Towards the Acceptance of the Equidistance Rule in the Delimitation of the Continental Shelf and the Exclusive Economic Zone

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I. INTRODUCTION

The delimitation of maritime zones is an arena where international law is confronted with the infinite variety of nature and the multifaceted economic interests of States in the wealth of the sea. This struggle becomes even fiercer because of the need to delimit maritime zones with different purposes, as they are established in the United Nations Convention on the Law of the Sea¹, most importantly the continental shelf² and the Exclusive Economic Zone³. Thus, the problem of the method to be followed in a maritime delimitation arises. The present paper seeks to examine the role of case law of international courts and tribunals in the establishment of a rule of international law according to which such delimitation is to be effected.

II. INITIAL APPROACH: EMPHASIS TO FLEXIBILITY (EQUIDISTANCE NOT CUSTOMARY INTERNATIONAL LAW)

1.The 1958 Geneva Convention on the Continental Shelf and the North Sea Continental Shelf case

In Art. 6 paras 1 and 2 of the 1958 Geneva Convention on the Continental Shelf⁴, the equidistance principle was established as the basic rule for the delimitation of the

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¹ Law of the Sea Convention (adopted 10 December 1982, entered into force 16 November 1994) 1933 UNTS 396 (hereinafter LOSC)

² See Arts. 76 para 1 and 77 para 1 LOSC.

³ See Arts. 55-57 LOSC.

⁴ “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.

continental shelf, with the exception of “special circumstances”⁵. As such circumstances were considered by the International Law Commission particular geographical features or configurations, because of which the application of the equidistance principle might result in an unreasonable or inequitable delimitation of the continental shelf; in such a case, a delimitation otherwise than by application of the equidistance method is justified⁶.

The equidistance rule for the delimitation of the continental shelf was dealt with by an international court for the first time in the North Sea Continental Shelf case⁷, when Denmark, the Federal Republic of Germany and the Netherlands asked the International Court of Justice to declare the principles and rules of international law which were applicable to the delimitation of the continental shelf in the North Sea. The 1958 Geneva Convention on the Continental Shelf had been ratified by Denmark and the Netherlands, but not by the Federal Republic of Germany.

Denmark and the Netherlands supported that Art. 6 was customary international law⁸, which the Federal Republic of Germany denied. It should be noted that in support of their argument that the equidistance rule should be applied, Denmark and the Netherlands claimed that the test of appurtenance of continental shelf to the coastal State was that of “closer proximity”: all those parts of the continental shelf can be considered as appurtenant to a coastal State which are closer to it than they are to any point on the coast of another State. Thus, the delimitation had to be effected by a

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.”

⁵ The “special circumstances” exception was introduced by the Greek international law scholar I. Spyropoulos, in order to ensure the acceptance of the equidistance rule by the Commission (Krateros Ioannou and Anastasia Strati, *Law of the Sea* (in Greek, A. N. Sakkoulas Publications, Athens-Komotini 2000) 326.

⁶ See UK/France Arbitral Award 1977, para 70; Ioannou-Strati (n 5) 327. According to Dupuy-Vignes [René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea 1*, Hague Academy of International Law (Martinus Nijhoff Publishers 1991) 457], there is no relationship of hierarchy between the equidistance line and special circumstances, because it is not at all certain that “normal” cases are more frequent than the “exceptional” situations. However, the formulation of Art. 6 rather reveals a relationship of rule (equidistance) and exception (special circumstances). In any case, as Scovazzi notes, (Tullio Scovazzi, ‘The Evolution of International Law of the Sea: New Issues, New Challenges’ (2000) 286 *Recueil des Cours de l’Académie de Droit International* 39, 194) Art. 6 also allowed for flexibility (ibid, 197).

⁷ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 4

⁸ Ibid, para 37

method which would leave to each one of the States concerned all those areas that are nearest to its own coast, and only an equidistant line would satisfy this condition⁹.

The Court in its judgment in 1969 admitted that the “closer proximity” argument had force, however it rejected it as vague and stated that it does not imply any inherent rule prohibiting any State from exercising continental shelf rights in respect of areas closer to the coast of another State¹⁰. On the contrary, it considered the principle that a coastal State has inherent rights in the continental shelf which constitutes the natural prolongation of its land territory as the most fundamental of all the rules of law relating to the continental shelf¹¹.

As to the equidistance rule, the ICJ declared that it was not a customary rule of international law, as far as adjacent coasts are concerned¹². It drew that conclusion based on various grounds, not all of which seem convincing¹³; however the most important was that when it examined the two elements of a customary rule of international law, namely State practice and *opinio juris*, it drew the conclusion that although in certain cases the States concerned had agreed the boundaries according to the principle of equidistance, there was no evidence that they considered that they had a legal obligation to do so; thus, the element of *opinio juris* was considered to be missing¹⁴.

Although the Court accepted that “*no other method of delimitation has the same combination of practical convenience and certainty of application*”¹⁵, it considered that “[...] *these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise, or in which “special circumstances” cannot be shown to exist. Juridically, if there is such a rule, it must*

⁹ Ibid, para 39

¹⁰ Ibid, paras 40-42. See also R.Y. Jennings, ‘The limits of Continental Shelf Jurisdiction: some possible implications of the North Sea Case Judgment’ (1969) 18 ICLQ, 825.

¹¹ Ibid, para 43

¹² Ibid, para 81. On the contrary, the continental shelf of opposite States can be claimed by each of them to be a natural prolongation of its territory, and as these prolongations meet and overlap, they can therefore only be delimited by means of a median line (Ibid, para 57; see also Emmanuel Roucouas, *International Law II* (2nd edition, A. N. Sakkoulas 2005) 188-9.

¹³ ICJ Rep 1969, paras 48-72. See analytically Etienne Grisel ‘The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases’ (1970) 64 AJIL, 562

¹⁴ ICJ Rep 1969, para 78. It also observed that in almost all cases, the delimitations concerned were median-line delimitations between opposite States and not lateral delimitations between adjacent States (ibid, para 79). As regards the element of *opinio juris* according to the judgment, see Katherine N. Guernsey ‘The North Sea Continental Shelf Cases’ (2000-1) 27 Ohio N.U. Rev., 141.

¹⁵ ICJ Rep 1969, para 23

*draw its legal force from other factors than the existence of these advantages, important though they may be*¹⁶. What is more, the Court went on to add that “*It would however be ignoring realities if it were not noted at the same time that the use of this method, can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable*”¹⁷. It emphasized that there is no legal basis to employ only one method for the purpose of delimitation; in fact, a delimitation can be effected by the concurrent use of various methods¹⁸. According to the Court, “*it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule*”¹⁹.

At this point it needs to be observed that the Court examined Art. 6 of the 1958 Convention by separating the equidistance rule from its exception, namely “special circumstances”, although both are incorporated in this article. In this way, it rejected the rule of equidistance as not taking proper account of the special characteristics of the area to delimitate, although exactly this consideration was the reason of the insertion of the “special circumstances” exception. However, the equitable or not character of the results of equidistance had to be examined in light of its possible adjustment, in exceptional cases, in order to accommodate these “special circumstances”.

In any case, the Court enunciated as the rule of customary international law 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 encroachment on the natural prolongation of the land territory of the other*”²⁰. It emphasized however that “*Equity does not necessarily imply equality. There can*

¹⁶Ibid, para 23. See however the Dissenting Opinions of Judge ad hoc Sørensen and Judges Lachs, Koretsky, Morelli and Tanaka, who considered that equidistance was customary international law or “general law”, as well as the Separate Opinion of Judge Ammoun, in which he concluded that the equidistance/special circumstances rule was applicable by virtue of equity. For an analysis of the dissenting opinions see J.G. Merrills ‘Images and Models in the World Court: The Individual Opinions in the North Sea Continental Shelf Cases’ (1978) 41 The Modern Law Review, 638.

¹⁷ICJ Rep 1969, para 25

¹⁸Ibid, para 89

¹⁹Ibid, para 83.

²⁰ ICJ Rep 1969, para 101 C

*never be any question of completely refashioning nature [...]*²¹. Nevertheless, the Court did not make clear which these equitable principles were.

The function of relevant circumstances is to ensure that the special characteristics of a delimitation case will not render contrary to equity the line which has been dictated on the basis of the legal title of distance, necessitating a correction of that line. While “special circumstances”, as it has already been mentioned, function as an exception to the equidistance rule, “relevant circumstances” were considered all those which lead to an equitable delimitation and not only those which function as an exception²². In other words, it is by taking into account of the relevant circumstances in a maritime delimitation case that the aim of equity is attained.

As to which these relevant circumstances might be, the Court stated that “*in fact there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.*”²³ Nevertheless, among the parameters that need to be examined the Court enumerated “*the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features; so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;*” and, lastly, proportionality, defining it as “*the 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 general direction of the coastline, account being taken for this purpose of the*

²¹ Ibid. As to the notion of equity it stated that “[...] *it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field*”(ibid) [...] “*There is consequently no question [...] of any decision ex aequo et bono*” (ibid, para 88). However, the Court has been criticized as deciding in fact *ex aequo et bono* (Wolfgang Friedmann ‘The North Sea Continental Shelf Cases- A Critique’ [1970] 64 AJIL, 234-6; Masahiro Miyoshi ‘Considerations of Equity in Maritime Boundary Cases before the International Court of Justice in N. Ando et al. (eds.) *Liber Amicorum Judge Shigeru Oda* (Kluwer 2002) 1087, 1101.

²² Christos Rozakis, *In search of lost time: the law of the continental shelf in the ICJ judgment on the Libya/Malta case* (in greek, Foundation for Mediterranean Studies, Athens 1989) 78; R.R.Churchill and A.V. Lowe, *The Law of the Sea* (3rd edition, Melland Schill Studies in International Law 1999) 187

²³ ICJ Rep1969, para 93.

effects, actual or prospective, of any other continental shelf delimitation between adjacent States in the same region”²⁴.

It has to be noted that the Court made a distinction between States the coasts of which are adjacent and States the coasts of which are opposite each other, considering that in the first case a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other, and therefore it does not lead to an equitable result²⁵. Moreover, according to the ICJ, the slightest irregularity in a coastline is automatically magnified by an equidistance line; hence, if the equidistance method is employed in the delimitation of the continental shelf in the case of concave or convex coastlines, as was the coastline of the Federal Republic of Germany, then “*the greater the irregularity, and the further from the coastline the area to be delimited, the more unreasonable are the results produced*”²⁶. Consequently, it could be supported that the judgment of the Court was influenced to a great extent by its perception about natural prolongation as the legal title to continental shelf, and by the specific characteristics of that delimitation case. Moreover, in the end of the decision, the Court recalled that it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory of the continental shelf, and that therefore it would not be appropriate to “*over-systematize a pragmatic construct the developments of which had occurred within a relatively short period of time*”²⁷. This perhaps justifies its reluctance to accept a concrete delimitation rule, as the equidistance line, in lack of adequate State practice.

As a conclusion it could be said that, on the one hand, the Court did not regard equidistance as a rule of customary international law for the delimitation of the continental shelf, and considered that such customary international law constituted a delimitation according to “equitable principles”; and on the other hand, it dissociated “special circumstances” from their conventional application in Art. 6 as an exception to equidistance, and, renaming them into “relevant circumstances”, declared that they were to be taken into account in any delimitation of continental shelf²⁸. In this way, a concrete rule was set aside and substituted by a vague notion of “equitable

²⁴ Ibid, para 101 D)

²⁵ Ibid, para 58

²⁶ Ibid, para 89

²⁷ Ibid, para 100

²⁸ Ioannou-Strati (n 5) 323

principles”, and the particular characteristics of the area to be delimited, from an exception to equidistance were called upon to give content to the rule of equity.

2. The 1982 Law of the Sea Convention

During the Third United Nations Conference on the Law of the Sea, when the concept of EEZ emerged, the proposals for rules to govern the delimitation of the continental shelf and the EEZ were the object of exactly the same disagreements between the supporters of the equidistance principle and the supporters of the equity principle²⁹, and for this reason the articles of the 1982 Law of the Sea Convention on the delimitation of the EEZ (Art. 74) and of the continental shelf (Art. 83) have the same formulation: “*The delimitation of the continental shelf (/exclusive economic zone) 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*”. As these articles are identical and dealt with in the same context, the only conclusion which can be drawn is that the principles and rules of international law on the delimitation of the continental shelf and the EEZ are the same³⁰. The purpose was to allow delimitations of both continental shelves and EEZs by a single maritime boundary³¹.

It can be observed that there is no reference to equidistance, which, coupled with the “special circumstances” clause, is retained as a conventional rule only in Art. 15 LOSC on the delimitation of the territorial sea. Nonetheless, this did not exclude the possibility that equidistance might, through *opinio juris* and State practice but also through case law, become a rule of customary international law³². However, at the same time, equity is stipulated as the purpose of the delimitation and not as the rule according to which the delimitation is to be effected, as was the approach of the ICJ in

²⁹ Dupuy-Vignes (n 6) 477; Scovazzi (n 6) 194, who notes that an effort to lay down clearcut solutions would have endangered the codification of the law of the sea (ibid, 196).

³⁰ Paul Peters and Gerard Tanja, ‘Lateral Delimitation of Continental Shelf and Exclusive Economic Zone’ [1984] *Il Diritto Maritimo*, 472. It is thus clear that the identical text of A 74 and 83 LOSC is “*a somewhat emaciated and non-committal compromise text*” (ibid, 472). According to Lucchini-Vœlckel, [Laurent Lucchini and Michel Vœlckel, *Droit de la Mer*, Tome II (Éditions A. Pédone 1996, 85) “*En caractérisant la qualité du but à atteindre, elle désigne le point focal de l’opération de délimitation; mais elle évite soigneusement toute mention à l’application de principes équitables au cours de cette opération, puisque c’ était là- comme on le sait- le cœur de la controverse qui divisait la 3ème Conférence sur le droit de la mer*”.

³¹ Churchill and Lowe (n 22) 195.

³² Ioannou-Strati (n 5) 355

its judgment in the North Sea Continental Shelf case. Moreover, there is no reference to “equitable principles” or to the notion of “relevant circumstances”³³, which were introduced into the law of maritime delimitation by the same judgment, although, through the general reference to “*international law, as referred to in Article 38 of the Statute of the International Court of Justice*”, including obviously customary international law, these notions were inserted in maritime delimitation law also under LOSC³⁴.

Given the lack of clarity in Arts. 74 and 83 LOSC, the crucial role that case law would play in the development of rules for the delimitation of maritime zones³⁵ hardly needs to be emphasized.

III. THE GRADUAL ACCEPTANCE OF THE PRIORITY OF THE EQUIDISTANCE METHOD

It has been observed in theory that the principle of equity³⁶, which is the touchstone of the law of the maritime delimitation according to Arts. 74 and 83 LOSC, is not interpreted in case law in a single way. On the contrary, there are two opposite approaches: on the one hand, the “autonomous equity”, namely the equity which has an autonomous normative function, identifies the delimitation method with the result of the delimitation and rejects the obligatory nature of the equidistance method³⁷; and on the other hand the “corrective equity”, which applies the equidistance method in the first place and subsequently takes into account relevant circumstances, in order to achieve an equitable result³⁸. In the first case equity constitutes the point of departure,

³³ See also M.D. Blecher, ‘Equitable Delimitation of Continental Shelf’ (1979) 73 AJIL, 65-66

³⁴ Anastasia Strati ‘The Exclusive Economic Zone’ in Haritini Dipla, Christos Rozakis (eds.) *Law of the Sea and its Application in Greece* (in greek, I. Sideris Publications, Athens 2004) 173.

³⁵ Scovazzi (n 6) 199

³⁶ It should be noted that the origin of the concept of equity can be traced back to Aristotle, in the sense of a way of tempering of the injustice caused by a strict and literal application of law. See also Blecher’s critique (n 33, 87) on the use of the notion of equity in modern international law.

³⁷ “*La croisade contre l’ équidistance*”, as Weil characteristically observed (Prosper Weil, *Perspectives du droit de la délimitation maritime* [Pedone 1988] 216)

³⁸ Ibid, 179 “*équité autonome*” and “*équité correctrice*”. See also Yoshifumi Tanaka, ‘Quelques Observations sur deux approches jurisprudentielles en droit de la delimitation maritime: l’ affrontement entre prévisibilité et flexibilité’, [2004] 2 Revue Belge de droit international, 419-455; Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford Monographs in International Law, 1989) 79-83

while in the second the point of arrival³⁹. Thus, the legal nature of equidistance constitutes the criterion of distinction between these two approaches⁴⁰.

The origin of each approach can be traced back to two decisions on delimitation of continental shelf respectively. The first, as it has already been mentioned, was the ICJ judgment in the North Sea Continental Shelf case, in which the Court emphasized that “*there is no other single method of delimitation the use of which is in all circumstances obligatory*”⁴¹ and that consequently “*it is necessary to seek not one method of delimitation but one goal [an equitable solution]*”⁴². It is obvious that this method aims at a greater flexibility in the delimitation of maritime boundaries, however it presents serious problems⁴³: it paves the way to subjective and possibly arbitrary evaluations of the Court⁴⁴, while States are confronted with the problem of the lack of a concrete delimitation method which may be applied in order to achieve an equitable result⁴⁵.

On the other hand, the approach of corrective equity can be traced back to the Arbitral Award in the Case Concerning the Delimitation of the Continental Shelf between the United Kingdom and France (1977). Three points need to be emphasized:

First of all, the Arbitral Tribunal treated the two elements of Art. 6 of the 1958 Geneva Convention, equidistance and special circumstances, as a single rule⁴⁶. This was a better approach than the one taken by the ICJ in the North Sea Continental Shelf case, which isolated the equidistance rule and ignored its exception, however, it did not emphasize the fact that in Art. 6 equidistance is the rule and “special circumstances” its exception.

Secondly, it considered that there is little difference between Art. 6 and customary international law as enunciated in the North Sea Continental Shelf case, namely that a delimitation is to be effected according to equitable principles: “*In short, the role of the “special circumstances” condition in Article 6 is to ensure an equitable delimitation; and the combined “equidistance-special circumstances rule”, in effect, gives particular expression to a general norm that, failing agreement, the boundary*

³⁹ Weil (n 37) 216-221

⁴⁰ Tanaka (n 38) 420

⁴¹ ICJ Rep1969, para 101 B)

⁴² Ibid, para 92

⁴³ See also Ioannou-Strati (n 5) 337

⁴⁴ See Dissenting Opinion of Judge Koretsky, para 166

⁴⁵ See Individual Opinion of Judge Ammoun, para 56

⁴⁶ *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1977) XVIII RIAA 3, para 174

between States abutting on the same continental shelf is to be determined on equitable principles”⁴⁷. Although the delimitation concerned States the coasts of which were opposite one another, it seems that the Arbitral Tribunal did not consider that there was a significant difference between adjacent and opposite coasts⁴⁸. The underlying intention was to avoid a fragmentation of the legal regimes governing the delimitation of the continental shelf. However, by the combined character of the equidistance-special circumstances rule and the fact that Art. 6 does not determine the scope and content of special circumstances, the Arbitral Tribunal considered that “[...] *even under Article 6 the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances [...] rather than the inherent quality of the method as a legal norm of delimitation*”⁴⁹. Nonetheless, by putting the emphasis on the geographical and other circumstances of each case, the Tribunal, although it had taken the important step of considering Art. 6 as customary international law, downgraded to a certain extent the role of equidistance⁵⁰.

Thirdly, however, when drawing the delimitation line, the Arbitral Tribunal resorted to the equidistance method, modified so as to take into consideration special circumstances. It stated that *“in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection”*⁵¹. Therefore it seems that in the end, the arbitral tribunal considered the function of equity as corrective to equidistance.

However, it was mainly two developments that led to the establishment of the equidistance method in maritime delimitations and its gradual acceptance as a legal

⁴⁷ Award 1977, para 70 “[...] *In view of this Court, therefore, the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6.*”

⁴⁸ Ibid, para 238. According to the Arbitral Tribunal, the distinction was not derived from legal theory, but from the substance of the two geographical situations. See also David A. Colson ‘United Kingdom-France Continental Shelf Arbitration’ (1978) 72 AJIL 96, 103

⁴⁹ Award 1977, para 70. This is how it also interpreted the Court’s Judgment in the North Sea Continental Shelf Case (para 84).

⁵⁰ Weil (n 37) 161. See also D. M. Mc Rae ‘Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration’ (1977) 15 Can. Y. B. Int’l L. 173, 183.

⁵¹ Award 1977, para 249.

rule, both related to the emergence of EEZ: a) the criterion of distance as legal title to maritime zones b) the preference for a single maritime boundary, both for the continental shelf and the EEZ.

a) The “autonomous” notion of equity did not disappear as a result of the 1977 Arbitral Award; on the contrary, it was also supported in the continental shelf delimitation case between Tunisia and Libya (1982). In this case the ICJ decided that *“the result of the application of equitable principles must be equitable...It is however the result which is predominant; the principles are subordinate to the goal”*⁵². It did not accept the customary law character of the equidistance method, or at least that it should be given priority in comparison to other methods⁵³. However, one may wonder whether it is possible to draw a delimitation line without specifying a certain method⁵⁴, as well as whether the *a priori* rejection by the Court of the equidistance method is correct⁵⁵. Nevertheless, the Court drew the delimitation line without resorting to equidistance. It divided the delimitation line in two sectors, and in the first sector the Court drew the line based mainly on the petroleum concessions which had been granted by the parties, while in the second sector, the delimitation line was drawn by giving half effect to Kerkennah islands, using the bisector method⁵⁶.

It should be noted though that in the Tunisia/Libya case the ICJ recognized that according to Art. 76 para 1 LOSC the distance criterion is the basis which must be used by the coastal State for the delimitation of its continental shelf⁵⁷.

Some aspects of the approach which was taken by the ICJ in the Tunisia/Libya case were modified by it in the Libya/Malta case (1985)⁵⁸. The Court again refused the

⁵² *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep 18 para. 70. The Court observed the disappearance, in the last draft text of what became Art. 83 para 1, of reference to delimitation by agreement “in accordance with equitable principles”, however it considered that it had to decide the case on this basis (ICJ Rep 1982, paras 49, 70). Consequently, equitable principles are applied not as a correction, but as an integral part of maritime delimitation law; however, the above mentioned reasoning is no more than a tautology (Ioannou-Strati [n 5] 337).

In the next paragraph (ICJ Rep 1982, para 71) it went on to explain that *“Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it”*.

⁵³ Ibid, para 110. See also Donna R. Christie ‘From the Shoals of Ras Kaboudia to the Shores of Tripoli: the Tunisia/Libya Continental Shelf Boundary Delimitation’ (1983) 13:1 Georgia Journal of International And Comparative Law, 1, 25, who supports that since the Tunisia/Libya Delimitation did not involve opposite States, it cannot be said that the ICJ rejected the theory of the Arbitral Tribunal (ibid, 27).

⁵⁴ ICJ Rep 1982, Dissenting Opinion of Judge Oda, para 155

⁵⁵ Ibid, Dissenting Opinion of Judge Evensen, para 15; Dissenting Opinion of Judge Gros, paras 11-12.

⁵⁶ Ibid, para 133 C 2,3

⁵⁷ Ibid, para 48.

obligatory application of equidistance even as a preliminary and provisional step towards the drawing of a delimitation line⁵⁹, as such a rule “*cannot be supported solely by the production of numerous examples of delimitations using equidistance or modified equidistance, though it is impressive evidence that the equidistance method can in many different situations yield an equitable result*”⁶⁰. The Court nonetheless did not consider that this “impressive evidence” should have legal consequences. As to the notion of equity, it pointed out that “*its application should display consistency and a degree of predictability[...]*”⁶¹. This was an important remark, which implicitly admitted the need of a delimitation method. Thus, contrary to the Tunisia/Libya case, the Court applied the equidistance method in the delimitation phase, when it drew a provisional equidistance line and adjusted it in favour of Libya, taking into consideration the principle of proportionality⁶². According to the Court “[...] *it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between the coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result*”⁶³.

It seems that the Court tried to justify this provisional application of the equidistance principle on the ground that the delimitation was between opposite coasts, which differentiated it from the North Sea Continental Shelf case and brought it closer to the UK v. France case. However, it remains the case that, notwithstanding the retrogression of the Tunisia/Libya case, since the 1977 Arbitral Award there was an implicit acceptance of the equidistance method, evidenced by its application as a first step in the delimitation phase, which was confirmed by the ICJ Libya/Malta judgment.

⁵⁸ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13. It should be noted that although Malta was a party to the 1958 Geneva Convention, Libya was not, and that although both parties had signed LOSC, the latter had not yet entered into force and therefore the only applicable law was customary international law. As to Art 76 LOSC, the Court observed that “*The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific content*” (ICJ Rep 1985, para 29).

⁵⁹ Ibid, para 43, 63. See also Herman L. Lawrence, ‘The Court Giveth and the Court Taketh Away: An Analysis of the Tunisia-Libya Continental Shelf Case’ [1984] 33 International and Comparative Law Quarterly, 855- 856

⁶⁰ Ibid, para 44

⁶¹ Ibid, para 45

⁶² Ibid, para 73

⁶³ Ibid, para 62.

As to the distance criterion, in the Libya/Malta case the Court went even further and established it as the only basis of legal title to the seabed and its subsoil within the limit of 200 n.m., in view of the emergence of the EEZ regime⁶⁴. It is also notable that with regard to the natural prolongation principle enunciated in the North Sea Continental Shelf case, the Court stated that, within 200 n.m., this principle is defined by the distance from the coast⁶⁵.

Moreover, according to the Court, *“the legal basis of that which is to be delimited cannot be other than pertinent to the delimitation”*⁶⁶. Therefore, apart from deciding that the criterion of distance constitutes common legal title to the continental shelf and EEZ, it observed a connection between the legal title and delimitation method: *“It therefore seems logical to the Court that the choice of the criterion and the method which 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”*⁶⁷. Thus a neutral, geometrical method applicable to the delimitation of both maritime zones was necessary, which was in fact no other than the equidistance line.

Consequently, in the Libya/Malta case, the ICJ took the decisive step towards the prevalence of the distance criterion in title and simultaneously in maritime delimitation. Thus, the end of the natural prolongation theory and the prevalence of the distance criterion permitted an important approach between the delimitation of the continental shelf and the EEZ, towards the acceptance of the equidistance method as point of departure in the delimitation process⁶⁸.

b) When the need for drawing a single boundary for more than one maritime zone arose, initially, in the period between 1984 and 1992, a trend towards the prevalence of the approach of the autonomous equity was observed.

The first case which dealt with the drawing of a single maritime boundary, both for the continental shelf and the fisheries zone, was the Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area, between Canada and USA

⁶⁴ The Court stated that the distance criterion must be taken into consideration even if neither interested State has proclaimed an EEZ (ICJ Rep1985, para 33).

⁶⁵ Ibid, para 34

⁶⁶ Ibid, para 34

⁶⁷ Ibid, para 61

⁶⁸ Weil (n 37) 108

(1984)⁶⁹. Canada and USA were parties to the 1958 Convention on the Continental Shelf, however, as the delimitation did not concern only the continental shelf, the Chamber decided not to apply the Convention in that case⁷⁰. A new series of problems was posed then, namely which was the rule which governed the drawing of a single maritime boundary, if there was a customary rule for that type of delimitation and if it was the same with that for the continental shelf, and whether it was possible to conciliate the relevant circumstances of the continental shelf with those of the fisheries zone.

As far as the applicable rule in such a delimitation is concerned, the Chamber of the Court defined it in three steps. First of all, it enunciated the “fundamental rule” which is applied in any maritime delimitation between neighbouring States:

“1) 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 agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

*2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.”*⁷¹

Since this fundamental rule can be applied to any maritime delimitation, the common maritime boundary could also be drawn according to it. However, in a second stage it was necessary to specify these equitable criteria which could be applied in the delimitation of the common boundary line. The Chamber stated that it was difficult to point out to an *a priori* catalogue⁷², and decided to use as an equitable

⁶⁹ *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246.

⁷⁰ *Ibid*, para 124-5.

⁷¹ *Ibid*, para 112. However, in this way the characteristics of the delimitation area, in other words the facts of the case, penetrate *ex post facto* into the rule, under the cloak of principles (Ioannou-Strati [n 5] 342).

⁷² However, it mentioned ‘the criterion expressed by the classic formula that the land dominates the sea; the criterion advocating, in cases where no special circumstances require correction thereof, the equal division of the areas of overlap of the maritime and submarine zones appertaining to the respective coasts of neighbouring States; the criterion that, whenever possible, the seaward extension of a State’s coast should not encroach upon areas that are too close to the coast of another State; the criterion of preventing, as far as possible, any cut-off of the seaward projection of the coast or of part of

criterion “a neutral criterion” which could be used for both the continental shelf and the superjacent waters and would not favour any of them to the detriment of the other⁷³.

Thirdly, a practical method of delimitation of the common maritime boundary had to be chosen. The Chamber stated that such a method had to be appropriate both for the seabed and its subsoil and the superjacent waters⁷⁴, and must therefore be basically founded upon geography just as the criteria.

The Chamber did not accept the application of equidistance as a starting point⁷⁵, as it did not consider it as a rule of law, but as just a practical method⁷⁶, though again it admitted its advantages⁷⁷. On a practical level however, it established one of the segments of the single boundary by drawing a provisional equidistance line, and by correcting it in a second stage in order to take into consideration proportionality and in order to give half effect to the Seal island⁷⁸. Thus, it seems that the Chamber accepted implicitly the equidistance method for the delimitation of a single maritime boundary. The emphasis however of the Chamber on the relevant circumstances of the area led it to an empirical research of an equitable solution, as the function and content of equitable principles are not clear⁷⁹. In any case, it must be noted that the search for neutral criteria applicable to both maritime zones, based mainly in geography, paved the way for the application of the equally neutral equidistance method in the delimitation of the common maritime boundary.

the coast of either of the States concerned; and the criterion whereby, in certain circumstances, the appropriate consequences may be drawn from any inequalities in the extent of the coasts of two States into the same area of delimitation.’ (ICJ Rep 1984, para 157). For a distinction between Equitable Principles, Relevant Circumstances and Practical Methods see M.C.W. Pinto ‘Maritime Boundary Issues and their Resolution’ in *Liber Amicorum Oda* (n 21) 1115, 1136-1137.

⁷³ Ibid, paras 157, 194.

⁷⁴ Ibid, para 199.

⁷⁵ According to the Chamber, the equidistance rule may apply over small distances, for example in the delimitation of territorial seas, but it seems less justifiable when boundaries have to be established which cover hundreds of nautical miles and are intended to share out the potential mineral wealth of continental shelves of the resources of the waters (Ibid, para 160).

⁷⁶ Ibid, para 106. According to the Chamber “*the most that can be said is that certain methods are easier to apply and that, because of their almost mechanical operation, they are less likely to entail doubts and arouse controversy*” (Ibid, para 162). *Contra* Judge Gros, Dissenting Opinion, paras 42-44.

⁷⁷ Ibid, para 107. This was the case also concerning the delimitation of a fisheries zone (para 122), which was until then high seas, and therefore, according to the Chamber, no rigid rules should apply (Ibid, para 111).

⁷⁸ Ibid, para 222. See also Emmanuel Decaux ‘L’ Arrêt de la Chambre de la Cour Internationale de Justice sur l’ Affaire de la Délimitation de la Frontière Maritime dans le Golfe du Maine (Canada/États-Unis)’ (1984) 30 AFDI, 320; Anthony F. Shelley ‘Law of the Sea: Delimitation of the Gulf of Maine’ 26 Harvard International Law Journal (1985) 650. However, in the latter’s opinion the Chamber furthered the trend toward using equitable principles in delimitation rather than equidistance (ibid, 653).

⁷⁹ Ioannou-Strati (n 6) 342.

In the case of Delimitation of Maritime Boundary between Guinea and Guinea-Bissau (1985)⁸⁰, the Arbitral Tribunal emphasized again as purpose of Arts. 74 and 83 LOSC the achievement of an equitable solution⁸¹. From various parts of the Award it can be inferred that the approach of “autonomous” equity is followed, with the rejection of the obligatory nature or priority of any method and the pursuit of a solution depending on the circumstances of the case⁸². Thus, the Arbitral Tribunal did not expressly use the equidistance method in drawing the boundary line⁸³.

In the Delimitation of Maritime Boundaries between Canada and France (Saint-Pierre et Miquelon case, 1992), again concerning the drawing of a single maritime boundary, the Arbitral Tribunal referred to the fundamental rule enunciated in the Gulf of Maine case, which demanded a delimitation according to “equitable principles” and rejected the obligatory character of any method⁸⁴. Consequently, the Arbitral Tribunal refused to accept the obligatory nature of the equidistance line. As far as the equitable criteria of the fundamental rule were concerned, the Arbitral Tribunal, following the Gulf of Maine case, set aside the application of the 1958 Convention on the Continental Shelf, although both States had ratified it⁸⁵, and favoured geographical elements, stating that “*les caractéristiques géographiques sont au cœur du processus de délimitation*”⁸⁶. However, this case was singular in that when drawing the single maritime delimitation line, it granted to the French islands maritime zones consisting in a radial projection westward, in the form of a semicircular modified enclave, and a frontal projection southward until it reached the outer limit of 200 n.m., which was in effect a long, narrow corridor running south. The ensuing maritime zone had “a strange mushroom shape”⁸⁷, and was criticized by

⁸⁰ *Delimitation of the maritime boundary between Guinea and Guinea-Bissau* (1985) XIX RIAA 149

⁸¹ Award 1985, para 88

⁸² Ibid, paras 88, 102. See also Kathleen A. Mc Llarky ‘Guinea/Guinea-Bissau: dispute concerning delimitation of the maritime boundary’ (1987) 11: 1 Maryland Journal of International Law and Commerce 93, 108; Eric David ‘La sentence arbitrale du 14 février 1985 sur la délimitation de la frontière maritime Guinée-Guinée Bissau’ (1986) 31 AFDI 350, 389, who noted the subjectivity of the judgment.

⁸³ Award 1985, para 111

⁸⁴ *Case Concerning the Delimitation of Maritime Areas Between Canada and the French Republic* (1992) 31 ILM 1149, par. 38

⁸⁵ Ibid, para 40

⁸⁶ Ibid, para 24

⁸⁷ Ibid, Dissenting Opinion of Judge Weil, para 2. See also Louise De la Fayette, ‘The Award in the Canada-France Maritime Boundary Arbitration’ [1993] 8 The International Journal of Marine and

Professor Weil in his dissenting opinion as not founded ‘on the basis of law’⁸⁸. In any case, the Arbitral Tribunal did not use the equidistance method⁸⁹.

IV. EMPHASIS ON LEGAL CERTAINTY: TOWARDS THE ACCEPTANCE OF EQUIDISTANCE AS A RULE OF INTERNATIONAL LAW

Subsequently however there was a clearer trend in case law towards the establishment of the approach of corrective equity. The starting point of that trend was the ICJ judgment on the Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway, 1993)⁹⁰. As there was no agreement between Norway and Denmark for the drawing of a single boundary, the Court examined separately the applicable law in the continental shelf and the fisheries zone⁹¹. As for the first, applicable law was considered that of Art. 6 of the 1958 Convention, as both States were parties to it. In this way, that judgment was differentiated from those in the Gulf of Maine and the Saint-Pierre et Miquelon cases⁹². The Court took the important step of considering Art. 6 as customary international law⁹³, at least for the delimitation of the continental shelf of States the coasts of which are opposite each other⁹⁴. “*If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on*

Coastal Law, 103, who noted the singularity of the geographical and political circumstances of the case.

⁸⁸ Ibid, para 2. In fact, it has been noted that there was nothing to prevent the Arbitral Tribunal from adopting a wider enclave for the French islands (Keith Highet ‘Delimitation of the maritime areas between Canada and France: Court of Arbitration, June 10, 1992’ [1993] 87 AJIL, 453, 461).

⁸⁹ Award 1992, paras 66-74

⁹⁰ *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)* [1993], ICJ Rep 38

⁹¹ Ibid, para 44

⁹² Ibid, para 51

⁹³ Ibid, paras 46, 51. According to Evans [Malcolm D. Evans, ‘Maritime Delimitation after Denmark v. Norway: Back to the Future?’ in Guy S. Goodwin-Gill and Stefan Talmon (eds) *The reality of international law: essays in honour of Ian Brownlie* (Oxford 1999) 160], while in the UK/France case this line of thinking was used to place Article 6 in the context of customary law and to justify importing the flexibility of ‘equitable principles’ into the article, in the Jan Mayen case the Court used it to justify ‘exporting the equidistance method into customary law’. *Contra* R.R. Churchill ‘The Greenland-Jan Mayen Case and its significance for the international law of maritime boundary delimitation’ [1994] 9:1 *The international journal of marine and coastal law* 1, 14-16). See also Jonathan I. Charney ‘Maritime delimitation in the area between Greenland and Jan Mayen’ [1994] 88 AJIL, 105-109.

⁹⁴ ICJ Rep 1993, para 46. As it has been observed in theory “[*La Cour*] saisit alors l’occasion qui lui est offerte pour marier le droit conventionnel (article 6) avec le droit coutumier. Elle rappelle en ce sens l’effort louable de rapprochement entre les deux branches de droit que le tribunal franco-britannique avait fait en 1977[...].” (Haritini Dipla ‘Affaire de la délimitation maritime Groenland/Jan Mayen’ [1994] 98:4 RGDIP 899, 909). In this way, the Court furthered legal certainty in maritime delimitation (ibid, 921-925).

equitable principles, it must be difficult to find any material difference- at any rate in regard to delimitation between opposite coasts- between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles” Moreover, it went on to observe that *“Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result”*⁹⁵.

As for the second, the Court observed that no international tribunal had ever decided a case concerning exclusively a fisheries zone; however, it stated that the parties had not raised any objections to the drawing of the delimitation line according to the customary rule governing the EEZ delimitation. The next step was to identify the relationship between these two applicable laws. The Court, emphasizing the phrase “equitable solution” of Arts 74 para 1 and 83 para 1 LOSC, stated that *“That statement of an “equitable solution” as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones”*⁹⁶. In the end, the Court drew a provisional equidistance line as a first step, which it subsequently modified in order to take into account relevant circumstances⁹⁷, such as proportionality and fair access to fisheries resources⁹⁸.

This approach was also followed in subsequent cases in which the delimitation of single maritime boundaries for the territorial seas, continental shelves and EEZs was sought. The Arbitral Tribunal in the maritime delimitation case between Eritrea and Yemen (1999)⁹⁹, in which for the first time applicable law was LOSC, stated with regard to the establishment of a common maritime boundary between States the coasts of which are opposite each other that the equidistance line provides a line according to

⁹⁵ICJ Rep 1993, para 56

⁹⁶Ibid, para 48. According to Churchill (n 93) the Court failed in this regard to examine state practice (17)

⁹⁷Ibid, para 53

⁹⁸Ibid, paras 87, 91-2. See also Alex G. Oude Elferink ‘Maritime Delimitation between Denmark/Greenland and Norway’ (2007) 38:4 Ocean Development and International Law, 375.

⁹⁹ *Eritrea- Yemen Arbitration (Award, Phase II, Maritime Delimitation)* [1999] available at <<http://www.pca-cpa.org>>. See Malcolm D. Evans ‘The Maritime Delimitation Between Eritrea and Yemen’ [2001] 14:1 Leiden Journal of International Law, 141

the principle of equity incorporated in Arts 74 and 83 LOSC¹⁰⁰, and furthermore implied that this method derives its legal character from examination of the State practice and case law. The Arbitral Tribunal drew the equidistance line and adjusted it in order to take into account the principle of proportionality¹⁰¹. The fact that the Tribunal affirmed that equidistance provides an equitable solution was an important contribution, however the fact that it maintained the distinction between oppositeness and adjacency regarding the use of equidistance did not further the law on maritime delimitation¹⁰².

However, it was the case concerning maritime delimitation between Qatar and Bahrain (2001)¹⁰³ which offered the Court the opportunity to bring about an important development in the law of maritime delimitation. It was the first time that the Court was asked to draw a single maritime boundary in accordance with customary international law. First of all it should be noted that neither Bahrain nor Qatar were parties to the 1958 Convention on the Continental Shelf and LOSC was not applicable law- however it was accepted that Arts. 74 and 83 LOSC were customary international law¹⁰⁴.

Moreover, the Court accepted for the first time in its jurisprudence the application of equidistance as customary international law in the maritime delimitation between States the coasts of which are adjacent, as well as the equation of the applicable law in the delimitation of the territorial sea with the applicable law in the continental shelf and EEZ. *“The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958*

¹⁰⁰ The Tribunal said that this was ‘in accord with practice and precedent’, but failed to support it adequately (Evans [n 99] 166; Nuno Sérgio Marques Antunes ‘The 1999 Eritrea-Yemen maritime delimitation award and the development of international law’ [2001] 50: 2 ICLQ 299, 344) in view of the strong controversy during the *travaux préparatoires* of LOSC.

¹⁰¹ Award 1999, paras 159, 165. It should be noted that both Parties had based their claims around the equidistance method.

¹⁰² Antunes (n 100) 334. The writer notes that the term “equitable principles”, which in his view has no normative content, was not used in the Award (ibid, 344). According to him, equidistance is a corollary of the principle that the land dominates the sea (ibid, 343).

¹⁰³ *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* [2001] ICJ Rep 40

¹⁰⁴ Ibid, paras 167 et seq.

*in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated*¹⁰⁵.

Thus, the Court decided on a single boundary in two sectors dividing the Parties' territorial seas, continental shelves and EEZs based on an equidistance line that was modified to give reduced effect to islands and low tide elevations and in order to take into account the interests of third States¹⁰⁶. Thus, with this judgment the law of maritime delimitation entered a phase of stabilization¹⁰⁷.

This approach was confirmed by the ICJ in the case concerning the maritime delimitation between Cameroun and Nigeria (2002)¹⁰⁸. The Court divided the maritime area to be delimited in two sectors, and in the second sector, the "principles of equity/relevant circumstances", which the ICJ considered very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea¹⁰⁹, led to the adoption of the approach of corrective equity¹¹⁰. Indeed the Court, having examined whether there were relevant circumstances which demanded the modification of the equidistance line in order to lead to an equitable result¹¹¹, drew the conclusion that there were no such relevant circumstances and therefore decided that the equidistance line permitted a delimitation according to the principle of equity in the sector in which the Court was competent to decide¹¹². It is interesting that the Court noted that "[...] *delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court's jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation*"¹¹³. Therefore, it reinforced the role of equidistance as the

¹⁰⁵ Ibid, para 231. However, according to Decaux [Emmanuel Decaux 'Affaire de la délimitation maritime et des questions territoriales entre Qatar et Bahrein' (2002) 47 AFDI 177, 235 "la Cour ne pousse pas cette logique unificatrice jusqu' au bout- contrairement aux vœux de Prosper Weil- comme si elle ne voulait pas se lier les mains à l' avance, en fixant des principes trop rigoureux, et préférerait garder une certaine marge de manœuvre, en combinant l'esprit de géométrie de l' équidistance et l' esprit de finesse de l' équité".

¹⁰⁶ Glen Plant 'Maritime delimitation and territorial questions between Qatar and Bahrain' [2002] 96:1 AJIL 198; Barbara Kwiatkowska 'The Qatar v. Bahrain maritime delimitation and territorial questions case' [2002] 33:3-4 Ocean development and international law 227, 239, 243

¹⁰⁷ Roucounas (n 12) 269

¹⁰⁸ *Land and Maritime Boundary between Cameroon and Nigeria case (Cameroon v. Nigeria; Equatorial Guinea intervening)* [2002] ICJ Rep 303.

¹⁰⁹ Ibid, para 288

¹¹⁰ Ibid, para 288. See also Pieter H F. Bekker, 'Land and Maritime Boundary Between Cameroon and Nigeria' [2003] 97 AJIL, 387-398

¹¹¹ Ibid, para 293

¹¹² Ibid, paras 293-305, 306

¹¹³ Ibid, para 294

equitable boundary not only between opposite, but also between adjacent States under both Art. 15 and Arts. 74 and 83 LOSC¹¹⁴.

The same approach was followed in principle by international courts and tribunals in subsequent cases. In the Barbados/Trinidad and Tobago maritime delimitation case (2006)¹¹⁵, the Court noted that some early attempts by international courts and tribunals to define the role of equity resulted in distancing the outcome from the rule of law and thus led to a state of confusion in the matter, and that the search for predictable, 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 the law¹¹⁶. As such objective criterion the Tribunal considered the principle of equidistance as a method of delimitation applicable in certain geographical circumstances¹¹⁷. The Tribunal reiterated the two-step approach encapsulated in the “equidistance/relevant circumstances” principle, noting that “*The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity and stability are thus integral parts of the process of delimitation*”¹¹⁸. The Tribunal considered that equidistance satisfies these conditions, subject to its subsequent correction if justified. “*A different method would require a well-founded justification and neither of the Parties has asked for an alternative method*”¹¹⁹.

It is obvious from the above mentioned that the Arbitral Tribunal in this case took a clear position in favour of the priority of equidistance in maritime delimitations, emphasizing its advantages, and considered that only in exceptional cases a different method would be justified. Thus the equidistance line was considered as the point of

¹¹⁴ Barbara Kwiatkowska ‘The contribution of the 2002 (Cameroon v. Nigeria: Equatorial Guinea intervening) land and maritime boundary between Cameroon and Nigeria Judgment of the International Court of Justice to equitable maritime boundary delimitation (2005) 17 HYIL 95, 111-112; Yoshifumi Tanaka ‘Reflections on maritime delimitation in the Cameroon/Nigeria case (2004) 53: 2 ICLQ 369, 388-390.

¹¹⁵ *Arbitration between Barbados and The Republic of Trinidad and Tobago* (2006) available at <<http://www.pca-cpa.org>>.

¹¹⁶ *Ibid*, para 230

¹¹⁷ *Ibid*, para 231. See also Barbara Kwiatkowska ‘The landmark 2006 UNCLOS Annex VII Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits) Award’ [2007] 39:3 *The George Washington International Law Review* 573, 603

¹¹⁸ Award 2006, para 244

¹¹⁹ *Ibid*, para 306, mentioning also *Newfoundland v. Nova Scotia*, Award of the Tribunal in the Second Phase, 26 March 2002, para 2.28.)

departure¹²⁰, and the Tribunal adjusted the last segment in accordance with the disparity in coastal lengths between the parties¹²¹. It is notable that although the main issue was that of proportionality, as the coast of Trinidad is approximately eight times longer than that of Barbados, the Arbitral Tribunal modified only slightly the provisional equidistance line¹²². Therefore again it is clear that the equidistance line is to be modified only in exceptional circumstances.

The equidistance/relevant circumstances principle was also used in the case concerning the delimitation of the maritime boundary between Guyana and Suriname (2007)¹²³. It must be observed that, contrary to other cases, neither party to the case considered that the provisional equidistance line represented an equitable delimitation as required by international law, due to the geographical circumstances of the maritime area to be delimited¹²⁴; yet still the Tribunal effected the delimitation according to the equidistance.

However, a departure from this trend may be observed in the ICJ judgment in the case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras, 2007)¹²⁵, in which the Court stated that the equidistance method “*does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate*”¹²⁶. Besides, neither Party had called for a provisional equidistance line as the most suitable method of delimitation¹²⁷. However, it should be noted that the ICJ applied in that case the bisector- “*the line formed by bisecting the angle created by the linear approximation of coastlines*”- as a substitute method only after finding it “*impossible for the Court to identify base points and construct a provisional equidistance line [...] delimiting maritime areas off the Parties’ mainland coasts*”¹²⁸. Indeed, it stated that in such a

¹²⁰ Ibid, para 265

¹²¹ Ibid, paras 294, 316, 350, 379

¹²² Ibid, paras 371-373. See P. J. Kozyris, ‘Islands in the Recent Maritime Adjudication’ [2008] 39:4 Ocean Development and International Law, 331-332.

¹²³ *Arbitration between Guyana and Suriname* (2007) available at www.pca-cpa.org, paras 342,352, 357, 377, 392

¹²⁴ Award 2007, para 373

¹²⁵ *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* [2007] ICJ Rep 659.

¹²⁶ Ibid, para 272

¹²⁷ Ibid, para 275

¹²⁸ Ibid, paras 280, 287

case “the bisector method may be seen as an approximation of the equidistance method”¹²⁹. This judgment has been criticized, as it could be supported that the difficulty of identifying basepoints is not insurmountable, and in any case because it undermines the predictability of the law of maritime delimitation.¹³⁰

Nonetheless, the prevalence of equidistance was soon confirmed by recent decisions of international courts and tribunals. In the Maritime Delimitation in the Black Sea case (Romania v. Ukraine, 2009)¹³¹ the Court, after having identified the relevant coasts, applied a three-stage methodology by drawing a provisional equidistance line between the adjacent and opposite coasts of the Parties, making adjustments based on relevant circumstances in order to achieve an equitable result, which was then assessed on the basis of proportionality.¹³²

More recently, in the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal¹³³, the International Tribunal for the Law of the Sea in its first maritime delimitation case and the first decision delimiting the continental shelf beyond 200 n.m.¹³⁴, noted that jurisprudence had developed in favour of the

¹²⁹ Ibid, para 287. Furthermore, it noted that “The bisector method comparably [to equidistance] seeks to approximate the relevant coastal relationships, but does so on the basis of the macro-geography of a coastline as represented by a line drawn between two points on the coast. Thus, where the bisector method is to be applied, care must be taken to avoid “completely refashioning nature” (ibid, para 289).

¹³⁰ Separate Opinion Judge Ranjeva para 10; Dissenting Opinion of Judge Torres Bernárdez, para 128. See analytically Yoshifumi Tanaka ‘Reflections on Maritime Delimitation in the Nicaragua/Honduras case’ (2008) 68:4 ZaöRV 903, who notes also the existence of Art. 7 para 2 LOSC and states that other cases in which the bisector method was used are not appropriate precedents for that judgment (ibid, 928-931). Moreover, he criticizes the bisector method for lack of scientific methodology for drawing general direction of the coast and for lack of legal ground (ibid, 932-934).

¹³¹ *Maritime Delimitation in the Black Sea case (Romania v. Ukraine)*, [2009] ICJ Rep 61

¹³² Ibid, paras 115-122 *Maritime Delimitation in the Black Sea case (Romania v. Ukraine)*, ICJ Reports 2009, p. 206. It is notable that the decision of the Court in this respect was unanimous. See also Coalter G. Lathrop, ‘Maritime Delimitation in the Black Sea’ [2009] 103 AJIL (2009) 543-549; Alex Oude Elferink, ‘Maritime Delimitation in the Black Sea’ The Hague Justice Portal, available at www.haguejusticeportal.net, 1-4; Nilufer Oral ‘International Court of Justice: Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)’ (2010) 25:1 International Journal of Marine and Coastal Law 115, who notes the absence of reference in the judgment to the customary or not character of equidistance (ibid, 130); Yoshifumi Tanaka ‘Reflections on maritime delimitation in the Romania/Ukraine case before the International Court of Justice’ (2009) NILR 397, 419-420, who noted that the three stage methodology was a variation of the corrective equity approach developed through jurisprudence.

¹³³ *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) (Judgment of 14 March 2012)* ITLOS Rep 2012. See Konstantinidis Ioannis ‘Dispute settlement in the Law of the Sea, the Extended Continental Shelf in the Bay of Bengal and the CLCS: some preliminary observations on the basis of the Case Bangladesh/Myanmar before the International Tribunal for the Law of the Sea’ [2011] 1:2 Aegean Review of the Law of the Sea and Maritime Law 267-285.

¹³⁴ Although the Parties’ submissions were still pending before the Commission on the Limits of the Continental Shelf. Thus, apart from the concavity and the role of geology, a similarity of the ITLOS

equidistance/relevant circumstances method¹³⁵ and followed the three-stage approach of the Black Sea case¹³⁶. Bangladesh argued that, because of the specific configuration of its coast in the northern part of the Bay of Bengal and of the double concavity characterizing it, the Tribunal should apply the angle-bisector method in delimiting the maritime boundary; however ITLOS just adjusted accordingly the provisional equidistance line, deflecting it at the point where it began to cut off the seaward projection of the Bangladesh coast, in order to achieve an equitable solution¹³⁷. Furthermore, in the view of the Tribunal, the delimitation method to be employed for the continental shelf beyond 200 n.m. should not differ from that within 200 n.m. and that, accordingly, the equidistance/relevant circumstances method continued to apply for the delimitation of the continental shelf beyond 200 n.m.¹³⁸ Moreover, having considered the concavity of the Bangladesh coast to be a relevant circumstance for the purpose of delimiting the EEZ and the continental shelf within 200 n.m., the Tribunal found that this relevant circumstance had a continuing effect beyond 200 n.m.¹³⁹. Thus, it adjusted the equidistance line delimiting both the EEZ and the continental shelf within 200 n.m. between the Parties, in order to follow in the same direction beyond the 200 n.m. limit of Bangladesh¹⁴⁰. Therefore the ITLOS decision dispersed any fears of fragmentation of international law on maritime delimitation¹⁴¹.

Decision with the North Sea Continental Shelf case was that the judge had to exercise “law-making” functions as to the delimitation beyond 200 n.m., in lack of judicial precedent (see Irini Papanicolopulu ‘From the North Sea to the Bay of Bengal: Maritime Delimitation at the International Tribunal for the Law of the Sea’ available at www.ejiltalk.org, published on March 23 2012).

¹³⁵ ITLOS Rep 2012, para 238

¹³⁶ Ibid, para 240

¹³⁷ Ibid, paras 292-3, 231, 323-9. See also Joint Declaration of Judges Ad hoc Mensah and Oxman, as well as the Joint Declaration of Judges Nelson, Chandrasekhara Rao and Cot, according to which ‘*considerations of equity come into play only in the second phase of the delimitation, as they necessarily carry an important element of subjectivity*’. *Contra* Dissenting Opinion Judge Lucky p. 54-55.

See however D. H. Anderson ‘Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)’ [2012] 106 AJIL 817, who supports that while the Tribunal drew provisionally the equidistance line, when it adjusted this it appeared to have adopted a different method, the azimuth of 215° proposed by Bangladesh as an angle bisector (ibid, 823); similarly Separate Opinion Gao paras 53 *et seq.*; Separate Opinion Cot p. 7-9.

¹³⁸ Ibid, paras 454-455.

¹³⁹ Ibid, para 461

¹⁴⁰ Ibid, para 462

¹⁴¹ Judge Treves, Declaration para 2; Papanicolopulu (n 134).

Lastly, in the maritime delimitation case between Nicaragua and Colombia (2012)¹⁴², since Colombia is not a party to LOSC, applicable law was customary international law¹⁴³. The Court acknowledged that the three-stage process is not to be applied in a mechanical fashion, and repeated the Nicaragua/Honduras case, emphasizing however that, unlike the latter, the case before it was not one in which the construction of such a line was not feasible.¹⁴⁴ Thus, again the Court proceeded in accordance with its standard method, beginning with the construction of a provisional median line, which it later adjusted in order to take into account as relevant circumstances the great disparity in the lengths of the relevant coasts and the avoidance, as much as possible, of a State being cut off or blocked from the maritime areas into which its coastline projects¹⁴⁵.

V. CONCLUSION

The delimitation of the continental shelf and the EEZ is indeed the most disputed issue in the international law of the sea¹⁴⁶. It can be observed that the law of maritime delimitation is a succession of two contrary approaches which aim at the achievement of an equitable solution¹⁴⁷. The approach of “autonomous” equity- which does not accept the priority of the equidistance method- aims at ensuring a greater flexibility, while the approach of “corrective” equity- according to which the equidistance method has to be applied in the first stage of the delimitation process and may be adjusted when this is required by relevant circumstances- aims at legal certainty. As far as jurisprudence is concerned, although in the beginning it tended to prefer the approach of “corrective” equity in maritime delimitations between States the coasts of which are opposite each other and the approach of “autonomous” equity in maritime delimitations between States the coasts of which are adjacent, since the judgments in the maritime delimitation cases between Qatar and Bahrain and between Cameroon and Nigeria, international courts and tribunals have accepted equidistance as the starting point even for delimitations between States the coasts of which are adjacent.

¹⁴² *Territorial and Maritime Dispute (Nicaragua v. Colombia)* [2012] available at <<http://www.icj-cij.org/icjwww/idocket.htm>>

¹⁴³ *Ibid*, para 114

¹⁴⁴ *Ibid*, paras 194-5

¹⁴⁵ *Ibid*, paras 199, 211, 216, 232

¹⁴⁶ Scovazzi (n 6) 194

¹⁴⁷ Tanaka (n 38) 454

Thus, similarly to State practice- which is however not always consistent-¹⁴⁸ the law of maritime delimitation was developed by jurisprudence from the coexistence of the two rules in the context of LOSC -namely the “equidistance/special circumstances” rule which was stipulated for the delimitation of the territorial sea and the “equity/relevant circumstances” rule which was stipulated for the delimitation of the continental shelf and EEZ¹⁴⁹- towards their unification¹⁵⁰ in the approach of equidistance/relevant circumstances rule. This unification of the law of maritime delimitation was brought about in four ways¹⁵¹: a) the unification of the interpretation of Art. 6 of the 1958 Geneva Convention on the Continental Shelf with that of Art. 83 LOSC; b) the unification between customary international law and treaties; c) the unification of the law of the maritime delimitation in the case of the territorial sea, the EEZ and the continental shelf; and d) the unification of the applicable law for the delimitation of opposite and adjacent coasts. Therefore, it seems that the indeterminacies of the law of maritime delimitation have been restricted and that the priority of equidistance has been acknowledged¹⁵².

Moreover, it is now accepted that there is no important difference between the circumstances which could be defined as “special” and those which could be defined as “relevant”, in the same way that there is actually no difference between “equidistance” and “equitable principles”¹⁵³. Besides, as it has been observed in theory, “*concrètement, même dans le cadre de la règle equidistance-circonstances spéciales, c’ est seulement après avoir examiné toutes les circonstances ‘pertinentes’*”

¹⁴⁸ It has been observed (Tanaka [n 38] 448-449) that in continental shelf delimitations between States the coasts of which are opposite, the percentage of bilateral agreements that are based on the equidistance method for the whole or part of the delimitation is above 80%. For the delimitation of the continental shelf between States the coasts of which are adjacent over 40% of the bilateral agreements resorted to the equidistance method, for the whole or part of the delimitation. As far as the delimitation between mixed coasts is concerned, around 90% of the agreements are based on the equidistance method for all or part of the delimitation. When it is about the delimitation of a single maritime boundary, the above results are slightly increased. Therefore it seems that also State practice confirms the equidistance rule for the delimitation of maritime boundaries. See also Churchill and Lowe (n 22) 197; and analytically J.I. Charney and L.M. Alexander (eds.) *International Maritime Boundaries* Vol. I- V (Martinus Nijhoff 1991, 1997, 2002, 2005).

¹⁴⁹ Jean Pierre Quéneudec, ‘Les Principes dégagés par le Juge et le Rôle des Circonstances Pertinentes en matière de Délimitation Maritime’, in *Le Processus de Délimitation Maritime, Étude d’ un Cas Fictif* (Colloque, Monaco 2003) 282

¹⁵⁰ Ibid, 283; Laurent Lucchini, ‘Le Contentieux de la Délimitation Maritime et l’ Apport de la Jurisprudence’, in *Le Plateau Continental dans ses Rapports avec la Zone Économique Exclusive* (Symposium International de Meknès, Pedone 2005) 28-29.

¹⁵¹ Tanaka (n 38) 454; Lucchini, (n 150) 23, 28-30.

¹⁵² Christos Rozakis ‘The Greek Continental Shelf’ in Haritini Dipla, Christos Rozakis (eds.) *Law of the Sea and its Application in Greece* (in Greek, I. Sideris Publications Athens 2004) 224.

¹⁵³ Quéneudec (n 149) 283

que l' on saura s' il existe ou non dans le cas d' espèce des circonstances 'spéciales' justifiant une delimitation autre qu' équidistante"¹⁵⁴.

Indeed, as Judge Guillaume, President of the ICJ observed:

*"Thus, the law on maritime delimitation was completely reunified. Whether it be for the territorial sea, the continental shelf or the fishing zone, it is an equitable result that must be achieved. Such a result may be achieved by first identifying the equidistance line, then correcting that line to take into account special circumstances or relevant factors, which are both essentially geographical in nature"*¹⁵⁵.

This unification of the law of maritime delimitation is besides necessary for the following reasons¹⁵⁶. First of all, because of the excessive subjectivity of the "autonomous" notion of equity, which may lead to *ex aequo et bono* judgments. Besides, as Legault and Hankey have noted, "for decision-makers, the choice of means or methods of translating the geographical and other circumstances into a precise line is, as ever, the most difficult issue in the law of maritime boundaries"¹⁵⁷. On the contrary, the important advantage of the approach of "corrective" equity is the greater legal certainty, because of the recognition of the legal character of an objective method, the equidistance method. Equity is only examined in a second stage, in order to ascertain whether the provisional equidistance line leads to results incompatible with equity¹⁵⁸. Secondly, the equidistance method is the same, regardless of whether the coasts are adjacent or opposite each other or mixed. Thirdly, the approach of "autonomous" equity, according to which "the application of criteria of equity must lead to an equitable result", as Judge Oda pointed out in the Tunisia/Libya case, "[...] merely amounts to an uninformative rearrangement of the terms of the main question

¹⁵⁴ Weil (n 37) 223

¹⁵⁵ Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001, p. 8-9

¹⁵⁶ Tanaka (n 38) 452-453

¹⁵⁷ Leonard Legault and Blair Hankey, "Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation", in Charney and Alexander (eds) *International Maritime Boundaries* (Martinus Nijhoff 1993) 206. As Churchill and Lowe have pointed out "*In stating what customary law is, the International Court and tribunals have been faced with the almost impossible task of trying to formulate rules of sufficient generality to be applicable to a wide variety of geographical circumstances, while at the same time being of sufficient precision to allow the boundary to be reasonable easily determined in the particular case*" (Churchill and Lowe [n 22] 185). See also Oscar Schachter 'Linking Equity and Law in Maritime Delimitation' in *Liber Amicorum Oda* (n 21) 1163, 1167-8.

¹⁵⁸ Weil (n 37) 180: "*Dans cette conception correctrice, l' équité incline vers une certaine objectivité. Ce n' est pas le sentiment de la justice morale qui conduit à préférer la règle du cas individuel à celle du cas normal, mais la constatation objective d' un résultat prima facie inapproprié. [...]. L' équité, dans cette première conception, est une équité selon la raison plutôt qu' une équité selon le cœur.*"

put to it [the Court]”¹⁵⁹. The real issue is that of the method which should be applied in order to achieve an equitable result.

It should be noted at this point that a crucial issue related to equidistance is the role of islands in the delimitation process¹⁶⁰, as they have often be treated by jurisprudence as mere relevant circumstances. It is very doubtful whether such an approach is in accordance with Art. 121 LOSC, and therefore legal certainty can only be achieved if equidistance is constructed by taking into account the entitlement of islands to full maritime zones.

Thus, equidistance constitutes the central concept of the maritime delimitation and means more than its practical advantages, namely its simplicity and its *prima facie* equitable character¹⁶¹: it is not only a method but has the value of a legal rule¹⁶². In fact, it could be supported that in the more recent decisions of international courts and tribunals there is an implicit acceptance of equidistance as a rule of international law. Even if it is accepted that the relevant State practice and *opinio juris* are not strong enough in order to lead to its acceptance as a rule of customary international law¹⁶³, the international jurisprudence, which is according to Article 38 para 1 d) of the Statute of the ICJ a subsidiary means for the determination of the rules of law, could be considered to serve as a means for ascertaining the content of “international law, as referred to in Article 38 of the Statute of the International Court of Justice” constituting the rule on delimitation stipulated in Arts. 74 and 83 LOSC. The fact that the vast majority of decisions by a multitude of international courts and tribunals- by the ICJ, by arbitral tribunals and, recently, by ITLOS- has resorted, explicitly or implicitly, to equidistance in order to effect the delimitation of maritime boundaries, proves that there is a consistent jurisprudence of international courts and tribunals which, through an *intra legem* interpretation of Arts. 74 and 83 LOSC, leads to the acceptance of equidistance as a rule of international law, which can be diverted from only when relevant circumstances require so.

¹⁵⁹ Dissenting Opinion Oda, para 1.

¹⁶⁰ See analytically Haritini Dipla, *Le régime juridique des îles dans le droit international de la mer* (Presses Universitaires de France 1984)

¹⁶¹ Weil (n 37) 86; Lucchini- Vœlckel, Tome II (n 30) 152-153

¹⁶² Weil (n 37) 302

¹⁶³ And it is true that when international courts and tribunals examined customary international law in maritime delimitations they did not pay enough attention to the two elements of customary international law; they have referred instead to their own case law (See Alberto Alvarez-Jiménez ‘Methods for the Identification of Customary International Law in the International Court’s Jurisprudence: 2000-2009’ [2011] 60:3 ICLQ 681, 708-710).

Besides, since it has been confirmed, as referred to above¹⁶⁴, that in the great majority of cases States have used the equidistance line in their maritime delimitations, it is difficult to consider why the international judge should refuse to incorporate this element of State practice in the determination of the customary rules of international law governing maritime delimitation. This State practice certainly does not show that States consider equidistance as legally compulsory, but nevertheless that they consider it as the most suitable, especially given the danger of equity leading to subjectivity¹⁶⁵. Besides, direct sources of international law and judicial decisions are closely interrelated and influence one another¹⁶⁶.

In any event, in most of the maritime delimitation decisions, the international courts or the arbitral tribunals have emphasized the role of jurisprudence for the purpose of ascertaining the rules of international law which govern the subject of maritime delimitation¹⁶⁷. Doctrine has gone even further: as Quintana has observed “*the law-creating role of decisions of international courts and tribunals is particularly noticeable in the field of maritime delimitation as a result of two concurring phenomena: on the one hand, the erosion of a precise rule which could be applied to any interstate maritime delimitation, and on the other hand, a separate and parallel process of emergence of an alternative rule of a generic nature, the application of which hardly guarantees the solving of any dispute of this kind, as is virtually devoid of any substantive content*”¹⁶⁸ the first referring obviously to equidistance and the second to the equitable principles/relevant circumstances rule. Judge Jennings has also described the law of maritime delimitation as “*judge-made law*”¹⁶⁹ and Weil has

¹⁶⁴ n 148

¹⁶⁵ Weil [n 37] 167

¹⁶⁶ Juan J. Quintana, ‘The International Court of Justice and the Formulation of General International Law: The Law of Maritime Delimitation as an Example’ in A.S. Muller et al. (eds.) *The International Court of Justice: Its Future Role After Fifty Years* [Martinus Nijhoff 1997] 372.

¹⁶⁷ ICJ Rep 1984, para 83, 95; ICJ Rep 1993, paras 54-55; Award 1999, para 132; ICJ Rep 2001, para 231; Award 2006, para 222; Award 2007, paras 335, 342, ITLOS Rep 2012, paras 225-6; ICJ Rep 2012 para 114

¹⁶⁸ Quintana (n 166) 373. As the same writer points out the second rule has not been developed through State practice and *opinio juris*, but through the case law of international courts and tribunals (ibid).

¹⁶⁹ Robert Y. Jennings ‘What is International Law and How Do We Tell It When We See It?’ (XXXVII Annuaire Suisse de Droit International 1981) 59, 68. See also Juan J. Quintana (n 166) 373; Laurent Lucchini ‘La Délimitation des Frontières Maritimes’ in Rainer Lagoni and Daniel Vignes (eds.) *Maritime Delimitation* (Martinus Nijhoff 2006) 1, 8-9.

The reasons for such an approach have been identified in the classic work by Lauterpacht (Hersch Lauterpacht, *The Development of International Law by the International Court* [CUP 1958])

See also Scovazzi, (n 6) 194, who considers that it is about an effort to determine the rule itself, rather than a question of interpretation, which presupposes an alternative between two or more meanings of a given rule; also the Declaration of Judge Wolfrum in the Bangladesh/Myanmar case.

stated that¹⁷⁰, “*La conquête de la délimitation maritime par le droit n’est en fin de compte l’œuvre ni de la convention ni de la coutume, mais celle de la jurisprudence qui, loin d’apparaître comme une source subsidiaire du droit international, remplit ici la mission d’une source primaire et directe de droit, même si elle a choisi modestement d’en porter le crédit au compte du droit coutumier*”. Indeed, the case law on maritime delimitations constitutes the richest contribution of the ICJ to the law of the sea, its impact consisting, on the one hand in the clarification of rules and principles of delimitation, and, on the other hand in the unification of the rules on the of all maritime zones¹⁷¹. Thus, the choice of the drafters of LOSC to leave Arts. 74 and 83 vague, led to the progressive development of methods by the jurisprudence of international courts and tribunals, and their subsequent consolidation into rules of customary international law¹⁷².

Consequently, the fundamental issue of the law of maritime delimitation remains how to strike a balance between legal certainty, which is ensured through the application of the equidistance principle, and flexibility, which is ensured through the taking into account of relevant circumstances. However, it can be supported that this balance is ensured if equidistance is accepted as a rule of international law, which may be adjusted only if relevant circumstances require so.

¹⁷⁰ Weil (n 37) 13. See also Lucchini- Völckel, Tome II, (n 30) 199, where there is reference to “*fonction ‘normative’ du juge*”; Ioannou-Strati (n 5) 325; Hugh Thirlway, ‘Judicial Activism and the International Court of Justice’ in *Liber Amicorum Oda* (n 21) 75-105.

¹⁷¹ Haritini Dipla ‘The Role of the ICJ and ITLOS in the Law of the Sea’ in Anastasia Strati, Maria Gavouneli & Nikos Skourtos (eds.), *Unresolved issues and New Challenges to the Law of the Sea* (Martinus Nijhoff Publishers 2006) 235, 237. See also Robin R. Churchill ‘The Role of the International Court of Justice in Maritime Boundary Delimitation in A.G. Oude Elferink and D.R. Rothwell (eds.) *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff 2004) 125- 142; Francisco Orrego Vicuña ‘The role of the International Court of Justice and other tribunals in the development of the law of maritime delimitation’ in *Implementation of the Law of the Sea Convention through International Institutions* (Proceedings of the Law of the Sea Institute annual conference Vol. 23, 1990) 601-625; Jiuyong Shi ‘Maritime Delimitation in the Jurisprudence of the International Court of Justice’ [2010] 9:2 Chinese Journal of International Law 271, 290-1.

¹⁷² Scovazzi (n 6) 199; Quintana (n 166) 378-9; Natalie Ros, ‘Les méthodes juridictionnelles de délimitation maritime’ in Rafael Casado Raigón et Giuseppe Cataldi (eds.) *L’évolution et l’état actuel du droit international de la mer: mélanges de droit de la mer offerts à Daniel Vignes* (Bruylant 2009) 798; Alain Pellet ‘Article 38’ in Andreas Zimmermann et als (eds.) *The Statute of the International Court of Justice- A Commentary* (OUP 2012) 790.