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A Flexible Approach
to Reach an Equitable Solution:
The Application of Principles to the
Delimitation of the Continental Shelf

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I. INTRODUCTION: DELIMITATION OF MARITIME
BOUNDARIES AND ITS IMPORTANCE

The delimitation of maritime boundaries involves a complex net of legal, technical, and political issues. Maritime delimitation strives for permanence and stability.¹ It can be viewed as an essential precursor to fully realizing the resource potential of national maritime zones and the peaceful management of the oceans and seas.²

Maritime delimitation has been defined as the process of “establishing lines separating from each other the maritime areas in which coastal States exercise [sovereignty or] jurisdiction.”³ It could be a simple process if the axiom “the land dominates the sea” always held true.⁴ However, the process involves situations where two or more States have overlapping titles.

Due to the maritime areas implemented in the United Nations Convention on the Law of the Sea (UNCLOS),⁵ there are about four hundred potential international maritime boundaries.⁶ Over half of these overlapping claims have been agreed upon, with boundary agreements in force.

With the advent of national claims to extended jurisdiction in the sea, the necessity of dividing vast maritime areas occurred. International courts and scholars have devoted considerable attention to determining the legal principles underpinning the continental shelf regime and deriving from those fundamental principles the rules applicable to continental shelf delimitation.⁷

1. Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 34–35 (June 15) (“when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality”).

2. Nugzar Dundua, *Delimitation of Maritime Boundaries Between Adjacent States* 3, UN.ORG (2006–2007), https://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/dundua_0607_georgia.pdf.

3. Lucius Cafilisch, *Maritime Boundaries, Delimitation*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 212 (Rudolf Bernhardt ed., 1989).

4. David H. Anderson, *Maritime Boundaries and Limits: Some Basic Legal Principles* (paper presented at the 2001 ABLOS Conference, Nov. 6, 2001), https://legacy.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf2/ANDERSON.PDF.

5. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

6. Lewis M. Alexander, *The Delimitation of Maritime Boundaries*, 5 *POLITICAL GEOGRAPHY QUARTERLY* 19, 19 (1990).

7. Edward Collins & Martin A. Rogoff, *The International Law of Maritime Boundary Delimitation*, 34 *MAINE LAW REVIEW* 1, 4 (1982).

Experience in applying those principles and rules has accumulated and coalesced into the current law of maritime delimitation, shaping the interpretation of certain provisions of UNCLOS.

In the case of the continental shelf, Article 83 reflects a diplomatic compromise reached at the Third Conference on the Law of the Sea between the supporters of a delimitation based on equidistance and those that advocated for delimitation based upon equitable principles. While each group acknowledged that delimitation by agreement was the most satisfactory way of resolving overlapping claims, they were not able to agree on what the guiding principles and rules should be in the absence of a specific agreement.⁸

The compromise wording of Article 83 focuses on the objective of the delimitation process rather than the methodology:⁹ “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.”¹⁰ The arbitral tribunal in the *Barbados/Trinidad and Tobago* case, for example, has described Article 83 as an “apparently simple and imprecise formula” that provides no clear guidance to States on how to delimit their maritime boundaries.¹¹ Additionally, every coast is unique; therefore, every delimitation is unique. Nature and geography cannot be redesigned by the law; consequently, it is difficult to frame rules that are precise.¹² It has, therefore, been left to State practice and the jurisprudence of international judicial organs to provide guidance about the principles and rules to be applied in pursuit of an equitable solution.¹³

This article will examine the principles applied to the delimitation of the continental shelf to reach an equitable solution. Part II describes the guiding doctrines, including “the land dominates the sea,” equitable principles, and proportionality. Part III depicts the contemporary principles that have been developed to give effect to the delimitation exercise. Part IV explores whether the principles applicable to delimitation within two hundred nautical

8. STEPHEN FIETTA & ROBIN CLEVERLY, A PRACTITIONER’S GUIDE TO MARITIME BOUNDARY DELIMITATION 26 (2016).

9. *Id.*

10. UNCLOS, *supra* note 5, art. 83(1).

11. Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf, Decision of Apr. 11, 2006, 27 R.I.A.A. 147, ¶ 222 (Perm. Ct. Arb. 2006).

12. Collins & Rogoff, *supra* note 7, at 3.

13. FIETTA & CLEVERLY, *supra* note 8, at 26.

miles can apply to delimitation beyond two hundred nautical miles considering the different grounds for entitlement. Part V elaborates on emerging principles inducted from the legal reasoning of international judicial organs. Part VI concludes.

II. GUIDING DOCTRINES

The principles and rules of public international law govern the delimitation of maritime boundaries between two or more coastal States.¹⁴ Public international law has developed special principles derived from the general principles of international law that are unique to the international law of the sea. This Part will examine those special principles and how they relate to the delimitation of maritime boundaries.

A. The Land Dominates the Sea and Equitable Principles

Having been expressed as “the land dominates the sea” by the International Court of Justice (ICJ) in the 1969 *North Sea Continental Shelf* judgment,¹⁵ this general principle of international law, developed by way of customary law and judicial decisions,¹⁶ means that the maritime entitlement will follow sovereignty over the land. Therefore, the land is the legal source of a State’s claim of maritime entitlements with the jurisdiction of a coastal State over its adjacent maritime zones based on the relationship of its land territory with the sea. This relationship is essentially geographical.¹⁷

The principle “the land dominates the sea” has been repeatedly confirmed by ICJ case law. Notably, in the *Tunisia/Libya* case, the Court observed that “the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it.”¹⁸ In the *Aegean Sea Continental Shelf* case, the Court likewise considered that rights over maritime zones “are le-

14. VICTOR PRESCOTT & CLIVE SCHOFIELD, *THE MARITIME POLITICAL BOUNDARIES OF THE WORLD* 1 (2004), https://doi.org/10.1163/9789047406204_004.

15. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 96 (Feb. 20).

16. Bing Bing Jia, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 57 *GERMAN YEARBOOK OF INTERNATIONAL LAW* 63, 67 (2014).

17. Collins & Rogoff, *supra* note 7, at 51.

18. *Continental Shelf* (Tunis. v. Libya), Judgment, 1982 I.C.J. 18, ¶ 73 (Feb. 24).

gally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.”¹⁹ The Court subsequently stated that “the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline.”²⁰

In the case of islands, the ICJ similarly observed that: “islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.”²¹ Consequently, sovereignty over islands must be determined independently and prior to maritime delimitation.²²

Ultimately, off-shore zones are considered to be prolongations of the land territory of the coastal State, although other voices claim that islands are features within the seas; therefore, they are dominated by the continental mainland.²³ Notwithstanding the foregoing, conventions, proclamations, and the literature on the continental shelf refer to those off-shore zones in such terms as “close to its shore,” “off its coast,” “in front of the coast,” “neighboring the coast,” “adjacent to,” or “contiguous.”²⁴ The land dominates the sea through “closeness,” which is encapsulated in the definition of outer limits of maritime zones based on distance from the coast.²⁵ This domination is reflected in UNCLOS, as the limits of the maritime zones are all defined with reference to distances from the baselines.

19. Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. 3, ¶ 86 (Dec. 19).

20. Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), Judgment, 1993 I.C.J. 38, ¶ 80 (June 14).

21. Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment, 2001 I.C.J. 97, ¶ 185 (July 1).

22. However, in disputed issues pertinent to islands, the international judicial bodies either enclaved or gave limited effect to the islands, especially if they are located on the opposite side of the median line. *See, e.g.*, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, Judgment, 2007 I.C.J. 659, ¶¶ 113, 126 (Oct. 8).

23. THOMAS COTTIER, *EQUITABLE PRINCIPLES OF MARITIME BOUNDARY DELIMITATION: THE QUEST FOR DISTRIBUTIVE JUSTICE IN INTERNATIONAL LAW* 525–30 (2015); Murat Sümer, *Equitable Considerations in the Delimitation of the Continental Shelf*, 100 INTERNATIONAL LAW STUDIES 752, 756–57 (2023).

24. North Sea Continental Shelf, *supra* note 15, ¶ 41.

25. Nuno Marques Antunes & Vasco Becker-Weinberg, *Entitlement to Maritime Zones and Their Delimitation: In the Doldrums of Uncertainty and Unpredictability*, MARITIME BOUNDARY DELIMITATION: THE CASE LAW 62, 66 (Alex G. Oude Elferink, Tore Henriksen & Signe Veierud Busch eds., 2018).

Nevertheless, the notion of equity is at the heart of the delimitation of the continental shelf.²⁶ The Truman Proclamation of September 28, 1945, emphasized the fundamental role of equitable principles in the determination and delimitation of the continental shelf.²⁷ Without referring to delimitation,²⁸ it stated that in cases where the continental shelf off the coast of the United States extends to the shores of another State or is shared with an adjacent State, “the boundary shall be determined by the United States and the State concerned in accordance with equitable principles.”²⁹

The application of equitable principles dictates that the delimitation line should respect the geographical features of the delimitation area.³⁰ In the judgments of international courts and tribunals, one can appreciate the strong correlation between geographical considerations and equitable principles in maritime boundary delimitation.³¹ These decisions, particularly those of the ICJ, have advanced and crystallized the doctrine of equitable principles applicable to maritime delimitation.³²

However, as Prosper Weil³³ and Vaughan Lowe³⁴ show, the Court has taken different views at different times on the role of equitable principles. The Court adopted a limited interpretation of equity in the *North Sea Continental Shelf* case, viewing it as being modulated by norms and mainly serving to remedy injustice resulting from the strict application of the law.³⁵ The “equitable principles,” as articulated in the *North Sea Continental Shelf* case, have a normative nature as part of general international law.³⁶ Comparable

26. YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 214 (4th ed. 2023).

27. JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 272–73 (2019).

28. M.D. Blecher, *Equitable Delimitation of Continental Shelf*, 73 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 60 (1979).

29. Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

30. Yunus Emre Acikgonul, *Equitable Delimitation of Maritime Boundaries: The Uncontested Supremacy of Coastal Geography in Case Law*, 31 *OCEAN YEARBOOK* 171, 176 (2017).

31. *Id.*

32. Barbara Kwiakowska, *Equitable Maritime Boundary Delimitation—A Legal Perspective*, 3 *INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW* 287 (1988).

33. PROSPER WEIL, *THE LAW OF MARITIME DELIMITATIONS—REFLECTIONS* 159–85 (1989).

34. Vaughan Lowe, *The Role of Equity in International Law*, 12 *AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW* 74 (1989).

35. *Id.*

36. CRAWFORD, *supra* note 27, at 273.

views were expressed in the *Channel Islands* dispute in 1977, where the Court of Arbitration said it did not have “carte blanche to employ any method that it chooses in order to effect an equitable delimitation of the continental shelf.”³⁷

Nonetheless, in the *Tunisia/Libya* case, the ICJ abandoned this narrow interpretation of equity as corrective to a view of what Weil calls “autonomous” equity.³⁸

Since the Court considers that it is bound to decide the case on the basis of equitable principles, it must first examine what such principles entail The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term “equitable principles” cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result.³⁹

Still, the role of the equitable principle in delimitation cases remained unsettled. The Court had already backtracked from the more expansive interpretation of equity in *Tunisia/Libya* by the time of the *Libya/Malta* case.⁴⁰ Libya argued for autonomous equity, citing a broad range of geographical, geological, and geomorphological factors, and requested that the Court weigh all relevant factual circumstances before rendering a decision. The Court declined, stating that: “While every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the

37. Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision, 18 R.I.A.A. 3 (Perm. Ct. Arb., June 30, 1977).

38. WEIL, *supra* note 33.

39. Continental Shelf (Tunis./Libya), *supra* note 18, ¶ 70.

40. Continental Shelf (Libya/Malta), Judgment, 1985 I.C.J. 13 (June 3).

objective of an equitable result, as required by general international law, to be attained.”⁴¹ Once again, the Court did not adequately explain the application of the principle of equity in these difficult delimitation cases.

Two years later, in the *Gulf of Maine* case,⁴² the Court sought to demystify this concept of “equitable principles” by declaring that even the “principles” in question do not exist; it would be appropriate to describe them more modestly as “criteria”:⁴³

[I]t seems above all essential to stress the distinction to be drawn between what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question.⁴⁴

It is therefore not surprising that the ICJ, in the *Gulf of Maine* case, concluded that the “equitable principles,” downgraded to the rank of “criteria,” “are not themselves rules of law and therefore mandatory in the different situations.”⁴⁵

The *Jan Mayen* case⁴⁶ finally marked notable progress as the operation of equity entered the equation thanks to the rapprochement of equidistance and equitable principles that shape the two-stage method. The ICJ found it necessary to start the process of delimitation by a provisional equidistance line, followed by an assessment of the factors calling for an adjustment of the equidistance line.⁴⁷ According to the Court: “The aim in each and every situation must be to achieve ‘an equitable result.’”⁴⁸ The international courts

41. *Id.* ¶ 76.

42. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246 (Oct. 12).

43. Mohammed Bedjaoui, *L’énigme des «principes équitables» dans le droit des délimitations maritimes*, 42 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 367, 373 (1990).

44. Delimitation of the Maritime Boundary in the Gulf of Maine Area, *supra* note 42, ¶ 80.

45. *Id.* ¶ 158.

46. Maritime Delimitation in the Area between Greenland and Jan Mayen, *supra* note 20.

47. Abdul Ghafur Hamid, *Refining the Maritime Boundary Delimitation Methodology: The Search for Predictability and Certainty*, 27 INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA LAW JOURNAL 35, 50 (2019).

48. Maritime Delimitation in the Area between Greenland and Jan Mayen, *supra* note 20.

further refined the delimitation methodology in *Black Sea*⁴⁹ and other more recent cases. They articulated the three-stage approach⁵⁰ by creating a new third stage (disproportionality test) that is added to the equidistance line/relevant circumstances model. Therefore, the doctrine of equitable principles provides the cornerstone of customary international law for effecting maritime boundary delimitation by agreement, taking into account all relevant circumstances to reach an equitable result.⁵¹ Since equity, in this instance, fully adheres to the law, *ex aequo et bono* decision-making is not at issue.⁵² The additional stage attests to the crucial objective of achieving an equitable outcome.

Furthermore, the application of equitable principles seeks to achieve an equitable result from the outset rather than to mitigate or modify the rigidity of the relevant legal rules. Indeed, the selection of the appropriate base points in the first stage of the delimitation process demonstrates that it is a simultaneous process from the very beginning to the end. The need to respect all relevant circumstances in a given case and the fact that no delimitation method—including equidistance—is mandatory are clear reflections of this.⁵³ As the arbitral tribunal noted in the *Barbados/Trinidad and Tobago* case:

Since the very outset, courts and tribunals have taken into consideration elements of equity in reaching a determination of a boundary line over maritime areas. This is also the approach stipulated by UNCLOS Articles 74 and 83, in conjunction with the broad reference to international law explained above.⁵⁴

B. Proportionality

Proportionality goes hand in hand with equity in the law of maritime delimitation. From a theoretical perspective, justice does not mean arithmetic

49. Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. 61 (Feb. 3).

50. Hamid, *supra* note 47, at 51.

51. See Barbara Kwiatkowska, *The International Court of Justice and Equitable Maritime Boundary Delimitation*, 28 ENVIRONMENTAL POLICY & LAW 91 (1998).

52. HUGO CAMINOS, LAW OF THE SEA 244–45 (2016).

53. *Id.*

54. Arbitration between Barbados and Trinidad and Tobago, *supra* note 11, ¶ 229.

equality but equality in ratios and proportions.⁵⁵ The principle of proportionality considers all relevant factors and prevents unreasonable results by determining whether a measure is excessive and attributing appropriate weight to each principle concerned.⁵⁶ In the context of maritime delimitation, the delimitation of boundaries should be effected by taking into account the ratio between the area of the continental shelf attributed to each party and the corresponding length of its coastline.⁵⁷

Every court decision pertaining to maritime delimitation has considered proportionality. However, the weights and values attributed to this principle have not always been the same. The proportionality test has frequently been used in connection with the non-encroachment principle. In other cases, proportionality has been interpreted to prevent distorting effects caused by particular individual features.⁵⁸ The importance of proportionality has been acknowledged by the case law, which has established an independent test of (dis)proportionality as a final stage in delimitation.

The origins of the principle of proportionality in the case law can be traced back to the *North Sea Continental Shelf* case, where the Court emphasized proportionality as a factor to be taken into account in the course of the negotiations of a boundary delimitation:

A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines.⁵⁹

Further expanding the application of the principle of proportionality in the *Channel Islands* case, the Court of Arbitration established that the concept of “proportionality” is not only a factor in the form of the ratio of the areas

55. Paul Reuter, *Quelques reflexions sur l'equite en droit international*, REVUE BELGE DE DROIT INTERNATIONAL 173 (1980).

56. Thomas Cottier et al, *The Principle of Proportionality in International Law*, NCCR Trade Working Paper No 2012/38 (2012), <https://doi.org/10.2139/ssrn.2598410>.

57. Yoshifuni Tanaka, *Reflections on the Concept of Proportionality in the Law of Maritime Delimitation*, 16 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 433 (2001).

58. Yunus Emre Acikgonul & Edward R. Lucas, *Developments in Maritime Delimitation Law over the Last Decade: Emerging Principles in Modern Case Law*, 57 THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 172 (2019).

59. *North Sea Continental Shelf*, *supra* note 15, ¶ 98.

of the continental shelf to the lengths of the respective coastlines, but it may also appear as a factor for determining the equitable or inequitable effects of particular geographical features or configurations upon the course of an equidistance-line boundary.⁶⁰

In the *Black Sea* case, the (dis)proportionality test was enshrined as an independent step in the three-stage delimitation approach:

Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line. A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.⁶¹

The disproportionality test is now widely recognized as the last stage of the delimitation process. The ICJ considered the disparity in coastal length in the 2012 *Nicaragua/Colombia* case and shifted the equidistance line to give proper weight to that relevant consideration.⁶² The disparity in the lengths of the relevant coasts was considered a relevant circumstance calling for an adjustment, which was enough to succeed in the disproportionality test.

The applicability of proportionality has been enlarged in the case law; it is not only a test of the equitableness of the results or a reason for shifting the provisional line of equidistance but also a separate stage in the delimitation approach.⁶³ Thus, the notion of proportionality appears to be implicit in the concept of equity in maritime boundary delimitation.⁶⁴

60. Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, *supra* note 37, ¶ 100.

61. Maritime Delimitation in the Black Sea, *supra* note 49, ¶ 122 (internal cross-reference omitted).

62. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, ¶¶ 235–36 (Nov. 19).

63. Hamid, *supra* note 47, at 46.

64. Continental Shelf (Tunis./Libya), *supra* note 18, at 258 (dissenting opinion by Oda, J.); Jin-Hyun Paik, *The Roles of Proportionality in Maritime Delimitation: State of Jurisprudence, in COEXISTENCE, COOPERATION AND SOLIDARITY* 199 (Holger P. Hestermeyer et al. eds., 2012).

III. CONTEMPORARY PRINCIPLES

In the last few decades, some other principles have been invoked by international judicial organs as relevant circumstances. Although one may consider them as contemporary principles, they have already come a long way to reach the status of principle to be applied to delimitations of the continental shelf.

A. Non-encroachment

The principle of non-encroachment seeks to prevent any type of cut-off on the seaward projection of coastal States. Recognized by the ICJ in the *North Sea Continental Shelf* case in relation to the natural prolongation of the coastline,⁶⁵ Robert Kolb emphasizes its dual *raison-d'être*: for security reasons, it prevents third States from exploiting the seabed right up to the coast of another State; for equitable reasons, it pushes the amputative effect produced by coastal configurations as far to seaward as possible.⁶⁶

Since the *Channel Islands* case,⁶⁷ the principle of non-encroachment has become independent of the rule of natural prolongation with which it had been allied in the *North Sea Continental Shelf* case.⁶⁸ Instead, it has aligned itself more closely with the concept of distance. In order to delimit maritime boundaries within two hundred nautical miles, international judicial organs have gradually shifted from prioritizing natural prolongation to coastal geography.⁶⁹ As defined by the ICJ in the *Libya/Malta* case, non-encroachment “is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances.”⁷⁰

65. *North Sea Continental Shelf*, *supra* note 15, ¶¶ 85, 101. Because of the natural prolongation and the concavity of the coastline, there were areas of the German continental shelf outside the area that would be attributed to Germany by the equidistance method.

66. ROBERT KOLB, *CASE LAW ON EQUITABLE MARITIME DELIMITATION: DIGEST AND COMMENTARIES* 202 (2003).

67. *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, *supra* note 37.

68. KOLB, *supra* note 66, at 109.

69. Yunus Emre Acikgonul, *Reflections on the Principle of Non-Cut Off: A Growing Concept in Maritime Boundary Delimitation Law*, 47 *OCEAN DEVELOPMENT & INTERNATIONAL LAW* 52, 53 (2016).

70. *Continental Shelf (Libya/Malta)*, *supra* note 40, ¶ 46.

An encroachment on the continental shelf of another State does not in itself require shifting the provisional delimitation line. The encroachment can constitute a relevant circumstance and call for the adjustment of the line only when an incidental geographical feature affects the provisional equidistance line so greatly as to render that line inequitable.⁷¹ Therefore, the line delimiting the competing claims between States should avoid the encroachment that would result from an unadjusted equidistance line.⁷²

In the *Black Sea* case, both Romania and Ukraine argued that the delimitation line proposed by the other party encroached on their maritime entitlements. However, the provisional equidistance line drawn by the Court avoided such a drawback as it allowed “the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way.”⁷³ Consequently, there was no reason to adjust the provisional equidistance line on this ground.

As discussed above, the principle of non-encroachment emerged from case law. Used in the sense of not cutting off the natural prolongation in the *North Sea Continental Shelf* case, in subsequent jurisprudence, it found application in the form of not cutting off the general projection of the coast. This principle is applied as a corrective measure for the purpose of delimitation to reach an equitable solution.⁷⁴

B. *Non-distortion*

According to the principle of non-distortion, geographical irregularities or minuscule features should not have a greatly disproportionate adverse effect by swinging the delimitation line to the substantial disadvantage of one State and the advantage of other States.⁷⁵ These distorting effects on the delimitation line usually result from situations where insignificant features are selected as base points for the construction of the equidistance line or when

71. Acikgonul & Lucas, *supra* note 58, at 180.

72. Arbitration between Barbados and Trinidad and Tobago, *supra* note 11, ¶¶ 321, 375.

73. Maritime Delimitation in the Black Sea, *supra* note 49, ¶¶ 199–201.

74. KOLB, *supra* note 66, at 202.

75. Arbitration between the Republic of Croatia and the Republic of Slovenia, Case No. 2012-04, Award of June 29, 2017, ¶ 1009 (Perm. Ct. Arb. 2017), <https://pcacases.com/web/sendAttach/2172>. See Yunus Emre Acikgonul, *Equitable Delimitation of Maritime Boundaries: The Uncontested Supremacy of Coastal Geography in Case Law*, 31 OCEAN YEARBOOK 171, 178 (2017).

geographical irregularities are given effects greater than their actual importance in the delimitation area.⁷⁶

The consideration of incidental features that unduly distort the direction of a delimitation line is a relevant circumstance to appropriately be assessed in the second stage of delimitation. Otherwise, disproportionate effects given to unusual features would alter the general geographical balance and amount to a refashioning of the given geography leading to inequitable results.

To avoid that judicial refashioning of geography, in the *Black Sea* case the ICJ considered it inappropriate to select any base point on Serpents' Island because it lay alone and about twenty nautical miles from the mainland coast of Ukraine, and its use as a part of the relevant coast "would amount to grafting an extraneous element onto Ukraine's coastline."⁷⁷ Likewise, in the *Nicaragua/Colombia* case, the Court reasoned that "[w]hen placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line."⁷⁸ Yet, according to Article 121 of UNCLOS, in the absence of relevant circumstances, islands, regardless of their size, are entitled to generate the same maritime rights as land territory. Even so, the role islands play in the delimitation of the continental shelf has been shaped more by case law and State practice, especially since they can considerably distort the final delimitation line.

However, these solutions are not always consistent. In some cases, the courts place a basepoint on the island but give it a reduced effect at a later stage. This was the Court of Arbitration's reasoning in the *Channel Islands* case, where the Scilly Islands were granted partial effect as the archipelago "constitutes an element of distortion which is material enough."⁷⁹ In most cases, the courts do not place a basepoint on the island; instead, they give it effect *a posteriori*, when the boundary line is drawn, either by shifting the line⁸⁰ or by creating an enclave.⁸¹

76. Acikgonul & Lucas, *supra* note 58, at 187.

77. Maritime Delimitation in the Black Sea, *supra* note 49, ¶ 149.

78. Territorial and Maritime Dispute (Nicar. v. Colom.), *supra* note 62, ¶ 202.

79. Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, *supra* note 37, ¶ 251.

80. Maritime Delimitation in the Black Sea, *supra* note 49, ¶ 186; Territorial and Maritime Dispute (Nicar. v. Colom.), *supra* note 62, ¶ 302.

81. Isabelle Rouche, *Island and the Construction of a Maritime Boundary: Pushing the Limits of State Sovereignty*, 15 *INDONESIAN JOURNAL OF INTERNATIONAL LAW* 449, 455 (2018).

Although the international courts and tribunals have attenuated the distorting effect of delimitation lines in a good number of cases,⁸² non-distortion as a principle was spelled out in academia only in 2019. For decades, it came hand in hand with the principle of non-encroachment or was referred to directly by its function. The author agrees with this reasoning since, although closely related, non-encroachment and non-distortion may refer to different geographical realities.

IV. APPLICATION OF PRINCIPLES TO DELIMITATION OF THE CONTINENTAL SHELF BEYOND TWO HUNDRED NAUTICAL MILES

The delimitation of the extended continental shelf is a relatively new phenomenon. In only four cases, thus far, has the continental shelf been delimited by an international court or tribunal.⁸³ Therefore, the limited case law has not provided answers to all substantive issues relating to relevant circumstances, such as the possible relevance of geology and geomorphology in the adjustment of the provisional equidistance line.

Do the principles already examined apply to the delimitation of the continental shelf, considering that the entitlement within two hundred nautical miles is based on distance, while the entitlement beyond two hundred nautical miles is based on geology and geomorphology?

A. The Land Dominates the Sea and Equitable Principles in the Continental Shelf Beyond Two Hundred Nautical Miles

The delineation of the extended continental shelf relies on the concept of natural prolongation—the claimant State needs to prove that the soil of the shelf is an extension of the terrestrial soil. When the physical continental margin extends beyond two hundred nautical miles, according to the formulae in Article 76(4) of UNCLOS, the foot of the slope serves as a reference

82. North Sea Continental Shelf, *supra* note 15, ¶ 91; Maritime Delimitation in the Black Sea, *supra* note 49, ¶ 117; Territorial and Maritime Dispute (Nicar. v. Colom.), *supra* note 62, ¶ 202; Arbitration between the Republic of Croatia and the Republic of Slovenia, *supra* note 75, ¶ 1009.

83. *See* Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012 ITLOS Rep. 2012, at 4; Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), 32 R.I.A.A. 1 (Perm. Ct. Arb. 2014); Dispute Concerning Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Case No. 23, Judgment of Sept. 23, 2017, ITLOS Rep. 2017, at 4; Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Judgment, 2021 I.C.J. 206 (Oct. 12).

point. Therefore, geology and geomorphology do matter for delineating the outer limits of the continental shelf.

However, geology and geomorphology seem to be of less relevance for delimiting overlapping extensions. Both State practice⁸⁴ and case law have sidelined the doctrine in favor of the geometry of the coasts.⁸⁵ As the ICJ observed in the *North Sea Continental Shelf* case, the continental shelf consists of “stretches of submerged land,” a soil and a subsoil that are “evocative of the land and not of the sea.”⁸⁶ Accordingly, with respect to the outer limit of the continental shelf, it can equally be said that “the land dominates the sea.”⁸⁷

What if the equidistance line is constructed from the foot of the slope or based on the outer edge of the natural prolongation? The Commission on the Limits of the Continental Shelf Scientific and Technical Guidelines view the foot of the slope as “an essential feature that serves as the basis for entitlement to the extended continental shelf and the delineation of its outer limits.”⁸⁸ On this basis, some authors have suggested that the foot of the slope or the base may also serve as a “starting line from which one has to set out in order to ascertain” the extent of the natural prolongation of a coastal State.⁸⁹ The rationale behind this view is that the foot of the slope is the key feature to determine the outer limits of the continental shelf beyond two hundred nautical miles.⁹⁰

84. The maritime boundary agreement between New Zealand and Australia applies equidistance to delimit their overlapping extended continental shelf.

85. Cornell Overfield, *An Off-the-Shelf Guide to Extended Continental Shelves and the Arctic*, LAWFARE (Apr. 21, 2021), <https://www.lawfaremedia.org/article/shelf-guide-extended-continental-shelves-and-arctic>.

86. *North Sea Continental Shelf*, *supra* note 15, ¶ 96.

87. FIETTA & CLEVERLY, *supra* note 8, at 27.

88. Commission on the Limits of the Continental Shelf, Scientific and Technical Guidelines, Doc. CLCS/11, ¶ 5.1.1 (May 13, 1999); Bjarni Már Magnússon, *The Rejection of a Theoretical Beauty: The Foot of the Continental Slope in Maritime Boundary Delimitations Beyond 200 Nautical Miles*, 45 OCEAN DEVELOPMENT & INTERNATIONAL LAW 41, 45 (2014).

89. See Hollis Hedberg, *Ocean Floor Boundaries*, 204 SCIENCE 135, 136 (1979); David Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring States*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 91, 103 (2003); Bjørn Kunoy, *The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf*, 25 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 237, 268–69 (2010).

90. Magnússon, *supra* note 88, at 45; Øystein Jensen, *The Delimitation of the Continental Shelf Beyond 200 nm: Substantive Issues*, in MARITIME BOUNDARY DELIMITATION: THE CASE LAW: IS IT CONSISTENT AND PREDICTABLE? 351, 371–72 (Alex G. Oude Elferink, Tore Henriksen & Signe Veierud Busch eds., 2018); Hilde J. Woker, *Challenging the Notion of a*

Although reasonable at first sight, this idea has not been retained by the case law. In the *Bangladesh/Myanmar* case, Bangladesh argued unsuccessfully that geophysical factors constituted relevant circumstances that should influence the course of the maritime delimitation line both within and beyond two hundred nautical miles. Instead, the International Tribunal for the Law of the Sea (ITLOS) deemed that “the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm.”⁹¹ Accordingly, the coastal geography was the dominant consideration and the Tribunal suggested that the method should be determined in light of the “prevailing geographic realities and the particular circumstances of each case.”⁹²

In the same vein, in *Ghana/Côte d’Ivoire*, the ITLOS special chamber stated that “[a]ccording to international jurisprudence, delimitation of maritime areas is to be decided objectively on the basis of the geographic configuration of the relevant coasts.”⁹³ Likewise, in *Somalia/Kenya*, the ICJ referred to a methodology that “is based on objective, geographical criteria.”⁹⁴ International judicial bodies are applying the fundamental principle that “the land dominates the sea.”

As the ICJ made it clear in the *Tunisia/Libya* case: “the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be the elements of an equitable solution.”⁹⁵ In line with this decision, the natural prolongation remains the legal basis of entitlement to a continental shelf beyond two hundred nautical miles. Thus, the geological and geomorphological aspects of natural prolon-

“*Significant Continental Shelf*”, 54 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 375 (2023).

91. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, *supra* note 83, ¶ 455. A uniform practice has developed in case law, where the judicial body has maintained that there is a single continental shelf, and therefore the same principles for delimitation apply both within and beyond two hundred nautical miles. *See* Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), *supra* note 83, ¶¶ 457–58; Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean, *supra* note 83, ¶ 526.

92. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, *supra* note 83, ¶ 235.

93. Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean, *supra* note 83, ¶ 452.

94. Maritime Delimitation in the Indian Ocean (Som. v. Kenya), *supra* note 83, ¶ 128.

95. Continental Shelf (Tunis. v. Libya), *supra* note 18, ¶ 68.

gation constitute relevant circumstances that should be taken into consideration in the delimitation.⁹⁶ Therefore, as to what extent (if any) or in what way natural prolongation as a geophysical factor plays a role in the delimitation of the extended continental shelf, it is left to the decisions of international judicial organs or States.⁹⁷ The judicial and arbitral practice so far has not given weight to any geophysical factors in the examination of relevant circumstances.⁹⁸

Up till now, international courts or tribunals have only dealt with delimitation between adjacent States. It seems that this type of delimitation would be more straightforward than that between opposite States. Adjacent States will present similar geological and geomorphological evidence in the boundary region, which would justify the prolongation of the delimitation line from the territorial sea baseline to the outer limits. On the other hand, opposite States' claims to a continental shelf may be based on entirely different geological and geomorphological evidence.⁹⁹

Article 83 makes no distinction between continental shelf within and beyond two hundred nautical miles. The goal is always to achieve an equitable solution. International judicial organs have reiterated this idea in the four decisions delimiting the extended continental shelf.

First, in the *Bangladesh/Myanmar* case, ITLOS indicated that “[t]he goal of achieving an equitable result must be the paramount consideration guiding the action of the Tribunal in this connection.”¹⁰⁰ Second, in the *Bangladesh/India* case, the arbitral tribunal stated that “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.”¹⁰¹ Third, in *Ghana/Côte d’Ivoire*, the ITLOS special chamber pointed out that “[s]uch delimitation has

96. Huang Yao & Xuexia Liao, *Natural Prolongation and Delimitation of the Continental Shelf Beyond 200 nm: Implications of the Bangladesh/Myanmar Case*, 4 ASIAN JOURNAL OF INTERNATIONAL LAW 281, 298–99 (2014).

97. *Id.*

98. Xuexia Liao, *Delimitation Methodology for the Continental Shelf Beyond 200 Nautical Miles: Three-stage Approach as a Way Forward?*, 37 LEIDEN JOURNAL OF INTERNATIONAL LAW 379, 395 (2023).

99. Yao & Liao, *supra* note 96, at 303.

100. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, *supra* note 83, ¶ 235.

101. Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), *supra* note 83, ¶ 339.

to be equitable in result for the two Parties concerned.”¹⁰² Finally, the ICJ reaffirmed in *Somalia/Kenya* that “[t]he goal of that exercise is the achievement of an “equitable solution.”¹⁰³ Indeed, it is quite clear that case law reaffirms that the delimitation of the continental shelf and the extended continental shelf both require equitable results.

B. Proportionality in the Continental Shelf Beyond Two Hundred Nautical Miles

What is proportionality in the delimitation of the continental shelf beyond two hundred nautical miles? Identifying the theoretical basis for calculation—the proportion between the relevant area and either the length of the coast or the actual prolongation—is largely responsible for the methodological problems raised by the application of the disproportionality test in the delimitation beyond two hundred nautical miles.¹⁰⁴ Despite these challenges, the courts and tribunals continue to use the disproportionality test in delimitation cases involving the continental shelf beyond two hundred nautical miles to demonstrate the equitableness of the result.¹⁰⁵

However, the scope of the assessed area has been different in cases involving an extended continental shelf.¹⁰⁶ For example, in the *Bangladesh/Myanmar* case, the relevant area in connection with the disproportionality test was determined after ITLOS extended the adjusted line to the continental shelf beyond two hundred nautical miles. As a result, almost all the area of the overlapping extended continental shelf was excluded.¹⁰⁷ Conversely, the ICJ, in the *Somalia/Kenya* case, conducted a limited disproportionality test only applicable to the delimitation within two hundred nautical miles.¹⁰⁸ In

102. Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, *supra* note 83, ¶ 283.

103. Maritime Delimitation in the Indian Ocean (Som. v. Kenya), *supra* note 83, ¶ 121.

104. Liao, *supra* note 98, at 398.

105. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, *supra* note 83, ¶¶ 493–99; Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), *supra* note 83, ¶¶ 490–97; Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, *supra* note 83, ¶¶ 533–38; Maritime Delimitation in the Indian Ocean (Som. v. Kenya), *supra* note 83, ¶¶ 175–77.

106. Liao, *supra* note 98, at 397–98.

107. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, *supra* note 83, ¶¶ 491–95.

108. Maritime Delimitation in the Indian Ocean (Som. v. Kenya), *supra* note 83, ¶¶ 175–77.

yet another calculation practice, in the *Bangladesh/India*¹⁰⁹ and *Ghana/Côte d'Ivoire*¹¹⁰ cases, the overlapping area of the extended continental shelf was incorporated for the disproportionality test.¹¹¹

In short, is the disproportionality test appropriate for the delimitation of the extended continental shelf? In fact, it is the entire three-stage methodology that can be questioned.¹¹² As Judge Xue points out in her separate opinion in the *Nicaragua/Colombia* case:¹¹³ “It seems highly problematic to apply the three-stage delimitation methodology that is usually used for maritime delimitation within 200 nautical miles; the relevant considerations for achieving an equitable solution may be quite different in the present situation.”

The four existing decisions demonstrate that the basis for calculation is not uniform. In this sense, the generalization of the three-stage methodology would also be called into question by the judicial bodies’ inability to resolve the dispute about relevant coasts and relevant areas (and consequently the application of the disproportionality test), as well as entitlements to the continental shelf beyond two hundred nautical miles in cases where the parties have not received affirmative recommendations from the CLCS.¹¹⁴

C. Non-encroachment in the Continental Shelf Beyond Two Hundred Nautical Miles

As David Colson anticipated in 2003, the principle of non-encroachment remains a key feature of extended continental shelf cases.¹¹⁵ The non-encroachment principle necessitates that natural prolongation as a geological and geomorphological factor should be considered in delimitation beyond two hundred nautical miles. According to the original interpretation of the

109. Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), *supra* note 83, ¶¶ 490–91.

110. Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, *supra* note 83, ¶ 528.

111. As both cases relied on the submissions of the parties to the CLCS to define the geographical scope of the relevant area in preparation for the disproportionality test.

112. Woker, *supra* note 90, at 390.

113. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast, Judgment of July 13, 2023, separate opinion of Judge Xue, ¶ 57, <https://icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-02-en.pdf>.

114. Liao, *supra* note 98, at 398.

115. Colson, *supra* note 89, at 107.

non-encroachment principle, the court tries to avoid encroaching on areas where coastal States already have rights.¹¹⁶

For instance, in the *Bangladesh/Myanmar* case, the Tribunal found “that the concavity of the coast of Bangladesh is a relevant circumstance . . . because the provisional equidistance line as drawn produces a cut-off effect on that coast requiring an adjustment of that line.”¹¹⁷ In a similar fashion, the tribunals in the *Bangladesh/India* and *Somalia/Kenya* cases reached the same conclusion.¹¹⁸

Although in *Ghana/Côte d’Ivoire*, the ITLOS special chamber did not shift the line as “adjusting the provisional equidistance line for the benefit of Côte d’Ivoire and to the detriment of Ghana would in fact cut off the seaward projection of the coast of Ghana,”¹¹⁹ the Tribunal did accept that the coast of Côte d’Ivoire was concave and analyzed the encroachment produced by the provisional equidistance line to the projections of Côte d’Ivoire’s coasts both within and beyond two hundred nautical miles.¹²⁰

D. *Non-distortion in the Continental Shelf Beyond Two Hundred Nautical Miles*

The effect of geographical features such as islands, rocks, or low-tide elevations on the equidistance line also remains a matter for close examination in the delimitation of the continental shelf beyond two hundred nautical miles. The location of the feature in relation to the delimitation line fixed by reference to the primary components of the relevant geographical region determines the influence it could exert on the line.¹²¹ The further the feature is from the coast, the lesser the distorting effect of the feature will be. Detached islands that may affect the direction of the delimitation line beyond two hundred nautical miles will most probably be ignored. Either because of their remoteness or their disconnection from the natural prolongation, in principle, these small features should not be contemplated as relevant circumstances for the application of the non-distortion principle.

116. Yao & Liao, *supra* note 96, at 299.

117. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, *supra* note 83, ¶ 297.

118. Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), *supra* note 83, ¶ 421; Maritime Delimitation in the Indian Ocean (Som. v. Kenya), *supra* note 83, ¶ 171.

119. Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean, *supra* note 83, ¶ 425.

120. Liao, *supra* note 98.

121. Jian-Jun Gao, *International Rules on the Continental Shelf Delimitation*, 1 KMI INTERNATIONAL JOURNAL OF MARITIME AFFAIRS AND FISHERIES 91, 106 (2009).

In the four cases dealing with the delimitation of the extended continental shelf, the effect of small features was examined based on the geographic realities and the circumstances of the specific case.¹²² However, the location of these features—close to the shore—did not affect the delimitation line that continued in the same direction until it reached the outer limits of the continental shelf.

V. EMERGING PRINCIPLES AND RULES IN MARITIME DELIMITATION

New cases bring novel circumstances that call for a legal answer, especially when customary or conventional rules are still lacking. In this context, new principles that fill legal gaps may emerge, or existing principles may be given an enhanced status. These principles are usually inducted from the legal reasoning of international judicial organs.¹²³

A. Transparency, Predictability, and Objectivity

Even though UNCLOS does not explicitly mention transparency, predictability, and objectivity in its delimitation provisions, achieving an “equitable solution” should encapsulate these objectives.¹²⁴ As Yurika Ishii observes, as long as a maritime delimitation is done in accordance with equitable principles, it is necessary that the decision accords with the values of transparency and predictability.¹²⁵ The rationale behind equidistance is the achievement of predictability and the objectivity of the process.¹²⁶ The need for stability and predictability motivates the promotion of transparency. Transparency serves

122. Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, *supra* note 83, ¶ 319; Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), *supra* note 83, ¶ 261; Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean, *supra* note 83, ¶ 434; Maritime Delimitation in the Indian Ocean (Som. v. Kenya), *supra* note 83, ¶ 114.

123. Marcelo Kohén & Bérénice Schramm, *General Principles of Law*, OXFORD BIBLIOGRAPHIES (Mar. 27, 2019), <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0063.xml>.

124. Pieter Bekker, Clive Schofield & Robert van de Poll, *Transparency and Predictability in the Maritime Delimitation Process: Reverse-engineering the Somalia-Kenya Adjudicated Boundary*, 37 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 413, 418 (2022).

125. Yurika Ishii, *Relevant Coasts and Relevant Area in the Maritime Delimitation of the EEZ and Continental Shelf*, 51 OCEAN DEVELOPMENT & INTERNATIONAL LAW 307, 322 (2020).

126. Hamid, *supra* note 47, at 50.

to build stakeholders' trust in maritime boundaries determined by international courts and tribunals.¹²⁷ As Kolb highlights: "With effect from *Libya/Malta* (1985), the Court will endeavor to reinforce the normative aspects of the delimitation operation, bringing it back under a degree of more transparent and more objective control."¹²⁸

In the *Bangladesh/India* case,¹²⁹ the arbitral tribunal highlighted the importance of transparency and predictability as objectives: "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."

But it is in the *Ghana/Cote d'Ivoire* case where an ITLOS special chamber elevated transparency and predictability to the level of a principle: "The Special Chamber would consider it to be in contradiction of the *principle of transparency and predictability* invoked above . . . to deviate, in this case, from a delimitation methodology which has been practised overwhelmingly by international courts and tribunals in recent decades."¹³⁰ This implies that reaching an equitable solution is the ultimate goal, subsuming predictability, transparency, and objectivity.¹³¹

B. *Non-encroachment Upon Another State's Two Hundred Nautical Miles*

In the judgment of July 13, 2023, in the *Nicaragua/Colombia* case,¹³² the ICJ addressed for the first time whether a State's entitlement to an outer continental shelf may overlap with another State's entitlement to maritime zones within two hundred nautical miles.

Referring to a uniform State practice, the Court observed that "the vast majority" of States parties to the Convention that made submissions to the

127. Bekker, Schofield & van de Poll, *supra* note 124, at 417.

128. KOLB, *supra* note 66, at 172.

129. Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), *supra* note 83, ¶ 339; Maritime Delimitation in the Indian Ocean (Som. v. Kenya), *supra* note 83, ¶ 128; Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean, Case No. 28, Judgment of Apr. 28, 2023, ¶ 96, https://itlos.org/fileadmin/itlos/documents/cases/28/Merits_Judgment/C28_Judgment_28.04.2023_orig.pdf.

130. Dispute Concerning Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), *supra* note 83, ¶ 289 (emphasis added) (internal cross-reference omitted).

131. Bekker, Schofield & van de Poll, *supra* note 124, at 418.

132. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast, *supra* note 113.

Commission on the Limits of the Continental Shelf did not claim a continental shelf that would encroach on maritime areas within two hundred nautical miles of other States.¹³³ It continued, “even if a State can demonstrate that it is entitled to an extended continental shelf, that entitlement may not extend within 200 nautical miles from the baselines of another State.”¹³⁴

Although qualified as customary international law, we might be witnessing the emergence of a new principle of law.¹³⁵ In any case, this decision upholds the idea that distance seems to be a more solid foundation for entitlement to a continental shelf than natural prolongation and/or geophysical criteria.¹³⁶

VI. CONCLUSIONS

The emergence of national claims to extended jurisdiction in the sea significantly increased the importance of maritime boundary delimitation in contemporary international law. In light of rising sea levels, time is of the essence for coastal States to settle their undefined maritime boundaries.

Although every delimitation is unique, State practice and case law have provided guidance about the principles and rules to be applied in pursuit of an equitable solution. In this vein, a true methodology for delimitation of the continental shelf must have the combined effect of predictability and flexibility.¹³⁷ That is why international courts and tribunals have divided the delimitation process into stages: starting with a provisional equidistance line

133. *Id.* ¶ 77.

134. *Id.* ¶ 79.

135. As Tanaka points out, the Court’s assessment of *opinio juris* is debatable. Yoshifumi Tanaka, *Recent Developments in the Jurisprudence Concerning the Delimitation of the Continental Shelf Beyond 200 Nautical Miles: Analysis of the Mauritius/Maldives and Nicaragua v. Colombia Cases*, 103 INTERNATIONAL LAW STUDIES 74, 97 (2024).

136. Hilde J. Woker, *Preliminary Reflections on the ICJ Judgment in Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia) of 13 July 2023*, EJIL:TALK! (July 21, 2023), <https://www.ejiltalk.org/preliminary-reflections-on-the-icj-judgment-in-question-of-the-delimitation-of-the-continental-shelf-between-nicaragua-and-colombia-beyond-200-nautical-miles-from-the-nicaraguan-coast-nicaragua-v-co/>.

137. Hamid, *supra* note 47, at 50.

(for the purpose of predictability and its relative ease),¹³⁸ assessing the relevant circumstances, and applying the disproportionality test (for the purpose of flexibility).

Most of the principles explained above contribute to the flexibility of the process. Even the emergence of new principles enhance clarity in maritime boundary delimitation. When considered as “relevant circumstances” for the delimitation of the continental shelf within two hundred nautical miles, equitable principles, proportionality, non-encroachment, and non-distortion may promote flexibility but not necessarily predictability and certainty.

The four decisions that have delimited the continental shelf beyond two hundred nautical miles opted for the same methodology. As they were adjacent coasts, the direction of the seaward segment of the boundary line was determined without specifying its precise terminus by indicating that the delimitation line continues until it reaches an area where the rights of third parties may be affected. The judicial and arbitral practice so far has not given weight to any geological or geomorphological factors in the examination of relevant circumstances. Therefore, the principles contemplated seem to be the same and to have played a similar role as in the continental shelf within two hundred nautical miles. It would be a truism to note that the relevant law is still evolving and, arguably, the relatively low number of cases prevents generalizations. Nevertheless, there is no early indication of why equitable principles should not be as relevant for extended continental shelf areas as they are for other maritime delimitations. Notably, Mauritius argued in the *Maldives/Mauritius* case that there is “reason to proceed with care in considering whether the method deemed to result in an equitable delimitation beyond 200 M in cases of adjacent States should be applied to the present situation, where the delimitation is between opposite States.”¹³⁹

Would current judicial practice on delimitation of the extended continental shelf between adjacent States serve as a model for opposite States? It is expected that with time, international judicial organs will state whether the principles and rules are considered in a different manner in a delimitation

138. Nonetheless, this provisional line is not simply the line between the two coasts of the claimant States, but a preliminary line constructed by the court by selecting its own base points.

139. Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean, Case No. 28, Memorial of Mauritius of May 25, 2021, ¶ 4.70, https://itlos.org/fileadmin/itlos/documents/cases/28/published/C28_Memorial.pdf; Woker, *supra* note 90, at 389.

between opposite States. In light of the treaty law and *acquis judiciaire* regarding the maritime boundary delimitation in general, the focus should not be on the search for a single methodology with general applicability but on the achievement of an equitable result in the particular case. An application of the relevant principles—including the geophysical ones—to delimitation beyond two hundred nautical miles would also be a sign of the flexibility required by the process.