JUDICIAL UNCERTAINTIES CONCERNING TERRITORIAL SEA DELIMITATION UNDER ARTICLE 15 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

MASSIMO LANDO*

Abstract Recent international jurisprudence has shown considerable uncertainty with regard to the delimitation of the territorial sea. While international tribunals endorse a two-stage approach to territorial sea delimitation, there is a lack of judicial consensus on the practical implementation of such an approach. This article argues that the rule-exception relationship between equidistance and special circumstances, as reflected in the drafting history of LOSC Article 15 and in jurisprudence prior to 2007, should inform the delimitation of the territorial sea. Cases since 2007 which have strayed from the earlier jurisprudence on LOSC Article 15, should be seen as a misconstruction of the law applicable to territorial sea delimitation.

Keywords: International Court of Justice, International Law Commission, International Tribunal for the Law of the Sea, maritime boundaries, maritime delimitation, territorial sea, UNCLOS.

I. AN UNEXPECTED CHANGE IN THE JURISPRUDENCE

Territorial sea delimitation under Article 15 of the 1982 United Nations Convention on the Law of the Sea (LOSC or the Convention) is generally regarded as an uncontroversial affair.[1] However, while Article 15 may not in itself be controversial, the same cannot be said for its interpretation and application. A recent, largely unnoticed change in the international jurisprudence on territorial sea delimitation bears witness to the persistent

* St. Catharine's College, University of Cambridge, mfl33@cam.ac.uk. An earlier version of this paper was presented at the Annual Conference of the Society of Legal Scholars (Oxford, 6–9 September 2016). The author would like to thank Christine Gray, José Alvarez, Benedict Kingsbury, Philippa Webb and Bruno Gélinas-Faucher for their comments. The usual caveats apply.

[1] 1833 UNTS 3. On territorial sea delimitation, see DR Rothwell and T Stephens, *The International Law of the Sea* (2nd edn, Hart 2016) 431; DH Anderson, 'Developments in Maritime Boundary Law and Practice' in DH Anderson (ed), *Modern Law of the Sea – Selected Essays* (Martinus Nijhoff 2008) 408; RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press 1999) 182–3; L Lucchini and M Vœlckel, *Droit de la Mer – Tome 2* (Pédone 1996) vol I, 64–6; MC Ciciriello, *Le Formazioni Insulari e la Delimitazione degli Spazi Marini* (Editoriale Scientifica 1990) 141–4; P Weil, *Perspectives du Droit de la Délimitation Maritime* (Pédone 1988) 147–8.

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challenges which this operation presents. A sound understanding of LOSC Article 15 seems to be crucial, especially since three cases are currently pending before international tribunals that involve the delimitation of the territorial sea.[2] The recent law of the sea literature, while discussing the delimitation of both the Exclusive Economic Zone (EEZ) and the continental shelf at length, has not focused on territorial sea delimitation.[3] The reason for this limited interest is probably based on the view that issues relating to the territorial sea, the history of which stretches as far back as Grotius,[4] are considered to be largely established. For instance, Evans has recently suggested that Article 15 'is not in itself controversial'.[5] Rothwell and Stephens likewise affirmed that '[t]he law in the field has … acquired stability'.[6] However, judicial decisions in the last decade demonstrate a degree of uncertainty in establishing inter-State territorial sea boundaries.

The LOSC distinguishes between, on one hand, Articles 74 and 83 on EEZ and continental shelf delimitation, and, on the other hand, Article 15 on the delimitation of the territorial sea.[7] While the former are framed in vague terms, only requiring that 'delimitation … shall be effected by agreement on the basis of international law … in order to achieve an equitable solution', the latter seems clearer as it provides for a more specific delimitation rule. Under LOSC Article 15:

> [w]here the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or

[2] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, filed 3 December 2014 <https://www.itlos.org/cases/list-of-cases/case-no-23/case-no-23-merits/>; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, filed 28 August 2014 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=SK&case=161&k=00>; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)*, filed 25 February 2014 <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=crnic&case=157&k=0f>.

[3] MD Evans, 'Maritime Boundary Delimitation' in DR Rothwell *et al.* (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 255–6; S Yanai, 'International Law Concerning Maritime Boundary Delimitation' in D Attard *et al.* (eds), *The IMLI Manual on International Maritime Law: Vol I – The Law of the Sea* (OUP 2014) 318.

[4] H Grotius, *De Jure Belli ac Pacis* (W Whewell (ed), CUP 1853) vol I.

[5] Evans (n 3) 255.

[6] Rothwell and Stephens (n 1) 431. See also P Von Mühlendahl, *L'Equidistance dans la Délimitation des Frontières Maritimes* (Pédone 2016) 91–3. According to Von Mühlendahl, the principal issue with LOSC art 15 is the choice of base points for the establishment of the equidistance line.

[7] The territorial sea covers the maritime areas up to 12 nautical miles from the baselines, while the continental shelf and the EEZ cover the maritime areas under national jurisdiction beyond 12 nautical miles from the baselines. See LOSC arts 3, 57 and 76. Normally the baselines are located along the low-water line, but in exceptional cases they could be drawn as straight lines connecting points on the coast. See LOSC arts 5 and 7.

> other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

The International Court of Justice (ICJ or the Court) defined special circumstances as 'those circumstances which might modify the result produced by an unqualified application of the equidistance principle',[8] such as the presence of islands or navigational channels in the area to be delimited. Article 15 entails that, lacking agreement between two States on the delimitation of their territorial seas, the boundary shall be the equidistance line, unless historic title or special circumstances require a boundary at variance with equidistance.[9] In *Qatar v Bahrain*, the ICJ declared Article 15 to be part of customary international law.[10] However, the case law since the entry into force of the LOSC in 1994 shows a degree of uncertainty regarding the application of Article 15. While judicial decisions prior to 2007 uphold the primacy of equidistance and the corrective function of special circumstances, the subsequent case law envisages a more central role for special circumstances which downplays the pre-eminence of equidistance. This article argues that Article 15 should be interpreted as codifying a rule-exception relationship between equidistance and special circumstances, and that, by failing to acknowledge the consequences of such a relationship, the more recent international jurisprudence has misconstrued the law applicable to territorial sea delimitation. This article does not argue that Article 15 inherently codifies the method for its practical application. Conversely, it aims to provide a number of reasons strongly suggesting how Article 15 should be interpreted and applied in practice for the purposes of territorial sea delimitation.

Section II discusses the case law on Article 15, highlighting the recent uncertainties concerning territorial sea delimitation. Section III sets out the relationship between equidistance and special circumstances in light of the drafting history of the LOSC. Section IV examines the reasons for and the implications of the recent change in the understanding of Article 15, including whether coastal instability could be considered to be a special circumstance. Section V concludes. The present article does not discuss historic title, owing to the absence of any reference to it in the territorial sea delimitation cases to date.

[8] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Judgment) [1993] ICJ Rep 38, para 55.

[9] Although under art 6 of the Continental Shelf Convention (see fn 61 below) 'equidistance' and 'median' respectively refer to the situation of adjacent and opposite coasts, the ICJ held that they are equivalent expressions. See *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, para 57.

[10] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40, para 176.

II. THE CASE LAW ON TERRITORIAL SEA DELIMITATION: FROM CONSENSUS TO UNCERTAINTY

This section discusses the interpretation and application of Article 15 by international tribunals.[11] It explains that the judicial consensus on the method for territorial sea delimitation has been challenged in recent years, as a consequence of international tribunals adopting a changed understanding of the relationship between equidistance and special circumstances.

A. Building Judicial Consensus around the Two-Stage Approach

Until 2007, international tribunals implemented Article 15 by means of a two-stage approach, pursuant to which an equidistance line would be provisionally drawn and subsequently adjusted should special circumstances so require. The 1999 delimitation award between Eritrea and Yemen was the first judicial application of Article 15, although it contained little discussion regarding its interpretation. By means of a special agreement, Eritrea and Yemen had requested an arbitral tribunal to hand down an 'award delimiting the maritime boundaries' between them in the Red Sea.[12] Both parties argued in favour of a boundary following the equidistance line.[13] However, while Yemen argued for an all-purpose equidistance line without distinguishing between maritime zones,[14] Eritrea argued for a boundary made of two lines based on equidistance, one for the territorial sea and one for the continental shelf and EEZ.[15] The tribunal decided that the boundary should, 'as far as practicable, be a median line between the opposite mainland coastlines',[16] and delimited the territorial sea by first drawing the boundary as a median line between the mainland coasts of the parties.[17] Subsequently, while constructing the equidistance line, the tribunal decided on the effect to be given to the Dahlaks, the island of al-Tayr and the al-Zubayr island group.[18] The tribunal implicitly applied Article 15 in two stages: first, it drew an equidistance line

[11] In both *Cameroon v Nigeria* and *Peru v Chile*, the States party to the dispute had already agreed upon that part of their maritime boundary which covered the territorial sea. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Merits) [2002] ICJ Rep 303, paras 263–4; *Maritime Dispute (Peru v Chile)* (Judgment) [2014] ICJ Rep 3, paras 149–51.

[12] *Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation) (Eritrea/Yemen)* (1999) XXII RIAA 335, 375 (1999). According to art 2 of the special agreement, the tribunal was bound to apply the LOSC, since Eritrea, although not a party to the Convention, had accepted the application of its provisions for the delimitation of the maritime boundary with Yemen. See ibid, para 130. On *Eritrea/Yemen*, see MD Evans, 'The Maritime Delimitation between Eritrea and Yemen' (2001) 14 LJIL 148 and 156.

[13] *Eritrea/Yemen* (n 12) para 131. [14] ibid, para 114. [15] ibid, paras 23–5.

[16] ibid, para 132. The tribunal had previously found that it had 'little difficulty in preferring the Eritrean argument, which brings into play [LOSC] Article 15'. See ibid, para 125.

[17] ibid, para 132.

[18] ibid, paras 139–53. The Dhalaks are an island group situated close to Eritrea's coast.

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between the coasts of the parties; second, it took account of the special circumstances, namely the effect of the existing islands.[19]

In *Qatar v Bahrain* (2001), the ICJ was called upon to apply customary international law, which, according to the Court, included LOSC Article 15.[20] Qatar[21] and Bahrain[22] argued that the boundary should be delimited on the basis of equidistance. Accepting the views of the parties, the Court held that '[t]he most logical and widely practised approach [to delimit the territorial sea] is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances'.[23] The Court first drew a provisional equidistance line, and subsequently considered whether certain islands present in the delimitation area constituted special circumstances warranting the adjustment of the provisional equidistance line.[24] The *Qatar v Bahrain* judgment adopted the arbitral tribunal's reasoning in *Eritrea/Yemen*.[25] However, it took that reasoning one step further by spelling out the two stages for the delimitation of the territorial sea under Article 15 and customary international law. The two-stage approach for territorial sea delimitation was also accepted by the dissenting judges.[26]

[19] See Y Tanaka, 'Reflections on the *Eritrea/Yemen* Arbitration of 17 December 1999 (Second Phase: Maritime Delimitation)' (2001) 48 NILR 211.

[20] See *Qatar v Bahrain* (n 10) para 176. The Court applied customary international law since Qatar was not a party to the LOSC. On *Qatar v Bahrain*, see MD Evans, 'Decisions of International Tribunals: The International Court of Justice' (2002) 51 ICLQ 709.

[21] Qatar submitted that 'the boundary of the two territorial seas is to be established by application of the equidistance method, at least as a first step in the delimitation process. Such a provisional median line has to be drawn by taking exclusively into consideration the two main opposite coasts, without regard to the numerous particular features existing in the area'. See Memorial of Qatar, para 11.37, <http://www.icj-cij.org/docket/files/87/7057.pdf>. See also Counter-Memorial of Qatar, paras 1.15–1.16, <http://www.icj-cij.org/docket/files/87/7061.pdf>.

[22] Bahrain argued that 'the rule expressed in Article 15 expressly requires, "whether the coasts of two States are opposite or adjacent to each other", that the starting point be "the median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two States is measured". In a second phase, it is appropriate to enquire whether "it is necessary, by reason of historic title or other special circumstances", to adjust or displace the median line in order to arrive at an equitable result.' See Memorial of Bahrain, para 614, <http://www.icj-cij.org/docket/files/87/7055.pdf>. See also Counter-Memorial of Bahrain, para 467, <http://www.icj-cij.org/docket/files/87/11051.pdf>.

[23] *Qatar v Bahrain* (n 10) para 176.

[24] Concerning Fasht al Azm, the Court held that whether it was considered part of the island of Sitrah, or whether it was considered a low-tide elevation, it would constitute a special circumstance requiring a boundary passing between Fasht al Azm itself and the island of Qit'at ash Shajarah. See ibid, para 218. Qit'at Jaradah was deemed to be an 'insignificant maritime feature' which would have a disproportionate effect on the boundary, therefore the Court resolved that the boundary should pass 'immediately to the east of Qit'at Jaradah'. See ibid, para 219.

[25] B Kwiatkowska, 'The *Qatar v Bahrain* Maritime Delimitation and Territorial Questions Case' (2002) 33 Ocean Development and International Law 246.

[26] Judges Bedjaoui, Ranjeva and Koroma wrote that 'special circumstances may be taken into account *only after* the true median line has been drawn, and only with a view to adjustment in order to achieve and equitable solution'. See *Qatar v Bahrain* (n 10) para 181 (Joint Dissenting Opinion Bedjaoui, Ranjeva and Koroma) (emphasis in the original). Judge ad hoc Torres Bernárdez maintained that 'special circumstances … are supposed to intervene in the delimitation operation

In their 2007 maritime boundary dispute, Guyana and Suriname suggested different courses for their territorial sea boundary. On one hand, Guyana argued that the boundary should follow the 'historical equidistance line' between the parties. If Guyana's boundary were not to be regarded as an equidistance line, 'the conduct of the Parties since 1966 in following it would be sufficient to constitute a special circumstance justifying an adjustment to the equidistance line'.[27] On the other hand, Suriname maintained that, as former colonial powers, 'the United Kingdom and The Netherlands respected the 10° Line as the territorial sea boundary in their mutual relations from 1939 to 1965' up to 3 nautical miles (nm) from the coast, and that such a line became the boundary between Guyana and Suriname up to 12 nm from the coast.[28] In order to address Suriname's arguments, the arbitral tribunal first discussed the delimitation up to 3 nm, and then the delimitation between 3 and 12 nm. At the outset, the tribunal stated that 'Article 15 of the Convention places primacy on the median line as the delimitation line between the territorial seas of opposite or adjacent States'.[29] Concerning the delimitation up to 3 nm, the tribunal held that navigation could be a special circumstance, yet found that an agreed boundary existed up to 3 nm from the coast which followed a N10°E delimitation line starting at the land boundary terminus.[30]

While the result in *Guyana v Suriname* was a line at variance with equidistance, the tribunal reached the correct solution by finding that there had been an agreement between the parties on their maritime boundary up to 3 nm from the coast. Concerning the delimitation between 3 and 12 nm, the tribunal found that 'a special circumstance is constituted by the very need to determine such a line from a point at sea fixed by historical arrangements of an unusual nature', and therefore that the boundary should follow 'a line continuing from the seaward terminus of the N10°E line at 3 nm, and drawn diagonally by the shortest distance to meet the line adopted later in this Award to delimit the Parties' continental shelf and exclusive economic zone'.[31] Gao noted that 'while giving lip-service to the equidistance method

after the establishment of the 'median line' … *and not before or simultaneously*'. See ibid, para 488 (Dissenting Opinion Torres Bernárdez) (emphasis in the original).

[27] *Maritime Boundary Arbitration between Guyana and Suriname (Guyana v Suriname)* (2007) XXX RIAA 1, paras 288–9. See also Memorial of Guyana, paras 8.44–8.55, <https://pcacases.com/web/sendAttach/904>; Reply of Guyana, paras 6.1–6.44, <https://pcacases.com/web/sendAttach/1040>.

[28] *Guyana v Suriname* (n 27) paras 282–6. See also Counter-Memorial of Suriname, paras 4.56–4.72, <https://pcacases.com/web/sendAttach/1162>; Rejoinder of Suriname, paras 3.263–3.266, <https://pcacases.com/web/sendAttach/1206>.

[29] *Guyana v Suriname* (n 27) para 296.

[30] According to the tribunal, 'special circumstances of navigation may justify deviation from the median line, and … the record amply supports the conclusion that the predecessors of the Parties agreed upon a N10°E delimitation line for the reason that all of the Corentyne River was to be Suriname's territory and that the 10° Line provided appropriate access through Suriname's territorial sea to the western channel of the Corentyne River'. See ibid, para 306.

[31] ibid, para 323.

in the territorial sea delimitation, the Tribunal got rid of it almost from the outset of delimitation, since the Tribunal did not draw a provisional equidistant line as the starting point', adding that the *Guyana v Suriname* award would suggest that 'beginning the delimitation process by drawing a provisional equidistant line is not applicable for all territorial sea delimitation'.[32] However, the *Guyana v Suriname* tribunal upheld the two-stage approach applied by the ICJ in *Qatar v Bahrain* by simply making a finding, consistent with Article 15, that an agreement already existed between the parties concerning their boundary up to 3 nm. It is conceivable that, between 3 and 12 nm, the tribunal did consider a provisional equidistance line, but failed to explicitly mention it in the award on account of the first segment of the boundary being at complete variance with equidistance.

B. Revisiting the Two-Stage Approach

In contrast to the three cases discussed above, the territorial sea delimitation cases since 2007 have downplayed the pre-eminence of equidistance within the two-stage approach. In the 2007 ICJ case between Nicaragua and Honduras, Article 15 was part of the applicable law.[33] With respect to territorial sea delimitation, neither party requested an equidistance boundary. On one hand, Nicaragua requested an angle-bisector line, since the coastal instability at the mouth of the River Coco made it impossible to identify suitable base points from which to draw an equidistance line.[34] On the other hand, Honduras built its argument on historical bases, arguing for an agreed boundary running due east along the 15th parallel.[35] The ICJ found that no agreed boundary existed between the parties.[36] Subsequently, the Court mentioned the two-stage approach used in *Qatar v Bahrain* with approval.[37] However, the Court went on to state that 'continued accretion at [Cape Gracias a Dios] might render any equidistance line so constructed today arbitrary and unreasonable in the near future',[38] adding that 'geographical and geological difficulties are further exacerbated by the absence of viable

[32] J Gao, 'Comments on *Guyana v Suriname*' (2009) 8 ChineseJIL 195–6.

[33] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, para 267. This judgment was handed down on 8 October 2007, three weeks after the *Guyana v Suriname* arbitral award of 17 September 2007.

[34] Nicaragua argued that '[t]he bisector of the lines representing the coastal fronts of the two Parties … constitutes the single maritime boundary for the purposes of the delimitation of the disputed areas of the territorial sea, exclusive economic zone and continental shelf'. See CR 2007/12, 53 (Argüello). For Nicaragua's argument on coastal instability, see CR 2007/5, 15–17 (Pellet).

[35] *Nicaragua v Honduras* (n 33) para 274. Honduras regarded the boundary it requested as a simplified or adjusted equidistance line. Moreover, according to Honduras 'the bisector approach advanced by Nicaragua produces a result which is wholly indefensible'. See CR 2007/6, 36 (Greenwood).

[36] *Nicaragua v Honduras* (n 33) paras 253–8.

[37] ibid, para 268.

[38] ibid, para 277.

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base points claimed or accepted by the Parties themselves at Cape Gracias a Dios'.[39] The Court finally constructed the bisector requested by Nicaragua.[40] Crucially, the Court held that:

> Article 15 of UNCLOS itself envisages an exception to the drawing of a median line, namely 'where it is necessary by reason of historic title or special circumstances…'. Nothing in the wording of Article 15 suggests that geomorphological problems are *per se* precluded from being 'special circumstances' within the meaning of the exception, nor that such 'special circumstances' may only be used as a corrective element to a line already drawn.[41]

After having paid lip-service to *Qatar v Bahrain*, the Court changed its understanding of Article 15. *Qatar v Bahrain* stood for the proposition that Article 15 requires the drawing of an equidistance line, to be adjusted at a second stage and only if special circumstances made such a line inequitable. *Nicaragua v Honduras* reversed those two stages: the Court first asked whether special circumstances warranted a non-equidistant boundary, and second, given an affirmative answer, decided not to draw an equidistance line at all. Equidistance moved from being compulsory to being merely a potential method for territorial sea delimitation, its use depending on the absence of special circumstances.

In 2012, the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) delivered its judgment in the delimitation dispute between Bangladesh and Myanmar. Before ITLOS, Bangladesh argued that the parties had 'reached an agreement on their boundary in the territorial sea that satisfies the requirements of Article 15'.[42] Myanmar argued that there was no agreement on a territorial sea boundary, and that such a boundary should be based on equidistance, adjusted due to the presence of St. Martin's Island.[43] Both Bangladesh and Myanmar appeared to construe the rule under Article 15 in the same manner as the ICJ had construed it in *Qatar v Bahrain*.[44] The Tribunal found no agreement between the parties on their territorial sea boundary.[45] Before delimiting the territorial sea, ITLOS explained that '[i]t

[39] ibid, para 278.

[40] ibid, para 287.

[41] ibid, para 280. Fietta and Cleverly welcomed this statement by the Court with approval, see S Fietta and R Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016) 106.

[42] Memorial of Bangladesh, paras 5.7 and 5.24, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Memorial_of_Bangladesh_Volume1.pdf>.

[43] According to Myanmar, 'St. Martin's Island must be considered … a special circumstance which calls for shifting or adjusting the median line which otherwise would have been drawn off the coasts of the Parties'. See Counter-Memorial of Myanmar, para 4.53, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Counter_Memorial_Myanmar.pdf>.

[44] While Myanmar's argument built upon the premise that the presence of St. Martin's Island, as a special circumstance, required the adjustment of a previously identified equidistance line, counsel for Bangladesh explicitly stated that 'the equidistance/special circumstances method takes equidistance and then adjusts it'. See ITLOS/PV.11/5/Rev.1, 2 (Crawford).

[45] *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2012] ITLOS Rep 4, paras 88–99 and 112–18.

follows from Article 15 of the Convention that before the equidistance principle is applied, consideration should be given to the possible existence of historic title or other special circumstances relevant to the area to be delimited'.[46] ITLOS continued not by plotting a provisional equidistance line, but by considering whether St. Martin's Island could be a special circumstance. It concluded that the island was not a special circumstance, and should therefore be given full effect.[47] Subsequently, the Tribunal established an equidistance line in the territorial sea.[48] Faithful to its initial statement, ITLOS drew the equidistance line as the final product of the delimitation exercise and only after it had considered existing special circumstances. Although not explicitly, the Tribunal followed the ICJ's lead in *Nicaragua v Honduras*.[49]

The 2014 arbitration between Bangladesh and India is the latest case in which an international tribunal established a territorial sea boundary pursuant to Article 15. Bangladesh requested the tribunal to draw the boundary as the bisector of the lines approximating the general direction of the parties' coasts, since, owing to coastal instability in the Bay of Bengal, it would have been impossible to select suitable base points to construct an equidistance line.[50] Conversely, India requested that the tribunal draw an equidistance line, which it argued to be the general rule under Article 15.[51] The tribunal recalled the ICJ's decision in *Qatar v Bahrain*, according to which Article 15 requires the use of a two-stage method. However, the tribunal immediately continued by saying that 'in its second sentence Article 15 of the Convention provided for the possibility of an alternative solution where this is necessary

[46] ibid, para 129. [47] ibid, para 152. [48] ibid, paras 154–69.

[49] Commentators have referred to the delimitation of the territorial sea in *Bangladesh/Myanmar* with approval. See RR Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2012' (2013) 28 International Journal of Marine and Coastal Law 571; BM Magnússon, 'Judgement in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (14 March 2012)' (2012) 27 International Journal of Marine and Coastal Law 624–5; D Anderson, 'Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)' (2012) 106 AJIL 823; HJ Kim, 'La Délimitation de la Frontière Maritime dans le Golfe du Bengale: Courir deux Lièvres à la Fois avec Succès dans le Règlement de la Délimitation Maritime' (2012) 59 Annuaire Français de Droit International 443, 446–50.

[50] Similarly to Nicaragua in *Nicaragua v Honduras*, Bangladesh contended that 'the unique geographic facts of this case, including both the instability of the Parties' coastlines and the concave configuration of the Bay's north coast, mean that the equidistance method cannot be used for any part of the maritime delimitation, including in the territorial sea'. See Memorial of Bangladesh, paras 1.30 and 5.2, <http://www.wx4all.net/pca/bd-in/Bangladesh's%20Memorial%20Vol%20I.pdf>.

[51] Counter-Memorial of India, para 5.33, <http://www.pcacases.com/pcadocs/India_CounterMemorial_Vol_I.pdf>. According to India, 'the geography of the Bay of Bengal provides for a large number of possible locations for base points along the relevant coastline', and that '[a]ppropriate base points are readily identifiable and, hence, exaggerated claims of instability should not come into play'. See Hearing Transcript, vol 3, 253 (Chadha) <http://www.pcacases.com/web/sendAttach/390>.

by reason of historic title … or "other special circumstances"'.[52] Concerning coastal instability, the tribunal found that '[g]iven [its] concern with the "physical reality at the time of the delimitation", … the Tribunal need not consider whether instability could in some instances qualify as a special circumstance under Article 15'.[53]

The tribunal rejected the suggestion that concavity and coastal instability constituted special circumstances, and subsequently established an equidistance line.[54] However, that equidistance line was unexpectedly provisional. After having drawn the territorial sea boundary as an equidistance line, the tribunal noted that:

> the land boundary terminus … is not at a point equidistant from the base points selected … for the delimitation of the territorial sea. Since the delimitation of the territorial sea begins from equidistance lines between the Parties, using the land boundary terminus in this case would not begin the delimitation on the "median line" as called for by Article 15 of the Convention. The Tribunal considers that the need to connect the land boundary terminus to the median line constructed by the Tribunal for the delimitation of the territorial sea constitutes a special circumstance in the present context.[55]

Therefore, the tribunal adjusted the equidistance line because the land boundary terminus was not equidistant between the parties' coasts. The tribunal thus considered special circumstances twice, both before and after drawing a provisional equidistance line.[56]

III. UNDERSTANDING LOSC ARTICLE 15

The judicial decisions on territorial sea delimitation discussed above show inconsistency in applying Article 15, and in particular concerning the relationship between the two components of the two-stage approach, equidistance and special circumstances. This section argues that Article 15 should be interpreted as codifying a rule-exception relationship between, respectively, equidistance and special circumstances, and that such a

[52] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)* (2014) 167 ILR 1, paras 246–247.

[53] ibid, para 248. The tribunal added that it 'also [did] not consider that the general configuration of the coast in the Bay of Bengal is relevant to the delimitation of the narrow belt of the territorial sea'.

[54] ibid, paras 250–70.

[55] ibid, paras 273–4.

[56] The erratic *modus operandi* in *Bangladesh v India* stands in marked contrast to the previous cases, in which the tribunal concerned either used special circumstances as a corrective for the equidistance line (*Eritrea/Yemen* and *Qatar v Bahrain*), or considered special circumstances only before drawing the equidistance line (*Nicaragua v Honduras* and *Bangladesh/Myanmar*). The literature on *Bangladesh v India* has not criticized the method used in territorial sea delimitation. See D Anderson, 'Bay of Bengal Maritime Boundary: Bangladesh v India' (2015) 109 AJIL 153; M Kaldunski, 'A Commentary on Maritime Boundary Arbitration between Bangladesh and India Concerning the Bay of Bengal' (2015) 28 LJIL 807–10; VJM Tassin, 'La Contribution au Droit International de l'Affaire de Délimitation Maritime Bangladesh/Inde dans la Baie du Bengale' (2014) 60 Annuaire Français de Droit International 107.

relationship should be the basis for undertaking the delimitation of the territorial sea.

A. Interpreting Article 15: Text and Drafting History

Article 15 provides that, if neighbouring States have not agreed on their territorial sea boundary, neither is entitled to 'extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured'. Nevertheless, the equidistance line boundary does not apply 'where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith'. The text of the provision suggests that special circumstances and historic title are exceptions to the general rule of equidistance.[57] However, a merely textual reading does not clarify the *raison d'être* of these exceptions to equidistance. The drafting history of Article 15, discussed below, suggests that, as a general rule, the territorial sea is to be delimited by means of an equidistance line, and that it is only if special circumstances made such a boundary inequitable that it should depart from equidistance.

1. The rule-exception relationship between equidistance and special circumstances

The drafting history of Article 15 confirms the rule-exception relationship between equidistance and special circumstances, and also elucidates the rationale behind such a relationship.[58] As the ICJ held on two occasions,[59] Article 15 is based on Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone (TSC).[60] Furthermore, as explained below, Article 12 TSC is in turn based on Article 6 of the 1958 Convention on the Continental Shelf (CSC).[61] The drafting history of Article 12 TSC and

[57] *Nicaragua v Honduras* (n 33) para 4 (Separate Opinion Ranjeva); *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624, para 4 (Declaration Keith).

[58] On the confirmatory function of *travaux préparatoires*, see *Territorial Dispute (Libya/Chad)* (Judgment) [1994] ICJ Rep 6, paras 55–6.

[59] *Nicaragua v Honduras* (n 33) para 280; *Qatar v Bahrain* (n 10) para 176.

[60] 516 UNTS 206. Under art 12(1) TSC, '[w]here the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision'.

[61] 499 UNTS 311. Under art 6 CSC, '(1) [w]here the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In

Article 6 CSC is thus relevant when analysing Article 15, since these three provisions, although concerned with the delimitation of different maritime zones, are all based on the same underlying logic.

The International Law Commission (ILC or the Commission) first mentioned the concept of 'special circumstances' in the context of its work on the continental shelf. Draft Article 7, as recorded in the 1953 ILC's Annual Report to the UN General Assembly, provided that the delimitation of the continental shelf between States with opposite or adjacent coasts should be undertaken by agreement, failing which the continental shelf boundary would be based on equidistance. The ILC's commentary to Draft Article 7 stated that:

> while in the case of both kinds of boundaries [ie between opposite and adjacent coasts] the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances. As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels.[62]

The introduction of Draft Article 7 in 1953 was a response to the comments made at the Commission's meetings earlier that year. At the ILC's 204th meeting, Mr. Sandström stated that:

> [t]here were cases … where a departure from the general rule [of equidistance] was necessary in fixing boundaries across the continental shelf; for example, where a small island opposite one State's coast belonged to another; the continental shelf surrounding that island must also belong to the second State. A general rule was necessary, but it was also necessary to provide for exceptions to it.[63]

Since Sir Hersch Lauterpacht opposed Mr. Sandström's proposal to specify, in Draft Article 7, that equidistance would apply 'as a general rule',[64] Mr. Spiropoulos suggested 'that it would be preferable to replace the words "as a general rule" by the words "unless another boundary line is justified by special circumstances"'.[65] Mr. Spiropoulos admitted that his suggestion was merely given 'as a point of drafting, and leaving aside the question of substance'.[66]

the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. (2) Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured'.

[62] *ILC Yearbook (1953)*, vol II, 216, para 82.

[63] *ILC Yearbook (1953)*, vol I, 128, para 37 (François).

[64] ibid 128, para 47 (Lauterpacht). [65] ibid 130, para 62 (Spiropoulos). [66] ibid.

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Accordingly, the introduction of 'special circumstances' in the delimitation lexicon was not intended to prejudice the character of equidistance as the general rule in relation to which special circumstances were an exception. Mr. Spiropoulos confirmed the rule-exception relationship between equidistance and special circumstances in his comments at the Commission's 205th meeting. Replying to some comments by Sir Hersch Lauterpacht on the indeterminacy of special circumstances,[67] Mr. Spiropoulos stated that '[t]he Commission could choose only between accepting a principle without exceptions, or admitting exceptions'.[68] Similarly, the 1956 ILC Commentary to the Draft Articles on the law of the sea stated that in continental shelf delimitation 'provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels'.[69]

In 1954, the ILC introduced the concept of special circumstances in the delimitation of the territorial sea, borrowing it from the Draft Articles on the continental shelf. At its 261st meeting the Commission discussed Draft Article 16 concerning the delimitation of the territorial sea between States whose coasts are opposite. On that occasion, Mr. Spiropoulos stated that:

> it was impossible to use, in the case covered by Article 16, a different method for the delimitation of the territorial sea from that which had been adopted for determining the boundary of the continental shelf. It would be inconceivable that the continental shelf of a State should be under the territorial sea of another State.[70]

Mr. Spiropoulos's concern arose from the fact that the rules for the delimitation of the territorial sea and of the continental shelf had, up to that moment, been treated as distinct and provided for different methods of delimitation.

As a consequence of such an approach, the delimitation of the continental shelf could have resulted in part of that continental shelf becoming the seabed of another State's territorial sea. In response to Mr. Spiropoulos's remarks, at the 262nd meeting the ILC Special Rapporteur, Mr. François, proposed that 'for Article 16 the Commission should adopt the same terminology as for Article 7 on the continental shelf'.[71] The proposal was put to a vote, and the Special Rapporteur's amendment was approved.[72] Accordingly, the 1954 version of the ILC Draft Articles on the territorial sea included two provisions, Draft Articles 15 and 16, under which territorial sea delimitation would be effected in the same manner as continental shelf delimitation, using equidistance as the rule and special circumstances as the exception.[73] Moreover, at the Commission's 380th meeting, Mr. Sandström

[67] ibid 131, para 17 (Lauterpacht).
[68] ibid 132, para 21 (Spiropoulos).
[69] *ILC Yearbook (1956)*, vol II, 300.
[70] *ILC Yearbook (1954)*, vol I, 100, para 56 (Spiropoulos).
[71] ibid 101–2, para 2 (François).
[72] ibid 103, para 18 (Sandström).
[73] *ILC Yearbook (1954)*, vol II, 157–8. See also DW Bowett, *The Legal Regime of Islands in International Law* (Oceana 1979) 36.

proposed that the second paragraph of the ILC commentary to Draft Article 12 on territorial sea delimitation between opposite coasts should reflect that the median line was conceived as the general rule and that special circumstances were an exception to such a rule. He proposed the 'insertion of the words "as a general rule" after the words "to adopt" in the last sentence of the first paragraph of the comment' to the ILC Draft Articles.[74] The proposal was adopted, and the ILC commentary to Draft Article 12 stated that 'the Commission … thought it advisable to adopt, as a general rule, the system of the median line as a basis for delimitation'.[75]

Admittedly, while special circumstances were first referred to in connection with continental shelf delimitation, equidistance was first mentioned with respect to territorial sea delimitation during the 1930 League of Nations Codification Conference.[76] Equidistance had, by itself, already been envisaged as a rule for territorial sea delimitation before the ILC even existed. Therefore, although in the 1950s the ILC borrowed the method for territorial sea delimitation from that for continental shelf delimitation, the ILC's action specifically concerned the delimitation method resulting from the combination of equidistance and special circumstances.

2. *The equitable solution requirement*

In its work leading up to the 1958 Conventions, the ILC also referred to the 'equitable solution' in connection with the delimitation of both the continental shelf and the territorial sea. Mr. Hudson first mentioned that the delimitation of the continental shelf must be equitable at the Commission's 115th meeting in 1951, when he remarked that the proclamations made by certain States concerning the continental shelf 'stated that the establishment of [continental shelf] boundaries should be carried out on an equitable basis'.[77] Sir Hersch Lauterpacht mentioned the 'equitable solution' in continental shelf delimitation at the Commission's 196th meeting,[78] and was soon after echoed by Mr. Pal, according to whom '[t]he only equitable starting point for dividing the continental shelf between two States whose coasts were opposite one another was the median line equidistant from the outer limits of the territorial waters'.[79] At the ILC's 360th meeting, Sir Gerald Fitzmaurice linked the concept of special circumstances to that of equitable delimitation, by stating that the delimitation of the continental shelf by means of a median line could be inequitable and suggesting that special circumstances could be the remedy to an inequitable delimitation.[80]

[74] *ILC Yearbook (1956)*, vol I, 284, para 3 (Sandström).
[75] *ILC Yearbook (1956)*, vol II, 271.
[76] S Rosenne, *League of Nations Conference for the Codification of International Law* (Oceana 1975) vol II, 277.
[77] *ILC Yearbook (1951)*, vol I, 287, para 123 (Hudson).
[78] *ILC Yearbook (1953)*, vol I, 74, para 6 (Lauterpacht).
[79] ibid 127, para 23 (Pal).
[80] *ILC Yearbook (1956)*, vol I, 152, para 28 (Fitzmaurice).

With reference to the delimitation of the territorial sea, the 1953 Report of the Committee of Experts mentioned the 'equitable solution'. Reporting to the ILC, the Committee of Experts answered a question relating to how the territorial sea should be delimited between States with adjacent coasts, stating that:

> [a]fter thoroughly discussing methods the Committee decided that the (lateral) boundary through the territorial sea … should be drawn according to the principle of equidistance from the respective coastlines. In a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation.[81]

The Committee of Experts also added that the considerations made in relation to territorial sea delimitation would equally apply to the delimitation of the continental shelf.[82] Moreover, in the debates of the First Committee at the 1958 Geneva Conference, Sir Gerald Fitzmaurice argued that special circumstances should not be deleted from the provision on territorial sea delimitation. Fitzmaurice stated that:

> [i]t was admittedly a weakness that there was no definition of special circumstances …. Nevertheless, special circumstances did exist which, for reasons of equity or because of the configuration of a particular coast, might make it difficult to accept the true median line as the actual line of delimitation between two territorial seas.[83]

Although neither Article 12 TSC nor Article 6 CSC explicitly refer to the need for an 'equitable solution' in territorial sea and continental shelf delimitation, it appears that their drafters did not intend them to operate mechanically, but with a view to achieving 'equitable solutions'.[84] The ILC introduced special circumstances to avoid the possibility that a mechanical application of equidistance would yield inequitable boundaries. Subsequent case law on maritime delimitation interpreted the two provisions at issue as requiring an 'equitable solution'.[85]

Although reading an equitable solution requirement into Article 15 could seem to add an element absent from that provision's text, the need to achieve an equitable solution in territorial sea delimitation strongly underlay the ILC's work leading up the 1958 Geneva Conventions. Moreover, the UNCLOS *travaux préparatoires* indicate that the equitable solution requirement emerges as the key element clarifying the relationship between equidistance and special circumstances. A broader view of maritime delimitation also suggests the desirability of having an equitable solution requirement under Article 15, since this would extend the objective explicitly

[81] *Addendum to the Second Report on the Régime of the Territorial Sea*, UN Doc A/CN.4/61/Add.1 (18 May 1953) 6–7 (Annex).
[82] ibid.
[83] Doc A/CONF.13/C.1/SR.60 (22 April 1958), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol III, 189, para 36.
[84] Ciciriello (n 1) 143.
[85] See section III.B below.

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pursued in continental shelf and EEZ delimitation under LOSC Articles 74 and 83 to territorial sea delimitation.

3. Territorial sea delimitation at UNCLOS III

Article 15, as drafted at the Third UN Conference on the Law of the Sea (1973–1982), incorporated both the rule-exception relationship between equidistance and special circumstances, and the need for an 'equitable solution'. States submitted a variety of similar proposals on territorial sea delimitation. For example, a proposal by Uganda and Zambia provided for the equidistance line as the rule. However, equidistance would not apply 'where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with [it]'.[86] The 1975 Informal Single Negotiating Text (ISNT) contained Article 13 on the delimitation of the territorial sea, which reproduced Article 12 TSC verbatim.[87] Article 14 of the 1976 Revised Single Negotiating Text (RSNT) on territorial sea delimitation was identical to Article 13 of the ISNT, with minor drafting changes.[88] Article 14 of the RSNT was repeated in Article 15 of the 1977 Informal Composite Negotiating Text (ICNT).[89] The final text of Article 15, which is identical to that of the ICNT for all practical purposes, was introduced in the 1981 Draft Convention.[90] No State presented amendments to Article 15 after the publication of the 1981 Draft Convention.[91] Shortly before the adoption of UNCLOS, Colombia noted that Article 15 'had been regarded as sacrosanct from a very early stage'.[92]

Notwithstanding the perceived sacrosanctity of the rule on territorial sea delimitation, certain States expressed their views that the provision should have made it explicit that delimitation must achieve an 'equitable solution'. For instance, Venezuela stated that 'since … any solution concerning the principles governing the delimitation of maritime spaces should be based on the concept of equity, [it] was unable to accept the wording of Article 15

[86] *Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction*, UN Doc A/9021(VOL.III)(SUPP) (1 January 1973) 90.
[87] Doc A/CONF.62/WP.8 (7 May 1975), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol IV, 154.
[88] Doc A/CONF.62/WP.8/Rev.1 (6 May 1976), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol V, 155.
[89] Doc A/CONF.62/WP.10/Rev.1 (15 July 1977), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol VIII, 7.
[90] Doc A/CONF.62/L.78 (28 August 1981), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol XV, 178.
[91] Docs A/CONF.62/L.96 to L.126 (13 April 1982), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol XVI, 216–33.
[92] Doc A/CONF.62/SR.165 (1 April 1982), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol XVI, 75, para 62.

relating to the delimitation of the territorial sea'.[93] Bangladesh argued that 'Article 15 … must be brought into conformity with Articles 74 and 83', presumably referring to the lack of reference to the 'equitable solution' in Article 15.[94] Belgium[95] and Turkey[96] made comparable statements. Colombia made the rule-exception relationship between equidistance and special circumstances explicit by stating that 'Article 15 established as a rule for the delimitation of the territorial sea that of the median line'.[97]

The drafting history of Article 15 shows, first, that ever since the ILC's work on the law of the sea there has existed a rule-exception relationship between equidistance and special circumstances, and, second, that Article 15 embodies a requirement that any delimitation effected pursuant to it must be equitable.

B. The Method for the Application of Article 15

The character of a norm as a rule and of an interrelated norm as an exception has significant implications for their interpretation.[98] For instance, Orakhelashvili wrote that '[a]s soon as the context of the treaty allows the clause to be considered as an exception to primary obligations, such exception clauses will always be seen as limited in their scope and in their substantive and temporal effect'.[99] Alland similarly stated that '[*d*]*ans la plupart des systèmes juridiques, il est généralement entendu que les exceptions sont d'interprétation*

[93] Doc A/CONF.62/SR.126 (2 April 1980), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol XIII, 20, para 137.

[94] Doc A/CONF.62/SR.162 (31 March 1982), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol XVI, 42, para 5.

[95] In its declaration upon signing the Convention Belgium stated that it 'regrets that the concept of equity, adopted for the delimitation of the continental shelf and the exclusive economic zone, was not applied again in the provisions for delimiting the territorial sea'. See Declaration by Belgium upon signing the UN Convention on the Law of the Sea (5 December 1984) (1985) 4 LOS Bulletin 10.

[96] At the Eleventh Session of the Conference (1982), Turkey stated that 'it is inadmissible to think that the intention of the authors of [Article 15] was to permit an inequitable delimitation. The reference in the Article to special circumstances, which is a means to arrive at an equitable result, also confirms this view. The reference in the Article to the median line does not give the median-line method prominence over other methods. The median line can be applied only if it produces an equitable delimitation'. See Doc A/CONF.62/SR.162 (31 March 1982), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol XVI, 76–7, paras 152–3.

[97] Doc A/CONF.62/SR.189 (8 December 1982), *Official Records of the Third United Nations Conference on the Law of the Sea*, vol XVII, 82, para 246.

[98] A Bianchi, 'The Game of Interpretation in International Law' in A Bianchi *et al.* (eds), *Interpretation in International Law* (OUP 2014) 51. From the procedural point of view, the characterization of a norm as an exception entails that the party invoking the exception bears the burden to prove the existence of that exception. On LOSC art 15 and the burden of proof, see LM Alexander, 'The Delimitation of Maritime Boundaries' (1986) 5 Political Geography Quarterly 20–1.

[99] A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 425.

restrictive'.[100] Commentators seem to agree that exceptions should be interpreted restrictively, entailing that they should displace general rules only in an as limited number of cases as possible. In any event, the restrictive interpretation of exceptions should always be in accordance with the object and purpose of the treaty concerned.[101]

Such an approach to interpreting exceptions is also espoused by international tribunals,[102] and can be regarded as uncontroversial. The restrictive interpretation of exceptions is also known to the ICJ, and it has used it in law of the sea cases, such as in *Qatar v Bahrain* with reference to straight baselines.[103] Moreover, in his dissenting opinion appended to the judgment in *North Sea Continental Shelf*, Judge Tanaka commented on Article 6 CSC, and wrote that:

> [t]he *raison d'être* of [Article 6 CSC] is that the mechanical application of the equidistance principle would sometimes produce an unpalatable result for a State concerned. Hence the necessity of supplementing the prescription of the equidistance principle with a clause that provides for special circumstances and constitutes an exception to the main principle of equidistance.[104]

Judge Tanaka added that if 'the exceptional nature of [the special circumstances clause] is admitted, the logical consequence would be its strict interpretation'.[105] As a matter of interpretation, exceptions are to be narrowly construed and are to be applied only if certain conditions set forth by the primary rule are met.

With regard to LOSC Article 15, special circumstances, as exceptions to equidistance, are to be applied only in a limited number of cases, subject to the only condition that a boundary based on equidistance would be inequitable. The exceptional character of special circumstances also suggests that a boundary determined by special circumstances should deviate from equidistance as little as feasible. This consideration justifies using the equidistance line as a provisional boundary for the territorial sea, to be

[100] D Alland, 'L'Interprétation du Droit International Public' (2012) 362 Recueil des Cours 189.

[101] *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996) 18.

[102] See *Access to, or Anchorage in, the port of Danzig, of Polish War Vessels* (Advisory Opinion) PCIJ Series A/B No 43, 142; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998), para 157; *US*—Section 337 *of the Tariff Act of 1930*, L/6439-36S/345 (7 November 1989), para 5.9; *Commission of the European Communities v Ireland*, Case 113/80, [1981] ECR 1638; *Vogt v Germany* (App No 17851/91) [1995] ECHR 29, para 52; *Silver v UK* (App Nos 5947/62, 6205/73 and 7052/75) [1983] ECHR 5, para 97; *Arctic Sunrise (Netherlands v Russia)* (2016) 55 ILM 5, para 366; *South China Sea Arbitration (Jurisdiction and Admissibility) (Philippines v China)* (2016) 55 ILM 805, para 107.

[103] According to the ICJ, 'the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity'. See *Qatar v Bahrain* (n 10) para 212.

[104] *North Sea Continental Shelf* (n 9) 186 (Dissenting Opinion Tanaka).

[105] ibid.

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adjusted only should special circumstances so require. In practice, the equitableness of an equidistance line can be assessed only by tracing such a line on a map, however provisionally. Special circumstances are the factors against which the equitableness of an equidistance line is subsequently evaluated, as well as the factors determining the eventual adjustment of such an equidistance line. The rule-exception relationship between equidistance and special circumstances and the equitable solution requirement under Article 15 indicate that, absent any agreement between the States concerned, the appropriate method to trace territorial sea boundaries involves two steps. First, a provisional equidistance line must be drawn; second, the equitableness of such a line must be evaluated by reference to special circumstances, which also determine the extent of the equidistance line's eventual adjustment.

This two-stage approach does not seem to *necessarily* follow from the rule-exception relationship between equidistance and special circumstances. Plausibly, the character of special circumstances as exceptions to equidistance could equally lead one to conclude that Article 15 requires international tribunals not to apply equidistance *tout court* if special circumstances are found to exist. This appears to be the interpretation in *Nicaragua v Honduras*, in *Bangladesh/Myanmar* and in *Bangladesh v India*. Nevertheless, broader considerations of predictability discourage this open-ended interpretation, which would inevitably emphasize judicial discretion to the detriment of legal certainty.[106] Moreover, the equitable solution requirement emerging from UNCLOS's drafting history provides a link between the two components of Article 15, which thus operate in tandem to achieve the equitable boundary objective. Suggesting that special circumstances would displace equidistance threatens to overlook the need to achieve an equitable solution in delimiting territorial sea boundaries.[107]

The restrictive interpretation of special circumstances under Article 15, which suggests the application of the two-stage method, has the aim of increasing predictability and certainty in territorial sea delimitation. Certainty and predictability could be seen as corollaries of the UNCLOS's object and purpose of establishing 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources'.[108] According to the arbitral tribunal in *Bangladesh v India*,

[106] Former ICJ President Guillaume commented that '[a]ny system of law requires a minimum of certainty, and any dispute settlement system a minimum of foreseeability'. See G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 JIDS 6. See section IV.B below.

[107] Although some may argue that using equidistance could threaten to overlook the equitable solution objective, special circumstances under LOSC art 15 operate in order to temper the strictness of equidistance. Therefore, while equidistance could be too strict a delimitation method, special circumstances ensure that its strictness be tempered in order to achieve an equitable solution.

[108] *Nicaragua v Colombia* (n 57) para 128.

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'transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process'.[109] Similarly, in *Libya/Malta* the ICJ found that maritime delimitation 'should display consistency and a degree of predictability'.[110] International tribunals appear to be developing a uniform law of maritime delimitation, as showed by the numerous cross-references between the decisions of the ICJ, ITLOS and arbitral tribunals.[111] De Brabandere argued that the references by the ICJ to the maritime delimitation decisions of other international tribunals 'may indicate a … trend towards showing that the ICJ's decision is consistent with the case law of other courts and tribunals'.[112] Applying Article 15 by means of the two-stage approach could increase predictability and certainty in the law of maritime delimitation, an objective avowedly pursued by international tribunals.

Moreover, it would also be consistent with the pre-UNCLOS cases on continental shelf delimitation under Article 6 CSC. Since Article 6 CSC and Article 15 are based on the same underlying logic, the interpretation of the former should inform the interpretation of the latter. International tribunals decided three cases on continental shelf delimitation prior to UNCLOS's entry into force in 1994. First, *North Sea Continental Shelf* was decided under customary international law, which at the time did not include Article 6 CSC.[113] Nevertheless, in its 1969 judgment the Court stated that legal thinking on continental shelf delimitation was:

> governed by two beliefs;—namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance

[109] *Bangladesh v India* (n 52) para 339.

[110] *Continental Shelf (Libya/Malta)* (Judgment) [1985] ICJ Rep 13, para 45. Similarly, in *Black Sea* the Court stated that drawing a provisional equidistance line as a first stage in delimiting the EEZ and continental shelf was '[i]n keeping with its settled jurisprudence on maritime delimitation', implying that there is a settled and consistent manner to delimit maritime boundaries. See *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61, para 118.

[111] See *Bangladesh/Myanmar* (n 45) paras 382–3; *Nicaragua v Colombia* (n 57) paras 178–9; *Maritime Delimitation between Barbados and Trinidad and Tobago (Barbados v Trinidad and Tobago)* (2006) XXVII RIAA 147, paras 234–5. This article does not suggest that international tribunals have achieved a satisfactory level of consistency in their delimitation jurisprudence, but simply that there seems to be a move in that direction. For some recent criticism of the international tribunals' approach to delimitation, see MD Evans, 'Maritime Boundary Delimitation: Whatever Next?' in J Barrett and R Barnes (eds), *Law of the Sea – UNCLOS as a Living Treaty* (BIICL 2016) 41.

[112] E De Brabandere, 'The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea' (2016) 15 Law and Practice of International Courts and Tribunals 45 and 51. See also H Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 14; GI Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 188–90.

[113] *North Sea Continental Shelf* (n 9) paras 46 and 81.

> of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement,—and in pursuance of the second that it introduced the exception in favour of 'special circumstances'.[114]

On one hand, the Court upheld the link between equitable principles and special circumstances. On the other hand, it clarified the character of special circumstances as an exception to equidistance for the cases where equidistance yields an inequitable solution.

Second, the 1977 Court of Arbitration in *Continental Shelf (France/UK)* implicitly applied the two-stage approach.[115] In delimiting the boundary around the Channel Islands, the Court of Arbitration noted that '[t]he existence of the Channel Islands close to the French coast, if permitted to divert the course of that mid-Channel median line, effects a radical distortion of the boundary creative of inequity',[116] and only subsequently decided to enclave the Channel Islands.[117] The Court of Arbitration first considered that the median line proposed by the UK would have been inequitable, and then it drew an alternative boundary. The same procedure was adopted in delimiting the boundary in the Atlantic region,[118] in relation to which the Court of Arbitration held that it was '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'.[119] Third, in the 1993 *Jan Mayen* judgment the ICJ found, with respect to continental shelf delimitation, that:

> since it is governed by Article 6 of the 1958 Convention, and the delimitation is between coasts that are opposite, it is appropriate to begin by taking provisionally the median line between the territorial sea baselines, and then enquiring whether 'special circumstances' require 'another boundary line'. Such a procedure is consistent with the words in Article 6, 'In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line'.[120]

[114] ibid, para 55.

[115] Some authors argued that the Court of Arbitration rejected that equidistance and special circumstances are the rule and the exception under art 6 CSC, but this view does not reflect the practical method employed by the Court of Arbitration to delimit the boundary. See DW Bowett, 'The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches' (1978) 49 BYBIL 5; DM McRae, 'Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration' (1977) 15 Canadian YBIL 182; ED Brown, 'The *Anglo-French Continental Shelf Case*' (1979) 16 San Diego L Rev 493.

[116] *Continental Shelf (France/UK)* (1977) XVIII RIAA 3, para 199.

[117] ibid, paras 201–2.

[118] ibid, paras 244–51.

[119] ibid, para 249. The Court of Arbitration's approach to the delimitation around the Channel Islands and in the Atlantic region also emerges from the map annexed to the award.

[120] *Jan Mayen* (n 8) para 49.

The Court also underscored the direct connection between special circumstances and the 'equitable solution', since the 'special circumstances of Article 6 of the 1958 Convention … are intended to enable the achievement of an equitable result'.[121] The pre-UNCLOS cases concerning Article 6 CSC all upheld the role of special circumstances as exceptions to equidistance, as well as the need for delimitation to achieve an 'equitable solution'.

IV. ASSESSING JUDICIAL UNCERTAINTY: A CRITIQUE OF THE JURISPRUDENCE

The recent case law on territorial sea delimitation casts a shadow of uncertainty over a question generally perceived as being uncontroversial. This section critiques the territorial sea delimitation jurisprudence, discussing the reasons for the changed understanding of Article 15, the practical impact on future delimitation cases, as well as the character of coastal instability as a special circumstance.

A. Reasons for Judicial Uncertainty

The text and drafting history of Article 15 suggest that the territorial sea should be delimited in two stages. However, in the last decade international tribunals have shown a degree of hesitation in applying this delimitation method. The reasons for this hesitation are not apparent, especially given the lack of any explanations in the relevant judicial decisions since *Nicaragua v Honduras*.

However, certain judges have commented on the use of Article 15 in their individual opinions.[122] In *Bangladesh/Myanmar*, all judges agreed on the manner in which the territorial sea was delimited, with Judge Gao briefly commenting on the issue. Discussing the adjustment of the boundary, Judge Gao wrote that:

> Article 15 of the Convention provides for the median line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each of the two States is measured. Accordingly, the adjusted equidistance line should be a line every point of which is approximately equidistant from the nearest points on the baselines of the two States, as required under the Convention.[123]

Judge Gao referred to the 'adjusted equidistance line', which may entail that, in his view, the final territorial sea boundary must be based on the preliminary

[121] ibid, para 56. On *Jan Mayen*, see RR Churchill, 'The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation' (1994) 9 International Journal of Marine and Coastal Law 15; MD Evans, 'Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)' (1994) 43 ICLQ 702.

[122] In *Bangladesh v India*, PS Rao explained that he 'happily' concurred with his colleagues on territorial sea delimitation. See *Bangladesh v India* (n 52) para 2 (Concurring and Dissenting Opinion of Dr. PS Rao).

[123] *Bangladesh/Myanmar* (n 45) para 58 (Separate Opinion Gao).

establishment of an equidistance line. Moreover, Judge Gao wrote of the territorial sea boundary as a line 'every point of which is approximately equidistant from the nearest points on the baselines of the two States', which seems to suggest that an adjusted territorial sea boundary should be as close to an equidistance line as possible. Judge Gao's comments appear to agree with the argument of this article, which raises the question of the reason why he agreed with the Tribunal's majority concerning the delimitation of the territorial sea in that case.

The individual opinions in *Nicaragua v Honduras* are the most interesting in the context of this article. Judge Koroma's views seem to have been strongly influenced by the parties' arguments, as in his separate opinion he emphasized that neither State had requested a territorial sea boundary based on equidistance.[124] However, Judge Koroma did not elaborate on his wholesale approval of the Court's approach to Article 15.[125] By contrast, Judge ad hoc Torres Bernárdez's dissenting opinion criticized the Court's method for territorial sea delimitation. He took issue with the Court's abandonment of equidistance, since he considered the Court to be motivated by the policy aim of assimilating, in the circumstances of that case, the delimitation method used within 12 nm to the delimitation method used beyond 12 nm.[126] Judge ad hoc Torres Bernárdez's assessment is correct. The equidistance line would presumably not have been inequitable within 12 nm, and it was feasible to construct it despite the coastal instability around Cape Gracias a Dios.[127] Conversely, equidistance might have been less convincing as a starting point beyond 12 nm. Nevertheless, this difference did not justify abandoning equidistance in the territorial sea, especially as it is the primary delimitation method under Article 15. Judge ad hoc Torres Bernárdez considered the equidistance line to be the 'general rule' for territorial sea delimitation,[128] which is a sound interpretation of Article 15.[129] He also wrote that:

> the efforts of recent years to make judicial decisions on maritime delimitations more objective by firstly drawing a provisional equidistance line, even if this subsequently has to be adjusted in the light of 'special' or 'relevant' circumstances, have thus been set aside. There is thus a return to the idea of *sui generis* solutions for each delimitation, in other words a relapse into pragmatism and subjectivity.[130]

[124] *Nicaragua v Honduras* (n 33) para 11 (Separate Opinion Koroma).
[125] ibid, para 18 (Separate Opinion Koroma).
[126] ibid, para 121 (Dissenting Opinion Torres Bernárdez).
[127] Section IV.C below. In *North Sea Continental Shelf*, the ICJ noted that 'the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters'. See *North Sea Continental Shelf* (n 9) para 59.
[128] *Nicaragua v Honduras* (n 33) para 161 (Dissenting Opinion Torres Bernárdez).
[129] Section III.A above.
[130] *Nicaragua v Honduras* (n 33) para 122 (Dissenting Opinion Torres Bernárdez).

Judge ad hoc Torres Bernárdez referred to the case-by-case approach to delimitation typical of the 1980s, in which international tribunals decided which delimitation method to adopt based on the relevant circumstances of each case, as exemplified by the decisions in *Tunisia/Libya* and *Guinea/Guinea-Bissau*.[131]

This criticism is cogent, although possibly overstated in the light of subsequent delimitation decisions. While Judge ad hoc Torres Bernárdez's remarks were correct in the context of *Nicaragua v Honduras*, ITLOS and the *Bangladesh v India* tribunal did not apply an ad hoc delimitation method but a variant of the two-stage approach.[132] Moreover, Judge ad hoc Torres Bernárdez suggested that the correct manner of dealing with coastal instability was not with reference to Article 15, but by looking to LOSC Article 7 on straight baselines.[133] However, this point is unpersuasive. As straight baselines connect a number of basepoints of a State whose coast is 'deeply indented and cut into', or 'if there is a fringe of islands along the coast in its immediate vicinity', they still require a State to identify such points on its coast. Coastal instability could complicate the establishment of straight baselines, in the same manner as it could complicate the selection of suitable base points for the drawing of an equidistance line. Moreover, straight baselines are established by the coastal State, and in *Nicaragua v Honduras* only Honduras had deposited with the UN Secretary-General the list of geographical coordinates identifying its territorial sea baseline, as required under LOSC Article 16.[134] Therefore, using straight baselines to remedy the lack of suitable base points for the construction of an equidistance line would not have been a viable solution.

Judge Ranjeva also issued a separate opinion in *Nicaragua v Honduras*, discussing territorial sea delimitation under Article 15. Judge Ranjeva argued that:

> [t]he literal interpretation of Article 15 of UNCLOS advocates the equidistance or median line for territorial sea delimitations when the coasts of the States are adjacent or opposite. Exceptions can be made to that rule of principle if special circumstances exist and if it is necessary to delimit the territorial sea in another manner. The use of the adjective 'necessary', which implies a notion of

[131] *Continental Shelf (Tunisia/Libya)* (Judgment) [1982] ICJ Rep 13; *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau)* (1985) XIX RIAA 149.

[132] Section II.B above.

[133] *Nicaragua v Honduras* (n 33) para 161 (Dissenting Opinion Torres Bernárdez). LOSC art 7(1) provides that '[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured'.

[134] *Nicaragua v Honduras* (n 33) para 278. Dealing with the geographical coordinates for base lines also established under LOSC art 7, LOSC art 16(2) provides that '[t]he coastal State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations'.

> inescapable constraint, prescribes a very strict and restrictive interpretation of the conditions which may, exceptionally, justify abandoning the general rule.[135]

Judge Ranjeva focused on whether the reasons on which the ICJ based the bisector line met the 'necessity test' set by Article 15 to justify establishing a boundary at variance with equidistance. He considered that 'the notion of necessity involves an absence of solution such that no alternative can be envisaged', concluding that '[t]he difficulties encountered are not of themselves sufficient to justify the necessity of abandoning the general rule'.[136] The upshot of the Court's reasoning is to give 'a rule-making function to the special circumstances', which contradicts Article 15 as well as the Court's previous jurisprudence.[137] Judge Ranjeva thus concluded that the Court had delimited the territorial sea using the wrong method. However persuasive, Judge Ranjeva's comments fail to fully elucidate the reasons that led the Court to give a 'rule-making function' to special circumstances.

Based on the individual opinions issued in *Nicaragua v Honduras*, *Bangladesh/Myanmar* and *Bangladesh v India*, it is difficult to grasp why international tribunals have recently strayed from the earlier jurisprudence. Both the judgments and the individual opinions do not convey the judges' dissatisfaction with the two-stage approach as applied in *Qatar v Bahrain*. International tribunals have explicitly subscribed to this approach even in the last decade, as demonstrated by the fact that, before delimiting the territorial sea, they would explicitly cite the part of the *Qatar v Bahrain* judgment setting forth the two-stage approach.[138] International tribunals simply changed their interpretation of Article 15, which shows inconsistency in the exercise of their judicial function. In *Nicaragua v Honduras*, the fountainhead of the change in territorial sea delimitation jurisprudence, it is plausible that the parties' arguments played an important role in shaping the transformed interpretation of Article 15. In that case neither party requested the Court to draw the boundary as an equidistance line, which has probably influenced the Court in its judgment.[139] Later cases have perpetuated this influence.

Remarkably, the changed understanding of Article 15 cuts across two standing tribunals, the ICJ and ITLOS, as well as an arbitral tribunal constituted under Annex VII UNCLOS. On one hand, the same approach to territorial sea delimitation in *Bangladesh/Myanmar* and *Bangladesh v India* could be explained by reference to the composition of the arbitral tribunal in the latter case. Judges Cot, Mensah and Wolfrum all sat on ITLOS when *Bangladesh/Myanmar* was decided, and also were three of the five arbitrators

[135] *Nicaragua v Honduras* (n 33) para 4 (Separate Opinion Ranjeva).
[136] ibid, para 7 (Separate Opinion Ranjeva).
[137] ibid, paras 8 and 11–12 (Separate Opinion Ranjeva).
[138] *Nicaragua v Honduras* (n 33) para 268; *Bangladesh v India* (n 52) para 246. ITLOS did not cite any previous decision on the territorial sea delimitation method, see *Bangladesh/Myanmar* (n 45) paras 126–9.
[139] Section II.B above.

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sitting on the *Bangladesh v India* tribunal.[140] On the other hand, the adoption of the *Nicaragua v Honduras* approach in the Bay of Bengal cases cannot be explained by reference to the composition of ITLOS and the *Bangladesh v India* tribunal. However, it is significant that, as often occurs in maritime delimitation, a number of jurists were involved as legal advisers either in two or in all three of the territorial sea delimitation cases since *Nicaragua v Honduras*. While it is implausible that the similar interpretation of Article 15 by these different tribunals depended entirely on the same legal counsel being involved, this may have played a role. Conceivably, the ITLOS Special Chamber's forthcoming decision in *Ghana/Côte d'Ivoire* could lend support to the institutional connection between the ICJ and ITLOS, if the approach to the interpretation of Article 15 adopted in *Nicaragua v Honduras* is upheld. The ITLOS Special Chamber in *Ghana/Côte d'Ivoire* is composed of five judges, one of them being Judge Abraham, currently the ICJ's President and a judge at the time when the Court decided *Nicaragua v Honduras*. The academic literature has already credited Judge Abraham's presence on the ITLOS Special Chamber for the adoption by ITLOS of the plausibility requirement for the prescription of provisional measures under LOSC Article 290.[141] Therefore, Judge Abraham's potential influence on the ITLOS Special Chamber's approach to territorial sea delimitation is not wholly speculative.

It is difficult to identify the precise reasons that have led international tribunals to change their understanding of Article 15, and therefore to invert the two stages of the territorial sea delimitation method. The parties' arguments in the cases since 2007, and especially in *Nicaragua v Honduras*, seem to have played a major role. A degree of institutional connection between international tribunals is also a plausible reason for judicial uncertainty since 2007, although it could not fully explain the link between the ICJ on one hand, and ITLOS and the *Bangladesh v India* tribunal on the other hand. It is likely that a combination of all reasons mentioned above have contributed to abandoning the earlier interpretation of Article 15 in favour of the less convincing interpretation which gives a more central role to special circumstances in territorial sea delimitation. The fact remains that there is no explicit suggestion in the case law that the two stages of the territorial sea delimitation method were inverted as a result of judicial dissatisfaction with the two-stage approach as applied in *Qatar v Bahrain*.

[140] The other two arbitrators in *Bangladesh v India* were Ivan Shearer and PS Rao.

[141] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Provisional Measures) Order of 25 April 2015, para 58, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_prov_meas/C23_Order_prov.measures_25.04.2015_orig_Eng.pdf>. See A Sarmiento Lamus and R González Quintero, 'Current Legal Developments in the International Tribunal for the Law of the Sea' (2016) 31 International Journal of Marine and Coastal Law 166; Y Tanaka, 'Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the *Ghana/Côte d'Ivoire* Order of 25 April 2015 before the Special Chamber of ITLOS' (2015) Ocean Development and International Law 317–19.

B. Implications of Judicial Uncertainty

The recent change in the jurisprudence on territorial sea delimitation could have important practical effects on future disputes. The two-stage approach under Article 15 envisages that a provisional equidistance line could be adjusted should special circumstances so require. However, no adjustment would take place if the two stages of the delimitation process were inverted, and special circumstances were appraised before plotting an equidistance line. The *Qatar v Bahrain* approach entails that the final outcome of delimitation is a line resembling an equidistance line. Under this approach, the choice is between a strict equidistance line, should special circumstances be absent, and a modified equidistance line, should special circumstances justify an adjustment. Under the *Nicaragua v Honduras* approach the final territorial sea boundary may have nothing in common with an equidistance line. Therefore, under this approach a modified equidistance line as a territorial sea boundary would be highly unlikely. Since special circumstances are assessed before an equidistance line is plotted, if they are found to exist an international tribunal would be compelled to draw a boundary according to a method at variance with equidistance. For example, such a method could be the angle-bisector, the perpendicular to the coast, a line running along a parallel of latitude, or a combination thereof.

While this was not the final outcome in either *Bangladesh/Myanmar* or *Bangladesh v India*, it was the consequence of the ICJ's findings in *Nicaragua v Honduras*. Having found that coastal instability constituted a special circumstance, the Court held that it could not establish an equidistance line, even provisionally, and opted to draw a bisector line instead.[142] If an international tribunal finds that special circumstances exist at the first stage of territorial sea delimitation, the logically necessary consequence is that an equidistance line cannot be drawn at the second stage of the delimitation process. However, this result is not in conformity with Article 15 as interpreted above,[143] and contradicts the pre-2007 case law.[144]

A finding that special circumstances exist would give unfettered discretion to the international tribunal concerned to select any delimitation method it might deem fit in a given case. This unfettered discretion does not seem justified under Article 15, whose drafting history is permeated by the aim of limiting the freedom of international tribunals to choose the method for delimiting the territorial sea. Territorial sea delimitation also aims to achieve an 'equitable solution'.[145] In EEZ and continental shelf delimitation, the achievement of an 'equitable solution' is conceived as an *ex post* appreciation by international tribunals. By contrast, with respect to territorial sea delimitation the ILC and

[142] Section II.B above.
[143] Sections III.A and III.B above.
[144] Sections II.A and III.B above.
[145] Section III.A.

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the UNCLOS drafters evaluated *ex ante* which method was capable of achieving an 'equitable solution', establishing that such a method is equidistance adjusted should special circumstances so require. Therefore, the 'equitable solution' in territorial sea delimitation is partially distinct from the 'equitable solution' in EEZ and continental shelf delimitation, as in the former case the 'equitable solution' is to be achieved within the limits of the equidistance line principle that Article 15 renders obligatory for territorial sea delimitation.

The question arises concerning whether the territorial sea delimitation methods used in *Qatar v Bahrain* and *Nicaragua v Honduras* could be reconciled. The *Bangladesh v India* tribunal seemed to attempt such a reconciliation by enquiring into special circumstances both before and after plotting a provisional equidistance line.[146] However, this *modus operandi* is problematic. Under Article 15, special circumstances have the function of modifying a provisional equidistance line,[147] which entails that, if any factor should be capable of determining the use of a delimitation method other than equidistance, it should belong to a category distinct from that of special circumstances. Judge Ranjeva briefly mentioned this hypothetical *tertium genus* of circumstances in his separate opinion in *Nicaragua v Honduras*. He argued that:

> [i]n paragraph 272, the present Judgment refers to 'particular circumstances'. The Court thus invents a third category of circumstances alongside the special circumstances and the relevant circumstances of the Convention on the Law of the Sea. That new category is thus of an unspecified nature …. Those circumstances, as distinct from the circumstances known as 'special or relevant', are no longer assigned the merely corrective function prescribed by the law and all jurisprudence to date, but instead a rule-making function.[148]

Judge Ranjeva's criticism might seem exaggerated. First, it is unclear whether the Court specifically intended to identify a third category of circumstances. Secondly, in the later cases neither ITLOS nor the *Bangladesh v India* tribunal mentioned 'particular circumstances' in delimiting the territorial sea, the EEZ and the continental shelf.

'Particular circumstances' lack any basis in positive international law, not being mentioned either under LOSC Article 15, 74 and 83. They are not mentioned in the pre-2007 case law either. Reconciling the *Qatar v Bahrain* and *Nicaragua v Honduras* approaches cannot be accomplished by introducing the category of 'particular circumstances', unless one accepts the

[146] Section II.B above.

[147] In *Jan Mayen*, the ICJ stated that 'special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle'. See *Jan Mayen* (n 8) para 55. Although the Court was referring to special circumstances under art 6 CSC, special circumstances under LOSC art 15 are characterized by the same underlying logic. See section III.A above.

[148] *Nicaragua v Honduras* (n 33) para 16 (Separate Opinion Ranjeva).

possibility of overt judicial law-making.[149] Moreover, Article 15 does not envisage that the equidistance could be substituted for any other delimitation method. It follows that reconciling the two approaches used in *Qatar v Bahrain* and in *Nicaragua v Honduras* does not seem viable under current international law, and that, consequently, international tribunals must choose between applying either one or the other.

Despite the problems discussed above, evaluating special circumstances as a first step in territorial sea delimitation could increase transparency with respect to the selection of base points for constructing the equidistance line. Base points could be located on islands, which entails that international tribunals may decide at the first stage of the delimitation process the effect of the islands on which base points are to be located. Selecting base points on islands could amount to evaluating special circumstances *sub rosa* at the first stage of the delimitation process. *Black Sea* exemplifies this practice, although with respect to the EEZ and continental shelf. In that case, the ICJ had jurisdiction to delimit only the continental shelf and EEZ,[150] and applied the three-stage approach envisaging the evaluation of relevant circumstances after the establishment of a provisional equidistance line.[151] Before drawing the equidistance line, the Court held that it could not place a base point on Serpents' Island. Therefore, its decision seemingly amounted to a surreptitious finding on Serpents' Island's effect before the second stage of delimitation.[152]

Inverting the two stages of the territorial sea delimitation method could avoid doubtful decisions on the effect of islands comparable to *Black Sea*. In *Bangladesh/Myanmar*, ITLOS evaluated special circumstances before establishing an equidistance line. ITLOS discussed whether St. Martin's Island should have been considered a special circumstance, and, as a consequence, whether it should have been awarded no effect in delimiting the territorial sea. The Tribunal concluded that St. Martin's Island was not a special circumstance, and gave it full effect in territorial sea delimitation by using it as a base point.[153] ITLOS did not decide the effect of St. Martin's Island *sub rosa*, since it had explicitly stated that it would consider special circumstances before drawing the equidistance line. Considering special circumstances at the first step of delimitation would thus avoid surreptitiously evaluating the effect of islands before drawing an equidistance line. However, inverting the two stages of territorial sea delimitation is not an appropriate interpretation of Article 15,

[149] Leading commentators have expressed caution with regard to the possibility of law-making by international tribunals. See J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 37–41; H Charlesworth, 'Law-making and Sources' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 197; A Cassese, *International Law* (2nd edn, OUP 2005) 194; R Jennings and A Watts, *Oppenheim's International Law* (9th edn, Longman 1992) vol I, 41–2.

[150] *Black Sea* (n 110) para 30.

[151] ibid, paras 115–22.

[152] ibid, para 149.

[153] *Bangladesh/Myanmar* (n 45) paras 146–52.

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and, accordingly, another means should be found to avoid determining the effect of islands *sub rosa* at the first stage of the delimitation process.

The post-2007 jurisprudence on territorial sea delimitation could have consequences for the delimitation of the EEZ and continental shelf. Delimitation beyond 12 nm is effected by means of a three-stage approach, identical to the two-stage approach to territorial sea delimitation but for the addition of a third stage concerning proportionality. The two-stage approach under Article 15 was inspired by the two-stage approach under Article 6 CSC, as both provisions are based on the same underlying logic.[154] Similarly, a change in the understanding of Article 15 could lead to a comparable change in the approach to delimitation beyond 12 nm, emphasizing the role of relevant circumstances in the selection of methods alternative to equidistance. In *Nicaragua v Honduras*, the ICJ rejected the use of an equidistance line for delimitation beyond 12 nm based on the same reasons that had led it to not draw an equidistance line in the territorial sea. The Court's reasoning on equidistance seemed to embrace all maritime zones, as the judgment makes no clear distinction between delimitation within and beyond 12 nm. The Court only reasoned on the basis of Article 15, decided for a bisector line, and simply extended that line up to the boundary's end-point situated at 200 nm from the States' coasts. This lack of clarity is regrettable.

Some individual opinions in post-2007 cases show that it is far from implausible that the reasoning in *Nicaragua v Honduras* might be extended to delimitation beyond 12 nm. In his separate opinion in the 2012 *Nicaragua v Colombia* judgment, Judge Abraham criticized the ICJ for having used the equidistance-based three-stage approach. He noted there were '*circonstances particulières justifiant d'ajuster la ligne médiane provisoire*'.[155] Judge Abraham referred to 'particular circumstances' as a means to adjust a provisional equidistance line, and not as reasons to draw a boundary at complete variance with equidistance. Nevertheless, his use of the expression 'particular circumstances' is reminiscent of the Court's judgment in *Nicaragua v Honduras*, as well as of Judge Ranjeva's criticism against it. Similarly to Judge Abraham, Judge Gao also mentioned 'particular circumstances' in his separate opinion in *Bangladesh/Myanmar*. Judge Gao explicitly cited with approval the ICJ's statement at paragraph 272 of the *Nicaragua v Honduras* judgment, in which the Court held that 'in particular circumstances, there may be factors which make the application of the equidistance method inappropriate'.[156] Although the ICJ's statement mainly

[154] Section III.A above.

[155] *Nicaragua v Colombia* (n 57) para 23 (Separate Opinion Abraham). Judge Abraham also mentioned 'particular circumstances' in other passages of his separate opinion appended to the 2012 *Nicaragua v Colombia* judgment, which suggest he may have attached some importance to this nomenclature. See ibid, paras 22, 26, 27 and 31 (Separate Opinion Abraham).

[156] *Bangladesh/Myanmar* (n 45) para 28 (Separate Opinion Gao).

applied to territorial sea delimitation, Judge Gao referred to it in the context of delimitation beyond 12 nm. Judge Gao's would seemingly favour resorting to 'particular circumstances' to justify the abandonment of equidistance in delimitation beyond 12 nm. This would extend the *Nicaragua v Honduras* judgment to delimitation beyond the territorial sea. Based on Judge Abraham's and Judge Gao's views, extending the reach of 'particular circumstances' from territorial sea delimitation to delimitation beyond 12 nm does not seem entirely implausible. However, this extension raises strong concerns for predictability and certainty in continental shelf and EEZ delimitation.

The *Nicaragua v Honduras* approach could also influence delimitation beyond 12 nm due to the vagueness of LOSC Articles 74 and 83, which only require that delimitation must achieve an 'equitable solution'. Those provisions make no mention of a compulsory method for delimiting the EEZ and the continental shelf, which in principle emphasizes the discretion of international tribunals in choosing how to delimit boundaries beyond 12 nm.[157] With regard to continental shelf and EEZ delimitation, the only bastion against a case-by-case approach is the quest for consistency with previous judicial decisions, which is not a matter of binding positive law but only of good judicial policy.

C. Judicial Uncertainty, Coastal Instability and Special Circumstances

In *Nicaragua v Honduras*, the ICJ established a non-equidistant territorial sea boundary due to the lack of suitable base points for the construction of an equidistance line. The Court could not identify such base points due to the high coastal instability at the mouth of the River Coco. The Court found that 'whatever base points would be used for the drawing of an equidistance line, the configuration and unstable nature of the relevant coasts, including the disputed islands formed in the mouth of the River Coco, would make these base points … uncertain within a short period of time'.[158] Building on the ICJ's findings, Bangladesh made the same argument in the dispute against India, which the arbitral tribunal ultimately rejected.[159]

This argument suggests that it is inappropriate to draw an equidistance line using base points which could disappear in the future owing to the high degree of coastal instability in the area to be delimited. *Nicaragua v Honduras* and *Bangladesh v India* raise the question concerning whether Article 15 allows an international tribunal not to draw an equidistance line as a first step in

[157] The international tribunals' discretion in drawing maritime boundaries in the continental shelf and in the EEZ is linked to the flexibility of delimitation beyond 12 nm. See Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart 2006); T Cottier, *Equitable Principles of Maritime Boundary Delimitation* (CUP 2015). On the approach to delimitation beyond 12 nm up to 1989, see MD Evans, *Relevant Circumstances and Maritime Delimitation* (OUP 1989).

[158] *Nicaragua v Honduras* (n 33) para 280.

[159] See section II.B above.

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territorial sea delimitation if suitable base points are lacking for reasons of coastal instability. According to Rothwell and Stephens, the *Nicaragua v Honduras* judgment 'indicates that while equidistance or median line is the starting point for territorial sea delimitation, it is not necessarily conclusive and may be displaced by the special circumstances of the case'.[160] However, it could not be said that coastal instability is a special circumstance. Special circumstances are only the means to adjust an already-drawn equidistance line. Drawing an equidistance line necessitates the prior identification of suitable base points, which entails that the lack of such base points cannot be seen as a special circumstance.

In the ILC's work preceding the 1958 Geneva Conventions, the subject of coastal instability was hardly ever mentioned, and was not seen as a special circumstance within the meaning of Article 12 TSC or Article 6 CSC. The 1952 Report of the Special Rapporteur contained a Draft Article 12 on the delimitation of the territorial sea at the mouth of a river, whose second paragraph provided that '[i]f the river flows into an estuary, the rules applicable to bays apply to the estuary'.[161] The commentary to that provision stated that the Draft Article was:

> open … to the objection that an estuary does not admit of a general and sufficiently firm definition; to determine whether an estuary is involved, it is necessary to consider such factors as the distance between the coasts, the nature of the coastline and alluvial deposits, currents and the like'.[162]

Although the commentary mentioned the 'nature of the coastline and alluvial deposits', such factors were seen as relevant to determine what an estuary was for the purpose of the application of the legal provision on bays, and not to delimit the territorial sea in the presence of an estuary. At the ILC's 320th meeting, Mr. Salamanca remarked on the formation of new strips of land at the estuary of the River Plate, adding that Argentina and Uruguay 'had agreed not to attempt any demarcation because of the constantly changing contour of the land'.[163] However, Mr. Salamanca's comments concerned the definition of an estuary, and not territorial sea delimitation.[164] The precursors of Article 15 were not drafted with the intention of allowing departures from equidistance based on coastal instability.[165]

The argument that it is inappropriate to draw an equidistance line by using base points which are more or less likely to disappear in the future is linked to the issue of the stability of international boundaries. Generally, once a

[160] Rothwell and Stephens (n 1) 428.
[161] *Report on the Régime of the Territorial Sea*, UN Doc A/CN.4/53 (3 April 1952) 31.
[162] ibid.
[163] *ILC Yearbook (1955)*, vol I, 220, para 2 (Salamanca).
[164] ibid 220, para 5 (Salamanca).
[165] Churchill wrote that 'the principal drafters of Article 6 … considered special circumstances as embracing (and apparently limited to) exceptional configurations of the coast, and the presence of islands and navigable channels'. See Churchill (n 122) 18.

boundary has been established, whether on land or at sea, it will remain unchanged,[166] unless the States concerned agree on a new boundary. In *Nicaragua v Honduras*, the Court seemed to reject this principle by stating that 'continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future'.[167] However, the Court's approach is unsound. An international tribunal could not possibly be expected to predict the evolution of coastal geography, as countless variables would render that exercise purely speculative. An international tribunal seised of a delimitation dispute must decide the case in the light of the geographical facts prevailing at the time of the delimitation. The ICJ implicitly changed the view it had previously expressed in *Nicaragua v Honduras*. In *Black Sea*, the Court found that 'the delimitation exercise leads it to use as base points those which the geography of the coast identifies as a physical reality at the time of the delimitation'.[168] The arbitral tribunal in *Bangladesh v India* expanded on the ICJ's statement in *Black Sea*. The arbitral tribunal held that it 'must … choose base points that are appropriate in reference to the time of the delimitation, i.e. the date of its Award'.[169] Therefore, the tribunal 'need not address the issue of the future instability of the coastline',[170] and would 'determine the appropriate base points by reference to the physical geography at the time of the delimitation and to the low-water line of the relevant coasts'.[171] In other words:

> [t]he issue is not whether the coastlines of the Parties will be affected by climate change in the years or centuries to come. It is rather whether the choice of base points located on the coastline and reflecting the general direction of the coast is feasible in the present case and at the present time.[172]

A concern of the ICJ in *Nicaragua v Honduras* was that a possible equidistance line would be constructed using only two base points, which could result in a distortion of the maritime boundary the further the line would protrude into the sea. The Court held that:

> the pair of base points to be identified on either bank of the River Coco at the tip of the Cape would assume a considerable dominance in constructing an equidistance line, especially as it travels out from the coast. Given the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line.[173]

However, the Court's concerns were ill-founded. Subsequent cases have shown that an equidistance line can be constructed using a limited number of base points located in the close proximity of the land boundary terminus. In *Black*

[166] *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, para 85; *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 34.
[167] *Nicaragua v Honduras* (n 33) para 277.
[168] *Black Sea* (n 110) para 131.
[169] *Bangladesh v India* (n 52) para 212.
[170] ibid, para 215.
[171] ibid, para 223.
[172] ibid, para 214.
[173] *Nicaragua v Honduras* (n 33) para 277.

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Sea, the Court identified two base points on the delta of the Danube, one on the Sulina Dyke on the Romanian side and one on Tsyganka Island on the Ukrainian side, which controlled the course of the equidistance line up to point 3 of the boundary, lying further than 30 nm from the coast.[174] Moreover, in *Bangladesh/Myanmar* ITLOS chose base points ß1 on Bangladesh's side and µ1 and µ2 on Myanmar's side, which controlled the course of the equidistance line up to point 10 on the boundary, located further than 25 nm from the coast.[175]

In these two cases, the base points identified close to the land boundary terminus determined the course of the equidistance line beyond the outer limit of the territorial sea. Therefore, it is also possible that base points having similar characteristics could have been used in *Nicaragua v Honduras* to delimit the territorial sea boundary, without that boundary being necessarily inequitable. As the ICJ found in *North Sea Continental Shelf*:

> the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are … comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out.[176]

V. THE PATH AHEAD

The differences in the judicial approaches to LOSC Article 15 are due to its vagueness. Although there is widespread agreement between States as to its wording, Article 15 is relatively unhelpful as to how it is to be applied in practice.[177] International courts and tribunals have applied Article 15 in distinct manners, revealing different views on its interpretation.

Although international tribunals readily accept the two-stage approach set forth in *Qatar v Bahrain*, their views are more uncertain when it comes to how that approach is to function practically. In his separate opinion appended to the *Nicaragua v Honduras* judgment, Judge Ranjeva observed that the Court gave a rule-making function to special circumstances, and said that:

> [i]n so doing, the [Court] reopen[ed] the debate that sank the diplomatic negotiations on maritime delimitation, whereas a rule-making provision concerning territorial sea delimitation has existed since 1958 in Article 12 of the Convention on the Territorial Sea, and the jurisprudence of the Court, particularly since the *Jan Mayen* case, has settled that debate.[178]

[174] *Black Sea* (n 110) paras 153–4.
[175] *Bangladesh/Myanmar* (n 45) paras 273 and 337–40.
[176] *North Sea Continental Shelf* (n 9) para 59.
[177] B Vukas, 'A Quarter of a Century after UNCLOS III: A Personal Recollection' in M Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law – Liber Amicorum Lucius Caflisch* (Martinus Nijhoff 2007) 801.
[178] *Nicaragua v Honduras* (n 33) para 8 (Separate Opinion Ranjeva).

Regrettably, the reasons for the judicial uncertainty concerning territorial sea delimitation are neither apparent from the relevant decisions, nor fully explained in the individual opinions. The wording of Article 15 and its drafting history do not justify the evolution of the case law on territorial sea delimitation since *Nicaragua v Honduras*. First, the text of Article 15 creates a rule-exception relationship between equidistance and special circumstances. Second, the drafting history of Article 15 shows a link between Article 15 itself, Article 12 TSC and Article 6 CSC, as well as the need to achieve an equitable solution in territorial sea delimitation.

The character of special circumstances as exceptions remedying the inequitableness of equidistance suggests that a sound method to apply Article 15 is the two-stage approach as established by the ICJ in *Qatar v Bahrain*. Absent an agreement, express or implied, between the States concerned, a boundary at variance with equidistance is legally permissible only if the equidistance line does not achieve an 'equitable solution'. This requires an appreciation of an equidistance boundary as a first step, to be followed by adjustment based on special circumstances. The case law on Article 6 CSC, which should guide the interpretation of Article 15, confirms such a conclusion. The inversion of the two stages of the territorial sea delimitation method may have important implications for future delimitations, both for the territorial sea itself, and for boundaries beyond 12 nm. Moreover, the difficulty in identifying suitable base points should not be seen as a reason not to start with the equidistance line. Overall, then, delimiting the territorial sea is currently not quite as uncontroversial as it may seem.