Leiden Journal of International Law (2013), 26, pp. 909–931
 doi:10.1017/S0922156513000460

HAGUE INTERNATIONAL TRIBUNALS INTERNATIONAL COURT OF JUSTICE

Reflections on the Territorial and Maritime Dispute between Nicaragua and Colombia before the International Court of Justice

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Abstract
On 19 November 2012, the International Court of Justice gave its judgment concerning the Territorial and Maritime Dispute between Nicaragua and Colombia. This judgment includes several important issues which need serious consideration, such the as legal status of maritime features, the interpretation and application of Article 121 of the UN Convention on the Law of the Sea, the methodology of maritime delimitations, the role of proportionality in maritime delimitations, and the impact of the judgment upon third states and effect of Article 59 of the ICJ Statute. Focusing on these issues, this contribution aims to analyse the judgment of 2012 from a viewpoint of the international law of the sea, in particular, the law of maritime delimitation.

Key words
maritime delimitations; islands; rocks; proportionality; International Court of Justice

1. Introduction

On 19 November 2012, the International Court of Justice (ICJ) gave its judgment concerning Territorial and Maritime Dispute between Nicaragua and Colombia.[1] The members of the Court, including two judges ad hoc, were unanimous on sovereignty over maritime features and the maritime delimitation. The 2012 *Nicaragua* v. *Colombia* case provides interesting insights into, inter alia, the interpretation of Article 121 of the UN Convention on the Law of the Sea (hereafter UNCLOS), the methodology of maritime delimitations, the function of proportionality, and the impact of the ICJ judgment upon third states. This article will focus on these issues, examining the

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1 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, [2012] ICJ Rep. (not yet published). The text of the judgment is available at the home page of the ICJ: www.icj-cij.org. The analysis of this study relies on the electronic version of the judgment. As this judgment has, at the time of writing, not yet been published, only the paragraph number will be quoted. Since the Court included upon the bench no judge of the nationality of either of the parties, Nicaragua chose Mr Thomas Mensa and Colombia chose Mr Jean-Pierre Cot as judge ad hoc. Ibid., para. 3. Colombia is not a party to the UNCLOS.

case from the viewpoint of the international law of the sea, in particular, the law of maritime delimitation.[2] In addition to this introduction (section 1), this contribution will contain four sections, dealing, respectively, with the legal status of maritime features in dispute (section 2), the methodology of maritime delimitation (section 3), and the critical assessment of maritime delimitation in the present proceedings (section 4). Finally, section 5 will draw a number of conclusions.

2. The legal status of maritime features in the dispute

2.1. The legal status of Quitasueño

The maritime features in dispute between the parties in the proceedings were: Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño, Serranilla, and Bajo Nuevo.[3] The law applicable to maritime features varies according to their legal status. Whilst it is well established in international law that islands, however small, are capable of appropriation, low-tide elevations cannot be appropriated.[4] Hence the legal status of maritime features is of particular importance in determining whether sovereignty over these features is governed by the law of acquisition of territory. Thus, the question whether or not Quitasueño could be regarded as a low-tide elevation was debated. The part of Quitasuenño which is above water at high tide is a minuscule feature, barely one square metre in dimension.[5] On this issue, the Court held that: '[O]ne of the features at Quitasueño, namely QS 32, is above water at high tide and thus constitutes *an island* within the definition embodied in *Article 121, paragraph 1, of UNCLOS*.'[6] It then concluded that, apart from QS 32, the other 53 features identified at Quitasueño are low-tide elevations.[7]

When deciding whether or not Quitasueño can be considered as 'an island' under UNCLOS Article 121(1), the Court focused solely on its height. In relation to this, it referred to the *Qatar* v. *Bahrain* case where Qit'at Jaradah was considered an island, notwithstanding that it was only 0.4 metre above water at high tide.[8] Nonetheless, the *Qatar* v. *Bahrain* judgment did not adequately clarify the reason why Qit'at Jaradah could be regarded as an island. Indeed, Judges Bedjaoui, Ranjeva, and Koroma dissented with the majority opinion on this matter. These three judges argued that:

> The fact that the land lies above the high-water line is not enough in itself for a feature to be characterized as an island; only areas of terra firma can be accorded the status of island under Article 121 of the Law of the Sea Convention.[9]

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2 Thus an examination of the law of acquisition of territory in the *Nicaragua v. Colombia* case falls outside the scope of this contribution.

3 *Territorial and Maritime Dispute*, *supra* note 1, para. 25.

4 Ibid., para. 26; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, [2001] ICJ Rep. 40, at 102, para. 206. See also Y. Tanaka, 'Low-Tide Elevations in International Law of the Sea: Selected Issues', (2006) 20 *Ocean Yearbook* 189, at 198–207.

5 *Territorial and Maritime Dispute*, *supra* note 1, paras. 24 and 202.

6 Emphasis added. Ibid., para. 181. As Colombia is not a party to the UNCLOS, the Convention was not applicable in the present proceedings. As will be discussed later, however, the ICJ considered that Art. 121 UNCLOS as a whole has the status of customary international law. *Territorial and Maritime Dispute*, *supra* note 1, para. 139.

7 Ibid., para. 181.

8 Ibid., para. 37; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *supra* note 4, at 99, para. 197.

9 Ibid., at 209, para. 198 (Judges Bedjaoui, Ranjeva, and Koroma, Dissenting Opinion).

https://doi.org/10.1017/S0922156513000460 Published online by Cambridge University Press

Judge Vereshchetin also considered that: 'In my assessment, this tiny maritime feature ..., constantly changing its physical condition, cannot be considered an island having its territorial sea.'[10] The learned judge concluded that Qit'at Jaradah was a low-tide elevation. Hence there are some doubts whether Qit'at Jaradah could provide a good precedent on this subject.

Furthermore, under UNCLOS Article 121, the legal status of a maritime feature cannot be determined only by its height. In order to decide the legal status of Quitasueño, there would be a need to examine elements reflected in UNCLOS Article 121(3), such as: the capability or possibility of rocks to sustain human habitation or economic life, the test of human habitation, the concept of 'economic life', and the meaning of the phrase 'of their own'.[11] If these elements are not satisfied, a maritime feature cannot be considered as an island. However, the Court did not examine elements set out in UNCLOS 121(3). Instead, the Court relied essentially on the claims by the parties and ruled that:

> It has not been suggested by either Party that QS 32 is anything other than *a rock* which is incapable of sustaining human habitation or economic life of its own under Article 121, paragraph 3, of UNCLOS, so this feature generates no entitlement to a continental shelf or exclusive economic zone.[12]

For the Court,

> Since Quitasueño is *a rock* incapable of sustaining human habitation or an economic life of its own and thus falls within the rule stated in Article 121, paragraph 3, of UNCLOS, it is not entitled to a continental shelf or exclusive economic zone.[13]

At first sight, this statement seems to be inconsistent with the Court's own statement that Quitasueño constitutes an island within the definition embodied in UNCLOS Article 121(1). A possible interpretation in this regard may be that, in the Court's view, 'rocks' set out in Article 121(3) constitute a sub-category of islands and that they are an exception to the regime of islands provided in Article 121(1) and (2). According to this interpretation, the concept of an island under Article 121(1) includes both 'islands' which can sustain human habitation or economic life of their own and 'rocks' which cannot meet such conditions. In fact, in another part of the judgment (with regard to Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla, and Bajo Nuevo), the Court stated that: '[E]ven *an island* which falls within the exception stated in Article 121, paragraph 3, of UNCLOS is entitled to a territorial sea'.[14] This statement did seem to imply that the Court regarded rocks which fall within the scope of Article 121(3) as a variation of an 'island'. According to the Court's terminology, however, the fact that a maritime feature constitutes an 'island' does not automatically mean that it is entitled to generate the exclusive economic zone (EEZ) and the continental shelf.

10 Ibid., at 220–1, para. 13 (Judge Vereshchetin, Declaration).
11 For an analysis of these elements, see Y. Tanaka, *The International Law of the Sea* (2012), 64–7.
12 Emphasis added. *Territorial and Maritime Dispute*, *supra* note 1, para. 183.
13 Emphasis added. Ibid., para. 238.
14 Emphasis added. Ibid., para. 176.

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2.2. Legal status of Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla, and Bajo Nuevo

Opinions of the parties were divided on the legal status of Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla, and Bajo Nuevo. Although Nicaragua contended that these maritime features all fall within the exception stated in UNCLOS Article 121(3), namely that they are rocks,[15] Colombia argued that they are islands.[16] Without specifying their legal status, the Court merely ruled that those maritime features are each entitled to a territorial sea of 12 nautical miles, irrespective of whether they fall within the exception stated in UNCLOS Article 121(3).[17] In relation to this, it is of particular interest to note that the ICJ regarded UNCLOS Article 121 as customary international law. In the *Qatar* v. *Bahrain* case, the Court already treated Article 121(1) and (2) as part of customary international law.[18] Further to this, the Court, in the *Nicaragua* v. *Colombia* judgment, stressed the linkage between paragraph 3 of Article 121 and paragraphs 1 and 2 of the same article. The Court thus took the view that the legal regime of islands set out in UNCLOS Article 121 forms an indivisible regime, all of which has the status of customary international law.[19] Although the Court's view is thought to be an innovation, caution is necessary in two points.

The first point concerns the ambiguity of the language of UNCLOS Article 121(3). To this day, there is no general agreement between commentators as to the precise meaning of the concepts of, inter alia, 'rocks which cannot sustain', 'economic life', and 'of their own'. The interrelationship between the human habitation test and the test of 'economic life on their own' also remains a matter for discussion.[20]

The second point relates to the paucity of state practice. It is uncommon that coastal states incorporate Article 121(3) in their national legislation.[21] Further, with the notable exception of Rockall in the North Atlantic Ocean, it is rare that coastal states have abandoned the establishment of an EEZ or continental shelf around marine formations because they constitute rocks under Article 121(3). It is also infrequent that municipal courts deal with UNCLOS Article 121(3).[22] Therefore, it is

15 Ibid., para. 170. See also Presentation by Mr Lowe, Verbatim Record, 24 April 2012, CR 2012/9, 27, para. 32.

16 *Territorial and Maritime Dispute*, *supra* note 1, para. 173; presentation by Mr Bundy, 27 April 2012, Verbatim Record, CR 2012/12, 17, paras. 38 and 40.

17 *Territorial and Maritime Dispute*, *supra* note 1, para. 180.

18 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *supra* note 4, at 91, para. 167, and at 97, para. 185.

19 *Territorial and Maritime Dispute*, *supra* note 1, para. 139.

20 The text of UNCLOS Article 121(3) provides the alternative, 'human habitation or economic life of their own'. A literal interpretation seems to suggest that only one of these tests must be met in order that a maritime feature is regarded as an island. However, some consider the phrase as a single concept. Tanaka, *supra* note 11, 66.

21 It appears that the only example of incorporation of Article 121(3) into national legislation is the 1986 EEZ Federal Act of Mexico. Article 51 of the Federal Act, 25 ILM 889 (1986), at 896. Nonetheless, Mexico gave full effect to many minuscule islets generating its EEZ. W. van Overbeek, 'Article 121(3) LOSC in Mexican State Practice in Pacific', (1989) 4 *International Journal of Estuarine and Coastal Law* 252, at 262; B. Kwiatkowska and H. A. Soons, 'Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own', (1990) 21 NYIL 139, at 176; R. Kolb, 'L'interprétation de l'article 121, paragraphe 3, de la Convention de Montego Bay sur le droit de la mer Les "roches qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre . . . "', (1994) 40 AFDI 876, at 896–7.

22 A notable exception is the Norwegian Supreme Court Judgment of 7 May 1996. In this case, the Supreme Court held that Abel Island, which is 13.2 square kilometres in area, was too large to be a 'rock' within the

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debatable whether there is 'extensive and virtually uniform' state practice and *opinio juris* generating a rule of customary law on this matter.

Overall there are serious doubts whether UNCLOS Article 121(3) can be thought to represent part of customary international law. Even if this provision became part of customary international law, its precise meaning would remain obscure. In any case, since there is no doubt that Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla, and Bajo Nuevo are not low-tide elevations, sovereignty over these features is governed by the law of acquisition of territory. Having considered the entirety of the arguments and evidence put forward by the parties,[23] the Court found, unanimously, that Colombia has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana, and Serranilla.[24]

3. Methodology of maritime delimitation

3.1. Three-stage approach

Next, the ICJ turned to maritime delimitation.[25] Here the methodology to be employed in effecting the maritime delimitation is of central importance in the law of maritime delimitation since it directly affects the establishment of a maritime boundary. In addition, this issue concerns the legal philosophy of the law as a whole. In this regard, the ICJ, in the *Nicaragua* v. *Colombia* judgment, made clear that it would normally carry out a maritime delimitation employing three stages. In the first stage, the Court establishes a provisional equidistance/median line, unless there are compelling reasons why the establishment of such a line is not feasible. In the second stage, it considers whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result. If it concludes that such circumstances are present, it establishes a different boundary which usually entails such adjustment or shifting of the equidistance/median line as is necessary to take account of those circumstances. In the third and final stage, it conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is such that the parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts. The Court pronounced that in the present case, it would proceed through the three stages in accordance with its standard method.[26] The

meaning of Article 121(3); and that the island would be able to support a significant polar bear hunt, were such hunting not prohibited for conservation reasons. R. Churchill, 'Norway: Supreme Court Judgment on Law of the Sea Issues', (1996) 11 IJMCL 576, at 576–80 (in particular, at 579).

23 The Court considered sovereignty over maritime features in dispute on the basis of *effectivités*. Specifically it examined public administration and legislation, regulation of economic activities, public works, law-enforcement measures, naval visits and search and rescue operations and consular representation. In addition, it examined alleged recognition by Nicaragua, positions taken by third states, and evidentiary value of maps. *Territorial and Maritime Dispute*, *supra* note 1, paras. 82–102.

24 Ibid., para. 251(1).

25 As Colombia is not a party to the UNCLOS, customary international law applied to the maritime delimitation. However, the Court recognized that the principles of maritime delimitation enshrined in UNCLOS Arts. 74 and 83 reflect customary international law. Ibid., para. 139; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *supra* note 4, at 91, paras. 167 et seq.

26 *Territorial and Maritime Dispute*, *supra* note 1, paras. 190–199.

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Court's approach – which may be called the three-stage approach – is essentially the same as that followed in the *Romania* v. *Ukraine* case.[27]

3.2. Change of the methodology in the jurisprudence concerning maritime delimitations

The Court's methodology in the *Nicaragua* v. *Colombia* case is in line with the development of the case law of maritime delimitations. As explained elsewhere, an essential issue of the law of maritime delimitation concerns the question how it is possible to reconcile the requirement of predictability with the requirement of flexibility within the law.[28] Reflecting these two contrasting requirements of the law, two contrasting approaches appeared.[29]

*3.2.1. The result-orientated equity approach (*l'équité créatrice*)*

The first approach emphasizes maximum flexibility. Originally this approach was adopted by the ICJ in the 1969 *North Sea Continental Shelf* judgment. In this judgment, the Court made clear that maritime delimitation is governed by equitable principles as customary law.[30] In this regard, it did not admit the existence of any obligatory method of continental shelf delimitation, including the equidistance method.[31] In the words of the Court, 'it is necessary to seek not one method of delimitation, but one goal'.[32] Hence the Court, in the *North Sea Continental Shelf* judgment, did not specify any method of delimitation and merely indicated the factors to be taken into account in a negotiation. According to this approach, it is the goal which should be stressed, and the law of maritime delimitation should be defined only by this goal, i.e., the achievement of equitable results. As a consequence, no specific method of delimitation is incorporated into the legal domain, and the law of maritime delimitation prescribes only an equitable result. In this sense, one can call this approach a result-oriented equity approach or *l'équité créatrice*.[33]

Subsequently the ICJ, in the 1982 *Tunisia* v. *Libya* case, further promoted the result-oriented equity approach, stating that:

> The result of the application of equitable principles must be equitable. ... It is, however, the result which is predominant; the principles are subordinate to the goal. The

27 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 February 2009, [2009] ICJ Rep. 61, at 101–3, paras. 11–22.

28 Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2006), 4–6.

29 For a detailed analysis of this subject, see ibid., at 51–126; Y. Tanaka, 'Quelques observations sur deux approches jurisprudentielles en droit de la délimitation maritime: l'affrontement entre prévisibilité et flexibilité', (2004) 37 *Revue Belge de droit international* 419. See also Tanaka, *supra* note 11, 192–8; by the same writer, 'Reflections on Maritime Delimitation in the *Romania/Ukraine* Case before the International Court of Justice', (2009) 56 NILR 397, at 413–19.

30 *North Sea Continental Shelf (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 46, para. 85; at 53, para. 101(C)(1).

31 Ibid., para. 101(B). See also at 49, para. 90.

32 Ibid., at 50, para 92.

33 Basically the result-oriented equity approach corresponds to the concept of *équité autonome* ('autonomous equity') presented by P. Weil, *Perspectives du droit de la délimitation maritime* (1988), 179–81.

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> equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.[34]

In this case, it accepted neither the mandatory character of equidistance, nor some privileged status of equidistance in relation to other methods.[35]

The result-oriented equity approach was also echoed by the Chamber of the ICJ in the 1984 *Gulf of Maine* case. In this case, the Chamber specified a 'fundamental norm' applicable to every maritime delimitation between neighbouring states. The first part of the norm is that maritime delimitation must be sought and effected by means of an agreement in good faith. The second part of the norm is:

> (2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.[36]

According to the Chamber, there has been no systematic definition of equitable criteria because of their highly variable adaptability to different concrete situations. Thus 'equitable criteria' are excluded from the legal domain.[37] The same applies to the 'practical method', since the latter would be selected on a case-by-case basis, relying on actual situations.[38] In the view of the Chamber, the law of maritime delimitation defines neither the equitable criteria nor the practical method, merely advancing the idea of 'an equitable result'.[39] The full Court, in the *Libya/Malta* case of 1985, also stressed the result to be achieved, not the means to be applied.[40] Later the result-oriented equity approach was echoed by the 1985 *Guinea* v. *Guinea-Bissau* arbitration[41] and the 1992 *St Pierre and Miquelon* arbitration.[42]

Overall, between 1969 and 1992 international courts and tribunals supported the result-oriented equity approach. This approach seeks to maintain considerable discretion of the international courts, stressing the maximum flexibility in the law of maritime delimitation. In light of the infinite variety of geographical and non-geographical factors to be taken into account in each case of maritime delimitation, the requirement of flexibility is not negligible. However, this approach presents three problems.[43] The first problem is its excessive subjectivity. An unlimited discretion for the international courts and tribunals without an objective criterion for judging

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34 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, [1982] ICJ Rep. 18, at 59, para. 70.

35 Ibid., at 79, para. 110.

36 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, [1984] ICJ Rep. 246, at 300, para. 112.

37 Ibid., at 312–3, paras. 157–158.

38 Ibid., at 315, paras. 162–163.

39 However, in the second segment of opposite coasts, the Chamber of the ICJ took the corrective-equity approach. Ibid., at 334–7, paras. 217–223.

40 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, [1985] ICJ Rep. 13, at 38–9, para. 45. At the stage of establishing the continental shelf boundary between opposite coasts, however, the Court applied the equidistance method as a first provisional step, and the equidistance line was adjusted in a second stage on account of relevant circumstances. Ibid., at 52–3, para. 73. Accordingly, the Court applied the equidistance method at the first stage of continental shelf delimitation, although it supported the result-oriented equity approach.

41 The *Guinea/Guinea-Bissau* arbitration, (1985) 89 *RGDIP* 483, at 521, para. 89; at 525, para. 102.

42 The *St Pierre and Miquelon* arbitration, 31 ILM 1145 (1992), at 1163, para. 38.

43 Tanaka, *supra* note 28, 123–5; Tanaka, *supra* note 29, at 415.

equitableness would entail the risk of equating the result of the application of the law of maritime delimitation with a decision *ex aequo et bono*.[44] The second problem relates to the lack of predictability. According to this approach, the application of equitable principles is to be broken down into relevant circumstances in specific situations. Nonetheless, over-individualization would make it difficult to formulate predictable rules of maritime delimitation. The third problem concerns the lack of specificity. The real issue disputed between the parties concerns the concrete method to be applied for maritime delimitations. Nonetheless, the result-oriented equity approach does not address this issue since, under this approach, no specific method of delimitation is incorporated into the realm of law. Overall it may be concluded that the result-oriented equity approach reduces the normativity of the law of maritime delimitation at the lowest level.[45]

*3.2.2. The corrective-equity approach (*l'équité correctrice*)*

In contrast, the second approach seeks to enhance predictability in the law of maritime delimitation by incorporating the equidistance method into the realm of law. This approach appeared in the 1977 *Anglo-French Continental Shelf* arbitration. Unlike the *North Sea Continental Shelf* judgment, the Court of Arbitration equated Article 6 of the 1958 Geneva Convention on the Continental Shelf, as a single combined equidistance–special circumstances rule, to the customary law of equitable principles.[46] The Court of Arbitration then applied the equidistance method with modification in the Atlantic region. The Court's view on this matter bears quoting:

> The Court notes that in a large proportion of the delimitations known to it, *where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection.* . . . [I]t seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in *a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation.*[47]

According to the approach of the Court of Arbitration, the equidistance method is applied at the first stage of delimitation, and then a shift of the equidistance line may be envisaged if relevant circumstances warrant it in order to achieve an equitable result; equity comes into play as a corrective element. In this sense, one could speak of the corrective-equity approach, or *l'équité correctrice*.[48]

Later, the corrective-equity approach was adopted by the ICJ itself. A turning point was the 1993 *Denmark* v. *Norway* case concerning a maritime delimitation

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44 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, [1993] ICJ Rep. 38, at 113, para. 85 (Judge Oda, Separate Opinion). See also S. Oda, 'The International Court of Justice Viewed from the Bench (1976–1993)', (1993) 244 *RCADI* 9, at 151–4; See the *Gulf of Maine* case, *supra* note 36, at 386, para. 41 (Judge Gros, Dissenting Opinion).

45 Weil, *supra* note 33, at 174–5.

46 The *Anglo-French Continental Shelf* arbitration, United Nations, 18 *Report of International Arbitral Award (RIAA)* 3, at 45, para. 70.

47 Emphasis added. Ibid., at 116, para. 249. The Court took into account the fact that, in the Atlantic region, Art. 6 was applicable. As Art. 6 is the particular expression of a customary law of equitable principles, the result would be the same as if customary law had been applied.

48 Weil, *supra* note 33, 179.

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between the continental shelf and the EEZ/fishery zone (FZ).[49] In this case, the Court attempted to achieve assimilation at three levels. First, the Court equated Article 6 of the Convention on the Continental Shelf with customary law by relying on a passage of the 1977 award of the Court of Arbitration in the *Anglo-French Continental Shelf* case.[50] The Court ruled that:

> [I]n respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether "'special circumstances'" require any adjustment or shifting of that line.[51]

Second, with respect to the law applicable to the FZ, the Court equated the customary law applicable to the FZ with that governing the EEZ on the basis of the agreement of the parties.[52] Third, quoting the *Anglo-French* arbitral award, the Court assimilated the law of continental shelf delimitation with that of the FZ at the customary-law level. In this regard, the Court took the view that: 'It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn'.[53] It went to state that:

> It cannot be surprising if an equidistance–special circumstances rule produces much the same result as an equitable principles–relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary.[54]

Thus, for the first time in the case law of the ICJ, the Court applied the corrective-equity approach as customary law. It is important to note that under this approach, the equidistance method is incorporated into the domain of customary law.

Later on, basically the corrective-equity approach was echoed by jurisprudence concerning maritime delimitations. In the 1999 *Eritrea* v. *Yemen* arbitration (the Second Phase), the Arbitral Tribunal applied the corrective-equity approach under UNCLOS Articles 74 and 83.[55] The ICJ, in the 2001 *Qatar* v. *Bahrain* case, accepted the applicability of the corrective-equity approach as customary law in the delimitation between states with adjacent coasts.[56] Furthermore, the ICJ, in the *Cameroon* v. *Nigeria* case, broke new ground by applying the corrective-equity approach under UNCLOS Articles 74 and 83.[57] According to the Court's interpretation, a specific method, i.e., the equidistance method, should be incorporated into Articles 74 and 83. Given

49 In this case, there was no agreement on a single maritime boundary and, thus, the law applicable to the continental shelf and to the EEZ/FZ had to be examined separately. Both parties had ratified the Convention on the Continental Shelf.

50 *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *supra* note 44, at 58, para. 46.

51 Ibid., at 61, para. 51.

52 Ibid., at 59, para. 47.

53 Ibid., at 61–2, para. 53.

54 Ibid., at 62–3, para. 56.

55 The *Eritrea/Yemen* Arbitration (the Second Phase),40 ILM 983 (2001), at 1005, paras. 131–132.

56 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *supra* note 4, at 91, para. 167, and at 111, para. 230.

57 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, [2002] ICJ Rep. 303, at 441–2, paras. 288–290.

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that any reference to a specific delimitation method was omitted in drafting those provisions, this is thought to be a judicial innovation.

In the 2006 *Barbados* v. *Trinidad and Tobago* arbitration, the Arbitral Tribunal did not admit a mandatory character of any delimitation method. Nevertheless, the Arbitral Tribunal considered that 'the need to avoid subjective determinations requires that the method used starts with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified'.[58] It thus applied the corrective-equity approach in the operation of maritime delimitation under UNCLOS Articles 74 and 83.[59] Likewise the ICJ, in the 2007 *Nicaragua* v. *Honduras* case, took the view that the application of the equidistance method at the first stage of maritime delimitation is not obligatory. In this case, the Court found itself that it could not apply the equidistance line because of the very active morphodynamism of the relevant area. Accordingly, it established a single maritime boundary by applying the bisector method. Nonetheless, the Court accepted that 'equidistance remains the general rule'.[60] This statement implies that the non-application of the equidistance method in the *Nicaragua* v. *Honduras* dispute is only exceptional. In fact, the Court applied the corrective-equity approach in relation to the delimitation around the islands in the dispute area without any problems, by referring to the *Qatar* v. *Bahrain* case.[61] Hence it may be argued that the departure from the previous jurisprudence is only partial.[62] The Arbitral Tribunal, in the 2007 *Guyana* v. *Suriname* arbitration, applied the corrective-equity approach more clearly under UNCLOS Articles 74 and 83.[63]

As noted, the ICJ, in the 2009 *Romania* v. *Ukraine* case, applied the three-stage approach. Given that the disproportionality test aims to check for an equitable outcome of the maritime delimitation, it may be argued that the three-stage approach in the *Romania v. Ukraine* case can be regarded as a variation of the corrective-equity approach developed through judicial practice in the field of maritime delimitations. The three-stage approach was followed by the International Tribunal for the Law of the Sea (ITLOS) in the 2012 *Bangladesh* v. *Myanmar* case.[64]

In summary, the development of the law of maritime delimitation is essentially characterized by the tension between predictability and flexibility in the law. It can be broadly observed that the law of maritime delimitation is moving in a direction from the result-orientated equity approach (*l'équité créatrice*) to the corrective-equity

58 The *Barbados/Trinidad and Tobago* arbitration, at 94, para. 306. The text of the award is available at the home page of the Permanent Court of Arbitration: http://www/pca-cpa.org.

59 Ibid., at 73, para. 242.

60 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* Judgment of 8 October 2007, [2007] ICJ Rep. 659, at 77, para. 281.

61 Ibid., at 83, para. 304.

62 Y. Tanaka, 'Case Concerning the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (8 October 2007), (2008) 23 *IJMCL* 342–3. See also R. Churchill, 'Dispute Settlement Under the UN Convention on the Law of the Sea: Survey for 2007', (2008) 23 IJMCL 601, at 622–4.

63 The *Guyana/Suriname* arbitration, at 108–9, para. 335 and at 110, para 342. The text of the award is available at the home page of the Permanent Court of Arbitration: http://www/pca-cpa.org.

64 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judgment of 14 March 2012, at 76, para. 240, available at www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf.

approach (*l'équité correctrice*).[65] As ITLOS aptly observed in the *Bangladesh* v. *Myanmar* case, it may be said that: 'Over time, the absence of a settled method of delimitation prompted increased interest in enhancing the objectivity and predictability of the process'.[66] Equidistance is the only objective method for ensuring predictability of results in the sense that once the base points are fixed, the delimitation line is mathematically determined.[67] By incorporating the equidistance method into the realm of law, the corrective-equity approach is thought to enhance predictability of the law of maritime delimitation. At the same time, equidistance can provide an objective criterion for testing the equitableness of a delimitation line taking relevant circumstances into account.[68] One can thus argue that the corrective-equity approach – and its variation of the three-stage approach – would provide a better framework for balancing predictability and flexibility in the law of maritime delimitation.[69] As will be discussed below, however, an issue arising concerns the *manner* in which this approach is applied.

4. Critical assessment of the maritime delimitation process

4.1. The manner in which the three-stage approach is applied

Three issues may arise with regard to the application of the three-stage approach in the present proceedings. The first issue pertains to the adjustment of the provisional equidistance line. According to the ICJ, in the western part of the relevant area, the disparity in coastal length is so marked as to justify a significant shift. In shifting the provisional median line eastwards, the Court thus constructed a line each point on which is three times as far from the controlling base point on the Nicaraguan islands as it is from the controlling base point on the Colombian islands. As a result, the 'weighted line' was constructed using a 3:1 ratio between Nicaraguan and Colombian base points.[70] Yet the legal ground of the 3:1 ratio remains unclear. It seems questionable whether there is any relationship between the ratio of coastal lengths of each party which is 8:1 and the 3:1 ratio for the adjustment. A possible reason may be that the effect of the provisional median line was to cut Nicaragua off from some three-quarters of the area into which its coast projects.[71] Even so, as Judge Xue pointedly observed, a question arises whether the weighted line can be

65 Tanaka, *supra* note 28, 419. See also Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001.

66 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, *supra* note 64, para. 228. It is also to be noted that as shown in the *Gulf of Maine* and the *Libya v. Malta* cases, the ICJ seemed to accept the validity of the corrective-equity approach in the maritime delimitation between states with opposite coasts, even when it supported the result-oriented equity approach.

67 H. W. A. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I (2013), 444.

68 T. Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges', (2000) 286 RCADI 39, at 200; M. Vœlckel, 'Aperçu de quelques problèmes techniques concernant la délimitation des frontières maritimes', (1979) 25 AFDI 693, at 706–7.

69 Tanaka, *supra* note 28, at 352 and 354.

70 *Territorial and Maritime Dispute*, *supra* note 1, paras. 233–235.

71 Ibid., para. 215.

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considered as a shifting of the provisional median line or a reconstruction of a new line by a 3:1 ratio between the base points of the parties.[72]

The second issue relates to the two horizontal lines. In this respect, the Court considered that 'an equitable result which gives proper weight to those relevant considerations is achieved by continuing the boundary line out to the line 200 nautical miles from the Nicaraguan baselines along lines of latitude'.[73] The Court thus drew two horizontal lines along lines of latitude from points one and nine. Here an issue arises in relation to the legal grounds for drawing these two horizontal lines. In this circumstance, the application of the equidistance method at the first stage of maritime delimitations relies on solid legal ground, i.e., the interlinkage between legal title and the delimitation method. This point was explicitly affirmed by the ICJ in the *Libya* v. *Malta* case, which stated that: '[t]he legal basis of that which is to be delimited cannot be other than pertinent to the delimitation'.[74] For the Court,

> [t]he criterion is linked with the law relating to a State's legal title to the continental shelf. ... 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.[75]

The Court's view was echoed by commentators. For instance, Weil stated that 'il est tout aussi évident, faut-il le rappeler, que la délimitation est étroitement liée à la base juridique du titre. La délimitation ne peut pas être comprise en dehors du titre; elle est fille du titre.'[76] Likewise Lucchini and Voelckel advanced the view that '[l]e titre est, en effet, l'élément fondamental de base. La délimitation ne peut avoir lieu qu'à partir de lui et en s'appuyant sur lui'.[77] Presently there is no doubt that the legal title over maritime spaces up to 200 nautical miles is attributed by virtue of the distance criterion. Therefore, it is logical that the method of delimitation should reflect the criterion of distance and its spatial nature. Equidistance is the most appropriate method which reflects the spatial nature of the distance criterion.[78] Should a method of delimitation be combined with the distance criterion, the equidistance method should logically be singled out. This is the reason why the equidistance method must be applied at the first stage of maritime delimitations.

By contrast, legal ground for establishing these two horizontal lines remains obscure. In fact, there is no linkage between the provisionally drawn equidistance line and these two horizontal lines. In this regard, Judge Abraham rightly observed that:

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72 Ibid., para. 5 (Judge Xue, Declaration).
73 Ibid., para. 236.
74 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *supra* note 40, at 34, para. 34.
75 Ibid., at 46–7, para. 61.
76 Weil, *supra* note 33, 53.
77 L. Lucchini and M. Vœlkel, *Droit de la mer*, Tome 2, *Délimitation, navigation et pêche*, Vol. I, *Délimitation* (1996). 211.
78 Weil, *supra* note 33, at 64.

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> [I]t is difficult to regard these two horizontal lines as a mere 'adjustment' or even 'shifting' of the provisional line. With the exception of the starting-point of the first line, those lines are actually entirely unrelated to the provisional line.[79]

Judge Xue also gave her misgivings that the Court unduly restricted the coastal projections of Colombian islands against those of the other two third states, i.e. Costa Rica and Panama, in the southern area.[80] Needless to say, maritime delimitations before international courts and tribunals must be effected by applying rules of international law. If the two horizontal lines in the *Nicaragua* v. *Colombia* judgment were drawn without solid legal grounds, this may entail the risk of equating maritime delimitations in accordance with international law by the Court with a decision *ex aequo et bono*.

Third, attention must be paid to the legal effect given to Serrana. It consists of several groups of cays. The largest one, Serrana Cay (also known as Southwest Cay), is some 1,000 metres in length and has an average width of 400 metres. There is a six-metre-wide well for the water supply of the marine infantry corpsmen and fishermen who visit the cay. There are also facilities, solar panels, and communication systems for a detachment of the Colombian marine infantry that carries out law-enforcement activities relating to the control of fishing and illicit drug trafficking.[81] In light of its small size, remoteness, and other characteristics, the Court established only a 12-nautical-mile envelope of arcs measured from Serrana Cay and other cays in its vicinity. It would seem to follow that Serrana was de facto treated as a rock, although the Court refrained from deciding whether or not Serrana falls within the scope of rocks under UNCLOS Article 121(3). According to the Court's solution, Serrana was given the same effect as Quitasueño, which is barely one square metre in dimension.

The creation of an enclave of 12 nautical miles' arc of the territorial sea is not new in the ICJ jurisprudence. In the *Romania* v. *Ukraine* case, the Court attributed only a 12-nautical-mile arc of the territorial sea to Serpents' Island.[82] Although the Court did not decide the legal status of Serpents' Island, the Court's solution seems to produce the same effect as if Serpents' Island were treated as a rock. Likewise, in the *Nicaragua* v. *Honduras* case, the Court took the view that Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay, which belong to Honduras, fall within the definition and regime of islands under UNCLOS Article 121 since the parties did not dispute the fact that these marine features remain above water at high tide. Thus these four features were referred to as islands in the *Nicaragua* v. *Honduras* judgment.[83] In drawing the maritime delimitation line between Nicaragua and Honduras, the Court ruled that the Honduran islands of Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay should be accorded a territorial sea of 12 nautical miles.[84] It thus

79 *Territorial and Maritime Dispute*, *supra* note 1, para. 32 (Judge Abraham, Separate Opinion).
80 Ibid., para. 13 (Judge Xue, Declaration).
81 Counter-memorial of the Republic of Colombia, Vol. I, 11 November 2008, at 28, para. 2.22; *Territorial and Maritime Dispute*, *supra* note 1, para. 24.
82 *Maritime Delimitation in the Black Sea*, *supra* note 27, at 123, para. 188.
83 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, *supra* note 60, at 702, para. 137.
84 Ibid., at 751, para. 302.

https://doi.org/10.1017/S0922156513000460 Published online by Cambridge University Press

traced the 12-nautical-mile arc of the territorial sea around the south of Bobel Cay until it reached the median line in the overlapping territorial seas of Bobel Cay, Port Royal Cay, and South Cay (Honduras) and Edinburgh Cay (Nicaragua). The Court also traced the arc of the outer limit of the 12-nautical-mile territorial sea of South Cay round to the north until it connected with the bisector line.[85] It would seem to follow that the Court's solution produced the same effect as these cays being treated as rocks under UNCLOS Article 121(3).

The ICJ jurisprudence seems to suggest that all maritime features which remain above water at high tide may be attributed at least 12 nautical miles of the territorial sea, regardless of their legal status. On the one hand, the Court's position will secure the territorial sea around any maritime features which are always above water. Even the consideration of proportionality can impede the concept of '12-nautical-mile territorial sea'. On the other hand, according to the Court's position, even if a maritime feature can be regarded as an island, this does not automatically mean that the island generates its EEZ and continental shelf. If this is the case, the distinction between 'islands' under Article 121(2) and 'rocks' provided in Article 121(3) of the UNCLOS will be thin in the context of maritime delimitations.

4.2. The role of (dis)proportionality in maritime delimitations

Another issue to be considered pertains to the role of proportionality in maritime delimitations. The concept of proportionality has been given an increasingly important role in the jurisprudence in the field of maritime delimitations. Nonetheless, the function of proportionality in maritime delimitations is in need of reconsideration. In this regard, the original function of the concept of proportionality must be examined.

It was in the 1969 *North Sea Continental Shelf* judgment when the concept of proportionality was, for the first time, introduced in the jurisprudence concerning maritime delimitations. In this case, North Sea coastlines of three states, i.e., Denmark, the Netherlands, and the Federal Republic of Germany, were in fact comparable in length. If the equidistance method was used, however, the German area of the continental shelf would be considerably diminished comparing it to the continental shelves of the other two states merely because the German coastline is roughly convex in form and the Netherlands' and Denmark's coastlines are markedly concave. In the Court's view, this situation would create inequity.[86] It was against that background that the ICJ took into account the concept of proportionality, stating that:

> 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,– these being measured according to their general direction *in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.*[87]

85 Ibid., at 759, para. 320.
86 *North Sea Continental Shelf*, *supra* note 30, at 50, para. 91.
87 Emphasis added. Ibid., at 52, para. 98.

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The *North Sea Continental Shelf* judgment suggests that the concept of proportionality was originally intended to correct inequitableness produced by the equidistance method in a particular geographical situation which comprises three elements: (i) adjacent coasts; (ii) existence of particular coastal configurations, such as concavity and convexity; and (iii) quasi-equal length of the relevant coasts. In such a geographical situation, the application of the equidistance method would reduce the scope of the marine space of the middle state with convex coast – that is, the Federal Republic of Germany in the *North Sea Continental Shelf* cases – as compared to those of its neighbours, although the coastlines are similar in length. Given that the coastal lengths of the parties are almost equal, there may be scope to argue that the distorting effect arising from the application of the equidistance method is thought to be inequitable. It was in this particular geographical situation that the concept of proportionality was taken into account with a view to reducing the distortions created by the application of the equidistance method.[88] In fact, Judge Oda stated that:

> [W]hat the Court intended to say in 1969 was that in such specific circumstances, in which the States concerned were located as adjacent States in similar situations, but where the existence of a marked concave or convex coastline produced a somewhat distorting effect, the proportion of the length of the coast as rectified by its general direction … was in principle useful in the verification of geographical equity … . The 1969 Judgment nowhere implied the possibility of generally applying the concept of proportionality in other cases, particularly in cases of delimitation between opposite States.[89]

Nonetheless, subsequently the role and geographical scope of the application of proportionality have been enlarged by international courts and tribunals.[90] Concerning the geographical scope, at the moment it appears that international courts are ready to apply the concept of proportionality to every geographical situation. For aforementioned reasons, however, there are serious doubts whether originally the concept of proportionality was thought to be universally applicable to maritime delimitations. In particular, the applicability of the concept of proportionality in the maritime delimitation between states with opposite coasts was questioned by some members of the ICJ and commentators because the difference of coastal lengths is already reflected in the surfaces of the two zones separated by the median line.[91] Respecting the role of the concept of proportionality, as noted, this concept is taken

88 Tanaka, *supra* note 28, 162 and *supra* note 29 (2009), 425. This view is supported by W. Bowett, *The Legal Régime of Islands in International Law* (1979), 164; R. Higgins, *Problems and Process: International Law and How We Use it* (1994), 229; R. Ida, 'The Role of Proportionality in Maritime Delimitation Revisited: The Origin and Meaning of the Principle from the Early Decisions of the Court', in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), 1037 at 1039; R. Kolb, *Jurisprudence sur les délimitations maritimes selon l'équité* (2003), 258.

89 *Continental Shelf (Libyan Arab Jamahiriya/Malta), supra* note 40, at 134–5, para. 18 (Judge Oda, Dissenting Opinion). This view was echoed by Judges Valticos and Schwebel. Ibid., at 110, para. 19 (Judge Valticos, Separate Opinion); ibid., at 182–5 (Judge Schwebel, Dissenting Opinion).

90 For an analysis of judicial practice on the application of the concept of proportionality, see Tanaka, *supra* note 28, at 161–79.

91 Tanaka, *supra* note 28, 167–9. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), supra* note 40, at 121 (Judge Mosler, Dissenting Opinion); Dissenting Opinion of Judge Schwebel, ibid., at 184 (Judge Schwebel, Dissenting Opinion); ibid., at 110, para. 19 (Judge Valticos, Separate Opinion).

into account as a factor for shifting a provisionally drawn equidistance line[92] and as a test of the equitable result at the same time. However, the double usage of proportionality at the second and third stages of maritime delimitation seems to be a circular reasoning. In any case it is clear that the dual role of proportionality has radically departed from the original concept of proportionality.

A fundamental question in relation to proportionality is the fact that it may blur the distinction between delimitation and apportionment stressed by the ICJ in the *North Sea Continental Shelf* cases. The Court's statement on this matter deserves quoting:

> [I]ts task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.[93]

Furthermore, the Court, in the *Tunisia* v. *Libya* case, stated that:

> [I]t is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.[94]

However, the very idea of 'ratios' necessarily entails that of shares.[95] Accordingly, it may have to be accepted that the concept of proportionality contradicts the rejection of the idea of an apportionment in maritime delimitation.[96] This contradiction increases by placing more weight on proportionality.

As the Arbitral Tribunal stressed in the *Barbados* v. *Trinidad and Tobago* case, the proportionality test 'does not require the drawing of a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines'.[97] Likewise, in the *Denmark* v. *Norway* case, the ICJ itself emphasized that 'taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front [of the parties]'.[98] In fact, there is no decisive legal reason why a state with longer coastlines should have larger marine areas than a state with shorter coastlines. Nonetheless, by giving much weight to the consideration of proportionality in the delimitation process, there is a serious concern that the process of maritime delimitations may be transformed to 'apportionment' or 'award

92 It must be noted that disparity of coastal lengths is an inseparable element of the concept of proportionality.
93 *North Sea Continental Shelf*, *supra* note 30, at 22, para. 18. See also Tanaka, *supra* note 28, at 11–12.
94 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *supra* note 34, at 60, para. 71. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *supra* note 40, at 40, para. 46; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *supra* note 44, at 67, para. 64.
95 Thirlway, *supra* note 67, at 500.
96 Tanaka, *supra* note 28, at 179.
97 The *Barbados v. Trinidad and Tobago* case, *supra* note 58, at 100, para. 328.
98 *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *supra* note 44, at 69, para. 69.

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of a just and equitable share' of marine spaces which was rejected by the Court itself. It must also be noted that the concept of proportionality contains several limitations as to its practical application.

The first limit concerns the obscurity of the methodology of calculation of coastal lengths and maritime areas pertaining to each party.[99] In many, if not most, cases, calculation of coastal lengths is a matter of dispute between the parties. Nonetheless, there is no objective criterion for calculating coastal lengths. In fact, the ICJ, in the *Romania* v. *Ukraine* case, admitted that diverse techniques have been used for assessing coastal length 'with no clear requirements of international law'.[100] It would seem to follow that the calculation of coastal lengths may rely on the subjective appreciation of the Court. In the *Nicaragua* v. *Colombia* case, for instance, Nicaragua claimed that its relevant coast comprises its entire mainland coast in the Caribbean together with the island and estimated that the length of its relevant coast was 453 kilometres.[101] Colombia accepted that Nicaragua's coast has a length of 453 kilometres, if the straight-line system is used; and that if the Nicaraguan coast is measured in a way which takes full account of its natural configuration, Colombia maintained that the maximum length of that coast was 551 kilometres.[102] In this regard, the Court ruled that the length of Nicaragua's coast is approximately 531 kilometres taking the general direction of this coast. Yet the Court did not provide any precision respecting the general direction of the Nicaragua's coast.

This is not a problem only with the *Nicaragua* v. *Colombia* judgment. In the *Romania* v. *Ukraine* case, the Court made clear that it had measured the coasts of the parties according to their general direction.[103] However, the Court did not identify the general direction of the coasts used for the calculation. Given that there is no objective method of identifying the general direction of the coasts,[104] the calculation of the coastal lengths may be subject to a case-by-case appreciation of the Court. In addition, the application of (dis)proportionality test may encounter a difficulty with regard to the calculation of the maritime areas pertaining to each party when considering the presence of third states. In the *Tunisia* v. *Libya* case, for instance, the outer limits of the delimitation area remained indeterminate because of the existence of third states. The size of the maritime areas belonging to the parties will change according to future agreements establishing maritime boundaries in this region.

The second limit of the concept of proportionality relates to the lack of any criterion for evaluating a difference in coastal lengths. In this regard, the following statement by the Court in the *Romania* v. *Ukraine* case merits attention:

> The Court cannot but observe that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would

99 Vœlckel, *supra* note 68, at 706.
100 *Maritime Delimitation in the Black Sea*, *supra* note 27, at 129, para. 212.
101 Presentation by Mr Oude Elferink, 23 April 2012, Verbatim Record, CR 2012/8, at 28, para. 8.
102 *Territorial and Maritime Dispute*, *supra* note 1, para. 144.
103 *Maritime Delimitation in the Black Sea*, *supra* note 27, at 129, para. 214.
104 M. Pratt, 'Commentary: Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*)', (2007) 2 *Hague Justice Journal* 34, at 38.

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> constitute a significant disproportionality which suggested the delimitation line was inequitable, and still required adjustment. This remains in each case a matter for the Court's appreciation, which it will exercise by reference to the overall geography of the area.[105]

The above passage did seem to imply that the question whether there was a disproportionality of the respective coastlines is decided by the judges on a case-by-case basis without using objective criteria.

The third limit of the concept of proportionality pertains to the lack of an objective criterion for evaluating (dis)proportionality between the coastal lengths and maritime areas appertaining to each Party. In the *Nicaragua* v. *Colombia* case, the Court considered that there was no disproportionality between the ratio for the coastal lengths, which is approximately 1:8.2 in Nicaragua's favour, and the ratio of the relevant area, which is approximately 1:3.44 in Nicaragua's favour. Yet there may be serious doubts as to whether or not the ratio of the lengths of the coasts and that of the maritime areas are reasonably proportionate. In support of its judgment, the Court referred to the 1993 *Denmark* v. *Norway* case.[106] It is also debatable whether there was no disproportionality between the ratio for the coastal lengths (approximately 1:9 in Denmark's favour) and the ratio of the maritime area (approximately 1:2.7 in Denmark's favour) in this case. The striking fact is that in all cases concerning maritime delimitations, international courts and tribunals concluded that there was no disproportion between the ratio of coastal lengths and the ratio for maritime areas appertaining to the parties. This is not merely a coincidence. It can be reasonably presumed that, at the second stage of maritime delimitation, the maritime boundary was already drawn so as to pass the proportionality test. It cannot be denied that the application of the proportionality test may be only formalistic.

Finally, but not least, particular attention must be devoted to the paucity of state practice concerning proportionality in the field of maritime delimitations. There are only a few treaties respecting maritime delimitation which rely on proportionality. Even in cases where considerations of proportionality may be presumed to have been present, it is difficult to determine its effect on the negotiated boundary with any degree of precision. It is clear that the concept of proportionality is not supported by 'extensive and virtually uniform' state practice and *opinio juris* and that there is no customary rule on this matter.[107] One can thus argue that the significant role of the concept of proportionality in the jurisprudence concerning maritime delimitations is the product of a 'judge-made law'. It must be remembered that the application of the concept of proportionality is not widely supported by state practice respecting maritime delimitations. In light of aforementioned limitations, it is advisable to exercise caution so as not to place excessive weight on this concept in the delimitation process.[108]

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105 *Maritime Delimitation in the Black Sea*, *supra* note 27, at 129, para. 213.
106 *Territorial and Maritime Dispute*, *supra* note 1, para. 246.
107 Tanaka, *supra* note 28, 179–82.
108 Higgins, *supra* note 88, at 230. Some argued that proportionality should no longer play any formal role in the process of maritime delimitation. M. D. Evans, 'Maritime Boundary Delimitation: Where Do We Go From Here?', in D. Freestone, R. Barnes, and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006), 137 at 156.

4.3. Legal effect of the decision upon third states

Another issue that merits particular attention is that of the impact of the maritime boundaries established by the court upon third states. Colombia already established maritime boundaries with Panama and Costa Rica in the Caribbean Sea in 1976 and 1977, respectively.[109] Colombia also constructed a maritime boundary and Joint Regime Area with Jamaica in 1993. In addition, Costa Rica and Panama established a delimitation line, without fixing an end point, by concluding the 1980 Treaty.[110]

The ICJ jurisprudence shows that the Court has consistently taken the approach of refraining from drawing a maritime boundary in the area where interests of third states may be involved, by indicating the 'directorial arrow' only or cutting off the area in question. In the *Tunisia* v. *Libya* case, for instance, the Court dismissed Malta's request to intervene in 1981.[111] Even so, the Court attempted to avoid prejudging the rights of Malta in its judgment of 1982. It thus ruled that in the northern and north-eastern parts of the Pelagian Block where conflicting claims of the parties existed, it 'has no jurisdiction to deal with such problems in the present case and must not prejudge their solution in the future'.[112] Concerning the second sector, the Court did not specify the terminal point of the delimitation line on the grounds that 'the extension of this line northeastwards in a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with a third state'.[113] In the *Libya* v. *Malta* case, the ICJ limited the scope of its judgment so as not to infringe upon the rights of Italy in the region,[114] although it refused Italy's request to intervene in 1984.[115] As a consequence, it may be said that Italy's application for permission to intervene was rewarded.

In the *Qatar* v. *Bahrain* case, the Court did not fix the territorial boundary's southernmost point since its definitive location depended on the limits of the maritime zones of Saudi Arabia and the parties.[116] Nor did the Court fix the terminal point of the delimitation line in the northern sector.[117] Likewise the Court in the *Cameroon* v. *Nigeria* case held that it could not rule on Cameroon's claim in so far as it might affect the rights of Equatorial Guinea and São Tomé and Príncipe.[118] Accordingly, the

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109 Treaty on the Delimitation of Marine and Submarine Areas and Associated Matters between the Republic of Panama and the Republic of Colombia of 20 November 1976, entered into force 30 November 1977. Text in: J. I. Charney and L. M. Alexander (eds.), *International Maritime Boundaries*, Vol. I (1993), at 532–5; Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica of 17 March 1977, not yet in force. Text in ibid., at 474–6. According to Colombia, 'Costa Rica has stated on numerous occasions that it has applied the 1977 Treaty in good faith and will continue to do so'. Presentation by Mr Bundy, Verbatim Record, 27 April 2012, CR 2012/12, at 21, para. 52.

110 Treaty Concerning Delimitation of Marine Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama of 2 February 1980. Entered into force 11 February 1982. Text in Charney and Alexander, *supra* note 109, at 547–9.

111 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, Judgment of 14 April 1981, [1981] ICJ Rep. 3, at 20, para. 37.

112 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *supra* note 34, at 42, para. 33.

113 Ibid., at 94, para. 133C(3).

114 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *supra* note 40, at 26, paras. 21–22.

115 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Application to Intervene*, Judgment of 21 March 1984, [1984] ICJ Rep. 3, at 28, para. 47.

116 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *supra* note 4, at 115–16, para. 250.

117 Ibid., at 115, para. 249.

118 *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 57, at 421, para. 238, and at 448, para. 307.

https://doi.org/10.1017/S0922156513000460 Published online by Cambridge University Press

Court drew a maritime boundary in so far as it did not affect the rights of Equatorial Guinea. The same approach was adopted in the *Nicaragua* v. *Honduras* case. In this case, the Court did not specify the precise location of the endpoint, simply stating that it extends beyond the 82nd meridian without affecting third-state rights.[119] More recently, the Court, in the *Romania* v. *Ukraine* case, did not fix the terminal point of the maritime boundary, stating that after point five, the boundary runs until it reaches the area where the rights of third states may be affected.[120] Overall, the ICJ was careful not to affect the rights of third states in maritime delimitations.

The Court's approach in the *Nicaragua* v. *Colombia* case seems to show a clear contrast with its precedents. On the one hand, the Court, in its 2011 judgment on Costa Rica's application for permission to intervene, ruled that 'a third state's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play'.[121] A similar view was expressed by the Court in the 2012 judgment on the merits of the case.[122] Nonetheless, the Court, in the present proceedings, did not hesitate to draw the horizontal lines. These two lines would inevitably affect the existing maritime boundaries between Colombia and Panama, between Colombia and Costa Rica, and between Colombia and Jamaica, even though the Court stated that the judgment in the present case addresses only Nicaragua's rights as against Colombia and vice versa and is, therefore, without prejudice to any claim of a third state or any claim which either party may have against a third state.[123] In fact, Judge Xue expressed her misgivings that '[t]he boundary line in the south would virtually produce the effect of invalidating the existing agreements on maritime delimitation that Colombia has concluded with Panama and Costa Rica respectively and drastically changing the maritime relations in the area'.[124] Likewise Judge ad hoc Cot took the view that '[t]he problem is that those treaty-based delimitations no longer exist, since their object disappears with the substitution of Nicaragua for Colombia as the holder of sovereignty or of sovereign rights in the spaces concerned'.[125] The same issue arises with regard to the 1993 Treaty between Colombia and Jamaica.

In this regard, a further issue to be considered is whether or not the rights of third states are adequately protected by Article 59 of the ICJ Statute. It seems that the Court had strong confidence in the protection of third states' interests under

119 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, *supra* note 60, at 759, para. 319.

120 *Maritime Delimitation in the Black Sea*, *supra* note 27, at 130–1, paras. 218–219.

121 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene*, Judgment of 13 December 2011, [2011] ICJ Rep. (not yet published), para. 86. See also para. 89.

122 *Territorial and Maritime Dispute*, *supra* note 1, para. 228.

123 Ibid. In the application for permission to intervene, Costa Rica expressed its concern that the Court's ruling on the maritime boundary between Nicaragua and Colombia could render the 1977 Agreement between Costa Rica and Colombia without purpose. *Application for Permission to Intervene by the Government of Costa Rica*, 25 February 2010, at 6, para. 13.

124 *Territorial and Maritime Dispute*, *supra* note 1, para. 15 (Judge Xue, Declaration).

125 Ibid., para. 10 (Judge ad hoc Cot, Declaration).

Article 59.[126] When dismissing Costa Rica's request to intervene under Article 62 of the Statute, the Court held that:

> [T]o succeed with its request, Costa Rica must show that its interest of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute, i.e., Costa Rica must fulfil the requirement of Article 62, paragraph 1, by showing that an interest of a legal nature which it has in the area 'may be affected' by the decision in the case.[127]

The Court, in the *Nicaragua* v. *Colombia* judgment, also observed that 'as Article 59 of the Statute of the Court makes clear, it is axiomatic that a judgment of the Court is not binding on any state other than the parties to the case'.[128] Nonetheless, there may be scope to consider the question whether interests of third states can be adequately protected by Article 59. In fact, in the *Cameroon* v. *Nigeria* case, the ICJ itself accepted the weakness of the protection, stating that:

> in particular in the case of maritime delimitations where the maritime areas of several states are involved, the protection afforded by Article 59 of the Statute may not always be sufficient. In the present case, Article 59 may not sufficiently protect Equatorial Guinea or Sao Tome and Principe from the effects – even if only indirect – of a judgment affecting their legal rights. … It follows that, in fixing the maritime boundary between Cameroon and Nigeria, the Court must ensure that it does not adopt any position which might affect the rights of Equatorial Guinea and Sao Tome and Principe.[129]

Regardless of the formalistic protection of Article 59, it cannot be denied that the delimitation line drawn by the Court may affect legal rights and interests of third states, creating a presumption of the finality of the maritime boundary.[130]

Several members of the Court expressed their misgivings on this matter. For instance, Judge Xue considered that '[t]he principle *res inter alios acta* and Article 59 of the Statute do not help in the present situation'.[131] This view was echoed by Judge ad hoc Cot, saying that 'Article 59 of the Statute of the Court does not afford them [third states] adequate protection in this case'.[132] Likewise Judge ad hoc Mensah also stated that '[he was] not sure that reliance on Article 59 of the Court's Statute alone would offer adequate protection for the rights of third states, and achieve the objective of stability and practicability, in this case'.[133] In practice, there will be a need for Costa Rica, Panama and Jamaica to negotiate with Nicaragua concerning their maritime boundaries in light of the Court's judgment.

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126 This issue also relates to intervention under Article 62 of the ICJ Statute. For an analysis of the relationship between Arts. 59 and 62 of the Statute, see in particular Thirlway, *supra* note 67, Vol. 2, at 1841–7.

127 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene*, *supra* note 121, para. 87.

128 *Territorial and Maritime Dispute*, *supra* note 1, para. 228.

129 *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 57, at 421, para. 238.

130 See Argument by George Abi-Saab in the *Cameroon v. Nigeria* case, Verbatim Record, 19 March 2002, CR 2002/23, at 18, paras. 3–4.

131 *Territorial and Maritime Dispute*, *supra* note 1, para. 13 (Judge Xue, Declaration). Thus Judge Xue expressed the view that the maritime boundary should stop at Point 8 with an arrow pointing eastward. Ibid., para. 11.

132 Ibid., para. 9 (Judge ad hoc Cot, Declaration).

133 Ibid., para. 13 (Judge ad hoc Mensah, Declaration).

https://doi.org/10.1017/S0922156513000460 Published online by Cambridge University Press

5. General conclusions

The above-made considerations can be summarized as follows:

1. The applicability of the law of acquisition of territory to maritime features relies on the legal status of these features. The legal title over marine spaces also differs according to the status of maritime features. Thus the legal status of maritime features is of particular importance. In this regard, it is of particular interest to note that the Court regarded Quitasueño as a rock. The Court's view on the legal status of Quitasueño will provide an interesting precedent respecting 'rocks' in international law.

2. The Court, in the present proceedings, considered that UNCLOS Article 121 as a whole represents customary international law, by stressing the indivisibility of the legal regime of islands under the UNCLOS. As already confirmed by the precedents, one can argue that UNCLOS Article 121(1) and (2) may be thought to have the status of customary international law. In light of the paucity of state practice, however, there is room for doubting whether Article 121(3) can also be considered as part of customary international law.

3. Following the international jurisprudence concerning maritime delimitations, the Court, in the present proceedings, adopted the three-stage approach when constructing maritime boundaries between Nicaragua and Colombia. It thus confirmed the validity of this methodology. Although this methodology has an advantage of enhancing the predictability of the law of maritime delimitation by applying the equidistance method at the first stage, the maritime boundaries established by the Court in the *Nicaragua* v. *Colombia* case significantly departed from the provisionally drawn equidistance line. It is debatable whether the maritime boundaries can be considered as modified equidistance lines. In this regard, there is a concern that an excessive departure from a provisionally drawn equidistance line may run the risk of undermining the predictability of the law of maritime delimitation.[134]

4. It is argued that originally the role of the concept of proportionality was limited to correct inequitableness produced by the equidistance method in a particular geographical situation which comprises three elements: (i) adjacent coasts; (ii) existence of particular coastal configurations, such as concavity and convexity; and (iii) quasi-equal length of the relevant coasts. Nonetheless, subsequently the ICJ as well as other international tribunals departed radically from the original concept of proportionality. In the *Nicaragua* v. *Colombia* case, it seems that the consideration of proportionality had a decisive impact upon the location of maritime boundaries drawn by the Court. Yet giving too much weight to proportionality may entail the serious risk of changing the nature of maritime delimitation to apportionment of marine spaces by international courts and tribunals.

134 In this regard, it must be recalled that the ICJ itself stressed 'consistency and a degree of predictability' in the *Libya v. Malta* judgment. *Supra* note 40, at 39, para. 45.

https://doi.org/10.1017/S0922156513000460 Published online by Cambridge University Press

5. In relation to this, particular attention must be devoted to the distinction between maritime delimitation and apportionment. As the ICJ repeatedly stressed, maritime delimitation effected by the Court must be distinct from an operation of distributive justice. In reality, apportionment of marine spaces may easily change the character of a decision from being a legal decision of maritime delimitation under international law to a decision on the basis of *ex aequo et bono* governed by Article 38(2) of the ICJ Statute.[135] This may run the risk of reducing the normativity of the law of maritime delimitation and might eventually damage the confidence of states in judicial settlement of maritime delimitation disputes.[136]
6. In the present proceedings, it may have to be accepted that the maritime boundary drawn by the Court will affect the existing boundaries between Colombia, Costa Rica, Panama, and Jamaica. In this regard, there may be scope to consider the question whether the rights of third states can be adequately protected by Article 59 of the ICJ Statue. Thus further consideration must be given to the legal effect of Article 59 and third states' intervention under Article 62 of the Court's Statute in a particular context of maritime delimitations.

135 Judge Oda, in the *Denmark v. Norway* case, stated that 'if the Court is requested by the parties to decide on a maritime delimitation in accordance with Article 36, paragraph 1, of the Statute, it will not be expected to apply rules of international law but will simply "decide a case ex aequo et bono"'. *Maritime Delimitation in the Area between Greenland and Jan Mayen, supra* note 44, at 113, para. 85 (Judge Oda, Separate Opinion).

136 In response to the *Nicaragua v. Colombia* judgment, on 27 November 2012, Colombia denounced the 1948 American Treaty on Pacific Settlement (Pact of Bogotá) in which the state parties to the treaty accepted the compulsory jurisdiction of the ICJ (Art. XXXI). See www.oas.org/juridico/english/sigs/a-42.html#Colombia.