THE OXFORD HANDBOOK OF

THE LAW
OF THE SEA

Edited by
DONALD R ROTHWELL
Professor of International Law, Australian National University

ALEX G OUDE ELFERINK
Professor of International Law of the Sea, University of Tromsø and Utrecht University

KAREN N SCOTT
Professor of Law, University of Canterbury

TIM STEPHENS
Professor of International Law, University of Sydney

OXFORD
UNIVERSITY PRESS
1 Setting the Scene

1.1 Introduction

It will often be impossible for States to extend their jurisdiction as far seawards as international law permits because of the claims of other States. The resulting problem of delimiting overlapping maritime zones has long been a contentious issue, particularly as regards the extended zones of maritime jurisdiction—the continental shelf and the exclusive economic zone (EEZ). In addition to the focus on delimitation between ‘opposite and adjacent’ coastal States, the question of the outer limit of such zones has also become increasingly important, as the interests of the international community as a whole have begun to be defined through the submissions made to, and the work done by, the Commission on the Limits of the Continental Shelf (CLCS). As a result, the jurisprudence relating to maritime boundary delimitation is now moving away from being principally focused on the ‘debate’ between ‘equidistance’ and ‘equitable

1 The International Court of Justice has said that ‘the task of delimitation consists in resolving the overlapping claims by drawing a line of separation between the maritime areas concerned’: Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment) [2012] ICJ Rep 624, [141].
principles’ which has for so long dominated the discussion. Nevertheless, it remains impossible to understand the topic without appreciating the evolution of the law over time. This chapter will, then, present an overview of the subject, drawing on its history while focusing on points of contemporary relevance.

It is axiomatic that States are free to agree upon the course of the maritime boundaries between themselves in any way they wish. Yet, perhaps surprisingly, maritime boundary delimitation has given rise to more cases before the International Court of Justice (ICJ) than any other single subject. Ad hoc arbitral tribunals have also long been involved in such issues, and in the past few years there has also been an upsurge in decisions taken by arbitral tribunals within the framework of the Law of the Sea Convention’s dispute settlement provisions. To this must now be added the work of the International Tribunal on the Law of the Sea (ITLOS) itself. This has a number of consequences. First, and despite the more general significance of State practice in the formation of customary law, it is the work of the judicial and arbitral bodies rather than State practice which has driven—and continues to drive—the subject in both theory and practice. Second, the possibility of there being significant differences in approach between these various fora is an important question which those involved in the practice of maritime boundary delimitation increasingly need to take into account.

1.2 The delimitation of the territorial sea

The initial phase of any maritime boundary delimitation between adjacent States involves the delimitation of their overlapping territorial seas, and a delimitation between opposite States claiming a 12 nautical miles (nm) territorial sea whose coastlines are less than 24 nm apart will only ever involve a territorial sea delimitation. The rule to be applied is not in itself controversial and is set out in Article 15 of the 1982 United Nations Convention on the Law of the Sea (LOSC) which, in summary, provides that in the absence of agreement to the contrary, States may not extend their territorial seas beyond the median or equidistance line unless there are historic or other ‘special’ circumstances that dictate otherwise. Its origins lie in the proposals of the International Law Commission (ILC), which were reflected in Article 12 of the 1958 Geneva Convention on the Territorial Sea and Contiguous...
Zone, and the ICJ has accepted that this 'equidistance/special circumstances' rule represents customary international law.\footnote{Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain) (Merits) (Judgment) [2001] ICJ Rep 40, [175]–[176]. Cf ibid, Separate Opinion of Judge Oda, [13]–[21], who challenged the Court's views of customary law. The Court reaffirmed its view in Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras) (Judgment) [2007] ICJ Rep 659, [268] and [281].}

While it was understood from the outset that departures from the median or equidistant line were likely to be frequent, it is only in exceptional cases that such a line will not form the basis of the boundary between overlapping territorial seas. Nevertheless, there have been examples of such exceptions in recent practice. For example, in the Territorial and Maritime Boundary Dispute between Nicaragua and Honduras in the Caribbean the ICJ, while emphasizing that equidistance remained the general rule, thought that both the configuration and unstable nature of the relevant coastal area made it impossible to identify basepoints from which to construct a provisional equidistance line and that this 'special circumstance' justified the use of an alternative method, this being the use of a line bisecting two lines drawn along the coastal fronts of the States.\footnote{Nicaragua v Honduras, n 4, [268]–[281].} Also in that year, the Annex VII Arbitration Award in the Guyana/Suriname case concluded that historical and navigational issues amounted to special circumstances which justified a departure from the use of the equidistance line for the delimitation of the territorial sea.\footnote{Arbitration between Guyana and Suriname (2007) XXX RIAA 1, [323]–[325] (hereinafter Guyana/Suriname). See also the Maritime Dispute (Peru v Chile), Judgment of the International Court of Justice,}

As this suggests, no matter how clear the rule, the particular circumstances surrounding each delimitation are likely to be such as to render its outcome speculative. If this is so as regards the delimitation of the relatively narrow bands of a territorial sea, it is all the more so as regards the continental shelf and EEZ, stretching as they do for up to 200 nm or more from the coast. As far as the territorial sea is concerned, however, the point of departure, Article 15 of the LOSC, is at least clear. The same cannot be said of the continental shelf and EEZ.

1.3 The ‘equidistance’ or ‘equitable principles’ debate and the LOSC

As proposed by the ILC, Article 6 of the 1958 Geneva Convention on the Continental Shelf adopted an approach to the delimitation of overlapping continental shelves similar to that adopted for the territorial seas, and which provided that:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such
States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

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

The main difference between the two situations is that in the case of opposite coasts, and in the absence of agreement or special circumstances, 'the boundary is the median line', whereas as regards adjacent coasts the boundary 'shall be determined by the principle of equidistance'. Perhaps unwittingly, the drafters of Article 6 also ushered in the subtle distinction between a 'rule' and a 'principle' which has bedevilled the subject ever since.

The origins of the resulting problems stem from the seminal judgment of the ICJ in the North Sea Continental Shelf cases in which Denmark and the Netherlands argued that Article 6 of the CSC represented customary law and so bound Germany, even though it was not a State party to the Convention. Applying this rule mechanically to the concave German coastline, which is sandwiched between that of Denmark and the Netherlands, restricted Germany to a modest triangle of continental shelf, to the substantial benefit of its neighbours. Rather than ameliorate this outcome by determining that the concave nature of the coast was a 'special circumstance' justifying the use of another line, the ICJ decided that Article 6 did not in fact reflect customary law at all, and that customary law in fact required that:

[D]elimitation 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 encroachment on the natural prolongation of the land territory of the other.

This opened up the prospect of there being two different approaches to delimitation, either that based on the more formulaic 'equidistance/special circumstances' rule found in Article 6 or the relatively more open-textured approach based

---


8 North Sea Continental Shelf, n 7, [101(c)(i)].
around the application of ‘equitable principles/relevant circumstances’—though it is doubtful whether there was ever much to choose between them in practice. At the Third United Nations Conference on the Law of the Sea (UNCLOS III), groups of States championed the approach they considered best suited their interests and, as no consensus could be found, an anodyne formula, applicable to both continental shelf and EEZ delimitation, was adopted in the dying days of the conference. Thus Articles 74(1) and 83(1) of the LOSC both provide that such delimitations are to 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.’ The chief virtue of this formulation is that it avoided any mention of the terms which at that time were a source of controversy—equidistance, equitable principles, special circumstances, or relevant circumstances—and is virtually devoid of substantive content, as was intended. It is of next to no practical utility at all for those seeking to better understand how to delimit a boundary. As a result, it is to the work of the ICJ, ITLOS, and other arbitral bodies that one must look for the articulation and development of the principles applicable under both the LOSC and customary international law.

Around the time that the LOSC was adopted, the ICJ delivered a trilogy of judgments, all of which emphasized the role of equity at the expense of equidistance, though in varying degrees. Perhaps these cases were too close in time to UNCLOS III to shake off the ideological hostility to equidistance as a principle of delimitation. By 1993, however, the Court was prepared to declare in the Jan Mayen case that, ‘[p]rima facie, a median line delimitation between opposite coasts results in general in an equitable solution,’ and in 2002 it confirmed, in the

---

9 Thus the 1977 Anglo-French Arbitration generally considered to lean towards the equitable principles school of thought, proceeded on the basis that although 1958 Convention on the Continental Shelf, Art 6 (hereinafter CCS) and custom were different, the practical result of their application would be the same. Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf (1979) 18 ILM 397 (hereinafter Anglo-French Continental Shelf Arbitration).


11 CCS, n 9, Art 6 does however, remain a source of obligation for, and in relation to, the increasingly small number of States who are a party to it but not to the LOSC, these currently being Cambodia, Colombia, Israel, the USA, and Venezuela.

12 Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Judgment) [1982] ICJ Rep 18; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Judgment) [1984] ICJ Rep 246 (hereinafter Gulf of Maine); Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment) [1985] ICJ Rep 13 (hereinafter Libya/Malta). Even in the latter two cases, in which the Court did apply an equidistance-based methodology, the Court went out of its way to deny the generally applicability of equidistance as a method, justifying its use on the basis its suitability to generate an equitable solution in light of relevant circumstances.

13 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Judgment) [1993] ICJ Rep 38, [64] (hereinafter Jan Mayen), a position affirmed in Eritrea v Yemen, Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen.
Qatar v Bahrain case, that equidistance would provide the starting point in cases in adjacency too. Thus after 35 years of hesitation, the ICJ finally accepted what it had rejected in the North Sea Continental Shelf cases, that the equidistance/special circumstances approach reflects customary international law. It has subsequently confirmed that this is the case both for the delimitation of the territorial sea and for the delimitation of the continental shelf, EEZ, or when drawing a single delimitation line.

1.4 The ‘three-stage test’

In the Black Sea case in 2009, the ICJ seemed to have gone even further when it systematized its previous practice into a delimitation methodology comprising a ‘three-stage’ approach with a seemingly high degree of specificity. According to the Court, the first stage (a) is to draw a provisional line, which as between adjacent coasts ‘will be’ an equidistance line, ‘unless there are compelling reasons that make this unfeasible in the particular case’. As regards opposite coasts, the Court said—in unqualified terms—that the provisional line ‘will be’ the median line. The second stage (b) is to ‘consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result’. Finally, the third stage (c) is to ‘verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line’.


14 Qatar v Bahrain, n 4, [230]. See also Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening) (Merits) (Judgment) [2002] ICJ Rep 303, [288]; Barbados/Trinidad and Tobago (2006) XXVII RIAA 147, [242]–[244] and [306].


16 Nicaragua v Honduras, n 4, [262]–[298].

17 Guyana/Suriname, n 6, [376]–[392]; Maritime Delimitation in the Black Sea (Romania v Ukraine) (Judgment) [2009] ICJ Rep 61, [116] (hereinafter Black Sea); Nicaragua v Colombia, n 1, [139]; Peru v Chile, n 6, [179].

18 Black Sea, n 17, [116].

19 Ibid.

20 Ibid, where it also makes it clear 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.’

21 Ibid, [120].

22 Ibid, [122].
This three-stage test was subsequently endorsed by the ITLOS in the *Bay of Bengal (Bangladesh/Myanmar)* case, its first boundary delimitation case, and subsequently by the ICJ in both the *Nicaragua v Colombia* case in 2012 and *Maritime Dispute (Peru v Chile)* in 2014. However, while endorsing this approach, both the ITLOS and the ICJ went on to apply it in a fashion which once again casts doubt upon the weight to be given to equidistance in practice. The ITLOS chose to emphasize the importance of the equitable solution and set equidistance aside in favour of a bisector methodology. In the *Nicaragua v Colombia* case, and while purporting to apply the three-stage approach, the ICJ also produced an outcome which bears so little relationship to the ‘provisional’ equidistance line as to cast doubt on its real place within the delimitation process, other than being a potential point of departure.

This ‘backtracking’ from the high water mark of equidistance in the *Black Sea* case is further reflected in the way in which the ICJ has subtly but significantly rephrased the first stage of the three-stage test. In the *Peru v Chile* case it said that “[i]n the first [stage], it constructs a provisional equidistance line unless there are compelling reasons preventing that.” This differs from the *Black Sea* case formulation in two significant ways. First, it now speaks of departures from equidistance if there are ‘compelling’ reasons, rather than the more stringent approach of doing so only if it were ‘unfeasible’ to draw such a line. Second, whereas in the *Black Sea* case this exception only applied to the case of adjacent coasts, the *Nicaragua v Colombia* case had already extended its applicability to opposite States, something which the formulation used in the *Peru v Chile* case also confirms. This marks a significant dilution of the first stage of the test. Moreover, in both cases, the Court introduced the more general caveat that the ‘three-stage test’ is a methodology which will ‘normally’ or ‘usually’ be employed—whereas in the *Black Sea* case there was no such qualification. Indeed, in the *Nicaragua v Colombia* case the Court went as far as to stress that ‘the three stage process is not, of course to be applied in a mechanical fashion and…it will not be appropriate in every case to begin with a provisional equidistance/median line.’ When set alongside the results of the delimitation exercises conducted in these recent cases, it is difficult to avoid concluding that, once again, ‘equity’ rather than ‘equidistance’ may

---

23 Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar) (Judgment) [2012] ITLOS Rep 12 [240] (hereinafter Bangladesh/Myanmar).
24 *Nicaragua v Colombia*, n 1, [190]–[194].
25 *Peru v Chile*, n 6, [180].
26 *Bangladesh/Myanmar*, n 23, [235].
27 Ibid, [334].
28 *Nicaragua v Colombia*, n 1, [199].
29 *Peru v Chile*, n 6, [180]; *Nicaragua v Colombia*, n 1, [180].
30 *Nicaragua v Colombia*, n 1, [191].
31 Ibid, [190].
32 *Peru v Chile*, n 6, [180].
33 *Black Sea*, n 19, [115].
34 *Nicaragua v Colombia*, n 1, [194].
be re-emerging as the dominant approach, though couched in the language of equidistance.

2 THE PROCESS OF DELIMITATION

2.1 Establishing entitlement

Although the ICJ has said that ‘the task of delimitation consists in resolving the overlapping claims by drawing a line of separation between the maritime areas concerned’, this is not entirely accurate. What is at issue is the generation of a line separating the overlapping entitlements of States, and so it is first necessary to establish whether the parties to a dispute do indeed have entitlements which overlap: just because a State claims that it has an entitlement does not mean that it does. The starting point is, naturally, the coastline and it is clearly acknowledged that all States are entitled to exercise jurisdiction over a territorial sea to a distance of 12 nm from baselines constructed in accordance with the provisions of international law.

It is also now accepted that all States are entitled to claim an EEZ of up to 200 nm from their baselines, and, in addition, that all States exercise jurisdiction ipso facto and ab initio over the continental shelf. There is less certainty regarding the seawards extent of a State’s entitlement to a continental shelf, however. In the Nicaragua v Colombia case, the ICJ accepted that Article 76(1) of the LOSC represents customary law, so that all States, irrespective of whether they are a party to the LOSC, are entitled to a continental shelf comprising:

...the sea-bed and subsoil of the submarine area that extends beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the

36 Thus in the Nicaragua v Colombia case, the ICJ concluded it did not need to consider the delimitation of a boundary between Nicaragua and Colombia’s 200 nm continental shelf generated from its mainland coast as ‘Nicaragua… has not established that it has a continental margin the extends for enough to overlap’: n 1, [129].
39 Nicaragua v Colombia, n 1, [118].
The territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

However, it reserved its position concerning whether the detailed formulae for determining the outer edge of the continental margin set out in Article 76(2)–(7) reflected customary international law.\textsuperscript{40} As a result, there is still uncertainty over the extent of the entitlement which a State may have over the seabed and subsoil beyond 200 nm, and this remains a difficulty for the process of effecting a delimitation where coasts are more than 400 nm apart, or where the areas at issue are more than 200 nm seawards of the land boundary between adjacent States.

There may of course be contentious disputes concerning sovereignty over land territory or insular features, and where this is the case then these will usually need to be resolved before the entitlement to a maritime zone of any nature can be established, as has been the case in several disputes before the ICJ.\textsuperscript{41} There may also be disagreements as to whether the course of the boundary has or has not been settled by virtue of some pre-existing agreement. If so, there is, by definition, no overlap of entitlements to be delimited.\textsuperscript{42} There might also be disputes concerning the legitimacy of the baselines used for the generation of distance-based maritime zones. While it is arguable that these, too, ought to be determined upon prior to the delimitation exercise as a part of the more general task of determining the existence of overlapping entitlements, such disagreements tend to be ‘rolled up’ into the delimitation itself, and contentious baselines rarely influence the ultimate line. As the Court has put it,

\begin{quote}
[T]he issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the EEZ and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the EEZ between adjacent/opposite States are two different issues.\textsuperscript{43}
\end{quote}

A further issue flows from Article 121 of the LOSC, concerning the legal regime of islands.\textsuperscript{44} An island is ‘a naturally formed area of land, surrounded by water, which is above water at high tide’. Islands are to be distinguished from ‘low tide

\begin{footnotesize}
\begin{enumerate}
\item Ibid. These provisions do of course remain binding as between States parties to the LOSC. Both SV Suarez, The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment (Springer Berlin 2008) 181, and Y Tanaka, The International Law of the Sea (Cambridge University Press Cambridge 2012) 141–2, express doubts as to the customary law status of LOSC, n 37, Art 76(2)–(7).
\item See eg Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua Intervening) (Judgment) [1992] ICJ Rep 351; Cameroon v Nigeria, n 14; Qatar v Bahrain, n 4; Nicaragua v Colombia, n 1.
\item See eg Jan Mayen, n 13; Peru v Chile, n 6.
\item Black Sea, n 17, [137]. The Court decided that, while a dyke stretching 75 km seawards might be used to generate a territorial sea entitlement, this did not mean that the end of that structure need be used as a basepoint for constructing the equidistance line.
\item See generally HW Jayewadene, The Regime of Islands in International Law (Martinus Nijhoff Dordrecht 1990).
\end{enumerate}
\end{footnotesize}
elevations’ which, as their name suggests, are below water at high tide. Low-tide elevations are only entitled to be used as basepoints for the generation of a territorial sea—and hence also potentially for generating an entitlement to an EEZ or continental shelf—if they are situated within the territorial sea generated by an island or mainland. Islands, so defined, are entitled to generate all forms of maritime zones, save that ‘[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” Both the status and meaning of this exception have been controversial, and while it is now settled that it reflects customary international law, its practical application remains uncertain and can only be determined on a case by case basis, providing yet another element of indeterminacy at the threshold stage of the delimitation process.

2.2 Other preliminary issues

Once it has been established that there are overlapping entitlements, a series of further preliminary questions arise. The first—a largely overlooked issue in this context—concerns the nature of the relationship between the continental shelf and the EEZ, both of which grant exclusive jurisdiction over the resources of the seabed and subsoil. It has long been understood that rights over the continental shelf do not have to be claimed: they exist by operation of law. An EEZ, on the other hand, has to be claimed. There is a certain oddity in this. If continental shelf rights are indeed pre-existing, then it is difficult to see how the pre-existing rights of State A can be encroached upon by the establishment of an EEZ by State B. On what basis can a State legitimately establish an entitlement to an area which already pertains to another? Of course, State B may also have an equally valid claim to the continental shelf area in question itself on the same basis, in which case there is the need to delimit the pre-existing entitlements of both. On the face of it, the relevance of the EEZ to the delimitation of pre-existing seabed and subsoil entitlements is difficult to discern. This may well be why there has long been something of a reluctance to draw on factors related to the water-column issues when determining maritime boundaries, although this reluctance is rarely explained on this basis.

45 LOSC, n 37, Art 13(1).  46 Ibid, Art 121(3). See Section 3.2 below.
47 Nicaragua v Colombia, n 1, [139]. But see Tanaka, n 40, 67–8, who, writing shortly before the judgment, felt there was insufficient evidence to justify such a conclusion.
49 Cf the use of ‘neutral factors’ in the Gulf of Maine, n 12, [194]. See generally MD Evans, ‘Delimitation and the Common Maritime Boundary’ (1993) 64 British Yearbook of International Law 283. See also Barbados/Trinidad and Tobago, n 14, [228], noting that neutral criteria had come to prevail, with very few exceptions.
In the years immediately following the adoption of the LOSC, this question became bound up with that of whether delimitation should be conducted on the basis of ‘equitable principles’ or ‘equidistance’. Since the North Sea Continental Shelf cases had linked the idea of entitlement to the continental shelf on the basis of the ‘natural prolongation’ of the landmass into and under the sea with delimitation being conducted on the basis of ‘equitable principles’, it was understandable that those who supported the application of the ‘equidistance/special circumstances’ should find support for this in the emergence of a fixed ‘distance’ approach to entitlement. As the ICJ put it in the Libya/Malta case:

[T]he law applicable to the present dispute, that is, to claims relating to continental shelves located less than 200 miles from the coasts of the States in question, is based not on geological or geomorphological criteria, but on a criterion of distance from the Coast. … It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.

That is to say, given that distance was the relevant basis of title, this suggested that equidistance ought to provide the relevant basis for delimitation. But what if distance was not the relevant basis of title?

This, then, raises a second, and related, preliminary issue. As has been seen, entitlement to the continental shelf under the LOSC is based on both distance and ‘natural prolongation’, in the sense of the coastal State being able to claim an entitlement to the outer limit of the continental margin as provided for in Article 76(2)–(7). This begs the question of whether entitlement based on ‘distance’ has priority over entitlement based on ‘natural prolongation’. To the extent that methods of delimitation are to reflect the basis of title to the area to be delimited, this raises the question of whether equidistance as a method ought to have a greater weight in delimitations where the basis of title of both parties is based on distance than would be the case in a delimitation where the entitlement of one State is based on distance while that of the other is based on natural prolongation. In the Libya/Malta case, this was irrelevant as the entitlement of each could be grounded in distance—but what if this was not possible?

---

50 The question of the relationship between the zone had previously also been raised directly by Trinidad in Barbados/Trinidad and Tobago, where it argued that its right to the continental shelf could not be ‘trumped’ by the claims of Barbados to an EEZ: n 14, [367]. The Tribunal concluded that it did not need to address this issue and so said it ‘takes no position on the substance of the problem’: ibid, [368].

51 Libya/Malta, n 12, [61].

52 For further consideration of this see Chapter 9 in this volume.

53 See also RR Churchill, ‘The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation’ (2012) 1 Cambridge Journal of International and Comparative Law 137, 149 who questions the use of the equidistance line as the starting point for the delimitation of the overlapping areas beyond 200 nm.

54 Libya/Malta, n 12, [130].
What had previously been considered a largely theoretical debate has taken on a renewed practical dimension following the decision of the ICJ in the *Nicaragua v Colombia* case. Nicaragua argued that ‘an entitlement to continental shelf based on the distance criterion does not take precedence over an entitlement based on the criterion of natural prolongation’. The Court however, expressly reserved its position on this point, commenting that since Nicaragua had not satisfactorily established its entitlement to the continental margin beyond 200 nm it ‘need not address any other arguments developed by the Parties, including the argument as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one party can affect a 200-nautical miles entitlement to the continental shelf of another party’. This longstanding and perplexing preliminary issue still, then, remains to be satisfactorily addressed.

The implications of this for the first stage of the ‘three-stage test’ also remain to be addressed. It is, however, difficult to see how the role of equidistance could remain unaffected by a decision to prioritize entitlement founded upon distance over entitlement founded on ‘natural’ prolongation. It should also be noted that this question is now increasingly referred to as concerning the relationship between the ‘inner’ and the ‘outer’ continental shelf. This language does not derive directly from the LOSC and its usage tends towards the outcome that there is indeed a substantive difference in the ‘quality’—or perhaps the ‘intensity’—of entitlement, with the ‘inner’ shelf to be prioritized over the ‘outer’.

A final preliminary issue concerns the nature of the line to be established. The distinction between the delimitation of a continental shelf and an EEZ has already

---

55 *Nicaragua v Colombia*, n 1, [121].  
56 Ibid, [130].  
57 At the time of writing (December 2014), Nicaragua has brought a further case against Colombia which is focussed on this very issue. See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, Order of the International Court of Justice (3 February 2014).  
58 In *Barbados/Trinidad and Tobago*, n 14, the Tribunal was hostile to distinguishing between an ‘inner’ and ‘outer’ shelf, noting that ‘there is in law only a single “continental shelf” rather than an inner continental shelf and a separate extended or outer continental shelf’ (ibid, [213]). The ITLOS quoted this with approval when deciding that it did have jurisdiction to determine the boundary beyond 200 nm (*Bangladesh/Myanmar*, n 23, [361]–[363]). Nevertheless, it seems that the mere act of rejecting this distinction has in fact helped to establish it. It remains to be seen if the approach of the ITLOS and ICJ on this point are mutually compatible. For an examination of State practice, see BM Magnusson, ‘Outer Continental Shelf Boundary Agreements’ (2013) 62 *International and Comparative Law Quarterly* 345.  
59 Article 82 does, however, provide for a system of payments or contributions in relation to exploitation in respect of the continental shelf beyond 200 nm. This however, hardly provides a basis for a general conceptual distinction between the ‘inner’ and ‘outer’ continental shelf, not least because this provision does not apply to ‘a developing state which is a net importer of a mineral resource produced from its continental shelf in respect of that mineral resource’: LOSC, n 37, Art 82(3). A provision which affects only some of the non-living resources produced by some of the States cannot justify a reconceptualization of the entitlement of all States over all non-living resources of the seabed and subsoil beyond 200 nm.
been noted. There are however, further possibilities, given that it seems to be accepted that parties to cases are free to agree upon how to characterize the task to be undertaken. Thus, in the Gulf of Maine case the Chamber of the Court was asked to determine the course of the ‘single maritime boundary’ separating the maritime zones of Canada and the USA. The Court took this to mean that it was undertaking a discrete exercise, which had consequences for the manner in which the delimitation was to be conducted, in particular that it ought to use methods and draw on factors which were common to both the EEZ and the continental shelf regimes (which in practice meant excluding consideration of issues directly related to water column resources). This contrasts with the Jan Mayen case, in which the Court was in fact asked to determine by means of a single line the continental shelf and the Exclusive Fishing Zone between Norway and Denmark, an exercise which could have resulted in two separate lines but which the court thought might be addressed by producing two identical lines, using its ‘equitable discretion’ to bring this about. In doing so, it seems evident that considerations relating to the continental shelf dominated the proceedings and the reasoning. In the Nicaragua v Colombia case, the parties again asked the Court to determine a single maritime boundary between the areas of continental shelf and EEZ. It is, however, difficult to discern the impact of this characterization upon the outcome of the case. Perhaps most interestingly, the Court was also asked to determine the course of ‘the boundary between the maritime zones of the two states’ in the Peru v Chile case, the background to which concerned the establishment a 200 nm zone by Peru, Chile, and Ecuador in the 1950s with the avowed purpose of exercising jurisdiction over the water column. In considering the delimitation of the boundary, however, factors related to the water column played no role. In other words, it seems to be the case that it is the delimitation of the continental shelf which does in fact dominate the process, and the space for other considerations, though not excluded is exceedingly constrained.

2.3 The elements of the process

Once it is determined that there is an overlap of entitlements over which the parties are in dispute the ‘process’ of delimitation commences. While parties remain free to determine boundaries between themselves in whatever way they wish, the approach of international bodies entrusted with the task increasingly follows a clear pattern, which might be described as the elements of the process. Such an approach is to be preferred to the language of ‘stages’ since it permits a greater degree of flexibility and, as has been seen, the latest attempt in the Black Sea case to reduce the process to a series of fairly mechanical steps has already floundered. In what follows, a brief

\[60\] Gulf of Maine, n 12, [194].
outline will be given of the key elements of the process while in the following section some selected issues concerning their practical application will be explored in more detail.

The first element of the process concerns the identification of the ‘relevant area’ within which the delimitation is to be conducted. In earlier cases, this was particularly significant as it went to the question of whether the predominant relationship between the parties was one of ‘oppositeness’ or ‘adjacency’, which in turn affected the weight to be given to equidistance within the process. As has been seen, later cases downplayed the importance of this distinction but the significance of determining the ‘relevant area’ remains, as this frames the context within which the dispute will be addressed. Increasingly, however, the idea of the ‘relevant area’ within which the delimitation is to be conducted has become secondary to, and largely a function of, the identification of the ‘relevant coasts’. This is said to reflect the underlying idea that the coasts are the starting point for entitlement. Hence in the Black Sea case the Court focussed on identifying the ‘relevant coasts’ and observed that ‘the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand’. This probably was intended to justify its rather generalized approach to ‘proportionality’, which will be considered below.

Although the approach taken by the Court in the Black Sea case to ‘the relevant area’ was subsequently quoted by the Court in the Nicaragua v Colombia case, in that later case the question of the relevant area raised very different issues. The Court said that ‘[t]he relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap.’ Colombia claimed that the ‘relevant area’ was limited to that lying between the Nicaraguan coastline and the Colombian islands which faced it, but the Court considered that this was not the case: it said that Nicaragua’s potential entitlement ‘extends from the Nicaraguan coast to a line in the east 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.’ Thus the relevant area comprised all those areas to which Nicaragua might be entitled. This is a very different approach to that followed in the Black Sea case, where the Court excluded from the ‘relevant area’ areas to which Ukraine was clearly entitled but which it did not consider ‘relevant’. As this suggests, not only is the relationship between the ‘relevant area’ and the ‘relevant coasts’ unclear, they are also quite malleable concepts. Moreover, their role within the delimitation process is unclear and seems to vary from case to case. What does appear to be clear, however, is that the identification of relevant coasts and areas

---

61 See eg Tunisia/Libya, n 12, [126] where the Court felt that as the coastal relationship changed from one which was predominantly adjacent to one in which it was predominantly opposite, the equitableness of equidistance as a method of delimitation increased. But cf Black Sea, n 17, [88], where this approach is still used to exclude the relevance of some areas of coast.
62 Black Sea, n 17, [110].
63 Nicaragua v Colombia, n 1, [159].
64 See Section 3.1 below.
has become entrenched as a foundational element of the delimitation process, these uncertainties notwithstanding.

The second element of the delimitation process involves the identification of the primary method of delimitation. How this is done has varied over time. It may be that there is evidence of a prior agreement between the parties stipulating what that boundary is (though in such cases there is not really any overlapping entitlement and so this becomes a threshold issue, as described above) or evidence of an agreement concerning the nature of the boundary to be established. If this is not the case, it is for the court to determine the approach and, as the ‘three stage test’ suggests, the first step is to determine a provisional line. In the early cases, the provisional line was identified in the light of the ‘relevant circumstances’ identified by the court, and which might in principle indicate the applicability of any form of provisional line.\(^6^5\) Over time, and as has been seen, equidistance emerged as the preferred—and in the Black Sea case the mandatory—starting point, although always with the possibility of this being set aside if other methods were considered more appropriate in the light of the circumstances. Thus in the Nicaragua v Honduras case, the Court concluded that it was not feasible to construct an equidistance line between these adjacent States because of their coastal configuration and in the Bangladesh/Myanmar case the ITLOS, having constructed a provisional equidistance line, ultimately set equidistance aside for ‘a geodetic line starting at a particular azimuth’.\(^6^6\) There is, then, still a decision to be made regarding the provisional delimitation line but it does seem safe to assume that equidistance will be used provisionally unless good reasons are advanced as to why it ought not. To that extent, it is fair to say that equidistance has become the point of departure at this stage of the delimitation process.

The third element of the process involves determining whether there are reasons to adjust the provisional line. This involves identifying what has previously been described as ‘special’ or ‘relevant’ circumstances. While there is no limit to the types of circumstances which might conceivably be relevant at this point, it has become increasingly clear over time that only a relatively small number of factors are likely to have a significant impact. Indeed, if there are significant reasons why the provisional line ought to be amended, then it is questionable whether the appropriate provisional line has been constructed. Of course, much will then depend on the rigidity of the approach taken at the previous stage of the process: if a rather doctrinal approach is taken to the application of equidistance, for example, it may well be that there remain significant reasons to adjust the provisional line, whereas if a more reflexive approach is taken to the identification of the relevant provisional method, then there is likely to be less need for dramatic adjustment. The types of circumstance which may affect the placement of the boundary at this stage tend to

\(^6^5\) Evans, n 2, 80–3. \(^6^6\) Bangladesh/Myanmar, n 23, [334].
be either geographic or non-geographic in nature, and while the former are often accorded significant weight, the latter rarely have a significant influence, though they may play on the margins, or (more likely) have an unarticulated impact upon the manner in which the geographic factors are allowed to influence the outcome. Some examples of such factors will be considered in Section 3.3 below.

Over time, the forms of geographic factors which are perceived as having potential relevance have become fairly stylized and provide distinct (though non-exhaustive) ‘categories’ or ‘issues’ to be considered, three of which have become particularly important. The first is one of the most long established factors—described in the North Sea Continental Shelf cases as an ‘equitable principle’—that delimitation must be conducted ‘without encroachment on the natural prolongation of the land territory of the other’, subsequently understood in terms of there being no ‘cut off’. This, however, raises more questions than it solves since it presupposes that there is knowledge of the extent of each State’s natural prolongation within the area of overlapping entitlements, the very thing which the delimitation is meant to determine. Nevertheless, it does seem to offer some rough and ready guide, based on whether, in the case of adjacent coasts, the provisional line seems to stray too far into areas which intuitively appear to pertain to one State rather than another. As the Court put it in the Peru v Chile case, ‘[i]n this case, the equidistance line avoids any excessive amputation of either State’s maritime projection.’ The second factor, which has come to carry great weight, is whether there is any significant disparity in the ratio between the lengths of the relevant coasts of the parties. Quite why this is so important is something of a mystery, though it probably rests on an assumption that the State with the longest coastal contact with the region in dispute has a more substantial presence within the area and that this ought to be reflected in the outcome. It needs to be recalled that the identification of the relevant coasts has also become critical to the identification of the relevant area within which the delimitation is to be conducted. As a result, this factor has an additional significance and so will be considered further shortly. The third issue concerns the presence of islands, an issue of such practical significance that it will be considered in more detail below in Section 3.2.

The final step in the delimitation process involves determining the equitability of the solution. This is, in fact, more a means of verifying that the previous elements of the process have yielded an appropriate outcome rather than an element of the delimitation process per se. Over time, this has come to be indistinguishable from the question of

---

67 North Sea Continental Shelf, n 7, [101 C (1)].
68 Peru v Chile, n 6, [191]. It should be noted, however, that as the first 80 nm of the boundary followed a parallel of latitude, the full boundary is not really an equidistant line, and there is in fact significant ‘cut off’ of Peru’s marine projection.
69 Black Sea, n 17, [122]: ‘a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths’ (emphasis added).
‘proportionality’. This is understandable, since in the North Sea Continental Shelf cases the Court pointed to ‘[t]he element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal state and the length of its coast measured in the direction of its coastline’. In the Black Sea case, however, the Court made it clear that it was not so much a question of there being a degree of ‘proportionality’ that mattered at this stage, but whether there was ‘significant disproportionality’. Indeed, in the Nicaragua v Colombia case, the Court refers to the ‘disproportionality test’. Once again, this takes us back to the question of the ‘relevant coasts’, which have already been seen to be of interest at each of the previous elements of the process. Three points need to be made by way of conclusion. First, the Court seems to have set a surprisingly high threshold for determining that a relationship is ‘significantly disproportionate’. Second, if, and as has been seen, the ‘relevant area’ is itself identified with reference to the ‘relevant coasts’, then this relationship has already been factored into the process. Third, and most importantly, it might be asked whether it really is the case that there are no other issues which might reasonably be thought to have a bearing on the ‘equitability’ of the solution—which is what the process is meant to achieve—other than a ratio between highly contentious ‘coastal lengths’ and ‘relevant areas’?

3 From Theory to Practice

3.1 Issues concerning the identification of the relevant area

While determining the relevant area for the purposes of delimitation is critical, it remains unclear and controversial. Given also the significance attached to the ‘relevant coasts’ for this purpose, and the relationships between them in terms both of

---

71 North Sea Continental Shelf, n 7, [101 (D)].
72 Black Sea, n 17, [122]. The language of disproportionality was not new, having been used, for example in Barbados/Trinidad and Tobago, n 14, [238], where the Tribunal speaks of the outcome ‘not being tainted by some form of gross disproportion’.
73 Nicaragua v Colombia, n 1, [239]–[247]. See also Bangladesh/Myanmar, n 23, [499], where ITLOS speaks of checking for ‘significant disproportion’.
74 Cf Nicaragua v Colombia, n 1, where the relationship between the relevant coasts was 1:8.2 while that of the relevant area was 1:3.4—that is, a disparity of about 100 per cent.
geographical alignment and length, this too becomes a central question and this is reflected in their increasing prominence in recent cases. Yet even a cursory survey indicates the high degree of arbitrariness which attaches to these calculations.

For example, in the Black Sea case, Romania argued that its entire coastline was relevant and measured 270 km, whereas Ukraine claimed it was only 204 km. The Court, without explaining why, decided it was 248 km. Ukraine claimed that its relevant coast comprised its entire coastline from Romania to the southern tip of the Crimea, some 1,058 km, with an actual coastal façade of 684 km, or 664 km if measured along its baselines. Romania argued that much of the Ukrainian coast abutting the Black Sea was irrelevant, and measured the relevant portions as 388 km, or 293 km along the baselines. The Court agreed that only parts of the Ukrainian coast were relevant but measured them at 704 km, more or less splitting the difference between the parties’ calculations. This meant the ratio between the relevant coasts was 1:2.8. It could easily have been considerably more—or considerably less.

Such indeterminacy is even more apparent in the Nicaragua v Colombia case. Nicaragua claimed its whole coastline was relevant and measured 701 km, whereas Colombia thought it 551 km. The Court excluded a small portion of the mainland coast and calculated it to be 531 km. Colombia measured its relevant coasts, generated by a series of small islands and cays, at 75 km, whereas Nicaragua, arguing that only those portions of the islands facing Nicaragua were relevant, thought it measured 21 km. The Court ultimately concluded the figure to be 65 km, yielding a ratio of 1:8.2.

While it would be wrong to suggest that almost any outcome is open to the Court, it is certainly correct to say that a broad range of outcomes are at its disposal. But in themselves such disparities are relatively meaningless. Their relevance lies in the extent to which they inform both the decision whether or not to amend a provisional line of delimitation and the assessment of whether there is any ‘significant disproportionality’ between this ratio and the ultimate result. It is obvious that in order to make this final assessment it is also necessary to have the ratio between the relevant areas accorded to each State as a result of the delimitation. At this point even greater problems emerge. For example, third parties might have potential claims within the area and thus affect the calculation. It has long been understood

---

75 Black Sea, n 17, [85]
76 Ibid, [87]. It did, however, note that the Romanian straight baseline system was 204 km and, if measured along the sinuosities of the coast, was 258 km.
77 Ibid, [97].
78 Ibid, [93].
79 Ibid, [103].
80 Ibid, [104].
81 Nicaragua v Colombia, n 1, [145].
82 Ibid, [150].
83 Ibid, [147].
84 Ibid, [153].
85 Thus when determining the relevant area in the Nicaragua v Colombia case, n 1, [165], the Court took account of a ‘hypothetic equidistance line’ between Nicaragua and Costa Rica in an area currently in dispute between them. Since this may not be the final line its use either understated or overstated the area accruing to the parties. In Bangladesh/Myanmar, n 23, [494], the ITLOS said that ‘the fact that a third party may claim the same maritime area does not prevent its inclusion in the relevant maritime
that determining the ‘relevant area’ in the context of adjacent State delimitations projecting into open seas is particularly impressionistic\(^8\) and in such cases it is just not really possible to calculate in any meaningful way the relationship between the area which the delimitation leaves to each party and the coastal lengths. No doubt this is why the ‘proportionality’ test has drifted into a ‘significant disproportionality’ test. It is noteworthy that in the *Peru v Chile* case, where the Court was faced with a situation in which because of the existence of a pre-existing agreement that the first 80 miles of the maritime boundary would follow a parallel of latitude and only after this point would the equidistance method kick-in, it concluded that it would be ‘difficult, if not impossible, [to make] … the usual calculation of the length of the relevant coasts and of the extent of the relevant area, were the usual mathematical calculation of the proportions to be undertaken’.\(^9\) Noting that the final phase of the process ‘does not purport to be precise and is approximate’ and involves a ‘broad assessment of disproportionality’ the Court contented itself by observing that ‘no significant disproportion is evident, such as would call into question the equitable nature of the provisional equidistance line’.\(^8\) We are not told, however, what was not disproportionate with what.

### 3.2 Issues concerning islands and low-tide elevations

Issues concerning islands are some of the most contentious in the entire field of maritime boundary delimitation. As has already been explained, the definition of an island embraces any area of naturally formed land which is above water at high tide, and it is clear that any such feature is entitled to generate a territorial sea of up to 12 nm. In the *Nicaragua v Colombia* case, the Court affirmed that this entitlement will not be eroded merely because of the size of the feature, noting that ‘the Court has never restricted the right of a State to establish a territorial sea of 12 nautical miles around an island on the basis of an overlap with the territorial sea and exclusive economic zone of another state’.\(^9\) Thus even the smallest of features will generate a full territorial sea, unless constrained by an overlapping entitlement to a territorial sea of another State. At the same time, however, Article 121(3) of the LOSC provides that rocks which cannot sustain human habitation or economic life of their own do not generate a continental shelf or economic zone.
The Court has so far been remarkably coy about shedding light on the meaning of this provision. In the *Nicaragua v Colombia* case it did accept, for the first time, that Article 121(3) reflected a rule of customary international law but, apart from noting that ‘a comparatively small island may give an entitlement to a considerable maritime area’ (and thus hinting at its having a fairly restrictive meaning), it ultimately concluded that it was unnecessary to decide on whether a number of small features did have generative capacity since there were larger features which clearly did so as regards the relevant area.

Turning now to the process of delimitation, a key question is whether the presence of islands may have an effect on the method of delimitation. This question arose in its most acute form in the 1977 *Anglo-French Continental Shelf Arbitration* concerning the Channel Islands, pertaining to the UK, which lay off the coast of France and ‘on the wrong side’ of a median line drawn between the mainland coasts. It should be noted that the UK did not in fact claim that the Channel Islands represented the relevant ‘opposite coast’ to France, but that they had an entitlement to a full continental shelf which merged with that generated from the mainland of the UK. Perhaps unwittingly, this gave rise to the idea that islands belonging to mainland States had something less than a full generative entitlement when opposed to the mainland of another. The decision of the ICJ in the *Nicaragua v Colombia* case, stressing that islands and other land territory enjoy the same entitlement might be thought to suggest otherwise. However, it is clear that this was a situation in which there was no clash of entitlements between ‘mainlands’ and, but for the presence of the Colombian islands being sufficiently proximate to the coasts of Nicaragua, there would be no delimitation dispute at all. In such situations, where the presence of islands is essential to the ‘generation’ of the dispute, it now seems clear that the presumption in favour of equidistance as the provisional methodology will remain.

It seems equally clear, however, that where the presence of islands is not essential to the generation of the dispute it is less likely that equidistance between the island and the mainland will be the starting point, but the presence of the island will be factored in at the next stage of the process, that of considering whether there are any circumstances which justify the shifting of the provisional boundary.

In a sense, then, these two contrasting approaches appear to converge. However, it does seem that significant departures from the provisional equidistant line are considered appropriate where the presence of a ‘distant’ island is seen as being

---

90 Ibid, [176].
91 Ibid, [180]. The same approach had been taken in the *Black Sea* case as regards Serpent Island, reinforcing the view that the Court is likely to be reluctant to decide upon the generative capacity of small islands unless it is absolutely necessary to do so (and it can do much to ensure that that necessity does not arise). For academic discussion of Art 121(3), see eg J Charney, ‘Rocks That Cannot Sustain Human Habitation’ (1999) 93 *American Journal of International Law* 864; Tanaka, n 40, 64–7.
92 *Anglo-French Continental Shelf Arbitration*, n 9, [199].
93 *Nicaragua v Colombia*, n 1, [177].
responsible for the generation of the overlap of entitlements, as in the Anglo-French Continental Shelf Arbitration, the St Pierre et Miquelon Arbitration,\(^{94}\) the Jan Mayen case, and the Nicaragua v Colombia case. On the other hand, there appears to be an increasing reluctance to allow the presence of an offshore island to have a significant effect on an equidistance line drawn from mainland coasts or generated by some other methodology without reference to it, as in the Black Sea case and the Bangladesh/Myanmar case. The overall result is that, despite their equal generative capacity, islands are rarely treated equally with mainland coasts within the delimitation process. Nowhere is this more evident than in the Libya v Malta case, in which the overlapping entitlement was between the mainland coasts of a large continental country—Libya—and a small island State—Malta. The Court saw no difficulty in letting the inevitable difference in coastal lengths of the two States justify a significant shift in a provisional equidistance line in favour of Libya.\(^{95}\) The justification for not treating the generative capacities of the coastlines of island States as being on par with that of mainland coastlines remains unclear.

3.3 The relevance of economic and jurisdictional issues to the delimitation process

Few things appear more settled than that economic factors are routinely dismissed as having no relevance to the delimitation process, this being ‘essentially, . . . determined in relation to what may properly be called the geographical features of the area’.\(^{96}\) This is, to say the least, strange given that the entire point of the EEZ and continental shelf regimes is to facilitate the exploration and exploitation of a State’s economic resources. Nevertheless, while the relative economic positions of the States concerned is not relevant,\(^{97}\) issues relating to economic activity do play a role—though often at one stage removed—within the process.\(^{98}\)

In the North Sea Continental Shelf case, the Court identified the ‘unity of a deposit’ as being a factor to consider. This has a long pedigree: the Grisbadårna arbitration sought to preserve the separation of existing fisheries interests.\(^{99}\) Nevertheless, it was a factor for the parties to consider rather than the Court in the context of continental

\(^{94}\) St Pierre and Miquelon Arbitration (1992) 95 ILR 645.

\(^{95}\) Libya/Malta, n 12, [73] and [78].

\(^{96}\) Gulf of Maine, n 12, [59].

\(^{97}\) This might be contrasted with the approach of the ITLOS, which drew on the preambular paragraphs of the LOSC when interpreting the LOSC taking account of the desirability of encouraging developing States’ participation in accessing oceanic resources. See Responsibilities and Obligations of States Sponsoring Persons and Entitles with respect to Activities in the Area (Advisory Opinion) [2011] ITLOS Rep 10 [163].

\(^{98}\) For a helpful overview of practice, see Tanaka, n 2, 265–88.

\(^{99}\) Grisbadårna (Norway v Sweden) (1909) XI RIAA 147.
shelf delimitation. There is much State practice on this point, including an increasing resort to complex joint development or other agreements in order to facilitate economic activity. Yet it is only when such practice has had the effect of indicating a *modus vivendi* or tacit agreement that the Court seems willing to take formal note of such practice. The key point here is the taking of ‘formal’ note: in the *Barbados/Trinidad and Tobago* arbitration, the Tribunal observed that ‘resource-related criteria have been treated much more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance’—a comment endorsed by the ICJ in both the *Black Sea* and *Nicaragua v Colombia* cases.

Despite all this, it may be safely assumed that *informal* notice is given to this factor, and if it is not formally recognized as a relevant circumstance in its own right it is likely to find an unarticulated reflection in the approach taken to other elements of the process. Indeed, the Court has in the past accepted that the equitability of the result of a delimitation can be tested by reference to whether it has any ‘catastrophic repercussions for the livelihood and well being of the population of the countries concerned’ but, perhaps unsurprisingly, is yet to conclude that this has been the case. This is, however, important since it indicates that when undertaking the delimitation process the Court is not blind to the consequences of what it is doing. Nevertheless, while there are some examples of the potential relevance of access to fisheries being recognized as an element within the earlier phases of the delimitation process, notably in the *Jan Mayen* case, this is very much the exception, as was stressed by the Tribunal in the *Barbados/Trinidad and Tobago* case when it declined to take account of Barbados fishing interests when determining the location of the boundary. It seems then, that the role of economic factors is destined to remain a ‘hidden hand’ for some while to come.

Despite what is said about the process being driven by geography and geographical factors this has never been entirely true, and economic factors are merely one example of broad range of issues the potential relevance of which is reflected in the practice of the parties, or which are recognized by the courts as either individually

---

100 See generally Rothwell and Stephens, n 38, 409–11; and Tanaka, n 40, 208–10.
101 Thus *Cameroon v Nigeria*, n 14, [304], the Court concluded that the presence of oil wells was not a relevant circumstance, unless their presence amounted to evidence of an agreement between the parties.
102 *Barbados/Trinidad and Tobago*, n 14, [241].
103 *Black Sea*, n 17, [198]; *Nicaragua v Colombia*, n 1, [223].
104 *Gulf of Maine*, n 12, [237].
105 In *Barbados/Trinidad and Tobago*, n 14, [267], the Tribunal also rejected the claim that there were catastrophic repercussions as being unproven, but also noting that ‘injury does not equate with catastrophe’.
106 The Court took account of the need to ensure equitable access to Capelin stocks (albeit that it was, strictly speaking, determining the boundary of an EFZ at that point). *Jan Mayen*, n 13, [76].
107 *Barbados/Trinidad and Tobago*, n 14, [269].
108 See eg Tanaka, n 2, ch 8 for a consideration of a broad range of non-geographical factors.
or collectively indicating the predominant interest of a particular State over the area of overlapping entitlement.\textsuperscript{109} One such factor, long acknowledged, has concerned navigational interests. From the very outset, the presence of navigable channels—though conceptually unrelated to the continental shelf—has been seen as a potentially relevant factor\textsuperscript{110} in their delimitation, an approach confirmed in the Anglo-French Continental Shelf Arbitration which referred to the ‘vital interests of the French Republic in the security and defence of its territory.’\textsuperscript{111} This finds resonance in the Nicaragua v Colombia case, where the Court confirmed that ‘legitimate security concerns might be a relevant consideration, if a maritime delimitation was effected particularly near to the coast of a State and the Court will bear this consideration in mind in determining what adjustment to make to the provisional median line or in what way that line should be shifted.’\textsuperscript{112} This suggests that a rather broader range of factors bears upon the delimitation process—even if they are not always articulated within it—than might at first be thought.

4 The 2014 Bay of Bengal Maritime Boundary Arbitration

The 2014 Award in the Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India), under Annex VII of the LOSC, was at the time of writing the most recent maritime boundary judgment of an international court or tribunal.\textsuperscript{113} The decision is of sufficient interest to warrant separate observations highlighting a number of its key features and possible implications as regards the process of maritime boundary delimitation.

An important overarching point is the concern of the Award to uphold the stability of boundaries. The Award stresses that the possible impact over time of climate change on a coastline is not to be taken into account as a factor within the delimitation process, nor can climate change be subsequently appealed to in order to revisit an agreed boundary.\textsuperscript{114} The primacy of the equidistance/special circumstances

\textsuperscript{109} See Evans, n 2, ch 16.
\textsuperscript{110} It had been identified as such by the ILC in its preparatory work for the CSC. See Evans, n 2, 179, though this was not without criticism at the time. See Tanaka, n 2, 314.
\textsuperscript{111} Anglo-French Arbitration, n 9, [161], referring the navigational access to naval facilities.
\textsuperscript{112} Nicaragua v Colombia, n 1, [222].
\textsuperscript{113} Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India), Award of the LOSC Annex VII Tribunal (7 July 2014).
\textsuperscript{114} Ibid, [216]–[218].
method for the delimitation of the territorial sea is again reaffirmed, despite the paucity and potential indeterminacy of relevant basepoints. The Tribunal also took the view that not only was the concave nature of general coastal configuration insufficient to warrant a departure from the use of a provisional equidistant line, but that the coastal configuration was not relevant at all to the delimitation of ‘the narrow belt of the territorial sea.’ Another very important element of the Award is its clear rejection of the use of basepoints located on low tide elevations for the purposes of delimitation (as opposed to the generation of maritime entitlements), the Tribunal insisting that such basepoints be located on the low-water line of coasts.

Turning to the EEZ and continental shelf, the Award continued the trend of turning away from the rigidity of the ‘three-stage test’ as set out in the Black Sea case and, following the Bangladesh/Myanmar case, it emphasizes the overriding importance of achieving an equitable solution. Although a provisional equidistance line is used, this is largely because of the ‘greater transparency’ associated with the equidistance/special circumstances method rather than with its having any privileged status. Moreover, once again, the provisional equidistance line is in fact largely abandoned in favour of a geodesic line in order to address the ‘relevant circumstance’ of its use resulting in India benefiting from a ‘cut off’ effect. It is, in consequence, difficult to see why the provisional line was drawn at all, as it does not seem to have had any practical impact on the outcome.

Identification of the relevant coasts, and consequently the relevant area, had no real role to play in the process since the Award concluded that there was no significant disproportion between a coastal length ratio of 1:1.92 and a ratio of allocated areas of 1: 2.81 in favour of India. This needs to be seen against the background of the Tribunal inflating the length of the relevant coastline of India by the inclusion of a part of the Andaman Islands in its assessment which even India did not request. Once again, all of the calculations made by the Tribunal appear to be both largely self-serving, yet ultimately pointless.

Attention needs to be drawn to a number of other interesting features. The Award stresses that there is only a single continental shelf and there is no distinction to be drawn between the ‘inner’ and ‘outer’ shelf. This seems to be at odds with the approach of the ICJ in Nicaragua v Colombia. Finally, the boundary of the

---

115 Ibid, [246]–[247].
116 Ibid, [248]. A small adjustment was, however, made to ensure that the starting point of the equidistance line commenced at the land terminus, another issue which it needed to address.
117 Ibid, [260] and [353].
118 Ibid, [339] and [397].
119 Ibid, [343], though transparency is hardly the hallmark of this, and most other delimitation decisions.
120 Ibid, [478].
121 Ibid, [495]–[497].
122 Ibid, [77] and [465]. However, this did not prevent it from determining the provisional method for the inner shelf and merely projecting that forward into the outer shelf (see ibid, [465] and [478]).
123 Nicaragua v Columbia, n 1.
continental shelf results in an area which is within 200 nm of India but beyond 200 nm from Bangladesh being awarded to Bangladesh. This means that, since Bangladesh has no entitlement to an EEZ in this area, it remains within the EEZ of India. The Tribunal notes this, but observes that since the continental shelf pertains to Bangladesh, this ‘does not otherwise limit India’s sovereign rights to the EEZ in the superadjacent waters’. It thus appears that within 200 nm, the continental shelf takes priority over the EEZ after all, and the EEZ is thus reduced to a residual right. The potential implication of this requires further attention.

5 Conclusion

While it is relatively easy to identify the relevant statements of treaty and customary law concerning maritime boundary delimitation, the application of that law remains complex and perplexing. The oscillation between predictability and flexibility seems set to remain a feature of the jurisprudence, with relatively ‘easy’ cases (such as the Black Sea case) being used to flagship the merits of the fairly formal application of objective criteria whereas the more complex (such as the Nicaragua v Colombia case) will continue to pull in the direction of a more results-oriented approach. The ‘equidistance versus equitable principles’ debate has never really gone away, nor is it ever likely to. We should continue to expect change, and whether such change is in the direction of increased certainty or of enhanced flexibility is secondary. The primary point is that this body of law is unlikely to remain conceptually static. But does this really matter? Some questions do not admit of an answer and, though it is important to chart these jurisprudential developments in order to understand where thinking currently lies along that spectrum, the real challenge is to look beyond these issues and focus on the essence of the process to be undertaken.

What does matter is that the almost inevitable fixation with the ‘certainty versus flexibility’, ‘equidistance versus equitable principles’ debates tends to obscure the debates which ought now to be taking place, concerning matters such as the relationships between the zones of extended maritime jurisdiction, the ‘inner’ and ‘outer’ continental shelf and the influence of the factors which, while playing a discernible role, are not formally accepted as being relevant and are hidden behind the language of ‘equitable discretion’. At the same time, there is an ever greater willingness to consider in an increasingly stylized fashion a small number of factors which are generally accepted as being relevant—irrespective of whether they really are.

114 Bay of Bengal Maritime Boundary Arbitration, n 113, [505].
Against this background, one of the most intriguing comments made by the ICJ in recent times was in the *Nicaragua v Colombia* case when, in the context of rejecting Nicaragua’s argument that the Colombian islands ought to be enclaved, it observed that such a solution would have ‘unfortunate consequences for the orderly management of maritime resources, policing and the public order of the oceans in general, all of which would be better served by a simpler and more coherent division of the relevant area.’ Almost every element of this statement is at odds with prevailing orthodoxies concerning continental shelf and EEZ delimitation, yet it probably far better encapsulates what an ‘equitable solution’ is meant to achieve.

125 *Nicaragua v Colombia*, n 1, [230].