The ICJ and its Lip Service to the Non-Priority Status of the Equidistance Method of Delimitation

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Abstract

Since the first maritime boundary delimitation dispute before the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases* in 1969 to the most recent maritime delimitation judgment in Maritime Dispute (*Peru v Chile*), the Court has maintained that the equidistance method of delimitation is not the preferred method for delimiting international maritime boundaries. Yet a close examination of the Court's decisions shows that by insisting that the equidistance method does not have priority over other methods of delimitation, and yet continuing to apply it in the first instance to maritime delimitation cases before it, the Court has been paying lip service to its stance regarding the equidistance method. In reality, the former is the preferred method of delimitation, and States who submit their disputes to the Court may well expect that this is the method that would be applied by the Court in delimiting their boundaries. In order to prove this position, this article will consider closely how the equidistance method has been and is being applied by the ICJ. It thus traces the life cycle of the equidistance method, from its non-mandatory status at the beginning to its present pre-eminent status in light of the ICJ's maritime boundary delimitation decisions. It also assesses the rationale behind this development, and argues that the ICJ has by its application of the equidistance method elevated it to *the* method for international maritime boundary delimitation.

Keywords

Equidistance, Maritime Delimitation, International Court of Justice, Equitable Principle

1 Introduction

In the jurisprudence of the International Court of Justice (ICJ or Court) relating to maritime boundary delimitation, beginning with the *North Sea Continental Shelf (Federal*

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Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)¹ in 1969 to the present day, the Court has maintained that the equidistance method of delimitation is just one of the methods applicable to the delimitation of maritime boundaries in the quest for an equitable solution. In particular, the ICJ has taken the approach that the equidistance method of delimitation has neither an automatic priority over other methods of delimitation nor a presumption in its favour. Yet a close examination of the Court's decisions shows that, by insisting on the non-priority status of the equidistance method and yet continuing to apply it in the first instance to maritime delimitation cases before it, the Court has been paying lip service to its stance on the non-preferential status of the equidistance method of delimitation.² In reality, there is a presumption in favour of the equidistance method, and States who submit their disputes to the Court may well expect that this is the method that would be applied by the Court in delimiting their boundaries. In order to prove this position, this article, divided into four sections, will consider in the first how the equidistance method has been, and is being, applied by the ICJ. It thus traces the life cycle of the equidistance method, from its non-mandatory status at the beginning to its present preminent status in light of the ICJ's maritime boundary delimitation decisions. The second section examines the reasons that have contributed to the present elevated status of the equidistance method in the jurisprudence of the Court. The third section looks at the implications of this jurisprudence and the last section concludes the discussion.

2 Equidistance method and its application in decided cases

According to the 1958 Convention on the Continental Shelf, the equidistance method of delimitation consists of drawing a line, every point of which is equidistant (equally distant) from the nearest points of the baselines from which the breadth of the territorial sea is measured.³ It can also be described as a line 'which leaves to each of the parties concerned

¹ *North Sea Continental Shelf (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3 (*North Sea Continental Shelf* cases).

² It is noteworthy that there is a dearth of knowledge about other delimitation methods; they are less frequently spoken about in and outside of delimitation cases, contributing to the point this article is trying to make. Examples include the angle bisector method, the equiratio method, the thalweg, perpendicular lines, among others. See generally for a discussion on methods of delimitation, Chris Carleton and others, *Developments in the Technical Determination of Maritime Space: Delimitation, Dispute Resolution, Geographical Information Systems and the Role of the Technical Expert* (International Boundaries Research Unit 2002); Nuno Antunes, 'Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process' (Durham University 2002) <<http://etheses.dur.ac.uk/4186/>> accessed 20 January 2015.

³ Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311, art 6. The Minerals Management Service of the United States Department of Interior similarly defined an equidistance line as 'one for which every point on the line is equidistant from the nearest points on the baselines being used': Federal Register, Volume 71 Issue 1 (3 January 2006) <<http://www.gpo.gov/fdsys/pkg/FR-2006-01-03/html/05-24659.htm>> accessed 10 March 2015.

all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other Party'.⁴ The term 'median line' is sometimes substituted for 'equidistant line' as they are regarded as being synonymous.⁵ Article 6 of the Convention on the Continental Shelf provides that in the case of delimitation between States with opposite coasts, the boundary shall be determined by agreement and in the absence of agreement, by a median line, unless the existence of special circumstances necessitates the drawing of another line. For adjacent coasts, the Convention employs the term 'equidistance' in place of 'median line' which, as has been noted, is used synonymously. In the *Maritime Delimitation in the Black Sea (Romania v Ukraine)* case, the Court noted that '[n]o legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation is the same for both'.⁶

Article 6 was called into question in the *North Sea Continental Shelf* cases, where the parties (Germany and the Netherlands, and Germany and Denmark) requested the Court to make a pronouncement on the rules and principles that were applicable between them in the delimitation of their continental shelf in the North Sea. The Netherlands and Denmark argued that article 6 of the Convention on the Continental Shelf contained the applicable rule and, as such, the continental shelf should be delimited by means of an equidistance line.⁷ For them, insofar as entitlement to the continental shelf was based on the notion of appurtenance (which they interpreted to mean 'proximity'), any delimitation method used must leave to a State all those parts which are closer to it.⁸ Germany, on the other hand, which had not ratified the Convention, contended that the equidistance method was not customary international law and therefore was not applicable.⁹ In addressing the issue, the Court held that article 6 had not attained the status of customary international law. It further held that, although the equidistance method is a convenient method of delimitation, which had been used in a number of instances by States, the practical advantages thereof did not transform it into a mandatory rule of law.¹⁰ As the Court had maintained that the fundamental rule relating to the continental shelf was that of natural prolongation (of the land territory of a State into and under the sea), it found that the equidistance method was irreconcilable with the notion of natural prolongation. This was because the former, if applied, would have the effect of attributing to one State areas that are the natural prolongation of another State.¹¹

Tracing the history of the equidistance method in international law, the Court noted that, during discussions of the International Law Commission (ILC) on delimitation, the

⁴ *North Sea Continental Shelf* cases (n 1) 17.

⁵ Hiran Jayewardene, *The Regime of Islands in International Law* (Martinus Nijhoff 1990) 334.

⁶ *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Merits) [2009] ICJ Rep 61 (*Black Sea* case) 101.

⁷ *North Sea Continental Shelf* cases (n 1) 10.

⁸ *ibid* 29.

⁹ *ibid* 11.

¹⁰ *ibid* 23.

¹¹ *ibid* 31.

equidistance method was neither considered an inherent necessity in the doctrine of the continental shelf,¹² nor was it regarded as having priority over other methods that could be employed.¹³ Moreover, at the time, the ILC was considering equidistance within the context of territorial sea delimitation; it only transposed the equidistance approach to continental shelf delimitation as an afterthought and in a haphazard fashion.¹⁴ The Court thus concluded that the equidistance method was neither obligatory nor applicable to the dispute,¹⁵ holding that the delimitation had to be effected by agreement between the States concerned which had to employ equitable principles to arrive at such an agreement.¹⁶ In the words of the Court,

the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved.¹⁷

As far as the Court was concerned, delimitation by agreement and in accordance with equitable principles were the two concepts that had underlain all the subsequent history of maritime delimitation since the Truman Proclamation, which was the start of the positive law on the continental shelf, being reflected in subsequent proclamations and later work on the subject.¹⁸

This decision was confirmed in subsequent cases brought before the ICJ. In the case, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)*, even though the parties, Canada and the United States of America, were parties to the 1958 Convention, the Chamber of the Court held that article 6 was not general international law.¹⁹ It held further that, as it could not apply article 6 to disputes involving non-parties to the 1958 Convention, it could also not apply article 6 to parties to the

¹² *ibid* 35.

¹³ *ibid* 34.

¹⁴ *ibid* 34–35.

¹⁵ The Court, however, stated that, regarding delimitation between States with opposite coasts, in the absence of islets and rocks which may cause disproportionate results, the equidistance line would be appropriate for delimitation since it was the case that either of the two opposite States could claim the same continental shelf as the natural prolongation of its land territory. The Court stated, ‘These prolongations meet and overlap, and can therefore only be delimited by means of a median line’: *ibid* 36. It may be added here that this pronouncement was made within the context of both States being entitled to the same continental shelf as the natural prolongation of their land territories. The Court’s reasoning shows that, where the continental shelf is the natural prolongation of the land territory of just one of the two States—or put differently, where there are two natural prolongations—then any delimitation method should respect the principle of non-encroachment on the natural prolongation. In such a situation, the equidistance principle would be inapplicable: *ibid* 31, 53.

¹⁶ *ibid* 46.

¹⁷ *ibid* 47.

¹⁸ *ibid* 33.

¹⁹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Merits) [1984] ICJ Rep 246 (*Gulf of Maine* case). Recall that in the *North Sea Continental Shelf* cases, Germany had not ratified the Convention.

Convention that sought to delimit both the fisheries zone and the continental shelf.²⁰ As the Court put it, '[i]n short, the Chamber does not believe that there is any argument to justify the attempt to turn the provisions of Article 6 of the 1958 Convention into a general rule applicable as such to every maritime delimitation.'²¹ Commenting on this decision, Mark Igiehon argues that, by coming to this conclusion, the Court denied that there was a general international rule to apply the equidistance-special circumstances method or even a special rule applicable as between parties to the 1958 Convention.²²

These decisions were concerned with the 1958 Convention, particularly article 6. However, in 1982, the United Nations Convention on the Law of the Sea (UNCLOS) was signed and, even though it did not come into force until 1994, the Court took it into consideration in delimitation cases before it, where it considered the Convention reflective of customary international law, and accordingly applicable to the determination of the disputes.²³ The provision of the UNCLOS relating to the delimitation of the continental shelf is contained in article 83(1).²⁴ This article states that:

The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

In the absence of agreement after a reasonable period of negotiations, the States concerned shall resort to the procedures provided for in part XV.²⁵ From this article, the following properties can be gleaned:

- (a) States shall determine where their continental shelf boundaries lie by agreement.
- (b) This agreement shall be done on the basis of international law. Article 38 of the Statute of the ICJ sets out the sources of international law—international conventions, international custom, the general principles of law recognised by civilised nations; judicial decisions²⁶ and the teachings of the most highly qualified publicists of the various nations.
- (c) The aim of a maritime boundary delimitation exercise is the achievement of an equitable delimitation.

²⁰ *ibid* 303.

²¹ *ibid*.

²² Mark Igiehon, 'Present International Law on Delimitation of the Continental Shelf' (2006) 8 IELTR 208, 211.

²³ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November, 1994) 1833 UNTS 3. *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (Merits) [1982] ICJ Rep 18 (*Tunisia v Libya*) 38; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Merits) [1985] ICJ Rep 13 (*Libya v Malta*) 29; 30.

²⁴ Delimitation of the EEZ is provided for in article 74(1) and this is identical to article 83 on delimitation of the continental shelf.

²⁵ Part XV sets out the dispute resolution options available under the Convention.

²⁶ This is subject to the provisions of article 59, which states that the decision of the Court only has binding force between the parties and in respect of that particular case.

Article 83(1) of UNCLOS, unlike article 6 of the 1958 Convention on the Continental Shelf, provides no method for delimitation. It has been described as empty or meaningless as it provides no guidance as to the delimitation method to be employed, leaving the gap to be filled by States or by an adjudicatory body whenever a dispute comes before it.²⁷ In the *Continental Shelf (Libyan Arab Jamahiriya v Malta)* case, the Court acknowledged this issue, stating that '[t]he Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves or to the courts, to endow this standard with specific content'.²⁸ The reason for this empty formula was the difference in positions between two groups at the Third United Nations Conference on the Law of the Sea (UNCLOS III) where UNCLOS was adopted. One group favoured the prescription of the equidistance method, while the other group argued for the application of equitable principles. To resolve the deadlock and achieve a compromise, article 83 was drafted as it is presently, requiring only that any delimitation carried out must lead to an equitable solution. This confirmed again that the equidistance method neither had priority nor precedence and was just one of the many methods States (and adjudicatory bodies) could employ in the delimitation of boundaries. In this respect, Degan asserts that the division in views between delegates at the Conference as to the delimitation method to be codified in UNCLOS and the outcome of article 83 proves that there was no general international law on maritime delimitation.²⁹

The first case to consider article 83 was the *Tunisia v Libya* case. The Court held that it did not have to apply the equidistance method unless it found that this method was inequitable, following which it would then be at liberty to consider another method. Therefore, the Court would only find in favour of the application of the equidistance method after evaluating and balancing all relevant circumstances, 'since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods'.³⁰

In 1985, the Court was once again in a position to develop the law relating to maritime boundary delimitation through its interpretation of the law. The Court, commenting on state practice surrounding the application of the equidistance method in the *Libya v Malta* case, noted that 'state practice, however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any

²⁷ In his dissenting opinion in the *Gulf of Maine* case (n 19), Judge Gros referred to article 83 of UNCLOS as providing an 'empty formula' that had the effect of destroying all previous gains achieved through the 1958 Convention, the 1969 *North Sea Continental Shelf* cases: *Gulf of Maine* case (n 19) 365. See Pål Jakob Aasen, *The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute* (Fridtjof Nansen Institute 2010) 13.

²⁸ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Merits) [1985] ICJ Rep 13 (*Libya v Malta*) 30–31.

²⁹ Vladimir-Djuro Degan, 'Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic' (2007) 6 CJIL 601, 606.

³⁰ *Tunisia v Libya* (n 23) 79.

method, as obligatory.³¹ It also rejected Malta's argument that, since entitlement to the continental shelf was based on distance from the coasts, the equidistance method was applicable to the delimitation of the continental shelf or at least as a first step towards delimiting the shelf. Deciding that the distance criterion of entitlement to the continental shelf did not confer primacy on the equidistance method, the Court held:

The Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used, or that the Court is 'required, as a first step, to examine the effects of a delimitation by application of the equidistance method'. Such a rule would come near to an espousal of the idea of 'absolute proximity', which was rejected by the Court in 1969, and which has since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea. That a coastal State may be entitled to continental shelf rights by reason of distance from the coast, and irrespective of the physical characteristics of the intervening sea-bed and subsoil, does not entail that equidistance is the only appropriate method of delimitation, even between opposite or quasi-opposite coasts, nor even the only permissible point of departure. The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation, even from the outset.³²

It further added that 'the equidistance method is not the only method applicable to the present dispute and it does not even have the benefit of a presumption in its favour'.³³

The Court, in drawing the boundary line between Libya and Malta, nevertheless employed the equidistance method as a provisional line which could only become the final line if it could be demonstrated (through an application of equitable principles to the relevant circumstances) that the equidistance line would lead to an equitable result. This decision was based on the Court's recognition that 'the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts'.³⁴ Still the Court added:

The fact that the Court has found that, in the circumstances of the present case, the drawing of a median line constitutes an appropriate first step in the delimitation process, should not be understood as implying that an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite States.³⁵

In spite of this pronouncement that the equidistance method did not even qualify to be used as a compulsory, first-step, provisional line, the Court in the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* held that it was appropriate to begin with a provisional median line which

³¹ *Libya v Malta* (n 23) 38.

³² *ibid* 37–38 (emphasis in original; internal citations omitted).

³³ *ibid* 47.

³⁴ *ibid* 47.

³⁵ *ibid* 56.

could be adjusted if necessitated by the presence of special circumstances.³⁶ Although Denmark argued that previous decisions of the Court had rejected the compulsory drawing of a provisional equidistance line, the Court held that the case before it was governed by article 6 of the 1958 Convention, which required the application of the equidistance method. More importantly, the Court went further to endorse the decision of the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (United Kingdom v France) (Anglo-French Arbitration)*.³⁷ It cited the opinion of that tribunal as authority for the proposition that article 6 actually meant that, where special circumstances exist, the equidistance line that would ordinarily apply should be varied or modified. Article 6 did not require that another delimitation method be used in place of the equidistance method. The Court also found that, inasmuch as the equidistance/special circumstances rule prescribed in article 6 of the 1958 Convention could be regarded as expressing a general norm based on equitable principles, there was no material difference between the effect produced by the application of article 6 and the effect of the customary rule requiring delimitation to be based on equitable principles.³⁸ A provisional equidistance line was thus drawn as the first step, since the Court had convinced itself that it was in accord with precedents to begin by drawing a median line and then asking whether special circumstances required the shifting or adjustment of the line.³⁹

This decision had the effect of placing the equidistance method on a higher pedestal than other methods of delimitation; of a presumption in favour of the equidistance method. As one learned scholar analysing this decision observed, '[e]quidistance, after having been for many years assigned to mistrust and disrepute, has been unfrozen and recommissioned'.⁴⁰ The interpretation of article 6 that the Court borrowed from the *Anglo-French Arbitration* indicated that an equidistance line would always be drawn, albeit it may be modified or varied, but in substance, it would not have changed drastically or significantly from the original equidistance line. In fact, Judge Fischer, dissenting, opined 'that the Court, when deciding to use a median line as a provisional line, has accorded a preferential and unwarranted status to the median line'.⁴¹ The Court had also not taken into consideration the developments in international law brought about by article 83 of UNCLOS that was to come into force the next year; developments that indicated that the median line was no more than one of the methods to be used to arrive at an equitable delimitation of the continental shelf.⁴²

³⁶ *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Merits) ICJ Rep 38 (*Jan Mayen*), 59–60.

³⁷ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK v France)* (1977–1978) 18 RIAA 3, 116.

³⁸ *Jan Mayen* (n 36) 58.

³⁹ *ibid* 61.

⁴⁰ George Politakis, 'The 1993 Jan Mayen Judgment: The End of Illusions?' (1994) 41 NILR 1, 17.

⁴¹ *Jan Mayen* (n 36) 306 (Dissenting Opinion of Judge Fischer).

⁴² *ibid*.

The reasoning in the *Jan Mayen* case was applied in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* case where the Court, after reviewing its earlier delimitation decisions, decided that it was in accordance with precedents and State practice to begin with an equidistance line, which may be adjusted if special circumstances required.⁴³ The Court proceeded to hold that the rule requiring that delimitation be carried out by employing equitable principles, taking account of all relevant circumstances, to the end that an equitable result is attained (equitable principles/relevant circumstances rule) and the rule requiring the drawing of an equidistance line subject to modification due to special circumstances were closely interrelated.⁴⁴

By so pronouncing, the Court subtly confirmed the elevation of the equidistance method to a special status without glaringly holding that the equidistance method was *the* method of delimitation. It also blurred the line between the equitable principles/relevant circumstances rule of delimitation and the equidistance/special circumstances method when it described them as closely interrelated. In fact, in the case, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*, the Court described the two methods as very similar and went on to explain that the equitable principles/relevant circumstances method involved first drawing an equidistance line and then asking whether any circumstances required shifting or adjusting the line.⁴⁵ Essentially, therefore, the Court merged the two methods, for its explanation of what the equitable principles/relevant circumstances method involved had the effect of declaring it one and the same thing as the equidistance/special circumstances method.

In accordance with this pronouncement, therefore, the Court in the *Cameroon v Nigeria* case applied the equidistance method.⁴⁶ Ironically, the Court still thought it necessary to quote from the judgment in the *Libya v Malta* case that:

the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question.⁴⁷

In the reasoning of the Court, once it has taken into consideration any factor necessary for adjusting (or shifting or modifying) the equidistance line, then it has satisfied the condition requiring it to demonstrate that the 'equidistance method leads to an equitable result in the case in question'.⁴⁸ In other words, any such adjustment of the equidistance line will necessarily result in an equitable solution. Noteworthy is the fact that the

⁴³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40, 74–75.

⁴⁴ *ibid* 75.

⁴⁵ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* (Merits) [2002] ICJ Rep 303 (*Cameroon v Nigeria*), 441.

⁴⁶ *ibid* 442.

⁴⁷ *ibid* 443.

⁴⁸ *ibid*.

Court did not consider that demonstrating that the equidistance method will lead to an equitable delimitation in a particular case may be better satisfied by comparing its outcome with those of other equally applicable methods.

A better interpretation of the quoted passage from the *Libya v Malta* case would require that satisfying the condition of equitableness be done early in the delimitation exercise when different applicable methods are weighed against each other, rather than after a preliminary equidistance line has been drawn. This line of reasoning is evident in the case, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*.⁴⁹ The Court listened to arguments about why starting with a provisional equidistance line would lead to inequitable results, and in the end found that the construction of an equidistance line was not feasible, so it opted to delimit the boundaries using the bisector method.⁵⁰ Due to the peculiarities of the area to be delimited, 'neither Party [had] as its main argument a call for a provisional equidistance line as the most suitable method of delimitation.'⁵¹ Honduras only argued for a provisional equidistance line in the event that the Court rejected the 15th parallel line that it considered applicable.⁵² Nicaragua stated the advantages of the bisector method of delimitation thus:

the equitable character of the bisector method is confirmed by the independent criteria of an equitable result: (a) the method produces an effective reflection of the coastal relationships; (b) the bisector produces a result which constitutes an expression of the principle of equal division of the areas in dispute; (c) the bisector method has the virtue of compliance with the principle of non-encroachment; (d) it also prevents, as far as possible, any cut-off of the seaward projection of the coast of either of the States concerned; and (e) the bisector method ensures the exercise of the right to development of the Parties.⁵³

Although the Court did not dispute these advantages, it did mention that the reason why the equidistance method is widely used in the practice of maritime delimitation is because of its scientific character, endowing it with certain intrinsic value and because it can be applied with relative ease.⁵⁴ It did not fail to mention (as it usually does and which this article argues amounts to lip service), however, that the equidistance method did not have priority over other methods.⁵⁵ In analysing this decision, Lathrop highlights the Court's departure from its two-step⁵⁶ process which it had used to delimit maritime boundaries for over twenty years;⁵⁷ that is, the drawing of a provisional equidistance

⁴⁹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Merits) [2007] ICJ Rep 659.

⁵⁰ *ibid* 745.

⁵¹ *ibid* 742.

⁵² *ibid* 690.

⁵³ *ibid* 747.

⁵⁴ *ibid* 741.

⁵⁵ *ibid*.

⁵⁶ Although Lathrop refers to the process as two-step, now the ICJ calls it the three-stage process.

⁵⁷ Coalter Lathrop, 'International Decisions, *Nicaragua v Honduras*' (2008) 102 AJIL 113, 119.

line and the adjustment of same depending on the presence of special circumstances. He adds that the decision 'might allow more flexibility in the choice of method in future delimitations'.⁵⁸

Elizabeth Kirk does not agree that using the bisector method was a departure from the jurisprudence of the Court.⁵⁹ She rather argues that it was in fact a confirmation of the law insofar as UNCLOS and the jurisprudence of the Court require the taking into consideration of geographical features of the relevant area to be delimited. Reiterating the non-priority status of the equidistance method, Kirk adds that, although the equidistance method is a convenient starting point, '[b]oth equity and special circumstances can dictate the use of other means to determine the boundary' and the peculiar geographical features in question necessitated the adoption of a method different from the usual equidistance method.⁶⁰ As persuasive as this may sound, Kirk does not consider that, in spite of the Court's insistence on the non-priority of the equidistance method, its jurisprudence about the methodology applicable to delimitation favours only the shifting or adjusting of the equidistance line and not the employment of a totally different method. As the Court in the *Jan Mayen* case stated:

it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to *seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation*.⁶¹

More so, the Court will now not consider any relevant circumstances at all during the first stage of the delimitation process; it will consider relevant circumstances only in the second stage after it has already drawn the provisional equidistance line.⁶² Again, this shows the presumption in favour of equidistance. If relevant circumstances are only considered after the drawing of the provisional line, meaning that no question of equitableness of the result arises at this point, how does the Court assess whether a particular case is one in which it is inappropriate to start with a provisional equidistance line? Is not a case in which it would be inappropriate to start with an equidistance line one where it would not be possible to achieve an equitable result by the use of the equidistance method?⁶³ Therefore Kirk's view that 'equity and special circumstances can dictate the use of other means to determine the boundary' does not find place in the Court's jurisprudence. Indeed, commenting on this decision, the Vice President of the Court agreed that the use of the bisector method was a necessary exception to the 'well-established equidistance method. And the Court made sure that it was absolutely clear

⁵⁸ *ibid* 118.

⁵⁹ Elizabeth A Kirk, 'Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v Honduras*), Judgment of 8 October 2007' (2008) 57 ICLQ 701, 708.

⁶⁰ *ibid* 708–09.

⁶¹ *Jan Mayen* (n 36) 61 (emphasis added).

⁶² *Black Sea case* (n 6) 101.

⁶³ *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] ICJ Rep 624, 746 (Declaration of Judge Xue).

from the text of the judgment that the general principle of equidistance remains firmly in place.⁶⁴

In light of this, then, Lathrop's prediction of flexibility for future maritime delimitation did not hold true. In fact, by the time the Court handed down its decision in the *Black Sea* case, it boldly declared that, when called upon to effect a delimitation of the continental shelf, it would proceed in defined stages. That is, delimitation would begin with the drawing of an equidistance line, before the Court would move to decide whether that line should be adjusted due to the presence of special circumstances necessitating such adjustment. The final stage would involve testing whether the result of the exercise is equitable in light of a reasonable degree of proportionality between the areas attributed to the parties and the length of their coasts.⁶⁵ This has now acquired the status of the Court's three-stage delimitation methodology.⁶⁶ As such, certain scholars have praised this as bringing consistency and predictability to the law of maritime boundary delimitation.⁶⁷

The Court has thus taken advantage of the gap in article 83 of UNCLOS to rewrite article 83 but it has also ensured that the equidistance group that could not force its views into UNCLOS are the winners in the end. This is true in spite of the Court's opinion that the equitable principle/relevant circumstances method is the same as the equidistance/special circumstances method. One is made to question if they really are the same, why the delegates at UNCLOS III were so sharply divided about the issue, and why the deadlock was only broken following the drafting of the compromise article 83 of UNCLOS that deliberately omits to prescribe a delimitation method.⁶⁸

⁶⁴ Bernardo Sepulveda-Amor, 'The International Court of Justice and the Law of the Sea' 19 <<http://biblio.juridicas.unam.mx/revista/pdf/DerechoInternacional/11.5/art/art1.pdf>> accessed 5 November 2014.

⁶⁵ *Black Sea* case (n 6) 101–03.

⁶⁶ *Nicaragua v Colombia* (n 63) 695.

⁶⁷ Ki Beom Lee, 'The Demise of Equitable Principles and the Rise of Relevant Circumstances in Maritime Boundary Delimitation' (PhD Thesis, University of Edinburgh 2012) 8 <<https://www.era.lib.ed.ac.uk/bitstream/handle/1842/7576/Lee2012.pdf?sequence=2>> accessed 5 November 2014; Igiehon (n 22) 215; Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart 2006) 130. Tanaka asserts that the equidistance method is the only method applicable that will ensure the predictability of results because, once the baselines have been determined, the delimitation (equidistance) line is mathematically determined. See also Gilbert Guillaume, 'Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations' <<http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1>> accessed 6 November 2014. There, Judge Guillaume stated, 'the law of maritime delimitations, by means of these developments [deciding to always begin with a provisional equidistance line that may be adjusted in the light of special circumstances] in the Court's case law, has reached a new level of unity and certainty'.

⁶⁸ Surely, in spite of the emptiness of article 83(1), the Court is still required, in a case before it, to apply a method for the delimitation of the area in dispute. Noting this in the *Libya v Malta* case, the Court stated that the Convention sets a goal to be achieved and it behoves on States and the Court to endow that standard with specific content: See *Libya v Malta* (n 23) 30. So in endowing this standard with specific content, the ICJ has equated the equitable principles method to the equidistance method (albeit artificially) to hold that the equidistance method is the starting point of any delimitation. One may simply accept that the Court, whatever method it adopts, is only bound by article 83 to ensure that its decision leads to an equitable solution. See also *Tunisia v Libya* (n 23) 49.

3 Rationale for development in this direction

A number of reasons account for why the Court's jurisprudence has developed in the manner set out above. First is the need for consistency and a degree of predictability. When the Court insisted on the application of equitable principles as the method of delimitation, it came under criticism for failing to set out objective rules by which delimitation should be governed. Judge Oda was quick to point out that that position of the Court 'appears simply to suggest the principle of non-principle' and did not display the much needed qualities of consistency and predictability.⁶⁹ Judge Schwebel also noted that 'equitable principles' as a method of delimitation opens considerable room for differences of opinion in their application to problems of maritime delimitation.⁷⁰ Further, he stated that '[i]f what is lawful in maritime delimitation by the Court is what is equitable, and if what is equitable is as variable as the weather of The Hague', then one is faced with an 'anything goes' situation.⁷¹ Igiehon also alludes to the fact that there may not be any material difference between a decision based on equitable principles and one decided *ex aequo et bono*.⁷² Following the need to fill this gap, the Court's jurisprudence has developed in such a way that applying the three-stage methodology provides some degree of consistency and predictability.

The rise of the distance criterion as a basis for entitlement to the continental shelf and the Exclusive Economic Zone (EEZ), and the increasing desire of States for a single line to delimit both the EEZ and the continental shelf (single maritime boundary) have also contributed to the development of the Court's jurisprudence in favour of equidistance. As Judge Evenson notes in his separate opinion in the *Tunisia v Libya* case, when States, whether opposite or adjacent, base their claims to the continental shelf or the EEZ on the 200 nautical mile distance criterion open to them, '[t]his very fact seems to strengthen the equidistance/median line principle as an equitable approach for delimiting overlapping areas'.⁷³ Similarly, Kwiatkowska remarks:

it seems possible to conclude that the principle of distance, being already a rule of customary international law governing the entitlement to the EEZ/[Continental Shelf (CS)] within 200 miles, enhanced the role of equidistance as an equitable principle applicable to delimitation of these areas in general, and delimitation between opposite states in particular.⁷⁴

Another reason for the rise of the equidistance method is the Court's acceptance of the advantages of this method and its preconceived notion that the equidistance method generally leads to an equitable solution. The Court accepts that there is 'impressive

⁶⁹ *Libya v Malta* (n 23) 125 (Dissenting Opinion of Judge Oda).

⁷⁰ *ibid* 187 (Dissenting Opinion of Judge Schwebel).

⁷¹ *ibid*.

⁷² Igiehon (n 22) 211, 214.

⁷³ *Tunisia v Libya* (n 23) 296 (Dissenting Opinion of Judge Evenson).

⁷⁴ Barbara Kwiatkowska, 'Equitable Maritime Boundary Delimitation—A Legal Perspective' (1998) 3 Intl J Estuarine & Coastal L 287, 301.

evidence that the equidistance method can in many different situations yield an equitable result.⁷⁵ In another case, the Court noted that no other method of delimitation has the combined advantages of certainty of application and practical convenience,⁷⁶ as well as the fact that the equidistance method is capable of being employed in almost all circumstances.⁷⁷

4 Implications

What are the implications of this article's position for States involved in maritime boundary disputes? First, it means that any State that argues for the non-application of the equidistance method is likely to face difficulties defending that argument, for the Court already has decided that it will start with a provisional equidistance line and only adjust it if need be. It is not inclined to search for a different delimitation method. This was confirmed by the President of the Court when he addressed the International Law Commission recently. Judge Peter Tomka reiterated the three-stage delimitation methodology of the Court, which he referred to as the 'usual' method.⁷⁸ Nowhere in his expatiation can room be found for the application of a method other than the equidistance method. It is an equidistance line or an adjustment of it, as all the Court is required to ask itself is whether there are special circumstances requiring the line to be adjusted, not whether there is another method more suitable to the achievement of an equitable solution.⁷⁹

Before a State can argue for the application of another method, it would have to consider the following views: in the *Barbados v Trinidad and Tobago Arbitral Award*, the Tribunal, seeking to align itself with the case law of the ICJ stated that, although the equidistance method is not compulsory, any application of a 'different method would require a well-founded justification'.⁸⁰ Or, as the Court in the *Black Sea* case noted, unless there are 'compelling reasons' which make the equidistance method unfeasible in the particular case, it will apply the equidistance method.⁸¹ This clearly shows the presumption in favour of equidistance and places an onerous burden of proof on the State opposing the application of the equidistance method. The standard of proof described as 'compelling' must be met, or else the equidistance method would be applied. Thus

⁷⁵ *Libya v Malta* (n 23) 38.

⁷⁶ *North Sea Continental Shelf* cases (n 1) 23.

⁷⁷ *ibid* 23.

⁷⁸ Peter Tomka, 'Speech by HE Judge Peter Tomka, President of the International Court of Justice, at the Sixty-Sixth Session of the International Law Commission, 22 July 2014' <[http://legal.un.org/ilc/sessions/66/Statement\(Pres.Tomka\).pdf](http://legal.un.org/ilc/sessions/66/Statement(Pres.Tomka).pdf)> accessed 6 July 2014.

⁷⁹ Guillaume (n 67).

⁸⁰ *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 (Barbados v Trinidad and Tobago)* (2006) 27 RIAA 147, 230.

⁸¹ *Black Sea* case (n 6) 101.

from the beginning, this State is disadvantaged in spite of the Court's insistence that no presumption exists in favour of the equidistance method.

This point is clearly evident in the decision in the *Nicaragua v Colombia* case where, although Nicaragua presented geographical evidence to prove the inequitableness that would result from the application of the equidistance method, the Court insisted on applying it. Thus Judge Keith opined that the particular geographical circumstances of the case 'immediately demonstrate for me the difficulty, or really the impossibility, of beginning with a provisional median line even if it is adjusted or shifted by reference to relevant circumstances'.⁸² And Judge Xue expressed her reservation as to whether 'it is necessary for the Court to proceed with the three-stage method in the present case simply for the sake of standardisation of methodology'.⁸³ Judge Abraham also stated that the provisional equidistance line was not fit for purpose.⁸⁴ He further stated that the case was one in which compelling reasons made it unfeasible to construct the provisional median line. In his words, 'it is obvious that the construction of a provisional median line as a starting-point for the delimitation is not only highly inappropriate in this case, but that it is even virtually impossible'.⁸⁵ More pointedly, Judge Abraham noted that 'it would have been clearer and more honest of the Court to acknowledge that it could not follow the so-called "standard" method in this case because the geographical framework did not at all lend itself to the application of that method'.⁸⁶ He concluded by noting that cases exist in which it is 'preferable to acknowledge that the Court needs to depart from its usual technique, and to explain why, rather than to sacrifice clarity and intelligibility to the semblance of an illusory continuity'.⁸⁷

The next question becomes: what might adjusting the provisional equidistance line come to for a State that vehemently argues against the equidistance method? It means that the outcome of the adjudicatory process will produce an equidistance line or something quite similar to it, because adjustments or shifting of the line usually do not involve a substantial departure from the provisional equidistance line.⁸⁸ That is why Judge Gao warned in the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v Myanmar)* regarding the use of the equidistance method thus:

⁸² *Nicaragua v Columbia* (n 63) 743–44 (Declaration of Judge Keith).

⁸³ *ibid* 749–49 (Declaration of Judge Xue).

⁸⁴ *ibid* 739 (Separate Opinion of Judge Abraham).

⁸⁵ *ibid* 736 (Separate Opinion of Judge Abraham).

⁸⁶ *ibid* 739 (Separate Opinion of Judge Abraham).

⁸⁷ *ibid*.

⁸⁸ Although the Court stated in the *Nicaragua v Columbia* case (*ibid*) that it was not precluded from substantially adjusting the line, it came under criticism that what it did in the name of adjusting the provisional equidistance line could not be regarded at all as an adjustment: 738 (Separate Opinion of Judge Abraham); 744 (Declaration of Judge Keith); 748 (Declaration of Judge Xue). Furthermore, evidence from previous cases casts doubts on the Court's inclination to substantially adjust the provisional equidistance line; so it is safe to conclude that the provisional line is not usually subject to a substantial adjustment.

First, the selection of the type of provisional line, and the base points for it, is absolutely critical, given the tendency of the ICJ and arbitral tribunals to be cautious in recognizing the effect of relevant circumstances. The importance of the selection phase of the delimitation process is plain, in that, afterwards, no drastic change (which is to say nothing beyond limited adjustments) has ever been made to the provisional line in the case law or State practice.⁸⁹

What does this last sentence imply, if not that the provisional equidistance line actually governs the whole delimitation and is in essence, *the* (not one of the many possible) delimitation methods? Though the Tribunal ‘adjusted’ the provisional equidistance line substantially in favour of Bangladesh, which did not support the application of the equidistance method in the first place, one is compelled to question the basis upon which this ‘adjustment’ was made. The Tribunal stated that there was reason to support the adjustment of the provisional equidistance line by drawing a geodetic line starting at an azimuth of 215°. ⁹⁰ Notably, Bangladesh had, on the basis of the angle-bisector method it proposed, constructed a line from the azimuth of 215°—a method which the Tribunal rejected. Yet the Tribunal gave no reason at all to justify the adjustment of the provisional equidistance line starting at the azimuth of 215°. ⁹¹

Thus it might be argued that the Tribunal was aware that the equidistance method would not lead to an equitable delimitation but it was so intent on applying it that, what it claimed to be an adjustment of the equidistance line, was in essence the adoption of another method. This led Judge Lucky, dissenting, to state:

I cannot agree with the view that the decision to use the 215° azimuth line to determine the direction of the adjustment to the provisional equidistance line is not based on the angle-bisector methodology either in principle or in the adoption of the particular azimuth calculated by Bangladesh. ⁹²

Similarly, Judges Nelson, Chandrasekhara Rao and Cot in their Joint Declaration cautioned that ‘[o]ne should not try to reintroduce other methods of delimitation when implementing the equidistance/relevant circumstances rule.’ ⁹³ Although not specifically stated, this was in obvious reference to the fact that the 215° Azimuth line was in reality a super-imposition of the bisector method on the equidistance method. Judge Wolfrum also chided the Tribunal for the opaqueness of its conclusion on the adjustment of the line, noting the Tribunal’s unwillingness to consider other alternatives when there was actually merit in considering alternatives. ⁹⁴ And Judge Ndiaye noted that, since the

⁸⁹ *Bangladesh v Myanmar* (Judgment, 14 March 2012) ITLOS Reports 2012, 16 (*Bangladesh v Myanmar*) 23 (Separate Opinion of Judge Gao).

⁹⁰ *ibid* 100.

⁹¹ *ibid* 5 (Declaration of Judge Wolfrum). See also Robin Churchill ‘The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation’ (2012) 1 CJICL 137, 144.

⁹² *Bangladesh v Myanmar* (n 89) 54 (Dissenting Opinion of Judge Lucky).

⁹³ *ibid* (Joint Declaration of Judges Nelson, Chandrasekhara Rao and Cot) 2.

⁹⁴ *ibid* 5–6 (Declaration of Judge Wolfrum).

Tribunal had opted to apply the equidistance method, changing approach amounted to an 'inherent contradiction, a logical paradox'.⁹⁵

Judge Gao was emphatic in asserting that the equidistance method ought not to have been used at all in that case, even as a provisional line. He said:

The final and overall conclusion on the delimitation method in the present case is that the decision by the Tribunal on the equidistance method and the results of its application in both the first and second stages cannot be right, because it has deliberately ignored the most important and unique features that define the geographical and geological context in which this delimitation case is taking place. What the adjustment did in the present case is to put feathers on a fish and call it a bird. If there is ever a case in the world in which the equidistance methodology should not be applied because of the special geography of a concave coastline, it must be this present case in the Bay of Bengal.⁹⁶

And Judge Lucky similarly stated:

I have found that the angle-bisector method of delimitation is the most suitable in this matter for the reasons set out above. Most importantly, the requirement in the law set out in Articles 74 and 83 of the Convention—'to achieve an equitable solution'—is paramount in these circumstances. By using the angle-bisector method, I have been able to achieve a just and equitable solution.⁹⁷

In view of this, one is minded to ask that if the objective of the delimitation process is the achievement of an equitable solution, and the angle-bisector method could achieve that solution (as Judge Lucky and the Tribunal's results proved), why did the Tribunal insist on the equidistance method even when it was aware that no reasonable adjustment of same could provide the equitable solution it sought? The Tribunal's considerable display of subjectivity in its adjustment of the provisional equidistance line leads one to wonder where the much touted advantages of objectivity of the equidistance method on the maritime delimitation process can be located in the case.⁹⁸ Indeed, the Tribunal tried so hard to stay within the mainstream of the jurisprudence in previously decided cases⁹⁹ that it found that jurisprudence has developed in *favour* of the equidistance/relevant circumstances method.¹⁰⁰

A similar treatment of the equidistance method was carried out in *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* where, again, the Tribunal rejected the angle-bisector method proposed by Bangladesh, holding that the equidistance method was applicable.¹⁰¹ The Tribunal, in order to prevent a cut-off effect

⁹⁵ *ibid* 33 (Separate Opinion of Judge Ndiaye).

⁹⁶ *ibid* 21 (Separate Opinion of Judge Gao).

⁹⁷ *ibid* 54–55 (Dissenting Opinion of Judge Lucky).

⁹⁸ *ibid* 8 (Separate Opinion of Judge Cot).

⁹⁹ *ibid*.

¹⁰⁰ *ibid* 75 (emphasis added).

¹⁰¹ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India)*, Award (7 July 2014) <http://www.pca-cpa.org/showpage.asp?pag_id=1376> accessed 12 March 2015.

on Bangladesh's access to the continental shelf beyond 200 nautical miles adjusted the provisional equidistance line by a line with an initial azimuth of 177° 30' 00".¹⁰² Here again, the Tribunal gave no concrete reasons for why the line was adjusted to reflect in essence, the angle-bisector proposal of Bangladesh, whilst claiming to reject that method in favour of the equidistance method.¹⁰³ Thus in highlighting the identicalness of the Tribunal's adjusted line approach with that constructed by Bangladesh, Judge Rao opined: 'This is, in my view, arbitrary and intrinsically runs counter to the majority's own reasoning which effectively rejected a bisector as a matter of law.'¹⁰⁴ In order words, the Tribunal applied the bisector method, not the equidistance method.

The foregoing analysis lends support to the position that the equidistance method is now the method of delimitation, and even where unsuitable, there is an unwillingness to depart from it, with the Court preferring only to adjust the equidistance line. In the most recent maritime delimitation judgement of the ICJ, the Court gave expression to the priority of the equidistance method when it held that '[t]he methodology which the Court *usually* employs in seeking an equitable solution involves' beginning with an equidistance line.¹⁰⁵ Although the Court added that beginning in this manner is subject to 'compelling reasons'¹⁰⁶ which may preclude the drawing of an equidistance line, it had already formed a general opinion that an equidistance line *prima facie* leads to an equitable result,¹⁰⁷ making it difficult to depart therefrom. Thus, in the words of the Vice President of the ICJ, '[t]oday, [the] adjusted equidistance line is (...) firmly established in the Court's jurisprudence as the *preferred* method for delimitation for the EEZ and continental shelf'.¹⁰⁸ Scholars and States may now discontinue any further rejection of the obligatory nature of the equidistance method expressed consistently in delimitation cases as amounting simply to lip service. They may further discontinue similar assertions expressed by leading scholars that the 'provisional equidistant line does not imply a legal presumption in its favour'.¹⁰⁹

As this is now the case, States that desire the delimitation of their maritime boundaries with neighbouring States on the basis of the equidistance method can expect a somewhat favourable outcome of the adjudicatory process.¹¹⁰ For States like China arguing fervently for why the equidistance method is inapplicable to its dispute with Japan in the East China Sea or Australia, in its dispute with Timor-Leste in the Timor Sea, the ICJ (and, it might be added, any other Tribunal with jurisdiction) is not an attractive

¹⁰² *ibid* 147.

¹⁰³ *ibid* 7, 12–13 (Concurring and Dissenting Opinion of Judge Rao).

¹⁰⁴ *ibid* 7 (Concurring and Dissenting Opinion of Judge Rao).

¹⁰⁵ *Maritime Dispute (Peru v Chile)* (Merits) [2014] ICJ Rep 137, 62 (emphasis added).

¹⁰⁶ *ibid*.

¹⁰⁷ *Jan Mayen* (n 36) 62.

¹⁰⁸ *Sepulveda-Amor* (n 64) 14.

¹⁰⁹ David Colson, 'The Delimitation of the Outer Continental Shelf between Neighbouring States' (2003) 97 AJIL 91, 101.

¹¹⁰ This will hold true where complications such as territorial disputes and disputes as to the precise location of baselines are absent.

medium through which the disputes might be resolved. This is because their contentions are weak in the light of the Court's jurisprudence set out in this article.¹¹¹ Nevertheless, the constant denial of the priority of the equidistance method might be a slight ray of hope for flexibility that indicates that States which argue against the equidistance method may succeed in persuading the Court to employ another delimitation method. This is a dangerous gamble though, as it is more probable that the Court will apply the equidistance method; more so, the standard of persuasion to be attained (styled as 'compelling') may be out of reach for such States. This means that these States may be more inclined to heed the warning by Burke that 'the devil you don't [know]' might be better than the devil you know.¹¹²

Another implication of the jurisprudence of the Court is that the equidistance method is unable to become a rule of customary international law. In spite of wide state practice favouring the method, the Court always denies its obligatory status, which in turn has a negative effect on its passage into customary international law.¹¹³ And as rightly noted by Judge Schwebel,

[t]he content of customary international law (...) may be influenced or even determined by a judgment of the Court. The Court's decisions thus enjoy, as Lauterpacht has put it, an 'intrinsic' authority within the international community. (...) The 'intrinsic' authority of the Court's decisions and the coherence of its case-law are fundamental factors which enable it to contribute to the development of international law.¹¹⁴

5 Conclusion

This article has examined the ICJ's decisions pertaining to the use of the equidistance method for the delimitation of international maritime boundaries. In the earliest cases, the Court was insistent on the non-compulsory nature of the equidistance method.

¹¹¹ Certainly, this calls into question the strength of the claims of China and Australia. Both States claim an entitlement to the continental shelf based on the natural prolongation principle, and accordingly, hold that the equidistance method will not lead to an equitable solution. On the other hand, Japan and Timor-Leste advocate for the application of the equidistance method. Although much has been written on the validity or otherwise of the natural prolongation principle within 200 nautical miles from the coasts in view of the decision in the *Libya v Malta* (n 23) case, the debate does not seem to be over. See Jianjun Gao, 'The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea' (2010) 9 (1) CJIL 143, 169–75.

¹¹² Naomi Burke, 'Nicaragua v Colombia at the ICJ: The Devil You Don't?' (2013) 2 CJICL 314.

¹¹³ Charney notes that negotiated boundaries which should act as evidence of state practice for the development of customary international law as one source of the law governing delimitation is less influential than adjudication. Consequently, the pronouncements of Courts take on salience as far as maritime boundary delimitation is concerned. Jonathan Charney, 'Progress in International Maritime Boundary Delimitation Law' (1994) 88 AJIL 227, 227–28.

¹¹⁴ S Schwebel, 'The Contribution of the International Court of Justice to the Development of International Law' in W Heere (ed) *International Law and The Hague's 750th Anniversary* (TMC Asser Press 1999) 405, 407.

Today, the Court insists on following its now established method of delimiting maritime boundaries, namely by drawing an equidistance line which it may adjust due to the presence of special circumstances. According to one author, '[t]he Court has thus, over the years, become less allergic to the use of equidistance—the “Cinderella” among delimitation methods’.¹¹⁵ Therefore, the equidistance method has gone through a life cycle rising from obscurity to a place of pre-eminence. Consequently, any State contending for the application of a delimitation method other than the equidistance method is in a hard place from which it is unlikely to emerge victorious. Even though the Court maintains that the equidistance method neither has priority over other methods, nor any presumption of use, this article has shown that that assertion amounts only to lip service as the equidistance method both has priority and a presumption in its favour. Accordingly, the equidistance method is now *the* method of international maritime boundary delimitation. Therefore, any maritime boundary is simply the outcome of checks or adjustments made to the equidistance line, and these checks and adjustments are not usually sufficiently significant to constitute any major change to the equidistance line.¹¹⁶

¹¹⁵ Politakis (n 40) 29. The term ‘Cinderella’ was used first by Judge ad hoc Valticos in his Separate Opinion in the *Libya v Malta* case to indicate a method that is undeservedly ignored and neglected: *Libya v Malta* (n 23) 106.

¹¹⁶ *Barbados v Trinidad and Tobago* (n 80) 233.