation, whereas the second favours predictability. Both schools of thought will be pursued throughout the study, as tools for analysing treaty law and jurisprudence in order to evaluate the law of maritime delimitation, *de lege lata*. Moreover, a line will be drawn from the international customary law that existed prior to any treaty law on the matter, to the emergence of the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf in 1958, and finally to the emergence of the LOS Convention in 1982 (2.3.1). Next, in 2.3.2 there follows a study of the relevant provisions on maritime delimitation in the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf.

We then turn to the existing law in accordance with the LOS Convention (2.4), beginning with an examination of the relevant maritime delimitation provisions, namely Articles 15, 74 and 83 of the LOS Convention (2.4.1). These are in turn compared to earlier rules of maritime delimitation, as found in the Convention of the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf, in order to map out their differences (2.4.2). We also examine the relationship between the respective treaty law and international customary law in this context, from two perspectives. The first concerns the relationship between the LOS Convention and UNCLOS I Treaties at treaty level in the event of a conflict between the two. The second perspective concerns the relationship between customary law and the LOS Convention: how customary law has been influenced by the LOS Convention prior to its entry into force. Then a study of the emergence and concept of a single maritime boundary for all purposes follows in section 2.4.3.

Section 2.5 offers a summary of the findings thus far, after which (in 2.6) we turn to how the jurisprudence of courts and arbitral tribunals has given effect to the provisions on maritime delimitation in the LOS Convention after its entry into force. In focus here are the Cameroon/Nigeria case (2002), the Barbados/Trinidad and Tobago case (2006), the Nicaragua/Honduras case (2007), the Guyana/Surinam case (2007) and the Romania/Ukraine case (2009). Some final remarks and general conclusions to the current standing of the law on maritime delimitation, *de lege lata*, will be made in 2.7.

The second part, chapter 3, studies the provisions for the settlement of disputes arising from the interpretation and application of the LOS Convention. These are examined in order to substantiate the procedural obligations of Norway and the Russian Federation, as states parties to the LOS Convention, to work toward a solution to the issue of their maritime boundaries.

The third part, chapter 4, turns to the maritime delimitation dispute between Norway and the Russian Federation in the Barents Sea. The aim here is to apply the law as discussed in chapter 2, *de lege lata*, to the present maritime delimitation dispute between Norway and the Russian Federation in order to see what solution it maps out, if any.

2 The Law and Relevant Legal Framework on Maritime Delimitation

2.1 Maritime Zones in the LOS Convention

Maritime zones in the LOS Convention are defined in relation to the state's coastal boundaries.⁹ Thus, the sole precondition for a state to be entitled to maritime zones is to have sovereignty over a coast facing the ocean.¹⁰ This legal concept, known as 'the land dominates the sea principle', has been developed in the law of the sea over the centuries.¹¹ The range of coastal state jurisdiction is defined spatially, as each maritime space has been formulated as an extension of a coastal state's jurisdiction.¹² Each zone sets out the rights, responsibilities and obligations of the coastal state in terms of giving full or limited jurisdiction. Coastal state jurisdiction is strongest in the zones closest to the coasts, which in this respect are the inland waters and territorial sea, becoming weaker further out. The territorial sea in which coastal states exercise territorial sovereignty shall not exceed 12 nautical miles (nm) measured from baselines

⁹ Each maritime space has been formulated as an extension of a coastal state's jurisdiction, and is measured from the state's baselines in accordance with the LOS Convention. See for instance Arts. 1(1), 2, 3, 33, 49(1), 56(1) 76(1) and 86.

¹⁰ However, every state is to some extent entitled to the resources in the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (the Area), as this is defined to be the common heritage of mankind. See Arts. 136 and 1. The Area is regulated by Part XI of the LOS Convention.

¹¹ The Permanent Court of Arbitration held in the 1909 *Grisbådarna Maritime Frontier Case* that 'the fundamental principles of the law of nations, both ancient and modern, according to which maritime territory is an essential appurtenance of land territory...' 4 AJIL (1910) p. 227, and in the *Anglo/Norwegian Fisheries case*, the ICJ held that 'it is the land which confers upon the coastal State a right to the waters off its coasts' 1951 ICJ Reports, p. 133.

¹² However, internal waters and archipelagic waters constitute exceptions. The former are located on the landward side of the baseline of the territorial sea, and the latter consist of the waters enclosed by the archipelagic baselines drawn in accordance with Arts. 47 and. 49. Consequently, these two maritime zones do not rely on spatial distance from the baseline. Also, the high seas is defined antithetically, as 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.' See Art. 86.

determined in accordance with the Convention.¹³ The contiguous zone over which limited jurisdiction is exercised by the coastal state is not to extend beyond 24 nm from the baselines.¹⁴ The EEZ, where the coastal state may exercise sovereign rights regarding the exploration and exploitation of natural resources in the waters superjacent to the seabed and of the seabed and its subsoil, shall not extend beyond 200 nm from the baselines.¹⁵ The same is in principle true for the continental shelf of less than 200 nm.¹⁶ But, if certain criteria embodied in the Convention are met, the continental shelf may extend beyond 200 nm.¹⁷

Accordingly, the definition of the spatial extent of the maritime zones of the coastal state is at the heart of the international law of the sea. A problem that often arises in determining the spatial extent of a coastal state's jurisdiction is the situation where the jurisdiction of two or more coastal states allegedly overlaps with that of the other, as is the case between Norway and the Russian Federation in the Barents Sea. This brings us to the next stage in this study: the concept of maritime delimitation.

2.2 The Concept of Maritime Delimitation

Maritime delimitation may be defined as the process of establishing lines separating the spatial ambit of coastal jurisdiction over maritime spaces where the legal title overlaps with that of another state.¹⁸ The spatial ambit of coastal jurisdiction may overlap by opposite coasts, and by adjacent coasts. While the meaning of the term 'opposite' is evident, the term 'adjacent' is used to refer to the lateral boundaries of the maritime zones between two adjoining states.

¹³ See Art. 3. It should be noted, however, that foreign vessels may exercise their right to innocent passage in the territorial sea, see. Art. 17.

¹⁴ See Art. 33.

¹⁵ See Art. 57.

¹⁶ According to Art. 76(1), 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 nm 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. Hence, the coastal state has right to a continental shelf up to 200 nm notwithstanding the geological and geomorphological characteristics of the respective sea bed.

¹⁷ See Art. 76(4). In any case, the outer limits of the continental shelf either shall not exceed 350 nm from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nm from the 2,500-metre isobaths, which is a line connecting the depth of 2,500 metres. See Art. 76(5). In this respect, the coastal state shall submit information on the limits of its continental shelf beyond 200 nm to the Commission on the Limits of the Continental Shelf set up under Annex II of the Convention, see. Art. 76(8). The Russian Federation submitted its information on 20 December 2001 and Norway on 27 November 2006. In regard to Norway, the Commission on the Limits of the Continental Shelf issued its final recommendations in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 March 2009. It is still processing the information submitted by the Russian Federation.

¹⁸ Tanaka 2006, p. 7.

The core of maritime delimitation is its international character. It is an operation to be effected by two or more states if their legal titles compete and each state seeks to exercise spatial jurisdiction over the same maritime area. In the Gulf of Maine case, the ICJ held that:

No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result.¹⁹

Maritime delimitation is an international operation in the sense that it cannot be effected unilaterally, but must result from a process between two or more states. On the other hand, delimiting maritime zones that are not in contact with those of another coastal state may be done unilaterally. That follows from the various provisions in the LOS Convention according to which coastal states are entitled to do so except when other provisions apply: 'has the right to' or 'shall/may not extend beyond'.²⁰

Also important in maritime delimitation is the distinction between 'delimitation' and 'apportionment'.²¹ Whereas the former is seen as a declaratory process, the latter is seen as a constitutive or man-made process.²² In this respect, 'delimitation' is a process in which an area is delimited by taking into account predefined criteria that with weight influence on the course of the boundaries, such as geographical and geomorphological features of the coast in question. Hence the declaratory process stresses the need for predictability in maritime delimitation. 'Apportionment', on the other hand, refers to a process in which the area is divided in agreed proportions based solely on notions of equity on a case-by-case basis. Hence, the constitutive process stresses the need for flexibility in maritime delimitation. Illustrative in this regard is the North Sea Continental Shelf case of 1969. The applicable law was internationally customary law; subject to delimitation was the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other. The parties had asked the ICJ to state the principles and law applicable to maritime delimitation. The Court held that:

...its task in the present proceedings relates essentially to delimitation and not the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already in place, in principle, appertaining to the coastal State and not the determination de novo of such an area.²³

¹⁹ 1984 Gulf of Maine case (United States/Canada), 1984 ICJ Reports, para. 112(1).

²⁰ See Arts. 3, 33(2), 57, 76(1). As regards the latter, see above n. 16.

²¹ Tanaka 2006., pp. 11–12.

²² *Ibid.*

²³ 1969 North Sea Continental Shelf cases (Federal Republic of Germany/ Denmark/The Netherlands), 1969 ICJ Reports, para. 18.

Thus, the idea of maritime delimitation is to delimit areas considered a patrimonial right or naturally belonging to the respective coastal states. This was not the same as apportioning areas belonging to no one:

Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.²⁴

So even though delimitation and apportionment may produce the same result in many cases, they are in principle different concepts and must therefore be dealt with separately. The Court developed its reasoning further in holding that:

More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, namely that the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.²⁵

Thus, the Court emphasized the need to take into account what it saw as essential in maritime delimitation, namely the inherent right of a coastal state to areas that are natural prolongations of its coasts. As the area is considered inherent, it should be accounted for as such in the maritime delimitation. With this argument, the ICJ disregarded the notion of apportionment. However, this was not a matter of either/or. The principle of natural prolongation did not solve the problem of maritime delimitation. But it underlined what the Court in essence saw as the area in question: the area in which the natural prolongation of one state overlaps that of another. In this respect the Court held that in the situation of two opposite coasts, ‘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’;²⁶ further, for adjacent coasts, that ‘a lateral equidistance line often leaves to one of the states concerned areas that are a natural prolongation of the territory of the other.’²⁷ Hence, there was need for the concept of apportionment in situations concerning adjacent coasts. In this respect, the Court held in its decision that:

...delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without

²⁴ *Ibid.*

²⁵ *Ibid.*, para. 19.

²⁶ *Ibid.*, para. 58.

²⁷ *Ibid.*

encroachment on the natural prolongation of the land territory of the other.²⁸

Thus, the delimitation of the continental shelf in the North Sea Continental Shelf cases was not effected solely by reference to the concept of natural prolongation; it was also necessary to invoke equitable principles (or apportionment), although the prolongation concept was more important. The Court apprehended that reliance solely on the concept of natural prolongation could generate a result that might not be considered equitable. In that regard, the discussion on delimitation versus apportionment to a large extent mirrored the two contrasting schools of thought that had appeared in the shaping of the law on maritime delimitation – the one stressing the need for maximum flexibility; and the other, the need for maximum predictability. That brings us to the next subject: the development of the legal framework on maritime delimitation.

2.3 The History of the Law of Maritime Delimitation

The LOS Convention is the international agreement that resulted from the Third United Nations Conference on the Law of the Sea (UNCLOS III), which lasted from 1973 through 1982. It entered into force on 16 November 1994 and has today 159 state parties.²⁹ As earlier mentioned, Norway ratified it on 10 December 1996 and the Russian Federation on 12 March 1997. The LOS Convention codified already existing rules and further developed the law of the sea. It sets out principles and norms for the conduct and relations of states on maritime issues in the world oceans, and is considered a milestone in the evolution of the law of the sea.³⁰ In defining the rights and obligations of states in various maritime zones such as the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf and the areas beyond national jurisdiction, it manages to balance the various competing interests in the use of the ocean and its resources in a comprehensive way. Of these zones, only the exclusive economic zone and the area beyond national jurisdiction were *new* legal concepts in the international law of the sea; the others were known from earlier treaties and customary law. In addition, the LOS Convention introduced new provisions concerning maritime delimitation. The introduction of new maritime zones and new provisions for their delimitation made the concept of maritime delimitation even more important than previously. In order to understand today's picture of maritime delimitation, we need to take a brief look at the history of maritime delimitation.

²⁸ *Ibid.*, para. 101.

²⁹ Above n. 4 (as of 28 September 2009)

³⁰ Ambassador Tommy T.B. Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea, described the Convention as the 'Constitution for the Oceans' at the final session of the Conference at Montego Bay, Jamaica, on 11 December 1982. Published by the United Nations with the text of the Convention and the Final Act of the Conference. UN Pub. Sales No. E.83.V.5 (1983).

2.3.1 *From international customary law to the UNCLOS I Treaties and the LOS Convention*

Until the entry into force of the LOS Convention in 1994, the law of the sea in general, and the law governing maritime delimitation in particular, was regulated by internationally customary law and by four treaties established at the First United Nations Conference on the Law of the Sea in 1958 (UNCLOS I). These treaties, often referred to as the UNCLOS I treaties, are as follows: the Convention on the Territorial Sea and Contiguous Zone,³¹ the Convention on the Continental Shelf,³² the Convention on the High Seas,³³ and the Convention on Fishing and Conservation of Living Resources of the High Seas.³⁴ Here we will be concerned only with the first two, which concern maritime delimitation.

For the time prior to the UNCLOS I treaties it seems difficult to identify the law applicable to maritime delimitation. Various methods were developed and used in the context of state practice, international customary law and legal theory in the 19th and the first half of the 20th centuries.³⁵ We should also note that only the territorial sea had been developed as a legal concept in international law making maritime delimitation necessary. These methods of maritime delimitation were the median-line system,³⁶ the drawing of a line perpendicular to the general direction of the coast,³⁷ the prolongation of the land boundary,³⁸ the *thalweg*³⁹ system and the common zone system.⁴⁰

³¹ Entered into force 10 Sept 1964, UNTS Vol. 516, No. 7477.

³² Entered into force 10 June 1964, UNTS Vol. 499, No. 7302.

³³ Entered into force 30 Sept 1962, UNTS Vol. 450, No. 6465.

³⁴ Entered into force 20 March 1966, UNTS Vol. 559, No. 8164.

³⁵ Tanaka 2006, pp. 19–32.

³⁶ The median line or equidistant line is that line every point of which is mathematically equidistant from the coastlines of each state. A strict median line would take into account all coastal extremities in calculating the line, while a normal median line would only take into account coastal base points permitted under international law.

³⁷ This method consists of drawing a perpendicular line to coast or general direction of the coast. It is important that the parties agree precisely which part or sector of the coast to be taken into account. Its length may be assumed to vary in relation to the length of delimitation line itself. The farther from the coast of the ending point, the longer should be the part or sector of the coastline to be taken into account.

³⁸ This method draws a line in prolongation of the land boundary. This method is prone to produce inequitable results where the land boundary does not cross a coast at right angle.

³⁹ The *thalweg* is a line drawn to join the lowest points along the entire length of a streambed or valley in its downward slope, defining its deepest channel. It serves historically to secure for each state an equal area of safe navigation, and is usually applied with rivers. Using the criterion on ocean boundary-making called for a variety of interpretations as it distinguishes itself from a traditional river or valley.

⁴⁰ Instead of delimiting the maritime zone, this system transforms an overlapping area into a zone that is common to both states.

The Hague Conference for the Codification of International Law, convened in 1930 at the request of the League of Nations, dealt with concept of maritime delimitation. A Committee of Experts was set up, and within this group there emerged two contrasting schools of thought regarding the concept of maritime delimitation.⁴¹ One view was the result-oriented equity approach, which rejected the use of any obligatory method. The other view favoured the use of an obligatory method, employing the median line as a general rule between coastal states opposite and adjacent to each other, allowing for necessary modifications in order to achieve an equitable result.⁴² It appears that the difference in these two views on maritime delimitation consisted in differing emphases given to the value of predictability on the one hand and flexibility on the other. The result oriented-equity approach gives the court or tribunal a large margin of discretion, allowing it to decide on a case-by-case basis without being bound by any specific method. This opens up for subjectivity and unpredictability to a vast degree, and might run the risk of undermining the law of maritime delimitation. The corrective/equity approach, on the other hand, contains a certain degree of predictability by incorporating a specific method of delimitation – the equidistance method. With this approach, considerations of equity may enter later at the second stage, but only if the provisional equidistance line produces an inequitable result. The equidistance line is as such given primacy, in that it establishes the foundation for the delimitation process. But as both schools of thought open up for equitable considerations, the identification of relevant circumstances and their legal effects remains the crucial part in the law of maritime delimitation. In the following, special attention will be paid to these two contrasting methods of maritime delimitation, as well as to the identification of relevant circumstances.

The Hague Conference failed to codify any delimitation rule for the territorial sea. But efforts to codify law on maritime delimitation continued, and at the First United Nations Conference on the Law of the Sea (UNCLOS I) held in Geneva in 1958, they bore fruit. Not only did it succeed in adopting a delimitation rule for the territorial sea, it also succeeded in adopting delimitation rules for the contiguous zone and the continental shelf as these two new legal concepts in the law of the sea emerged. The relevant provisions are Articles 12 and 24 of the Convention on the Territorial Sea and the Contiguous Zone, and Article 6 of the Convention of the Continental Shelf.⁴³ Those provisions will be examined in the following.

⁴¹ Tanaka 2006, pp. 34–35.

⁴² *Ibid.*

⁴³ The Russian Federation ratified the Convention on the Territorial Sea and Contiguous Zone on 22 Nov 1960 (entered into force 10 September 1964), above n. 31, and the Convention on the Continental Shelf on 22 Nov 1960 (entered into force 10 June 1964), above n. 32. Norway is party only to the Convention on the Continental Shelf, which it ratified 9 September 1971, above n. 32.

2.3.2 *Delimitation rules of the Territorial Sea and the Continental Shelf – a similar approach*

In light of the similarity in structure of the delimitation rules to be examined, it would first be appropriate to note the likeness of Article 6 of the Convention on the Continental Shelf and Article 12 of the Convention on the Territorial Sea and the Contiguous Zone. According to paragraph 1 of the latter:

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

Firstly, the provision identifies the self-evident point that states parties are free to conclude or not to conclude an agreement on the matter. Undeniably, they are in position to do so as long as they do not act contrary to *jus cogens*.⁴⁴ Still, it serves to underline that states parties are not in position to act legally by unilateral delimitation.⁴⁵ Secondly, failure to make an agreement on the matter calls for the use of the equidistance method. Thirdly, if special circumstances call for a delimitation line different than that obtained through the equidistance method, the equidistant line shall not apply. This triple rule of agreement–equidistance–special circumstances can also be found in Article 6 of the Convention on the Continental Shelf. Note paragraph 1 of Article 6, on the delimitation of opposite coasts:

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

⁴⁴ The principle of *jus cogens* is a peremptory norm of general international law. Any treaty is void if in conflict with that norm of *jus cogens*. The principle of *jus cogens* is recognised as part of internationally customary law and is also embodied in the Vienna Convention on the Law of Treaties, Art.s 53 and 64. See Dunoff, Ratner and Wippmann 2006. pp. 58–61.

⁴⁵ This is applicable not only to maritime delimitation between coastal states opposite or adjacent to each other – it applies in general. In the *Anglo/Norwegian Fisheries* case, the Court held that ‘the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal States as expressed in municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.’ (See above n. 11, p. 132.) This dictum has also been applied to the fishing zone in the *Fisheries Jurisdiction* cases (*United Kingdom vs Iceland*; *Federal Republic of Germany vs Iceland*) 1974 ICJ Reports, paras. 41 and 49, and to the delimitation of the continental shelf in the 1982 *Continental Shelf* case (*Tunisia/Libyan Arab Jamahiriya*) 1982 ICJ Reports, para. 87.

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.

According to paragraph 2 of Article 6, on the delimitation of the adjacent coasts:

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.

Apart from using the words of ‘median line’ for opposite coast and the ‘principle of equidistance’ for adjacent coasts, paragraphs 1 and 2 contain exactly the same rules – the triple rule of agreement–equidistance–special circumstances. We should also note that no legal consequences flow from the use of the terms ‘median line’ and ‘equidistance line’, since the method of delimitation is the same for both.⁴⁶

Finally, comparing Article 24 of the Convention on the Territorial Sea and the Contiguous Zone with the two paragraphs of the latter provision, we see it contains exactly the same wording, except that it combines the two into one single paragraph and omits any reference to special circumstances. Thus, a purely mechanical use of the equidistance method is applicable to the delimitation of the contiguous zone.

There are also some other differences between Article 6 of the Convention on the Continental Shelf and Article 12 of the Convention on the Territorial Sea and the Contiguous Zone, but these are not relevant for the purpose of this study. What should be stressed is that, despite the differences, the applicable rule is essentially the same⁴⁷ – the triple rule of agreement–equidistance–special circumstances.⁴⁸

In conclusion, we may say that by establishing the triple rule in the two Geneva Conventions, a model based on the general rule of agreement–equidistance–special circumstances was adopted. The general rule won over the case-by-case model argued by the other school in the shaping of rules on maritime delimitation at UNCLOS I. We should also note that the concept of equity, which formed the basis for both schools, succeeded by the reference to special circumstances. This reference is quite clearly meant to correct inequitable results that might result from the sole use of the equidistance method, a point that concerned both schools in the shaping of maritime delimitation rules at UNCLOS I. Hence, the more

⁴⁶ Romania/Ukraine case, 2009 ICJ Reports, para. 116.

⁴⁷ In the North Sea Continental Shelf cases, Judge Sørensen stated that Art 12 of the Convention on the Territorial Sea and the Contiguous Zone and Art 6 of the Convention on the Continental Shelf were substantially the same. See above n. 23, p. 252.

⁴⁸ Tanaka 2006, p. 39.

predictable method of equidistance won ground in the maritime delimitation provisions in the UNLOS I Treaties, at the expense of the more flexible result-oriented equity approach.

We now turn to the maritime delimitation rules laid down in the LOS Convention. The LOS Convention makes no reference to either of the two methods mentioned above. But as long as the nature of maritime delimitation requires both aspects to be taken into account, the same debate is also naturally found in the *travaux préparatoires* to the LOS Convention.

2.4 Existing Law: the LOS Convention

2.4.1 Articles 15, 74(1) and 83(1) of the LOS Convention

In terms of maritime delimitation, the LOS Convention differs from the UNCLOS I Treaties in three respects. Firstly, the law applicable to the continental shelf was separated from the triple-rule method in the Convention on the Continental Shelf. Secondly, the delimitation of the contiguous zone is no longer mentioned in the Convention text, leaving unclear the rule applicable to the contiguous zone. Thirdly, Articles 74(1) and 83(1) of the LOS Convention provide identical rules for delimiting the continental shelf and the EEZ:

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

Article 15, on the territorial sea, has kept the same wording as in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone, and is thus essentially the same. The following will therefore concentrate on Articles 74(1) and 83(1).

Articles 74(1) and 83(1) make no reference to a method for delimitation. They were therefore for a time considered meaningless as they lack any form of guidance – leaving it to the discretion of a court or tribunal to decide what method to employ.⁴⁹ Moreover, the use of the term ‘agreement’ in combination with the terms ‘in order to achieve an equitable solution’ can be considered to contradict only general principles of international law. It is a general principle of international law that states are free to conclude any agreement as long it is not in violation of *jus cogens*.⁵⁰ Thus, assuming that Articles 74 and 83 do not qualify as *jus cogens*, states may conclude valid international agreements for delimiting their maritime boundaries even if such agreement are considered inequitable. Moreover, by suggesting that delimitation shall be effected solely by agreement, the provisions elegantly circumvents the fact that maritime delimitation may be adjudicated by court or arbitral tribunals at the resolve of the parties, in accordance with Chapter XV of the Convention.

⁴⁹ *Ibid.*, p. 47.

⁵⁰ Dunhoff, Ratner, Wippman 2006, pp. 58–61.

What remains as the sole guiding principle is that the end result of a maritime delimitation must be equitable.⁵¹ Accordingly, the LOS Convention neither solved nor provided guidance on the discussion of flexibility versus predictability, and the discussion has therefore continued. In order to understanding this admittedly not so successful provision, we should touch briefly on the legal history of these provisions at the Third United Nations Conference on the Law of the Sea, which lasted from 1973 through 1982 (UNCLOS III).

From the outset of the Conference, as with previous attempts to decide upon the matter, there was disagreement between the two opposing schools of thought – equidistance vs equitable principles, and no compromise materialized. At the Conference, the Soviet Union took an intermediate position in the debate, not associating itself with either group.⁵² Norway, however, sided with the group supporting the equidistance method.⁵³

The result was in one way devastating, as what stressed the importance of predictability in maritime delimitation in the Convention of the Continental Shelf was left totally blank in the LOS Convention. This paved the way for the maximum flexibility approach in the LOS Convention as to EEZs and the continental shelf. On the other hand, the overall importance of managing to strike a deal at UNCLOS III and bringing the LOS Convention to life overshadows this fact in every respect. Still, the only guiding star from this point on was that maritime delimitation had to be equitable in its result.

That brings us to the next point: how the courts and tribunals have tackled this situation since the entry into force of the LOS Convention (2.6). They were given rather free hands in terms of having the responsibility to substantiate what constitutes an ‘equitable solution’ under Articles 74(1) and 83(1). Which approach did they choose? The answer is of importance for identifying the law applicable to the maritime delimitation dispute in the Barents Sea. Further, what would be the most likely outcome of a court or tribunal adjudicating on the matter? However, before analysing how courts and tribunals have interpreted the maritime delimitation provisions in the LOS Convention, we need to examine the relationship between the UNCLOS I Treaties, customary law and the LOS Convention. Special attention will also be paid to the emergence of the concept

⁵¹ Dissenting Judge Gros, in the Gulf of Maine case, called these provisions ‘an empty formula’. (See above n. 19, para. 8.) Moreover, the Permanent Court of Arbitration in the Eritrea/Yemen Award stated in relation to Arts. 74(1) and 83(1) that there had to ‘be room for differences of opinion about the interpretation of articles which, in a last minute endeavour at the Third United Nations Conference on the Law of the Sea to get agreement on a very controversial matter, were consciously designed to decide as little as possible. It is clear, however, that both Art.s (74(1) and 83(1) envisage an equitable result’. The Eritra/Yemen Award (Second Stage), (2001) 40 ILM 983–1013, para 116. This was the first award in which an arbitral tribunal decided upon the nature of Articles 74 and 83 of the LOS Convention.

⁵² Oude Elferink 1994, p. 138.

⁵³ Nordquist, ed., 1985, p. 78.

of a single maritime boundary delimiting the territorial sea, the continental shelf and the EEZ by one single line. The aim of first studying these aspects is to broaden our understanding of the concept of maritime delimitation as it developed until the entry into force of the LOS Convention. That will help us to understand the subsequent jurisprudence in which the LOS Convention has been directly applicable between the parties, examined in chapter 2.6. Let us begin with the relationship between the UNCLOS I Treaties, customary law and the LOS Convention.

2.4.2 The LOS Convention, the UNCLOS I Treaties and International Customary Law

We begin by examining the relationship between the LOS Convention UNCLOS I Treaties and international customary law from two perspectives. The first perspective concerns the relationship between the LOS Convention and UNCLOS I Treaties at treaty level in the event of a conflict between the two. The second perspective concerns the relationship between international customary law and the LOS Convention, i.e. how international customary law was influenced by the LOS Convention prior to its entry into force. In relation to the second perspective, we will also focus on the gradual materialization of a law on single maritime boundaries for all purposes.

The relationship between the LOS Convention and the UNCLOS I Treaties is relevant first of all because Norway and the Russian Federation are states parties to both the Convention on the Continental Shelf and the LOS Convention, and a conflict between the two treaties might possibly arise. By contrast, the relationship between the Convention on the Territorial Sea and the Contiguous Zone and the LOS Convention is of different nature: the Russian Federation is party to both whereas Norway is party only to the latter, so only the LOS Convention is applicable between the parties in this regard. Also, as explained above, the LOS Convention prescribes essentially the same rule as the Convention on the Territorial Sea and the Contiguous Zone as regards the territorial sea, so the relationship would be in harmony either way. Moreover, the Varanger Fjord Agreement of 2007 settled the boundary of the territorial sea between the countries, so this boundary is not subject to disagreement either.⁵⁴

It is clear that in case of conflict between the Convention on the Continental Shelf and the LOS Convention, the latter is to prevail, according to its Article 311.⁵⁵ Does the agreement–equidistant–special circumstance

⁵⁴ The Varanger Fjord Agreement establishes a single maritime boundary for the territorial sea, the EEZ, the continental shelf and the contiguous zone from the mouth of the land boundary up to the intersection between the Norwegian median-line claim and the Russian Federation sector-principle claim. The Agreement came about due partly to Norway's extension of its territorial sea from 4 to 12 nm in 2004; moreover, it updates and supplements the previous Varanger Fjord Agreement of 1957. See Proposition No. 3 to the Storting, 2007–2008, pp. 1–3.

⁵⁵ Art. 311(1) states that 'This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.'

method provided for in the Convention on the Continental Shelf constitute a conflict with the 'equitable solution' provision in the LOS Convention? The former provides a method for maritime delimitation, whereas the latter omits any reference to one. It is clear that only if application of the equidistance method would produce an inequitable result would a conflict emerge. Yet, in the present conflict, it seems highly unlikely that a court or tribunal would first apply the method prescribed in the Convention of the Continental Shelf and then, in the final stage of the process, ask if the result produced was in accordance with the LOS Convention. Jurisprudence has taken another approach to this scenario, largely thanks to the development of a single maritime boundary for all purposes.⁵⁶ Moreover, case law seems to have established much the same procedure for maritime delimitation under the LOS Convention as that prescribed by the Convention on the Continental Shelf: recourse to the corrective/equity approach.

Now to the relationship between international customary law and the LOS Convention. Even prior to the entry into force of the LOS Convention, many references were made in case law to the various provisions on maritime delimitation in it. It would therefore be appropriate to touch briefly on some of these cases before examining to which extent the LOS Convention has adopted international customary law in its provisions after its entry into force. There seems to have been a gradual transition from customary law to treaty law here.

In the Guinea/Guinea-Bissau case of 1985, even though the two countries were not party to any of the relevant treaties, the essential objective for the Court consisted in:

Finding an equitable solution with reference to the provisions of Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention of 10 December 1982 on the Law of the Sea. This is a rule of international law which is recognized by the Parties and which compels recognition by the Tribunal.⁵⁷

Guinea advocated recourse to the equidistance method, whereas Guinea-Bissau advocated the result-oriented equity approach. The Court denied any obligation to use the equidistance method, stating that:

The Tribunal itself considers the equidistance method is just one among many and that there is no obligation to use it or give priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied.⁵⁸

Further:

...the factors and methods referred to result from legal rules, although they evolve from physical, mathematical, historical, political, economic or other factors. However, they are not restricted in

⁵⁶ See chapter 2.4.3.

⁵⁷ The Guinea/Guinea Bissau Maritime Boundary Arbitration of 1985, 25 ILM 251 (1986), para. 88.

⁵⁸ *Ibid.*, p. 294, para. 102.

number and none of them is obligatory for the Tribunal, since each case of delimitation is a *unicum*, as has been emphasised by the International Court of Justice.⁵⁹

Thus the Tribunal favoured the result-oriented case-by-case method for achieving an equitable result with reference to the LOS Convention in this case.

In the Greenland/Jan Mayen case of 1993, the Court also referred to Articles 74(1) and 83(1) of the LOS Convention. Here, however, the Court had been asked to draw up a fishery zone, not an EEZ. The parties had agreed, though, that the fishery zone was to be determined by the law governing that of the EEZ, which at that point was customary law. The Court said:

...statement of an ‘equitable solution’ as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both to the continental shelf and of the exclusive economic zones’⁶⁰

This way the Court established a link between the customary law applicable to the fishery zone and the customary law applicable to continental shelf. Further, the Court found that:

It thus appears that, both for the continental shelf and for the fishery zone in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.⁶¹

Furthermore, it held 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 case of a delimitation of continental shelf, fishery zone, or of an all-purpose single boundary.’⁶²

To summarize, the Court first made an assimilation between the customary law of the continental shelf with that of the fishery zone/EEZ. Secondly, in so far as coasts are opposite each other, the law of maritime delimitation points towards the triple rule, explained above. Unlike the situation in the Guinea/Guinea-Bissau case and earlier cases, the Court now adopted as customary law the corrective/equity approach in the form of a triple rule based on the agreement–equidistance–special circumstances formula. This marked a shift towards a more predictable approach in maritime delimitation.

The view taken in the Greenland/Jan Mayen case was also to a large extent upheld in the Eritrea/Yemen case of 1999. The Court first held that ‘many of the relevant elements of customary law are incorporated into the

⁵⁹ *Ibid.*, pp. 89, 289–90.

⁶⁰ 1993 Greenland/Jan Mayen case (Norway/Denmark), 1993 ICJ Reports, para. 48.

⁶¹ *Ibid.*, para. 53.

⁶² *Ibid.*, para. 56.

provisions of the Convention.’ Thus also in this case the Tribunal established a link between the new provisions in the LOS Convention and earlier jurisprudence in customary law.⁶³ Further:

It is a generally accepted view, as is evidenced in both the writings of commentators and in 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, and in particular those of its Articles 74 and 83 which respectively provide for the equitable delimitation of the EEZ and of the continental shelf between States with opposite or adjacent coasts.⁶⁴

The words ‘normally provides’ were clearly meant as a reference to the corrective/equity approach. This was illustrated by the fact that the Court did not consider the median line as the end product. The Tribunal applied a proportionality test to examine the equitableness of the median line provisionally drawn at the first stage.⁶⁵

In the Qatar/Bahrain case of 2001 the Court referred to the approach taken in the Greenland/Jan Mayen case, i.e. the corrective/equity approach, and stated it would follow the same method. Thereby it referred indirectly to the provisions of the LOS Convention Articles 74 and 83. Thus, according to the Court it would ‘first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line’⁶⁶ Moreover, in the area in which the Court was to draw a single maritime line, ‘the coasts of the two States were rather comparable to adjacent coasts’⁶⁷ By this, and for the first time in case law,⁶⁸ the Court accepted the applicability of the corrective/equity approach as customary law in delimitation between states with adjacent coasts.

To summarize these cases, it seems that, to a large extent, customary law gradually adapted to the provisions on maritime delimitation in the LOS Convention even before the convention had entered into force. The main reason was either that the Court was asked to apply the provisions directly by the parties to the conflict, or because it considered the provisions on maritime delimitation in the LOS Convention to express the rule of maritime delimitation law at customary level. Moreover, case

⁶³ Eritrea was not and is not party to the LOS Convention. Eritrea and Yemen had concluded an Arbitration Agreement by which they requested an arbitral tribunal to be established to render an award regarding a dispute on territorial sovereignty and maritime delimitation. In the maritime delimitation the Tribunal was to take into account the provisions of the LOS Convention. It was in relation to this the Tribunal made its remarks on the relationship between Art.s 74 and 83 and customary law.

⁶⁴ The Eritrea/Yemen Award (Second Stage), (2001) 40 ILM 983–1013, para 131.

⁶⁵ The Court found no disproportionality between the ratio of coastal lengths of each Party (1 (Yemen): 1.31 (Eritrea)) and the ratio of waters areas (1 (Yemen): 1.09 Eritrea)). *Ibid.*, paras. 165–68.

⁶⁶ 2001 Qatar/Bahrain case, 2001 ICJ Reports, para. 230.

⁶⁷ *Ibid.*, para. 170.

⁶⁸ Tanaka 2006, p. 109.

law turned towards the more predictable corrective/equity approach in which the Court first draws a provisional equidistance line and then considers whether there are special circumstances that require an adjustment of that line. That approach was used both for the continental shelf and the EEZ, first in the scenario with opposite coasts in the Greenland/Jan Mayen case, and then in the scenario with adjacent coasts in the Qatar/Bahrain case.

Much of this development may be ascribed to the emergence of fishery zones and EEZ at customary level at the time the UNCLOS III negotiations took place, and the practical need that arose in subsequent case law for a single maritime boundary delimiting the continental shelf and the EEZ. To this we now turn.

2.4.3 Delimiting the EEZ and the continental shelf: The emergence of a single maritime boundary

In theory, the delimitation of the exclusive economic zone could follow a different line than the continental shelf. For practical reasons, however, states seem to have wanted to have their maritime zones delimited by a single maritime boundary for all purposes.⁶⁹ The reason for this lies first of all in the shared overlap of natural resources between the two zones. Both zones give rights to living and non-living natural resources in the seabed and its subsoil, but with the limitation that the rights of continental shelf are limited to certain ‘sedentary species’ such as coral, oysters, sponges and possibly lobsters and crabs. Therefore, as held in the Libya/Malta case, whereas ‘there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.’⁷⁰ Thus, having the same boundary delimiting the seabed and subsoil and the water column above seems practical in terms of exploiting the area in a proper way and maintaining effective coastal management. Having clear and manageable maritime zones can also be said to be conflict-preventive. On the other hand, this desire for a single maritime boundary for all purposes gave rise to a serious dilemma in the delimitation of these zones. As the relevant circumstances to be taken into account may differ for the seabed and for the superjacent water column, the boundary of the continental shelf and the EEZ may differ.

The 1984 Gulf of Maine case between Canada and the United States was the first to involve a single maritime boundary adjudicated by an international dispute settlement body.⁷¹ Both Canada and the United States had ratified the Convention on the Continental Shelf. At the same

⁶⁹ In the Barbados/Trinidad and Tobago Award of 2006, it was evident to the Tribunal ‘that State practice with very few exceptions ha[d] overwhelmingly resorted to the establishment of single maritime boundary lines and that courts and tribunals have endorsed this practice either by means of the determination of a single boundary line or by the determination of lines that are theoretically separate but in fact coincident.’ See 2006 Barbados/Trinidad and Tobago Award, PCA Awards Series, Vol. V (2007), para. 235.

⁷⁰ 1985 Libya/Malta case, 1985 ICJ Reports, para. 33.

⁷¹ Tanaka 2006, p. 81.

time they had asked the Court to draw up a single maritime boundary applicable to both the fishery zone⁷² and the continental zone.⁷³ The Court held that the Convention on the Continental Shelf ‘cannot have such mandatory force between States which are Parties to the Convention, as regards a maritime boundary concerning a much wider subject-matter than the continental shelf alone’. By this the Court considered the Convention on the Continental Shelf as not regulating the matter when the issue at hand involves delimiting more than just the continental shelf. As there was no treaty law regulating a single maritime boundary at the time of the Gulf of Maine case, the Court had to rely on customary law. In this respect it referred to a ‘fundamental norm’ applicable to every maritime delimitation between states.⁷⁴ The Court was now faced with the dilemma indicated above – how to treat the possibility that a criterion suitable for one maritime zone differs from one appropriate to that of another. To steer clear of this problem, the Court established a ‘neutral criterion’:

In reality, a delimitation by a single line, such as that which has to be carried out in the present case, i.e., a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can be carried out only by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard, moreover, it can be foreseen that with the gradual adoption by the majority of maritime states of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation.⁷⁵

As a consequence, geological and geomorphological circumstances relevant for the delimitation of the continental shelf were subordinated or even excluded as relevant factors, as such criteria would not relate to the

⁷² In the second half of the 1970s many states, basing themselves on the consensus meanwhile achieved at the UNCLOS III, unilaterally began introducing the concept of 200 nm zones. The concept of fishery zones started with Latin American and African states claiming broad territorial seas and fishing zones, and then further developed into EEZs during the time of the Conference. See Churchill and Lowe, 1999, pp. 160–61. That state practice was eventually accepted as customary law by the ICJ in the Libya/Malta Continental Shelf case of 1985, when it said that it is ‘incontestable that...the EEZ...is shown by the practice of States to have become part of customary law.’ (See above, n. 70, para. 33.) In the present case, the court drew a single maritime boundary involving the continental shelf and a fishery zone. (The Gulf of Maine case, above n 19, pp. 246–352.)

⁷³ The Gulf of Maine case, above n. 19, p. 253, Art. II of the Special Agreement. According to the Special Agreement, ‘the single boundary line to be drawn should be applicable to all aspects of the jurisdiction of the coastal State, not only to jurisdiction as defined by international law in its present state, but also as it will be defined in the future’. *Ibid.*, p. 267, para. 26.

⁷⁴ *Ibid.*, pp. 299–300, para. 112.

⁷⁵ *Ibid.*, para. 194.

water column in the superjacent waters. In order to be considered a ‘special circumstance’ in this regard, something would have to be equally suitable for the seabed and the superjacent waters. Further to this the Court held:

It is, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place has a political aspect. Within this framework it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely 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 between which delimitation is to be effected converge and overlap.

Accordingly, in this case the Court favoured apportionment rather than delimitation in the context of a single maritime boundary for all purposes, and thus adopted the result-oriented equity approach. Yet, this was to change.

This understanding was upheld in the Guinea/Guinea-Bissau case of 1985, where the Court denied Guinea-Bissau's contention of recourse to the equidistance method, saying that:

The Tribunal itself considers that the equidistance method is only one among many and that there is no obligation to use it or give it priority, even though it is recognized as having certain intrinsic values because of its scientific character and the relative ease with which it can be applied.⁷⁶

In the St. Pierre and Miquelon case of 1992, the Court reaffirmed the approach taken in the Gulf of Maine case, saying that the delimitation should be ‘effected in accordance with equitable principles, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result. The underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method.’⁷⁷

The 1993 Greenland/Jan Mayen case between Denmark and Norway differed from the three cases above in the sense that the Court was not asked specifically to draw up a single maritime boundary. Rather, the Court was asked to draw the boundary of the continental shelf and the fishery zone, and thus had to determine whether to apply the method of drawing a single maritime boundary, or to consider them separately. Norway argued that the boundaries should coincide but remain conceptually distinct, whereas Denmark asked for ‘a single line of delimitation of the fishery zone and the continental shelf.’⁷⁸ The Court affirmed Norway's conten-

⁷⁶ The Guinea/Guinea Bissau Maritime Boundary Arbitration of 1985, 25 ILM 251 (1986), para. 102. Also referred to in n. 58.

⁷⁷ 1992 St Pierre and Miquelon case (France/Canada), 31 ILM (1992), para 38.

⁷⁸ 1993 Greenland/Jan Mayen case (Norway/Denmark), 1993 ICJ Reports, para. 9.

tion by stating that the Court was ‘not empowered or constrained by any such agreement for a single dual-purpose boundary.’⁷⁹ Accordingly, there was no law of coexistence of the boundaries, unless the Court had been asked specifically to draw them as such.

When we turn to the cases subsequent to the entry into force of the LOS Convention, that reasoning will be analysed as to whether that approach is still applicable by international law *de lege lata*. Examining this is important because the Court ended up drawing a coincident maritime boundary for the continental shelf and the fishery zone as in the previous cases, but now with a separate reasoning for each zone. The interesting thing about this approach is that the Court came to the same conclusion as in the previous cases *without* any reference to the ‘neutral criterion’ adopted in the previous cases involving a single maritime boundary. In this case the Court made its conclusion with reference to Article 6 of the Convention on the Continental Shelf as regards the delimitation of the continental shelf, and with reference to customary law of the EEZ for the delimitation of the fishery zone. If the parties had requested the Court to draw a single boundary, the ‘neutral criterion’ would have applied. And as a consequence the weight of access to fishery resources would have been minimized as it would not be relevant to the boundary of the continental shelf.⁸⁰ Thus, had the Court been asked to draw single maritime boundaries, the end result might have been different.

In the Eritrea/Yemen case of 1999 the issue before the Court was once again to settle a single maritime boundary between the continental shelf and the EEZ.⁸¹ The relevant coasts were situated opposite each other; and, as mentioned earlier, the Tribunal considered that a median line would constitute an equitable maritime boundary in situations with opposite mainland coasts under Articles 74 and 83 of the LOS Convention. In the Qatar/Bahrain case two years later, the Court decided that the same method was applicable under customary law for delimiting the single maritime boundary between states with adjacent coasts. This marked a shift in customary law from a situation in which any obligatory method was rejected and where maritime delimitation was conducted on a case-

⁷⁹ *Ibid.*, para. 43.

⁸⁰ In this case, the Tribunal considered fishing resources to be a relevant circumstance. Thus, the Court had to ensure that the delimitation should not entail ‘catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned’. And further, that in light of this case-law, the Tribunal had to ‘consider whether any shifting or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned.’ In answering this, The Tribunal found that the fishery zone would have to be shifted eastward from the provisional median line. See 1993 Greenland/Jan Mayen case (Norway/Denmark), 1993 ICJ Reports, paras. 75 and 76.

⁸¹ Yet, the Arbitration Agreement did not identify the type of maritime boundary to be drawn, it only referred to ‘maritime boundaries’. But the Tribunal concluded ‘after careful consideration of all the cogent and skilful arguments put before them by both parties material,’ that the ‘international boundary shall be a single all-purpose boundary. See the Eritrea/Yemen Award (Second Stage), (2001) 40 ILM 983–1013, para. 132.

by-case basis to achieve an equitable result, to a corrective/equity approach in which the court first draws a provisional median/equidistant line, and then inquires whether any special circumstances call for an adjustment of that line.

2.5 Summary

In this chapter we have focused on the law and relevant legal framework on maritime delimitation until the entry into force of the LOS Convention. We started by looking into the various maritime zones in the LOS Convention, what they are, and how ‘the land dominates the sea principle’ embodied in the LOS Convention links the right to each of them to the state’s sovereignty over a coast facing the ocean. Further, that the territorial sea, the contiguous zone, the EEZ and the continental shelf are defined spatially, as they are formulated as a limited extension of the coastal state’s jurisdiction over the land territory.

Then we examined the concept of maritime delimitation. It may be defined as the process of establishing lines that separate the spatial ambit of coastal jurisdiction over maritime spaces where the legal title overlaps with that of another state. This may occur in situations where states are situated adjacent or opposite to each other. Moreover, maritime delimitation where legal titles overlap is an ‘international’ operation in that it cannot be effected unilaterally, but must result from a process between two or more states. As regards the dispute in the Barents Sea, this means that Norway and the Russian Federation may resolve their maritime boundaries only through agreement or by consenting to international adjudication.

Thirdly, the distinction between ‘delimitation’ and ‘apportionment’ in maritime delimitation was examined. With ‘delimitation’ is meant a process which involves establishing the boundaries of an area already appertaining to the coastal state as an inherent or patrimonial right. This process takes into account predefined criteria that influence the course of boundaries, e.g. the geographical shape of the coast. It is an attempt towards an objective and scientific approach to maritime delimitation, and thus stresses the need for predictability. ‘Apportionment’, on the other hand, is seen as a *de novo* determination of an area on the basis of just and equitable shares. This approach leaves much of the result of a maritime delimitation to the discretion of courts and tribunals, and consequently stresses the need for flexibility, at the expense of predictability. We have seen that international tribunals have largely avoided accepting the idea of proceeding to apportionment. Nevertheless, complete rejection of the idea of apportionment in maritime delimitation has proved unattainable. There is thus need for a certain degree of flexibility, as a too rigid rule might give rise to inequitable results. Also, the very idea that the maritime delimitation is to result in an ‘equitable solution’, as well as the recourse to the proportionality test in the third and final stage of the maritime delimitation process, inevitably leads to idea of apportionment. It is also clear that courts and tribunals have largely embraced the idea of ‘delimitation’ in their approach to maritime delimitation. We saw this for the first time in the North Sea Continental Shelf cases where the expressed aim of the maritime delimitation process was ‘to leave as much as possible to each Party all those parts of the continental shelf that con-

stitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.' Later, with the emergence of the fishery zone and the EEZ, a new approach was introduced, based on distance from the coast. But that did not mean that the law of maritime delimitation became removed from the principle of natural prolongation. In fact, as later held in the Barbados/Trinidad and Tobago Award, the concept of distance as the basis for entitlement to maritime zones became increasingly intertwined with that of natural prolongation.

Fourthly, in this chapter we have examined the gradual development from international customary law to the UNCLOS I Treaties and finally to the LOS Convention. We saw that prior to the entry into force of the UNCLOS I Treaties it seems difficult to identify the law applicable to maritime delimitation. Then, with the emergence of the UNCLOS I Treaties came provisions for delimiting the territorial sea and the continental shelf. In the shaping of that law, two different schools of thought emerged. One view was the result-oriented equity approach, which rejected the use of any obligatory method in maritime delimitation processes. The sole criterion should be that the result had to be equitable. The other view favoured the use of an obligatory method, employing the median line as a general rule between coastal states opposite and adjacent to each other, and allowing for necessary modifications in order to achieve an equitable result. As the difference between these two schools of thought is generally linked to the question of whether maritime delimitation disputes should be resolved by recourse to an obligatory method or not, it may also be linked to the concepts of 'delimitation' and 'apportionment'. The core of the distinction between 'delimitation' and 'apportionment' concerns the value of predictability on the one hand, and flexibility on the other – which in essence is also the core of the debate between employing an obligatory method or not in the maritime delimitation process. Both debates have concerned the very essence of the law on maritime delimitation: to what extent it should be possible to predict the outcome of a maritime boundary dispute also in the future.

As we have seen, the school favouring the use of an obligatory method won through in the shaping of the UNCLOS I Treaties. Article 6 of the Convention on the Continental Shelf and Article 12 of the Convention on the Territorial Sea and the Contiguous Zone prescribe the use of the corrective/equity approach by means of the triple-rule of agreement–equidistance–special circumstances. In the shaping of the LOS Convention, however, the school of thought favouring maximum flexibility won ground, as Articles 74(1) and 83(1) of the LOS Convention omit any references as to what method to use. These articles were therefore for a while deemed meaningless, as they lacked any form of guidance – leaving it to the discretion of a court or tribunal to decide upon the method to be employed.

We saw how, to a large extent, international customary law gradually adapted to the provisions on maritime delimitation in the LOS Convention prior to its entry into force. The main reason was that the courts and tribunals were asked to apply the provisions directly by the parties to the conflict, or because they saw the provisions on maritime delimitation in

the LOS Convention as expressing the rule of maritime delimitation law at customary level. The same period also saw the development of a new phenomenon in maritime delimitation law: the adoption of a single maritime boundary delimiting both the EEZ and the continental shelf by one single line. This rapid development was related to the major achievements at UNCLOS III, and especially the development of EEZs as a new optional legal entitlement for coastal states. In the mid-1970s, when the conference was held, many states had started to claim their EEZs, and this again pushed forward a new approach to the law of maritime delimitation. States began delimiting their continental shelves and EEZs by one single line, a practice which in turn became that of courts and tribunals, as the parties to disputes asked them to render their judgements that way. First the courts and tribunals at customary level favoured the case-by-case model – the result-oriented equity approach. The Gulf of Maine case, the Guinea/Guinea-Bissau case and the St. Pierre and Miquelon case are, as we have seen, examples of this approach. Then came a shift to the gradual adoption of the model based on the equidistance method – the corrective/equity approach. That approach was used both for the continental shelf and the EEZ separately in the scenario with opposite coasts in the Greenland/Jan Mayen case, and then in the scenario involving a single maritime boundary: first with opposite coasts in the Eritrea/Yemen case and then with adjacent coasts in the Qatar/Bahrain case. In all these cases, the treaty law of the time was inadequate for dealing with the legal questions put before the courts and tribunals. They therefore started to fill in the existing legal gaps on their own. This resulted first in creating a law on single maritime boundaries. The Gulf of Maine case was the first judgement in this regard. The Court considered that the Convention on the Continental Shelf could not regulate a much wider matter than the continental shelf alone. The St. Pierre Miquelon case was a further example. Then courts and tribunals were increasingly asked to take into account the maritime delimitation provisions in the LOS Convention, even though it had not yet entered into force. The Guinea/Guinea-Bissau case, the Greenland/Jan Mayen case, the Eritrea/Yemen case and the Qatar/Bahrain case are all examples of this. The result was that international customary law to a large degree adapted to the maritime delimitation provisions in the LOS Convention even prior to its entry into force.

In the remaining part of this chapter the focus turns to the jurisprudence of courts and tribunals subsequent to the entry into force of the LOS Convention. In the cases examined here, the LOS Convention has been directly applicable as between the parties, and not, as in the cases we have studied so far, where the Convention has been interpreted only indirectly at customary level. Have courts and tribunals, in interpreting Articles 74(1) and 83(1) of the LOS Convention, followed the growing trend towards the more predictable corrective/equity approach in maritime delimitation, as seen above? Or have they shifted direction once again, to the more flexible result-oriented case-by-case method, as in the past?

2.6 Articles 74 and 83 by ICJ and International Arbitral Tribunals (after the entry into force of the LOS Convention)

2.6.1 *The Cameroon vs Nigeria Case (2002)*

On 29 March 1994, the Republic of Cameroon instituted proceedings before the ICJ against the Federal Republic of Nigeria. The case, which also involved the question of sovereignty over the Bakassi Peninsula, concerned the delimitation of the maritime boundary between the two states. The jurisdiction of the Court relied on the declarations made by the two states accepting the jurisdiction of the Court under Article 36(2) of the Statute of the Court. Moreover, The Cameroon/Nigeria case was the first case for an international tribunal where the LOS Convention was applicable between the parties in a dispute on maritime delimitation, and is therefore of particular interest.

Method for maritime delimitation

The parties had agreed through their written pleadings that the maritime boundaries should be effected by a single line.⁸² The maritime boundary up to and involving a point G, which concerned the territorial sea, was regarded as having been established by former agreements by the parties. Now the Court was to establish a single maritime boundary for the EEZ and the continental shelf from point G and onwards, until the point where the decision might affect the rights of Equatorial Guinea, which was not party to the proceedings. However, the presence of Equatorial Guinea's Bioko Island south of Nigeria and south and west of Cameroon made the area in question strictly limited. Under these circumstances the Court could only indicate the general direction, from a point X and onwards.

The Court started by reiterating the criteria of Articles 74 and 83, that such delimitation must be effected in such a way as to 'achieve an equitable solution'.⁸³ The Court went on to repeat the 'neutral criterion' in the Gulf of Maine case, stating that the determination of such a single maritime boundary:

...can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of [the zones] to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them.⁸⁴

And further, referring to the same case, that 'preference w[ould] henceforth...be given to a criteria that, because of their more neutral character are best suited for use in a multi-purpose delimitation'.⁸⁵

⁸² 2002 Cameroon/Nigeria case, 2002 ICJ Reports, para. 286.

⁸³ *Ibid.*, para. 285.

⁸⁴ *Ibid.*, para. 287.

⁸⁵ *Ibid.*

It also stressed the link between the EEZ and the continental shelf in modern law as expressed in the *Libya/Malta* case.⁸⁶ In this regard, the Court noted that it on various occasions had determined what criteria, principles and rules for delimitation were applicable to single maritime boundaries. Those were expressed in the equitable principles/special circumstances method. That method, it held:

...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 an adjustment or shifting of that line in order to achieve an equitable result.⁸⁷

The Court concluded, by referring to the *Greenland/Jan Mayen* and *Qatar/Bahrain* cases where this method had been used, that it would also apply it in the present case.⁸⁸ Thus, unlike in the cases of the *Gulf of Maine*, *Guinea/Guinea Bissau* or *St. Pierre and Miquelon*, the Court applied the corrective/equity approach as it had done in the cases of *Eritrea/Yemen*, *Qatar/Bahrain* and *Greenland/Jan Mayen* in this, its first case where the LOS Convention was directly applicable. However, it should be noted that in the *Greenland/Jan Mayen* case, the Court had not been requested to draw a single maritime boundary as in the *Qatar/Bahrain* case, even though it ended up by concluding a coincident boundary. So even though the Court referred to this case in connection with the relevant method to be used, it should be held materially distinct.⁸⁹ The essential point was to underline what method the Court found appropriate for the delimitation of the single line. Equally important is the fact that the equidistance method was considered applicable in a maritime delimitation with adjacent coasts.⁹⁰ Here we should recall that the *Qatar/Bahrain* case one year earlier was the first case in which the Court had deemed the corrective/equity approach applicable in a maritime delimitation with adjacent coasts. That case had been founded on customary law;

⁸⁶ In the *Libya/Malta* case the Court held that ‘Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone... This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation... is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and sub-soil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.’ See above n. 70, para. 33.

⁸⁷ 2002 *Cameroon/Nigeria* case, 2002 ICJ Reports, para. 288.

⁸⁸ *Ibid.*, para. 290.

⁸⁹ It is somewhat disturbing that the Court refers to a case where the issue at hand was not a single maritime boundary, but rather two distinct maritime boundaries that happen to be coincident by way of applying the same method separately.

⁹⁰ According to *Cameroon*, the equidistance method was not a principle of customary law directly applicable in situations with adjacent coasts. *Nigeria* on the other hand, argued international tribunals generally start from an equidistance line, which is then adjusted in order to take into account other relevant circumstances. See paras. 71 and 280 respectively.

now, only one year later, the same reasoning was considered as constitutional law in accordance with the LOS Convention. It should also be noted that both cases involved a single maritime boundary by way of agreement between the parties.

The Court went on to define the relevant coastlines of the parties by reference to the relevant base points to be used in the construction of the equidistance line.⁹¹ It started by citing the Qatar/Bahrain case, where it was held that ‘the equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.’⁹² In this regard, the Court first noted that the maritime boundary could be determined only by reference to points on the coastlines of the two states respectively and not of third states. Secondly, that it considered the most southerly points on the low-water line to either side of the bay formed by the estuaries of the Akwayafe and Cross Rivers. In the Court’s view, no other base points were necessary for it to undertake maritime delimitation in this area.⁹³

Consideration of relevant circumstances

After having drawn a provisional equidistance line, the Court went on to consider whether there were any relevant circumstances that could make it necessary to adjust the line in order to achieve an equitable solution. First, however, the Court cited the Libya/Malta case, where it was held that:

The equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to equitable result in the case in question.⁹⁴

This could be read to indicate that the Court demoted the primacy effect (if any at all) of the equidistance line as the end result by application of the equidistance method. According to this view, only if the application of the equidistance method leads to an equitable result it is worthwhile using, and this must be demonstrated for each case. The Court further underlined this view by stating that ‘equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation.’⁹⁵ Thus the Court spoke in favour of the case-by-case result-oriented equity approach that it had adopted in some of the previous cases. What was new in this case is that the Court did so after first having declared equidistance as the applicable method for the dispute at hand.

What the Court really meant to say is not clear. On the one hand it favoured the use of the equidistance method, and yet it also held that it

⁹¹ 2002 Cameroon/Nigeria case, 2002 ICJ Reports, para. 290.

⁹² *Ibid.*

⁹³ *Ibid.*, para. 292.

⁹⁴ *Ibid.*, para. 293.

⁹⁵ *Ibid.*, para. 294.

was not obliged to do so. What is problematic is not the view in itself, but maintaining that view without explaining why it favoured the equidistance method over other methods in the case. A reasonable interpretation seems that the Court did not want to be bound by the equidistance method in future cases; further, that even though this point did not matter for the present dispute, it could matter for disputes in the future. In this regard, the Court must be understood as once again stressing the need for flexibility in maritime delimitation law. In examining the cases to follow we will see whether this view has been maintained.

Having said this, the Court went on to identify the relevant circumstances and their effect on the present delimitation. Those circumstances were the concavity of the Gulf of Guinea, the presence of Bioko Island, proportionality, and the oil concessions of the parties.

The concavity of the coasts

The Court began by stating that the ‘geographical configuration of the maritime areas that the Court is called upon to delimit is a given.’⁹⁶ There could be no complete refashioning of nature. Although ‘certain geographical peculiarities of maritime areas to be delimited may be taken into account, this is solely as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line.’ But not all such geographical circumstances could be taken into account. In citing the North Sea Continental Shelf cases, the Court held:

[i]t is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of states, of abating the effects of the incidental special feature from which an unjustifiable difference of treatment could result.⁹⁷

For its part, Cameroon argued as a special circumstance that the concavity of the Gulf of Guinea in general, and its coastline in particular, created a virtual enclavement of Cameroon, and that this would have to be adjusted for. Nigeria, on the other hand, argued that it was not for the Court to compensate Cameroon for any disadvantages it might have suffered as a direct consequence of this area. The Court acknowledged Nigeria’s contention, and held that although concavity might be a circumstance to be accounted for, that was not so in the present case, as the concavity did not lie within the area to be delimited. The area to be delimited was considered as the coastlines relevant to delimitation and did not include all of the coastlines of the two states within the Gulf of Guinea, as Cameroon had argued. The Court held in this regard that ‘the sectors of coastlines relevant to the present delimitation exhibit no particular concavity.’⁹⁸ In other words, because the relevant coastlines for delimitation were defined by only two base points on either side of the bay formed by the estuaries of the Akwayafe and Cross Rivers, there was no concavity involved. The determination of the relevant coastlines became crucial for deciding

⁹⁶ *Ibid.*, para. 295.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, para. 297.

which geographical circumstances should be taken into account; and here the Court held that the configuration of the respective coastlines could not justify any adjustment of the provisional line.

The presence of Bioko Island

Cameroon argued that since the presence of Bioko Island reduced the seaward projection of Cameroon's coastlines, that justified a shift of the provisional line in Cameroon's favour.⁹⁹ The Court noted that islands have at times been taken into account as a relevant circumstance when they lie within the area to be delimited, but only if they belong to any of the parties to the dispute.¹⁰⁰ This was not the case here, as Bioko Island is under the sovereignty of Equatorial Guinea. The presence of Bioko Island was solely a matter between Cameroon and Equatorial Guinea, irrelevant to the delimitation of the present dispute.¹⁰¹

Proportionality

As regards proportionality, the Court acknowledged that it on earlier occasions had considered 'substantial difference' in the lengths of the parties' respective coastlines to be a factor to be taken into account in order to adjust the provisional delimitation line.¹⁰² These occasions were the Gulf of Maine case of 1984 and the Greenland/Jan Mayen case of 1993. In the present case, however, the relevant coastline for the maritime delimitation of Cameroon was not longer than that of Nigeria. Thus the Court saw no reason to adjust the equidistance line that it had provisionally drawn.¹⁰³

Oil concessions

Nigeria argued that state practice with regard to oil concessions was a decisive factor to be taken into account in establishing maritime boundaries.¹⁰⁴ Cameroon, on the other hand, argued that oil concessions had never been accorded particular significance in maritime delimitation.¹⁰⁵ The Court in response said that both the ICJ and arbitral tribunals have dealt with the role of oil practice in maritime delimitations on several occasions.¹⁰⁶ It went through those cases and summarized as follows:

Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the

⁹⁹ *Ibid.*, para. 298.

¹⁰⁰ *Ibid.*, para. 299.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, para. 301.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, para. 303.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, para. 304. The Court went through the Tunisia/Libya case of 1982, the Gulf of Maine case of 1984 and the Libya/Malta case of 1985, where the ICJ had dealt with concept of *modus vivendi* and estoppel by acquiescence concerning oil concessions. As regards arbitral tribunals, the Court went through the Guinea/Guinea Bissau arbitration of 1985 and the St. Pierre/Miquelon arbitration of 1992 for the same.

sitting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.¹⁰⁷

In the present case the Court found no evidence of express or tacit agreement between the parties. Hence it rejected the contention that any of the oil concessions were relevant for adjusting the provisional equidistance line.¹⁰⁸

Conclusion

The Cameroon/Nigeria case was the first case before an international tribunal where the LOS Convention was directly applicable as between the parties in a dispute on maritime delimitation. The Court was asked to draw a single maritime boundary, and here it recalled and applied the ‘neutral criterion’ that it had developed in previous cases. As to method, it chose the corrective/equity approach – as in the cases of Eritrea/Yemen, Qatar/Bahrain and Greenland/Jan Mayen – in which the Court first draws an equidistant line and then considers whether there are any special circumstances that call for an adjustment of that line. The application of the equidistance method on adjacent coasts must be seen as significant, as this had been debated in earlier jurisprudence. We should, however, also note that the Court left the door open for using methods other than the corrective-equidistance approach in the delimitation of maritime boundaries. In fact, it held that there was no presumption for any one method to be used under Articles 74(1) and 83(1) – putting, in theory, all thinkable methods of maritime delimitation on an equal footing. However, no explanation was given as to why or when a particular method should be preferred over another, making it hard to understand the Court’s intention as anything else than paving the way for greater flexibility in future cases. As to possible relevant circumstances, the Court took careful consideration of the concavity of the coasts, the presence of Bioko Island, proportionality of the respective coastlines and finally the oil concessions made in the area to be delimited. None of these was considered substantial enough for adjusting the provisionally drawn equidistance line. The Court found the equidistance line to constitute an equitable solution under Articles 74 and 83 of the LOS Convention.

2.6.2 *The Barbados vs Trinidad and Tobago Award (2006)*

On 16 February 2004, Barbados initiated arbitration proceedings concerning its maritime boundary with the Republic of Trinidad and Tobago pursuant to Article 286 of the LOS Convention.¹⁰⁹ As both states had been parties to the LOS Convention at all relevant times, they were bound by the dispute resolution procedures provided for in Part XV of the Con-

¹⁰⁷ 2002 Cameroon/Nigeria case, 2002 ICJ Reports, para. 304.

¹⁰⁸ *Ibid.*

¹⁰⁹ 2006 Barbados/Trinidad and Tobago Award, PCA Awards Series, Vol. V (2007).

vention.¹¹⁰ Neither of the parties had declared, pursuant to Article 298 of the Convention, any exceptions to the applicability of the dispute resolution procedures of Part XV, nor had either party declared their means for settlement of disputes under Article 287(1) of the Convention. Thus, under Article 287(3), both parties were deemed to have accepted arbitration in accordance with Annex VII of the LOS Convention.¹¹¹ The parties had carried out discussions and formal negotiations on the use of resources and questions of delimitation since the late 1970s and in July 2000, respectively. But despite their efforts, in the Tribunal's view, the parties had negotiated for a reasonable period of time without being able to reach agreement. Accordingly, Articles 74(2) and 83(2) required the parties to resort to the procedures provided for in Part XV of the LOS Convention.¹¹²

The Tribunal also had to examine four other issues: Whether or not there in legal terms existed a dispute; the obligation to exchange views in accordance with Article 283; whether the Tribunal had jurisdiction over the extended continental shelf; and whether the Tribunal had jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply in waters that might be determined to form part of Trinidad and Tobago's EEZ. In relation to the first issue, it held that there did exist a dispute because of the parties' divergent legal views as to which rules were applicable for the delimitation and consequently to where the boundaries should lie. Further that the existence of a dispute could not be precluded by the fact that negotiations could, in theory, continue. Where there is an obligation to negotiate, it is also well established under general international law that that obligation does not require the parties to continue with negotiations 'which in advance show every sign of being unproductive'.¹¹³ As regards the other issues, the Tribunal held that:

- (i) it ha[d] jurisdiction to delimit, by the drawing of a single maritime boundary, the continental shelf and EEZ appertaining to each of the Parties in the waters where their claims to these maritime zones overlap[ped];
- (ii) its jurisdiction in that respect includ[ed] the delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nautical miles; and
- (iii) while it ha[d] jurisdiction to consider the possible impact upon a prospective delimitation line of Barbadian fishing activity in waters affected by the delimitation, it ha[d] no jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply in waters which may be determined to form part of Trinidad and Tobago's EEZ.¹¹⁴

¹¹⁰ *Ibid.*, para. 191.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, para. 195.

¹¹³ *Ibid.*, para. 199. The Parties had since 2000 held several rounds of more formal negotiations, some devoted to questions of delimitation and others to associated problems of fisheries in waters potentially affected by the delimitation. Despite their efforts, however, they failed to reach agreement. Thus the obligations under Section 1 of Part XV were fulfilled, and recourse to compulsory procedure entailing binding decision could be initiated; see Art. 286.

¹¹⁴ *Ibid.*, para. 217.

The Court further emphasized that its jurisdiction was limited to the dispute concerning the delimitation of maritime zones between Barbados and Trinidad and Tobago, and not between either of the parties and any third state; and finally that the Tribunal's award did not prejudice the position of any state in respect of any such boundary.¹¹⁵

The award rendered by the Tribunal was the first maritime boundary arbitration award established under the LOS Convention, and is particularly interesting in this regard.

Method for maritime delimitation

In its Award, the Tribunal did something rather extraordinary in the history of maritime boundary delimitation adjudications. In chapter V, 'Maritime Delimitation: General Considerations', the Tribunal elaborated thoroughly on what comprises the applicable law under Article 74(1) and 83(1). In so doing, it summed up and clarified former jurisprudence in order to substantiate the law of maritime delimitation under Articles 74(1) and 83(1) of the LOS Convention *de lege lata*. It thereby sought to confine and consolidate the methodology that had evolved through decisions of courts and arbitral tribunals in maritime delimitation disputes thus far.

The Tribunal started by referring to the 'identical and fundamentally equitable solution' criterion for the delimitation of the EEZ and the continental shelf in Articles 74(1) and 83(1), respectively. This, according to the Tribunal, 'imprecise formula' allowed for a broad range of considerations of the rules embodied in treaties, customary law and general principles of law, as well as contributions by courts and tribunals and learned writers in the field of maritime delimitation.¹¹⁶

The Tribunal went on to reaffirm the basic premise for all maritime delimitation: the entitlement of a state to a given maritime area, in this case both an EEZ and to a continental shelf. The Tribunal then linked the historical origin of the continental shelf, in which the entitlement found its basis in natural prolongation (as in the North Sea Continental Shelf cases) to the subsequent emergence of the EEZ, where the entitlement was based on a distance criterion from the coast of 200 nm.¹¹⁷ In fact, according to the Tribunal, the concept of distance as the basis of entitlement had become increasingly intertwined with that of natural prolongation.¹¹⁸ As evidence for this view, the Tribunal referred to Article 76, where the two concepts were assigned complementary roles – the right to a 200 nm continental shelf, and, on condition that defined criteria are met, the right to a continental shelf extending beyond that limit.¹¹⁹ Further, the same interconnection is found in Article 56 as regards the EEZ, distance being the sole basis of the coastal state's entitlement to both the seabed and subsoil

¹¹⁵ *Ibid.*, para. 218.

¹¹⁶ *Ibid.*, para. 222.

¹¹⁷ *Ibid.*, para. 225.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

and the superjacent waters.¹²⁰ Thus, in the view of the Tribunal, both the continental shelf and the EEZ co-existed with significant elements in common arising from the fact that 200 nm from a state's baselines distance is the basis for the entitlement to each of them.¹²¹

This trend towards harmonization, as the Tribunal pointed out, led to the situation where states sought to establish single maritime boundaries delimiting both the continental shelf and the EEZ by one single line. In fact, it was evident in the Tribunal's view that state practice with very few exceptions had overwhelmingly resorted to the establishment of single maritime boundary lines, and that courts and tribunals had endorsed this practice either by determining a single maritime boundary or by determining lines that are theoretically separate but in fact coincident.¹²²

According to the Tribunal, this development made the law of maritime delimitation more complex, as it dealt with the specific criteria applicable to effect delimitation. In this regard, the Tribunal held that initially courts and tribunals had been naturally reluctant to give preference to those elements more closely connected to the continental shelf over those more closely related to the EEZ, or vice versa. This eventually led to the quest for a neutral criterion of a geographical character, which in the end prevailed over area-specific criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks, with a very few exceptions, as in the Greenland/Jan Mayen case.¹²³ The Tribunal held that the Greenland/Jan Mayen case was most exceptional in having determined the line of delimitation in connection with the fisheries conducted by the parties in dispute. As it was further held, 'courts and tribunals have not altogether excluded the role of this factor but, as in the Gulf of Maine case, have restricted its application to circumstances in which catastrophic results might follow from the adoption of a particular line.'¹²⁴

Also the search for a generally acceptable legal approach to maritime delimitation contributed to the complexity. The Tribunal held that, since the very outset of maritime delimitation, courts and tribunals have taken into account considerations of equity in reaching a determination of a boundary line over maritime areas. Yet, as equitable considerations *per se* are an imprecise concept, this led to confusion on the matter in light of the need for stability and certainty in the outcome of a legal process.¹²⁵ This confusion subsequently led to the search for 'predictable,

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, para. 226.

¹²² *Ibid.*, para. 235. The Tribunal mentioned the cases of Gulf of Maine, Guinea/Guinea Bissau and Qatar/Bahrain as examples in jurisprudence in which courts and tribunals had established single maritime boundaries. As regards the determination of boundaries that are theoretically separate but in fact coincident, the Greenland/Jan Mayen case was used as an example. The latter is interesting, given the Court's reasoning in the Cameroon/Nigeria case as regards the same. See above n. 87.

¹²³ *Ibid.*, para. 228.

¹²⁴ *Ibid.*, para. 241.

¹²⁵ *Ibid.*, para. 230

objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases, emphasized that the role of equity lies within and not beyond law.¹²⁶ Here the Tribunal mentioned various criteria that had emerged and which might or might not be appropriate for effecting delimitation in light of the specific circumstances in each case. Those were: (i) the identification of the relevant coasts abutting upon areas to be delimited; (ii) the principle of equidistance as a method of delimitation applicable in certain geographical circumstances; (iii) the principle that delimitation should avoid the encroachment by one party on the natural prolongation of the other or its equivalent in respect of the EEZ; (iv) avoidance, to the extent possible, of interrupting the maritime projection of the relevant coastlines; and (v) consideration ensuring that any disproportionate outcome should be corrected.¹²⁷ Although this list is not exhaustive, it may be seen as setting the bar for what may be deemed relevant circumstances in future maritime delimitation disputes, especially those involving single maritime boundaries in which the ‘neutral criterion’ applies.

The Tribunal summarized its findings as follows:

The determination of the line of delimitation thus 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.¹²⁸

Thus, also in the second case where the LOS Convention was applicable as between the parties, the method employed was the corrective/equity approach.

Consideration of relevant circumstances

The area to be delimited was separated into three areas: east, west and a central segment. In the relatively short central segment of approximately 16 nm, the parties made no contentions as to adjusting the provisional equidistance line. Consequently, the Tribunal concluded that the equidistance line was agreed to in this segment of the single maritime boundary.

Delimitation in the west

In the west, it was common ground between the parties that the line of delimitation was to be found in the equidistance line between their opposite coasts. Nevertheless, the parties disagreed as to whether the provisional equidistance line should be adjusted taking into account relevant

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, paras. 231–32

¹²⁸ *Ibid.*, para. 242.

circumstances. Barbados contended that the line had to be adjusted southwards just off the coasts of the island of Tobago, basing its argument on three core submissions: (i) the fact that Barbadian fisherfolk for centuries have fished in the waters off the coast of Tobago; (ii) that their livelihoods were critically dependent on continued access to the fishery resources in these waters; (iii) and finally that the fisherfolk of Trinidad and Tobago were not dependent on fishery in these waters.¹²⁹ Nonetheless, the Tribunal dismissed Barbados' contentions, on grounds of not finding any of the invoked factual circumstances proved.¹³⁰ Hence, it concluded that the single maritime boundary in the western segment was that of the provisional equidistance line. In addition, it decided that Trinidad and Tobago was obliged to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries within the EEZ of Trinidad and Tobago.¹³¹

Delimitation in the east

In the eastern segment, the parties did not agree as to whether the boundaries should consist of a single maritime boundary or of separate boundaries for the EEZ and for the continental shelf.¹³² The Tribunal held that this question was largely theoretical, as Trinidad and Tobago, which had claimed the boundary to be delimited separately, had also accepted that there was no *de facto* reason for the Tribunal to draw different boundary lines for the EEZ and for the continental shelf within the 200 nm of its baselines.¹³³ Trinidad and Tobago's need for a separate boundary line appeared, in the view of the Tribunal, to be associated with its claim over the outer continental shelf beyond its 200 nm area.¹³⁴ For these reasons, the Tribunal stated that it would first determine a single maritime boundary for the delimitation of both the EEZ and the continental shelf to the extent of the overlapping claims, without prejudice to the question of the separate legal existence of the EEZ and of the continental shelf.¹³⁵

Concerning the law applicable to maritime delimitation, the parties concurred that the delimitation was to be effected by resort to the corrective/equity approach.¹³⁶ However, whereas Barbados contended that the equidistance/special circumstances method was the proper method prescribed by international law, Trinidad and Tobago claimed that the equidistance method was not a compulsory method of delimitation; further, that there was no presumption that the equidistance method should be the governing principle.¹³⁷ In this respect, the Tribunal held that:

...while no method of delimitation can be considered of and by itself compulsory, and no court or tribunal has so held, the need to

¹²⁹ *Ibid.*, para. 247.

¹³⁰ *Ibid.*, para. 265.

¹³¹ *Ibid.*, para. 292.

¹³² *Ibid.*, para. 296.

¹³³ *Ibid.*, para. 297.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, 298.

¹³⁶ *Ibid.*, para. 301.

¹³⁷ *Ibid.*

avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified.¹³⁸

Thus, the Tribunal upheld the argument laid down in the Cameroon/Nigeria case, in which resort to the corrective/equity approach under Articles 74(1) and 83(2) was not seen as being compulsory. However, the Tribunal clarified this view by stating that the application of a different method than the corrective/equity approach required the parties to ask for such specifically; moreover, that it required a well-founded justification.¹³⁹ Thus, the Tribunal strengthened the corrective/equity approach by making it presumptive, unlike in the Cameroon/Nigeria case, where it was held that this approach in fact not was presumptive. Accordingly, by making the corrective/equity approach presumptive, the Tribunal strengthened the rule of maritime delimitation law in the direction of predictability. As the stipulated requirements for another approach were not met, the delimitation was to be determined by the equidistance/special circumstances method.

Trinidad and Tobago offered four arguments for adjusting the provisional equidistance northwards: (i) distinction between the ‘Caribbean sector’ and the ‘Atlantic Sector’, as the former sector was characterized by oppositeness and the latter by adjacency;¹⁴⁰ (ii) the relevant coasts and their projection; (iii) proportionality; (iv) regional considerations.

The Tribunal did not agree on the distinction between the ‘Caribbean sector’ and the ‘Atlantic sector’, but held that:

...the applicable law under UNCLOS is the same in either case: Articles 74 and 83 do not distinguish between opposite and adjacent coasts. It follows that there is no justification to approach the process of delimitation from the perspective of a distinction between opposite and adjacent coasts and apply different criteria to each, which in essence is the purpose of the two sectors argument.¹⁴¹

This view affirmed the approach of using the corrective/equity method in situations of both opposite and adjacent coasts, as first applied in the scenario with opposite coasts in the Greenland/Jan Mayen case, and then in the scenario with adjacent coasts in the Qatar/Bahrain case and the subsequent Cameroon/Nigeria case.

Next for consideration were the relevant coasts and their projection. The Tribunal found no difficulty in concluding that coastal frontages were a circumstance relevant to the delimitation and that their relative lengths might require an adjustment of the provisional equidistance line.¹⁴² Secondly, the Tribunal agreed that the coastal frontages of Trinidad and Tobago had a clearly easterly orientation, and were a relevant circumstance to be taken into account in adjusting the equidistance line.¹⁴³

¹³⁸ *Ibid.*, para. 306.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, para 308.

¹⁴¹ *Ibid.*, para. 315.

¹⁴² *Ibid.*, para. 327.

¹⁴³ *Ibid.*, para. 331.

As regards proportionality, Barbados contested that proportionality could be used as an independent method of delimitation.¹⁴⁴ In this respect, the Tribunal concluded:

...proportionality is a relevant circumstance to be taken into consideration in reviewing the equity of a tentative delimitation, but not in any way to require the application of ratios or mathematical determinations in the attribution of maritime areas.¹⁴⁵

Thus the role of proportionality was to examine in the final outcome of the delimitation effected, as the final test to ensure that equitableness was not contradicted by a disproportionate result.¹⁴⁶ Before the Tribunal could proceed with the proportionality test, it therefore had to examine Trinidad and Tobago's last claim for adjusting the equidistance line. Trinidad and Tobago held that other agreements delimiting the sea in the region had to be taken into account in order to avoid a cut-off effect.¹⁴⁷ In this respect, the Tribunal ruled that the treaty between France (Guadeloupe and Martinique) and Dominica in the region north of Barbados, and the Barbados/Guyana Joint Cooperation Zone Treaty, could have no effect on the present dispute.¹⁴⁸ Yet, the Tribunal was bound to take into account the treaty between Trinidad and Tobago and Venezuela in so far as it determined what the maritime claims of Trinidad and Tobago might be.¹⁴⁹ Thus, it held that in so far as Trinidad and Tobago's claim was concerned, the maximum extent of overlapping areas between the parties was partly determined by the treaty between Trinidad and Tobago and Venezuela.¹⁵⁰ In relation to this, Barbados contended that Trinidad and Tobago could not claim an adjustment of the equidistance line to the north because that state had consistently recognized and acquiesced in Barbados' exercise of sovereignty in the area.¹⁵¹ Although seismic surveys sporadically authorizing oil concessions in the area and patrolling were relevant, that did not provide sufficient evidence to establish estoppel or acquiescence.¹⁵² Hence the Tribunal did not find this activity to be of decisive legal significance.¹⁵³

Based on the above considerations, the Tribunal adjusted the provisional equidistance line. It concluded that the appropriate point of deflection was the point that gave effect to the presence of the coastal frontages of both the islands of Trinidad and of Tobago, thus taking into account a circumstance that would otherwise be ignored by an unadjusted equidistance line.¹⁵⁴ This point was located where the provisional equidistance line meets the geodetic line joining (a) the archipelagic baseline turning-point on Little Tobago Island with (b) the point of intersection of Trini-

¹⁴⁴ *Ibid.*, para. 335.

¹⁴⁵ *Ibid.*, para. 337.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* para. 342

¹⁴⁸ *Ibid.*, paras. 344, 349.

¹⁴⁹ *Ibid.*, para. 347.

¹⁵⁰ *Ibid.*, para. 348.

¹⁵¹ *Ibid.*, para. 361.

¹⁵² *Ibid.*, para. 363.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, para. 373.

dad and Tobago's southern maritime boundary with its 200 nm EEZ limit.¹⁵⁵ Then a straight line was drawn from this point in the direction of its terminal point, where the delimitation line intersected the Trinidad and Tobago-Venezuela agreed maritime boundary, which was the southernmost limit of the area claimed by Trinidad and Tobago.¹⁵⁶

Finally, the Tribunal applied the test of proportionality. It concluded that the bending of the equidistance line reflected a reasonable influence of the coastal frontages on the overall area of delimitation, with a view to avoiding reciprocal encroachments that would otherwise result in some form of inequity.¹⁵⁷

Conclusion

The Barbados/Trinidad and Tobago Award is unusual in respect to earlier jurisprudence on maritime delimitation, and in this case it is also therefore important. The Tribunal, openly and honestly, acknowledged that earlier attempts by international courts and tribunals to define the role of equity had resulted in distancing the outcome from the role of law, leading to a state of confusion in the matter. This brings us back to the two diverging schools of thought that emerged in the shaping of the law of maritime delimitation in the first half of the 20th century. As we have seen, courts and tribunals have at times employed the corrective/equity approach and other times adopted the result-oriented equity approach, without properly explaining why. Yet, as the study so far has shown, there has been an increasing tendency towards the use of the corrective/equity approach, first in situations with opposite coasts, and then finally to situations with adjacent coasts. The Tribunal also affirmed this tendency in the present case. In the Tribunal's view, it was necessary to search for an approach that could accommodate both the need for predictability and stability within the rule of law and the need for flexibility in the outcome. According to the Tribunal, the method that met those requirements was the corrective/equity approach, in which the court or tribunal first draws a provisional equidistance line, and then at the second stage asks if any special circumstances call for an adjustment of that line. In the words of the Tribunal, 'certainty [was] thus combined with the need for an equitable result.'¹⁵⁸

As in the Cameroon/Nigeria case, the Tribunal affirmed that the corrective/equity approach under Articles 74(1) and 83(2) was not compulsory. But contrary to the Cameroon/Nigeria case, the Tribunal concluded that the application of a method other than the corrective/equity approach required the parties to ask for such specifically; moreover, that this required a well-founded justification. Thus, the Tribunal strengthened the corrective/equity approach by holding it as presumptive.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, para. 374.

¹⁵⁷ *Ibid.*, para. 379

¹⁵⁸ *Ibid.*

The Tribunal also made some important remarks to the development in jurisprudence of, and increasing will of states to establish, a single maritime boundary delimiting the various zones by a single line. In the Tribunal's view, both the continental shelf and the EEZ co-exist in the LOS Convention, with significant elements in common arising from the fact that the distance criterion provides the basis for the entitlement to both of them. This co-existence led to the adoption in case law of a neutral criterion, in which geographical aspects prevail, rather than area-specific criteria like geomorphological aspects or resource-specific criteria like the distribution of fish stocks.

In relation to the relevant circumstances to be taken into account, the Tribunal held that the process of achieving an equitable result is constrained by legal principle, in particular concerning the factors that may be taken into account. Here the Tribunal held that it was necessary that the delimitation be 'consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention.'¹⁵⁹

2.6.3 *The Nicaragua vs Honduras Case (2007)*

On 8 December 1999 Nicaragua initiated proceedings against Honduras in relation to their maritime boundary dispute in the Caribbean Sea.¹⁶⁰ Nicaragua invoked the declarations whereby both countries had accepted the compulsory jurisdiction of the ICJ pursuant to Article 36(2) of the Court's Statutes, and Article XXXI of the American Treaty on Pacific Settlement, also known as the 'Pact of Bogotá'.¹⁶¹ The Court's jurisdiction was not contested by Honduras. The maritime dispute also involved the question of sovereignty over certain islands in the disputed area. As the issue of sovereignty was not requested in the initial petition, however, the Court could have refused to consider it. Notwithstanding, the Court concluded it had jurisdiction to decide the sovereignty of the islands, as its jurisdiction to do so had to be considered inherent in the initial claim.¹⁶² The basis for this inference was that the islands were located within the disputed area to be delimited. On the basis of post-colonial conduct (*effectivités*), the Court determined that Honduras has sovereignty over the islands.¹⁶³

Method for maritime delimitation

Nicaragua argued that the boundary should be the bisector of the lines representing the coastal fronts of the two parties.¹⁶⁴ Honduras, on the other hand, argued that: (i) based on the principle of *uti possidetis juris*¹⁶⁵

¹⁵⁹ *Ibid.*, para. 243.

¹⁶⁰ 2007 Nicaragua/Honduras case, 2007 ICJ Reports; 46 ILM (2007), para. 1.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*, paras. 114–115.

¹⁶³ *Ibid.*, para. 229.

¹⁶⁴ *Ibid.*, para. 83.

¹⁶⁵ a principle of international law that states that newly formed sovereign states should have the same borders that they had before their independence. Murphy 2006, p.125.

and a prior tacit agreement, the boundary should follow the 15th parallel, and (ii) if that line was not accepted, the boundary should be an adjusted equidistance line.¹⁶⁶ The parties agreed that the boundary of their territorial seas, EEZs and continental shelves should be effected by one single maritime boundary.¹⁶⁷

The Court started with the claim of Honduras that the boundary should be based on the principle of *uti possidetis juris*. The Court acknowledged that the principle might, in certain circumstances – as in connection with historical bays and territorial seas – play a role in maritime delimitation.¹⁶⁸ However, finding no evidence that Spain in colonial times had divided its maritime jurisdiction between the provinces of Honduras and Nicaragua, even within the limits of the territorial sea, the Court had to reject Honduras' contention.¹⁶⁹

Next to be considered by the Court was the claim of Honduras that there was a tacit agreement between the parties that the 15th parallel constituted *de facto* their maritime boundary. Here the Court held that 'evidence of a tacit agreement must be compelling' and that 'the establishment of a permanent boundary is matter of grave importance and agreement is not easily to be presumed.'¹⁷⁰ The Court found, after having considered the evidence of a tacit agreement laid down for it, that while the 15th parallel appeared to have had some relevance in the conduct of the parties, there was 'no tacit agreement...of a nature to establish a legally binding maritime boundary.'¹⁷¹

Having found that there was no traditional boundary along the line of the 15th parallel, the Court turned to the determination of the maritime boundary. It declared that even though Nicaragua was not party to the LOS Convention when submitting the case, the LOS Convention was the applicable law between them in this dispute, as both parties were in agreement on this and now had become state parties to it.¹⁷² The area to be delimited by a single maritime boundary stretched from the mainland coast to at least the 82nd meridian, where third-state interests could become relevant.

The Court then began by explaining the law that had evolved in regard to single maritime boundaries and reiterated the 'neutral criterion' first adapted in the Qatar /Bahrain case and later used when drawing single maritime boundaries. It also found reason to differentiate that criterion, as applied in situations in which a single line was to delimit that of the continental shelf and the EEZ, from situations in which the area also involved the territorial sea. When delimiting the territorial sea the Court had first and foremost to apply 'the principles and rules of international

¹⁶⁶ 2007 Nicaragua/Honduras case, 2007 ICJ Reports; 46 ILM (2007), paras. 228–259.

¹⁶⁷ *Ibid.*, para. 261.

¹⁶⁸ *Ibid.*, para. 232.

¹⁶⁹ *Ibid.*, para. 234.

¹⁷⁰ *Ibid.*, para. 253.

¹⁷¹ *Ibid.*, para. 258.

¹⁷² *Ibid.*, para. 261.

customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary that serves other purposes as well.’¹⁷³

The Court then turned to Article 15 of the LOS Convention, according to which the boundary between the overlapping territorial seas of neighbouring states is to be an equidistance line, except where historical or other special circumstances make it necessary to delimit the boundary differently. In relation to this the Court explained why the equidistance/special circumstances or the corrective/equity approach had widely been used for boundary delimitation, but went on to observe that the ‘equidistance method does not automatically have priority over other methods of boundary delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.’¹⁷⁴

The latter was the situation in that case. First of all, neither of the parties had as its main argument the use of the equidistance/special circumstances method.¹⁷⁵ Further, because of the sharply convex projection of Cape Gracias a Dios at the terminus of the land boundary, ‘the pair of base points at the tip of the Cape would assume a considerable dominance in constructing an equidistance line, especially as it travels out from the coast.’¹⁷⁶ Moreover, ‘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.’¹⁷⁷ Further, the changing shape and accretion of the delta at the mouth of the River Coco, where their land boundary ends, ‘might render any equidistance line so constructed today arbitrary and unreasonable in the near future.’¹⁷⁸ In addition came the fact that the parties disagreed as to sovereignty over unstable islands formed in the delta.

The Court considered that these geographical and geomorphological features constituted special circumstances within the meaning of Article 15 of the LOS Convention. Yet, what the Court found impossible was not the application of these features as special circumstances *per se*, but the very application of the equidistance method itself and the drawing of a provisional equidistance line as prescribed by Article 15. The Court considered that the facts in the present case gave reason for exemption from the general rule of the equidistance/special circumstances method, as prescribed by Article 15.¹⁷⁹ It drew support for those conclusions from the International Law Commission’s commentary on the draft article that became Article 12 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, which is virtually identical to Article 15 of the LOS Convention.¹⁸⁰ The Court noted, however, that even if special circumstances now required the use of another method, ‘equidistance

¹⁷³ *Ibid.*, para. 265.

¹⁷⁴ *Ibid.*, para. 272.

¹⁷⁵ *Ibid.*, para. 275.

¹⁷⁶ *Ibid.*, para. 277.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, para. 281.

¹⁸⁰ *Ibid.*, para. 280.

remains the general rule.’¹⁸¹ Thus, for the first time in history where the LOS Convention has been the applicable law between the parties, the equidistance/special circumstance or the equity/corrective approach was not considered the appropriate method.

Next for consideration was what alternative method should be used. While Honduras’ claims in regard to the boundary to be drawn had both been rejected, Nicaragua’s claim for the use of the bisector line had not yet been processed. Thus the Court turned to consider whether in principle some form of bisector of the angle created by lines representing the relevant mainland coasts could serve as the basis for the delimitation.¹⁸² It noted that ‘the use of a bisector—the line formed by bisecting the angle created by the linear approximations of coastlines—has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate.’¹⁸³ And further, ‘that in instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method.’¹⁸⁴ The Court considered that the use of the bisector method was indeed justified in the present case because of the geographical configuration of the coast and the geomorphological features of the area where the terminus of the land boundary was located.¹⁸⁵

Next to be considered was which of the various possibilities for the coastal fronts could be used to define these linear approximations of the relevant geography. The Court rejected Nicaragua’s proposal in this regard, as it would cut off a significant portion of Honduran territory.¹⁸⁶ Instead the Court found that the front extending from Punta Patuca to Wouhnta would avoid the problem of cutting off Honduran territory, while providing a coastal façade of sufficient length to account properly for the coastal configuration in the disputed area. Accordingly, a Honduran coastal front running to Punta Patuca and a Nicaraguan coastal front running to Wouhnta were, in the Court’s view, relevant for drawing the bisector.¹⁸⁷

Having identified the bisector line as the appropriate method for maritime delimitation, the Court proceeded with the delimitation of the waters around and between the islands in question. According to the Court, each island should have a 12-nm territorial sea, but no other zone, since neither Honduras nor Nicaragua had requested any such zone.¹⁸⁸ The Court rejected Nicaragua’s contention that that each island should have a three nautical miles enclave of territorial sea in order to prevent Honduras from

¹⁸¹ *Ibid.*, para. 281.

¹⁸² *Ibid.*, para. 287.

¹⁸³ *Ibid.* The Court referred to the Gulf of Maine case and the Guinea/Guinea Bissau case as examples where the bisector line has been found appropriate for certain segments of the maritime boundaries.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*, para. 292.

¹⁸⁶ *Ibid.*, para. 295.

¹⁸⁷ *Ibid.*, para. 298.

¹⁸⁸ *Ibid.*, paras. 300–302.

obtaining a disproportionate share of the area in dispute, as would result from giving the islands a 12 nm territorial sea.¹⁸⁹

According to the Court, the boundary should deviate from the bisector line southwards around the four islands and in principle 12 nm from them. However, the 12 nm territorial sea around three of the islands overlapped with the 12 nm territorial sea of the Nicaraguan island of Edinburgh Cay, lying to the south.¹⁹⁰

As there were no special circumstances present in this area, the Court found that the territorial sea boundary line between the three Honduran islands and the Nicaraguan Edinburgh Cay should be the equidistance line.¹⁹¹ West of the most westerly Honduran island of South Cay, the Court decided that the boundary should resume along the bisector line where the 12-mile arch around South Cay intersects with the bisector line initially drawn from the mainland.¹⁹²

Finally, the Court had to determine the starting and end points of the single maritime boundary. It set the starting point three nautical miles out to the sea, along the azimuth of the bisector line from the point determined by the Mixed Boundary Commission in 1962 as the terminus of the land boundary between Honduras and Nicaragua.¹⁹³ Furthermore, as the parties had requested, the Court decided they should agree on the line which linked the end of the land boundary as fixed by an earlier arbitral award of 1906 and the point of departure of the maritime delimitation in accordance with the present judgment (three nautical miles out in the sea).¹⁹⁴ As for the end point of the boundary, the Court decided that the boundary should extend as far as the area where the rights of third states might be affected.¹⁹⁵ Unlike in the Barbados/Trinidad and Tobago case, in which the Tribunal considered itself competent to delimit the continental shelf boundary beyond 200 nm, the Court in this case determined that the boundary should in no case extend beyond 200 nm; further: 'any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.'¹⁹⁶

Conclusion

The Nicaragua/Honduras case was the first case in which the LOS Convention was the applicable law between the parties and where the equidistance/special circumstance or the corrective/equity approach was not deemed the appropriate method for delimitation. This departure from previous case law, however, must be seen as an exception to the general rule of the equidistance/special circumstances method. As the Court explicitly stated, 'equidistance remains the general rule'. We also have

¹⁸⁹ *Ibid.*, paras. 300–301.

¹⁹⁰ *Ibid.*, para. 303.

¹⁹¹ *Ibid.*, para. 304.

¹⁹² *Ibid.*, para. 305.

¹⁹³ *Ibid.*, para. 311.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, para. 312. Such third states could include Colombia and Jamaica.

¹⁹⁶ *Ibid.*, para. 319.

seen that, when delimiting the maritime boundary between the islands, the Court reverted to the equidistance method.

It is also worth noting that the Court's decision to reject the equidistance method was made in relation to the territorial sea under Article 15, and not in relation to the EEZ and the continental shelf under Articles 74(1) and 83(1). The suitability of the bisector method for the delimitation of the EEZ and the continental shelf was not properly discussed by the Court. Indirectly, however, it should be understood that the factors that made an equidistance line inappropriate for a territorial sea boundary also made an equidistance line inappropriate as the starting point for the boundary of the EEZ and the continental shelf. This inference is supported by the Court's consideration of the potentially distorting effect of the choice of base points in which, the further that that line travels from the coast, could assume considerable dominance when constructing the equidistance line.¹⁹⁷ The Court also described the bisector method as an approximation of the equidistance method. Thus, the actual departure from the use of the equidistance method can be said to be minimal. More important are the reasons that the Court gave for not employing the equidistance method for most of the boundary. The Court upheld the line articulated by the Tribunal in the Barbados/Trinidad and Tobago case, where it was held that the application of a different method than the use of the corrective-equity approach required the parties to ask for such specifically, and moreover, that it required a well-founded justification. In the present case neither of the parties had advocated the use of the equidistance method as their main argument.

Finally, what justified the shift from the equidistance/special circumstances method were the rare circumstances of the case: the extreme convexity of the coast at the terminus of the land boundary, and the constantly shifting delta of the River Coco. Hence the Court set the bar for using another method than that of the equidistance/special circumstance relatively high.

2.6.4 *The Guyana vs Surinam Award (2007)*

On 24 February 2004 Guyana initiated proceedings against Suriname in relation to three matters: (i) the delimitation of the territorial sea, the EEZ and the continental shelf by a single maritime boundary; (ii) whether or not Surinam had infringed its obligations under the LOS Convention, the UN Charter, and general international law to settle disputes by peaceful means, by using force against a drilling rig licensed by Guyana; (iii) whether or not Suriname had infringed Articles 74(3) and 83(3) of the LOS Convention in regard to its obligation to make every effort to enter into provisional arrangements pending agreement on a maritime boundary, and by jeopardizing or hampering the reaching of the final agreement.¹⁹⁸ We will examine only the first point.

¹⁹⁷ *Ibid.*, para. 296.

¹⁹⁸ 2007 Guyana/Surinam Award, PCA Awards Series Vol. V (2007), para. 157. See also paras. 488–89 of the disposition.

Guyana and Suriname ratified the LOS Convention on 16 November 1993 and 9 July 1998, respectively.¹⁹⁹ Neither party had made a declaration pursuant to Article 287(1) of the LOS Convention regarding the choice of compulsory procedures.²⁰⁰ Thus, according to Article 287(3), the parties were deemed to have accepted arbitration in accordance with Annex VII of the LOS Convention. Furthermore, neither had made a declaration pursuant to Article 298 regarding optional exceptions to the applicability of the compulsory procedures provided for in Section 2 of Part XV.²⁰¹ Thus, the parties were entitled under Article 286 of the Convention to pursue recourse to binding decisions under Section 2 of Part XV. Both agreed to the Tribunal's jurisdiction, but disagreed as to the scope of it.²⁰²

Method for maritime delimitation

Before the Tribunal could proceed with the delimitation of the territorial sea, it had to address a jurisdictional objection raised by Suriname. Suriname argued that the Tribunal had no jurisdiction to establish the terminus of the land boundary and that without such a terminus there could be no maritime boundary. However, the Tribunal found that the terminus had been established by a boundary commission in 1936, and therefore there was no need to consider Suriname's objection to jurisdiction further.²⁰³ The Tribunal went on to state that the governing law was Article 15 of the LOS Convention, which meant that the territorial sea boundary would be an equidistance line unless there were special circumstances.²⁰⁴ As regards the delimitation of the EEZ and the continental shelf boundary, the Tribunal pointed out that delimitation was governed by Articles 74(1) and 83(1).²⁰⁵ However, the Tribunal noted that it had been asked to draw a single maritime boundary, and that the concept of such a boundary did not have its origins in the LOS Convention, but was 'squarely based on State practice and the law as developed by international courts and tribunals.'²⁰⁶ Here the Tribunal referred to the dictums made in the Barbados/Trinidad and Tobago case, as regards the relevant material to be taken into account when deciding the law *de lege lata*, and the extent of the Tribunal's discretion in this respect.²⁰⁷ The Tribunal further held 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.'²⁰⁸ It cited earlier cases in this regard, and added: 'it is important to note that recent decisions indicate that the presumption in

¹⁹⁹ 2007 Guyana/Surinam Award, PCA Awards Series Vol. V (2007), para. 1.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, para. 2.

²⁰² *Ibid.*, para. 175.

²⁰³ *Ibid.*, para. 308.

²⁰⁴ *Ibid.*, paras. 295–96.

²⁰⁵ *Ibid.*, paras. 330–42.

²⁰⁶ *Ibid.*, para. 334.

²⁰⁷ *Ibid.*, paras. 333–34.

²⁰⁸ *Ibid.*, para. 335.

favour of the equidistance, established in case law relating to States with opposite coasts, also applies in the case of States with adjacent coasts.’²⁰⁹

Thus the Tribunal concluded that the law under Articles 74(1) and 83(1) required a two-stage approach to boundary delimitation, in accordance with its precedents. The process should begin by positing a provisional equidistance which might, at the second stage, be adjusted in light of any relevant circumstances, if necessary to achieve an equitable solution.²¹⁰

The Tribunal proceeded to determine what coastlines were relevant for delimiting the provisional equidistance line. It found it logical and appropriate to treat as relevant the coasts of the parties which generated ‘the complete course’ of the provisional equidistance, and made reference to the Greenland/Jan Mayen case.²¹¹ In applying this inference the Tribunal found that on Guyana’s side the relevant coast ran from a point just seaward of marker ‘B’ to Devonshire Castle Flats, and on Suriname’s side from Bluff Point on the east bank of the Corentyne River to a point on Vissers Bank.²¹²

As the Tribunal had not been requested to delimit maritime areas beyond 200 nm from the baselines of Guyana and Suriname, the Tribunal was not concerned with matters concerning the delimitation of the outer continental shelf of the parties.²¹³

Consideration of special circumstances

In considering special circumstances relevant to delimitation of the territorial sea, the Tribunal first held that there was no evidence to suggest that some form of historic title to the territorial waters had inured to any of the parties, nor that there were any geographical features such as low-tide elevations or islands to be considered in delimiting the territorial sea.²¹⁴ It also made a note of the quantitative and qualitative circumstances to be considered in a maritime delimitation: that there was ‘no closed list of considerations’ or ‘finite list of special circumstances’; rather, the Tribunal was called upon to ‘examine every particular factor of the case which might suggest an adjustment or shifting of that line’.²¹⁵

Next for consideration was whether or not navigational interests of the Corentyne River could play a part as a special circumstance in the case. The Tribunal concluded that navigational interests indeed could constitute a special circumstance and that they did so in the present case. In support of the view, it quoted the *travaux préparatoires* of the 1958 Territorial Sea Convention, in particular, the International Law Commission’s commentary on what became Article 12 of that 1958 Convention,

²⁰⁹ *Ibid.*, para. 338.

²¹⁰ *Ibid.*, para. 342.

²¹¹ *Ibid.*, para. 352. With the ‘complete course’ the Tribunal referred to the base points which generate the complete course of the median line provisionally drawn; see Greenland/Jan Mayen case, above n. 60, para. 67.

²¹² 2007 Guyana/Surinam Award, PCA Awards Series Vol. V (2007), para. 352.

²¹³ *Ibid.*, para. 353.

²¹⁴ *Ibid.*, para. 297.

²¹⁵ *Ibid.*, para. 303.

as well as the Beagle Channel and English Channel arbitrations.²¹⁶ The Tribunal found that the previous colonial powers (the Netherlands and the United Kingdom) had agreed *de facto* on a line N10°E as the line of delimitation for the then three nautical miles territorial sea, as all of the Corentyne River was to be Surinamese territory.²¹⁷ Furthermore, the line N10°E provided appropriate access for Guyana through Suriname's territorial sea to the western channel of navigation in the Corentyne River.²¹⁸ According to the Tribunal, those reasons justified an adjustment from the equidistance line.²¹⁹ The Tribunal concluded that the boundary of the first three nautical miles of the territorial sea was to be the line N10°E starting from the intersection of the low-water line of the west bank of the Corentyne River and the line N10°E that passes through marker 'B', a marker placed by the 1936 Mixed Boundary Commission 220 metres distant from marker 'A', which was established by the Commission as the terminus of the land boundary.²²⁰

The Tribunal then turned to the remaining territorial sea boundary between three and twelve nautical miles. It noted that the question on how an existing territorial sea boundary was to be extended, in the absence of an agreement to do so, when states extended their territorial seas from three to twelve nautical miles, appeared not to have engaged attention in international jurisprudence, state practice or by commentators.²²¹ The Tribunal rejected Suriname's claim that the line N10°E should simply be extended beyond three nautical miles to form the boundary, and held instead that it was 'necessary to find a principled method' by which the N10°E line could be connected to starting point of the single maritime boundary delimiting the EEZ and the continental shelf.²²² The Tribunal concluded by establishing the shortest line drawn diagonally from the point at which the N10°E line intersected the three nautical miles limit to the starting point of the single maritime boundary of EEZ and the continental shelf.²²³

Having delimited the maritime boundary of the territorial sea, the Tribunal proceeded with the consideration of special circumstances in relation to the single maritime boundary of the EEZ and the continental shelf. Neither of the parties considered the provisional equidistance line to represent an equitable delimitation. Suriname argued that the geographical situation in the area would lead to a cut-off effect on the projection of its coastal front if the equidistance method were applied. It therefore urged that instead of the equidistance line, the boundary should be the bisector of the angle formed by the coastal fronts of Guyana and Suriname, and referred to former jurisprudence in which this method had been used.²²⁴

²¹⁶ *Ibid.*, paras. 300–06

²¹⁷ *Ibid.*, para. 306.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*, paras. 307–08.

²²¹ *Ibid.*, para. 311.

²²² *Ibid.*, para. 315.

²²³ *Ibid.*, para. 325.

²²⁴ *Ibid.*, paras. 369–70. Suriname argued the cases of Tunisia/Libya, the Gulf of Maine and St. Pierre/Miquelon as case law in support of this approach. The

The Tribunal, however, rejected the use of the bisector method, observing that the ‘general configuration of the maritime area to be delimited does not present the type of geographical peculiarities which could lead the Tribunal to adopt a methodology at variance with that which has been practised by international courts and tribunals during the past two decades.’²²⁵ Furthermore, it found that there were no other geographical circumstances that required any modification of the equidistance line, as the relevant coastlines presented no ‘marked concavity or convexity.’²²⁶ Guyana had argued that the equidistance line should be modified because the pattern of oil and gas concessions by the parties for nearly 50 years indicated a *modus vivendi* that a modified equidistance line should form the boundary.²²⁷ However, the Tribunal considered the jurisprudence of international courts and tribunals to reveal a ‘marked reluctance’ on the part of courts and tribunals ‘to accord significance to the oil practice of the parties in the determination of the delimitation line.’²²⁸ In the present case the Tribunal found ‘no evidence of any agreement between the Parties’ in the practice of awarding concessions, and therefore such practice would not be taken into account.²²⁹ Finally, the Tribunal dismissed as irrelevant the contention by Guyana that it should take account of the maritime boundary proposed in a draft agreement between Suriname and France for the boundary between Suriname and French Guiana.²³⁰ Accordingly, the Tribunal concluded that there were no relevant circumstances that required adjustment of the equidistance line.²³¹

The Tribunal also noted that it had checked the relevant coastal lengths for proportionality and arrived at nearly the same ratio as for the relevant areas (51:49, 54:46 respectively, in Guyana’s favour). The areas resulting from the use of the equidistance line were therefore proportionate in the Tribunal’s view.²³²

Conclusion

The Guyana/Suriname case followed the line of its recent precedents in adopting the two-stage approach or the corrective/equity approach when delimiting the territorial sea and a single maritime boundary for the EEZ and the continental shelf. In contrast to the Nicaragua/Honduras case, the Tribunal in this case rejected a proposition to use the bisector method

method was also used in the Nicaragua/Honduras case (which came about a few weeks later).

²²⁵ 2007 Guyana/Surinam Award, PCA Awards Series Vol. V (2007), para. 372.

²²⁶ *Ibid.*, paras. 375–77.

²²⁷ *Ibid.*, para. 378.

²²⁸ *Ibid.*, para. 390. Among many of the cases considered, the Tribunal cited the Cameroon/Nigeria case in which it was held that ‘oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional line. Only if they are based on express or tacit agreement between the parties may they be taken into account’. See above n. 82, para. 304.

²²⁹ 2007 Guyana/Surinam Award, PCA Awards Series Vol. V (2007), para. 390.

²³⁰ *Ibid.*, para. 391.

²³¹ *Ibid.*, para. 392.

²³² *Ibid.*

instead of the equidistance method. Its reasoning in this regard strengthens the presumption of the equidistance method in relation to single maritime boundaries and provides a further clarification of its role in maritime delimitation. The Tribunal further strengthened the role of the equidistance method by reiterating the view that recent case law had indicated ‘that the presumption in favour of the equidistance, established in case law relating to States with opposite coasts, also applies in the case of States with adjacent coasts.’²³³ It also upheld the ‘neutral criterion’ adopted in previous cases in regard to the drawing of single maritime boundaries. Having cited earlier cases, it simply held that ‘international courts and tribunals dealing with maritime delimitation should be mindful of not remaking or wholly refashioning nature, but should in a sense respect nature.’²³⁴

2.6.5 *The Romania vs Ukraine Case (2009)*

On 16 September 2004 Romania instituted proceedings against Ukraine concerning the delimitation of the continental shelf and the EEZs of these two states in the Black Sea.²³⁵ Romania invoked as basis for the ICJ’s jurisdiction Article 36(h), paragraph 1, of the Statute of the Court, and paragraph 4(h) of the Additional Agreement to the Treaty on Good Neighbourliness and Co-operation, which the parties had concluded on 2 June 1997.²³⁶ The parties were in agreement that the conditions for the Court’s jurisdiction were satisfied; however, they differed to the exact scope of it.²³⁷ Both parties agreed that delimitation should result in a single maritime boundary for the EEZ and the continental shelf.²³⁸

Ukraine argued that the jurisdiction of the Court concerned only the delimitation of the continental shelf and the EEZ, not the territorial sea, as only the former two were the zones explicitly referred to in the above-mentioned treaty and agreement.²³⁹ Thus, Ukraine contested the first segment of Romania’s boundary claim, i.e. the line between point F and point X which followed the 12 nm arch outer limit of the territorial sea of Serpents’ Island, which belongs to Ukraine. The Court approved Ukraine’s contention that it had ‘no jurisdiction to delimit the territorial seas of the Parties’, but, at the same time, it opposed the view that it was therefore prevented from delimiting ‘on the one hand, the exclusive economic zone and the continental shelf of one State, and, on the other hand, the territorial sea of the other State at its seaward limit.’²⁴⁰

Romania and Ukraine had ratified the LOS Convention on 17 December 1997 and 26 July 1999, respectively. Thus, the applicable provisions for delimiting the EEZ continental shelf between the parties were Articles

²³³ *Ibid.*, para. 338.

²³⁴ *Ibid.*, para. 374.

²³⁵ 2009 Romania/Ukraine case, 2009 ICJ Reports, para. 1.

²³⁶ *Ibid.*, para. 20.

²³⁷ *Ibid.*, para. 22.

²³⁸ *Ibid.*, paras. 12, 13, 17.

²³⁹ *Ibid.*, para. 24.

²⁴⁰ *Ibid.*, para. 30.

74(1) and 83(1) of that Convention.²⁴¹ Romania held, however, that previous agreements between the parties had to be taken into account, as they defined procedures and principles for the negotiation of a single maritime boundary between them. According to Romania, those agreements had to be interpreted within the meaning of Articles 74(4) and 83(4), but this was rejected by the Court.²⁴² According to the Court, the principles and procedures referred to in those agreements were applicable only to the negotiations between the parties. As regards the present case, they were relevant only to the extent that they formed ‘part of the relevant rules of international law.’²⁴³ Therefore, the Court held that what was applicable law in the present case were the relevant provisions of the LOS Convention as interpreted in its jurisprudence.²⁴⁴

Method for maritime delimitation

The Court started by dealing with a disagreement between the parties as to whether there already existed an agreed maritime boundary around Serpents’ Island for all purposes (this island belongs to Ukraine and is located only 20 nm east of the mainland coast of Ukraine). The disagreement also concerned the starting point of the delimitation of the EEZ and the continental shelf in the present case. The Court found that Article 1 of the 2003 State Border Regime Treaty established the starting point for the present delimitation by determining the end point of the parties’ territorial sea boundary.²⁴⁵ The Court also found that there was an agreed maritime boundary around Serpents’ Island in the form of a 12 nm arc establishing the territorial sea of the island.²⁴⁶ This maritime boundary did not delimit the territorial sea of Ukraine and the EEZ and continental shelf of Romania, and consequently did not forfeit possible entitlement by Ukraine to maritime zones beyond the 12 nm limit.²⁴⁷ Thus, Ukraine’s entitlement to a continental shelf and an EEZ around Serpents’ Island was still intact.

Next was the determination of relevant coastlines and maritime areas pertaining to each of the parties in the delimitation process. According to the Court, the role of relevant coasts served mainly two legal aspects in the delimitation of the EEZ and the continental shelf. Firstly, it was necessary in order to determine, regarding the specific context of the case, what coastlines constituted the overlapping claims to those zones.²⁴⁸ Here the Court reiterated the ‘land dominates the sea’ principle previously adapted by courts and tribunals, in which ‘the land is the legal source of the power which a State may exercise over territorial extensions seaward’ and that the ‘coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it.’²⁴⁹ Secondly, the relevant coasts would have to be ascertained in order to check, in the third and

²⁴¹ *Ibid.*, para. 40.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, para. 42.

²⁴⁵ *Ibid.*, para. 66.

²⁴⁶ *Ibid.*, para. 76.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*, para. 78.

²⁴⁹ *Ibid.*, para. 77.

final stage of the delimitation process, whether there existed any disproportionality in the ratios of the coastal length of each state and the maritime areas falling to either side of the delimitation line.²⁵⁰

The Court decided that the whole Romanian coast, from the terminus of the boundary with Ukraine to the terminus of the land boundary with Bulgaria, constituted the relevant coast for the purpose of delimitation, as the parties were in agreement on this.²⁵¹ As regards the relevant Ukrainian coast, the Court decided that most of Ukraine's mainland coast was relevant, from the terminus of the land boundary with Romania, to the southern tip of the Crimean Peninsula. What was not deemed as relevant coast was that of the Karkinit's'ka Gulf, in which the coasts faced each other and did not project into the area to be delimited.²⁵² Further, the Court found that the coast of Serpents' Island was 'so short that that it [made] no real difference to the overall length of the relevant coasts of the Parties.'²⁵³ Accordingly, the Court arrived at a coastal length ratio between Romania and Ukraine of 1:2.8.²⁵⁴ As the relevant maritime area, the Court included all the waters in which maritime entitlements of Ukraine and Romania overlapped with each other, omitting the waters of the Karkinit's'ka Gulf.²⁵⁵

The court then turned to the delimitation methodology. It held that when called upon to delimit the continental shelf or the EEZ, or to draw a single maritime boundary as in the present case, the Court proceeds in defined stages which in recent decades have been 'defined with precision'. It explicated this view:

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.²⁵⁶

Secondly, as the final line should result in an equitable solution according to Articles 74(1) and 83(1) of the LOS Convention, the Court would at next consider whether there were any factors in the case calling for an adjustment of the provisional equidistance line in order to achieve an equitable result.²⁵⁷

In the third and final stage, the Court would check if, after having taken into consideration special circumstances, the line would lead to an in-

²⁵⁰ *Ibid.*, para. 78. The citations reiterated by the Court stem originally from the North Sea Continental Shelf cases and the Tunisia/Libya case, respectively.

²⁵¹ *Ibid.*, para. 88.

²⁵² *Ibid.*, para. 100.

²⁵³ *Ibid.*, para. 102.

²⁵⁴ *Ibid.*, para. 104.

²⁵⁵ *Ibid.*, paras. 106–114.

²⁵⁶ *Ibid.*, para. 116.

²⁵⁷ *Ibid.*, para. 120.

equitable result by reason of great disproportionality of maritime areas.²⁵⁸ This was not to suggest that the respective area should be proportionate to coastal lengths. The Court quoted the Greenland/Jan Mayen case in this regard, where it was held that ‘the sharing out of the area is therefore the consequence of the delimitation, not vice versa.’²⁵⁹

The Court also reiterated what had been held in the Nicaragua/Honduras case: ‘when the line to be drawn covers several zones of coincident jurisdictions, 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.’²⁶⁰

Before constructing the provisional equidistance line, the Court had to determine the base points, so as to ‘identify the appropriate points on the parties’ relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines.’²⁶¹ The Court eliminated Serpents’ Island as a source of base points on Ukraine’s coast, holding that 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.’²⁶² Further, the Court eliminated the base points on the seaward end of Romania’s 7.5 km long Sulina dyke and substituted it instead with a base point on the landward end of the dyke.²⁶³ The Court found the provisional equidistance line to be governed by two base points on the Romanian coast and by three base points on the Ukrainian coast, constructing a line with turning points A-B-C.²⁶⁴ From the last turning point C, the equidistance line continued in a southerly direction until the point at which the interests of third states could become affected – which was not specified further. The line drawn by the Court coincided with neither that drawn by Romania nor that drawn by Ukraine.

Consideration of special circumstances

Having constructed the provisional equidistance line, the Court proceeded to the consideration of relevant circumstances that might call for an adjustment of this line. The Court found these to include the disproportion of coastal lengths, the enclosed nature of the Black Sea and existing maritime delimitations in the region, the presence of Serpents’ Island in the delimitation area, the conduct of the parties, possible cut-off effects, and security considerations. These will now be examined individually.

²⁵⁸ *Ibid.*, para. 122.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*, para. 120.

²⁶¹ *Ibid.*, para. 127.

²⁶² *Ibid.*, para. 149.

²⁶³ *Ibid.*, paras. 138–41.

²⁶⁴ *Ibid.*, para. 154.

Disparity of coastal lengths

The Court held that where ‘disparities in the lengths of coast are *particularly marked*, the Court may choose to treat that fact or geography as a relevant circumstance that would require some adjustment to the provisional equidistance to be made.’²⁶⁵ The Court went through former jurisprudence to elaborate on the law in this regard. It cited the Cameroon/Nigeria case, where it was held that ‘a *substantial* difference in the lengths of the parties’ respective coastlines *may* be a factor to be taken into consideration in order to adjust or shift the provisional equidistance line.’²⁶⁶ It further noted that in the Greenland/Jan Mayen case and in the Libya/Malta case, disparities of 1:9 and 1:8, respectively, were considered so great as to justify adjusting the equidistance line.²⁶⁷ At the same time it should be made clear that taking account of disparity in coastal lengths does not ‘mean a direct and mathematical application of the relationship’ between the lengths of the coastal fronts, as was held in the Greenland/Jan Mayen case.²⁶⁸ That being said, the Court held that it did not see ‘such particularly marked disparities’ in the present case. In light of this view, it was held that the Court could not disregard the fact that a considerable portion of the Ukrainian coast that was considered relevant in the case projected into the same area as other segments of the Ukrainian coast, in such a way as to strengthen but not spatially expand the Ukrainian entitlement. Accordingly, the Court downgraded the relevance of the Ukrainian coastal length in relation to that of Romania, making the disparities between the two less prominent.

The enclosed nature of the Black Sea and existing maritime delimitations in the region

Romania argued that because of the enclosed nature of the Black Sea, together with pre-existing delimitation agreements in the region, delimitation in the present case should not dramatically depart from the method previously used in the same sea between other riparian states.²⁶⁹ The Court held that this view had no bearing on the method to be used in the present case; and that as for other delimitation agreements in the same sea, the Court would take them into account when considering the end point of the single maritime boundary between Romania and Ukraine.²⁷⁰

The presence of Serpents’ Island

The Court started by recalling that the Serpents’ Island could not serve as a base point for constructing a provisional equidistance line, since it did not form part of the general configuration of the coast.²⁷¹ It is also worth noting the Court’s initial reasoning in this regard, where it was held that since the coastal length of the island was so short, a mere 2 kilometres,

²⁶⁵ *Ibid.*, para. 164. (Emphasis added)

²⁶⁶ *Ibid.*, para. 165. (Emphasis added)

²⁶⁷ *Ibid.*, para. 166.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*, para. 169.

²⁷⁰ *Ibid.*, paras. 177–78.

²⁷¹ *Ibid.*, para. 186.

compared to mainland coast of 705 kilometres, including it or not would be insignificant to the overall coastal length.²⁷² Further, a 12 nm territorial sea was attributed to Serpents' Island pursuant to agreements of the parties. The Court held that, with the island located only 20 nm to the east of Ukraine's mainland coast, and the enclosed nature of the Black Sea in area to be delimited, any EEZ and continental shelf entitlements generated by the island could not project further than the entitlements generated by Ukraine's mainland coast because of the southern limit established on the Crimean Peninsula.²⁷³ In light of these circumstances, the Court concluded that the presence of Serpents' Island did not call for an adjustment of the provisional equidistance line. Moreover, this line of argumentation made it unnecessary for the Court to consider whether Serpents' Island constituted a 'rock' under Article 121(3) or an 'island' under Article 121(1) of the LOS Convention.²⁷⁴

Conduct of the parties

According to the Court, Ukraine was not relying on state activities in order to prove a tacit agreement or *modus vivendi* between the parties, in order to undermine the delimitation line claimed by Romania.²⁷⁵ The Court reiterated Barbados/Trinidad and Tobago case where it was held that 'resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance.'²⁷⁶ And with respect to fisheries, the Court held that no evidence had been submitted by Ukraine that any delimitation line other than the one claimed by it would 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population', as had been developed as the criteria in the Gulf of Maine case.²⁷⁷ For these reasons, the Court concluded that the circumstances invoked did not justify an adjustment of the provisional equidistance line.²⁷⁸

Cut-off effects

The Court acknowledged that the positions of both parties curtailed each other's entitlements to an EEZ and a continental shelf generated by each respective coastline.²⁷⁹ However, the Court considered that the equidistance line drawn by it would avoid such encroachments, as it allowed for the adjacent coasts of the parties to produce their effects in a reasonable and mutually balanced way.²⁸⁰ Thus, the Court found no reason to adjust

²⁷² *Ibid.*, paras. 16, 103.

²⁷³ *Ibid.*, para. 187. According to Art. 121(1 and 2) 'islands' are entitled to a territorial zone, a contiguous zone a continental shelf and a EEZ, whereas 'rocks' which cannot sustain human habitation or economic life of their own are not entitled to such zones.

²⁷⁴ 2009 Romania/Ukraine case, 2009 ICJ Reports, para 187.

²⁷⁵ *Ibid.*, para. 197.

²⁷⁶ *Ibid.*, para. 198.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*, para. 201.

²⁸⁰ *Ibid.*

the provisional equidistance line because of these alleged cut-off effects.²⁸¹

Security considerations

The Court first held that legitimate security considerations of the parties may play a role in determining the final delimitation line, and referred to the Libya/Malta case.²⁸² However, in the present case the provisional equidistance line drawn by the Court differed substantially from the lines drawn by Romania and by Ukraine. The Court held that the provisional equidistance line fully respected the legitimate security interests the parties, obviating any need to adjust the provisional equidistance line for the reasons given by the parties.²⁸³

The disproportionality test

The Court then proceeded to the final stage, of checking that the result thus far arrived at did not lead to any significant disproportionality with respect to the respective coastal lengths and the apportionment of maritime areas thereof.²⁸⁴ The Court agreed with observation held in the Anglo-French Continental Shelf case that:

...it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor . . . there can never be a question of completely refashioning nature . . . it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features.²⁸⁵

And further, that:

The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines. Rather, the Court will check, ex post facto, on the equitableness of the delimitation line it has constructed.²⁸⁶

According to the Court, this final equitability check of the line drawn thus far in the delimitation process could be only approximate, and it remained a matter for the Court's discretion to substantiate it by reference to the overall geography of the area on a case-by-case basis.²⁸⁷ The Court noted that the ratio of the respective coastal lengths for Romania and Ukraine was approximately 1:2.8, and that of the relevant area between Romania and Ukraine approximately 1:2.1. The Court then concluded that the line provisionally constructed and checked carefully for any relevant circumstances that might warrant adjustment, required no further alteration.²⁸⁸ Hence, the provisional equidistance line drawn at the first stage of the

²⁸¹ *Ibid.*

²⁸² *Ibid.*, para. 204.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*, para. 210.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*, para. 211.

²⁸⁷ *Ibid.*, para. 213.

²⁸⁸ *Ibid.*, para. 216.

delimitation process became the single maritime boundary delimiting the territorial sea, the EEZ and the continental shelf between Romania and Ukraine.

Conclusion

The Romania/Ukraine case is the fifth and last case after the entry into force of the LOS Convention to be examined in this study. The ICJ affirmed the predominant role recent jurisprudence has given the corrective/equity approach when delimiting the EEZ, the continental shelf, or a single maritime boundary in accordance with Articles 74(1) and 83(1) of the LOS Convention. It did this first of all by laying out the law on maritime delimitation under these Articles in general terms – although the Court was to delimit a single maritime boundary, the Court argued the law as such. And it is worth noting that for the Court this way of interpreting the law on maritime delimitation seems to have been defined with precision in jurisprudence over the two last decades. Yet, as this study has shown, courts and tribunals have varied in their approach during the last two decades, rather than defining one method with precision. Nevertheless, the trend has been clear towards the use of the corrective/equity approach, as we have seen. The assurance and clear language of the Court's reasoning may therefore be understood only as strengthening the role of the corrective/equity approach. According to the Court, the one method to be used is the corrective/equity approach, unless no other method is justified, under Articles 74(1) and 83(1) of the LOS Convention. It is worth reiterating what the Court held in this regard: that as 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. And as to delimitation between opposite coasts, the Court simply held that the provisional delimitation line 'will consist' of an equidistance line. Hence, the presumption for the corrective/equity approach was not only upheld in the Romania/Ukraine case, it was also further strengthened.

Moreover, rather than prescribing a two-stage approach, as in previous cases, the Court described the corrective/equity approach as a three-stage approach. Materially, nothing new was introduced with this three-step approach. What the Court did was rather to put a new and more information label on the same maritime delimitation process that it has adopted in the past. The third stage in the present case, where the Court checked the final outcome of the delimitation effected, as a final test to ensure that equitableness is not contradicted by a disproportionate result, had been adopted previously in several cases, as we have seen. This way of describing the corrective/equity approach will also be used in the following.

2.7 Concluding Remarks

The aim of examining jurisprudence subsequent to the entry into force of the LOS Convention was to analyse how courts and tribunals have given effect to the provisions on maritime delimitation in the LOS Convention. It did this by identifying the method used for maritime delimitation and the consideration of relevant circumstances in each case. Here we inquired whether courts and tribunals came to favour the corrective/equity

approach and follow up on the increasing trend prior to the entry into force of the LOS Convention, or if they reverted to favouring the result-oriented equity approach. The analysis demonstrated that, in all cases except one, the method of the corrective/equity approach has been applied. Moreover, these cases show not only the use of the corrective/equity approach, they also reveal the principal standpoint of this method in the law of maritime delimitation.

In the Cameroon/Nigeria case it was held that there was no presumption for any one method to be used under Articles 74(1) and 83(1), putting, in theory, all thinkable methods of maritime delimitation on an equal footing. Yet, in the Barbados/Trinidad and Tobago Award, it was held that the determination of the line of delimitation normally follows that of the corrective/equity approach. In the Nicaragua/Honduras case it was held that the use of another method than that of the corrective/equity approach would require a well-founded justification (as indeed was the situation in this case). In the Guyana/Surinam Award it was held that there is presumption for the corrective/equity approach in situations with opposite as well as adjacent coasts. And finally in the Romania/Ukraine case it was held that there is presumption for the corrective/equity approach unless compelling reasons make this unfeasible in the particular case.

All these cases clearly indicate that, single maritime boundary or not, there is now presumption for the corrective/equity approach under Article 74(1) and 83(1), and that applying another approach will require a well-founded justification. It is also worth noting that in the Nicaragua/Honduras case, in which the court considered the proper method to be the bisector method rather than the corrective/equity approach, the shift of method was justified by reference to two unusual circumstances in the case: the extreme convexity of the coast, and a constantly shifting river delta. Important is also the fact that the Court described the bisector method as an “approximation” of the equidistance method, so any departure from the use of the equidistance method can be said to have been minimal.

On the whole we may conclude that, prior to the entry into force of the LOS Convention, there was an increased trend in jurisprudence towards the use of the corrective/equity approach, and that this trend has continued subsequent to the Convention’s entry into force. The principal or legal standing of the corrective/equity approach under Articles 83(1) and 74(1) has also been clarified. There is now presumption for the corrective/equity approach, either a continental shelf or EEZ boundary shall be drawn separately or by one single maritime boundary. Another approach requires compelling reasons or a well founded justification.

This corrective/equity approach consists of three defined stages: (i) first, the court or tribunal will establish a provisional equidistance line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place; (ii) secondly, as the final line should result in an equitable solution according to Articles 74(1) and 83(1) of the LOS Convention, the Court will at the second stage consider whether there are factors in the case calling for an adjustment of the provisional equidistance line in order to achieve an

equitable result; (iii) thirdly, the Court will check that there exists no significant disproportionality in the ratios of the coastal length of each state and the maritime areas falling to either side of the delimitation line as it now stands, having taking into account the relevant circumstances.

Having examined the law and legal framework on maritime delimitation, in the following we will examine the procedural obligations of Norway and the Russian Federation under the LOS Convention; and apply the law as found, *de lege lata*, on the maritime boundary dispute between Norway and the Russian Federation in the Barents Sea.

3 Procedural Obligations of Norway and the Russian Federation under Part XV of the LOS Convention

3.1 Introduction

As state parties to the LOS Convention, both Norway and the Russian Federation are bound by the jurisdictional-procedural provisions in Part XV of the Convention for settling disputes. Part XV identifies an obligatory system for the settlement of disputes arising between parties concerning its interpretation and application. According to its Articles 74(1) and 83(1), delimitation of the EEZ and the continental shelf is to be effected by agreement on the basis of international law. Articles 74(2) and 83(2) state further that if no delimitation agreement can be reached within a ‘reasonable period of time’, the states concerned shall resort to the procedures provided for in Part XV. As the negotiations between Norway and the Russian Federation over their maritime boundaries have been going on for almost four decades now, a ‘reasonable period of time’ has arguably past. In the following we focus on the obligations of these two states under Part XV of the Convention.

3.1.1 Obligations under Section 1 of Part XV

Article 279 obliges state parties to settle disputes under the Convention by peaceful means in accordance with Article 2, paragraph 3, of the UN Charter, and to seek a solution by the means indicated in Article 33, paragraph 1 of the Charter. Article 2, paragraph 3 of the Charter provides that ‘All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered’. Thus, this Article is applicable only when there is a ‘dispute’ and it relates to either the ‘interpretation’ or ‘application’ of the LOS Convention. The standard definition of an international ‘dispute’ is that given by the PCIJ in the *Mavrommatis Palestine Concessions* case: ‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of the interests of two persons.’²⁸⁹ The ICJ has stated that

²⁸⁹ *Mavrommatis Palestine Concessions* (Greece *vs* United Kingdom). Judgment, 1924 PCIJ (Ser. A) No. 2, 11. There are several cases for the ICJ where this view has been adopted: See e.g. *Case Concerning Right of Passage Over Indian Territory* (Portugal *vs* India) 1960 ICJ Reports 34; *South-West Africa Cases* (Ethiopia *vs* South Africa; Liberia *vs* South Africa) 1962 ICJ Reports 328, 343; *Case Concerning East Timor* (Portugal *vs* Australia) 1995 ICJ Reports 99.

whether an international dispute exists or not is ‘a matter of objective determination’.²⁹⁰ Further, the mere assertion or denial that a dispute exists is not conclusive of the existence of a dispute. Nor is the mere existence of conflicting interests, the instigation of proceedings, or a purely theoretical disagreement on a point of law or fact.²⁹¹ The ICJ has held that ‘it must be shown that the claim of one party is positively opposed to the other’.²⁹² With respect to the delimitation of maritime boundaries, this is undoubtedly an issue relating to the interpretation and application to the LOS Convention. The determination of whether there is in fact a dispute over where a boundary should be, must be based on an assessment of the claims of the parties as to where they argue the boundary should be. As to the current case, Norway argues the boundary should be based on the equidistance principle, whereas the Russian Federation argues it should be based on the sector line principle. As these claims are clearly opposed to each other, and relate to the interpretation of international law, the preliminary requirement of there being a dispute is sufficiently met.

Another important aspect is that by incorporating this provision the state parties agree to refrain from endangering not only international peace and security, but also ‘justice’: in other words, this provision requires them to settle their disputes in accordance with justice or international law²⁹³. The means for seeking a solution indicated in Article 33 are ‘... negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice’. Thus, in theory, state parties may resort to any conceivable kind of dispute settlement mechanism, as long as it takes due account of international law. Note should be made of the fact that the reference is only to the ‘means’ referred to in Article 33, not to the Article as a whole. By this reference, the LOS Convention avoids the restriction in Article 33 that only disputes ‘the continuance of which is likely to endanger the maintenance of international peace and security’ are subject to settlement under Chapter VI of the Charter. Therefore, any dispute concerning the interpretation or application of the LOS Convention must be settled by peaceful means, whether or not it is likely to endanger the maintenance of international peace and security.

Article 280 reiterates what can be read from Article 279, the right of state parties to depart from the provisions of Part XV and to use instead ‘any peaceful means of their own choice.’ They can do so even if any procedure under section 1 has started (‘at any time’). Thus, the state parties are complete masters of the procedure to be used for settling the dispute.

²⁹⁰ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 ICJ Reports 65, 17 ILR 331.

²⁹¹ South-West Africa Cases (Ethiopia vs South Africa; Liberia vs South Africa) 1962 ICJ Reports 328, 547, 566.

²⁹² Southern Bluefin Tuna Cases (New Zealand vs Japan; Australia vs Japan) 1999 ITLOS Cases No. 3 and 4., 43.

²⁹³ See also what ICJ stated in the North Sea Continental case: ‘Whatever the legal reasoning of a court of justice, its decision must be just, and therefore in that sense equitable.’ See above n. 23, para. 88.

Should, however, resort under Article 280 to a procedure outside the scope of Part XV fail to bring a solution, Article 281 makes clear that the parties may resort back to the procedures specified in section 1, unless any agreement excludes any further procedure. In that case, the case will remain unsettled without any obligations to continue negotiations to reach a settlement under sections 1.²⁹⁴

Article 282 applies when state parties have agreed through general, regional, or bilateral agreement, or otherwise, that the dispute may, at the request of any party to the disputes, be submitted to a procedure that entails binding decision. In such a case, that procedure shall apply in lieu of the procedures provided for in section 1, unless the parties to the dispute agree otherwise.²⁹⁵ The use of the word ‘otherwise’ is meant to incorporate, in particular, the acceptance of the jurisdiction of the ICJ by declarations made under Article 36, paragraph 2, of the Statute of the Court.²⁹⁶ Norway has recognized as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation (that is, on condition of reciprocity) the jurisdiction of the ICJ²⁹⁷. In relation to all disputes regarding the LOS Convention, however, Norway has declared that all limitations and exceptions made in relation to settlement of disputes under the Convention²⁹⁸ shall also apply if the matter is brought before the ICJ directly, i.e. by reference to Article 282 of the Convention. The Russian Federation, on the other hand, has not recognized the ICJ as compulsory. Consequently, the Norwegian recognition of the ICJ as compulsory will not come into play in the present case, and a separate consent from both Norway and the Russian Federation is needed for the Court to have jurisdiction to adjudicate in the matter.²⁹⁹

Article 283 obliges the states parties to exchange views, expeditiously, with regard to settlement by negotiation or other peaceful means. As for the current dispute, which arose prior to entry into force of the LOS Convention, it must be read as obligation to exchange views expeditiously following the entry into force of the LOS Convention for each respective state – for Norway 1996³⁰⁰ and for the Russian Federation 1997.³⁰¹ The phrase ‘other peaceful means’ re-emphasizes the basic principle in Article 280 that the parties are free to agree at any time on the settlement of the dispute by any means of their own choice. But the rule should also be seen as an obligation to get into negotiations, although not as an obligation to reach an agreement³⁰². The ICJ has stated:

²⁹⁴ Nordquist, ed., 1989, p 24..

²⁹⁵ Art. 282, final paragraph.

²⁹⁶ Nordquist, ed., 1989, p 27.

²⁹⁷ See Norwegian declaration of 24 June 1996 in relation to Art. 36(2) of the Statute of the Court.

²⁹⁸ See Norway’s declaration in pursuance to Art. 287, above n. 4.

²⁹⁹ According to article 36, paragraph 1 of the ICJ’s Statutes, parties may only refer jurisdiction to the Court by separate consent of one kind or another. Jurisdiction does not exist merely by virtue of a state being party to the Statutes.

³⁰⁰ Above n. 4.

³⁰¹ Above n. 4.

³⁰² Nordquist, ed., 1989, p. 30.

...the parties are under obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of an agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.’³⁰³

We may ask to what extent the parties are under obligation to continue with an exchange of views. This question was considered by ITLOS in the *Malaysia vs Singapore Case*. The Tribunal found that ‘Malaysia was not obliged to continue with an exchange of view when it concluded that this exchange could not yield a positive result’.³⁰⁴ This case reaffirmed two previous decisions of the Tribunal where it was held that ‘a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted’³⁰⁵ and that ‘a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted’.³⁰⁶

Article 284 refers to conciliation, the so-called voluntary conciliation procedure. This requires consent from both parties, and underlines further the fundamental principle that the parties are complete masters of the procedures to be used to settle the dispute. In accordance with Annex 5, section 1, conciliation proceedings instituted before a five-member conciliation commission may solve the dispute only by means of an agreement between the parties, as the commission’s power is restricted to hearing the parties, examining their claims and objections, and making proposals to the parties with a view of reaching an amicable settlement.

Summary section 1

First of all, the dispute between Norway and the Russian Federation qualifies legally as an international dispute in relation to international law. Secondly, the parties are bound to find an equitable solution to their dispute in accordance with international law. Thirdly, they are obliged to settle their dispute by peaceful means and not through the use of force. Fourthly, they are obliged to seek a solution by the means indicated in Article 33 of the UN Charter. Still, they are complete masters of the procedures to be used, as both Article 33 of the Charter and Article 281 of the LOS Convention prescribe their right to choose peaceful means of their own choice. Fifthly, they are obliged to proceed expeditiously to an exchange of views regarding settlement by negotiations or other peaceful means.

³⁰³ North Sea Continental Shelf cases, above n. 23, para. 85 (a). In this case the parties had actually tried, but were not able to reach an agreement.

³⁰⁴ Case concerning Land Reclamation by Singapore in and around the Straits of Johor (*Malaysia vs Singapore*) ITLOS Case No 12, 48.

³⁰⁵ Southern Bluefin Tuna Cases (*New Zealand vs Japan*; *Australia vs Japan*) 1999 ITLOS Cases No. 3 and 4., 60.

³⁰⁶ *Max Plant Case* (*Ireland vs United Kingdom*) ITLOS Case No. 10, 60.

Further, where settlement cannot be reached using one procedure, the parties must consider what other means could be utilized to settle the dispute. Moreover, the obligation to enter into an exchange of views should also be seen as an obligation to get into negotiations with a view to arriving at an agreement. This may be seen as obligation to make compromises; however, any length to which the parties are under obligation to compromise must be understood from the legal standing of the parties' claims in relation to the international law *de lege lata*. Therefore, the parties are obliged to continue with negotiations and exchange of views only to the point where the possibilities of reaching an agreement have been exhausted. We may say that, when interpreting all articles in section 1 as a whole, parties to a dispute are not only under obligation to enter into negotiations with a view to concluding an agreement (ref. '...to seek a solution by the means of...'), but more so to pursue them as far as possible to reach a final agreement.

This becomes even more evident when interpreting the articles in section 1 in relation to those in section 2 and 3 which describe the next stages in the procedure to be followed if initiatives after section 1 fail to bring any final solution – that is compulsory conciliation or dispute settlement entailing binding decisions. So before invoking any of the procedures set out in section 2 and 3, state parties should endeavour to settle their dispute by recourse to the procedures entailing non-binding decisions in sections 1.

3.1.2 *Obligations under Section 2 and 3 of Part XV*

Section 2 deals with compulsory procedures entailing binding decisions. Where no settlement has been reached with reference to the obligations of the parties under section 1, Article 286 provides that the dispute shall be submitted at the request of any party to the dispute to a court or tribunal having jurisdiction in this regard. Any decision rendered by such a court or tribunal shall be final and shall be complied with by all parties to the dispute.³⁰⁷ Article 287 of the Convention lists specific courts or tribunals state parties may choose as their forum in this regard: those are ITLOS, the ICJ, an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal constituted in accordance with Annex VIII of the Convention. Norway has declared³⁰⁸ pursuant to Article 287 that it chooses the ICJ for the settlement of disputes concerning the interpretation or application of the Convention, while the Russian Federation has declared³⁰⁹ that it chooses an arbitral tribunal constituted in accordance with Annex VII³¹⁰. As Norway and the Russian Federation have not

³⁰⁷ Art. 296

³⁰⁸ UNTS 16 November 1994, No. 31363.

³⁰⁹ *Ibid.*

³¹⁰ However, in matters relating to the prompt release of detained vessels and crews, the Russian Federation has declared that it chooses ITLOS; whereas in matters of dispute relating to fisheries, the protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and dumping, it chooses a special arbitral tribunal constituted in accordance with Annex VIII.

accepted the same procedure, disputes between them may only be submitted to arbitration in accordance with Annex VII.³¹¹

However, Article 298 (1)(a) of Section 3, allows states parties to declare that they do not accept one or more of the compulsory procedures entailing binding decision with reference to disputes concerning the interpretation or application of the articles dealing with delimitation of the territorial sea, the EEZ and the continental shelf. Opening up for the parties to exempt from the compulsory procedures entailing binding decision must be seen from the perspective that this was the sole compromise solution available to them in light of the wide gap between their opposing views as to whether the LOS Convention should contain compulsory third party settlement of border disputes.³¹² They could agree only on compulsory conciliation, which, to its fullest extent, may end up with a non-binding recommendation from a conciliation commission.³¹³ However, also completely excluded from this obligation are disputes that arose prior to the entry into force of the Convention.³¹⁴ This raises the question as to when the dispute between Norway and the Russian Federation legally came to existence. The opposing legal views, described above, that qualify as an international dispute in relation to the LOS Convention came about in the 1970s when the matter for the first time became the subject of negotiations between Norway and the Soviet Union. For these reasons, the dispute must quite clearly be seen to have arisen prior to the entry into force of the LOS Convention. Accordingly, Norway and the Russian Federation are not obliged to constitute any compulsory conciliation procedure, when failing to reach an agreement abiding its obligations under section 1 as described above.

Compulsory conciliation or not, in order to escape the compulsory procedure entailing binding decision, the parties must declare they are not bound by this criteria. The Russian Federation has made a declaration under Article 298 that 'it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of Articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations.'³¹⁵ Norway on the other hand has declared that 'that it does not accept an arbitral tribunal constituted in accordance with Annex VII for any of the categories of disputes mentioned in Article 298.'³¹⁶ Thus, Norway allows for compulsory procedure entailing binding decision in general, unless the ascribed procedure to be used by section 2 is an arbitral tribunal in accordance with Annex VII. As noted above, since Norway and the Russian Federation have not accepted the same procedure under Article 287, disputes between them may be submitted to arbitration only in accordance with Annex VII. Consequently, even if the Russian Federation were to change its view and accept compulsory procedure entailing

³¹¹ Art. 287(2)(5).

³¹² Nordquist, ed., 1989, p. 122.

³¹³ LOS Convention Annex 5, Arts. 11–14.

³¹⁴ LOS Convention Art. 298(a)(i).

³¹⁵ UNTS 16 November 1994, No. 31363.

³¹⁶ *Ibid.*

binding decision, it could not invoke Article 287 and request the dispute to be submitted to the court or tribunal with jurisdiction under section 2. In order for the Russian Federation to bring Norway to a binding third-party settlement procedure, the Russian Federation must in addition change its view regarding the forum to be used, to the ICJ. The Russian Federation could also accept the jurisdiction of the ICJ by declaring its acceptance in accordance with Article 36(2) of the Statutes of that Court, as this would apply in lieu of the procedure under section 2 and would meet Norway's condition on reciprocity under its current declaration. Conversely, in order for Norway to bring the Russian Federation to a binding third-party settlement procedure, the Russian Federation would first have to withdraw its declaration under 298 that it does not accept third-party settlement or declare that it accepts the ICJ's 'optional clause', whereas Norway in the former case also would have to withdraw its position on non-acceptance of an arbitral tribunal under Annex VII.

Summary sections 2 and 3

Judging from the declarations made pursuant to sections 2 and 3 of Part XV and Article 36 of the Statutes of the ICJ, the views of Norway and the Russian Federation on having the dispute brought for third-party settlement entailing binding decision seem quite clearly to have been designed to avoid such procedures, as neither of the parties may bring in the other for such. Accordingly, all good intentions aside, Part XV does not seem to bring the parties any closer to a solution to their maritime boundary dispute. This of course, must be seen in light of the fact Norway and the Russian Federation both hold that their maritime boundary dispute is best resolved through negotiation and not litigation. On the other hand, Norway generally fears binding third-party settlement to a lesser extent than does the Russian Federation, as Norway has accepted both the ICJ's 'optional clause' and compulsory procedure entailing binding decision under Section 2 of Part XV as such, just not an arbitral tribunal in accordance with Annex VII.

4 The Maritime Dispute between Norway and the Russian Federation in the Barents Sea and the Application of the Three-step Method

4.1 Introduction

Having examined the law and legal framework of maritime delimitation (ch. 2), and Norway's and the Russian Federation's procedural obligations under the LOS Convention (ch. 3), in this chapter we apply the law of maritime delimitation, as found, *de lege lata*, on the maritime boundary dispute between Norway and the Russian Federation in the Barents Sea. However, as full source materials have not been available to the author, the examination is limited to make some overall considerations. As an introduction to the subject matter, this chapter begins by reviewing the general geography of the area in question. Then follows an overview of the negotiations thus far. Finally, we examine the dispute by applying the three-step method identified in chapter 2.

4.2 The Barents Sea

Although difficult to define precisely, the Barents Sea forms part of the Arctic Sea and covers about 1.4 million km².³¹⁷ To the north it is bounded by the archipelagos of Svalbard and Franz Josef Land, belonging to Norway and the Russian Federation respectively. To the east it is bounded by the archipelago of Novaya Zemlya and by the Kara Sea in the north. To the south it borders on the mainland coasts of the Russian Federation and Norway, and the White Sea in the east. Finally in the west it meets the Norwegian Sea in the south and the Denmark Sea in the north, whereas the dividing line follows a straight line drawn from North Cape on the Norwegian mainland towards Bear Island (Norwegian) and further on to South Cape on Svalbard.³¹⁸

The oceanography of the Barents Sea is characterized by relatively shallow water, varying between 200 and 500 metres for the most part, but is as shallow as 50 m. on the Spitsbergen Bank. Average depth is 230 m.³¹⁹

The Barents Sea is extremely rich in living and non-living natural resources and has great economic potential. The 2008 US Geological Survey has estimated the undiscovered, conventional, technically recoverable petroleum resources in the Barents Sea Shelf at more than 76 billion barrels of oil equivalent – which includes approximately 11 billion barrels of crude oil, 380 trillion cubic feet of natural gas, and two billion barrels of natural gas liquids.³²⁰ The Barents Sea is also an important feeding area for cod, capelin, haddock, herring, sea perch, catfish, plaice, halibut, Atlantic salmon and redfish.³²¹ The average yearly catch in the Barents Sea is at present about one million metric tons.³²²

4.3 Four Decades of Negotiations

The first contacts between Norway and the Soviet Union in regard to the ongoing maritime boundary dispute in the Barents Sea took place in 1967, when Norway took the initiative to start negotiating a maritime boundary for its continental shelf.³²³ Prior to this Norway and the Russian Federation had concluded an agreement in 1957 delimiting most of the Varanger Fjord area.³²⁴ What led up to this scenario were claims by both

³¹⁷ Data from *Store norske leksikon* (the Great Norwegian Encyclopaedia), www.snl.no, 11 Sept. 09, www.snl.no/Barentshavet.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ The US Geological Survey of 2008, Assessment of Undiscovered Petroleum Resources of the Barents Sea Shelf, <http://pubs.usgs.gov/fs/2009/3037/pdf/FS09-3037.pdf> (6 Dec. 2009).

³²¹ *The Encyclopaedia of the Earth*, www.eoearth.org/article/Barents_Sea_large_marine_ecosystem (6 Dec. 2009).

³²² *Ibid.*

³²³ Churchill and Ulfstein 1992, p. 63.

³²⁴ The Varanger Fjord Agreement of 1957 consists of two straight line segments. The first segment delimits the territorial seas between the two states; the other segment runs from the end point of the territorial sea boundary to the middle point of the closing line of the Varanger Fjord. See above n. 1. This agreement is updated and supplemented by the Varanger Fjord Agreement of 2007. See above n. 2.

states to their continental shelves. Norway made a formal claim to its continental shelf in 1963, issuing a Royal Decree which claimed sovereign rights over:

The seabed and the subsoil in the maritime areas outside the coast of Norway...as far as the depth of the superjacent waters admit of exploitation of natural resources...but not beyond the median line in relation to other states.³²⁵

The Soviet Union issued a Decree five years later, claiming sovereign rights over:

The seabed and subsoil of the submarine areas adjacent to the coast or to the islands of the USSR...to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.³²⁶

The Soviet Decree went on to reiterate Article 6 of the Convention on the Continental Shelf as regards boundary delimitation with neighbouring states, i.e. the triple rule of agreement/equidistance/special circumstances (as examined above in 2.3.2). Thus both states in their internal law indirectly, as in case of Norway, and directly, as in case of the Soviet Union, referred to the applicable provision in treaty law at that time, which was Article 6 of the Convention on the Continental Shelf. Norway, however, made no reference to the special circumstances criterion in its legislation. The parties held first an informal meeting on the matter in Oslo in 1970, and in 1974 the parties agreed to open formal negotiations in Moscow.³²⁷ In 1977 the negotiations became further complicated with the establishment of a 200 nm EEZ by Norway and a 200 nm fishery zone by the Soviet Union.³²⁸ The negotiations were now concerned not only with the delimitation of the continental shelf, but also with the delimitation of the EEZ and the fishery zone. When the Soviet Union changed its fishery zone to a 200-nm EEZ in 1984, the subject matter of the negotiations changed similarly.³²⁹ Since then the parties have agreed that the purpose of the negotiations must be to delimit the continental shelf and the EEZ

³²⁵ Royal Decree of 31 May 1963; English translation in UN Legislative Series B/15, p. 393.

³²⁶ Decree of the Presidium of the Supreme Soviet of the USSR of 6 February 1968; English translation in UN Legislative Series B/15, p. 441. In 1995 this decree was succeeded by a new legislation concerning the continental shelf. This law refers to international treaties and recognized principles and norms of international law as regard maritime boundary delimitation. See Federal'nii zakon ot 30 noiabria 1995 g. N 187-F3 'O kontinental'nom shel'fe Rossiskoi Federatsii.' (transcribed by the author) .

³²⁷ Churchill and Ulfstein 1992, p. 63.

³²⁸ *Ibid.* In 1998 The Russian Federation adopted a new law governing the EEZ. As regards maritime boundary delimitation, this law refers to international law as the governing law. See Federal'nii zakon ot 17 dekabria 1998 g. N 191-F3 'Ob iskluchitel'noi zone Rossiskoi Federatsii' (transcribed by the author). Norway's governing law on the EEZ contains the same provision as the law on the continental shelf (cf. '...not beyond the median line') as regards maritime boundary delimitation. See Royal Decree of 17 Dec. 1976.

³²⁹ *Ibid.*, p. 64.

by a single maritime boundary, where the boundaries should be drawn within 200 nm from the baselines.³³⁰ Since the start of the negotiations both states have respected international law as the applicable law of the delimitation process.³³¹ When the negotiations, started Article 6 the Convention on the Continental Shelf was the governing law; today the governing law is LOS Convention Articles 74 and 83, as examined above.³³² Throughout the negotiations the Russian Federation has maintained that a sector line along the longitude 32° 4' 35' E forms the appropriate delimitation line in accordance with international law.³³³ This sector line was drawn by the Soviet Sector Decree of 1926, in which sovereignty was asserted over all islands, discovered and undiscovered, located between 32° 4' 35' E and 168° 49' 30' W.³³⁴ However, the portion of the Svalbard archipelago situated within this sector, also known as the 'Svalbard box', was taken into account (see fig. 1 below).³³⁵ Norway, on the other hand, has maintained that an equidistance line forms the appropriate maritime boundary in accordance with international law. These competing claims involve a disputed area of about 175,000 km², of which 155,000 km² lie within the Barents Sea and 20,000 km² just north of it.³³⁶

Following the establishment of the 200 nm zones in 1977, and the non-achievement of resolving their maritime boundary dispute, Norway and the Soviet Union concluded a provisional arrangement to regulate fishing activities in parts of the disputed area. Apart from stating that both countries are to refrain from conducting inspections or from exercising any form of control over fishing vessels of the other country, it also contains provisions relating to how third-country vessels shall be treated in the area.³³⁷ This arrangement – called the Grey Zone Agreement – applies to an area within 200 nm from the mainland coast of both countries. It maps out a provisional compromise between the initial positions of the parties, and takes into account the location of important fishing areas.³³⁸ The 'grey zone' comprises 67,500 km², of which 41,500 km² lie in the disputed area.³³⁹ The Agreement is valid for one year at a time and has been extended every year since it was adopted. The Agreement explicitly states that the provisional arrangement is not to prejudice the final outcome of the negotiations on a maritime boundary.³⁴⁰

³³⁰ Tresselt 1988, p. 85.

³³¹ *Ibid.*, p. 79.

³³² Norway and the Russian Federation ratified the Convention on the Continental Shelf on 9 September 1971 and 22 November 1960, respectively. It entered into force 10 June 1964; see above n. 32. The LOS Convention entered into force 16 November 1994 and was ratified by Norway on 24 June 1996 and by the Russian Federation on 12 March 1997; see above n. 4.

³³³ Oude Elferink 1997, p. 8.

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ Churchill and Ulfstein 1992, p. 67.

³³⁸ Oude Elferink 1994, p. 9.

³³⁹ *Ibid.*

³⁴⁰ Churchill and Ulfstein 1992, p. 67.

Various approaches to the boundary question have been put forward by the parties. Apparently there exists willingness to compromise, but the parties are yet to agree on the closer content of such.³⁴¹ A joint development zone for hydrocarbons has been proposed by the Soviet Union, but this has been rejected by Norway.³⁴² For a while negotiations were put on hold due to the dissolution of the Soviet Union in 1991 and the founding of the Russian Federation as its successor state. In 2007, Norway and the Russian Federation updated and supplemented the Varanger Fjord Agreement of 1957.³⁴³ This revision was due mainly to Norway's expansion of its territorial sea from four to 12 nm and the establishment of a 24 nm contiguous zone in 2004.³⁴⁴ The agreement determines a single maritime boundary to the end of the territorial sea, and further on for the contiguous zone, continental shelf and the EEZ to the junction of the parties' opposing views since the beginning of the negotiations, and might be read as a compromise mapping out the direction of the remaining part of the boundary in the southern segment of the Barents Sea.³⁴⁵ However, the fact remains that, after almost 40 years of negotiations, a final solution has not yet been achieved.

4.4 Method for Maritime Delimitation in the Barents Sea

As concluded above in chapter 2, there is now presumption for the use of the corrective/equity approach, unless compelling reasons make this unfeasible in the particular case, when delimiting the EEZ and the continental shelf in accordance with Articles 83(1) and 74(1) of the LOS Convention. We must therefore ask: are there compelling reasons for applying another method in the present dispute? In most of the area in which the boundary is to be drawn, the coasts of each party are face each other. In such situations, the presumption of the corrective/equity approach stands very strong, making it highly unlikely that another approach is applicable in these areas. As was held in the Romania/Ukraine case: 'So far as opposite coasts are concerned, the provisional delimitation line *will* consist of a median line between the two coasts.'³⁴⁶ However, in the southern area, another approach can be argued, as the relevant coasts here lie adjacent to each other, and not opposing. The Norwegian coast projects slightly further seaward in this area than the adjacent general coast of the Russian Federation. The effect of this is to push the equidistance line a little further to the east, possibly to such an extent that it might be regarded as encroaching on areas that more naturally belong to the Russian Federation.³⁴⁷ The use of the bisector method could counteract this effect, drawing instead a 90° angle of the general coast. However, the

³⁴¹ Tresselt 1998., p. 81.

³⁴² Churchill and Ulfstein 1992, p. 68.

³⁴³ See Proposition No. 3 to the Storting, 2007–2008, pp. 1–3, and the 2007 Agreement between the Russian Federation and the Kingdom of Norway on the maritime delimitation in the Varanger Fjord area, above n. 2.

³⁴⁴ See Proposition No. 3 to the Storting, 2007–2008, pp. 1–3.

³⁴⁵ *Ibid.*

³⁴⁶ Romania/Ukraine case, 2009 ICJ Reports, para. 116. Emphasised by the author.

³⁴⁷ See also Churchill and Ulfstein 1992, p. 73.

presence of the Rybachiy Peninsula on the side opposite to Norway at the mouth of the Varanger Fjord outweighs this effect to a large degree. There seem therefore to be no compelling reasons for using another method than the corrective/equity approach.

Having concluded that the corrective/equity approach is the applicable method under international law to the present dispute, we now proceed to the first stage of this method: the drawing of the provisional equidistance line.

4.4.1 Drawing the provisional equidistance line

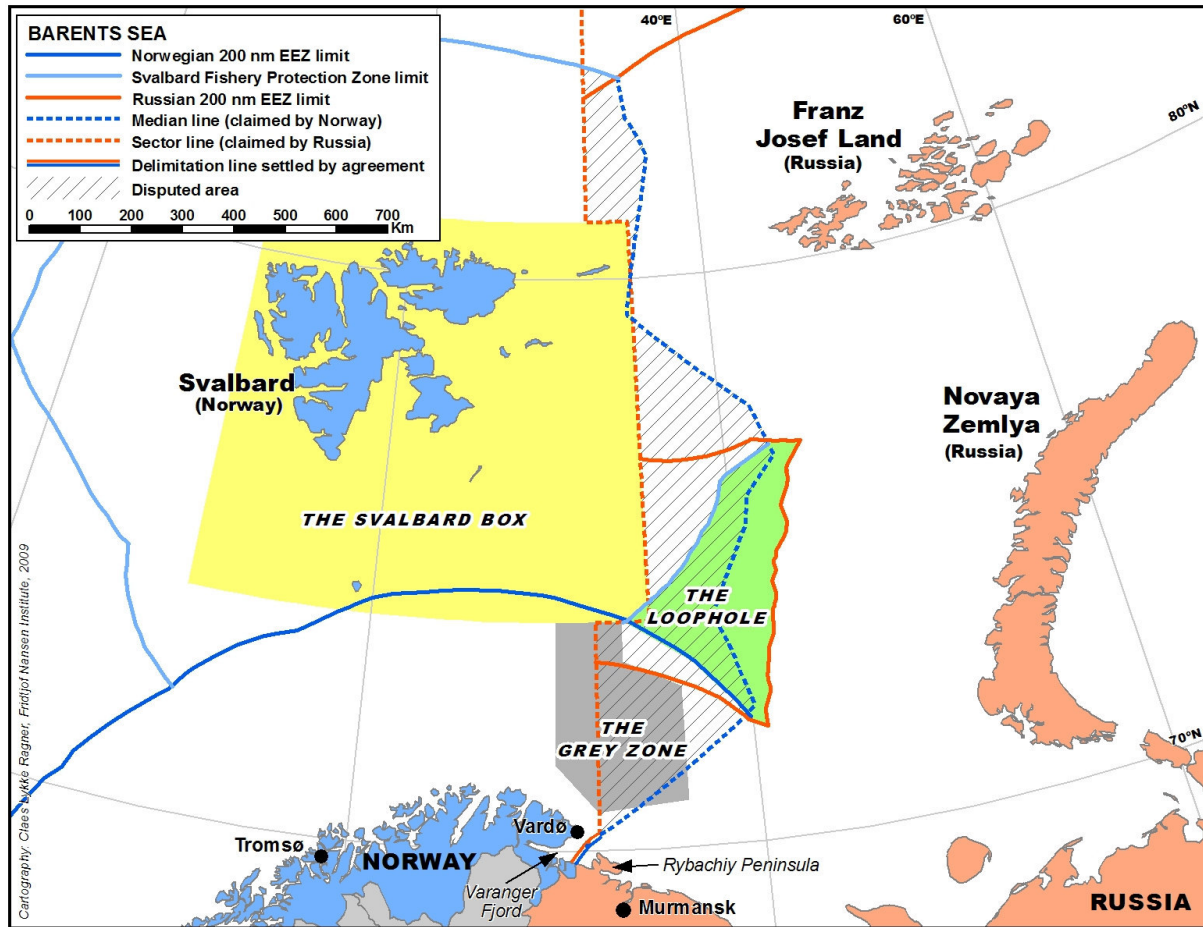
As was held in the Romania/Ukraine case, the equidistance line is to be constructed from the most appropriate points on the coast of the two states concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to be delimited.³⁴⁸ Thus the line to be constructed is heavily dependent on the physical seaward geography of the coasts of both states. Applied to the Barents Sea, this involves two different sectors, characterized by different coastal geographies. The first sector is characterized by coasts lying adjacent to each other; the second by opposite coasts. These two sectors may again be divided into four different segments, which will be examined below. Due to lack of accurate source material, all estimates are approximate.

The first segment is situated in the southern part of the Barents Sea. In this sector a single maritime boundary is needed from the terminus of the maritime boundary of the Varanger Fjord Agreement of 2007 to the end of the 200 nm EEZ. The course of this equidistance line is influenced by the adjacent mainland coasts of Norway and the Russian Federation. On the Norwegian side, the coastal extremities influencing the equidistance line seem to be that of Cape Kibergnes and the northeasternmost extremity of the island on which Vardø is located. On the Russian side, the equidistance line seems to be influenced by at least two extremities on the northwesternmost and northeasternmost extremities on the Rybachiy Peninsula. Possibly the line is also influenced by extremities further east along the mainland coast.

The second segment lies beyond 200 nm from the coasts of each state. Most of the coasts constructing the line in this segment lie opposite each other. The single maritime boundary is here transformed to a continental shelf boundary. Coastal extremities on the island of Novaya Zemlya and some coastal extremities further west of Vardø on the Varanger Peninsula seem here to be decisive for the course of the boundary. Then the coastal extremities of Hope Island take over, along with coastal extremities further north along the coast on Novaya Zemlya. In this area a pocket of high seas is formed, as the area lies beyond the EEZs of both states (the so-called 'Loophole').

³⁴⁸ Romania/Ukraine case, 2009 ICJ Reports, para 117.

Figure 1



The third segment lies within 200 nm of both states' coasts on the Svalbard archipelago and on Franz Josef Land, which belong to Norway and the Russian Federation, respectively. The continental shelf boundary is thus again transformed to a single maritime boundary. Coastal extremities on the islands of Kong Karls Land and Kvitøya (Norway) and Viktoria (the Russian Federation) seem to construct the equidistance line in this segment.

The fourth segment lies beyond 200 nm of the coasts of the Svalbard archipelago and Franz Josef Land. The single maritime boundary is thus transformed again to a continental shelf boundary. The equidistance line seems here to be influenced by Kvitøya and Viktoria, as in parts of the third segment.

We can now proceed to the second stage of delimitation process: considering whether there are circumstances that might justify any adjustment of the provisional equidistance line indicated above.

4.4.2 *Circumstances that might justify adjustment of the provisional equidistant line*

Norway contends that there are no circumstances that would justify any adjustment of the equidistance line. The Russian Federation considers that special circumstances present in the case should lead to a boundary following the above-mentioned sector line of the 1926 Soviet Decree; or, alternatively, that the Decree itself constitutes the maritime boundary.³⁴⁹

We begin with the latter. There is naturally no mention of sovereignty over maritime zones in the 1926 Decree, since those concepts had not been established in international law at the time. The Decree refers explicitly to 'lands and inlands.'³⁵⁰ Therefore it could not have been recognized by international law as a rightful claim to maritime zones, as maritime zones simply did not exist at the time when the decree was issued (except for the territorial sea). The question becomes if international law has since recognized the Decree as a rightful claim to the respective maritime zones. There is, however, little to indicate that this is the case.³⁵¹ Nor is there any evidence for the sector Decree having been accepted by Norway through acquiescence or estoppel or any other form of tacit agreement. Quite the contrary: Norway has expressly and consistently rejected the use of the sector line as the boundary.³⁵² Hence, the view that the Soviet Sector Decree establishes maritime boundary between Norway and the Russian Federation seems to have no legal bearing.

The question then becomes if there are other circumstances in the present case that require an adjustment of the equidistance line. The Russian Federation has advocated a range of non-geographical circumstances to adjust the equidistance line. Among these are fishing resources, ice conditions, population size, security interests, shipping and the existence of the Svalbard Treaty. As regards fishing resources, case law has recognized as relevant dependency on the part of the coastal population on fishing in general or on particular fish stocks located within the area of dispute. This kind of evidence played a role in both the Greenland/Jan Mayen case and the Eritrea-Yemen arbitration.³⁵³ However, it must be proved that there would be 'catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned.'³⁵⁴ This means a strong burden of proof, and it is not likely that this criterion is met. If this criterion is to play a role, it would most likely be in the southern area in which the parties have already made a provisional arrangement (the 'Grey Zone Agreement').

³⁴⁹ Churchill and Ulfstein 1992, pp. 74–75.

³⁵⁰ See Churchill 2001, p. 122; Churchill and Ulfstein 1992, p. 75.

³⁵¹ Churchill 2001, p. 122.

³⁵² Churchill and Ulfstein, 1992, p. 75.

³⁵³ The Greenland/Jan Mayen case, above n. 60, paras. 75–76; Eritrea/ Yemen arbitration, Award in the First Stage, 9 October 1998, paras 126, 527, and Award in the Second Stage, para. 103.

³⁵⁴ The Gulf of Maine case, above n. 19, para. 237; Romania/Ukraine case, above n. 236, para. 198.

Fully ascertaining whether this criterion is fulfilled requires further examination. Security interests have played a role, but it is difficult to see how the equidistance line could possibly affect the security interests of Russian Federation in such a way as to require a shift. On the other hand, ice conditions might possibly play a role, as ice conditions in the eastern part of the southern Barents Sea are less favourable than in its western part.³⁵⁵ But, as with fishing resources, the bar for justifying an adjustment based on ice conditions is likely to be set relatively high, if recognized at all by courts or tribunals. It is therefore not likely that the presence of ice in the Barents Sea could justify any adjustment of the equidistance line. Arguments concerning shipping, population size and economic factors unrelated to the area of delimitation have not been recognized by international law. As for the 1920 Svalbard Treaty, it recognizes the full sovereignty of Norway over Svalbard, defined within the ‘Svalbard box’.³⁵⁶ The Russian Federation holds that the definition of the ‘Svalbard box’ in the Treaty limits the extent of Svalbard’s maritime zones. However, the latitudes and longitudes in the Treaty are not intended to serve as a maritime boundary, but to describe the land and islands to which the Treaty is applicable. Thus, as with the Soviet Decree of 1926, there is no reason to see this as a relevant circumstance for adjusting the equidistance line. Nor does the geology of the seabed seem relevant, as it is shallow with no marked depressions, and in legal terms consists of one continuous continental shelf.³⁵⁷ Rather, the role of all non-geographical circumstances has been minimized through the endorsement by courts and tribunals of the ‘neutral criterion’ originally upheld in the Gulf of Maine case.³⁵⁸ According to this criterion, a circumstance must be considered equally suitable for both the seabed and the superjacent waters in order to justify an adjustment of the equidistance line.³⁵⁹ Preference is therefore given to geographical circumstances, whereas non-geographical circumstances are subordinated.

Having concluded that there are no circumstances justifying an adjustment of the provisional equidistance line, we can proceed to the third and final stage of the three-step method of the corrective/equity approach: the proportionality test.

4.4.3 Proportionality between the ratios of the resulting maritime area allocated to each state and relevant coastal lengths

The aim of this third and last stage is to check that the result arrived at thus far in the delimitation process does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of the maritime areas that have been generated.³⁶⁰ As we

³⁵⁵ See Oude Elferink 200, p. 189.

³⁵⁶ Treaty concerning the Archipelago of Spitsbergen of 9 February 1920, 2 LNTS 7, Art. 1.

³⁵⁷ See final recommendation adopted by the Commission on the Continental Shelf in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea.

³⁵⁸ The Gulf of Maine case, above n. 19, para. 112.

³⁵⁹ *Ibid.*

³⁶⁰ Romania/Ukraine case, above n. 235, para. 210.

have seen, courts and tribunals have held that there can never be question of completely refashioning nature: it is more a question of remedying any disproportionality or inequitable effects produced by particular geographical configurations;³⁶¹ And further, that continental shelf and EEZ allocations are not to be assigned in proportion to the length of the respective coastlines. Rather, it is a check, *ex post facto*, on the equitableness of the delimitation line that has been constructed.³⁶² There is no clear requirement established by case law as to which method to use for calculating the relevant coastal lengths and maritime areas, so this step is largely a matter for the court's discretion.³⁶³ However, it is clear that any disproportion would have to be significant in order to warrant adjustment of the line drawn thus far. Some estimates made by other authors have indicated a division of the Barents Sea as a whole to be about 60/40 in favour of the Russian Federation by use of the equidistance line.³⁶⁴ But even if this figure is correct, it is probably not correct to look at the Barents Sea as a whole; and how to calculate the relevant coasts must also be determined in order to make a proper comparison. But the 60/40 figure perhaps gives an indication of the proportions in the area. And if it is correct, then it becomes difficult to see how this disproportion can be said to be 'significant'. What should be kept in mind is that the disputed area, legally speaking, must be far less than 176,000 km², since the sector principle has no legal bearing. What constitutes a disputed area is where the legal entitlement to maritime zones of states, either opposite or adjacent to each other, overlap.³⁶⁵ In the Barents Sea this is the case with the first segment of the first sector, and in the third and fourth segments of the second sector, where the rights to a 200 nm continental shelf and EEZ overlap. Delving more deeply into this issue would require more accurate source material than that made available to the author. Our examination will therefore end here.

4.5 Conclusion

The three-step method of the corrective/equity clearly seems applicable for the maritime delimitation between Norway and the Russian Federation in the Barents Sea. As it is hard to see how the special circumstances advocated by the Russian Federation could justify an adjustment of the equidistance line, we must conclude that the equidistance line has strong support in the present case, given the status it has gained through the case law examined here. The question that remains, and that could not be addressed properly here, is whether there, legally speaking, exists significant disproportion between the ratios of the resultant maritime area allocated to each state and the states' respective coastal lengths.

³⁶¹ *Ibid.*

³⁶² *Ibid.*, para. 211.

³⁶³ *Ibid.*, paras. 212–13.

³⁶⁴ See Tresselt 1998 p. 79 and Churchill and Ulfstein 1992, pp. 71–72.

³⁶⁵ Romania/Ukraine case, above n. 235, para. 77.

5 Final remarks

The overall aim of this study has been to get behind the law of maritime delimitation and its application to the maritime boundary disputes between Norway and the Russian Federation in the Barents Sea. Over two-thirds of this study has focused on the law and legal framework of maritime delimitation. We have noted important developments through examining jurisprudence after the entry into force of the LOS Convention. These foundations were laid by examining the concept, history and development of the law of maritime delimitation prior to its entry into force. The long time-horizon painted a larger picture, and the conclusions to be drawn could thus be made with a higher degree of certainty. By applying these findings to the maritime delimitation dispute between Norway and the Russian Federation in the Barents Sea, we have seen how a more nuanced and updated legal view on this dispute has now crystallized.

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