23 The Contribution of the International Court of Justice to the Law of the Sea

Peter Tomka

Edited By: David J Attard, Malgosia Fitzmaurice, Norman A Martinez Gutiérrez

Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 30 October 2014
ISBN: 9780199683925

Subject(s):
Delimitation — Continental shelf — Exclusive economic zone — Fisheries — Islands and artificial islands — Territorial sea — Innocent passage — Flag state — Arbitral tribunals — Jurisdiction — Natural resources
23. The Contribution of the International Court of Justice to the Law of the Sea

23.1 Introduction

From the very first decision rendered by the World Court in 1949 in the *Corfu Channel* case to the recent case opposing Nicaragua and Colombia dealing with their claims to sovereignty over certain maritime features and with the issue of maritime boundaries, the International Court of Justice (ICJ, ‘the Court’, or ‘World Court’) has had several opportunities to make major contributions to the law of the sea, in particular, by developing and refining the rules applicable between States in maritime areas, both under conventional and customary law. Its contribution has been particularly significant in the area of maritime delimitation. Indeed, the Court has had the opportunity to handle some twenty cases where at least one of the issues submitted by the parties concerned the determination of boundaries covering one or several of their maritime spaces. In this connection, the Court not only interpreted and applied customary and conventional rules to effect proper and equitable delimitations in unique situations, but it also greatly contributed to the clarification and unification of the rules applicable to the different maritime areas, as well as to the elaboration of a methodology for achieving equitable solutions in delimitation cases.

The Court has also had occasion to pronounce itself on other crucial aspects of the law of the sea, such as the right of innocent passage, for example, and its jurisprudence in that regard certainly remains of great relevance to this day.

This Chapter is not intended to cover the details of every case decided by the ICJ in the area of the law of the sea since its creation, but rather to sketch a broad picture of its influence in that field by highlighting the most essential and salient features of its contribution.

23.2 Jurisdiction of the International Court of Justice and the Creation of ITLOS

For a long period of time, the ICJ was practically the only permanent forum where States could file claims on matters relating to the law of the sea, provided they had consented to the jurisdiction of the Court. Interestingly, the Optional Protocol to the 1958 Geneva Conventions on the Law of the Sea, though not largely ratified by States, provided for compulsory jurisdiction of the principal judicial organ of the United Nations over all disputes concerning the interpretation or application of any of the Geneva Conventions, not otherwise settled by arbitration or conciliation.\(^1\)

The instrument replacing the latter Conventions,\(^2\) the 1982 UN Convention on the Law of the Sea (UNCLOS), offers a much larger choice of mechanisms available to States parties who decide to opt, by way of a declaration, for a compulsory method of settlement of disputes arising out of the interpretation and/or application of UNCLOS. Article 287 of that instrument sets out four alternatives in this regard: (a) the International Tribunal for the Law of the Sea (ITLOS), established under Annex VI to the Convention, (b) the International Court of Justice, (c) an arbitral tribunal, or (d) a special arbitral tribunal constituted for certain categories of disputes. For States deciding not to make such a choice, or when two States parties to a dispute differ as to their preferred modes of dispute settlement, arbitration becomes the mechanism by default.\(^3\)
The emergence of a specialized tribunal to settle disputes specifically in the area of the law of the sea, such as the one established under UNCLOS, is not entirely a novel phenomenon in the extant international legal order, as evidenced by the proliferation of specialized international courts and tribunals. The fear, however, that such a body would contribute to the fragmentation of the law of the sea and that a difficult coexistence between the ITLOS and the ICJ was to ensue, owing partly to a concurrent jurisdiction, did not materialize. While ITLOS has mainly, so far, handled applications made under Article 292 UNCLOS regarding prompt release of arrested vessels and/or crews upon provision of a sufficient financial security, the ICJ has developed for its part a special expertise, flowing from a previous quasi-monopoly, in maritime delimitation cases. Considering the large and diversified choice of dispute settlement mechanisms envisaged by UNCLOS, and bearing in mind that the ICJ does not constitute the default option, it is impressive that a considerable number of delimitation cases have ended up before the Court. This situation might be explained in part by the fact that maritime delimitation is often part of a broader dispute which also includes the issue(s) of title to territory and/or the course of the territorial boundary, over which ITLOS has no jurisdiction. Another possible factor pointing to the ICJ as a preferred forum for maritime delimitation disputes also resides in the importance attached by parties to submitting their disagreements to an organ whose mission encompasses broader considerations related to maintaining international peace and security throughout the world, rather than the strict delimitation of maritime areas between disputing parties.

There is every indication that the jurisprudence emanating both from ITLOS and the World Court, along with that originating in the context of arbitral proceedings, will continue to develop and coexist harmoniously. Undoubtedly, the availability of multiple fora for States to settle their maritime disputes constitutes a positive development, in that it affords States the possibility to select an appropriate forum that meets their needs and fulfils their expectations, while at the same time contributing to the increasing volume of international disputes adjudicated by international bodies. Despite certain inevitable disparities in the legal scheme surrounding the work of these different institutions, ICJ President Schwebel (as he then was) delivered astute observations to that effect in his Statement to the 53rd General Assembly on 27 October 1998, referring to the very first case submitted to ITLOS: ‘the fabric of international law and life is, it is believed, resilient enough to sustain such occasional differences as may arise’.

### 23.3 Maritime Delimitation

The most important aspect of the Court’s contribution to the law of the sea undoubtedly resides in the unification and clarification of the principles and rules governing maritime delimitation, particularly when applicable to adjacent and opposite States. A key development in that regard is without doubt the elaboration by the Court of the ‘equidistance/relevant circumstances’ methodology, particularly with respect to the delimitation of the continental shelf and the exclusive economic zone (EEZ), with a view to achieving an ‘equitable solution’. In that respect, the extent of the Court’s contribution cannot be overemphasized. However, before turning to the substantive rules governing maritime delimitation and their application in the jurisprudence of the Court, a few general principles underlying those norms warrant consideration.

#### 23.3.1 A few general principles

The first such principle, nowadays very well established in the jurisprudence of the ICJ, translates into the notion that maritime delimitation is always governed by international law, as opposed to being a matter left for each coastal State to determine for itself. This
The principle was unequivocally affirmed by the Court, shortly after its inception, in the Anglo-Norwegian Fisheries case. Thus, in 1951, the Court declared that:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.\footnote{7}

The important consequence deriving from this assertion is that international law necessarily prescribes, in one way or the other, the limits of the different maritime zones appertaining to a State, in any given situation.\footnote{8} Another significant, if perhaps too frequently overlooked aspect in scholarly accounts, also flows from this principle and confirms that international law not only confers rights to States over their respective maritime areas, but also imposes fundamental obligations and important responsibilities owed towards other members of the international community. These duties include the protection of the environment at sea, as well as, to a certain extent, the protection of foreign persons and property against crimes committed in States’ maritime zones, to invoke but a few examples.\footnote{9}

The second principle warranting special attention, commonly expressed as ‘the land dominates the sea’, is the notion according to which maritime rights derive from a State’s sovereignty over the land and are thus determined in accordance (p. 622) with the establishment of territorial entitlements. First referred to by the Court in the 1969 Continental Shelf cases in relation to the rules applicable to the delimitation of the seabed in the North Sea,\footnote{10} this principle was subsequently reaffirmed in the jurisprudence of the Court on multiple occasions.\footnote{11} In the Qatar v Bahrain case for instance, the Court stressed that ‘[i]t is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State.’\footnote{12} Interestingly, in that case the Court attributed sovereignty to Qatar over a low-tide elevation, Fasht ad Dibal, because of its location on the ‘right side’ of the boundary, once the line was drawn and adjusted.\footnote{13} The Court reasoned that, given that this low-tide feature is situated in the territorial sea of Qatar, it therefore falls under its sovereignty; a contrary conclusion would have contravened the principle according to which ‘the land dominates the sea’ in an obvious way.

### 23.3.2 A single maritime boundary

An ever-evolving feature of maritime delimitation flows from an increasing trend in recent years, spearheaded by parties before the Court requesting it to draw a ‘single maritime boundary’ so as to divide, by a single line, all their respective maritime zones (continental shelf and EEZ) beyond the territorial sea. Reliance on this method, which closely followed the emergence of the legal framework governing the EEZ, took place for the first time in the 1984 Gulf of Maine case. That case constituted the first instance where the Court was not only asked to delimit the continental shelf of the parties, but also their respective superjacent water columns.\footnote{14} The request submitted by the parties to draw a single boundary in respect of these two maritime areas, ‘in accordance with the principles and rules of international law applicable in the matter as between the Parties’, was well received by the Court, notwithstanding the absence of precedents on this front in its prior jurisprudence. The Chamber went on to:

observe that the Parties have simply taken it for granted that it would be possible, both legally and materially, to draw a single boundary for two different jurisdictions. They have not put forward any arguments in support of this assumption. The (p. 623) Chamber, for its part, is of the opinion that there is certainly no rule of international law to the contrary, and, in the present case, there is no material
impossibility in drawing a boundary of this kind. There can thus be no doubt that the Chamber can carry out the operation requested of it.\textsuperscript{15}

Since then, most of the parties involved in maritime delimitation disputes have requested the Court to draw a single maritime boundary to divide their respective maritime areas.\textsuperscript{16} Needless to say, the concept of ‘single maritime boundary’ is neither provided for in UNCLOS, nor in any other multilateral conventions, and nor is it a creation of the Court. The idea of crafting a unique boundary to delimit different, partially coincident maritime zones rather originated in the practice of States, for practical purposes, with the Court unfailingly giving heed to the parties’ preferences in that regard when confronted with maritime delimitation litigation. Naturally, the Court always remains bound by customary and relevant conventional rules governing maritime delimitation when drawing such single maritime boundaries.

23.3.3 Relevant coasts and baselines

The determination of a boundary line which delimits the respective entitlements of the parties in the relevant maritime area can only be effected when the baselines are known, based on the relevant coastlines, as they constitute the first element warranting consideration when initiating the delimitation process:

(p. 624)

Before it can draw an equidistance line and consider whether there are relevant circumstances that might make it necessary to adjust that line, the Court must...

define the relevant coastlines of the Parties by reference to which the location of the base points to be used in the construction of the equidistance line will be determined.\textsuperscript{17}

Not surprisingly, the Court was called upon, rather frequently, to adjudicate cases in which the parties had not specified the baselines which were to be used for the determination of the breadth of the territorial sea and, ultimately, for the delimitation of the resulting maritime boundary.\textsuperscript{18} This situation can best be explained by the fact that, in many cases, sovereignty over certain maritime features which might be relevant for the establishment of some baselines is undetermined, thereby requiring the Court to pronounce on any unresolved sovereignty issues before proceeding to the delimitation.

The method of determining the baselines, from which the breadth of the territorial sea is measured seaward, lay at the very heart of the arguments advanced by the parties in the Fisheries case, opposing the United Kingdom and Norway in 1951. Norway contended that, owing mainly to historical reasons and also to the particular indented shape of its coast, it was entitled to use straight baselines to measure its territorial sea, rather than the usual low-water mark along the coast. The actual breadth of Norway’s territorial sea was not a matter of dispute between the parties, since the United Kingdom had conceded a breadth of four miles to Norway.\textsuperscript{19} While confirming Norway’s claim that the geographical peculiarity of its coast could confer upon it the right to use a general straight baselines system to measure the breadth of its territorial sea, the Court further elaborated on the appropriate circumstances where the adoption of such method could be justified, many of which have since then been codified in UNCLOS.

One can easily infer from the Fisheries decision that the use of a straight baselines system should constitute the exception, rather than the rule, a view that was ultimately adopted in the 1958 Convention on the Territorial Sea and the Contiguous Zone and subsequently in UNCLOS, whose Article 5 describes the default regime as follows: ‘Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.’ Article 7 of the Convention also codifies several of the
main indications given by the Court with respect to the straight baselines regime. Among other points, it first consecrates the notion that straight baselines may be drawn ‘[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.’ This provision further states, at paragraph 3, that the straight baselines must not be drawn in a fashion which ‘depart[s] to any appreciable extent from the general direction of the coast’, and that ‘the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters’, thereby also mirroring the positions taken by the Court in the

20Economic factors, such as the reliance of certain local communities on fishing activities in a particular maritime area, did not constitute an independent element underpinning the Court’s decision to determine whether the method of straight baselines was applicable to Norway’s coastline, but rather a contributory one. A similar approach was codified in UNCLOS, which provides in Article 7 paragraph 5 that it is only once the use of straight baselines is justified based on geographical factors that ‘economic interests peculiar to the region concerned’ may be taken into account to determine particular baselines.

21The possibility for a State to draw straight baselines in order to effect the delimitation of its maritime zones was briefly revisited by the Court in the Qatar v Bahrain case, this time in a completely different context. In particular, Bahrain claimed a right to draw archipelagic baselines, in accordance with the method provided for under UNCLOS, based on its status as a de facto archipelagic State. Pursuant to Article 47 of the Convention, States having such status are entitled to draw ‘straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago’. The Court, however, took the view that it did not have to decide the matter, considering that Bahrain had not made this request one of its formal submissions before the Court, and that its role was solely confined to drawing, as requested, a single maritime boundary between the parties’ respective areas of maritime entitlement, in accordance with the principles and rules of international law.

What is more, the ICJ recalled the binding force of its judgments upon the parties, in accordance with Article 59 of its Statute, and cautioned that Bahrain’s eventual decision to declare itself an archipelagic State, or any other such unilateral action undertaken by either party, would not affect the delimitation carried out by the Court. The ICJ thereby emphasized the importance of the stability of maritime boundaries.

22Other than the possibility of establishing straight baselines, which, as mentioned, remains linked to the existence of particular circumstances justifying such method and is not usually applied generally, careful consideration must also be given to maritime features, other than the main coast, which are relevant for the determination of the baselines.

(p. 626) In that regard, the Court recalled that ‘[i]n accordance with Article 121 paragraph 2 of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory’. Article 121(1) UNCLOS defines an island as being ‘a naturally formed area of land, surrounded by water, which is above water at high tide’ and, therefore, excludes low-tide elevations from its purview. The situation becomes increasingly more complex, however, when a delimitation is to take place between two opposite or adjacent States, with their respective maritime areas overlapping, in which case some of the islands might be disregarded for the purposes of establishing baselines, should they engender a disproportionate effect on the finalized boundary. Whether this operation should take place before even drawing a provisional line, or whether it should be considered at the adjustment stage where account is taken of special or relevant circumstances, or during both stages of the delimitation, remains open to interpretation. What is more, UNCLOS also provides that when a low-tide elevation is ‘situated wholly or partly at a distance not exceeding the breadth of the territorial sea from
the mainland or an island’, ‘the low-water line on that elevation may be used as the baseline
for measuring the breadth of the territorial sea’.24

23.3.4 Delimitation of the territorial sea, the continental shelf, and
the exclusive economic zone: the quest for an equitable solution

It should be stressed that the relevant discussions and dialogue on maritime delimitation
and surrounding issues before the Court mainly took place in the context of competing
claims between adjacent and opposite States. In the absence of specific rules governing all
possible situations necessitating maritime delimitation in instances of overlapping claims,
each coastal State having its own peculiarities, it is no surprise that the notion of ‘equity’
quickly became part of the delimitation equation. In that regard, the importance of the 1969
North Sea Continental Shelf cases cannot be overemphasized. When requested to
determine, as between the parties to the disputes,25 the rules and principles applicable to
the delimitation of their respective continental shelves in the North Sea, the Court
underscored that such delimitation had to be effected ‘in accordance with equitable
principles, and taking account of all the relevant circumstances’.26

(p. 627) The pronouncements of the Court were echoed during the debates in the Third
United Nations Conference on the Law of the Sea, and were ultimately reflected in the
resulting Convention. In both provisions dealing with the delimitation of the continental
shelf and the EEZ between States with opposite or adjacent coasts, namely Articles 74 and
83 UNCLOS, the achievement of an ‘equitable solution’ constitutes the overarching
objective. However, whereas Article 15 UNCLOS27 expressly refers to the median
(equidistance) line/special circumstances method to delimit the territorial sea between
States with adjacent or opposite coasts, such guidelines are not provided for in cases of
delimitation of the continental shelf and the EEZ (other than striving to find an ‘equitable
solution’ pursuant to the wording of Articles 74 and 83). The delimitation must therefore be
carried out in accordance with the principles and rules of customary international law
applicable to these maritime areas.28

It should be recalled that, in the North Sea Continental Shelf cases, the Court had to
determine whether the equidistance principle, as embodied in Article 6 of the 1958 Geneva
Convention on the Continental Shelf, was part of customary international law, Germany not
being a party to that instrument. The Court had dismissed this contention, however, holding
that neither the equidistance method, nor any other delimitation technique, was in fact of
mandatory application between the parties to determine their respective continental
shelves in the North Sea.29 Some sixteen years later, in 1985, namely three years after the
adoption of UNCLOS, in the Continental Shelf case between Libya and Malta, the Court
likewise refused to ‘accept that, even as a preliminary and provisional step towards the
drawing of a delimitation line, the equidistance method is one which must be
used’ (emphasis in original).30

However, the drawing of a provisional equidistance line in the area to be delimited,
followed, if necessary, by an adjustment of the line to take account of special circumstances
allowing the achievement of an equitable solution as required under UNCLOS, rapidly
became the preferred method of delimitation. In fact, almost all maritime delimitation cases
brought before the Court after its Chamber rendered the Judgment in the Gulf of Maine
case in 1984 were decided in accordance with this method, with respect to all maritime
areas, with the notable exception of the case opposing Nicaragua and Honduras in 2007,
which addressed maritime delimitation in the Caribbean Sea and in which the Court
ultimately favoured a bisector line of delimitation in view of the geographical particularities
of that case.31 The Court observed that Cape Gracias a Dios, where the Nicaragua-Honduras
land boundary ends, is a sharply convex territorial projection abutting a concave
coastline on either side of the boundary. Further, because of the instability of the mouth of
the River Coco near the Nicaragua-Honduras land boundary, combined with the uncertain
nature of some maritime features located offshore, thus affecting the position of the appropriate base points to construct an equidistance line, the Court decided that the use of this method would not generate an equitable solution. Consequently, in order to depart from the traditional rule, it relied upon the wording of Article 15 UNCLOS, which, in its view, did not preclude geomorphological difficulties from amounting to ‘special circumstances’ and, hence, from falling within the ambit of the exception laid down in that provision. The possibility of resorting to another method of delimitation had also been envisaged by the parties in their pleadings, and was duly noted by the Court. In the end, the Court favoured the drawing of a bisector line, as opposed to constructing a delimitation based on equidistance, but nonetheless emphasized that ‘[a]t the same time equidistance remains the general rule’.

The pronouncements of the Court also proved extremely relevant for the clarification and unification of the rules they sought to achieve in the field of maritime delimitation. In that regard, the Court expressed the view that there exists a strong nexus between the legal regime established for the delimitation of the territorial sea (termed the ‘equidistance/special circumstances rule’ by the Court), on the one hand, and the rules developed in both the Court’s jurisprudence and State practice regarding the delimitation of the continental shelf and the EEZ (referred to as the ‘equitable principles/relevant circumstances rule’ by the Court), on the other. Under both regimes, a similar approach, solidly grounded in notions of equity and taking into account particular circumstances relevant to each case, is warranted.

What is more, the concept of ‘median line’, which has been interchangeably equated with ‘equidistance line’ in judicial pronouncements with respect to delimitation methodology, was defined by the Court as being ‘the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas [or the continental shelf and the EEZ] of each of the two States is measured’. That being said, the particular circumstances which can potentially affect the adjustment of a provisional equidistance line can be identified with less certainty, given that no exhaustive list of relevant/special circumstances that may be taken into account exists. As pointed out by the arbitral tribunal in the Guyana/Suriname arbitration, ‘special circumstances that may affect a delimitation are to be assessed on a case-by-case basis, with reference to international jurisprudence and State practice’. These relevant factors, largely influenced by the arguments submitted by the parties, were gradually developed in the jurisprudence of the Court.

23.3.5 Special/relevant circumstances

One of the most important factors considered by the Court over the years as a relevant circumstance for potentially shifting a provisional delimitation line, in order to achieve an equitable solution, is undoubtedly the length of the relevant coastlines of the parties. The Court mentioned this element for the first time in the North Sea Continental Shelf cases, while determining the rules and principles applicable to the delimitation of the parties’ continental shelves. In its general conclusions on the factors to be taken into account during the negotiations of an equitable boundary, enshrined in the operative clause of its judgment, the Court referred to the idea of having ‘a reasonable degree of proportionality... 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’. Since then, the ‘proportionality’ factor has been invoked on several occasions before the Court in order to justify an adjustment of the equidistance line provisionally drawn, often unsuccessfully however.
In the case involving Tunisia and Libya in 1982, the Court considered that it was reasonable to proceed to the analysis of proportionality, based on an hypothesis that the entire maritime area between the two States had been divided, even if in fact the delimitation line could not entirely be drawn in the relevant area, in order to preserve rights which other States could claim in the future. Otherwise, according to the Court, establishing an equitable delimitation would prove difficult until all other delimitations in the area—including those implicating the entitlements of third States not involved in the original dispute—had been effected. In this connection, the Court emphasized that it was ‘not dealing here with absolute areas, but with proportions’. It went on to determine the ratio between the length of the relevant coast of Libya, measured alongside its coastline, and the length of the relevant coast of Tunisia, measured in a similar manner, to identify a proportion of approximately 31:69 in favour of the Tunisian coast. It repeated the same operation, this time with straight lines drawn along the two coasts, which led it to identify a similar proportion. The ratio representing the two States’ respective seabed areas, as identified by the Court, was similar (40:60). The Court concluded as follows: ‘This result, taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity.’

The presence of a significant disparity in the coastal lengths of the parties was also raised in the Qatar v Bahrain case. Without proceeding to precise calculations of the coastal ratios as it had done in the Tunisia/Libya case, the Court noted that Qatar’s contention as to disparity rested solely on the assumption that the disputed Hawar Islands fell under its sovereignty. Having determined that this was not the case, the Court swiftly dismissed Qatar’s claim for an appropriate correction of the delimitation line provisionally drawn. Another factor invoked by States, rather unsuccessfully so far, is the existence of economic activities undertaken by the parties in the maritime areas to be delimited. In the Qatar v Bahrain case for instance, Bahrain claimed that the presence of pearling banks, located along the northern coast of the Qatar peninsula and where Bahraini fishermen traditionally exercised their activities since time immemorial, should affect the delimitation in its favour. However, the Court observed that pearl fishing in that area was always considered ‘as a right which was common to the coastal population’, not exclusively reserved for Bahraini fishermen, and that, moreover, the pearling industry along those banks had ceased a long time ago. The Court thus rejected Bahrain’s contention, holding that it ‘does not consider the existence of pearling banks, though predominantly exploited in the past by Bahraini fishermen, as forming a circumstance which would justify an eastward shifting of the equidistance line as requested by Bahrain’.

Several arguments based on economic considerations were likewise pleaded by the parties in the case between Tunisia and Libya, in order to affect the direction of the delimitation. Tunisia’s argument in that regard was two-fold: it first contended that it did not have access to the same natural resources that Libya could secure, in terms of minerals and agricultural resources, and that it was in a state of relative poverty compared to the wealth of resources enjoyed by Libya. Tunisia’s second point was that the fishing resources located in the waters claimed on the basis of ‘historic rights’ was a way for Tunisia to supplement its national economy in order to ensure its survival. For its part, Libya contended that the presence or absence of oil or gas resources in the continental shelf of either party should be a considerable factor taken into account in the delimitation process. The Court dismissed the arguments advanced by Tunisia, equating them with ‘extraneous factors’ that may vary over time. According to the Court, ‘[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.’ As for the oil and gas resources located in the continental shelf to be delimited, the Court kept the door open by stating that such a factor might indeed be a relevant
circumstance to consider, along with all other relevant factors, in order to achieve an equitable result.  

Another interesting element raised as a special circumstance in the Qatar v Bahrain case, this time by Qatar, was the existence of a division of the seabed between the parties that had been decided by the British authorities in 1947, while both Qatar and Bahrain were under their protection. The Court did not afford significant weight to this element, however, rather pointing out that none of the parties had argued that the British decision was binding upon them, and that they had both invoked only parts of the decision to support and justify their own claims. In that case, the Court was moreover entrusted by the parties with the task of delimiting, by a single maritime boundary, both the continental shelves and the EEZs of the parties, whereas the British decision of 1947 was exclusively concerned with the division of the seabed of the two States.

The grant of concessions for offshore exploitation of oil and gas is an additional ‘special circumstance’ considered by the Court as having the potential to affect the direction of the delimitation line, in order to ensure an equitable result. In the case opposing Tunisia and Libya for example, concerning the delimitation of their respective continental shelf areas, the Court considered that the granting of oil concessions in certain areas revealed the existence of a de facto line. Without making a finding of a tacit agreement between the parties as regards a particular line of demarcation, the Court took the view that the location of the concessions was certainly a relevant factor in effecting the delimitation of the parties’ continental shelf areas, at least as a starting point. A similar argument was raised by Nigeria in the Cameroon v Nigeria case, namely whether ‘the oil practice of the (p. 632) Parties provides helpful indications for purposes of the delimitation of their respective maritime areas’. The Court reviewed its jurisprudence on the matter, as well as a few arbitral decisions, and reached the conclusion that ‘although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line’. Since there was no such agreement between the parties as regards their oil concessions, the Court refused to take into account this circumstance as a grounds justifying a shift in the provisional equidistance line.

Lastly, the presence of islands and other maritime features in the relevant area is also a major consideration for the adjustment of a provisional boundary, thereby having exerted the greatest influence so far in the jurisprudence of the Court as regards shifting a provisional equidistance line. As noted, islands normally generate their own entitlements to a territorial sea, a continental shelf, as well as an EEZ, as is the case with other land territory, and their low-water line can typically be used for determining baselines. However, in maritime areas where competing claims exist, and where delimitations are necessary, islands, as well as other maritime features, have at times been disregarded in the process of establishing equitable maritime boundaries in order to eliminate their disproportionate effect. In the Qatar v Bahrain case for instance, Qit’at Jaradah, a very small uninhabited island located midway between the main island of Bahrain and the Qatar peninsula, was not used for determining the base points in the construction of the equidistance line between the two States, because of the disproportionate effect that would have given to an insignificant maritime feature. In similar fashion, the uninhabited islet of Filfla was also excluded from the establishment of the provisional equidistance line between Libya and Malta, for equitable purposes. In the case opposing Cameroon and Nigeria, the former had likewise contended that the presence of Bioko Island off its coast could justify shifting the median line. In that case, however, Bioko Island was subject to the sovereignty of a third State, Equatorial Guinea, and the Court consequently opined that ‘the effect of Bioko Island on the seaward projection of the Cameroonian coastal front is an issue between Cameroon
and Equatorial Guinea and not between Cameroon and Nigeria, and is not relevant to the issue of delimitation before the Court’.\(^{55}\)

In other instances, it may well be that the Court disregards minuscule or insignificant maritime features in the plotting of a provisional equidistance or median (p. 633) line, that is, before turning to the assessment of whether special/relevant circumstances could justify shifting that line. In such scenarios, the maritime features in question might engender a distorting effect on the geography of the relevant area or unjustifiably shift the provisional line towards the coast of one of the parties. In a recent judgment on maritime delimitation, which settled a dispute between Nicaragua and Colombia, the Court was confronted with such a feature—Quitasueño—which it had to consider as potentially forming part of the relevant Colombian coast in plotting the provisional median line. In this regard, the Court opined that ‘Quitasueño should not contribute to the construction of the provisional median line’, as ‘[t]he part of Quitasueño which is undoubtedly above water at high tide is a minuscule feature, barely 1 square m in dimension.’\(^{56}\) The Court went on to insist upon the fact that, ‘[w]hen placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line.’\(^{57}\) As the Court pointed out immediately after, it had been faced with a similar maritime feature—Serpents’ Island—in the 2009 \textit{Maritime Delimitation in the Black Sea} case opposing Romania and Ukraine. In that case, as explained in the 2012 Judgment in the \textit{Nicaragua v Colombia} dispute, ‘the Court held that it was inappropriate to select any base point on Serpents’ Island (which, at 0.17 square km was very much larger than the part of Quitasueño which is above water at high tide), because it lay alone and at a distance of some 20 nautical miles from the mainland coast of Ukraine’.\(^{58}\) Moreover, ‘its use as part of the relevant coast “would amount to grafting an extraneous element onto Ukraine’s coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes”.’\(^{59}\) Reverting back to the case at hand between Nicaragua and Colombia, the Court thus concluded that ‘[t]hese considerations apply with even greater force to Quitasueño’, remarking that ‘[i]n addition to being a tiny feature, it is 38 nautical miles from Santa Catalina [a Colombian island forming part of the San Andrés Archipelago] and its use in the construction of the provisional median line would push that line significantly closer to Nicaragua.’\(^{60}\)

Although this section has provided a limited sampling of some of the relevant/special circumstances sometimes invoked by parties before the Court to justify shifting a provisional equidistance line, the Court’s jurisprudence is replete with (p. 634) other instances in which this judicial organ has been called upon to engage arguments to that effect. This analytical richness was again exemplified recently in the Court’s judgment on maritime delimitation, as referenced, which settled a territorial and maritime dispute between Nicaragua and Colombia. In its decision of November 2012, at a later stage of its inquiry, the Court was confronted with determining whether a set of relevant circumstances could potentially affect the construction of the delimitation line in the Western Caribbean Sea, namely: the disparity in the lengths of the relevant coasts of the two parties; the overall geographical context; the conduct of the parties; security and law enforcement considerations pertaining to the relevant maritime area; equitable access to natural resources; and delimitations already effected in the area.\(^{61}\)

\subsection*{23.3.6 Towards a homogenous and coherent delimitation methodology}

The influence of the Court’s jurisprudence in the field of maritime delimitation is undeniable.\(^{62}\) In turn, it has inspired and informed a wide range of arbitral awards and other international decisions involving the delimitation of maritime boundaries. For instance, the equidistance/special circumstances methodology, initially articulated in the
Court’s Libya/Malta case was invoked and confirmed in the Guyana/Suriname Award as the leading delimitation approach in public international law.

However, one of the Court’s most enduring contributions to date to the law governing maritime delimitation undoubtedly arose when handing down its judgment in the Maritime Delimitation in the Black Sea case. In its unanimous decision, the Court drew attention to the jurisprudential coherence that had emerged and characterized the field up until then, with most relevant international decisions relying on the delimitation methodology, as mentioned, and ultimately contributed to the further development of the law of maritime delimitation. In particular, the Court indicated that international law prescribes three defined steps when delimitation of the continental shelf or EEZ is to be effected, or when it is called upon to construct a single maritime boundary.

(p. 635) First, the Court constructs a provisional delimitation line, on the basis of a geometrically objective approach that is also congruent with the geography of the zone to be delimited. When dealing with delimitation between adjacent coasts, the Court went on to say, ‘an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case’. Furthermore, the ‘provisional delimitation line will consist of a median line between the two coasts’ when delimitation is to be carried out between two opposite coasts. In the case at hand, the Court first drew a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which then transformed into a median line between their opposite coasts, given the specific geography of the area to be delimited.

The Court emphasized that the ‘course of the line should result in an equitable solution’, in accordance with Articles 74 and 83 UNCLOS. Thus, the second stage of the inquiry entails the assessment of whether relevant factors or circumstances should prompt the Court to adjust or shift the provisional equidistance line so as to attain such equitable settlement of the dispute. Last, the Court described the third and final stage of its delimitation approach, which appeared corroborated by State and jurisprudential practice, commonly termed the ‘disproportionality test’. In short, at that stage of the inquiry, the Court ‘will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line... A final check for an equitable (p. 636) outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

There is every indication that this three-step methodology now constitutes the basic approach to be adopted in appropriate cases involving maritime delimitation. In fact, the Court again had recourse to this methodology in a recent judgment on maritime delimitation, which it handed down in November 2012 to settle a territorial and maritime dispute opposing Nicaragua and Colombia over maritime areas and features located in the Caribbean Sea. Not only did the Court confirm the prevalence of this methodology within its own jurisprudence, thereby consecrating the validity of the three distinct stages of the legal inquiry, but it also proceeded to apply it to the facts at hand. Similarly, in its first ever delimitation case where it was called upon to determine a maritime boundary between Bangladesh and Myanmar in the Bay of Bengal, the ITLOS endorsed the Court’s three-step approach as reflective of the current state of international law.

More recently, the Court was confronted with a peculiar factual scenario in the Maritime Dispute opposing Peru and Chile. In that case, the parties advanced opposite—and fundamentally different—views as to how the Court should proceed in respect of the allocation of their respective maritime areas. For its part, Peru advocated that the Court perform a maritime delimitation de novo by relying on the three-step methodology, as
described, so as to attain an equitable result. By contrast, Chile opined that the maritime boundary had already been agreed between the parties and, in its view, ran along the parallel of latitude passing through the starting point of the Peru-Chile land boundary, extending to a minimum of 200 nm seaward. In canvassing the various agreements that had been struck by the parties, the Court held that the 1954 Special Maritime Frontier Zone Agreement, signed by Chile, Ecuador, and Peru, acknowledged that a maritime boundary already existed between the parties to the case before it. Such boundary had already been tacitly agreed by the parties and ran along the parallel of latitude out to an unspecified distance. After reviewing the practice of the parties at the relevant time—particularly their fishing activities in the early and mid-1950s—the Court concluded that, in view of the relevant evidence presented (p. 637) to it, the agreed maritime boundary extended seaward to a distance of 80 nm along the parallel from its starting point.

The Court then concluded that the starting point of the agreed maritime boundary between the parties was the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line. Turning to the determination of the course of the undefined maritime boundary from the endpoint of the agreed maritime frontier, the Court proceeded on the basis of Articles 74(1) and 83(1) UNCLOS which, as confirmed by the Court’s jurisprudence, reflect customary international law. The Court then pointed out that the delimitation of the unallocated maritime spaces would begin at the endpoint of the agreed maritime boundary, recalling that in practice some delimitations had been carried out from starting points not located at the low-water line, but further seaward. By contrast, however, it underscored that ‘[t]he situation the Court face[d] [was]… unusual in that the starting-point for the delimitation in this case [was] much further from the coast: 80 nautical miles from the closest point on the Chilean coast and about 45 nautical miles from the closest point on the Peruvian coast’. In any event, the Court then proceeded to apply the usual three-step methodology in delimiting the area of overlapping entitlements situated beyond the terminal point of the agreed maritime boundary; first, by plotting a provisional equidistance line, then by turning to the assessment of any relevant circumstances calling for an adjustment of that line, and ultimately by applying the ‘disproportionality’ test, all with the aim of achieving an equitable solution.

Thus, the Court thereby again consecrated the three-step maritime delimitation methodology, this time in the face of an unusual situation. Most importantly, it confirmed that in disputes where a maritime boundary has already been agreed between the parties, the delimitation of any remaining, unallocated maritime areas beyond the agreed frontier should be effected in accordance with this methodology.

(p. 638) 23.4 Right of Innocent Passage

The right of innocent passage of ships in States’ territorial seas constitutes another fundamental aspect of the law of the sea on which the Court has pronounced itself. In the seminal Corfu Channel case, decided in 1949, Albania contended that its sovereignty had been violated by the United Kingdom because of the passage of British warships in the North Corfu Strait. According to Albania, all foreign warships, as well as merchant vessels, had no right to freely circulate in Albanian territorial waters until and unless permission to do so was given by its governmental authorities. The Court dismissed Albania’s contention and established, on the contrary, that ‘[i]t is … generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent’. The ‘innocence’ of the passage of the British warships, also strongly challenged by Albania, was further confirmed by the Court. Though not establishing the precise criteria to be fulfilled for such passage to be innocent, the decision of the Court undoubtedly laid the groundwork for the definition adopted in the 1958 Geneva Convention on the Territorial Sea and the
Contiguous Zone and, subsequently, in UNCLOS. While Article 17 of the Convention confirms the right of ships of all States—be they coastal or landlocked—to enjoy the right of innocent passage through the territorial sea, Article 19 provides the following qualification: ‘[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State’, thereafter enumerating a series of activities considered as falling outside the purview of this definition (such as threats and uses of force against the coastal State, engaging in exercises with weapons, collecting information to the prejudice of the security of the coastal State, fishing activities, etc.).

The right of innocent passage for ships in the territorial sea of a coastal State was further confirmed in the Court’s more recent jurisprudence, most notably in the *Qatar v Bahrain* case. After having established a provisional equidistance line to delimit the respective territorial seas of the parties to the dispute and adjusted that line to take account of the special circumstances relevant to the case, the Court noted that some Qatari maritime zones, due to the orientation of the line drawn, were connected only by a channel located between the Hawar Islands—over which Bahrain’s sovereignty was confirmed by the Court—and the peninsula of Qatar. In that context, the Court underscored that, Bahrain not being entitled to draw archipelagic straight baselines around the different islands under its sovereignty, the waters located between the Hawar Islands and the other Bahraini islands therefore fell under the regime governing the territorial sea (and not that of internal waters). Drawing on that conclusion, the Court recalled that ‘Qatari vessels, like those of all other States, shall enjoy in these waters the right of innocent passage accorded by customary international law. In the same way, Bahraini vessels, like those of all other States, enjoy this right of innocent passage in the territorial sea of Qatar’.

This point was also reaffirmed in the Court’s formal conclusions, and endorsed unanimously by its members.

### 23.5 Use of Force in the High Seas

A dispute arose between Spain and Canada in the 1990s when the Canadian authorities proceeded to the pursuit, boarding, and seizure of a Spanish fishing vessel on the high seas, off the Canadian coast. At that time, Canada had amended its *Canadian Coastal Fisheries Protection Act* in order to provide for some management and conservation measures on the high seas, including a right for Canadian authorities to exercise a certain level of control over ships flying a foreign flag in a defined area. Spain filed an application with the Court, complaining of Canada’s posture in that regard and invoking as jurisdictional basis the two declarations of acceptance of the Court’s compulsory jurisdiction filed by the parties pursuant to Article 36 paragraph 2 of the Court’s Statute.

However, the Canadian declaration contained a reservation according to which it excluded the jurisdiction of the Court for ‘disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing...and the enforcement of such measures’ on parts of the high seas. Consequently, Canada requested the Court to decline jurisdiction over the matter. Spain, for its part, framed the issue more broadly and contended that the dispute between the two parties pertained to Canada’s entitlement to exercise its jurisdiction on the high seas against ships flying a foreign flag, and was not concerned per se with the management and conservation measures adopted by the Canadian government. Alternatively, Spain also argued that the dispute could not fall within the ambit of Canada’s reservation since the measures taken by the latter were not in conformity with international law.

Both sets of arguments were dismissed by the Court. On the latter point, the Court confirmed that ‘[n]owhere in the Court’s case-law has it been suggested that interpretation in accordance with the legality under international law of the (p. 640) matters exempted from the jurisdiction of the Court is a rule that governs the interpretation of such reservations’. Having concluded that the dispute fell within the scope of the reservation,
the Court could not, as a result, rule on the merits of the case. Given that very few cases
dealing with the rules and principles governing the regime of the high seas have been
submitted to the Court, the *Fisheries Jurisdiction* case could have provided insight and
guidance in this field and on possible coercion measures in that area of the sea, had it
proceeded to the merits phase. Needless to say, the consent of States parties to a dispute
before the Court with respect to the jurisdiction of that organ remains a basic rule that
cannot be set aside artificially.

That said, it is interesting to underscore that the issue of forcible enforcement by a State of
fisheries measures on the high seas was taken into account by the Court at the stage of
indicating interim measures of protection in the 1972 *Fisheries Jurisdiction* cases. In
particular, the Court’s pronouncements in that context no doubt encompassed the
consideration of the prohibition of recourse to force by States in the high seas, as embodied
in a series of provisional measures that were indicated by the Court against the backdrop of
the ‘Cod War’. Thus, in both orders on provisional measures, the Court indicated that the
parties—Germany and Iceland and the United Kingdom and Iceland, respectively—should
all ensure that ‘no action is taken which might aggravate or extend the dispute submitted to
the Court’ until it has pronounced on the merits. More importantly, in both cases the Court
indicated that Iceland should ‘refrain from taking any measures to enforce the
Regulations...against vessels registered in’ the United Kingdom and in Germany, and that
Iceland should ‘refrain from applying administrative, judicial or other measures against
ships registered in’ the United Kingdom or Germany, ‘their crews or other related persons,
because of their having engaged in fishing activities in the waters around Iceland outside
the 12-mile fishery zone’.

23.6 Conclusion

The ICJ’s contribution to the law of the sea over the last six-and-a-half decades has been
considerable across the board, and particularly significant with respect to maritime
delimitation issues. It is no secret that predictability and stability are essential concepts
that must drive international legal norms underpinning judicial delimitations of
international boundaries, generally; this objective is equally desirable in the specific field of
maritime delimitation. In that regard, the Court’s (p. 641) influence has been pervasive, be
it in consecrating the provisional equidistance line/relevant circumstances methodology—
later clearly articulated as the three-step approach in the *Black Sea* case—or in insisting
upon the importance of equidistance as a sort of basic rule in delimitation matters.

In fact, the Court’s jurisprudence on matters of equidistance, which strives to achieve
predictability in maritime delimitation disputes, undoubtedly prompted arbitral tribunals to
follow suit. For instance, it led the *Guyana/Suriname* tribunal to take note of a ‘presumption
in favour of equidistance’ whenever a court or tribunal is called upon to delimit the EEZ and
continental shelf, regardless of whether disputing parties have adjacent or opposite
coasts. Thus, these jurisprudential strands evince the importance of equidistance in
generating equitable outcomes in maritime delimitation disputes for several obvious
reasons, chief among them being that the objective nature of this delimitation approach can
be geometrically verified once base points are fixed. More importantly, the various dicta
of the World Court have undoubtedly assuaged initial concerns over the possible
fragmentation of public international law with respect to maritime delimitation, in
particular, fears that the multiplication of ad hoc tribunals, the creation of ITLOS, and the
burgeoning ICJ docket on delimitation matters might lead to jurisprudential chaos and
methodological inconsistency.
Quite to the contrary, jurisprudence relating to maritime delimitation has evolved harmoniously and coherently over the last two decades, with the ICJ playing a central role in the principled development of the resulting normative scheme. Indeed, a rich horizontal dialogue and cross-fertilization actuate various judicial and arbitral processes confirming the validity of the relevant rules applicable to delimitation exercises, thereby bolstering the assertion of the then ICJ President, Rosalyn Higgins, that ‘so-called “fragmentation of international law” is best avoided by regular dialogue between courts and exchanges of information’.

Relevant guiding principles and consecration by the Court of the provisionally equidistance line/relevant circumstances methodology—or the quasi-identical three-step approach if the final verification of the boundary line is considered as a separate stage of the inquiry—is now firmly entrenched in maritime delimitation decision-making. Indeed, the Court once again confirmed the validity of this methodology in a recent judgment on maritime delimitation, which settled a dispute between Nicaragua and Colombia over maritime areas and features in the Western Caribbean Sea. Even more recently, as referenced, in the Maritime Dispute between Peru and Chile the Court also applied this methodology when confronted with an uncommon situation: namely, where a segment of the maritime boundary had been previously agreed by the parties by way of agreement, out to a certain distance. In that context, the tried and true three-step methodology once again proved helpful in carrying out the delimitation, in the area beyond the final point of the agreed maritime boundary. In this light, there is every indication that the lockstep march and practice of States and international judicial and arbitral bodies will continue onward, and towards greater unity and coherence in the application and interpretation of legal principles governing maritime delimitation.

Footnotes:

1 Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (Geneva, 29 Apr. 1958) 450 UNTS 169, preamble.


3 UNCLOS, Art. 287(3) and (5) respectively.

4 If anything, it would appear as though the anxieties initially expressed with respect to the potential fragmentation of the field of maritime delimitation were largely unfounded. Rather, upon canvassing both State practice and judicial/arbitral decisions rendered over the last two decades, the picture that emerges is more one of unity and coherence in delimitation methodology and dispute settlement. See e.g. P Tomka, ‘The Guyana/Suriname Arbitration Award of 2007’ (2012) 8 PCA Award Series 1, 16–21.


Fitzmaurice (n 8) vol. I, 204–5.


12 *Qatar v Bahrain* [2001] ICJ Rep 97, para 185.

13 *Qatar v Bahrain* [2001] ICJ Rep, 109, para 220.

14 *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment [1984] ICJ Rep 246, 267, para 26. It may be recalled that the 1969 *North Sea Continental Shelf* cases and the *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, Judgment [1982] ICJ Rep 18 were solely concerned with the delimitation of the continental shelf.

15 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* [1984] ICJ Rep 267, para 27.

16 See e.g. *Maritime Delimitation in the Black Sea (Romania v Ukraine)* Judgment, [2009] ICJ Rep 61, 70, para 17. In the case recently decided by the Court between Nicaragua and Colombia, the Applicant had likewise originally requested the establishment by the Court of a unique maritime boundary to delimit the respective continental shelves and EEZs. Nicaragua, however, after the Court rendered the Judgment on Preliminary Objections ([2007] ICJ Rep 832), changed its position in its Reply in order to claim an extended continental shelf. See *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Reply of the Government of Nicaragua, vol. 1, 18 Sept. 2009, <http://www.icj-cij.org/docket/files/124/16971.pdf> accessed 24 May 2014, paras 25–26. In its Judgment on the merits, the Court determined that Nicaragua’s final submission regarding its claim for continental shelf delimitation extending into an area beyond 200 nm from its coast was admissible, but ultimately concluded that it cannot be upheld. See *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment [2012] ICJ Rep 624, 662–70, paras 104–31. The Court delimited the course of the maritime boundary between the parties in para 251 of its Judgment. On 16 Sept. 2013, Nicaragua instituted new proceedings against Colombia before the Court in the *Case Concerning the Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)*. In that context, the Applicant State refers to a dispute concerning ‘the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia’. Ultimately, Nicaragua is primarily seeking clarification from the Court as to the ‘precise course of the maritime boundary’ between the parties ‘in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012’. See Application of the Republic of Nicaragua, <http://www.icj-cij.org/docket/files/154/17532.pdf> accessed 24 May 2014, paras 2, 12.


18 See e.g. *Qatar v Bahrain* [2001] ICJ Rep 94, para 177.

Fisheries Case [1951] ICJ Rep 133.

Qatar v Bahrain [2001] ICJ Rep 97, para 183.

Qatar v Bahrain [2001] ICJ Rep 97, para 183.

Qatar v Bahrain [2001] ICJ Rep 97, para 185. More recently, the Court equated all of the provisions of UNCLOS, Art. 121—thereby including para 3 as well—which govern the regime of islands under international law, with ‘an indivisible régime, all of which...has the status of customary international law’. See Territorial and Maritime Dispute (Nicaragua v Colombia), Judgment [2012] ICJ Rep 624, 674, para 139 in fine.

UNCLOS, Art. 13(1). See also Section 23.2.

The parties to those disputes were Germany, appearing as a party in both cases on the one hand, and the Netherlands and Denmark, on the other.


The customary character of this provision was confirmed by the ICJ in Qatar v Bahrain [2001] ICJ Rep 94, para 176.


Continental Shelf (Libyan Arab Jamahiriya v Malta) Judgment [1985] ICJ Rep 13, 37, para 43.

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea [2007] ICJ Rep 659.


Territorial and Maritime Dispute (Nicaragua v Honduras) [2007] ICJ Rep 659, paras 275, 282.

Territorial and Maritime Dispute (Nicaragua v Honduras) [2007] ICJ Rep 659, para 281.


See Maritime Delimitation in the Black Sea [2009] ICJ Rep 101, para 116 (underscoring that no legal consequences follow from the use of both terminologies since ‘the method of delimitation is the same for both’). For a more recent confirmation of this approach by the Court, see Territorial and Maritime Dispute (Nicaragua v Colombia) Judgment [2012] ICJ Rep 624, 695, para 191.


Guyana v Suriname Arbitration, Award of 17 Sept. 2007, 95–6, para 303. See also Qatar v Bahrain [2007] ICJ Rep, para 304 (equating ‘[n]avigational interests’ with ‘special circumstances’).


Likewise, in the Libya/Malta case, the Court rejected the proposition that the wealth of States constitutes a relevant factor that should affect maritime delimitation:

The Court does not however consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law.

See Continental Shelf (Libyan Arab Jamahiriya v Malta) [1985] ICJ Rep 41, para 50.

Indeed, the Tribunal stated that ‘[t]he case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution.’ See Guyana v Suriname Arbitration, Award, 17 Sept. 2007, para 342.

This approach also accords with that espoused by older cases rendered by the principal judicial organ of the United Nations, prior to the judicial consecration of the provisional equidistance line/relevant circumstances methodology. See e.g. Delimitation of the Maritime Boundary in the Gulf of Maine Area [1984] ICJ Rep 327, para 194 (underscoring that, in the light of increasing requests for single boundary delimitations, ‘preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation’).

Maritime Delimitation in the Black Sea [2009] ICJ Rep 101, para 116. The Court also specified that equidistance and median lines ‘are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to be delimited’. Moreover, ‘[w]hen construction of a provisional equidistance line between adjacent States is called for’, the Court indicated that it ‘will have in mind considerations relating to both Parties’ coastlines when choosing its own base points for this purpose’. Thus, it follows that this preliminary boundary delimitation ‘is heavily dependent on the physical geography and the most seaward points of the two coasts’. Maritime Delimitation in the Black Sea [2009] ICJ Rep 101, para 117.


Maritime Delimitation in the Black Sea [2009] ICJ Rep 103, para 122. The Court went on to offer the following clarification: ‘This is not to suggest that these respective areas should be proportionate to coastal lengths.’


Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) [2012] ITLOS Rep 66–8, paras 233–40.


Maritime Dispute, Judgment, 27 Jan. 2014, paras 80–95. The Court also concluded that the agreed maritime frontier between the parties was an all-purpose boundary. Maritime Dispute, Judgment, 27 Jan. 2014, paras 100–2.


Maritime Dispute, Judgment, 27 Jan. 2014, para 179 (citing Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Merits, Judgment


For the Court’s application of the three-step methodology, see *Maritime Dispute (Peru v Chile)*, Judgment, 27 Jan. 2014, paras 184–97.


UNCLOS Art. 19; see Section 23.1.


Qatar v Bahrain [2001] ICJ Rep 117.


Guyana v Suriname Arbitration, Award of 17 Sept. 2007, para 338. The ICJ’s own jurisprudence also aligns with this conception of equidistance. See e.g. *Cameroon v Nigeria* [2002] ICJ Rep 442, para 290.


