2013

One step forwards, two steps back? Progress and challenges in the delimitation of maritime boundaries since the drafting of the United Nations Convention on the Law of the Sea

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Publication Details

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Keywords
forwards, two, steps, one, back, step, progress, challenges, delimitation, maritime, boundaries, since, drafting, united, nations, convention, law, sea

Disciplines
Arts and Humanities | Law

Publication Details

This book chapter is available at Research Online: http://ro.uow.edu.au/lhapapers/1233
One Step Forwards, Two Steps Back?:


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Abstract
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1. Introduction
The provisions of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982 dealing with the delimitation of maritime boundaries are inherently and intentionally imprecise. The constructive ambiguity evident in the UNCLOS rules on boundary delimitation reflected the distinct lack of consensus on this issue when the Convention was being drafted. The advent of the Convention nonetheless led to a significant shift in approach to maritime boundary delimitation. Subsequent developments, as reflected in the jurisprudence of international courts and tribunals and through State practice, have seen approaches to this issue progressively evolve and clarify. This paper traces progress and highlights challenges in the delimitation of maritime boundaries over the past three decades. It is suggested that while a clearer overall approach to delimitation has emerged, the practical implementation of the most recently emergent approach to maritime boundary delimitation is by no means free from uncertainty.

The provisions of UNCLOS dealing with the delimitation of maritime boundaries offer scant guidance as to how maritime delimitation is to be achieved in practice. In particular, while the significant extent of continental shelf and exclusive economic zone (EEZ) right have resulted in broad areas of the oceans being subject to overlapping maritime jurisdictional claims, the relevant provisions of UNCLOS offer no preferred method of boundary delimitation. The delimitation provisions contained in UNCLOS can, however, be regarded as being reflecting customary international law and have been subsequently developed through the jurisprudence of international courts and tribunals.  

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Delimitation of the Territorial Sea
Where overlapping territorial seas claims exist, Article 15 of UNCLOS applies. This article states that:

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

For the delimitation of the territorial sea, therefore, a clear method of delimitation is favoured. That is, the construction of a median or equidistance line, equating to a geometrically and geodetically exact expression of the mid-line concept. Departure from the median line may, however, be justified on the basis of the existence of an “historic title or other special circumstances” in the area to be delimited. While Article 15 provides no further definition of what is meant by these terms, it is notable that when the provisions relating to the delimitation of the territorial sea were discussed at the Third United Nations Convention on the Law of the Sea (UNCLOS III), the United Kingdom suggested that examples of special circumstances might include the presence of a navigational channel or the presence of small islands. This approach has been termed the “equidistance/special circumstances” method of delimitation by international courts and tribunals. The International Court of Justice (ICJ) has also stated that Article 15 “is part of customary [international] law.”

3 Article 3 of UNCLOS provides that states have the right to establish a territorial sea “not exceeding 12 nautical miles” measured from its baselines. Article 15 of UNCLOS represents a near verbatim repetition of Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone. See, UNCLOS, supra note 3, art. 3.

4 The terms “equidistance line” and “median line” are used interchangeably in the present context although it is recognised that the latter terms is more commonly applied to equidistance lines between opposite coastlines.


6 UNCLOS, supra note 3, art. 15.


8 See, for example, the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), 2002 I.C.J. 303 ¶ 288 [hereinafter Cameroon/Nigeria Case].

9 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.) 2001 I.C.J. 40, ¶175 (Mar. 16) [hereinafter Qatar/Bahrain Case].
Delimitation of the EEZ and Continental Shelf

Articles 74 and 83 of the UNCLOS, dealing with delimitation of the continental shelf and EEZ respectively, call in identical general terms for delimitation to be “effected by agreement” or, pending agreement, “provisional arrangements of a practical nature” may be entered into for a “transitional period”.10 Other than a general statement that such agreements are to be reached on the basis of international law in order to achieve “an equitable solution”, UNCLOS is silent concerning how agreements are to be reached in practical terms.11 In particular, no preferred method of delimitation is indicated. This contrasts sharply with the relevant provisions of the 1958 Convention on the Continental Shelf which stated, analogously to the rules on the delimitation of the territorial sea, that delimitation of the continental shelf was to be effected by the use of median lines unless agreement to the contrary or “special circumstances” existed that justified an alternative approach.12

The marked shift away from equidistance as a preferred method of delimitation, at least with respect to the delimitation of the continental shelf and newly introduced EEZ, resulted from lack of consensus at UNCLOS III on the inclusion of equidistance as a preferred method of delimitation for the continental shelf and EEZ. This, in turn, translated into the ambiguous wording contained in UNCLOS.

International courts and tribunals have termed the method of delimitation applicable to EEZ and continental shelf delimitation as contained in Articles 74 and 83 (and in customary international law) as the equitable principles/relevant circumstances method. For example, in the Cameroon/Nigeria Case the ICJ stated explicitly that:

The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method.13

The Court went on to note that this method is “very similar to the equidistance/special circumstances” method applicable in delimitation of the territorial sea.14

The vague nature of these articles, which were among the last to be agreed at UNCLOS III, resulted from disagreement between the negotiating States. The difference of view was essentially between two camps – whilst some States preferred an “equidistance/special circumstances” rule, others favoured delimitation on the basis of “principles of equity.” The end result was compromise text which places particular emphasis on the objective of the delimitation, utilising an alternative form of words not reflective of either side’s view and thus acceptable to both.15 As the Arbitral Tribunal in the Eritrea-Yemen Arbitration stated in reference to Article 83, this was “a last minute endeavour…to get agreement on a very controversial matter”, and therefore, “consciously designed to decide as little as possible.”16

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10 UNCLOS, supra note 3, arts. 74 & 83.
11 UNCLOS, supra note 3, arts. 74 & 83.
13 Cameroon/Nigeria Case, supra note 8, at ¶ 288.
14 Id.
15 Moving Beyond Disputes, supra note 1, at 11-12.
The UNCLOS provisions relating to maritime boundary delimitation provide limited substantive guidance to those tasked with seeking a maritime boundary. These provisions can therefore be interpreted in contrasting ways. If one takes a ‘glass half-full’ perspective, they can be viewed as offering great flexibility to coastal States. The counterpoint is that the UNCLOS provisions on the delimitation of the continental shelf and EEZ are overly vague, providing scant clear guidance, and consequently offer considerable scope for conflicting interpretations leading to maritime boundary disputes. However, the subsequent practice of international courts and tribunals, particularly in recent years, has served to elaborate on the minimalist foundations contained in the text of UNCLOS itself.

3. The Evolution of Ocean Boundary Making

In light of the fundamental flexibility or, alternatively, the inherent vagueness of the UNCLOS provisions on the delimitation of maritime boundaries, it is unsurprising that State practice in respect of the delimitation of maritime boundaries is characterised by diversity.\(^{17}\) Indeed, the most systematic survey of State practice in maritime delimitation to date reached the conclusion that no normative principle of international law had developed that would lead inexorably to determining the specific location of any particular maritime boundary line.\(^{18}\) The lack of specificity in the approach of the ICJ and other international tribunals in the past led to their decisions being criticised for advancing “numerous approaches, rules and concepts,” but failing to articulate clear principles, instead producing “a bewildering array of quasi-principles” leading to considerable uncertainty regarding their delimitation decisions.\(^{19}\)

Although the factors, or potentially relevant circumstances, that need to be taken into consideration in the delimitation equation, and lead to the adjustment of, for example, a provisional equidistance line, are theoretically limitless, nonetheless, it has become abundantly clear from the practice of States allied to the rulings of international courts and tribunals, that coastal geography has a critical role to play in the delimitation of maritime boundaries. Aspects of coastal geography that have proved especially influential include the configuration of the coasts under consideration, the relative coastal lengths and the potential impact of outstanding geographical features, notably islands.\(^{20}\)

The salient role of coastal geography in maritime boundary delimitation is directly linked to the widespread use of equidistant lines. Equidistance lines have proved extremely popular as a method or basis for maritime delimitation in practice. The construction of equidistance lines offer considerable advantages – if there is agreement on the baselines to be used, there is only one strict equidistance line and this provides the appeal of mathematical certainty and objectivity as well as affording coastal States the not inconceivable attraction of jurisdiction

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18 *Id.* at 9-10, see also JONATHAN I. CHARNEY & LEWIS M. ALEXANDER, *INTERNATIONAL MARITIME BOUNDARIES xlii* (1993) [hereinafter INTERNATIONAL MARITIME BOUNDARIES].
over those maritime areas closest to them. Equidistance lines can also be flexibly applied and may be simplified, adjusted or modified to take specific geographical circumstances into account.\(^2\) In practice the equidistance method has proved more popular than any alternative method and most agreed maritime boundaries are based on some form of equidistance.\(^2\) Consequently, equidistance lines are often constructed at least as a means of assessing a maritime boundary situation or as the starting point for discussions in the context of maritime boundary negotiations.\(^2\) Such lines have also frequently been adopted as the basis for a final delimitation line.

In contrast, the past jurisprudence of international courts and tribunals would seem to indicate that factors such as marked differences between the land areas belonging to each State involved would be unlikely to prove influential in this context.\(^4\) Similarly, socio-economic arguments based on disparities in the wealth and size of population of the States concerned that is, that one party to a dispute is relatively economically disadvantaged as compared with the other party to the dispute, have received short shrift before the ICJ. On more than one occasion the Court has held that such factors are not of relevance as they are liable to significant change over time. For example, in the Tunisia/Libya Case, Tunisia argued its poverty relative to Libya. The Court’s responded that:

...these economic considerations cannot be taken into account for the delimitation of the continental shelf appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource.\(^5\)

That said, it can be observed that the Court has tended to be reluctant to entirely dismiss potential relevant circumstances (however, see below regarding geophysical factors). Thus, with respect to issues of a socio-economic nature, the Court left the door slightly ajar to consideration of such factors as relate to fishing, navigation, security or seabed resources as a test of the equitability of the result. Indeed the ICJ ruled that they are generally to be disregarded unless to do so would entail “catastrophic repercussions” for the States concerned and this view was articulated in the Gulf of Maine Case.\(^6\) Similarly, it was on the basis of this approach that the Court, when considering such issues in the case between Denmark and Norway concerning maritime boundary delimitation in the area between Greenland and Jan Mayen, took into account fisheries issues in the shape of a migratory stock of capelin in the


\(^{2}\) Method, Oppositeness & Adjacency, supra note 24, at 205. For example, of 157 maritime boundary agreements concluded by the year 2000, 124 of them (79 per cent) were based on some form of equidistance line. See also, MARITIME POLITICAL BOUNDARIES, supra note 23, at 239.

\(^{23}\) Carleton and Schofield, 2002: 54-56.


area to be delimited.\textsuperscript{27} This resulted in the final delimitation line being shifted eastwards of the Court’s provisional equidistance line and the division of Zone 1 into two parts so as to ensure equitable access to the fishery.\textsuperscript{28} Nevertheless, according to this view the delimitation “reaffirmed the irrelevance of socio-economic factors (other than resource-related factors) to equitable maritime delimitation.”\textsuperscript{29}

In a similar vein, while international courts and tribunals have not wholly dismissed arguments that a \textit{de facto} boundary line is already in existence based on the past conduct of the parties, they have tended to err on the side of caution. For example, in the 2007 \textit{Nicaragua-Honduras Case} the ICJ ruled that evidence of a tacit legal agreement “must be compelling.”\textsuperscript{30} The International Tribunal on the Law of the Sea (ITLOS) shared this view that there should be a ‘high bar’ in terms of evidence that such a \textit{de facto} or tacit agreement exists through its decision in the \textit{Bay of Bengal Case} that Bangladesh’s arguments, particularly concerning documents arising from bilateral negotiations indicating agreement on a particular boundary line for territorial sea delimitation, fell short of proving the existence of such an agreement.\textsuperscript{31}

### 4. A Key Impact of UNCLOS – the Demise of Geophysical Factors in Delimitation

The advent of the Convention did induce a major shift in thinking related to ocean boundary making. It led directly to a decline in the significance of geophysical factors to the delimitation of maritime boundaries, or at least in respect of the delimitation of the EEZ, has declined in importance. Where once arguments based on concepts of “natural prolongation” expressed through the composition (geology) and configuration (geomorphology) of the seafloor were determinative factors in the delimitation of, particularly, continental shelf boundaries,\textsuperscript{32} to a large extent this is no longer the case.

In the Libya-Malta Case of 1985 before the ICJ, Libya contended that a “Rift Zone” lay between the parties of such a profound character, described as a “fundamental discontinuity”, that it should form the basis of the continental shelf boundary between the two States.\textsuperscript{33} Ultimately, however, the Court decided to do away with geophysical arguments in their

\begin{itemize}
\item \textsuperscript{27} Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (Jun. 14) [hereinafter Jan Mayen Case].
\item \textsuperscript{28} B. Kwiatkowska, \textit{Equitable Maritime Boundary Delimitation as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Yewdall Jennings and Beyond}, 28 OCEAN DEV. & INT’L L.,91-145,105 (1997).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} \textit{Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras [2007], I.C.J. Reports 659}.
\item \textsuperscript{31} Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal, (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, [hereinafter Bay of Bengal Case], at 117-118.
\item \textsuperscript{32} The ICJ, through its Judgment in the North Sea Continental Shelf Cases, had introduced the concept of natural prolongation such that coastal States have rights over that part of the continental shelf that constitutes “a natural prolongation of its land territory” and determined that this should be a key consideration in delimiting the continental shelf. The ICJ ruled that: The ICJ ruled that: “delimitation is to be effected...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 another state.” See \textit{North Sea Continental Shelf Cases}, \textit{supra} note 12, at ¶ 101.
\item \textsuperscript{33} Continental Shelf (Libya v. Malta), 1985 I.C.J.,13, ¶ 36 (June 3), \textit{available at} http://www.icj-cij.org/docket/files/68/6415.pdf [hereinafter the Libya/Malta Case].
\end{itemize}
entirety, at least in relation to those areas within 200 nautical miles of the coast. The Court therefore found that, on the basis of “new developments in international law”, that is, the opening of the UNCLOS for signature in 1982 and the introduction of the EEZ concept, as there was less than 400 nautical miles between the parties’ coastlines, “the geological and geomorphological characteristics of those areas...are completely immaterial”, and that:

...since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding seabed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims.  

The Court’s decision was based on the development of the concept of the EEZ introduced as part of UNCLOS. Thus, whereas previously the geology and geomorphology of the seabed were regarded as highly influential considerations, the rise of the EEZ has led to a reassessment such that geophysical factors are essentially irrelevant to delimitation within 200 nautical miles of the coast. The introduction of the EEZ and the 200 nautical miles distance principle that this entails has effectively eliminated geophysical factors as relevant circumstances in the applicable equitable principles/relevant circumstances delimitation equation. This development has, with some irony, been referred to as little more than a “disguised throwback to equidistance.”

 Nonetheless, natural prolongation-based arguments persist, for example, Australia argues that much of the continental shelf underlying the Timor Sea is Australian rather than Indonesian or East Timorese on the basis of natural prolongations arguments. Similarly, both China and the Republic of Korea utilise natural prolongation-based arguments in the East China Sea. Indeed, Bangladesh advanced analogous arguments in the Bay of Bengal Case but to scant effect (see below). While a number of States do still base their continental shelf claims on such considerations, Bangladesh’s experience before ITLOS suggests that States relying on natural prolongation-inspired arguments in the context of a maritime boundary determined through binding third-party international judicial dispute resolution should be less than sanguine as to their chances of securing a successful outcome.

It is also the case that such factors potentially remain highly relevant to submissions relating to outer continental shelf limits beyond 200 nautical miles from the coast and to the delimitation of continental shelf boundaries on shared margins extending seawards of the 200 nautical miles EEZ limit. For example, it has been suggested that “after a hiatus since 1985, geological and geomorphological factors will re-emerge in the law of maritime delimitation

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34 Id. at ¶ 39. See also, K. Highet, The Use of Geophysical Factors in the Delimitation of Maritime Boundaries, INTERNATIONAL MARITIME BOUNDARIES 163-202, supra note 21, at 177 [hereinafter Geophysical Factors].

35 Geophysical Factors, supra note 35, 183.


of the outer continental shelf.”

However, once again the outcome of the Bay of Bengal Case suggests otherwise (see below).

Nevertheless, clearer guidance on maritime delimitation has emerged over time as to how international courts and tribunals approach the challenge of maritime boundary delimitation. This included the emergence of a two-stage approach of constructing an equidistance line in the first instance and then examining factors that might lead to its modification at the second stage. Further evolutions have recently taken place, however. In particular this can be seen through the lens of the ICJ’s ruling in the Black Sea Case of February 2009, the first maritime delimitation case brought before ITLOS, the Bay of Bengal Case of March 2012, at the time of writing, most recent ICJ decision involving maritime boundary delimitation, the Territorial and Maritime Dispute Case between Colombia and Nicaragua of November 2012.

5. Recent Developments

The Black Sea Case
In a notable development, in the Black Sea Case the Court articulated a three-stage approach to the delimitation of a maritime boundary. First, and “[i]n keeping with its settled jurisprudence on maritime delimitation”, a provisional delimitation line should be established using geometrically objective methods. In this context it was stated that “an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case” [emphasis added]. While a two-stage process, involving the construction of a provisional delimitation line based on equidistance and then consideration of factors that might lead to the adjustment of that provisional line in pursuit of the goal of an equitable result, had been applied on a number of occasions previously, this explicit preference for an equidistance line as the starting point for maritime delimitation marks a significant development as it contrasts with previous, rather more circumspect, statements on the part of the Court on this issue.

For example, in the Libya-Malta Case, the ICJ observed that: “The Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a median line, a

39 Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 61, ¶ 118 (Feb. 3)
40 Id. at ¶ 116.
41 Id.
provisional equidistance line must be drawn” [emphasis in original].\(^4^3\) Similarly, and more recently, in the Court’s Judgment in the Nicaragua/Honduras Case of 2007, the ICJ referred to the widespread use of equidistance lines in the delimitation of maritime boundaries and the merits, or “certain intrinsic value”, of this method of delimitation on account of its “scientific character and the relative ease with which it can be applied.” However, the Court reached the conclusion that “the equidistance method does not automatically have priority over other methods of delimitation” as “there may be factors which make the application of the equidistance method inappropriate” [emphasis added].\(^4^4\) Indeed, the ICJ concluded the particular circumstances of that case, where the starting point for the maritime boundary constituted the mouth of a river subject to substantial and rapid change in location over time thanks the accretion and erosion of sediments emanating from the river system made the application of equidistance impractical as such a line constructed now might well be rendered “arbitrary and unreasonable in the near future.”\(^4^5\)

It can, however, be observed that the provisional line drawn by the Court in the Black Sea Case was not a strict equidistance line from all features in the relevant area as the Court was selective regarding the basepoints to be used (see below). In the same manner in which the ICJ had previously ignored the Maltese islet of Filfla in the Malta/Libya Case (see below), the Court in the Black Sea Case decided not to utilise Serpents’ Island as a basepoint for the drawing of the provisional equidistance line. Giving “specific” attention to Serpents’ Island in the determination of the provisional equidistance line the Court stated:

In connection with the selection of base points, the Court observes that there have been instances when coastal islands have been considered part of a State’s coast, in particular when a coast is made up of a cluster or fringe of islands…However, Serpents’ Island lying alone some 20 nautical miles away from the mainland, is not one of a cluster or fringe of islands constituting the “coast” of Ukraine.

To count Serpents’ Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine’s coast; the consequence would be judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes [emphasis added].\(^4^6\)

The Court emphasised the point by remarking that:

Serpents’ Island cannot serve as a base point for the construction of the provisional equidistance line...since it does not form part of the general configuration of the coast.\(^4^7\)

Arguably, to completely ignore part of the coast, that is, Serpents’ Island, also constitutes a judicial refashioning of geography. However, the Court appears to have deemed that the use

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\(^4^3\) Case Concerning the Continental Shelf (Libya Arab Jamahiriya/Malta), Judgment of 3 June 1985, [1985] ICJ Reports,13, (hereinafter the Libya/Malta Case), at 43.


\(^4^5\) Id., at 277.

\(^4^6\) Black Sea Case, supra note 40, ¶ 149.

\(^4^7\) Id. at ¶ 186.
Serpents’ Island as a basepoint would have had a disproportionate and distorting impact on the construction of a strict equidistance line.

Once a provisional, equidistance-based, delimitation line has been established, at the second stage the Court is to assess “whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result.” The third stage outlined by the Court in the Black Sea Case, involved the verification of the line resulting potential delimitation line, which may or may not have been adjusted, through what the Court termed a “disproportionality test” in order to ascertain that it,

...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. A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

The Court did, however, take care to assert that this (dis)proportionality test “is not to suggest that these respective areas should be proportionate to coastal lengths.” When it came to applying the “disproportionality test” in the context of the Black Sea Case the Court noted that such a check “can only be approximate” in light of the “[d]iverse techniques” that can be used to assess coastal lengths and the lack of clear requirements in international law as to whether the “real” coastline or baselines are to be followed or whether coasts relating to internal waters should be excluded. The Court found that the ratio of relevant coastal lengths for Romania and Ukraine was approximately 1:2.8, that the ratio of relevant maritime areas of the order of 1:2.1. Following careful checking, the Court concluded that this difference between the ratio of relevant coastal lengths and maritime areas did not constitute a disproportion and that consequently no further adjustment to the delimitation line was required at the third stage.

The Bay of Bengal Case
In the Bay of Bengal Case between Bangladesh and Myanmar, seawards of the territorial sea delimitation where equidistance was applied in keeping with Article 15 of UNCLOS, the Tribunal decided that the equidistance/special circumstances approach constituted the appropriate method for delimitation, and opted to apply the three-stage approach pioneered in the Black Sea Case. Accordingly, the Tribunal first constructed a provisional boundary line based on equidistance. However, the provisional delimitation line so defined was not a strict equidistance line as St. Martin’s island was excluded as a basepoint in its construction, notwithstanding Bangladesh’s assertions that the island fulfils the criteria of Article 121(1) of

48 Id. at ¶ 120. At this point the Court cited its earlier Judgment in the Cameroon/Nigeria Case, supra note 8, at ¶ 288 in support of its ruling.
49 Id. at ¶ 122 & ¶ 210-216.
50 Id. at ¶ 122 & ¶ 214-215.
51 Id. The Court reinforced this statement by quoting from its Judgment in the Jan Mayen Case (supra note 30, at ¶ 64): “the sharing out of the areas should be proportionate to coastal lengths – not vice versa”.
52 Id. at ¶ 212.
53 Id. at ¶ 215.
54 Id. at ¶ 216.
55 See, Bay of Bengal Case, supra note 38, at 240.
56 Id. at ¶ 240 & ¶ 271-274.
UNCLOS and should therefore be entitled to not only a 12 nautical miles territorial sea but also its own continental shelf and EEZ.\textsuperscript{57} Here the distinct contrasts between St. Martin’s Island and Serpents’ Island can be remarked upon. St. Martin’s Island is a considerably bigger feature than Serpents’ Island (0.135km\textsuperscript{2} versus around 8km\textsuperscript{2}) as well as hosting a permanent population of approximately 7,000 people as compared with government personnel only. Additionally, St. Martin’s Island is, according to Bangladesh, the island is extensively cultivated and able to produce “enough food to meet a significant proportion of the needs of its residents.”\textsuperscript{58}

The Tribunal determined that as a consequence of the island’s location “immediately in front of the mainland on Myanmar’s side of the Parties’ land boundary”, use of the island as a basepoint “would result in a line that blocks the seaward projection of Myanmar’s coast”, leading to “an unwarranted distortion of the delimitation line.”\textsuperscript{59} This scenario was analogous to the ICJ’s treatment of Serpents’ Island in the Black Sea Case,\textsuperscript{60} a decision which was duly cited by the Tribunal in support of its treatment of St. Martin’s Island.\textsuperscript{61}

Subsequent to drawing the provisional delimitation line, the Tribunal proceeded to determine whether there existed any reasons to adjust or modify that line in order to achieve an equitable delimitation\textsuperscript{62} Bangladesh argued persuasively that the concave character of Bangladesh’s coastline would mean that the application of strict equidistance line maritime boundaries would result in its maritime entitlements being severely and inequitably curtailed.\textsuperscript{63} The Tribunal ruled that Bangladesh’s coast is “manifestly concave”\textsuperscript{64} and considered it appropriate to adjust the provisional equidistance line in such a way as to relieve the resulting ‘cut off’ effect on Bangladesh’s maritime entitlements.\textsuperscript{65} It did so by adjusting the equidistance line “at the point where it begins to cut off the seaward projection of the Bangladesh coast”, considered to be from a point on the provisional delimitation line due south of Kutubia Island where the Bangladeshi coastline makes an abrupt change in direction, and then proceeding along a geodetic line with an azimuth of 215º (see Figure 2).\textsuperscript{66} The Tribunal offered no mathematical formula for such an adjustment. It can also be observed that while the Tribunal rejected Bangladesh’s preferred method of delimitation, that of an angle-bisector,\textsuperscript{67} it remarkably nonetheless eventually came up with an identical azimuth for its adjusted equidistance line (215º). This raises some question that the adjustment of the provisional equidistance line might have to an extent been informed or influenced by Bangladesh’s angle-bisector proposals.

Finally, a proportionality test was undertaken to ensure that the proposed delimitation line was equitable.\textsuperscript{68} The Tribunal calculated the ratio of relevant coasts to be 1:1.42 in favour of

\textsuperscript{57} Id. at ¶ 142.
\textsuperscript{58} Bay of Bengal Case, supra note 38, at ¶ 143.
\textsuperscript{59} Id. at ¶ 265.
\textsuperscript{60} Black Sea Case, supra note 40, ¶ 149.
\textsuperscript{61} Bay of Bengal Case, supra note 38, ¶ 265.
\textsuperscript{62} Id. at ¶ 275.
\textsuperscript{63} Id. at ¶¶ 279-287.
\textsuperscript{64} Id. at ¶ 291.
\textsuperscript{65} Id. at ¶¶ 293-297.
\textsuperscript{66} Id. at ¶ 334.
\textsuperscript{67} See, Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), International Tribunal for the Law of the Sea (ITLOS), Case no.16, Written Proceedings, Memorial of Bangladesh, at 1.14 and 6.56-6.80.
\textsuperscript{68} Bay of Bengal Case, supra note 38, at ¶ 497.
Myanmar with the ratio of maritime spaces allocated on the basis of the adjusted delimitation line determined to be 1:1.54 in Myanmar’s favour. On comparing these ratios, the Tribunal ruled that no significant disproportion between them existed, warranting further adjustment of the delimitation line.

As noted above, with respect to delimitation of the EEZ within 200 nautical miles of the coast, the Tribunal rejected Bangladesh’s arguments based on geological and geomorphological factors on the grounds that delimitation of a single maritime boundary applicable to both the seabed and subsoil and also to the superjacent water column should be delimited on the basis of coastal geography rather than on the basis of the geology and geomorphology of the seabed. Seaward of the 200 nautical miles limit, in delimiting extended continental shelf areas, the Tribunal once again rejected arguments based on the composition (geology) and shape (geomorphology) of the seabed. This finding appears to bode ill for coastal States whose claims remain reliant on the concept of natural prolongation and therefore geophysical factors. That may be the case, at least as far as the treatment of such arguments before international courts and tribunals is concerned which, in turn, probably explains why these States are apparently reluctant to resort to such means to delimit their maritime boundaries.

The Tribunal went on to rule that as there was only one continental shelf with no essential difference between those parts of it within and seaward of the 200 nautical miles limit, the method of delimitation applied within 200 nautical miles of the coast should also apply beyond that limit. Finding that the cut-off effect produced by the marked concavity of Bangladesh’s coastline has “continuing effect” beyond 200 nautical miles, the Tribunal opted to continue the delimitation line for the extended continental shelf along the same 215° azimuth line relevant to the delimitation of the EEZ.

Perhaps the most remarkable aspect of the Judgment is the Tribunal’s creation of a so-called “grey area”, measuring approximately 1,100km², where continental shelf rights are determined to belong to one of the parties (Bangladesh) but jurisdiction concerning the overlying water column rest with the other party (Myanmar). This situation arises because of the adjustment of the provisional boundary line. As a result, the grey area is located beyond 200 nautical miles from Bangladesh, and from the Bangladeshi perspective is an area of extended continental shelf, yet is within 200 nautical miles of Myanmar.

While innovative, the definition of the grey area arguably leaves the parties with potentially contentious issues to resolve in the future, especially with respect to as yet unresolved ocean governance arrangements. In this context, it is worth noting that the pivotal event that led to this case being brought before ITLOS was the discovery of gas deposits in the disputed regions, the unilateral authorization of exploration concessions by Myanmar in 2008, and the armed response by Bangladesh.

69 Id. at ¶¶ 498-499. Relevant coastal lengths and areas calculated to be 413km and 111,631km² for Bangladesh, and 587km and 171,832km² for Myanmar.
70 Id.
71 Id. at ¶ 322.
72 Id. at ¶ 460.
73 Id. at ¶ 449.
74 Id. at ¶ 455.
75 Id. at ¶¶ 461-462.
76 Tensions Rise as Bangladesh Sends Another Warship, ASEAN AFFAIRS: VOICE OF SOUTHEAST ASIA, Nov. 5, 2008, available at
The Colombia – Nicaragua Case

In the, at the time of writing, most recent international case dealing with maritime boundary delimitation, the Territorial and Maritime Dispute Case between Colombia and Nicaragua, on which the ICJ rendered its Judgment in November 2012, analogous approaches were in evidence.\(^{77}\) Perhaps of most significance, once again the three-stage approach was adopted.\(^{78}\) This was in spite of the geographical complexities of the case,\(^{79}\) where numerous Colombian islands, notably San Andrés, Providencia and Santa Catalina and associated features, face the Nicaraguan mainland coastal front at a distance of approximately 105-125 nautical miles (while simultaneously being of the order of 380 nautical miles from the mainland of Colombia).\(^{80}\) Although there was little doubt that at least some of the Colombian islands relevant to the delimitation are indeed capable of generating EEZ and continental shelf rights – San Andrés hosting a population of over 70,000 and Providencia one of 5,000,\(^{81}\) this scenario led to strenuous protestations on the part of Nicaragua concerning the application of the three-stage approach.

In Nicaragua’s view the three-stage process would be inappropriate on the grounds that the construction of an equidistance line between the Nicaraguan mainland and Colombia’s islands would be “wholly artificial” in that it would treat the islands as though they were the opposing mainland coast.\(^{82}\) Consequently, even if the provisional equidistance line were to be shifted at the second stage of the process, an equitable result would be precluded.\(^{83}\) Nicaragua instead proposed enclaving Colombia’s islands. Perhaps unsurprisingly Colombia was in favour of the application of the three-stage approach, starting with the construction of an equidistance-based provisional delimitation line.

Despite the geographical challenges involved in the Colombia-Nicaragua Case, the Court concluded that the construction of a provisional equidistance line was not impossible.\(^{84}\) However, the Court simultaneously recognised the existence of overlapping entitlements to the east of Colombia’s islands and thus “behind the base points on the Colombian side from which the provisional equidistance/median line is constructed.”\(^{85}\) The Court adopted innovative means to overcome this apparent conundrum. In particular, the Court concluded that substantial adjustments should be made to the provisional equidistance line, in a ratio of 3:10 in Nicaragua’s favour, in large part as a consequence of the disparity in the lengths of the relevant coasts in play.\(^{86}\) Additionally, to the north and south of the “weighted line” so constructed, Nicaragua was awarded maritime areas out to 200 nautical miles.\(^{87}\) This was achieved through restricting certain Colombian insular features, notably Quiatsueño, Roncador and Serrana in the north and Albuquerque Cays and East-Southeast Cays in the south, to 12 nautical mile territorial seas.\(^{88}\) In


\(^{78}\) Id. at 191-194.

\(^{79}\) Id. at 18-24.

\(^{80}\) Id., at 22.

\(^{81}\) Id.

\(^{82}\) Id., at 185.

\(^{83}\) Id.

\(^{84}\) Id., at 195.

\(^{85}\) Id., at 196.

\(^{86}\) Id., at 234.

\(^{87}\) Id., at 236.

\(^{88}\) Id. at 237.
this context Quiatsueño and Serrana were wholly enslaved with the former being specifically acknowledged as a “rock” within the meaning of Article 121(3) of UNCLOS. Consequently, and despite the geographical complexities and peculiarities involved, application of the three-stage process was maintained.

6. Progress and Challenges

UNCLOS induced a major shift in ocean boundary making and this has been sustained over time. Significant further developments have taken place over the last three decades including the emergence of first a two-stage approach to maritime delimitation and more recently a three-stage approach. Indeed, recent decisions appear to indicate some consolidation as maritime boundary delimitation methodology on the part of international courts and tribunals. These are positive developments in that they appear to offer enhanced clarity and consistency in terms of the overall approach to maritime delimitation in this context. These virtues are also, in all likelihood, liable to feed through into developing State practice. Indeed, while it is acknowledged that, strictly speaking, arbitral and judicial decisions are only binding on the parties to the particular case and each case features its own particular facts and circumstances, international judicial decisions are clearly influential. This is illustrated by the way in which national claims tend to be bolstered by reference to past judicial decisions as a means of adding support and legitimacy to particular positions.

Although these developments are broadly positive, significant uncertainty remains. In particular, the emerging trend towards selectivity in choice of basepoints prior to constructing the provisional delimitation line is arguably troubling. After all, to ignore certain potentially critical basepoints itself represents a judicial refashioning of geography that serves to undermine the clarity and consistency of the three-stage process. An alternative option, and one that might be viewed as more rigorous, impartial and methodologically systematic, would have been to draw the strict equidistance line including all potential basepoints and then to adjust or modify the provisional delimitation line at the second stage of the three-stage process. Such an adjustment could, in fact, have led to the adjustment of a strict equidistance line so as to award certain problematic features, such as Serpents’ Island and St. Martin’s Island for example, a nil effect, thereby yielding the same result but in an arguably more logical and elegant manner.

It can, however, be observed that both the ICJ’s and Tribunal’s treatment of relatively small islands in the shape of Serpents’ Island and St. Martin’s Island, as well as certain features in the Colombia-Nicaragua Case, that is, awarding these features nil effect at the first stage of the delimitation process is consistent with a growing trend in the treatment of islands in the delimitation of maritime boundaries, especially those that are small and sparsely inhabited or are located far from the coast or in such a manner as to significantly and potentially inequitably impact on an equidistance line-based boundary. This overall trend is welcome in that it tends to downplay the potential significance of the sort of tiny, remote or problematically positioned insular features that are frequently the focus of maritime disputes.

89 *Id.* While the Court accorded these features no more than territorial sea rights, it generally did not address their status with respect to Article 121 of UNCLOS (*Id.*, at 180). Nonetheless, the Court observed that “It has not been suggested by either Party that QS32 [i.e. Quiatsueño] is anything other than a rock which is incapable of human habitation or an economic life of its own, under Article 121, paragraph 3, of UNCLOS, so this feature has no entitlement to a continental shelf or an exclusive economic zone”, *Id.* at 183.
Overall, therefore, considerable progress has been made in respect of ocean boundary making but, perhaps inevitably, significant scope for subjectivity and discretion on the part of courts and tribunals remains present in the maritime delimitation equation. Consequently, considerable challenges exist in terms of the practical application of contemporary approaches to the delimitation of maritime boundaries and the task of attempting to predict the final location of yet to be delimited maritime boundaries remains a hazardous one.