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Equidistance – Special Circumstances: A Return to the Geneva Convention of 1958 or a Continuing Uncertainty?

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Abstract: *Since the date of 3 February 2019 marks the 10th anniversary of the judgment of the international Court of Justice in the Maritime Delimitation in the Black Sea (Romania v. Ukraine) case, the study proposes an analysis of the relevant case-law in the field of maritime delimitations, in order to ascertain the existence of a trend towards the consecration of the "equidistance – special circumstances" as the most pertinent method for international courts and tribunals, to effectuate maritime delimitations. The study demonstrates that the Black Sea case has been a turning point, which established, as a matter of "acquis judiciaire", that the equitable result envisaged by the relevant law (articles 74 and 83 of UNCLOS, reflecting customary international law) is to be achieved by the use of the "equidistance – special circumstances" method (except for "compelling reasons"). The line of cases which started with the Black Sea delimitation provided, as a matter of legal certainty, the predictability that this method will be used in the application of articles 74 and 83 of UNCLOS. However, the study shows that certain difficulties persist with respect to the "way in which" the method will be applied, especially in the light of certain special circumstances, such as "concavity" or "cut-off effect".*

Key-words: *continental shelf and exclusive economic zone, maritime delimitation, equidistance/special circumstances, equitable result*

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1. Introduction

The date of 3 February 2019 will mark the 10th anniversary of the judgment of the international Court of Justice in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*[1]. It has been not only a landmark for the recent Romanian history, but an important point in the jurisprudence related to maritime delimitations. Both before and after this case, jurisprudence evolved. The purpose of this study is to analyze the jurisprudential trends and the very fine balance between "certainty and predictability", on one side, and „flexibility" (or "uncertainty") as to the perspectives of future delimitation cases, on the other side[2]. Of course, observing the role of the *Black Sea* case in the evolution of case-law is an important objective.

The conventional international law on maritime delimitations resides on two similar articles of the United Nations Convention on the Law of the Sea[3] – articles 74 and 83 – which throw little light on how a particular delimitation should be effected. Their text (applicable, respectively, for the continental shelf and the exclusive economic zone) provides simply that delimitation "*shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution*". This "vagueness" of the convention law has not always been the case, because, by the beginning of the development of the international law on the continental shelf, the 1958 Geneva Convention on the Continental Shelf provided that, in absence of agreement, "*and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance/[median line] from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured*"[4].

It is well known that the International Court of Justice acknowledged in 1969 that the principle of equidistance enshrined in the above quoted article 6 of the Geneva Convention neither reflects a declaratory customary rule of international law, at the moment of its adoption, nor constituted the origin of a subsequent development of such a norm[5]. The Court recalled that the

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[1] *Maritime Delimitation in the Black Sea,* ICJ Reports, 2009, p. 61.

[2] For the difficulties related to the concept of equity: L. D. M. Nelson, "The Roles of Equity in the Delimitation of Maritime Boundaries", in *American Journal of International Law* vol. 84, issue 4 (1990), p. 837–858.

[3] UNTS, vol. 1833, no. 31363.

[4] UNTS, vol. 499, p. 311, article 6, para. 1 and 2.

[5] *North Sea Continental Shelf*, Judgement, ICJ Reports 1969, p. 3, 45, para. 81.

International Law Commission proposed the equidistance – special circumstances norm "with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*"[1]. The applicable customary international law, as from the *North Sea Continental Shelf Decision,* was to be the "equitable principles, taking into account the relevant circumstances"[2], which was later somehow reflected in the United Nations Convention on the Law of the Sea[3].

Nevertheless, in case of a delimitation case, the "equitable principle" does not help very much the technical experts and the cartographers. Therefore, case-law evolved, with different trends, and international courts and tribunals tried to apply different methods in order to provide more concreteness to equity[4]. From this perspective, an important place is held by the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*[5], because, even if the Court had referred in earlier cases to the method named "equidistance – special circumstances", it was for the first time when the method was comprehensively explained and detailed[6]. Even if it was mentioned just as a "method" and not a "rule", it has been followed

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[1] *Ibid.* p. 38, para. 62.

[2] *Ibid.* p. 55, para. 101.

[3] For general considerations on the reflection of the 1969 judgment in the UNCLOS and beyond, see Prosper Weil, *Law of Maritime Delimitation: Reflections*, Grotius, Cambridge, 1989, p. 1-327.

[4] For methods of delimitation: Leonard Legault, Blair Hankey, "Method, Opositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation", in Jonathan I. Charney, Robert W. Smith (ed.), *International Maritime Boundaries,* vol. I, Martinus Nijhoff Publishers, 1993, p. 203-243; Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*. Publications on Ocean Development 42. Leiden, The Netherlands: Martinus Nijhoff, 2003; B. H. Oxman, "International Maritime Boundaries: Political, Strategic and Historical Considerations." *University of Miami Inter-American Law Review* vol 26, issue 2 (1994–1995), p. 243–296.

[5] *Maritime Delimitation in the Black Sea, ICJ Reports, 2009,* p. 61.

[6] *Ibid.* p. 101-103, para. 115-122.

by the same Court or by other international courts and tribunals in subsequent cases[1].

As Alain Pellet put it, the *Maritime Delimitation in the Black Sea* was a "refounding case" ("un arrêt refondateur")[2], for the main reason that it reverted, in practical terms, the certainty of the law on maritime delimitations back to article 6 of the 1958 Geneva Convention, which was "denied" as a matter of customary international law by the 1969 *North Sea Continental Shelf Cases.* The purpose of this study would be to explore the way in which the method called "equidistance – special circumstance" was applied before and after the *Black Sea* case and to analyse the "degree of certainty" brought by the case-law developments. Thus, the question that arises is whether the "shift back", as a matter of customary law, to the "article 6 of the 1958 Convention" is real and whether it enshrines sufficient predictability to a delimitation process.

The article would attempt to examine the delimitation cases before and after the *Maritime Delimitation in the Black Sea* from two perspectives: the choice of the method and the way in which the method was applied (in particular, what would be the special circumstances required for adjustment of the line and how the adjustment should be performed).

2. Choice of the method of delimitation before the *Maritime Delimitation in the Black Sea*

2.1. Initial rejection of equidistance

After the 1969 *North Sea Continental Shelf Cases*, there was little light on the particular method to be used in order to put in practice the equitable

[1] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4; *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Judgment, ICJ Reports 2012, p. 624; In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, award of 7 July 2014, Registry PCA; ITLOS Case no. 23, Judgment of 23 September 2017, *Dispute concerning Delimitation o the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)* (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf, accessed 20 August 2018 – not published yet in the ITLOS Reports); Joined Cases *Maritime Delimitation in the Caribbean Se and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, general List no. 157 and 162, Judgment of 2 February 2018, not reported yet in ICJ Reports, available at http://www.icj-cij.org/files/case-related/157/157-20180202-JUD-01-00-EN.pdf (consulted 20 December 2018).

[2] Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", in Bogdan Aurescu (ed.), *Romania and the International Court of Justice*, Ed. Hamangiu, Bucureşti, 2014, p. 31-45.

principles which configured the applicable customary (and, then, conventional) law on the maritime delimitations.

Even under the regime of the 1958 Convention on the Continental Shelf, the Arbitral Tribunal deciding upon the *Anglo-French Continental Shelf Case*[1] was confronted with a reservation made by France to article 6 of the Convention, which had the effect of rendering article 6 inapplicable as between the two countries"to the extent, but only to the extent, of the reservations"[2] (more precisely, in the area of the Channel Islands, expressly excluded by the French reservation). The Court of Arbitration held that "*the fact that Article 6 is not applicable as between the Parties to the extent that it is excluded by the French reservations does not mean that there are no legal rules to govern the delimitation of the boundary in areas where the reservation operates*"[3]. Nevertheless, it is important that the Court of Arbitration considered that"the practical significance" between applying article 6 and not applying it is"*very small*", because, in the present case, the application of rules of customary international law led to the same result[4]. More precisely, the equidistance principle was found to be"conditional" upon the non-existence of special circumstances[5].

The method chosen by the Arbitral Tribunal seemed, therefore, not to depend on the formal applicability of article 6 of the 1958 Geneva Convention:

> "*the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those circumstances*"[6].

The Anglo-French Continental Shelf Case is also important for advancing the concept of"limited effect" of certain features. The Court admitted that certain islands (Ushant and Scilly), of a certain size and populated, cannot

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[1] Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977 and 14 March 1978, RIAA, VOLUME XVIII pp. 3-413.

[2] *Ibid.* p. 42, para. 61.

[3] *Ibid.* p. 42, para. 62.

[4] *Ibid.* p. 43-44, para. 65.

[5] *Ibid.* p. 45, para. 70.

[6] *Ibid.* p. 56, para. 97.

be disregarded without"refashioning geography"[1] (term employed years later in the *Maritime Delimitation in the Black Sea,* with respect to the Serpents Island[2]). Nevertheless, the Court had to find a method"of remedying in an appropriate measure the distorting effect on the course of the boundary" caused by these features[3]. What is also important is that the method chosen to remedy this effect was not the abandonment of equidistance: the Court relied on the practice of States, represented by"*some modification or variant of the equidistance rather than its total rejection*" and considered that the appropriate method was to give"*less than full effect*" to certain features in applying the equidistance method[4].

A first case involving a higher degree of difficulty in identifying the delimitation method was the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya*)[5] of 1982. Neither of the parties asked for the application of the equidistance. Libya had the strongest position, asking the Court to adjudge that"*the equidistance method is in itself neither a 'rule' nor a 'principle' and is not necessarily 'equitable' since its application under particular circumstances may lead to inequitable results*" and to acknowledge that in the particular case, the application of the equidistance would be "*inequitable, inappropriate, and not in conformity with international law*"[6]. Although Tunisia "previously argued " in favour of the equidistance at least for a portion of the disputed area, it acknowledged that this method would lead to a result which were inequitable to Libya[7]. Nevertheless, in its submissions, Tunisia asked for the concrete application of the bisector method ("*a line parallel to the bisector of the angle formed by the Tuniso-Libyan littoral in the Gulf of Gabes or [...] be determined according to the angle of aperture of the coastline of the Tuniso-Libyan frontier*"[8]).

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[1] *Ibid.* p. 116, para. 248.

[2] *Maritime Delimitation in the Black Sea*, ICJ Reports, 2009, p. 110, para. 149.

[3] Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977 and 14 March 1978, RIAA, VOLUME XVIII. p. 116, para. 248.

[4] *Ibid.* p. 116, para. 249. See also Robert Kolb, *Case Law on Equitable Maritime Delimitation. Digest and Commentaries,* Martinus Nijhoff Publishers, 2003, p. 85

[5] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, ICJ Reports 1982, p. 18.

[6] *Ibid.* p. 31-33, para. 15.

[7] *Ibid.* p. 79, para. 110.

[8] *Ibid.* p. 27, para. 15.

Court examined a wide range of relevant circumstances[1]. The Court noted the establishment by the parties of a de facto line of “26" east of north, which was the result of the manner in which both Parties initially granted concessions for offshore exploration and exploitation of oil and gas”[2]. Although the parties presented extensive arguments based on geology, the Court did not pay significant attention to these elements, noting that the relevant circumstances „*are not limited to the facts of geography and geomorphology*”[3]. The Court also examined historic rights and economic considerations as part of relevant circumstances and decided that their relevance for the delimitation is limited[4].

The delimitation method used by the Court in the Tunisia/Libya case was based on the bisector/perpendicular on the coastline, „inspired” in the first sector from the *de facto line* established by the parties (the angle of 26” form the meridian) and a the second sector, by a line „parallel to a line drawn from that point bisecting the angle between the line of the Tunisian coast (42") and the line along the seaward coast of the Kerkennah Islands (62"), that is to Say at an angle of 52" to the meridian”[5].

Two elements could be observed in the Tunisia/Libya case: first, the Court took into account the „change of direction” of the Tunisian coast, from a point on the parallel passing through the Gulf of Gabes (the area where the coast changed direction)[6]; second, it appeared in practice that the Kerkannah Islands were given in a way „half effect” in terms of the angle under which they have influenced the delimitation line.

The *Tunisia/Libya Case* was shortly followed by the *Gulf of Maine*[7] ruling of the Camber of the Court, which triggered similar uncertainties related to the choice of the method of delimitation. While Canada argued for a line based on the”equidistance – special circumstance” rule, stemming from article 6 of the 1958 Geneva Convention (in force between the Parties), the United States proposed a line based on the”perpendicular” to the general

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[1] For an outline of the relevant circumstances analysed by jurisprudence in the 1980s, see Malcolm D. Evans, “Maritime Delimitation and Expanding Categories of Relevant Circumstances.” *International and Comparative Law Quarterly* 40.1 (1991), p. 1–33.

[2] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, ICJ Reports 1982, p. 71, para. 96.

[3] *Ibid.* p. 64, para. 81.

[4] *Ibid,* p. 76, para. 105 (as the delimitation of continental shelf was not seemingly affecting the historic fishery rights of Tunisia) and p. 77, para. 107.

[5] *Ibid.* p. 89, para. 129.

[6] *Ibid.* p. 88, para. 126.

[7] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Reports 1984, p. 246.

direction of the coast[1]. As the parties asked the Chamber to draw a single maritime boundary separating not only the continental shelf, but also the superjacent waters[2], the Chamber decided that the applicable law was represented"*by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result*"[3]. The Chamber referred also to the article 6 of the 1958 Geneva Convention, and underlined that the use of the equidistance method"*is, however, subject to the condition that there are no special circumstances in the case which would make that criterion inequitable, by showing such division to be unreasonable and so entailing recourse to a different method or methods or, at the very least, appropriate correction of the effect produced by the application of the first method.*"[4]

The Chamber chose its own method of delimitation, notwithstanding the proposals made by the parties. It aimed to achieve"*an equal division of the area of overlapping created by the lateral superimposition of the maritime projections of the coasts of the two States*"[5]. It chose to establish three segments. In the first segment, the Chamber decided that the recourse to the geometric equidistance would imply difficulties linked to the "uncertainty as to sovereignty over the Machias Seal Island"[6] and, therefore, chose another geometric method, namely the bisector, described as follows:

> "*one may justifiably draw from point A two lines respectively perpendicular to the two basic coastal lines here to be considered, namely the line from Cape Elizabeth to the international boundary terminus and the line from that latter point to Cape Sable. These perpendiculars form, at point A, on one side an acute angle of about 82" and on the other a reflex angle of about 278". It is the bisector of this second angle which the Chamber considers that it should adopt for the course of the first segment of the delimitation line.*"[7]

The second segment was chosen on the basis of a"corrected median line"[8], while the third (and the longest) segment was determined, on the basis

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[1] *Ibid.* p. 287-288, para. 77-78.
[2] *Ibid,* p. 301, para. 116.
[3] *Ibid.* p. 300, para. 112.
[4] *Ibid.* p. 300, para. 115.
[5] *Ibid.* p. 331, para. 209.
[6] *Ibid.* p. 332, para. 211.
[7] *Ibid.* p. 333, para. 213.
[8] *Ibid.*, p. 337, para. 223.

of"simplicity", by drawing of a perpendicular to the closing line of the Gulf[1].

Both the *Tunisia/Libya* and the *Gulf of Maine* cases prove the rather „confuse" situation that the customary international law proscribing the"equitable principles" offered. The ICJ (and its Chamber) insisted on"equitable principles", while the predictability as to the identification of a potential solution was reduced. Both cases are relevant for emphasizing a combination of methods: perpendicular/bisector/even adjusted median in the central sector of the *Gulf of Maine* delimitation.

The choice of another method of delimitation was also the option of the Arbitral Tribunal in the *Guinea-Guinea Bissau* dispute[2]. The Tribunal decided not to apply equidistance, because of the "concavity" of the coasts of the relevant States, and because of the possibility of "enclavement"/"cutting-off" of the maritime areas of Guinea (between those of Guinea Bissau and Senegal)[3]. The Tribunal took into consideration the entire context of the geography of the Western African Coast and chose a totally different method: the delimitation was defined following the "southern limit of the 1886 Convention" (by reference to the so-called "Pilots Passage" and to the parallel 10°40'N) to 12 miles west of Alcatraz, and then the Tribunal established an azimuth to the south west, a straight line with a bearing of 236°, *grosso modo* perpendicular to the Almadies-Shilling line"[4].

2.2. The beginning of a return towards a"methodology"

While the *Tunisia/Libya* and the *Gulf of Maine* cases were relevant for outlining certain difficulties stemming from the choice of the method of delimitation, a series of cases that followed it seemed to opt for the application of the equidistance – special circumstances methodology.

A first case of such series was the *Libya/Malta Continental Shelf Case*[5] of 1985, where the Court applied the customary international law (as Libya

[1] *Ibid.* p.337-338, para. 224.

[2] *Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary*, Award by the Arbitral Tribunal, 14 February 1985, International Law Materials, Vol. XXV, No. 2, Mar. 1986, p. 251-305. See also Kathleen A. McLlarky, Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, February 14, 1985, 11 Maryland Journal of International Law (1987), p. 93-121.

[3] *Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary,* p. 296, para. 107-109.

[4] *Ibid.*, p. 298, para. 111.

[5] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports 1985, p. 13.

was not a party to the 1958 Convention and the UNCLOS was not yet in force). While applying the"equitable principles", the Court rejected the"rift-zone" argument of Libya[1] and established the"staged approach":

> "*The Court intends to proceed by stages ; thus, it will first make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result; it will then examine this provisional solution in the light of the requirements derived from other criteria, which may call for a correction of this initial result*"[2].

The Court applied the median line in order to establish the provisional delimitation[3]. The Court found appropriate, in order to achieve an equitable solution, to shift the delimitation line in order to"lie closer to the coasts of Malta"[4]. Nevertheless, it seems a little unclear why the Court chose a particular method of"shifting" the provisional median line, in order to transpose it"in an exactly northward direction"[5]:

> "*In the light of these circumstances, the Court finds it necessary, in order to ensure the achievement of an equitable solution, that the delimitation line between the areas of continental shelf appertaining respectively to the two Parties, be adjusted so as to lie closer to the coasts of Malta. Within the area with which the Court is concerned, the coasts of the Parties are opposite to each other, and the equidistance line between them lies broadly West to East, so that its adjustment can be satisfactorily and simply achieved by transposing it in an exactly northward direction*"[6].

Despite the "unclear" decision related to the way in which the line was shifted, the Libya/Malta case is important, for setting for the first time the "staged" approach, which was the basis of the delimitation methodology consecrated by the *Maritime Delimitation in the Black Sea*[7].

The approach towards developing a method of equidistance-special circumstances was further ascertained in the *Jan Mayen Case (Denmark/Norway)*[8] of 1993. The case is interesting from the point of view

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[1] *Ibid.* p. 36-37, para. 41.
[2] *Ibid.* p. 46, para. 60.
[3] *Ibid.* p. 47, para. 63.
[4] *Ibid.* p. 51, para. 71.
[5] *Ibid.* p. 51, para. 71.
[6] *Ibid.* p. 51, para. 71.
[7] ICJ Reports, 2009, p. 101-103, para. 115-122.
[8] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, ICJ Reports 1993, p. 38;

of the applicable law: since the Court has rejected the Norwegian argument that a delimitation has already been effected in 1965 through an agreement between the parties[1], the Court found that the delimitation of continental shelf was governed by article 6 of the 1958 Geneva Convention on the Continental Shelf, while the delimitation of the fisheries zones (exclusive economic zones) was governed by customary international law – namely equitable principles/relevant circumstances[2]. The situation might seem similar to the *Gulf of Maine* case, previously presented. However, the Court held that, whether in the *Gulf of Maine* it was precluded to apply article 6 of the 1958 Convention because of the "Parties' agreement to ask for a single maritime boundary"[3]. In our view, the argument for the difference between the two cases may seem rather loose. However, it allowed for a step forward: unifying the application of the two sets of rules – article 6 of the 1958 Convention and customary international law:

> "*If the equidistance-special circumstances rule of the 1958 Convention is [...] to be regarded as expressing a general nom based on equitable principles, it must be difficult to find any material difference [...] between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles*"[4].

Thus, the Court chose to draw a provisional median line[5] and to examine the "special"/"relevant" circumstances which may call for its adjustment. It has to be mentioned that the Court underlined that "*is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law*"[6]. Examining the particular features of the Jan Mayen Island, the Court held that the disparity of coastal lengths represents a special/relevant circumstances that requires shifting the line towards Jan Mayen[7]. The Court also examined fishing of capelin, presence of ice in the areas to be delimited, as special/relevant circumstances and decided that the final line should be situated between the median line and the 200 miles line off the coasts of Greenland. The method chosen by the Court to define the exact

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[1] *Ibid.* p. 52, para. 32.
[2] *Ibid.* p. 57-58, para. 44.
[3] *Ibid.* p. 57, para. 43.
[4] *Ibid.* p. 58, para. 46.
[5] *Ibid.* p. 62, para. 53.
[6] *Ibid.* p. 62, para. 56.
[7] *Ibid.* p. 69, para. 69.

line was the division of the overlapping area in three zones, followed by the equal division of “zone 1” and non-equal division of “zones 2 and 3”[1].

In the following case-law, the Court applied the same approach – drawing first a provisional equidistance line and then examining the special circumstances which might ask for the adjustment of the line in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[2]. Since the disputed area was rather limited, the Court has been asked to delimit both the territorial seas and the exclusive economic zones/continental shelves. While applying formally different rules (equidistance/special circumstances in case of the territorial sea and equitable principles/relevant circumstances in case of the other maritime zones), it is important to quote a paragraph from the judgment emphasizing the fact that the two different rules lead, in fact, to the same approach:

> “*The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated*”[3].

In fact, the Court applied the same approach to both the territorial sea and the exclusive economic zones/continental shelves: drawing a provisional equidistance line and verifying the effect of special circumstances. The Court examined whether special circumstances would require the adjustment of the provisional line, examining aspects related to the pearling industry, claimed by Bahrain[4], as well as the disparity between the lengths of the coasts, claimed by Qatar[5], and came to the conclusion that adjustment is not necessary[6]. The Court also examined the effect of the maritime feature called Fasht al Jarim: it decided not to take it into consideration for the delimitation of the continental shelf and exclusive economic zone, as it, “*if*

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[1] *Ibid.* p. 79-81, para. 91-92; see also Robert Kolb, *op. cit.*, p. 446-475.

[2] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, p. 40; see also Barbara Kwiatkowska, “The Qatar v. Bahrain Maritime Delimitation and Territorial Questions Case”, Ocean Development and International Law, vol. 33, issue 3-4, July 2002, p. 227–262.

[3] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001., p. 111, para. 231.

[4] *Ibid.* p. 112-113, para. 235-236.

[5] *Ibid.* p. 114, para. 241-243.

[6] Robert Kolb, *op. cit.*, p. 547-553.

given full effect, would distort the boundary and have disproportionate effects".[1]

The same approach was followed by the Court in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*[2]*:* the Court found that the "equitable principles/relevant circumstances method" is very similar to the "equidistance/special circumstances" applicable to the territorial sea and "involves first drawing an equidistance line, the considering whether there are factors calling for the adjustment or shifting of the line in order to achieve an equitable result"[3]. The Court defined the relevant coastlines and the location of the base points used in the construction of the line.

The Cameroon/Nigeria case is also relevant for the argument of concavity, invoked by Cameroon as a special circumstance. The Court decided that, even if "concavity of a coastline may be a circumstance relevant to delimitation", it can only be so "*when the concavity lies in the area to be delimited*". Thus, the "concave" sectors of the Cameroonian coast faced primarily the island of Bioko (belonging to Equatorial Guinea)[4]. The Court also decided that other circumstances like the disparities between coastal length, the presence of the Bioko Island and the practice of oil concessions do not require the adjustment of the equidistance line, which reflects the "equitable result"[5].

Case-law of arbitral tribunals in the 1990s and 2000s also seemed to favour the application of the equidistance/median line method. Thus, following a first difficult award on sovereignty issues[6], the Arbitral Tribunal ruled in the second award within the *Eritrea/Yemen* case[7] that the single maritime boundary would be represented by the median line. Nevertheless, the divergences between the parties referred to the construction of the median line[8]. The *Barbados – Trinidad Tobago Arbitration*[1] also confirmed the two step approach to be followed:

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[1] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, p. 114-115, para. 247.

[2] *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, p. 303.

[3] *Ibid.* p. 441, para. 288.

[4] *Ibid.* p. 445, para. 297.

[5] *Ibid.* p. 448, para. 306.

[6] In the Matter of an Arbitration Pursuant to an Agreement to Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), 9 October 1998, RIAA, vol XXII, p. 209-332.

[7] Award of 17 December 1999 RIAA, vol XXII p. 335-410.

[8] *Ibid.* p. 362-364, para. 113-128; Robert Kolb, *op. cit.*, p. 506-525.

> "*The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point [...]. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result*"[2].

Nevertheless, in the eastern sector of the delimitation, the Tribunal found that "the disparity of the Parties' coastal lengths resulting in the coastal frontages abutting upon the area of overlapping claims is sufficiently great to justify an adjustment"[3]. The Tribunal rejected the claim of Trinidad Tobago to proceed to an adjustment following a specific azimuth, but, indeed, proceeded to such adjustment. The following paragraph appears relevant on the approach used by the Tribunal to adjust the equidistance line:

> "*There are no magic formulas for making such a determination and it is here that the Tribunal's discretion must be exercised within the limits set out by the applicable law. The Tribunal concludes that the appropriate point of deflection of the equidistance line is located where the provisional equidistance line meets the geodetic line that joins (a) the archipelagic baseline turning point on Little Tobago Island with (b) the point of intersection of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit. This point gives effect to the presence of the coastal frontages of both the islands of Trinidad and of Tobago thus taking into account a circumstance which would otherwise be ignored by an unadjusted equidistance line*"[4].

The Tribunal determined the "turning point" and the "terminal point" (not an azimuth): "*the terminal point is where the delimitation line intersects the Trinidad and Tobago-Venezuela agreed maritime boundary, which as noted establishes the southernmost limit of the area claimed by Trinidad and Tobago*"[5].

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[1] Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006, RIAA, vol. XXVII p.147-251.

[2] *Ibid.* p. 214-215, para. 242.

[3] *Ibid.* p. 240, para. 350.

[4] *Ibid.* p. 243, para. 373.

[5] *Ibid.* p. 243, para. 374.

According to the same approach, the Arbitral Tribunal in the *Guyana – Suriname* delimitation case[1] rejected Suriname's claim to apply the angle bisector method[2], as well as the claim of Suriname to avoid the cut-off effect caused by a provisional equidistance[3]. The Tribunal established first the provisional equidistance line and, following the examination of certain alleged special circumstances (geographic features, conduct of parties), found that no adjustment is necessary. It would be useful to quote the assessment of the Tribunal as regards the geographic characteristics (the cut-off effect claimed by Suriname): "*In short, international courts and tribunals dealing with maritime delimitation should be mindful of not remaking or wholly refashioning nature, but should in a sense respect nature*"[4].

2.3. A point of incertitude – the Nicaragua-Honduras case

Even the above mentioned case-law developments encouraged the gradual establishment of a "method" that would somehow "unify" the "rules" relating to equidistance/special circumstances and equitable principles/relevant circumstances, the *Nicaragua-Honduras* case[5] of 2007 threw again a degree of incertitude as to the method to be used, as the International Court of Justice chose to apply the bisector method. The Court stated clearly that:

> "*The jurisprudence of the Court sets out the reasons why the equidistance method is widely used in the practice of maritime delimitation: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. However, the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate*"[6].

Nevertheless, in this particular case there existed justified reasons not to apply the equidistance/special circumstances „method". First, neither of the

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[1] Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA, vol. XXX p.1-144.

[2] *Ibid.* p. 57-58, para. 221.

[3] *Ibid.* p. 70, para. 259.

[4] *Ibid.* p. 104, para. 374.

[5] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659.

[6] *Ibid.* p. 741, para. 272. See also Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case", under publication in Analele Universității București, 2018.

parties put forward as the main argument the drawing of a provisional equidistance line as the starting point of the delimitation[1]. Nicaragua asked for "the bisector of two lines representing the entire coastal front of both states", which would be determined by an azimuth[2], while Honduras put forward the argument of a tacit agreement to use the 15th parallel as the boundary (however, Honduras referred also to the bisector as producing equitable results and mentioned that the 15th parallel would also represent an adjusted and simplified equidistance line)[3]. Moreover, Nicaragua argued that the "instability of the mouth of the River Coco, combined with the very small and uncertain nature of the offshore islands and cays", would make fixing points and constructing equidistance "unduly problematic"[4]. On its term, Honduras was in agreement that "the mouth of the River Coco "shifts considerably, even from year to year", making it "necessary to adopt a technique so that the maritime boundary need not change as the mouth of the river changes"[5].

The Court itself found that:

> "*Given the set of circumstances in the current case it is impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties' mainland coasts*".[6]

What is also important to underline is that in the *Nicaragua – Honduras* case the Court declined to use equidistance both for the territorial sea, and for the exclusive economic zone and continental shelf. UNCLOS was in force between the parties and article 15 provided expressly for equidistance/special circumstances in case of the territorial sea, while articles 74 and 83 referred to the equitable result, in case of the exclusive economic zone and continental shelf. The Court referred expressly to the "exception" provided by the existence of special circumstances, envisaged by article 15[7].

Under these circumstances, the Court determined the relevant coastal fronts and chose the bisector line at an azimuth of 70°14′41.25″[8]. Subsequently,

[1] *Ibid.* p. 742, para. 275.
[2] *Ibid.* p 741, para. 273.
[3] *Ibid.* p. 742, para. 274.
[4] *Ibid.* p. 741, para. 273.
[5] *Ibid.* p. 742, para. 274.
[6] *Ibid.* p. 743, para. 280.
[7] *Ibid.* p. 745, para. 281.
[8] *Ibid.* p. 749, para. 287-289.

the bisector line was adjusted only to provide 12 miles territorial sea to certain islands that the judgment has attributed to the parties[1].

The *Nicaragua – Honduras* case provided some uncertainty to the future perspectives of judicial delimitation, to the extent that the judgment would be read at a glance. In fact, both the parties and the Court found that the particular circumstances of the case made the construction of a provisional equidistance line unfeasible. The Court also referred to the previous *Gulf of Maine* case and pointed out that in that particular case it was impossible to construct an provisional equidistance line because by Special Agreement the parties asked that delimitation would start in a specific point[2]. Although, indeed, the reasons for the Court not to apply the provisional equidistance are grounded, the case could not be ignored as creating a certain degree of uncertainty with regard to future perspectives of applying the method "equidistance/special circumstances"[3].

3. The Black Sea Case – a turning point? Evolution of case-law beyond 2009

3.1. The importance of the *Maritime Delimitation in the Black Sea*

It is not the purpose of this study to make an in-depth analysis of the *Maritime Delimitation in the Black Sea* case, but we consider important to underline three main features for which it may be considered a turning point in the law related to the delimitation of maritime areas. As it has been presented, the case-law before the Black Sea case provided for a certain degree of incertitude with respect to the predictability of the methodology to use in a delimitation case.

First, as Alain Pellet underlined in a commentary to the Black Sea case, the judgment "reestablished the order and the method, where the 1969 case set the disorder" ("*Il rétablit de l'ordre et de la méthode là où l'arrêt de 1969 avait engendré le désordre"*)[4]. It is not the law that is established (or "re-established") by the Romania – Ukraine decision, but a firm methodology to apply the law: the equidistance – special circumstances method. It could be questioned whether, following the Black Sea case, "equidistance-special circumstances" becomes "law" (as Alain Pellet puts it, the case is

[1] *Ibid.* p. 752, para. 304-305.

[2] *Ibid.* p. 743, para. 279.

[3] Yoshifumi Tanaka, "Reflections on Maritime Delimitation in the Nicaragua/Honduras Case", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, vol. 68 (2008), p. 903-937, 933-934.

[4] Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", *loc. cit.* p. 39.

"refounding firmly the law that has been abandoned in 1969"[1]) or "method do apply the law" (the law itself being articles 74 and 83 of UNCLOS).

In our view, it could be argued the International Court of Justice made through the Romania-Ukraine case a firm "*infra legem*" establishment that the "equidistance-special circumstances" method is the way in which articles 74 and 83 of UNCLOS will be applied. It could be considered as a matter of judicial interpretation of these rather vague articles, but, in any case, what is important is that it offers predictability. In the end, it does not matter whether "equidistance – special circumstances" represents "law"[2] or "judicial interpretation of the law" or "method to apply law": what it matters is the firmness of the future perspective that the Court (or any international court) will apply it in a delimitation case.

Secondly, in a "pedagogical manner"[3], the Court described the way in which it shall apply the "equidistance – special circumstances method". The Court presented in detail the three stages that it shall use: i) the drawing of a provisional equidistance/median line, ii) the examination of possible factors or circumstances that may lead to the adjustment or shifting of the equidistance line, in order to achieve an equitable result and iii) applying the proportionality test in order to verify the equitable character of the result[4]. The Court also provided clarification as to the overall method that includes: the determination of the relevant coasts[5], relevant maritime areas[6], and selection of base points[7].

In this sense, it has to be emphasized that even the parties presented extensive arguments related to the application of article 121 para (3) or (1) of UNCLOS to the Serpents' Island, the Court did not provide an interpretation to article 121. Nevertheless, the Serpents' Island was counted

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[1] *Ibid.*

[2] See, for example, Malcolm D. Evans, "The Law of the Sea", in Malcolm D. Evans (ed.), *International Law,* Oxford University Press, 2006, p. 623-657, p. 648: "for all practical purposes accepted what it rejected in the North Sea cases, that the equidistance/special circumstances approach reflects customary international law"; Ion Galea, , "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[3] Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", *loc. cit.* p. 38.

[4] *Maritime Delimitation in the Black Sea, (Romania v. Ukraine),* ICJ Reports, 2009, p. 101-103, para. 115-122.

[5] *Ibid.* para. 77-105.

[6] *Ibid.* para. 106-114.

[7] *Ibid.* para. 123-149.

neither as relevant coast[1], nor as a base point[2], nor as a special circumstance[3]. In the words of the Court,

> "*To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorize*"[4].

Thirdly, the case is important for the way in which the Court analyzed the special circumstances (labelled "relevant circumstances" in the decision). Even if Alain Pellet criticizes the decision for "mixing" the second and third stages of the methodology[5] (as the disproportion between the coasts was treated both in the second stage – relevant circumstances and in the third – test of proportionality), we appreciate that what it is important from this case is the fact that the Court found that none of circumstances which have been examined required for the adjustment of the equidistance line: disproportion between lengths of coasts, the enclosed nature of the Black Sea and existing delimitations in the region, the presence of Serpents' Island, the conduct of the parties (oil and gas concessions, fishing activities and naval patrols, any cutting-off effect and security considerations of the parties[6].

In the perspective of future delimitation cases, a special importance seems to be enjoyed by the "cutting-off effect", invoked by many States in different instances. Thus, it would be useful to point out the Court's considerations on this issue – because the paragraph below tends to accept the idea that "cutting-off" may have existed in case of the lines initially proposed by the parties, but not in the case of the line drawn by the Court:

> "*The Court observes that the delimitation lines proposed by the Parties, in particular their first segments, each significantly curtail the entitlement of the other Party to the continental shelf and the exclusive economic zone. The Romanian line obstructs the entitlement of Ukraine generated by its coast adjacent to that of*

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[1] *Ibid.* p. 97-98, para. 102.

[2] *Ibid.* p. 110, para. 149.

[3] *Ibid.* p. 122-123, para. 187; see also see also Coalter G. Lathrop, "Maritime Delimitation in the Black Sea (Romania v. Ukraine)", American Journal of International Law, Vol. 103, 2009, p. 543-549, 547.

[4] *Ibid.,* p. 110, para. 149.

[5] Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", *loc. cit.* p. 39-40.

[6] *Maritime Delimitation in the Black Sea, (Romania v. Ukraine),* ICJ Reports, 2009, para. 158-204.

> *Romania, the entitlement further strengthened by the northern coast of Ukraine. At the same time, the Ukrainian line restricts the entitlement of Romania generated by its coast, in particular its first sector between the Sulina dyke and the Sacalin Peninsula. By contrast, the provisional equidistance line drawn by the Court avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way. That being so, the Court sees no reason to adjust the provisional equidistance line on this ground*"[1].

There is no need to underline once more the tremendous importance the *Maritime Delimitation in the Black Sea* had for Romania: almost 80% of the disputed area, representing 9700 km^2 of the disputed 12.200 km^2, together with the advantage of extracting a very sensitive issue of the bilateral agenda and allowing for the Romanian – Ukrainian relations to fully develop[2]. What we would like to underline is the importance of the case for future developments in the law on maritime delimitations: first, because it anchored the "equidistance/special circumstances" method into legal certainty and, second, because it conferred a certain tendency or predictability in the sense that the provisional equidistance line seemed to appear as "invulnerable" as possible to the challenge for adjustment following the examination of special circumstances (the provisional equidistance line, which coincides with the final line of the Court, is depicted in annex I).

3.2. Confirmation of the choice of the method by subsequent case-law

Subsequent case-law witnessed cases where rarely the parties were in agreement as to the method to be used for delimitation.

A first "challenge" was represented by the case before the International Tribunal for the Law of the Sea between Myanmar and Bangladesh[3]. The position of Bangladesh (which was constantly upheld in the subsequent case

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[1] *Ibid.*, p. 127, para. 201.

[2] Bogdan Aurescu, *Avanscena și culisele procesului de la Haga. Memoriile unui tanar diplomat.* Ed. Monitorul Oficial, 2009, p. 210-256; Adrian Năstase, Bogdan Aurescu, *Drept international. Sinteze.* Ed. a IX-a, Ed. CH Beck, 2018, p. 232; James Crawford, Vaughan Lowe, Alain Pellet, Daniel Muller, Simon Olleson, "A brief evaluation of the International Court of Justice decision of 3 February 2009 in the case concerning Maritime Delimitation in the Black Sea*",* Romanian Journal of International Law, no. 8 (January – June 2009), p. 97-110.

[3] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4.

against India of 2014) was that the method equidistance – special circumstances produced an inequitable result, because of the concave coasts of the northern Bay of Bengal ("double concavity") and because of the cut-off effect it produces[1]. Thus, Bangladesh argued that the method to be applied should be "the angle-bisector method in delimiting the maritime boundary between Bangladesh and Myanmar in the exclusive economic zone and on the continental shelf", "specifically the 215° azimuth line"[2]. Myanmar, on its turn, argued that the law has evolved since the adoption of the 1982 Convention on the law of the Sea and invoked the *Black Sea* case, in order to argue that the Tribunal should "apply the now well-established method for drawing an all-purpose line for the delimitation of the maritime boundary between the Parties"[3].

The Tribunal observed that jurisprudence evolved and noted that "*over time, the absence of a settled method of delimitation prompted increased interest in enhancing the objectivity and predictability of the process*"[4]. The Tribunal expressly referred to the *Black Sea* case, observing that on this occasion "*the ICJ built on the evolution of the jurisprudence on maritime delimitation. In that case, the ICJ gave a description of the three-stage methodology which it applied* [and the Tribunal proceeded to describe the three stage steps"[5]. Finally, the Tribunal decided that

> *"[...] jurisprudence has developed in favour of the equidistance/relevant circumstances method. This is the method adopted by international courts and tribunals in the majority of the delimitation cases that have come before them.*
>
> *The Tribunal finds that in the present case the appropriate method to be applied for delimiting the exclusive economic zone and the continental shelf between Bangladesh and Myanmar is the equidistance/relevant circumstances method*"[6].

The *Myanmar – Bangladesh* case was important because it involved a geographical context characterized by concavity (even "double concavity"), not very different from the 1969 *North Sea* case. Nevertheless, the Tribunal recognized that "jurisprudence has evolved" and relied its decision on the method described in the *Black Sea* case. Nevertheless, the *Myanmar – Bangladesh* case brought a degree of uncertainty as to the "way in which"

[1] *Ibid.* p. 61-62, para. 210-213, 216.
[2] *Ibid.* p. 62, para. 215, 217.
[3] *Ibid.* p. 64, para. 222.
[4] *Ibid.* p. 65, para. 228.
[5] *Ibid.* p. 66, para. 233.
[6] *Ibid.* p. 67, para. 238-239.

the method should be applied (as it will be shown below), because the Tribunal adjusted the equidistance line exactly towards the azimuth of 215°[1] (which was the bisector line requested by Bangladesh).

In the *Nicaragua – Colombia* dispute[2], adjudged by the Court in 2012, the Court had to achieve the delimitation between the Nicaraguan mainland coast and the Colombian islands of San Andrés, Providencia and Santa Catalina[3]. The parties had different views: while Colombia supported the method to draw a provisional equidistance line that could subsequently be adjusted in order to produce an equitable result, Nicaragua relied on the 2007 judgment in the *Nicaragua - Honduras* case in order to argue that "here may be factors which make it inappropriate to use the methodology of constructing a provisional equidistance/median line and then determining whether there are circumstances requiring its adjustment or shifting"[4]. Nicaragua argued that the use of the equidistance/special circumstances method would be "wholly artificial" because it would "treat the islands as though they were an opposing mainland coast"[5] and suggested that the Court should just "enclave" the Colombian islands[6]. The Court was very clear in pointing out that the methodology it will use would be the three stages approach described in the *Black Sea* case: *"[...] has made clear on a number of occasions that the methodology which it will normally employ when called upon to effect a delimitation between overlapping continental shelf and exclusive economic zone entitlements involves proceeding in three stages*" [7] and proceeded to explain in the same "pedagogic" manner these three stages[8]. The Court rejected the use of another method and held that the

[1] *Ibid.* p. 89, para. 334; see also Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[2] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment,* ICJ Reports 2012*,* p. 624.

[3] On the role of islands in delimitation, see John Briscole, Peter Prows, "Role of Islands in the Generation of Boundaries at Sea", in Clive H. Schofield, Seokwoo Lee, Moon-Sang Kwon (ed.), *The Limits of Maritime Jurisdiction,* Brill, 2014, p. 79-111; for the role of islands in previous delimitations in the Carribean Sea, see Chris Carleton, "Maritime Delimitation in Complex Island Situations: A Case Study on the Caribbean Sea", in Rainer Lagoni, Daniel Vignes (ed.), *Maritime Delimitation,* Martinus Nijhoff Publishers, 2006, p. 153-188.

[4] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment,* ICJ. Reports 2012, p. 694, para. 185.

[5] *Ibid,* p. 693, para. 185.

[6] *Ibid.* p. 694, para. 186.

[7] *Ibid.* p. 695, para. 190.

[8] *Ibid.* p. 695-697, para. 191-194.

elements invoked by Nicaragua might represent special circumstances, to be analyzed in the second or third stages of the delimitation:

> "*The Court recognizes that the existence of overlapping potential entitlements to the east of the principal Colombian islands, and thus behind the base points on the Colombian side from which the provisional equidistance/median line is to be constructed, may be a relevant circumstance requiring adjustment or shifting of the provisional median line. The same is true of the considerable disparity of coastal lengths. These are factors which have to be considered in the second stage of the delimitation process; they do not justify discarding the entire methodology and substituting an approach in which the starting-point is the construction of enclaves for each island, rather than the construction of a provisional median line*"[1].

The *Peru – Chile* delimitation[2] represented a particular case, because the Court found that an agreed delimitation on the geographical parallel exists within the limit of 80 nautical miles[3]. Nevertheless, beyond this limit, the Court applied the same three-stage methodology, quoting the previous *Black Sea* and *Nicaragua – Colombia* cases[4].

The *India – Bangladesh* dispute[5] could be seen also as a "challenge" to the equidistance – special circumstances method, as it took place in the same geographic context characterized by concavity of the coasts in the Bay of Bengal.

On one hand, Bangladesh kept the same position as in the case against Myanmar and relied on the *Nicaragua – Colombia* and *Myanmar – Bangladesh* decision, to argue that "while both decisions nominally adopted the three-stage equidistance/relevant circumstances method, the ultimate delimitations departed significantly from equidistance". Moreover, Bangladesh argued that the ITLOS applied, in fact, in the 2012 decision

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[1] *Ibid.* p. 697, para. 197; nevertheless, whether the *Black Sea case* was voted unanimously, in the *Nicaragua – Colombia* case, for example, Judge Ronny Abraham considered in his separate opinion that the drawing of a provisional equidistance line "is not only highly inappropriate in this case, but that it is even virtually impossible" – *Separate opinion of Judge Abraham*, ICJ Reports, 2012, p. 736, para. 24; see also Alain Pellet, ''Roumanie c. Ukraine – un arrêt refondateur", *loc. cit.* p. 38.

[2] *Maritime Dispute (Peru v. Chile)*, Judgment, ICJ Reports 2014, p. 3.

[3] *Ibid.* p. 57, para. 149.

[4] *Ibid.* p. 65, para. 180.

[5] In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, award of 7 July 2014, Registry PCA.

against Myanmar, the angle bisector line, "albeit without so stating", because the 215° azimuth was finally chosen to adjust the provisional equidistance line and it coincided with the bisector proposed by Bangladesh[1]. As it can be noted, Bangladesh "speculated" the difficulties or uncertainties related to the concrete application of the equidistance-special circumstances method and requested the Court to apply the angle-bisector line, relying on the *Nicaragua – Honduras* case[2].

On the other hand, India argued that international jurisprudence has developed in favour of equidistance[3] and that "the leading authority for the modern law on maritime delimitation is the Black Sea judgment"[4].

The Tribunal noted the divergent views of the parties and we find important that it made certain considerations on the evolution of case-law:

> "Since articles 74 and 83 of the Convention do not provide for a particular method of delimitation, the appropriate delimitation method—if the States concerned cannot agree—is left to be determined through the mechanisms for the peaceful settlement of disputes. In addressing this question, international courts and tribunals are guided by a paramount objective, namely, that the method chosen be designed so as to lead to an equitable result and that, at the end of the process, an equitable result be achieved. [..] *This Tribunal wishes to add that transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process. The ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an acquis judiciaire, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention*" (emphasis added)[5].

Based on the examination of the case-law, the Tribunal held that "*equidistance/relevant circumstances method is preferable unless, as the International Court of Justice stated in Nicaragua v. Honduras, there are "factors which make the application of the equidistance method*

[1] *Ibid.* p. 91-92, para. 316.
[2] *Ibid.* p. 93, para. 323.
[3] *Ibid.* p. 92, para. 319.
[4] *Ibid.* p. 96, para. 330.
[5] *Ibid.* p. 98, para. 339.

inappropriate" [...] This is not the case here. Bangladesh was able to identify base points on its coast, as well as on the coast of India"[1].

A case in which the Chamber of the International Tribunal for the Law of the Sea applied strictly the equidistance – relevant circumstances method was the delimitation between *Ghana and Cote d'Ivoire* of 2017[2]. Again, the views of the parties as to the method to be used differed: Cote d'Ivoire supported the angle-bisector method, as the "most appropriate" in the present case, because it would take into account the "macro-geographical area"[3], while Ghana argued firmly that equidistance is the "now standard method" and explained that the geographical context of the coastlines of the two States offered "a textbook case for the maritime boundary between the two States to follow an equidistance line"[4].

The Special Chamber of the Tribunal rejected the argument of Cote d'Ivoire, which contended that "unlike the equidistance/relevant circumstances methodology – the angle bisector methodology is free from subjective factors"[5]. At the same time, the argument based on the "macro-geographical context" was rejected, as the Chamber considered that the delimitation "has to be equitable in result for the two Parties concerned", not involving the rights and interests of third States[6]. Therefore, the Special Chamber found that:

> "*the international jurisprudence concerning the delimitation of maritime spaces in principle favours the equidistance/relevant circumstances methodology. It further finds that the international decisions which adopted the angle bisector methodology were due to particular circumstances in each of the cases concerned. This international jurisprudence confirms that, in the absence of any compelling reasons that make it impossible or inappropriate to draw*

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[1] *Ibid.* p. 99-100, p. 945-946; see also Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[2] ITLOS Case no. 23, Judgment of 23 September 2017, *Dispute concerning Delimitation o the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)* (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf, accessed 20 December 2018 – not published yet in the ITLOS Reports); see aslo Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[3] *Ibid.* p. 80, para. 272.

[4] *Ibid.* p. 79, para. 265-266.

[5] *Ibid.* p. 83, para. 282.

[6] *Ibid.* p. 83, para. 283.

a provisional equidistance line, the equidistance/relevant circumstances methodology should be chosen for maritime delimitation."[1]

The latest case of maritime delimitation – a "double" dispute between *Nicaragua and Costa Rica*, both in the Caribbean Sea and in the Pacific Ocean (judgment of 2 February 2018)[2], did not raise difficult problems with respect to the choice of methodology: the Court used in both areas the three-stages method described in the *Black Sea* case[3]. The case is, indeed, relevant for the next sub-section of the study, involving the way in which he method was applied, respectively the way in which the provisional equidistance line was adjusted in order to respond to certain special circumstances.

3.3. The way in which the method was applied: adjustment of the provisional equidistance line

The *Black Sea* case provided, as mentioned above, a general view that the provisional equidistance line would be subject to the minimum degree of influence as a consequence of the special circumstances. However, the Court arrived at this conclusion in the case between Romania and Ukraine upon the basis of a line which did not coincide either with Romania's or with Ukraine's claim: it was the provisional equidistance line drawn by the

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[1] *Ibid.* p. 86, para. 289; see also Constantinos Yiallourides, Elizabeth Rose Donnelly, "Part I: Analysis of Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean", EJIL Talk!, 19 October 2017, available at https://www.ejiltalk.org/part-i-analysis-of-dispute-concerning-delimitation-of-the-maritime-boundary-between-ghana-and-cote-divoire-in-the-atlantic-ocean/ (accessed 20 December 2018) and "Part II: Analysis of Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean", EJIL Talk!, 20 October 2017, available at https://www.ejiltalk.org/part-ii-analysis-of-dispute-concerning-delimitation-of-the-maritime-boundary-between-ghana-and-cote-divoire-in-the-atlantic-ocean/ (accessed 20 December 2018). The authors point out that: "the ITLOS Special Chamber evidenced a desire to contribute to the development of consistent delimitation jurisprudence, and confirmed that the 'equidistance/relevant circumstances method' is now standard in a delimitation process – regardless of whether the coasts of claiming States parties are opposite or adjacent to one another. Importantly, it adhered to the three-step methodology identified and employed by the International Court of Justice (ICJ) in *Black Sea"*.

[2] Joined Cases *Maritime Delimitation in the Caribbean Se and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, general List no. 157 and 162, Judgment of 2 February 2018, not reported yet in ICJ Reports, available at http://www.icj-cij.org/files/case-related/157/157-20180202-JUD-01-00-EN.pdf (consulted 20 December 2018).

[3] *Ibid.,* p. 53, para. 135, p. 75, para. 176.

Court[1]. Therefore, on one hand, it is certain that jurisprudence confirmed that equidistance-special circumstance is the acknowledged method to achieve an equitable result, but, on the other hand, in each case, the method is applied in a fine balanced manner, based on the assumption that „each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable"[2].

Thus, following the *Black Sea* case, in all the cases, except for the *Ghana – Cote d'Ivoire* dispute, the international courts and tribunals proceeded to the adjustment of the equidistance line.

The *Ghana – Cote d'Ivoire* was characterized by the relative simpleness of the geographical context, the coasts of the two parties being rather straight. Nevertheless, Cote d'Ivoire requested the adjustment of the equidistance line, as a consequence of the „cut-off effect" generated by the "concavity" of the coast[3]. The Special Chamber of ITLOS rejected this argument and held that *"the existence of a cut-off effect should be established on an objective basis and [...] the decision as to the existence of a cut-off effect must take into account the relevant area in which competing claims have been made*"[4]. The Chamber explained that, even if a cut-off effect exists, it is "not as pronounced as in, for example, the case of the Bay of Bengal"[5], it comes into being at a great distance from the coast and, if the equidistance line would have been adjusted, this would be "to the detriment of Ghana would in fact cut off the seaward projection of the coast of Ghana"[6]. Annex II depicts the general equidistance line and the geographical context.

Maybe the most difficult case was the *Myanmar – Bangladesh* delimitation, as it occurred next after the *Black Sea* case, but involved a geographical context characterized by the concavity of the coast of Bangladesh, in the

[1] See, for example, *Maritime Delimitation in the Black Sea, (Romania v. Ukraine),* ICJ Reports, 2009, p. 127, para. 201; the Court chose its own line by taking as a relevant point the land end of the Sulina dike, not the sea end, as Romania has asked for.

[2] *Maritime Delimitation in the Caribbean Sea and Pacific Ocean,* para. 153; *ITLOS Case no. 16, Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, ITLOS Reports 2012, p. 86, para. 317.

[3] ITLOS Case no. 23, Judgment of 23 September 2017, *Dispute concerning Delimitation o the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)* (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf, accessed 20 December 2018 – not published yet in the ITLOS Reports), p. 117-118, para. 411-415.

[4] *Ibid.* p. 120, para. 423.

[5] *Ibid.* p. 120, para. 424.

[6] *Ibid.* p. 120, para. 425; see also Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

Bay of Bengal. Bangladesh – after invoking the use of the angle-bisector method and asking for a bisector line to be determined at the 215° azimuth line – presented, as a subsidiary argument, the cut-off effect generated by the concavity of the coast. The Tribunal decided to operate an adjustment:

> „ *[...] there is reason to consider an adjustment of the provisional equidistance line by drawing a geodetic line starting at a particular azimuth. In the view of the Tribunal the direction of any plausible adjustment of the provisional equidistance line would not differ substantially from a geodetic line starting at an azimuth of 215°. A significant shift in the angle of that azimuth would result in cut-off effects on the projections from the coast of one Party or the other*"[1].

One could note that, „as a matter of coincidence", the azimuth chosen by the Tribunal was exactly the angle bisector supported initially by Bangladesh. This led Bangladesh to argue, in the later case against India, that, in fact, the Tribunal applied the angle-bisector method without naming it so[2].

Another important element of the *Myanmar – Bangladesh* judgment is the determination of the point in which the adjustment of the equidistance line should begin. The Tribunal decided that "the provisional equidistance line is to be deflected at the point where it begins to cut off the seaward projection of the Bangladesh coast"[3]. The Tribunal presented the exact coordinates of the point of deflection and motivated its choice as follows:

> "*The Tribunal has selected the point on the provisional equidistance line that is due south of the point on Kutubdia Island at which the direction of the coast of Bangladesh shifts markedly from northwest to west, as indicated by the lines drawn by the Tribunal to identify the relevant coasts of Bangladesh*"[4].

Annex III shows the adjustment of the provisional equidistance line and the point from which the line was deflected.

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[1] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 89, para. 334.

[2] In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, award of 7 July 2014, Registry PCA, p. 91-92, para. 316.

[3] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 88, para. 329; Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*

[4] *Ibid.* p. 89, para. 331.

It appears that the solution to apply formally the equidistance – special circumstances method and to adjust the provisional line on the basis of the angle-bisector was not only a "compromise" between the arguments of the parties, but also a compromise solution between the judges of the Tribunal – and, therefore, it allowed for a "shallow" motivation. As judge Wolfrum pointed out, "*there is very little reasoning explaining why the adjusted line must be deflected at point B1 and none at all why the line should follow an azimuth of 215.[…] I have no reason to doubt that this line constitutes an equitable result, but other lines may equally have done so. However, the way in which the Tribunal reaches this conclusion again lacks transparency*"[1]. At the same time, Judge Gao explained that he has voted in favour of "*the the 215° angle-bisector line, rather than the so-called equidistance line generated by the equidistance/relevance circumstances method*"[2].

The case between *India and Bangladesh* was characterized by a similar geographical context – concavity of the coast of Bangladesh. While India argued for no adjustment of the provisional equidistance line, Bangladesh asked that the line would be adjusted as a result of the concavity. The Arbitral Tribunal decided to adjust the provisional equidistance line and pointed out that two conditions must be met in order for a cut-off effect to generate adjustment: first, the provisional equidistance must "prevent a coastal State from extending its maritime boundary as far seaward as international law permits" and, second, the solution would fall short of the "equitable" criterion, this evaluation requiring "an assessment of where the disadvantage of the cut-off materializes and of its seriousness"[3].

Contrary to the *Myanmar – Bangladesh* case, the Arbitral Tribunal did not adjust the provisional equidistance as to the "angle bisector line" required by Bangladesh (Bangladesh argued for an azimuth of 180° (based on angle bisector), while the Tribunal decided to adjust the line to the azimuth of 177° 30′ 00″[4]. The adjustment of the provisional equidistance line is depicted in annex IV.

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[1] Declaration of Judge Wolfrum, p. 140.

[2] Separate opinion of Judge GAO, p. 229, para. 100; see also Ravi A. Balaram, "Case Study: The Myanmar and Bangladesh Maritime Boundary Dispute in the Bay of Bengal and Its Implications for South China Sea Claims", Journal of Current Southeast Asian Affairs, vol. 31, issue 3 (2012), p. 85-104, 96.

[3] *In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India*, award of 7 July 2014, Registry PCA, p. 122, para. 417.

[4] *Ibid.* p. 147, para. 478.

Nevertheless, the choice of the Tribunal is even "less transparent" or "less motivated" than the *Myanmar – Bangladesh* case: the Tribunal did not motivate why it chose this azimuth and why it chose a particular deflection point. It pointed out only that "the adjusted delimitation line does not unreasonably limit the entitlement of India" and "adjusted delimitation line avoids turning points and is thus simpler to implement and administer by the Parties"[1].

The International Court of Justice seemed to have a rather different approach to the adjustment of the provisional equidistance line, although the geographical circumstances in each case were, indeed, different. Thus, in the *Nicaragua – Colombia* case, the Court was confronted with a median line generated, on one side, by the Nicaraguan mainland and islands close to the coast, and, on the other side, by the Colombian islands of Providencia/Santa Catalina, San Andres and Alburquerque Cays. The Court chose a complex method of simplifying the line, but, essentially, it departed from the assumption that the line was achieved by "*giving a weighting of one to each of the Colombian base points and a weighting of three to each of the Nicaraguan base points. That is done by constructing a line each point on which is three times as far from the controlling base point on the Nicaraguan islands as it is from the controlling base point on the Colombian islands*"[2]. The line was further simplified by the Court, in order to avoid a large number of turning points and to give sufficient effect to the projection of the Nicaraguan coast, which was "more than eight times the length of Colombia's relevant coast"[3]. Annex V depicts the way in which the line was drawn.

In the most recent case, of the *Nicaragua – Costa Rica* "double" delimitation in the Caribbean Sea and the Pacific Ocean, requests for adjustment of the provisional equidistance line were made by both parties. As in other cases, arguments based on "concavity" and the "cut-off effect" played an important role.

In case of the Caribbean Sea, Nicaragua asked the adjustment of the provisional line, as a result of the cut-off effect caused by "the convex and

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[1] *Ibid.* p. 147, para. 479-480.

[2] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* p. 709-710, para. 234.

[3] *Ibid.* p. 710, para. 235.

north-facing nature of Costa Rica's coastline" [1]. Costa Rica asked at the same time that the provisional line should be adjusted in its favour, due to the "three-State-concavity situation". Thus, Costa Rica argued that "the combination of convexity and concavity can only be relevant when a State occupies a central position between two States along a convex or concave coast"[2]. At the same time, Costa Rica argued that, should the Court adopt base-points on the Corn Islands, the provisional equidistance line should be adjusted as to give no effect to these Islands, having in mind "their location at a distance from the mainland coast"[3] (the Court held that the Corn Islands should be taken as relevant coast and base-points, as they "amply satisfy the requirements set forth in Article 121 of UNCLOS for an island to be entitled to generate an exclusive economic zone and continental shelf")[4]..

The Court, indeed, decided that, in the case of the Corn Islands, "given their limited size and significant distance from the mainland coast, it is appropriate to give them only half effect"[5]. Thus, the Court adjusted the provisional equidistance line in favour of Costa Rica, by constructing two lines (one with full effect to the Corn Islands, one with no effect, and identifying a simplified median line between them. The Court rejected the arguments based on cut-off and concavity, arguing that the cut-off effect is, in cases claimed by both parties, "not significant/not sufficiently significant, especially at a distance from the coast"[6].

In the Pacific Ocean, again, the cut-off effect generated by certain features was the debated element: Nicaragua argued that placing base points on the Santa Elena Peninsula and on the Nicoya Peninsula generates a shift to the north of the provisional equidistance line, thus cutting-off its coastal projection. Nicaragua characterized the cut-off effect as "marked and unjustified"[7]. Costa Rica argued that no adjustment is needed.

The Court analyzed separately the two features: the Santa Elena Peninsula and the Nicoya Peninsula. As to the Santa Elena Peninsula, it found that it

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[1] *Maritime Delimitation in the Caribbean Sea and Pacific Ocean,* p. 58, para. 148; for this case, see Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.,* sections III and IV.

[2] *Ibid.* p. 58, para. 149.

[3] *Ibid.* p. 59, para. 151.

[4] *Ibid.* p. 54, para. 140.

[5] *Ibid.* p. 59, para. 154.

[6] *Ibid.* p. 60, para. 155, 156; Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.*, section IV.

[7] *Ibid.* p. 85, para. 191.

"control[s] the course of the provisional equidistance line from the 12-nautical-mile limit of the territorial sea up to a point located approximately 120 nautical miles from the coasts of the Parties. The Court considers that such base points have a disproportionate effect on the direction of the provisional equidistance line"[1]. Therefore, the Court decided to adjust the line, by giving half effect to the Santa Elena Peninsula. At the same time, the Court found that no adjustment is needed in case of the Nicoya Peninsula, which is "a feature with large landmass, corresponding to approximately one seventh of Costa Rica's territory, and with a large population" and a "a prominent part of Costa Rica's mainland"[2].

The overall solution in the *Nicaragua – Costa Rica* delimitation seems balanced, in order to achieve an equitable result: the provisional line was adjusted in favour of Costa Rica in the Caribbean Sea and in favour of Nicaragua in the Pacific. In both cases, the Court did not adhere fully to the arguments of the party requesting adjustment (as Costa Rica claimed no effect for the Corn Islands in the Caribbean Sea, while Nicaragua criticized the cut-off effect generated by two peninsulas). One could note, in the same time, that the technique developed by the ICJ in the two cases: *Nicaragua – Colombia* and *Nicaragua –Costa Rica* appears to be, in our opinion, somehow more predictable: the Court chose to give half effect or one third effect to certain features (islands or peninsulas). The way in which the lines were adjusted, in the Caribbean Sea and the Pacific Ocean, is depicted in annex VI.

4. Conclusion

The law related to maritime delimitations evolved a lot. As pointed out by the Arbitral Tribunal in the *India - Bangladesh* case, the case-law represents *"an acquis judiciaire, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice"*[3]. Certainly, case-law brought more predictability to the delimitation process. Parties to a case before an international Court could anticipate, within a certain margin, the way in which the delimitation will be effected. Following the above (rather lengthy) examination of the relevant case-law, we think that two elements of conclusion could be drawn.

[1] *Ibid.* p. 85-86, para. 193.

[2] *Ibid.* p. 86-87, para. 195-196; Ion Galea, "Recent Developments in International Law on Maritime Delimitations: The Judgment of the International Court of Justice of 2 February 2018 in the Costa Rica – Nicaragua Case*", loc. cit.,* section IV.

[3] *Supra, Section II.2.*

First, we wish to emphasize that, as results from the tendencies in the jurisprudence, the *Maritime Delimitation in the Black Sea* has been a turning point, in the sense that, following this case, as a matter of ”acquis judiciaire”, articles 74 and 83 of UNCLOS are to be applied by using the method ”equidistance – special circumstances”, except for ”compelling reasons”, which could be rather exceptional, such as instability of the coastline that triggers impossibility to select base points. This conclusion is also emphasized by the Joint Declaration of the three Judges – Nelson, Chandrasehkhara Rao and Cot, in the *Myanmar – Bangladesh* case:

> ”Priority is given today to the equidistance/relevant circumstances method. Resort to equidistance as a first step leads to a delimitation that is simple and precise. However, complicated the coastline involved is, there is always one and only one equidistance line, whose construction results from geometry and can be produced through graphic and analytical methods. […] *As the International Court of Justice stated authoritatively in the Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment*, it is only if there are compelling reasons that make this unfeasible on objective geographical or geophysical grounds, such as the instability of the coastline, that one should contemplate another method of delimitation, for instance the angle bisector method”[1]. (Emphasis added)

Thus, if after the 1969 *North Sea* judgment, the applicable law, contained in the formula “equitable principles”, did not throw much light as to how the equitable result would be achieved, the case-law that developed following the *Black Sea* case brings an important degree of detail and predictability: parties could certainly expect that any international court or tribunal would use the three stages approach of the equidistance/special circumstances method, as a matter of legal certainty (except for “compelling reasons”). All the cases following *Romania v Ukraine* applied this method, notwithstanding the complexity of the geographical context. In our view, it is not about “modifying” the law prescribed by articles 74 and 83 of UNCLOS, but of bringing legal details as to the interpretation and application of this law, by means of “aquis judiciaire”. Thus, not even that the current situation could be seen as a return to the legal consecration of the “equidistance/special circumstance” in article 6 of the Geneva Convention

[1] ITLOS Case no. 16, Judgment of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, Joint Declaration of Judges Nelson, Chandrasehkhara, Rao and Cot, p. 134.

of 1958, but the current jurisprudence – based law offers even more predictability.

Second, if the case-law brought a high degree of certainty as to the question *whether* the “equidistance/special circumstances method” will be applied, the same case-law threw a shadow of uncertainty as to *how* it will be applied. It was noted that the special circumstances that generated the highest degree of uncertainty were concavity and the”cut-off effect” generated by it.

Just after the *Maritime Delimitation in the Black Sea,* the *Myanmar – Bangladesh* case brought an important degree of uncertainty, because even if it rejected the argument of Bangladesh for the use of the angle-bisector method, in fact the Tribunal adjusted the equidistance line towards the same azimuth as the angle-bisector requested by Bangladesh, without providing extensive reasoning. At the same time, the reasoning for choosing the point of deflection of the provisional equidistance line was rather scarce. This rather „untransparent” approach was somehow continued in the *India – Bangladesh* delimitation (as the Arbitral Tribunal did not provide extensive reasons for choosing the azimuth of the adjusted line and the point of deflection). These two cases threw a light of concern as to the predictability of future delimitations, even if it cannot be contested that the decision rendered were equitable.

The International Court of Justice chose other method for adjustment of the equidistance line, which, in our view, seems more objective and predictable: it granted limited effect (half effect or one third effect) to certain features and built a ”weighted line” or ”half effect line”. In any case, such a way to construct an equidistance line is more objectively determined than choosing an azimuth (without providing an objective reason for it).

In the end, the way in which the”equidistance – special circumstances” should be applied in practice remains unclear, even if „each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable”[1] .

The unclear situation of the way in which the ”equidistance/special circumstances method” is to be applied was summarized very eloquently by Judge Cot in his separate opinion in the *Myanmar – Bangladesh* case:

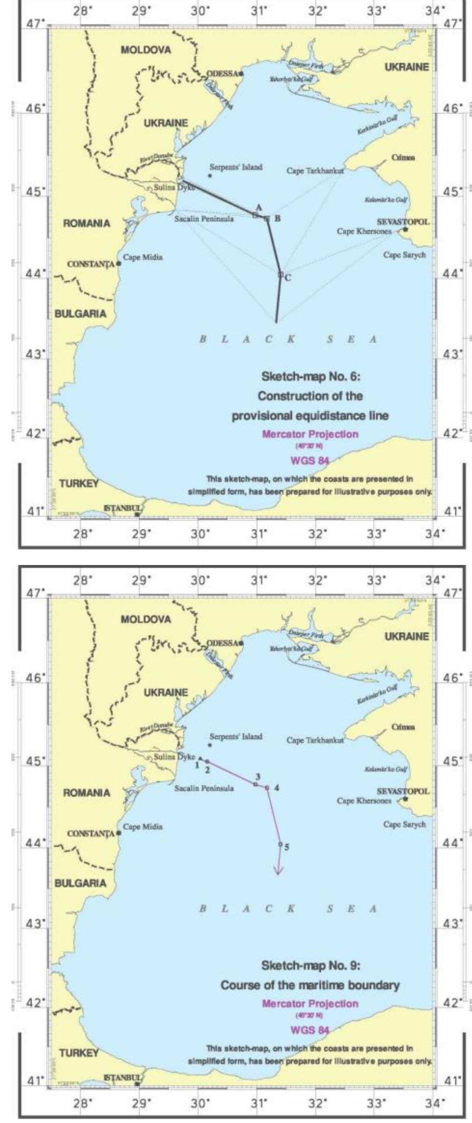
> ”*In other words, confusion reigns. The re-introduction of the azimuth method deriving from the angle-bisector theory results in mixing*

[1] *ITLOS Case no. 16, Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, ITLOS Reports 2012, p. 86, para. 317.

disparate concepts and reinforces the elements of subjectivity and unpredictability that the equidistance/relevant circumstances method is aimed at reducing"[1].

Annex I

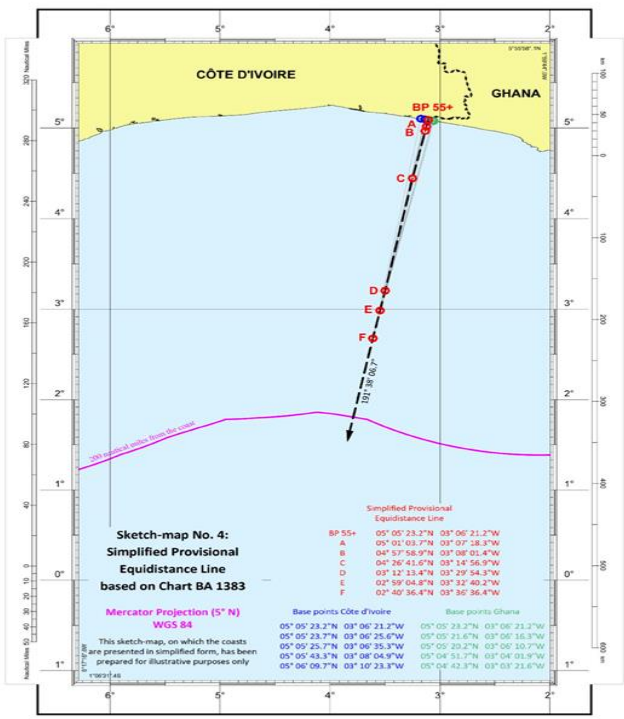
Provisional equidistance line and final line in the *Maritime Delimitation in the Black Case* (source: ICJ Reports, 2012, p. 114, 133)



[1] *Ibid.*, p. 190.

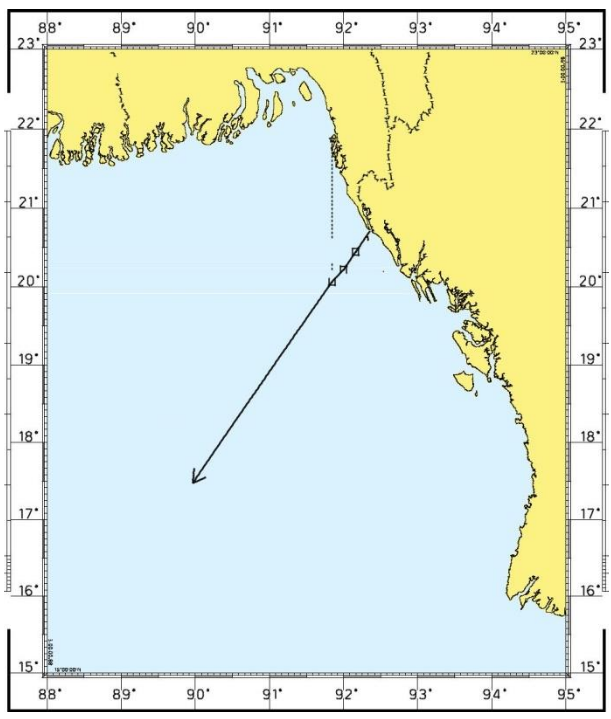
Annex II

Equidistance line in the Ghana – Cote d'Ivoire case (source: ITLOS Case no. 23, Judgment of 23 September 2017, *Dispute concerning Delimitation o the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)*, p. 114)



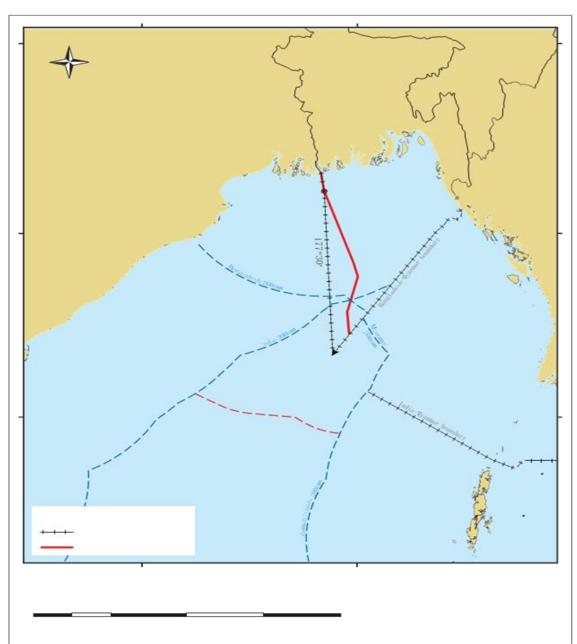
Annex III

Adjustment of the provisional equidistance line in the Myanmar – Bangladesh dispute (source: ITLOS Reports, 2012, p. 91).



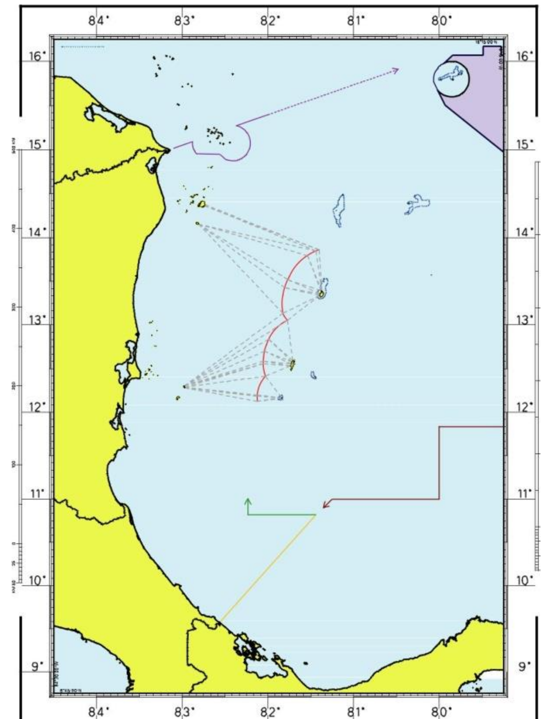
Annex IV

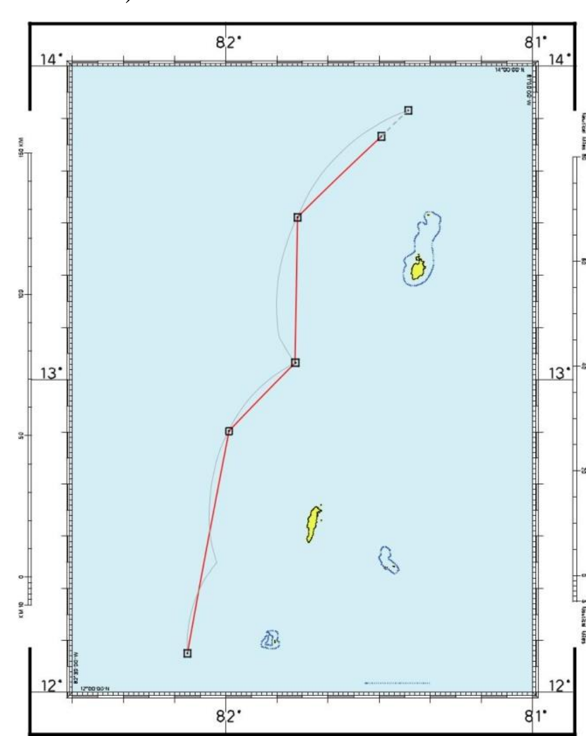
Adjustment of the provisional equidistance line in the India – Bangladesh dispute (source: *In the Matter of the Bay of Bengal, Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India*, award of 7 July 2014, Registry PCA, p. 149)



Annex V

Adjustment of the provisional equidistance line in the Nicaragua – Colombia dispute (source: ICJ Reports, 2012, p. 711-712)





Annex VI
Adjustment of the provisional equidistance line in the Nicaragua – Costa Rica dispute in the Carribean Sea and in the Pacific Ocean (Source: Joined Cases *Maritime Delimitation in the Caribbean Se and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, general List no. 157 and 162, Judgment of 2 February 2018p. 62, 89)