
The Provisional Equidistance Line

Charting a Course between Objectivity and Subjectivity?

COALTER G. LATHROP

8.1 Introduction

The International Court of Justice (ICJ) and other international courts and tribunals have developed what is now described as a three-stage maritime delimitation methodology which has been applied in one form or another in almost every delimitation case in the modern, post-*North Sea Continental Shelf* era in order to achieve an equitable delimitation solution.¹ Ostensibly, the first stage consists of the objective, geometric process of constructing a line that is at an equal distance from the nearest points on the coasts of the parties. This provisionally drawn equidistance line, which is subject to adjustment in the second stage when accounting for relevant circumstances and the third stage in the event that gross disproportionality is discovered between coastal length and maritime area ratios, has come to be known as the ‘provisional equidistance line’² or, alternatively,

¹ Evans addresses the second-stage consideration of relevant circumstances in Chapter 9, and Tanaka addresses the third-stage consideration of disproportionality in Chapter 11 in this volume. As Tanaka notes, the concept of a reasonable degree of proportionality between coastal lengths and maritime area arose in *North Sea Continental Shelf Cases (Federal Republic of Germany/ Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep. 3. While proportionality has long been described as ‘a test of equitableness of a delimitation arrived at by some other means’ (*Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)* [1999] XXII RIAA 335, 372 [165]), it was not until *Black Sea* that the disproportionality test formally became the third stage of a three-stage delimitation procedure. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment) [2009] ICJ Rep. 61.

² See *In the Matter of the Bay of Bengal Maritime Boundary (Bangladesh v. India)* PCA Case 2010-16 (Award) 7 July 2014; *Maritime Dispute (Peru v. Chile)* (Judgment) [2014] ICJ Rep. 3; *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep. 624; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) ITLOS, Case No 16, 14 March 2012; *Black Sea*, n. 1; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (Judgment)

as the ‘provisional median line,’³ the ‘provisional equidistance/median line,’⁴ or the ‘provisional delimitation line.’⁵ By whatever name it is known, the provisional line is ‘posited as a hypothesis and a practical starting point’ subject to examination and adjustment in light of relevant circumstances.⁶

The topic of this chapter is the purportedly objective first-stage construction of the equidistance line. In an area of international law described as result oriented,⁷ vague,⁸ imprecise,⁹ open-textured,¹⁰ and arbitrary,¹¹ a clear procedural method with an objective starting point could provide much welcomed certainty to litigants, who want predictability from third-party resolution of their maritime boundary disputes, and to negotiators, who have an interest in narrowing the differences between neighboring states in an effort to achieve an agreed solution. This chapter

[2007] ICJ Rep. 659; *In the Matter of an Arbitration between Guyana and Suriname (Guyana v. Suriname)* (Award) 30 RIAA 1; *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them (Barbados v. Trinidad and Tobago)* (Award) [2006] 27 RIAA 147; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain)* (Judgment) [2001] ICJ Rep. 91.

³ See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 2; *Black Sea*, n. 1; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (Judgment) [1993] ICJ Rep. 38; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep. 13.

⁴ See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 2. The Court, in *Black Sea*, assures 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.’ *Black Sea*, n. 1, [116].

⁵ The use of this phrase has always been in reference to a median or equidistance line provisionally drawn and does not appear to be intended to distinguish a provisional equidistance line from a provisional line drawn on some other basis. See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 2; *Black Sea*, (n. 1); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep. 303; *Libya/Malta*, n. 3.

⁶ *Barbados v. Trinidad and Tobago*, n. 2, [242].

⁷ J. I. Charney, ‘Ocean Boundaries between Nations: A Theory for Progress,’ (1984) 78 *American Journal of International Law* 582, 583.

⁸ E. D. Brown, ‘The Tunisia-Libya Continental Shelf Case: A Missed Opportunity,’ (July 1983) *Marine Policy* 142, 162.

⁹ *Ibid.*, 142.

¹⁰ M. D. Evans, ‘Maritime Boundary Delimitation,’ in D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, and T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press Oxford 2015) 255, 257.

¹¹ Specifically in regard to the judgment in *Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep. 18, see *Tunisia/Libya* (Diss. Op. Oda); *Tunisia/Libya* (Diss. Op. Gros); *Tunisia/Libya* (Diss. Op. Evensen).

considers whether courts and tribunals indeed have been faithful to their much-vaunted methodology; do their descriptions of the first stage match their actions?

Tunisia/Libya, decided in 1982, months before the adoption of the United Nations Convention on the Law of the Sea (LOS),¹² is one of the few cases in which the Court declined to construct such a provisional equidistance line. The judgment, separate opinions, and dissenting opinions in that case provide the springboard for a discussion of equidistance as a provisional starting point from which an equitable maritime boundary may be delimited.

The following section sets the stage with a review of *Tunisia/Libya* and the different approaches applied in that judgment and advocated for in the separate opinion of Judge ad hoc Jiménez de Aréchaga and the dissenting opinions of Judges Oda and Gros. To some degree these judicial opinions reflected the negotiating positions of the opposing camps contemporaneously debating the exclusive economic zone and continental shelf delimitation provisions (eventually Articles 74(1) and 83(1)) during the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹³ Judge Oda's dissent, in particular, sowed the seeds from which the provisional equidistance line jurisprudence would grow over the following three decades and more. The chapter turns, in Section 8.3, to the ideal of equidistance as an objective, scientific methodology for anchoring the delimitation process, relying in part on the case law that purports to apply this method in the first stage of the delimitation process and describing the stated rationale for doing so (i.e., the inherent value of applying an objective method on which to base any subsequent assessment in the search for an equitable delimitation solution). Section 8.4 contrasts the ideal of blindly constructing a provisional line using geometry and objective data as the first, distinct stage of delimitation with the concepts of simultaneity and preemptive modification of baselines, and presents examples of the actual practice of the Court and other international courts and tribunals with respect to the selection of basepoints from which to construct the provisional line, a practice which introduces relevant circumstances and a significant level of subjectivity to the first stage of the delimitation process. Section 8.5 contains some concluding remarks.

¹² Adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

¹³ For further discussion of these negotiations, see *Virginia Commentaries*, vol. 2, 796–816, 948–985.

8.2 *Tunisia/Libya*: Crystallizing the Debate

As the Court deliberated in the continental shelf delimitation case between Tunisia and Libya, from the end of oral argument in October 1981 to the release of the judgment and appended opinions in February 1982, delegations at UNCLOS III were tying up loose ends left over from nearly a decade of negotiation. By then the draft convention was available to the Court with its draft Articles 74(1) and 83(1), the delimitation provisions applicable to the newly established, *sui generis* exclusive economic zone and the continental shelf, respectively. By the time the Court was deciding *Tunisia/Libya*, the word 'equidistance' had disappeared from both provisions which had assumed their now familiar form in what would soon be adopted as the LOSC.¹⁴

The mandate of the Court in *Tunisia/Libya*, as set out in the parties' *compromis*, was to 'take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea.'¹⁵ The Court recognized the equidistance-less draft text of Article 83(1) as representing one of those trends.¹⁶ Judge ad hoc Jiménez de Aréchaga, voting with the Court, seized on the absence of any reference to equidistance in his separate opinion. Referring to UNCLOS III he wrote 'the whole process of the Conference is indicative of a new accepted trend, which is to minimize or 'tone down' the role assigned to equidistance.'¹⁷

Jiménez de Aréchaga's identification of a 'new accepted trend' in relation to the minimized role of equidistance undoubtedly was correct, especially when juxtaposed to Article 6 of the 1958 Convention on the Continental Shelf¹⁸ and in light of the ongoing but nearly completed negotiations at UNCLOS III. Beginning with the rejection of Article 6 as a reflection of customary international law in *North Sea Continental Shelf*, there clearly was a trend toward minimizing the role of equidistance and removing any misconception that delimitation-by-equidistance had risen

¹⁴ 'The delimitation of the [exclusive economic zone/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.'

¹⁵ *Tunisia/Libya*, n. 11, [4] quoting the Libyan translation of the Tunisia/Libya Special Agreement, Art. 2.

¹⁶ *Ibid.*, [47 *et seq.*]. ¹⁷ *Ibid.* (Sep. Op. Jiménez de Aréchaga), [35].

¹⁸ Adopted 29 April 1958, entered into force 10 June 1964, 499 UNTS 311.

to the level of legal rule or principle. The language of Articles 74(1) and 83(1) embodied that trend.

As a result, neither party argued for an equidistance delimitation, and the Court did not entertain equidistance or construct an equidistance line in that case. Following the decision in *Tunisia/Libya* one might have asked whether the new accepted trend required the wholesale elimination of equidistance from the jurists' tool box? And, if yes, what would replace this method, a method incomparable in respect of its 'combination of practical convenience and certainty of application'?¹⁹ Without recourse to equidistance in *Tunisia/Libya*, the Court's search for a practical delimitation method seemed to be adrift.

Recognizing and reiterating the axiomatic rule that title to maritime areas is derivative of title to territory ('the land dominates the sea') and that geography is the starting point for delimiting those areas,²⁰ the Court constructed a two-segment line by reference to several coastal features but without any objective methodology for linking the coastal geography to the delimitation line or for choosing the directions or lengths of the line segments. Taking aim, not at the result in *Tunisia/Libya*, but at 'the way in which the Court set about the search for an equitable delimitation,' Judge Gros described the arbitrary approach in which the Court '[chose] to draw lines of direction which no principle dictates and to adopt angles without justifying their selection in terms of any relevant facts.'²¹ He continued his critique by noting that the 'lack of a systematic search for the equitable has produced a result the equity of which remains to be proved,'²² and concluded that 'the judgment has strayed into subjectivism.'²³

Judge Oda was more specific in his criticism of the Court's practical method and the illusory link between the coastal geography and the resulting delimitation. Oda could 'neither share, nor even understand, the view which the majority of the Court, in describing the practical method to be employed for the delimitation between the Parties, has expressed to the effect that the delimitation line should be composed of two segments.'²⁴ Writing about the location of the inflection point between the two segments he asked, 'What significance, moreover, from any objective viewpoint, has the point of intersection of this line with the parallel passing through the most westerly point of the Gulf of Gabes?'²⁵ With regard to the direction of the second segment, he asked, 'Why should

¹⁹ *North Sea Continental Shelf*, n. 1, [23]. ²⁰ *Tunisia/Libya*, n. 11, [73, 114].

²¹ *Ibid.* (Diss. Op. Gros), [17]. ²² *Ibid.*, [11]. ²³ *Ibid.*, [24].

²⁴ *Ibid.* (Diss. Op. Oda), [177]. ²⁵ *Ibid.*, [178].

this segment of the line be parallel with the coast of Tunisia rather than the coast of Libya?²⁶ He concluded that ‘the Court fails to adduce any cogent ground for either segment of the line, or for the line as a whole, a line which does not exemplify any principle or rule of international law.’²⁷ Oda rounded out his assessment with a damning critique of a decision ostensibly based in law: ‘[t]he Judgment appears, to my eyes, simply as one appropriate to a case *ex aequo et bono* such as might have been decided, if the Parties so agreed, in accordance with Article 38, paragraph 2, of the Statute.’²⁸

Did this decision, perceived as unsystematic, subjective, and made solely on the basis of what is fair and just, produce an equitable solution nonetheless? Perhaps it did. The parties accepted the Court’s judgment and adopted the line in their 1988 boundary agreement implementing the judgment.²⁹ Narrowly construed, the Court may have discharged its duty to clarify the practical delimitation method to be applied in the specific situation between these parties in this geography. But did the manner in which the Court arrived at its equitable solution in *Tunisia/Libya* strengthen consistency with past delimitations, predictability for those still to come, fairness for participants, transparency of process, and legitimacy of this area of international law?³⁰

Devoid of discernible process, the judgment in *Tunisia/Libya* stands at the nadir of consistency and predictability in the maritime boundary jurisprudence.³¹ Without method, the Courts’ approach sounded in magic, conjuring Jiménez de Aréchaga’s metaphorical description of the Court’s delimitation method in which ‘[all the relevant circumstances] are to be thrown together into the crucible and their interaction will yield the correct equitable solution of each individual case’³² without any attempt to explain how one might reproduce, much less predict, the result. Exactly what invisible interactions were at work in Jiménez de Aréchaga’s crucible? And what alternative approach could contribute to the predictability and

²⁶ *Ibid.*, [179]. ²⁷ *Ibid.*, [180]. ²⁸ *Ibid.*, [1].

²⁹ See T. Scovazzi, ‘Libya-Tunisia,’ in J. I. Charney and L. M. Alexander (eds.), *International Maritime Boundaries*, vol. 2 (Martinus Nijhoff Dordrecht 1993) 1663.

³⁰ The tribunal formed to delimit the boundary between Bangladesh and India stated that, aside from the ‘paramount objective’ – achieving an equitable result – ‘transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process.’ *Bangladesh v. India*, n. 2, [339].

³¹ Brown writes of *Tunisia/Libya* that, ‘so far as the clarification and development of the law are concerned, the Judgment is a distinct step backwards [. . .].’ Brown, n. 8, 143.

³² *Tunisia/Libya*, n. 11 (Sep. Op. Jiménez de Aréchaga), [35].

consistency of maritime delimitation decisions in the future? Notwithstanding the new accepted trend, Oda urged equidistance as the starting point.³³ Three years later the Court adopted his recommendation.

The Court's opaque, 'crucible' approach in *Tunisia/Libya*, in which the inputs (coastal geography and historical conduct of the parties) and outputs (a two-segment maritime boundary) are visible but the process by which the outputs are created is difficult to discern,³⁴ combined with the illogic of ignoring distance in the delimitation of the continental shelf, title to which was, by then, determined in large part by distance from shore,³⁵ could not stand for long. Within three years, and immediately next door, the Court changed course with respect to process, invoking for the first time equidistance as a *procedural* starting point in *Libya/Malta*, a case that has been attributed with moving the law of maritime delimitation 'dramatically . . . toward a more secure legal foundation.'³⁶

In that case the Court explained its approach as a two-stage process. In the first stage, the Court would 'make a provisional delimitation by using a criterion and a method both of which are clearly destined to play an important role in producing the final result.'³⁷ The Court's criterion, 'distance from the coast,' was 'linked with the law relating to a State's legal title to the continental shelf.'³⁸ The Court continued: 'it therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.'³⁹ With distance from the coast as the criterion, equidistance was the logical method. As the Court explained, '[i]t is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.'⁴⁰

³³ *Ibid.*, (Diss. Op. Oda), [181] ('[t]he qualified equidistance method is thus the equitable method *par excellence*, and for this reason alone should be tried before all others').

³⁴ Charney notes that '[w]hat is missing, however, is an articulate statement of how the Court took the law and applied it to all of the facts it found relevant in order to reach that particular boundary line.' Charney, n. 7, 584.

³⁵ Distance is the sole criterion for attributing legal title to the exclusive economic zone and the main criterion for attributing legal title to the continental shelf in areas within 200 nautical miles from shore. See Chapter 3 in this volume.

³⁶ *Case concerning the Delimitation of Maritime Areas between Canada and France* (Canada/France) (Diss. Op. Weil) [1992] 31 *International Legal Materials* 1145, 1197 [1].

³⁷ *Libya/Malta*, n. 3, [60]. ³⁸ *Ibid.*, [61]. ³⁹ *Ibid.* ⁴⁰ *Ibid.*, [62].

8.3 Equidistance: The Ideal

Considering the newly codified distance basis of title to water column and seabed areas for all LOSC zones within 200 nautical miles from shore, by 1985 distance from shore had become an obvious choice for starting any delimitation analysis. It is not surprising, on that basis alone, that equidistance was quickly adopted and used as a starting point in subsequent delimitation analyses.

In the context of distance-based title, the equidistance method 'has a certain intrinsic value,'⁴¹ and that value comes from its objectivity: distance measurements are exemplars of objective fact. As long as there is agreement on the starting point, any competent measurer will produce, within a margin of error, the same result as the next measurer. The starting point for measuring distance in maritime boundary delimitation is on the law of the sea baselines, either the normal baselines or straight line baselines. Considering that an equidistance line is a line every point of which is equidistant from the nearest points on the baselines of the two states, constructing an equidistance line should start with the interpretation of the LOSC baseline rules, including the rules related to the normal baseline (Articles 5, 6, 11, and 13) and to straight line baselines (Articles 7, 9, 10, and 47). A court or tribunal may also be required to interpret LOSC rules related to the status and location of a feature, including Article 13 (vertical and horizontal criteria for low-tide elevations) and Article 121 (definition of an island and criteria islands have to meet for generating all LOSC coastal state zones), before constructing a provisional equidistance line. Once the legal baselines have been discerned through the application of these rules to the coastal geography of the parties, the equidistance line may be constructed by any competent cartographer. In theory, these are the steps that make up the first stage of delimitation as it has been described in the case law: identify legal baselines; construct provisional equidistance line therefrom.

An example of the Court strictly adhering to this stepwise process is provided by *Qatar/Bahrain*. For the purpose of the delimitation in that case, the Court turned first to an assessment of the status of Fasht al Azm (based on the geographic facts, was it a stand-alone low-tide elevation or was it part of Sitrah Island?),⁴² Qit'at Jaradah (was it an island or a low-tide elevation?),⁴³ and Fasht ad Dibal (was it a valid source of basepoints under

⁴¹ *Nicaragua v. Honduras*, n. 2, [272].

⁴² *Qatar/Bahrain*, n. 2, [188–190].

⁴³ *Ibid.*, [191–195].

international law considering its status and location?).⁴⁴ The Court also assessed Bahrain's coast against the criteria of Article 7 and Part IV of the LOSC and rejected the notion that Bahrain was entitled to draw straight or archipelagic baselines for the purpose of the delimitation.⁴⁵ After discerning the legal baselines, the Court constructed two versions of the provisional equidistance line to account for factual ambiguity related to the status of Fasht al Azm.⁴⁶ Only after the completion of this objective⁴⁷ first stage did the Court turn to a consideration of special circumstances in the territorial sea and relevant circumstances beyond the territorial sea that might 'call [. . .] for an appropriate correction to the delimitation line provisionally arrived at.'⁴⁸ Only after applying the law to the geographic facts and plotting an equidistance line on strictly geometrical criteria did the Court entertain considerations of appropriateness: the appropriateness of treating Fasht al Azm as part of Sitrah Island,⁴⁹ the appropriateness of giving no effect to Qit'at Jaradah,⁵⁰ the appropriateness of simplifying the line,⁵¹ the appropriateness of correcting the line to account for disparate coastal lengths⁵² or the disproportionate effect of Fasht al Jarim.⁵³

In *Qatar/Bahrain*, the Court executed its own process as described:

In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.⁵⁴

This approach to the first stage brings with it the benefits of convenience and certainty, qualities of equidistance recognized by the Court as early as *North Sea Continental Shelf*. In that judgment, famous for undercutting the customary status and central role of equidistance in delimitation, the Court nonetheless heaped praise on the method, observing that:

⁴⁴ *Ibid.*, [199–209]. ⁴⁵ *Ibid.*, [210–215].

⁴⁶ *Ibid.*, [216] ('After careful analysis of the various reports, documents and charts submitted by the Parties, the Court has been unable to establish whether a permanent passage separating Sitrah Island from Fasht al Azm existed before the reclamation works of 1982 were undertaken' [190]).

⁴⁷ The Court's application in this case of the law, as codified in the baselines provisions of the LOSC, to the facts, as discerned from scientific and technical sources, in order to ascertain the legality of the use of certain features as basepoint-generating features, was not subject to assessments of appropriateness. The Court waited until the second stage to make this subjective assessment in *Qatar/Bahrain*.

⁴⁸ *Ibid.*, [241]. ⁴⁹ *Ibid.*, [218]. ⁵⁰ *Ibid.*, [220]. ⁵¹ *Ibid.*, [221].

⁵² *Ibid.*, [241–243]. ⁵³ *Ibid.*, [245–249]. ⁵⁴ *Black Sea*, n. 1, [118].

22 . . . It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary . . . any cartographer can *de facto* trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree.

23. In short, it would probably be true to say that *no other method of delimitation has the same combination of practical convenience and certainty of application.*⁵⁵

Further praise for equidistance as a starting point has continued throughout the maritime delimitation jurisprudence of the Court and other courts and tribunals. In *Nicaragua v. Honduras*, the Court noted that '[equidistance] has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied.'⁵⁶ In *Bangladesh/Myanmar*, the International Tribunal for the Law of the Sea (ITLOS) acknowledged 'the objective precision of equidistance,'⁵⁷ and in *Black Sea* the Court referred to equidistance as 'geometrically objective.'⁵⁸ Because of these desirable characteristics, equidistance has been applied in delimitations between States and by adjudicators and 'has rendered undeniable service in many concrete situations, . . .'⁵⁹ But it has not always been applied as scientifically or as objectively as one might expect from a first reading of the judgments and awards.

8.4 Equidistance: The First Stage as Applied

Jiménez de Aréchaga described the delimitation process as a simultaneous one, expressly disavowing 'distinct and successive phases.' As he wrote in his separate opinion in *Tunisia/Libya*:

[t]he application of equidistance and of equitable principles are not to be viewed as two distinct and successive phases, nor as requiring that equitable principles are only to be resorted to after applying equidistance, in

⁵⁵ *North Sea Continental Shelf*, n. 1, [22–23] (emphasis provided); cf. *ibid.*, [57] (distinguishing role of equidistance in opposite versus lateral delimitations).

⁵⁶ *Nicaragua v. Honduras*, n. 2, [272]. ⁵⁷ *Bangladesh/Myanmar*, n. 2, [228].

⁵⁸ *Black Sea*, n. 1, [116].

⁵⁹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)* [1984] ICJ Rep. 4 [107].

order to correct its result. There is no such succession in time and the process must be a simultaneous one.⁶⁰

In direct contrast to Jiménez de Aréchaga's simultaneity, and beginning only a few years after the judgment in *Tunisia/Libya*, the Court and other courts and tribunals have repeatedly and consistently described their process as a stepwise process of two (or three) distinct and successive phases. In *Black Sea*, the Court clearly separated the objective first stage in which 'the Court is not yet concerned with any relevant circumstances that may obtain'⁶¹ from 'the next, second stage' when the Court will 'consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result.'⁶²

This structure has value. As conceived, the first stage of the methodology creates procedural predictability and an objectively determined starting point: the provisional equidistance line. If the Court's process of applying distinct and successive stages to a delimitation were followed with rigor, one would not expect any consideration of 'appropriateness' of base points in the first stage, only a consideration of whether they were legally justified under the applicable baseline rules. The Court's approach in *Qatar/Bahrain* epitomizes a considered application of the LOSC baseline rules to coastal geographic facts followed by the mechanical application of equidistance. Only after the first-stage construction of the provisional equidistance line in that case did the Court embark on the less objective task of considering relevant circumstances that might require an adjustment of the first-stage line. Perhaps surprisingly, considering the repeated assertions of and praise for an objective first stage, the Court's approach in *Qatar/Bahrain* is an outlier. Instead, the case law is rife with examples of first-stage subjective assessments of coastal geography that, according to the Court's own process, should not appear until the second stage.

In more than half of the cases in which a provisional line has been constructed, the inherent value of an objective first stage has been reduced by using subjectively chosen base points to construct that line. This practice is described, without any apparent irony, by the tribunal in *Bangladesh v. India*:

In the view of the Tribunal, the advantage of the equidistance/relevant circumstances method lies in the fact that it clearly separates the steps to be taken and is thus more transparent. The identification of a

⁶⁰ *Tunisia/Libya*, n. 11 (Sep. Op. Jiménez de Aréchaga), [35].

⁶¹ *Black Sea*, n. 1, [118]. ⁶² *Black Sea*, n. 1, [120].

provisional equidistance line is based on geometrically objective criteria, while at the same time account is taken of the geography through the selection of appropriate base points.⁶³

The objectivity of the equidistance method is severely undercut when base points are ‘selected’; all the more so when judges are doing the selecting and when ‘appropriateness’ is the criterion for that selection.⁶⁴

Selection of base points is an inherently subjective process. The intrinsic value of equidistance is that base points need not be ‘selected’ in order to construct such a line. Instead, the legal coast lines must be identified through the application of the baseline rules discussed above and then represented mathematically with coordinates. With these inputs – data representing two states’ coasts – the output – a line every point of which is equidistant from the nearest points on those coasts – will be substantially the same every time.⁶⁵ With equidistance, the interactions in the crucible are a matter of mathematics, not magic, but with judge-selected inputs, the promise of objectivity fades.

In fact, inserting subjective choice into the purportedly objective first stage was embedded in the provisional equidistance line construction process advocated by Judge Oda in his dissent in *Tunisia/Libya*. In that opinion, Oda staunchly supported equidistance as a method to be applied in the search for an equitable solution, but his suggested application of the method was not blind. He asked, rhetorically, ‘Should the real configuration of the coast of each state be the sole baseline for measuring equidistance?’⁶⁶ In short, he answered ‘no.’ According to Oda, the ‘real configuration’ of the coast may need to be modified before equidistance may be applied. He explained:

⁶³ *Bangladesh v. India*, n. 2, [343].

⁶⁴ As Anderson notes, ‘appropriateness is a relative concept containing an element of appreciation. In contrast, the identification of the “nearest points” is an objective exercise, as is the construction of an equidistance line between them.’ D. H. Anderson, ‘Maritime Delimitation in the Black Sea Case (Romania v. Ukraine),’ (2009) 8 *Law and Practice of International Courts and Tribunals* 305, 316.

⁶⁵ The technical aspects of constructing or calculating an equidistance line using spherical trigonometry is beyond the scope of this chapter. I hope the reader will trust that the available measurement and calculating tools will result in largely the same line when applied to the same coastal geography on the same spheroid, irrespective of who pushes the ‘calculate’ button. To the extent that there is a significant difference between provisional equidistance line A and provisional equidistance line B, it will be because the inputs (baselines and base points) are fundamentally different. Fundamental differences in these inputs arise from subjective decisions made by judges.

⁶⁶ *Tunisia/Libya*, n. 11 (Diss. Op. Oda), [168].

168... While the sole use of the equidistance method can be expected to lead to an equitable result, this is on the understanding that the baseline to be employed for the purpose of the geometrical construction will vary from case to case, from the strict version used in measuring the limit of the territorial sea to certain modified baselines employed because of special circumstances in the geography of the region.

169. If I may put the conclusion first, ‘irregularities in coastlines’ and the ‘existence of islands’ have always, even if only implicitly, been regarded as circumstances to be taken into account. Certainly, not just any existing geographical condition may be regarded as an anomaly, and it will not be easy to define what irregularities should be rectified in determining the baseline for application of the equidistance method. However, an irregular overall shape of the coastline, significant configurational irregularities and the existence of narrow promontories or peninsulae, or even of islands, might be agreed upon as constituting irregularities *the effect of which is to be mitigated in settling the baselines*.⁶⁷

In theory, it is the ‘strict version [of the baseline] used in measuring the limit of the territorial sea’ that one would expect courts and tribunals to use in the construction of the provisional equidistance line. This is not the approach Oda advocated. Instead, Oda expressed the same concerns shared by the majority in *North Sea Continental Shelf* about ‘abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.’⁶⁸

The question presented in this chapter is not whether to abate unjustifiable effects, but at what stage in the delimitation process that abatement should occur. This is a question of timing and sequence. While courts and tribunals are clear in their statements about timing and sequence – that they matter and are to be followed – a close assessment of the actual practice of these same bodies reflects a substantial adherence to Jiménez de Aréchaga’s concept of simultaneity and to Oda’s approach of modifying baselines before calculating the equidistance line.

8.4.1 Libya/Malta: *The Precursor*

From the start of the equidistance renaissance in *Libya/Malta*, the Court conflated ‘the tracing of a median line between [the] coasts [of Libya and Malta], by way of a provisional step’⁶⁹ with the distinct and subsequent step of assessing the equitableness of the result. The Court echoed Oda’s

⁶⁷ *Ibid.*, n. 11 (Diss. Op. Oda), [168–169] (emphasis provided).

⁶⁸ *North Sea Continental Shelf*, n. 1, [91]. ⁶⁹ *Libya/Malta*, n. 3, [62].

concern about using strict law of the sea baselines even for the limited purpose of constructing a provisional line. Before constructing that line, the Court wrote, '[a]n immediate qualification of the median line which the Court considers must be made concerns the basepoints from which it is to be constructed.'⁷⁰ The Court then proceeded to eliminate Malta's 'uninhabited islet of Filfla' from the basepoints to be used in the construction of its provisional median line. The Court explained this modification of Malta's baseline:

The Court does not express any opinion on whether the inclusion of Filfla in the Maltese baselines was legally justified; but in any event the baselines as determined by coastal States are not *per se* identical with the points chosen on a coast to make it possible to calculate the area of continental shelf appertaining to that State. In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain 'islets, rocks and minor coastal projections,' to use the language of the Court in its 1969 Judgment, quoted above. The Court thus finds it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya. Having established such a provisional median line, the Court still has to consider whether other considerations, including the factor of proportionality, should lead to an adjustment of that line being made.⁷¹

It is worth unpacking this paragraph because the issues raised here arise in the subsequent cases.

Was the inclusion of Filfla in the Maltese baselines legally justified? While the Court declined to ask or answer this question, it seems to be a necessary prerequisite for constructing a median line from legally justifiable baselines. Malta included Filfla in a system of straight baselines authorized by its 1971 Territorial Waters and Contiguous Zone Act.⁷² As a state party to the 1958 Territorial Convention on the Territorial Sea and the Contiguous Zone⁷³ (the LOSC was not yet in force), it may not have satisfied the conditions of Article 4 for drawing straight baselines, but Filfla would have qualified as an island under Article 10 of the 1958 Convention, with baselines of its own and, in any event, is situated within the territorial sea measured from Malta's main island.⁷⁴ On the facts, yes, the

⁷⁰ *Ibid.*, [64]. ⁷¹ *Ibid.*

⁷² Malta, Territorial Waters and Contiguous Zone Act. No. XXXII of 1971.

⁷³ Adopted 29 April 1958, entered into force 10 September 1964, 516 UNTS 206.

⁷⁴ Even if Filfla had been a low-tide elevation, it would have been legally justifiable to include the feature in Malta's baselines on the basis of Art. 11(1) of the 1958 Convention related to low-tide elevations situated within the territorial sea.

inclusion of Filfla in the Maltese baselines, at least normal baselines, was legally justified under the baseline rules of both the 1958 Convention and the LOSC.

The Court found it unnecessary to opine on Filfla because ‘the baselines as determined by coastal States are not *per se* identical with the points chosen on a coast to make it possible to calculate the area of continental shelf appertaining to that State.’ This statement raises two points. First, it must certainly be correct that states participating in a judicial process do not have the last word on the veracity of the facts presented, including facts related to baselines and base points. This is left to the fact finder, here the Court. The Court could have applied the baseline rules to the coasts of Libya and Malta to determine their legally justifiable baselines. Instead, and this is the second point, the Court moved directly to the important distinction between the legally justifiable baseline (a product of the law applied to the facts), on the one hand, and ‘the points chosen on a coast’ for the purpose of delimitation (a product of subjective selection), on the other. By making this distinction during the first stage of the delimitation process, the Court mixed ingredients from the second stage into the first. There is no dispute that legally justified baselines are not *per se* identical to the baselines ultimately to be used to determine the extent of one state’s maritime zones vis-à-vis another state’s maritime zones,⁷⁵ which is to say the baselines relevant in the final delimitation, but to eliminate parts of a legally justifiable baseline *before* constructing the provisional line is to work out of sequence bringing second-stage relevant circumstances into the first stage.

In the next sentence the Court cites the *North Sea Continental Shelf* cases as it explains that an equidistance line may not be equitable unless precautions are taken to eliminate the disproportionate effect of certain coastal and insular features, concluding that ‘[t]he Court thus finds it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya.’ Thereby, the Court inserts subjective considerations of equitableness into the objective first stage resulting in the construction of what would more properly be called the provisional *modified* median line. Under an objective approach, Filfla would have

⁷⁵ The Court reiterated this point in *Black Sea*, noting that ‘the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and exclusive economic zone between adjacent/opposite States are two different issues,’ n. 1, [137].

been included in the first-stage construction, possibly to be eliminated in the second stage when considerations of equitableness are purportedly to be made. Ultimately (considering the Court's substantial adjustment of its provisional median line to account for other relevant circumstances, including disparity in coastal lengths), the question of including Filfla in the calculation of the provisional line would not have made any difference in the final outcome. Therefore Filfla's first-stage elimination was not only contrary to objectivity, but also unnecessary in the circumstances.⁷⁶

In several of the subsequent delimitation cases before the Court and other courts and tribunals, no provisional line was constructed in the delimitation process.⁷⁷ In several others, the provisional line was constructed properly without considerations of equity at that stage.⁷⁸ In most of the cases in this second group the basepoints presented by the parties for their own coasts were accepted, without modification, as legally justified basepoints to be used in the first stage. But in a substantial number of other cases the cross contamination between the objective construction of a provisional equidistance line and the subjective considerations of relevant circumstances and equity recurred. Those cases have been heard by the ICJ, ITLOS, and a LOSC Annex VII tribunal, and they include *Black Sea*, *Bangladesh/Myanmar*, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Maritime Dispute (Peru v. Chile)*, and *Bangladesh v. India*. The cases are considered below in chronological order.

8.4.2 Black Sea and Its Progeny

The practice of separating the objective first stage from the subjective second stage changed with the Court's decision in *Black Sea* and its treatment of Serpents' Island and Sulina Dyke,⁷⁹ which was especially surprising considering the Court's description of its process in that case. That

⁷⁶ *Libya/Malta*, n. 3, [68 et seq.].

⁷⁷ See *Nicaragua v. Honduras*, n. 2; *In the Matter of an Arbitration pursuant to an Agreement to Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government of the Republic of Yemen (Eritrea/Yemen)* (1999) XXII RIAA 335; *Canada/France* (n. 36); *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau)* [1985] 19 RIAA 149.

⁷⁸ See *Guyana v. Suriname*, n. 2; *Barbados v. Trinidad and Tobago*, n. 2; *Cameroon v. Nigeria*, n. 5; *Qatar/Bahrain*, n. 2; and *Jan Mayen*, n. 3.

⁷⁹ Evans refers to the decision in *Black Sea* as 'the high water mark of equidistance.' Evans, n. 10, 260. Indeed, once the provisional equidistance line was constructed, the Court did not adjust it in subsequent phases. However, the subjective selection of basepoints, including the non-use of Serpents' Island, seems to undermine the place of equidistance in this case.

description bears repeating here: 'At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.'⁸⁰ And yet the Court did concern itself at length with 'choosing its own basepoints for [the] purpose [of constructing the provisional equidistance line].'⁸¹ Noting that the Court may 'deviate from the base points selected by the parties for their territorial seas,'⁸² the Court went on to describe the process of choosing its own base points:

In this stage of the delimitation exercise, the Court will identify the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines. The points thus selected on each coast will have an effect on the provisional equidistance line that takes due account of the geography.⁸³

This approach in *Black Sea* represented a significant shift in the Court's practice. In *Qatar/Bahrain*, only eight years earlier, the Court considered the legal status and baseline eligibility of every questionable insular feature in the delimitation area and then applied equidistance without further questioning the coasts of the parties or the overall geography of the area to be delimited. The resulting first-stage line emphasized and responded to the micro-geographic configurations of the natural coastlines of the parties. Natural coastlines tend to be sinuous and irregular, and the location and direction of an equidistance line, therefore, can be unduly influenced by an otherwise insignificant piece of coastal territory. This, of course, is one of the criticisms of equidistance as a delimitation method. Nonetheless, the Court in *Qatar/Bahrain* conducted the exercise of constructing an equidistance line on the basis of the actual coast as a provisional step.

In *Black Sea*, the Court, before applying equidistance, selected points that, in the Court's view, were 'appropriate,' 'mark[ing] a significant change in the direction of the coast,' and, when taken together 'reflect[ed] the general direction of the coastlines.' Applying this strikingly macro-geographic approach to coasts, the Court reduced the parties' 1,000 kilometres of coast to five points. This led to the elimination (among many others) of the coastal features that would have provided the nearest basepoint on the Romanian coast at the seaward end of Sulina Dyke, and the

⁸⁰ *Black Sea*, n. 1, [118]. ⁸¹ *Ibid.*, [117]. ⁸² *Ibid.* ⁸³ *Ibid.*, [127].

nearest basepoint on the Ukrainian coast on Serpents' Island: the two points that would have played the most prominent role in the construction of the provisional equidistance line. While there is nothing inherently wrong with this approach, it does not result in a provisional line drawn 'on the basis of objective data.' It results in a provisional line drawn on the basis of subjective, judge-modified data.

Although the Court started to apply the baseline rules to Sulina Dyke, specifically Article 11 of the LOSC regarding the inclusion of harbor works in the normal baseline, it did not reach a conclusion about whether Sulina Dyke was a legally justifiable part of Romania's baseline. Instead, the Court eliminated the seaward end of Sulina Dyke so that it would not give 'greater importance to an installation than to the physical geography of the landmass.'⁸⁴ The treatment of Sulina Dyke involved at least a partial application of the baseline rules to the feature in question. The rationale for the elimination of Serpents' Island was unsupported by any such justification.

In its explanation for eliminating Serpents' Island from the construction of the provisional equidistance line, the Court wrote:

To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes.⁸⁵

In a bizarre twist, the Court used its own famous phrase from *North Sea Continental Shelf*, cautioning against 'totally refashioning geography' when eliminating incidental features,⁸⁶ to support the elimination of an incidental feature. No other rationale, such as an analysis of the Article 121 status of Serpents' Island, was forthcoming to justify the elimination of Serpents' Island from the calculation of the provisional equidistance line at this initial stage, when the Court purportedly is 'not yet concerned with any relevant circumstances.' The spillover from the second stage into the first in this case was substantial. It directly contradicted the purported use of distinct, successive stages. And we have seen a similar disregard for the distinction between the first and second stages in every delimitation case since.

⁸⁴ *Ibid.*, [139]. ⁸⁵ *Ibid.*, [149].

⁸⁶ 'It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which unjustifiable difference of treatment could result.' *North Sea Continental Shelf*, n. 1, [91].

The practice of subjectively eliminating islands prior to the ‘objective’ construction of the provisional equidistance line continued in the subsequent cases even as those courts and tribunals paid lip service to the inherent value of equidistance and the distinct and successive phases in the oft-touted delimitation methodology. In *Bangladesh/Myanmar*, citing *Black Sea*, the ITLOS excluded ‘as the source of any base point’ St. Martin’s Island, a substantial, inhabited Bangladeshi island just off the coast near the land boundary terminus.⁸⁷ The Tribunal’s reasoning was not based in an analysis of St. Martin’s Island as a legally justifiable source of basepoints for the purpose of constructing a provisional line. Instead the Tribunal wrote:

because it is located immediately in front of the mainland on Myanmar’s side of the Parties’ land boundary terminus in the Naaf River, the selection of a base point on St. Martin’s Island would result in a line that blocks the seaward projection from Myanmar’s coast . . . result[ing] in an unwarranted distortion of the delimitation line.⁸⁸

Cut-off of seaward projections and considerations of small insular features that unduly distort the direction of a delimitation line are quintessential relevant circumstances appropriately to be assessed in the second stage of delimitation.

In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, again citing *Black Sea*, the Court took it upon itself to select ‘the basepoints which it considers appropriate.’⁸⁹ Without any explanation, the Court eliminated base points on Colombia’s Low Cay, ‘a small uninhabited feature near Santa Catalina,’ from the construction of the provisional median line.⁹⁰ Colombia’s Quitasueño and Serrana received slightly more attention, but base points on those features were not used because they ‘would have a marked effect upon the course of the provisional median line which would be out of all proportion to [their] size and importance.’⁹¹ Again, any consideration of a feature’s disproportionate effect on the course of a delimitation line is, according to the descriptions of this process in the jurisprudence, appropriately to be considered in the second stage of delimitation.

⁸⁷ *Bangladesh/Myanmar*, n. 2, [265]. ⁸⁸ *Ibid.*

⁸⁹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, n. 2, [200].

⁹⁰ *Ibid.*, [202]. Like Filfla in *Libya/Malta*, subsequent severe adjustments to the provisional line would have wiped out any influence of Low Cay, making its first-stage elimination both contrary to the objectivity of the first stage and unnecessary as a matter of reaching an equitable solution.

⁹¹ *Ibid.*, [202].

The treatment of base points and the construction of a provisional equidistance line in the Court's 2014 judgment in *Maritime Dispute (Peru v. Chile)* is an extreme outlier, unmatched for its subjectivity. Faced with an agreed, non-equidistant boundary for the first eighty nautical miles of its length, the Court still felt compelled to apply its three-stage methodology to delimit the remaining maritime area. In order to get around the problem of starting an equidistance line at a non-equidistant point, the Court developed a new approach to the selection of 'appropriate base points' by eliminating all base points on the Peruvian coast that were *closer* than eighty nautical miles from the agreed segment of the boundary, all the while insisting that 'base points for the construction of the provisional equidistance line have been selected as the most seaward coastal points "situated nearest to the area to be delimited."⁹² Tortured and arbitrary, the Court's first-stage provisional line is not related to equidistance or the actual coasts of the parties in any real way.⁹³

Finally, in the most recent maritime boundary decision, the 2014 decision in *Bangladesh v. India*, the tribunal formed pursuant to LOSC Annex VII followed *Bangladesh/Myanmar* in its non-use of basepoints on St. Martin's Island because neither party proposed such use.⁹⁴ With respect to other features, the Tribunal undertook to 'choose the base points it consider[ed] appropriate.'⁹⁵ In that process, the tribunal reviewed Article 13 of the LOSC and acknowledged that '[l]ow-tide elevations may certainly be used as baselines for measuring the breadth of the territorial sea.'⁹⁶ It did not 'follow, however, that low-tide elevations should be considered as appropriate base points for use by a court or tribunal in delimiting a maritime boundary . . .'⁹⁷ The tribunal concluded that it would not use base points located on low-tide elevations for the construction of its provisional line thus eliminating otherwise legally justifiable base points from its first-stage calculation.⁹⁸

8.5 Conclusions

Despite an oft-cited delimitation methodology consisting of distinct and successive stages, an element of Jiménez de Aréchaga's simultaneity has

⁹² *Maritime Dispute (Peru v. Chile)*, n. 2, [185], quoting *Black Sea*, [117].

⁹³ For a further assessment of the Court's deviation from equidistance in this case, see A. G. Oude Elferink, 'International Law and Negotiated and Adjudicated Maritime Boundaries: A Complex Relationship,' (2015) 58 *German Yearbook of International Law* 231.

⁹⁴ *Bangladesh v. India*, n. 2, [367]. ⁹⁵ *Ibid.*, [253]. ⁹⁶ *Ibid.*, [259].

⁹⁷ *Ibid.*, [260]. ⁹⁸ *Ibid.*, [261], quoting *Black Sea*, [117, 127].

crept back into the method applied by courts and tribunals. He insisted that 'the [delimitation] process must be a simultaneous one,' and where the construction of the provisional equidistance line and considerations of the effect of specific features on that line are concerned, simultaneity is now prevalent in the case law. Indeed, considerations of second-stage relevant circumstances have crept into the first-stage construction of the provisional equidistance line to such an extent that the second stage has been rendered unnecessary in some of the cases.⁹⁹ Ironically, considering Jiménez de Aréchaga and Oda's diametrically opposed positions in *Tunisia/Libya*, Jiménez de Aréchaga's simultaneity has, in practice, taken the form of Oda's suggested application of the equidistance method to modified baselines in order to address, preemptively, 'special circumstances in the geography.'¹⁰⁰

The practice of simultaneity does not match the language of distinct, successive stages. Why have the actions of courts and tribunals, with respect to the first stage, not matched the words describing that stage? Perhaps by cloaking subjective considerations of equity and appropriateness in the language of objectivity, judges are attempting to avoid the critique of arbitrariness and imprecision often leveled at the second stage consideration of relevant circumstances.¹⁰¹ Perhaps considerations of appropriateness in the first stage may be used to avoid difficult or incidental questions of law or fact, such as whether a feature is above water at low tide, the status of an island under LOSC Article 121, or the validity of a party's baselines under LOSC Part II.¹⁰² Or perhaps it is an indication that judges are reluctant to fetter their own discretion with rigid procedural steps, even if those steps have arisen from the case law.

Does the apparent disregard for these separate steps have an effect on the delimitation result? Would a stricter adherence to the methodology as described change the substantive outcomes of the cases? In many instances, probably it would not. For example, if Serpents' Island had been included in the first stage in *Black Sea*, probably the Court would have eliminated it in the second stage and perhaps on the same grounds that it was eliminated in the first stage: it 'would amount to grafting an extraneous element onto Ukraine's coastline.'¹⁰³ If St. Martin's Island had

⁹⁹ See Anderson, n. 61, 326 ('This may deprive the second and third stages of much of their salience').

¹⁰⁰ *Tunisia/Libya*, n. 11 (Diss. Op. Oda) [168].

¹⁰¹ See Evans, n. 10, 261 ('Once again, "equity" rather than "equidistance" may be re-emerging as the dominant approach, though couched in the language of equidistance').

¹⁰² See Anderson, n. 61, 327. ¹⁰³ *Black Sea*, n. 1, [149].

been included in the first stage in *Bangladesh/Myanmar*, probably the Tribunal would have eliminated it in the second stage and perhaps on the same grounds that it was eliminated in the first stage: its use 'would result in an unwarranted distortion of the delimitation line.'¹⁰⁴

Maritime delimitation under the LOSC is result oriented; achieving an equitable solution is the goal. If the result would have been the same, perhaps it is unimportant whether courts and tribunals approach delimitation the way the Court did in *Qatar/Bahrain* – eliminating a distorting feature in the second stage – or the way the Court did in *Black Sea* – eliminating an extraneous feature in the first stage. But *how* a court decides is often as important as *what* a court decides, especially in the international legal system where legitimacy is such a valuable commodity. Consistency, predictability, fairness, transparency, and legitimacy are all served by a clear process that is followed reliably, and these are all characteristics that international maritime boundary delimitation could use more of. The three-stage methodology as described in the decisions provides a clearly articulated process for moving through the deliberations in pursuit of an equitable solution. The first-stage construction of a provisional equidistance line from the legal coasts of the parties provides a solid foundation from which to consider, in particular, the effect of coastal irregularities and other features. When a sound procedural methodology has been developed and a court or tribunal claims to apply it, that application should be faithful to the process as described. Courts and tribunals that ignore or distort their own process undermine the legitimacy of their decisions unnecessarily.

¹⁰⁴ *Bangladesh/Myanmar*, n. 2, [265].