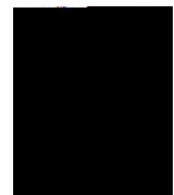
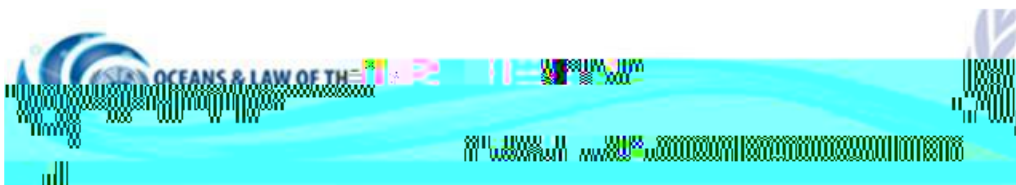


# **Economic Zone and Continental Shelf: The Role of Environmental and Sociocultural Factors as Relevant**

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## **ABSTRACT**

Since 1969, international courts and tribunals have applied different approaches to maritime boundary delimitation

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## LIST OF ACRONYMS

1958 Geneva Conventions	Convention on the Territorial Sea and the Contiguous Zone, Convention on the Continental Shelf, Convention on the High Seas, and Convention on Fishing and Conservation of the Living Resources of the High Seas
CS	Continental Shelf
CS*	Continental Shelf beyond 200nm
CS Convention	Convention on the Continental Shelf
ed./eds.	Editor/Editors
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishery Zone
IACHR	Inter-American Commission on Human Rights
Ibid.	Ibidem
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
No.	Number
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
RIAA	Reports of International Arbitral Awards
TS	Territor





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## INTRODUCTION

### Background

Maritime boundary delimitation between neighboring States is a matter that often causes disagreement and could potentially give rise to international disputes. While customary international law and the text of relevant legal instruments are clear on the method to be adopted for the delimitation of the territorial sea between States with opposite or adjacent coasts, the generally agreed method governing the delimitation of the exclusive economic zone (the is not settled.

For example, Articles 74(1) and 83(1) of the United Nations Convention on the Law of the Sea contain an identical rule governing the delimitation in the EEZ and continental shelf. However, neither of these two articles provide a clear method for delimitation besides calling for an agreement on the basis of international law, as referred to in Article 38 of the

This allows international courts and tribunals to exercise their discretions on what the applicable method should be; however, international courts and tribunals are still guided by a

On the contrary, Article 6 of the Con agreement between the parties or failing such agreement, an application of the median line or the principle of equidistance unless another boundary line is justified by special circumstances. It appears that the CS Convention contains a method for delimitation of the continental shelf; however, it does not address the delimitation in the EEZ. A general observation for the two conventions is that they are based on a fundamental rule that delimitation should be first effected by an agreement between the States concerned, making an agreement a cornerstone of maritime boundary delimitation.<sup>1</sup> However, when an agreement could not be reached, the two instruments enable the States concerned to have a suitable mechanism for the peaceful settlement of disputes to determine the appropriate delimitation line and the delimitation method.

The lack of a consensus of relevant provisions of the CS Convention and UNCLOS on the methodology for delimiting the EEZ and continental shelf is predictable given the widely

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<sup>1</sup> *Handbook on the Delimitation of Maritime Boundaries* (United Nations publication, 2000), p. 16.

accepted view that each maritime boundary is unique and therefore not susceptible to the development and application of general rules of delimitation. However, case law helps to demonstrate that when dealing with maritime boundary delimitation cases, international court and tribunals suggest that maritime boundaries need to be delimited in accordance with equitable principles, taking into account all of the relevant circumstances of the case so as to produce an equitable result.<sup>2</sup> At the same time, this trigger a lot of discussion among adjudicators and scholars on the substance of equitable principles and relevant circumstances and how to produce an equitable result for each maritime boundary delimitation case.

Since the 1969 *North Sea Continental Shelf cases* to the 1992 *St. Pierre and Miquelon case*, regardless of the applicable law governing the delimitation, international courts and tribunals have occasionally made references to equitable principles,<sup>3</sup> and used different methods and factors in the delimitation.<sup>4</sup> International courts and tribunals also recognized that the goal of achieving an equitable result tracked back in the 1945 Truman Proclamation and has since then become customary law applicable to all maritime boundary delimitation.<sup>5</sup> Consequently, they have focused more on the outcome of the delimitation and less on the principle or the method for the delimitation process,<sup>6</sup> reflecting a result-oriented equity approach in the law of delimitation. Under this approach, the equidistance principle had no status in the delimitation process,<sup>7</sup> and could only be applied if equidistance principle could led to an equitable solution.<sup>8</sup> The approach adopted in these cases has been criticized over time by many judges and scholars of the law of the sea such as Judge Shigeru Oda, Professor Malcolm D. Evans,<sup>9</sup> and Professor

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*The American Journal of International Law*, vol. 88, No. 2 (April 1994), p. 230.

<sup>3</sup> See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement, I.C.J Reports 1969*, p. 46, para. 85; *Case concerning the delimitation of*

Yoshifumi Tanaka<sup>10</sup> that the approach provides excessive subjectivity of the judgment and unpredictability of the law, which undermine certainty in the law of delimitation.

On the contrary, subsequent case law decided in 1993 onward has shifted the focus from the outcome of delimitation to the process of delimitation itself, reflecting a corrective equity approach.<sup>11</sup> Although the focus has been shifted but the aim for delimitation remains with

<sup>12</sup> For instance, the ICJ declared in the 1993 judgment of the *Greenland and Jan Mayen case* that *prima facie*, a median line could generally result in an equitable solution for delimitation between opposite coasts,<sup>13</sup> and the 2002 judgment of the *Qatar/Bahrain case* that the equidistance line would provide the starting point for the delimitation between adjacent States.<sup>14</sup> Furthermore, in its 2009 judgment in the *Black Sea case*, the ICJ made an unprecedented move by developing a maritime delimitation methodology to assist the ICJ in carrying out its task, which is known as the three-stage approach.<sup>15</sup> This three-stage approach was also endorsed by subsequent decisions of the international courts and tribunals involving maritime boundary delimitation cases and it proceeded from (i) drawing the provisional equidistance line, then (ii) adjusting the provisional equidistance line by taking into account relevant circumstances, before (iii) applying a final proportionality test. While it is relatively easy to draw the equidistance line and to apply a proportionality test at the first and last stage of the delimitation process, the second stage receives a lot of discussion, particularly on what constitutes relevant circumstances as neither the CS Convention nor UNCLOS defines these terms. However, leaving the discussion on the contents of relevant circumstances aside, it seemed that relevant circumstances function as a bridge between the starting line of equidistance, which might not always be equitable, and the finishing line of delimitation, which must be equitable.

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<sup>10</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 123 and 125.

<sup>11</sup> *Ibid.*, pp. 119 and 120.

<sup>12</sup> See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports 1993*, p. 59, para. 48, in which the ICJ noted that:  
*aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones.*

<sup>13</sup> *Ibid.*, p. 66, para. 64.

<sup>14</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits*, Judgment, *I.C.J. Reports 2001*, pp. 103 and 104, para. 215.

<sup>15</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, pp.101–103, paras. 115–122.

Whether result-oriented equity approach or corrective equity approach has been adopted by the international courts and tribunals, they have always dealt with relevant circumstances in the course of delimitation. Starting from the 1969 *North Sea Continental Shelf cases* to the 2023 *Mauritius/Maldives case*, international courts and tribunals have developed a list of factors constituting relevant circumstances and it could be classified into two categories -

Compared to environmental factors, sociocultural factors have been raised more often. The first  
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consider directly as a case dealing with a maritime boundary delimitation; therefore, its discussion will be excluded from this paper.

### **Research Questions and Objective**

The objective of this research is to study the role played by environmental and sociocultural factors in achieving an equitable solution in maritime boundary delimitation in the EEZ and continental shelf as pleaded by the parties and discussed by the relevant decisions of the international courts and tribunals. To achieve this objective, this research will address the following questions:

- What can we learn from the practices of international courts and tribunals concerning maritime boundary delimitation in the EEZ and continental shelf?
- To what extent have States and international courts and tribunals considered environmental and sociocultural factors

This research is an additional brick to be added to the wall of the law on maritime boundary delimitation. It aims to influence law of the sea practitioners to understand how States and international courts and tribunals interpret and apply environmental and sociocultural factors as relevant circumstances in the course of achieving an equitable solution of maritime boundary

## **Part One: The Evolution of Applicable Rules Governing Delimitation in the EEZ and Continental Shelf**

Although the essential concepts of maritime boundary delimitation emerged in the 19<sup>th</sup> century via State practices<sup>29</sup> and case law,<sup>30</sup> the discussion at that time merely focused on the delimitation in the territorial sea. Continental shelf delimitation only emerged on the international stage

UNCLOS I was held in Geneva from 24 February to 29 April 1958 and participated by 86 States and observed by several specialized agencies of the UN and inter-governmental bodies. It was the first time in the early development of the law of the sea, that 54 out of 86 States represented at UNCLOS I, called for a codification of new international law governing the ocean and sea.<sup>31</sup> It was also the first time that newly independent States from Asia and African continents played a role in shaping international law of the sea which was normally dominated by the traditional Western-oriented law. There were several points of discussion and divergent views among the participants at UNCLOS I relating to the territorial sea, contiguous zone, innocent passage through international straits, fisheries and their conservation, and continental shelf. Regardless



Regardless of the failure of UNCLOS II, its outcome did not affect the agreed formula for delimiting continental shelves between opposite or adjacent States as provided in Article 6 of the CS Convention. However, three years after the entering into force of the CS Convention, the agreed formula on continental shelf delimitation was challenged through the institution of the proceedings with the ICJ in 1967. By an Order of 26 April 1968, the Court joined the proceedings in the two cases after having found that Denmark and the Netherlands were in the same interest.<sup>33</sup> Almost a year after this Order, the Court in the *North Sea Continental Shelf cases*

transformed concept of the continental shelf,<sup>38</sup> particularly on the provisions for delimiting the EEZ and continental shelf. At the adoption of UNCLOS III, it seemed clear that the previously agreed formula in the CS Convention was no longer a preferred solution for the delimitation of the EEZ and continental shelf.

Since the 1960s several proceedings on maritime boundary delimitation particularly on the EEZ and continental shelf came before the international courts and tribunals.<sup>39</sup> These proceedings centered around the discussion on the applicable law and principle governing the EEZ and continental shelf delimitation (Chapter 1), particularly the interpretation and application of Article 6 of the CS Convention, Articles 74(1) and 83(1) of UNCLOS and customary international law. International courts and tribunals substantively dealt with the relationship between customary international law and treaty provisions on the delimitation of the EEZ and continental shelf and agreed that the aim for each delimitation was an equitable result or equitable solution.<sup>40</sup> To achieve this equitable result or equitable solution, the legal basis and substance of equitable principles and relevant circumstances (Chapter 2) were

This new provision differed from the original formula and contained an identical provision for delimiting a new regime, the EEZ. The provisions for delimiting the EEZ and continental shelf emerged from UNCLOS III and found their way into Articles 74(1) and 83(1) of UNCLOS.

Even with the treaty provisions such as Article 6 of the CS Convention and Articles 74(1) and 83(1) of UNCLOS, disputing parties often seek intervention from third-party dispute settlement mechanisms when negotiation failed, making maritime boundary delimitation disputes one of the most litigated areas before the international courts and tribunals for the past five decades. This made the law on maritime boundary delimitation commonly referred to as a judge-made law<sup>41</sup> in which international courts and tribunals have provided substantive discussions on the application and interpretation of those applicable laws including its interaction with customary international law. Furthermore, international courts and tribunals have developed practices to assist them with such a complex task. The single maritime boundary and the three-stage approach are key among these practices. With this background, this chapter examines the applicable law governing the EEZ and continental shelf delimitation (Section A) and later explores the emerging practices from case law for the EEZ and continental shelf delimitation (Section B).

## Section A: The Applicable Law Governing the EEZ and Continental Shelf Delimitation

### *Subsection A.1: Article 6 of the CS Convention and Customary International Law*

The relevant text of Article 6 of the CS Convention dealing with continental shelf delimitation provides:

1. Where 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 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.

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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.

The above text suggested that States shall first try to reach an agreement on the respective boundary. If they are unable to do so, the boundary will be a line of equidistant from the baselines of the parties (median line for opposite boundary or equidistance line for adjacent boundary), unless another line is justified by special circumstances.<sup>42</sup> This explanation is also echoed in various decisions of international courts and tribunals involving the interpretation of Article 6 of the CS Convention.<sup>43</sup>

Commentators further explained that Article 6 of the CS Convention contains a triple rule of agreement- equidistance (median line)-special circumstances .<sup>44</sup> The first element of the triple -evident that maritime boundary delimitation is not a unilateral act; therefore, this first element intends to highlight the international character of maritime delimitation where agreement, regardless of form, needs to exist.<sup>45</sup> The second element is term median line is commonly used for the delimitation between opposite boundaries and equidistance line for adjacent boundaries.<sup>46</sup> This second element links with the third element of the triple rule special circumstances. Under the CS Convention, it seems unclear whether there exists a hierarchy between these two elements median or equidistance line and special circumstances it is possible to draw two conclusions with three outcomes from their

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<sup>42</sup> R.R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester, Manchester University Press, 1999), p. 184.

<sup>43</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969*, p. 38, para. 62; *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Award, 30 June 1977, *RIAA*, vol. XVIII, p. 45, para. 70; and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports 1993*, pp. 59 and 60, para. 49.

<sup>44</sup> Yoshifumi Tanaka, *The International Law of the Sea*,

relationships. The first conclusion is there is no hierarchy between these two elements and they exist as a combined rule of median or equidistance line and special circumstance.<sup>47</sup> The second conclusion is there is a hierarchy between them with two outcomes: (1) median or equidistance line serves as a principle and special circumstances act as an exception or by contract, and (2) special circumstance serve as a principle and median or equidistance line acts as an exception.<sup>48</sup> The earlier conclusion seems to be more convincing regardless of the limited authoritative answer within the framework of the CS Convention as at least it is supported by the *Anglo-French Continental Shelf case*.<sup>49</sup>

occasions in the text of the 1958 Geneva Conventions, neither of them provided a clear list of what should be included as special circumstances. However, the idea of such incorporation of strict equidistance line<sup>50</sup> or in other words to avoid inequitable results from a mechanical application of the median or equidistance line.

to state that the ILC at most proposed the content of Article 6 of the CS Convention as *de lege ferenda* and not as *lex lata* or as an emerging rule of customary international law.<sup>53</sup>

Contrary to the *North Sea Continental Shelf cases*, the next case law on maritime boundary delimitation involved parties to the CS Convention, i.e., France and the United Kingdom. However, the *ad hoc* Court of Arbitration still had to deal with a preliminary consideration on the question of reservation by the French government on Article 6 of the CS Convention. The *ad hoc* Court of Arbitration concluded that the combined effect of the French reservations and their rejections by the United Kingdom rendered Article 6 of the CS Convention inapplicable between the two countries to the extent but only to the extent of the reservations.<sup>54</sup> However, in the area where the reservation was not in effect, the rules and principles of general international law, ie. the equitable principle, were applicable.<sup>55</sup> What is interesting about the award was that the *ad hoc* Court of Arbitration stated that the rules of customary law led to a similar result to the provisions of Article 6 of the CS Convention.<sup>56</sup>

Furthermore, when examining the relationship between Article 6 and customary law, the *ad hoc* Court of Arbitration stated that the role of an equitable delimitation,<sup>57</sup> and the combined equidistance-special circumstances rule was equated to the customary law of equitable principles,<sup>58</sup> This assimilation of Article 6 of the CS Convention to customary international law generated an important consequence. Particularly, the incorporation of the equidistance method into customary international law even though the *ad hoc* Court of Arbitration did not directly express such a conclusion. This decision also differed from the earlier conclusion reached by the ICJ in the *North Sea Continental Shelf cases*.

Up until the judgment of the *Greenland and Jan Mayen case*, the ICJ had never had an opportunity to solely apply the CS Convention<sup>59</sup> as either one of the parties to the dispute was not a party to the CS Convention or the parties jointly asked for applicability of other rules.

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<sup>53</sup> Ibid., p. 38, para. 62.

<sup>54</sup> *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII, p. 42, para. 61.*

<sup>55</sup> Ibid., para. 62.

<sup>56</sup> Ibid., p. 44, para. 65.

<sup>57</sup> Ibid., p. 45, para. 70.

<sup>58</sup> Ibid., pp. 44 and 45, paras. 68–70.

<sup>59</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 58, para. 45.*

The Court acknowledged that the application of Article 6 of the CS Convention for continental shelf delimitation between the parties did not mean that this Article can be interpreted without reference to customary law.<sup>60</sup> Thus, in its judgment, after examining the contents of Article 6 of the CS Convention and judicial decision on the basis of customary law governing the continental shelf delimitation, the Court decided to begin with the median line as a provisional line before examining whether there existed any special circumstances that require any adjustment or shifting of that line.<sup>61</sup>

When discussing the relationship between Article 6 of the CS Convention and customary configurations of coasts and the presence of islands and navigable channels.<sup>62</sup> On the other ded to contain a wider scope referring to those circumstances that are relevant to the continental shelf and are primarily geographical in character.<sup>63</sup> The ICJ even suggested that there was no limit to the kind of circumstances that might be taken into account in effecting an equitable delimitation.<sup>64</sup>

#### *Subsection A.2: Articles 74(1) and 83(1) of UNCLOS and Customary International Law*

The drafting history of Articles 74(1) and 83(1) of UNCLOS shows the divergent views among the drafters and their formulations were one of the most contentious issues in the drafting history of UNCLOS.<sup>65</sup>

<sup>66</sup> that advocated for the rule of equidistance proposed t *The delimitation of the Exclusive Economic Zone Continental Shelf between adjacent or opposite States shall be effected by agreement employing, as a general principle,*

*the median or equidistance line, taking into account any special circumstances where this is justified.* <sup>67</sup> The other 27 States<sup>68</sup>



Another proposal was suggested by the Chairman of Negotiating Group 7 in the ninth session of 1980 and this



account when defining a delimitation line may well be different between the EEZ and the continental shelf,<sup>81</sup> and it inspired the emphasis on the result.<sup>82</sup>

The Virginia Commentary provided that the first paragraph of Article 74 sets out the element that constitute the fundamental rule for delimitation

*Subsection B.1: The Single Maritime Boundary*

Neither the 1958 Geneva Conventions nor UNCLOS contain a provision on the issue of a single maritime boundary. The ICJ observed that this concept stems from State practices and not from multilateral treaties.<sup>88</sup> However, jurisprudence on maritime boundary delimitation also plays a significant role in further developing the concept itself.

Professor Weil suggests

Tunisia submitted for a coincide zone between the two zones and that the circumstances which are relevant for the delimitation in the EEZ are also relevant for the delimitation in the continental shelf.<sup>93</sup> Given that the parties requested the ICJ to deal with the continental shelf problem; therefore, the Court did not find it necessary to render a decision in terms of the EEZ or even to pronounce on the relationship between the two zones.<sup>94</sup> However, the Court did refer to factors relating to fisheries in the delimitation of the continental shelf.<sup>95</sup> This decision came with several opinions by the judges discussing a controversy over the decision, specifically, they were in favor of the unity of delimitation and that the two delimitations, by their very nature, were identical.<sup>96</sup>

them to the single maritime boundary delimitation.<sup>100</sup> The Chamber noted that the ultimate objective was to ensure an equitable result in all delimitation cases including those seeking to establish a single maritime boundary.<sup>101</sup> *there is*

though the present case relates only to the delimitation of the continental shelf.<sup>106</sup> Consequently, the distance criterion was applied to the continental shelf as well as to the EEZ in respect of both title and delimitation.<sup>107</sup>

Another ICJ judgment involving delimitation in the continental shelf and fishery zone was issued in the 1993 *Greenland and Jan Mayen case*. Contrary to the *Gulf of Maine case*, there

Since then the establishment of a single maritime boundary has become a common practice in the case law as international courts and tribunals have decided to exercise their discretions in favor of more convenient and pragmatic solutions, regardless of the lack of legal basis for the establishment of a single maritime boundary. In fact, the single maritime boundary has subsequently been used in the 1999 *Eritrea/Yemen case*, the 2001 *Qatar/Bahrain case*, the 2002 *Cameroon/Nigeria case*, the 2006 *Barbados v. Trinidad and Tobago*, the 2007 *Guyana v. Suriname case*, the 2007 *Nicaragua v. Honduras case*, the 2009 *Black Sea case*, the 2012 *Bangladesh v. Myanmar*, the 2012 *Nicaragua v. Colombia case*, the 2014 *Peru v. Chile case*, the 2014 *Bangladesh v. India case*, the 2014 *Somalia v. Kenya*, the 2017 *Ghana v. Côt*



constructing a provisional equidistance line; (2) considering the possible need to adjust the provisional line by the existence of relevant circumstances; and (3) verifying that the proposed line would not lead to significant disproportionality through conducting a proportionality test.

<sup>114</sup> This relevant area will depend on the configuration of the relevant coasts in the general geographical context (concave or convex coastlines, significant indentations such as gulf, or presence of islands within the delimitation area) and the method for the construction of their seaward projections. This relevant area also plays a crucial role in checking disproportionality which comes at the final stage of this methodology – the proportionality test – *a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.* <sup>115</sup> Generally, international courts or tribunals will need to determine this relevant area before commencing the delimitation process.<sup>116</sup>

It seems that the three-stage approach has incorporated the equidistance method into the realm of law and enhanced the predictability of the law on maritime boundary delimitation. However, the idea of avoiding significant disproportion remains relevant and it is known as an elusive concept, and proving difficulty to apply in practice.<sup>117</sup>

While the three-stage approach seems to become a default rule for delimiting the EEZ, the continental shelf, or the single maritime boundary, it is worth recalling a possible situation where the ICJ in its 2007 *Nicaragua v. Honduras case* rejected a drawing of a provisional equidistance line due to the presence of unstable basepoints.<sup>118</sup> Consequently, the Court

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<sup>114</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J Reports 2009*, p. 99, para. 110.

<sup>115</sup> *Ibid.*

<sup>116</sup> Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford, Portland, Oregon, Hart Publishing, 2010), p. 399.

<sup>117</sup>

*Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos*, Lilian del Castillo, ed. (Brill Nijhoff; Leiden, Boston, 2015).

<sup>118</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J Reports 2007*, p. 743, para. 280.

decided to adopt a different method of delimitation, known as a bisector line by drawing two coastal fronts and bisecting the reflex angle between them.<sup>119</sup>

It seems that the bisector line method is favored by the parties on various occasions even if it has later been rejected by international courts and tribunals. For example, in the *Guyana v. Suriname case*

configuration did not present unusual geographical peculiarities.<sup>120</sup> In the *Bangladesh v. Myanmar case*

angle-bisector method on the grounds that the geographical circumstances were not possible or appropriate.<sup>121</sup> As for the *Nicaragua v. Colombia case*

Nicaragua should all be enslaved.<sup>122</sup> In the *Peru v. Chile case*, the Court referred to the need for compelling reasons preventing the drawing of the provisional equidistance line.<sup>123</sup> From these cases, it is clear that the drawing of the provisional equidistance line remains a general rule within the three-stage approach. Also, the three-stage approach could be argued to provide a better framework for balancing predictability and flexibility in the law of maritime delimitation.

## Chapter 2: The Legal Basis and Substance of Equitable Principles and Relevant Circumstances

Since the 1960s, cases on maritime boundary delimitation in the EEZ and continental shelf have been determined based on customary international law, the CS Convention, UNCLOS, or a mixture of both custom and treaty law. From the adoption of the CS Convention until the entry into force of UNCLOS, international jurisprudences have gradually developed to be in

was heavily reflected in submissions made in the *North Sea Continental Shelf cases* and *Anglo-French Continental Shelf case*, the argument for such a concept was later replaced by an acceptance that all States are entitled to a 200 nm continental shelf. However, what remains

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<sup>119</sup> Ibid., pp. 745–749, paras. 283–298.

<sup>120</sup> *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, vol. XXX, p. 120, para. 372.

<sup>121</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*, Judgment, 12 March 2012, ITLOS Reports 2012, pp. 74–76, paras. 234–239.

<sup>122</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, pp. 691 and 692, para. 180.

<sup>123</sup> *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 61, para. 180.

relevant and serves as the heart of the law of maritime boundary delimitation is probably the discussion on the equitable principles and relevant circumstances.

Theoretically, equitable principles and relevant circumstances are different in kind; however, practically, these two concepts go hand in hand. Without relevant circumstances, equitable principles form a conceptual framework devoid of content and without the help of equitable principles, relevant circumstances would be powerless to produce any assessment of the equity of a situation.<sup>124</sup> It seemed that they were two sides of the same coin and it was their coexistence that produced an equitable solution to maritime boundary delimitation.

This chapter will, therefore, explore the content of these two concepts, particularly by looking into the approaches to equitable principles (Section A) as developed by case law. Given that by its nature, the concept of equity varies from one context to the other and it seems that there is no uniform interpretation of this concept. In the context of maritime boundary delimitation, equity was given a role by hydrographers and not by lawyers.<sup>125</sup> Consequently, in the law of maritime boundary delimitation itself, there is a certain degree of difference between adjudicators in judging the equitableness of



relevant circumstances that characterized the area.<sup>133</sup>

principles was clearly stated in paragraph 70 of the judgment, the relevant part provided:

terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result that is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in light of its usefulness to arrive at an equitable result. It is not every such principle that is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their

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result over the method of delimitation. Thus, the Court remained consistent with its previous decision in the *North Sea Continental Shelf cases* and denied the mandatory character of the equidistance method and its privileged status as compared to other methods of delimitation.<sup>135</sup> However, such a conclusion from the Court received significant comments from several judges in their dissenting opinions, particularly on the lack of a delimitation method.<sup>136</sup> For instance,

*the problem is what principles and rules of international law should apply in order to achieve an equitable solution?*<sup>137</sup> Judge *ad hoc* Evensen questioned the approach of the Court in this judgment for its failure to examine whether the equidistance principle could be fruitfully used, adjusted by principles of equity and the relevant circumstances characterizing the region concerned to bring about an equitable result.<sup>138</sup> Similarly, Judge Gros criticized the judgment for its failure to clarify its reasoning for rejecting equidistance.<sup>139</sup>

In the 1984 *Gulf of Maine case*, the United States requested the Chamber of the ICJ to delimit a single maritime boundary through an application of equitable principles, taking into account

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<sup>133</sup> *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 21, para. 2.

<sup>134</sup> Ibid., p. 59, para. 70.

<sup>135</sup> Ibid., pp. 78 and 79, paras. 109 and 110.

<sup>136</sup> It is interesting to note that this Judgment has received significant numbers of dissenting opinions: Judges Forster, Gros, Oda and Judge *ad hoc* Evensen.

<sup>137</sup> Ibid., *Dissenting Opinion of Judge Oda*, I.C.J. Reports 1982, p. 255, para. 155.

<sup>138</sup> Ibid., *Dissenting Opinion of Judge Evensen*, I.C.J. Reports 1982, p. 297, para. 15.

<sup>139</sup> Ibid., *Dissenting Opinion of Judge Gros*, I.C.J. Reports 1982, p. 149, para. 12.

the relevant circumstances in the area, to produce an equitable solution.<sup>140</sup> On the other hand, Canada has submitted that the delimitation needs to conform with equitable principles, having regard to all relevant circumstances, in order to achieve an equitable result.<sup>141</sup> It should be

of delimitation.<sup>142</sup> In the end, the Chamber suggested slightly different terms from what had been submitted by the parties and instead stressed the need to apply equitable criteria and practical methods capable of ensuring an equitable result for the delimitation of the single maritime boundary in the EFZ and continental shelf.<sup>143</sup> When it came to the equitable criteria, it seems that the Chamber took a flexible approach by explaining that the assessment of the equitableness of those criteria or otherwise should be done in the light of the circumstances of each case. The Chamber went further to state that for the same criterion, it was possible to arrive at a different or even opposite conclusion in different cases.<sup>144</sup> *international law only required that recourse be had in each case to the criterion, or the balance of different criteria, appearing to be most appropriate to the concrete situation.*<sup>145</sup> As for the practical method, the approach was the same as those of equitable criteria, and it would be selected on a case-by-case basis, depending on the actual situation.<sup>146</sup> Thus, the Chamber once again echoed the result-oriented equity approach as the law neither defined the equitable criteria nor the practical method and simply advanced the idea of an equitable result.<sup>147</sup>

In the 1985 *Libya/Malta case*, the parties agreed to apply customary law to govern the dispute as Malta was a party to the CS Convention while Libya was not. Therefore, the Court decided that the delimitation of a continental shelf boundary between Libya and Malta must be effected by the application of equitable principles in all the relevant circumstances in order to achieve

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<sup>140</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, p. 258.

<sup>141</sup> Ibid., p. 295, para. 99.

<sup>142</sup> Lucie Delab *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 161.

<sup>143</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, p. 300, para. 113.

<sup>144</sup> Ibid., p. 313, para. 158.

<sup>145</sup> Ibid.

<sup>146</sup> Yoshifumi Tanaka, *The International Law of the Sea*, 2nd ed. (Cambridge, New York, Cambridge University Press, 2015), p. 204.

<sup>147</sup> Ibid.

an equitable result.<sup>148</sup> Consistent with previous judgments of the ICJ, the Court rejected the mandatory nature of equidistance or any method as obligatory and concurred with the previous -oriented equity approach. However, the Court agreed that there was impressive evidence demonstrating that the equidistance method yielded an equitable result in many situations.<sup>149</sup>

The Court went on to state that the application of equitable principles enables the Court to

boundary, the Court applied the equidistance line at the first stage, following by consideration of the question on whether or not it produces an equitable solution after adjusting the provisional equidistance line in a second stage on account of relevant circumstances.<sup>154</sup> This seems to suggest that the Court tended to adopt a mixed approach in this case, consisting of both a result-oriented and corrective equity approaches.

From the four cases from 1969 to 1985 decided by the ICJ, it seems that the approach to maritime boundary delimitation centered on a result-oriented equity approach. However, the *Libya/Malta case* suggested an addition to the result-oriented equity approach with the corrective equity approach in the operational stage. Regardless of this unexpected move, the result-oriented equity approach remained a trend before the 1993 *Greenland and Jan Mayen case* as this approach was later supported by the award in the 1985 *Guinea/Guinea-Bissau case*<sup>155</sup> and the 1992 *St. Pierre and Miquelon case*.<sup>156</sup>

On the other hand, in the 1977 *Anglo-French Continental Shelf case*, the *ad hoc* Court of Arbitration took a different approach from that of the ICJ in *North Sea Continental Shelf cases* and subsequent jurisprudence on the matter. The *ad hoc* Court of Arbitration equated Article 6 of the CS Convention as a single combined rule of median line or equidistance and special circumstances to the customary law of equitable principle.<sup>157</sup> The *ad hoc* Court of Arbitration went further to state that the equidistance-special circumstances rule and the rules of customary law have the same object – the delimitation of the boundary in accordance with equitable principles,<sup>158</sup> In other words, both rules strive for the goal of an equitable result.<sup>159</sup> Under this approach, the *ad hoc* Court of Arbitration applied equidistance at the first stage of delimitation and then shifted the delimitation line by relevant circumstances in order to achieve an equitable

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*International Maritime Boundaries Volume V*, David A. Colson and Robert W. Smith, eds. (Leiden, Boston, Martinus Nijhoff Publishers, 2005), p. 3209.

<sup>155</sup> *Delimitation of the maritime boundary between Guinea and Guinea-*



result.<sup>160</sup> Particularly, the *ad hoc* Court of Arbitration stated in paragraph 249 of the Award that: *The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection*

demonstrated a constant and clear application toward the corrective-equity approach. In fact, the ICJ in the



lead to an adjustment of that line.<sup>176</sup> A year later, in the 2002 *Cameroon/Nigeria case*, the ICJ made a noticeable move by applying a corrective-equity approach under Articles 74 and 83 of UNCLOS.<sup>177</sup> The Court referred to the previous practices of the ICJ and called the principles and rules of delimitation for a line covering several zones of coincident jurisdictions an

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In the 2006 *Barbados v. Trinidad and Tobago arbitration*, the Arbitral Tribunal applied a corrective-equity approach in the operation of maritime boundaries under Articles 74 and 83 of UNCLOS<sup>179</sup> as the Arbitral Tribunal took the view that the need to avoid subjective determinations requires that the method used started with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified.<sup>180</sup>

Another arbitral award rendered a year after in the 2007 *Guyana v. Suriname case* echoed the previous decisions on the use of the corrective-equity approach and went further to state that:

The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line, which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution.<sup>181</sup>

In the 2007 *Nicaragua v. Honduras case*, the ICJ slightly took a different view from the previous practices by applying the bisector method instead of the equidistance method at the first stage of maritime boundary delimitation. The Court explained this derivation from the practices since the 1993 *Greenland and Jan Mayen case* by referring to the impossibility of the current case to identify the base points for constructing a provisional equidistance line<sup>182</sup> yet reiterated that equidistance remained the general rule.<sup>183</sup> Although the bisector method was

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<sup>176</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 91, para. 167 and p. 111, para. 230.

<sup>177</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 441 and 442, paras. 288

employed, the Court still adopted corrective-equity approach particularly concerning the delimitation around the islands in the disputed area by referring to the *Qatar/Bahrain case*.<sup>184</sup>

In the 2009 *Black Sea case*, the ICJ developed the three-stage approach for the delimitation of a single maritime boundary under Articles 74 and 83 of UNCLOS. This three-stage approach was regarded as a variation of the corrective-equity approach developed through judicial practices in the field of maritime boundary delimitation,<sup>185</sup> and it was later adopted by

*Bangladesh v. Myanmar*

*case*<sup>186</sup> the 2012 *Nicaragua/Colombia case*,<sup>187</sup> the 2014 *Peru/Chile case*,<sup>188</sup> the 2014 *Bangladesh v. India case*,<sup>189</sup> the 2017 *Ghana v. Côté d'Ivoire*,<sup>190</sup> the 2018 *Costa Rica v. Nicaragua case*,<sup>191</sup> the 2021 *Kenya v. Somalia case*,<sup>192</sup> and the 2023 *Mauritius/Maldives case*.<sup>193</sup>

From the discussion above, it could be concluded that from the 1993 *Greenland and Jan Mayen case*, international courts and tribunals have adopted a corrective-equity approach, focusing on the methodology in the course of delimiting maritime boundaries in the EEZ and continental shelf. Under this approach or the three-stage approach, the law of maritime boundary delimitation becomes more predictable as the equidistance method is incorporated into the legal domain of delimitation. Under this approach, it seems that equity comes into play at a second stage of delimitation; therefore, this approach reduces the subjectivity and unpredictability of equitable principles. This approach was also advocated by various scholars as a better

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<sup>184</sup> Ibid., pp. 751 and 752, paras. 303 and 304.

<sup>185</sup>

*Romania/Ukraine Case* before the

*Netherlands International Law Review*





Section B:



a factor to be taken into account by the parties in the delimitation process.<sup>201</sup> With this *extremely liberal view of relevant circumstances, in line with its belief that an equitable solution could be achieved only by a consideration of all the relevant circumstances.*<sup>202</sup>

In the 1984 *Gulf of Maine case*, the Chamber of the ICJ concluded that *delimitation is to*

the need to avoid an excessive disproportionality.<sup>207</sup> The ICJ took the position that the line *the requirement of the test of proportionality and more generally to be equitable, taking into account all relevant circumstances.*<sup>208</sup> It should be noted that the parties also based their submissions on the expanded categories of relevant circumstances. However, contrary to previous judgments, the Court accorded security issues as of potential relevance and accepted the existence of economic resources as might be relevance.<sup>209</sup>

In the the1985 *Guinea/Guinea-Bissau case*, the *ad hoc* Tribunal denied morphological factor as relevance to the delimitation process as the two States abutted onto a common natural prolongation and therefore this rule of natural prolongation cannot be effectively invoked for the purposes of delimitation where there is no separation of continental shelves.<sup>210</sup> The *ad hoc* Tribunal considered economic factors and expressed sympathetic for the economic realities underlying the delimitation although concluded that it was not possible to take them into account due to their uncertainty and changing factors.<sup>211</sup> At the same time, the *ad hoc* Tribunal indicated a broad range of factors that might be considered relevant circumstances including the general coastal configuration of the region and the impact of the current delimitation upon future delimitation in the area,<sup>212</sup> presence of islands,<sup>213</sup> and significant land frontier.<sup>214</sup>

Another award rendered by the *ad hoc* Court of Arbitration in the 1992 *St. Pierre and Miquelon case* involved a drawing of a single maritime boundary in which the *ad hoc* Court of Arbitration applied the neutral criterion as echoed in the 1984 *Gulf of Maine case*. The *ad hoc* Court of Arbitration rejected the Canadian invocation of proportionality as a relevant circumstance;

verification stage.<sup>216</sup> The *ad hoc* Court of Arbitration was unable to close its eyes to the arguments presented by both parties concerning the impact of fishing rights and practices on the economic well-being of the people most affected by the delimitation.<sup>217</sup> Therefore, the *ad hoc* Court of Arbitration addressed these matters in the context of the solution.<sup>218</sup>

A year later in the 1993 *Greenland and Jan Mayen case*, the concept of relevant circumstances was again interpreted in a broad sense by various judges<sup>219</sup> and it seemed to echo the view of the Court in the 1969 *North Sea Continental Shelf cases*.<sup>220</sup> The Court slightly distinguished

cultural factors,<sup>227</sup> security consideration,<sup>228</sup> and conduct of the parties<sup>229</sup> as relevant circumstances.

In the 1999 *Eritrea/Yemen case*, the Arbitral Tribunal drew a single all-purpose boundary between the parties by using a median line between the opposite mainland coastlines.<sup>230</sup> The Tribunal treated coastal configuration, proportionality, presence of islands, baselines, and presence of third States and navigation as relevant circumstances. Although the Tribunal took into consideration navigation as a relevant circumstance, the Tribunal did not explain why such factors should be given priority over the geographical factor, the presence of the islands a relevant circumstance as the Tribunal found that neither party had demonstrated that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activities of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals.<sup>231</sup>

As for the 2001 *Qatar/Bahrain case* and the 2002 *Cameroon/Nigeria case*, the ICJ took into consideration geographical factors only to draw the delimitation line between the concerned parties. In the *Qatar/ Bahrain case*, the Court did not consider the existence of pearling banks predominantly exploited by Bahrain fishermen in the past as relevant circumstances affecting the provisional equidistance line.<sup>232</sup> As for the *Cameroon/Nigeria case*

In the 2006 *Barbados v. Trinidad and Tobago case*, the applicable law governing the single maritime boundary between the parties was Article 74(1) and 83(1) of UNCLOS and the Annex VII Arbitral Tribunal noted that the identification of the relevant circumstances became a necessary step in determining the approach to delimitation<sup>235</sup> and this specifically referred to the identification of maritime domain, particularly the geography features such as the length and configurations of the respective coastlines. The Tribunal considered the projections of the and made a relatively small adjustment of the provisional line in the easternmost sector.<sup>236</sup> The Tribunal, however, rejected the arguments of the parties requesting greater adjustments in both the east and the west sectors.

As for the 2007 *Guyana v. Suriname case*, the Annex VII Arbitral Tribunal echoed the two-stage approach previously developed in case law<sup>237</sup> and adopted the role of relevant circumstances as factors adjusting the primary methodology, the equidistance line. The Tribunal took into consideration the physical configuration of the respective coastlines,<sup>238</sup> the proportions of lengths of coasts to the respective areas of maritime jurisdiction, and the conduct of the parties<sup>239</sup> as relevant circumstances; however, there was no adjustment to the provisional line.<sup>240</sup>

However, in the 2007 *Nicaragua v. Honduras case*, the ICJ deviated from the previous approach when it came to the delimitation method. Instead of following the two-stage method of first drawing an equidistance line and then considering whether factors are calling for the adjustment or shifting of that line to achieve an equitable result, the Court used a bisector method instead of an equidistance line at the first stage<sup>241</sup> and enclave method around small islands ultimately produced a boundary between the territorial sea of Honduras and the

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<sup>235</sup> *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados v. Trinidad and Tobago)*, Award, 11 April 2006, RIAA, vol. XXVII, pp. 212 and 213, para. 233.

<sup>236</sup> *International Maritime Boundaries Volume VI*, David. A Colson and Robert W. Smith, eds. (Leiden, Boston, Martinus Nijhoff Publishers, 2011), p. 4130.

<sup>237</sup> *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 Septa 0 595 131.640 g(t)9(a 0.JE, R)13IAA, v0 0 1[( )2wXX,0.000008871 0 595.32 841.92 reWñBT/F3 10.02 Tfl 0 0 1

EEZ/continental shelf of Nicaragua.<sup>242</sup> The approach taken by the Court in this case seemed to suggest that the role of relevant circumstances functioned as a means to determine what the primary methodology is to be.

From the *North Sea Continental Shelf* cases to the *Guyana v. Suriname* case, international courts and tribunals were inconsistent in the roles and categories of relevant circumstances and how relevant circumstances should be treated in the delimitation process. It can be observed that the categories of relevant circumstances were identified into two scenarios: in a broad sense where categories of relevant circumstances are open-ended and in a narrow sense where categories of relevant circumstances are limited to those that are pertinent to the institution of the maritime zones in question.

Although it is possible to argue that relevant circumstances seem to be open-ended categories, none of them guides what process may be adopted in other cases to enable the parties to arrive at an equitable result. A greater number of relevant circumstances seemed to be developed throughout these cases, yet the greater the number of relevant circumstances the more difficult it became to indicate their particular relevance and weight to be provided in each delimitation case. This then encouraged the result for each delimitation rather than the means to achieve and somehow failed to demonstrate the various interactions between those relevant elements to produce the equitable solution – the goal of the delimitation process.<sup>243</sup>

It could be noted that proportionality had on several occasions referred to relevant circumstances. However, this should not be the suitable placement of proportionality within the delimitation process. As *the concept of proportionality takes its place as another means of demonstrating to the watchful world that the delimitation line settled upon by the application of other methods and circumstances has an equitable*

<sup>244</sup> Therefore, proportionality should have nothing to do with the process of generating the line, especially at the first stage of the delimitation, and should instead operate







discussed by Nicaragua are those factors that may be considered at the second stage of the delimitation.<sup>260</sup>

took into consideration disparity in the lengths of the relevant coasts<sup>261</sup> and overall geographical context<sup>262</sup> as relevant circumstances and recognized that legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast of a State.<sup>263</sup> On the other hand, the Court rejected the conduct of the parties,<sup>264</sup> equitable access to natural resources<sup>265</sup> and delimitation already effected in the area<sup>266</sup> as relevant circumstances in the second stage of delimitation.

In the 2014 *Chile v. Peru case*, the ICJ found that the nature of the agreed maritime boundary in the 1954 Special Maritime Frontier Zone Agreement is an all-purpose one;<sup>267</sup> however, the existence of this agreed boundary were unlikely to have extended all the way to the 200 nautical miles limit.<sup>268</sup> Consequently, the Court determined the starting point of the agreed boundary up to 80 nautical miles along the parallel of latitude, and only proceed to determine the course of maritime boundary delimitation between the parties from that point on.<sup>269</sup> Although it is a bit unusual for the Court to commence the delimitation process further from the coast, the Court still noted the aim of achieving an equitable solution in delimitation process.<sup>270</sup> Ultimately, the Court applied the three-stage approach; however, there was no relevant circumstances for adjusting the provisional equidistance line.<sup>271</sup> From the judgement, it seemed that the Court did not consider whether the result produced a proportional or disproportional one under the third stage test.<sup>272</sup>

In the *Bangladesh v. India case*, the Annex VII Arbitral Tribunal seemed to challenge the three-stage approach as developed by the *Black Sea case*, particularly on the requirement to construct

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<sup>260</sup> Ibid., p. 697, para. 196.

<sup>261</sup> Ibid., p. 702, para. 211.

<sup>262</sup> Ibid., p. 704, para. 216.



*it constructed produces a cut-off effect on the seaward projections of the coast of Bangladesh. For that reason, the Tribunal considers the cut-off to constitute a relevant circumstance which may require the adjustment of the provisional equidistance line it constructed.* <sup>280</sup>

As for the *Ghana v. Cote d'Ivoire*, the Special Chamber of ITLOS denied all the relevant circumstances advocated by the parties as relevant circumstances, particularly concavity/convexity and the potential cut-off,<sup>281</sup> the geography of Jomoro as an island on the

security threats of terrorism and piracy, the conduct of parties in relation to oil concessions, naval patrols, fishing and other activities, and the devastating repercussions for the livelihoods and economic well-

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The Court s

a maritime boundary based on the parallel of latitude.<sup>290</sup> The Court denied the non-geographical factors as relevant circumstances<sup>291</sup> and accepted the potential cut-off effect raised by Kenya as relevant circumstances warranting some adjustment to the provisional equidistance line.<sup>292</sup>

In the recent judgment by the ITLOS Tribunal in the *Mauritius/Maldives case*, the parties in principle considered that there were no relevant circumstances affecting the adjustment of the provisional equidistance line. However, there was a different position between the parties concerning the placement of base points on Blenheim Reef for the construction of the provisional equidistance line.<sup>293</sup> While Mauritius claimed that Blenheim Reef should be used as a base point for the construction of the provision equidistance line, Maldives responded that such placement would result in an extraordinarily disproportionate effect that required a southward adjustment of the provisional equidistance line.<sup>294</sup> The Special Chamber decided not to place any base point on Blenheim Reef given it is a low-tide elevation where international jurisprudence rarely placed base points on.<sup>295</sup> However, the Special Chamber granted half effect to Blenheim Reef as it is considered a relevant circumstance.<sup>296</sup>

On the face of it, it shows that relevant circumstances have limited impact and equitable principles seem to have been given short shrift in recent judgments. However, the interaction of roles of relevant circumstances in the delimitation process in order to achieve an equitable solution suggests a more complex picture. Relevant circumstances exercise influence in the background, even at the first stage of the three-stage process. For instance, the selecting or discarding of basepoints at the first stage of the delimitation process indirectly suggests an influence of relevant circumstances on the drawing of the provisional equidistance line.

Despite the development of the three-stage approach in the *Black Sea case*, this author took the same view as other maritime boundary delimitation scholars that: the approach itself failed to provide concrete guidance on key questions in the maritime boundary delimitation process

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It seemed that from the 1969 *North Sea Continental Shelf cases*, the jurisprudences have evidenced and encouraged an ever-increasing number of factors being advanced as having potential relevance to the delimitation process, particularly to achieve an equitable solution. International jurisprudences have demonstrated that international courts and tribunals have given the most significance to geographical factors and are less willing to give effect to non-geological factors.<sup>298</sup>

Before the 2009 *Black Sea case*, proportionality was said to have relevance for maritime delimitation and considered as special/relevant circumstances within the framework of the

<sup>299</sup> For example, the Court in the 1969 *North Sea Continental Shelf cases* expressed that the application of equitable principles entailed a reasonable degree of proportionality between the areas appertaining to the parties and the coastlines of the parties.<sup>300</sup>

With the expansion of categories of relevant circumstances, environmental and sociocultural factors remained a minority despite the various attempts by States to justify their applications. How States and international courts and tribunals have treated these two factors since the first attempt in the 1984 *Gulf of Maine case* will be further discussed in Part II of this paper.

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*Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 381.

<sup>298</sup> Louis B. Sohn and others, *Law of the Sea in a Nutshell*, 2ed ed. (US, Thomson Reuters, 2010), pp. 165–166.

<sup>299</sup> Malcolm D *The Law of the Sea Progress and Prospects*, David Freestone, Richard Barnes, and David Ong eds. (New York, Oxford University Press, 2006), p. 154.

<sup>300</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J Reports 1969*, pp. 53 and 54, para. 101(c)(3).



11.	2002	<i>Cameroon v. Nigeria case</i>		
12.	2006	<i>Barbados v. Trinidad and Tobago case</i>		Artisanal fishing
13.	2007	<i>Guyana v. Suriname case</i>		
14.	2007	<i>Nicaragua v. Honduras case</i>	Presence of islands (full effect)	
15.	2009	<i>Black Sea case</i>	Security interest	Presence of islands

## **Part Two: The Role of Environmental and Sociocultural Considerations in Case Law on the EEZ and Continental Shelf Delimitation**

Since 1969 until present, there have been more than 30 cases concerning maritime boundary delimitation adjudicated by international courts and tribunals. Nevertheless, there has been little discussion on the role of environmental and sociocultural considerations by the concerned parties and the relevant courts and tribunals regardless of their acknowledgments of the need to protect the marine environment and human attachment to the sea.

The second part of this research, therefore, explored the discussion on the role of environmental considerations (Chapter 1) and sociocultural considerations in maritime delimitation dispute (Chapter 2) by revisiting the arguments presented by the relevant parties before focusing on the decisions of the international courts and tribunals along with an assessment for each case.

### **Chapter 1: The Role of Environmental Considerations in Maritime Delimitation Dispute**

International law particularly UNCLOS and other environmental-related legal instruments preserve the marine environment, yet existing case law has not recognized the influence of environmental factors in the context of maritime boundary delimitation. One of the factors that influences this non-recognition could be due to the limited number of cases in which environmental considerations have been invoked by the parties to the dispute. Until recently, there have been four instances where environmental considerations have been raised by the parties or discussed by the courts and tribunals on its effect on maritime boundary delimitation. The pioneer is the *Gulf of Maine case*, followed by the *Greenland and Jan Mayen case*, the *Eritrea/Yemen case*, and the *Bangladesh v. India case*. This Chapter, however, only discussed issues on the marine environment in the *Gulf of Maine case* (Section A) and the effect of climate change in the *Bangladesh v. India case* (Section B) as there were minor and less relevant discussions on the role of environmental considerations in the *Eritrea/Yemen case*. Additionally, the presence of ice argument in the *Greenland and Jan Mayen case* is linked with the access to fishery resources, one of the factors in sociocultural considerations, which will then be discussed in the next Chapter.



## Section A: The *Gulf of Maine Case*

### *Subsection A.1: The Position of the Parties*

In the *Gulf of Maine case*, the legal team of the United States might be the pioneer in developing a legal argument and theory justifying the relevance of environmental factors in maritime boundary delimitation case as this was the first case where the international court had to deal with environmental factors in the course of a maritime boundary delimitation. From their memorials and oral pleadings, the parties agreed that the whole continental shelf of the Gulf of Maine constituted a single continuous, uninterrupted, and uniform physiographical structure, and maybe defined as the natural prolongation of the land mass around the Gulf of Maine.<sup>301</sup> They had different positions, however, concerning the water column and how the environmental factors played a role in justifying an equitable maritime boundary.<sup>302</sup> The parties approached the matters in two ways.

First, the United States argued that there was a natural boundary in the marine environment, particularly in the Northeast Channel which must be seen as a natural boundary serving as a basis for drawing a single maritime boundary.<sup>303</sup> They explained how Georges Bank has a separate and integrated oceanographic regime and how the Northeast Channel forms a significant natural feature in the Gulf of Maine area.<sup>304</sup> They described that there existed a natural division in the seabed creating two separate legal continental shelves in the delimitation area,<sup>305</sup> dividing the Georges Bank and Scotian Shelf ecological regime and most of the important commercial fish stocks in the area. They included factual arguments to prove the existence of a natural boundary in the marine environment at the Northeast Channel<sup>306</sup> and that the Northeast Channel can serve as a basis for drawing a single maritime delimitation line.<sup>307</sup> They supported this argument by stating that the natural boundary in the marine

argument has never been rejected by the *ad hoc* Court of Arbitration nor the ICJ.<sup>308</sup> Furthermore, the United States went on to support their claim by referring to the land boundary cases which have often looked to natural boundaries in the terrain for a legal boundary.<sup>309</sup>

Second, the United States further submitted that environmental factors were legally relevant by proposing that the boundary ought to be based upon two equitable principles that called upon environmental factors in their application.<sup>310</sup> This argument drew upon the concept of unity of deposit identified by the ICJ in the *North Sea Continental Shelf cases*.<sup>311</sup> The first principle was that the delimitation should facilitate the conservation and management of the resources and the second principle was that the delimitation should minimize the potential for international disputes.<sup>312</sup> The United States submitted that the Georges Bank was an integrated ocean ecosystem and its living resources were common pool resources in economic terms. Consequently, any delimitation dividing the Georges Bank permitting Canada to undertake the development of potential oil and gas in the area could potentially increase the likelihood of significant disputes between Canada and the United States.<sup>313</sup> Thus, this would result in wasteful competition and harm the resources that international law was designated to protect.<sup>314</sup> The United States even went further to describe how legal and governmental mechanisms could protect and accommodate the interest in the Georges Bank and that these mechanisms could only be effective if it is exercised by one party, the United States.<sup>315</sup>

In response to the argument submitted by the United States, Canada emphasized the overall unity of the water column and argued that the natural boundary between fishing banks and fishing stocks located at the Northeast Channel is not legally entitled to be considered as a

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<sup>308</sup> *The UN Convention on the Law of the Sea: Impact and Implementation*, E.D. Brown and R. R. Churchill, eds. (US, Law of the Sea Institute, 1987), p. 221.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*, pp. 221 and 222.

<sup>311</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Memorial of the United States of America, 27 September 1982, p. 82, para. 212.

<sup>312</sup> *The UN Convention on the Law of the Sea: Impact and Implementation*, E.D. Brown and R. R. Churchill, eds. (US, Law of the Sea Institute, 1987), p. 222.

<sup>313</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Oral Proceedings, vol. VI, 1984, p. 450.

<sup>314</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Memorial of the United States of America, 27 September 1982, p. 82, para. 212.

<sup>315</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Oral Proceedings, vol. VI, 1984, p. 455.





waters.<sup>332</sup> The Chamber also noted that the great mass of water belonging to the delimitation areas essentially possesses the same character of unity and uniformity apparent from the examination of the sea bed; therefore, there is no such natural boundary in the delimitation area.<sup>333</sup> Finally, the Chamber emphasized that delimitation is a *-political operation and that it is not the case that where a natural boundary is discernible, the political delimitation necessarily has to follow the*<sup>334</sup> The Chamber also stressed that the legal boundary need not follow a natural boundary if the location of the natural boundary is inequitable.<sup>335</sup>

From the decision of the Chamber, it would be helpful to note that on this argument, the Chamber has extensively discussed the argument in the same way as they have dealt with the natural prolongation arguments in the *Tunisia/Libya case*. Although in practice it is common to use natural features for land border demarcation, the Chamber did not expressly accept that natural features could similarly be used in the context of maritime boundary delimitation. The approach of the Chamber was to not expressly deny that there was no such thing as a natural boundary in the marine environment that might constitute a legal boundary. What the Chamber did was to indicate that there was more considerable doubt on the point and that they seemed to find it difficult conceptually to handle the relationship between the marine environment and the continental shelf. This position may be the result of a combination of its incapacity to appreciate the complexity of the scientific evidence involved and a growing perception of the unfortunate effects of the concept of natural prolongation on the law of delimitation.<sup>336</sup>

As for the second submission of the United States, it seemed that the Chamber was not persuaded by the submission of the United States and instead decided that there was no rule of general international law requiring delimitation to ensure the optimum conservation and management of living resources and reduce the potential of future disputes at the same time.<sup>337</sup> The Chamber did not explain why the delimitation does not promote these goals besides stating that it was still a new and unconsolidated field and that it was unrewarding to look to general

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<sup>332</sup>] TJETQq0.000008871 0 595.32 841.92 reW\* nBT/F3 12 G[(uta&not )]&71Fok .of li02y the delimitation doe



*continental shelf pertaining to Bangladesh that lies more than 200 nautical miles from*

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The second proceeding against Myanmar started with a letter dated 13 December 2009 which Bangladesh notified the President of ITLOS concerning declarations made by Bangladesh and Myanmar consenting to the jurisdiction of ITLOS in accordance with the provisions of Article 287(4) UNCLOS.<sup>341</sup>

foreseeable future.<sup>346</sup> Furthermore, Bangladesh claimed that its rapidly eroding coastline due to climate change served as an exception to the equidistance method.<sup>347</sup>

coastlines and instead chose some of its base points on the low-tide elevations located at some



Bangladesh's coast, particularly the coast of the Raimangal and Haribhanga estuary, was not a relevant circumstance that rendered the adjustment of the provisional equidistance line in the delimitation of the EEZ and continental shelf.<sup>356</sup>

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provisional equidistance line as compared to other tribunals.<sup>357</sup> The Tribunal rejected only two basepoints as they were on low-tide elevations and adopted most of the base points presented by the parties.<sup>358</sup>

Rhetorically, the Tribunal was not willing to open up a new ground, the impact of climate change to be specific, as a possible relevant circumstance that justifies the adjustment of the provisional equidistance line under the three-stage approach. The Tribunal ruled that:

*, and lack of predictability as to the impact of climate change on the marine environment, particularly the coastal front of States, make all predictions concerning the amount of coastal erosion or accretion unpredictable. Future changes of the coast, including those resulting from climate change, cannot be*

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## Chapter 2: The Role of Sociocultural Considerations in Maritime Delimitation Dispute

State practices, particularly those in the Pacific island countries, have shown that there is attention given to the livelihood of traditional inhabitants when delimiting maritime boundaries. For instance, the 1978 Torres Strait Agreement between Australia and Papua New Guinea and the 1989 Agreement between Papua New Guinea and the Solomon Islands have acknowledged the need to protect the traditional life and the livelihood of the traditional inhabitants living in the areas including the rights of free movement, fishing, and other lawful traditional activities.<sup>360</sup>

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<sup>356</sup> Ibid., p. 120, para. 399.

<sup>357</sup> *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 105.

<sup>358</sup> Ibid, pp. 104 and 105.

<sup>359</sup>

*Republic of India, Award, 7 July 2014, RIAA, vol. XXXII*, p. 120, para. 399.

<sup>360</sup> Jonathan I. Charney and Alexander Yonah, eds, *International Maritime Boundary, vol. I* (Leiden, Boston, Brill/Nijhoff, 1993), pp. 937–975 and pp. 1162–1165.

Contrary to the practices of the Pacific island countries, sociocultural considerations were not considered in the majority of cases that appeared before the international courts and tribunals in which sociocultural factors were raised by the parties concerned. Apart from the reluctance to give

position on the importance of this factor is worth noticing. For instance, forty years ago, the parties in the *Gulf of Maine case* argued for the relevance of activities pursued by its nationals, particularly the coastal communities in the delimitation areas.<sup>361</sup> Almost ten years after the *Gulf of Maine case*, Denmark used the attachment of the people of Greenland in addition to access to fishing in the disputed area as relevant circumstances justifying the shifting of the median line.<sup>362</sup> Similarly, the parties in the *Eritrea/Yemen case* and *Barbados v. Trinidad and Tobago case* relied on the existence and non-existence of traditional fishing as one of the grounds for supporting its claim in the delimitation area.<sup>363</sup> For further information on these cases, this Chapter approaches the discussion by exploring the legal position of the parties and the decision of the international courts and tribunals starting with the *Gulf of Maine case* (Section A), the *Greenland and Jan Mayen case* (Section B), the *Eritrea/Yemen case* (Section C), and the *Barbados v. Trinidad and Tobago case* (Section D).

Before getting into the discussion for each case, the author would like to note that sociocultural considerations in this case take two forms. First, it concerns access to the fishery, particularly in the case of traditional artisanal fishing or part of historic rights; therefore, access to the fishery merely for economic purposes will not be considered in this case. Second, it deals with the attachment of the people to certain geography, particularly in the case of coastal communities where their survival would depend on the sea and its surroundings.

## Section A: The *Gulf of Maine Case*

### *Subsection A.1: The Legal Position of the Parties*

Another divergent view on the relevant circumstance between the United States and Canada concerned the human dimension in the delimitation area. The United States claimed that there is evidence of historical presence and activities of its nationals particularly for fishing,

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<sup>361</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, pp. 340 and 341, paras. 233 and 234.

<sup>362</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, pp. 73 and 74, paras. 79 and 80.

<sup>363</sup>



based on these criteria.<sup>372</sup> Furthermore, the Chamber stated that the respective scale of activities related to the human presence in the area could not be taken into account as relevant circumstances; however, the Chamber viewed that the delimitation it was establishing would leave to each party its most important traditional fishing grounds on Georges Bank, at least for scallops and lobsters.<sup>373</sup>

Although the Chamber did not consider the relevance of these fishery resources at the operational stage, the Chamber looked into it at the verification stage when testing the equitableness of the delimitation line. The Chamber noted that it would only consider fisheries

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*repercussions for the livelihood and economic well-being of the population of the countries*

<sup>374</sup> Consequently, at the verification, stage the Chamber came up with a negative answer for the test.<sup>375</sup> Although the test conducted by the Chamber was a simple one as it was limited merely to check whether the test would lead to a radically inequitable result,<sup>376</sup> the Chamber developed a threshold for further consideration in later cases.

## Section B: The *Greenland and Jan Mayen Case*

### *Subsection B.1: The Position of the Parties*

In the *Greenland and Jan Mayen case*

access to fishery resources, in which they centered their submissions on its importance for their respective economies and the traditional character of the different types of fishing carried out by the concerned populations.<sup>377</sup> In its Memorial, Denmark argued for a delimitation line that will bring about equitable solution to the parties, and not a median line as claimed by Norway. To justify its position, Denmark submitted evidence to demonstrate how the median line would not provide equitable results in the delimitation, particularly how the median line would affect its access to fishery resources in the relevant area.

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<sup>372</sup> Ibid.

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*American Society of International Law*, vol. 79, No. 4 (October 1985), p. 971.

<sup>374</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, p. 342, para. 237.

<sup>375</sup> Ibid., pp. 343 and 344, paras. 238–241.

<sup>376</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 270.

<sup>377</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 71, para. 75.

Relying on access to fishery resources as a circumstance that required an adjustment to the median line, Denmark submitted evidence to demonstrate the importance of capelin stock, particularly how it had been used for the production of fish meal and fish oil and how the population of the small communities on the east coast of Greenland had traditionally used capelin for human and animal consumption.<sup>378</sup> Denmark noted the presence of compact ice and polar ice which had made fishing off the east coast of Greenland impossible for all 12 months of an average year and this compact ice extended seawards to cover the disputed areas, allowing commercial fishing feasible only in late summer and early autumn.<sup>379</sup> Access to fishing in the disputed area, however, was important for Denmark, particularly for summer capelin.<sup>380</sup>

An additional point to the access to fishery resources in the area, Denmark used the population factor and the attachment of the people of Greenland as relevant circumstances. First, Denmark submitted that Jan Mayen had no population nor could sustain an economic life of its own.<sup>381</sup> In addition to the fact that only meteorologists, engineers, and other technicians manning the fishermen nor other settled population on Jan Mayen.<sup>382</sup> Consequently, Norwegian fishing



fishing off the East Greenland coast north of 68° North constituted less than one percent of the value of fisheries in the whole of the Greenland zone.<sup>400</sup>

As for the argument submitted by Denmark on the issue of population particularly on Jan







different courses. Eritrea claimed for a median line between the mainland coasts and this line -sea islands of Yemen.<sup>421</sup> Yemen, on the other hand, claimed for three segments of the delimitation line, the northern, the central, and the southern segments.<sup>422</sup> It seemed that the main difference centered on the effects to be given to the mid-sea islands, located in the central segment, where parties had strong and differing views on the effect of the traditional fishing regime on the delimitation line.

The parties had adv

The second point concerns the economic dependency on fishing which Eritrea claimed for its efforts to reorganize and build up the fishing industry.<sup>427</sup> Eritrea further asserted that even the most active market claimed by Yemen, the Hodeidah, it was Eritrean fishermen who brought the most fish there.<sup>428</sup> For its part, Yemen replied that fishing activities in the Red Sea had long been a vital part of their economy and the regional economy of the Tihama region along the f basis of evidence supporting the existing or utilization of proposals or projects for the development of their future fishing activities.<sup>429</sup>

For the third point concerning the location of fishing areas, Eritrea claimed that their artisanal fishermen had dominated fishing in the Red Sea, while Yemen fishermen had hardly relied on it.<sup>430</sup> Yemen, on the other hand, referred to the evidence produced in the form of witness statements in the First Phase Proceeding and argued that their artisanal and traditional fishermen had long fished in the waters of the Red Sea, specifically around Jabal al-Tayr and the Zubayr group, the Zuqar-Hanish group, and in the deep waters west of Greater Hanish and around the Mohabbakahs, the Haycocks and the South-West Rocks.<sup>431</sup> Yemen asserted that the fishing activities of Eritrean fishermen were confined to waters of the Dahlak archipelago and inshore waters surrounding the islands at issue in the First Phase Proceeding.<sup>432</sup>

As for the fourth ground on the consumption of fish by the population, Eritrea submitted that their coastal population consumed far more amount of fish than that of Yemen and there are efforts taking place to increase the availability and popularity of fresh fish for consumption by its general population.<sup>433</sup> Responding to this, Yemen asserted that its coastal population particularly those residing in Tihama consumed substantial quantities of fish.<sup>434</sup>

For the last ground on the effect of fishing on the delimitation line, both sides focused their submission on the need to achieve equitable results of the delimitation line. Eritrean submitted

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result for both parties.<sup>435</sup>

fore, created an equitable

For the location of the fishing areas, the Tribunal looked into the evidence submitted in both proceedings and held that fishermen of both sides conducted their fishing activities commonly

Tribunal in paragraphs 72 and 73 of the Award in the Second Phase Proceeding, the Tribunal did not expressly reject the relevance of fishing as relevant circumstances. The position, however, is that the parties fail to convince the Tribunal of its relevance in the current case. However, given that the Tribunal did not even consider applying the equitability test at the end of the delimitation process, it seemed that the role of traditional fishing rights was diminished in this case.

On an unrelated point to the effect of traditional fishing on maritime boundary delimitation, it seemed that the parties have agreed to a rather odd choice of law,<sup>450</sup> specifically their

The award in the Second Phase Proceeding helps to identify what constitutes artisanal fishing and clarifies the obligation to protect the traditional fishing regime although the parties

for drying fish, for way stations, for the provision of temporary shelter, and for the effecting of

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## Section D: The *Barbados v. Trinidad and Tobago* Case

### *Subsection D.1: The Position of the Parties*

In the *Barbados v. Trinidad and Tobago* case

maintained the equidistance line as a delimitation line, Barbados claimed an adjustment to its due to artisanal fishing.

Barbados advanced their arguments in three folds. First, they submitted that there existed a centuries-old history of artisanal fishing in the waters off the northwest, north, and northeast coasts of the island of Tobago by their fisherfolk.<sup>454</sup> Barbados stated that their artisanal fishing was done for the flying fish, a species that moves seasonally to the waters off Tobago. Barbadian fisherfolk had transported their catches home on ice or used preservation methods such as salting and pickling before transporting them home.<sup>455</sup> They supported this historical

Tobago and a record of public recognition by government ministers and officials from Trinidad and Tobago of Barbadian fisherfolk in the claimed area.<sup>456</sup> Second, they submitted that those Barbadian fisherfolk are dependent upon fishing in the claimed area off Tobago,<sup>457</sup> as the flying fish formed a staple part of their diet and constituted an important element of the history, economy, and culture of Barbados.<sup>458</sup> Barbados submitted affidavits and videos confirming how their fisherfolk attached to the tradition and vital nature of Barbadian fishing for the flying fish and argued that without the flying fish, the concerned fisherfolk would suffer severe economic disruption and in some cases, a loss of livelihood.<sup>459</sup> Finally, they contrasted the situation between their fisherfolk and those of Trinidad and Tobago and claimed that the fisherfolk of Trinidad and Tobago did not rely on fishing in the area claimed by Barbados for their livelihoods.<sup>460</sup> Barbados used the testimony of its fisherfolk and statements by Trinidad and Tobago fishing officials to claim that fishing is not a major revenue earner and that fisherfolk of Trinidad and Tobago generally do not rely on flying fish.<sup>461</sup>

After the discussion on the existence of artisanal fishing in the western segment, Barbados further asserted that access to fishery resources and fishing activities can constitute a special circumstance as confirmed in State practices, highly qualified publicists in major treaties, and

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<sup>454</sup> *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados v. Trinidad and Tobago)*, Award, 11 April 2006, RIAA, vol. XXVII, p. 184, para. 125.

<sup>455</sup> *Ibid.*, p. 185, para. 126.

<sup>456</sup> *Ibid.*, para. 127.

<sup>457</sup> *Ibid.*, p. 184, para. 125.

<sup>458</sup> *Ibid.*, p. 185, para. 128.

<sup>459</sup> *Ibid.*

<sup>460</sup> *Ibid.*, p. 184, para. 125.

<sup>461</sup> *Ibid.*, p. 185, para. 129.

various decisions such as the *Gulf of Maine case*, the *Greenland and Jan Mayan case*, the *Eritrea/Yemen case*, and the *St Pierre et Miquelon case*.<sup>462</sup> Particularly, Barbados submitted during the oral proceedings that:

*favor*

*of Barbados to protect the traditional artisanal*



*Subsection D.2: The Decision of the Tribunal*

Before proceeding to the delimitation matter, particularly on the question of whether artisanal fishing is a relevant or special circumstance, the Tribunal in the *Barbados v. Trinidad and Tobago case* stated that the applicable law governing the matter is UNCLOS as both States are State parties to it.<sup>470</sup> Additionally, the Tribunal considered bilateral treaties between the parties and between each party and third States to also have a certain degree of influence in the delimitation.<sup>471</sup> The Tribunal noted the role of customary law and judicial and arbitral decisions as shaping the considerations that apply in any process of delimitation.<sup>472</sup>

The Tribunal also made a strong statement on its right and duty to exercise judicial discretion in order to achieve the equitable result, the Tribunal stated in paragraph 244 of the Award that:

*right and the duty to exercise judicial discretion in order to achieve an equitable result. There will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are*

Although the Tribunal missed the opportunity to provide a substantial discussion on the relevance of artisanal fishing, the Tribunal did provide a quick comment in paragraph 269 of the Award that even if Barbados had succeeded in establishing artisanal fishing in the waters off Tobago, its case would not be conclusive enough as a matter of law to render an adjustment of the provisional equidistance line. The Tribunal further cited Sir Gerald Fitzmaurice and the *Greenland and Jan Mayen case* as 477

With such an approach, the Tribunal at the same time was cautious with its wording as the Tribunal stressed that the current case was without prejudice to boundaries between either of

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<sup>477</sup> Ibid., pp. 222 and 223, para. 269.

<sup>478</sup> Barbara Kwiatkowska, The 2006 Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits) Award, *Law of the Sea, Environmental Law and Settlement of Dispute*, Tafsir Malick Ndiaye and Rüdiger Wolfrum, eds. (Martinus Nijhoff Publishers, Leiden, Boston, 2007), p. 943.

## Conclusion

Among international maritime-related disputes, maritime boundary delimitation is probably the most sensitive one since it concerns the extent of the sovereignty, sovereign rights, and jurisdictions over the natural resources of the concerned States. Each maritime boundary dispute involves complex issues of geographical, geological, and historical circumstances, which require careful discussion among the concerned States. While resolving the differences through amicable means, particularly negotiations, could be seen as the best approach toward maritime boundary delimitation, going to third-party dispute settlement mechanisms is unavoidable when negotiations can no longer serve the interest of the concerned States. This is the reason why there have been more than 30 cases before the international courts and tribunals over the past five decades, the majority dealing particularly with the delimitation of the EEZ and continental shelf.

The existing case law has demonstrated that the goal of each maritime boundary delimitation is to achieve an equitable solution for the concerned parties.<sup>479</sup> However, approaches to reaching that goal could differ depending on the applicable laws and to what extent the international courts and tribunals could exercise their discretion on the interpretation of those applicable laws. This is not different from any other field of law in which the specificity of the applicable laws will have an impact on the freedom of the judges and arbitrators.

Starting from the first case in the *North Sea Continental Shelf case* to the *St. Pierre and Miquelon case*, the international courts and tribunals took an inconsistency approach to the method for delimiting the maritime boundary in the EEZ and continental shelf; however, the approach adopted generally reflect a result oriented equity approach, where the focus for each maritime boundary delimitation case is to achieve an equitable solution and not to follow any

In later cases from the *Greenland and Jan Mayen case* to the *Mauritius/Maldives case*, the jurisprudences demonstrated the adoption of what is known as the corrective equity approach where the goal for delimitation remained the same, that is the need to achieve an equitable solution. However, the international courts and tribunals have developed certain steps to be undertaken for each case to achieve an equitable solution. Consequently, the methodology for delimiting the maritime boundary became a center of discussion, and the equidistance method received more attention than before.

While the equidistance method has become part of the methodology for achieving an equitable solution, the other element that should not be ignored is the existence of relevant circumstances. Relevant circumstances have been referred to since the *North Sea Continental Shelf cases* although the substance and roles of this term are developing from time to time in case law. This development corresponds with the development of the methodology for delimiting maritime boundaries where there is no fixed rule to apply. It was until the *Black Sea case* in which the

necessarily been denied.<sup>480</sup> For instance, the Chamber in the *Gulf of Maine case* did not dismiss environmental factors as relevant circumstances or ruled that environmental considerations were irrelevant, yet the real situation seemed to be the Chamber did not find them to be relevant in that case.<sup>481</sup> Hypothetically, should there exist concrete evidence and sufficient legal grounds to justify the relevance of environmental factors in the delimitation area, the Chamber might have considered environmental factors as relevant circumstances affecting the delimitation line.

As for the *Bangladesh v. India case*

submission of the relevance of potential climate change and coastal instability in the delimitation area. The Tribunal made a strong statement that *change nor its possible effects can jeopardize a large number of settled maritime boundaries throughout the world. This applies equally to maritime boundaries agreed between States and*

<sup>482</sup> This conclusion by the Tribunal was not surprising as there seemed to be limited evidence and legal position submitted by Bangladesh to support its claim. Furthermore, Bangladesh instability and the effect of climate change was inconsistent, which might affect its credibility on the matter.

Even if environmental factors have not received much attention in adjudicated cases concerning maritime boundary delimitation, State practices offered a different narrative. For

maritime delimitation treaties.<sup>484</sup> Furthermore, States have been more assertive in pursuing cases dealing with marine environmental protection for the past 10 years as compared to 40 years ago. This is evidenced by the fact that there are two pending cases before the Annex VII Arbitration<sup>485</sup> and the ICJ<sup>486</sup> as compared to only one case before the ICJ.<sup>487</sup>

Furthermore, climate change has been on the hotline recently as compared to the past 5 decades and it has already triggered significant responses in the international community. Particularly, the three ongoing requests by States to regional and international courts asking for their advisory opinions on the scope of State obligations for responding to climate emergency at the Inter-American Court of Human Rights,<sup>488</sup> the specific obligations by State parties to UNCLOS to prevent, reduce and control pollution of the marine environment from climate change and obligation to protect and preserve the marine environment from climate change impacts at the ITLOS,<sup>489</sup> and the obligations of States in respect of climate change to the ICJ.<sup>490</sup> The outcomes of these three advisory opinions will surely shape the human and environmental dimension aspects of the general law of the sea and will further expand the discussion of climate change in delimitation law.

Another non-geographical factor that has received limited influence is the sociocultural considerations, specifically access to fishing and the sociocultural attachment of the coastal communities in the delimitation area. Statistically, the sociocultural considerations appeared only 4 times in case law thus far, starting with the *Gulf of Maine case*, the *Greenland and Jan Mayen case*, the *Eritrea/Yemen case*, and the *Barbados v. Trinidad and Tobago case*.

The four cases demonstrated the inconsistency in international jurisprudence concerning the treatment of sociocultural factors in maritime boundary delimitation. In the first case, the *Gulf*

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<sup>484</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation*

of *Maine case*, the Chamber of the ICJ rejected sociocultural factors as a relevant circumstance; however, it seemed that that the Chamber had created a test that later applied by the Court in the *Greenland and Jan Mayen case*, in which the Court adjusted the median line to enable

*entails catastrophic repercussions for the livelihood and economic well-*<sup>491</sup> Therefore, it seemed that sociocultural considerations could play a role not only in the first stage of delimitation but also in the verification stage.

On the other hand, practices from the Tribunals in the *Eritrea/Yemen case*

rights have never  
been an exclusive right solely reserved for the coastal States.

It should be noted that despite the fact that historic fishing rights and artisanal fishing have not yet been recognized as relevant circumstances in delimitating the EEZ and continental shelf for the purpose of achieving an equitable solution, the traditional character of the different fishing types carried out by the population concerned was given some weight in arriving at the final delimitation.<sup>495</sup> The case has not been the same for cultural rights, particularly the attachment of the people to the sea and its surroundings. As there was only one case in the last 5 decades that this factor has been put forward by the parties, it would be interesting to see how and to what extent international courts and tribunals entertain this argument in the near future. The closest is the pending case of the



geomorphological factors; however, most of the time the concerned parties choose to submit the non-geographical factors for their consideration regardless of the predictable result. This behavior of States cannot be ignored by the international courts and tribunals as their tasks are not merely about finding the best methodology and delimiting a boundary based on it as this is not the end goal for maritime boundary delimitation. The end goal is to find an equitable solution for the parties. Therefore, the task of international courts and tribunals is to guide the disputing parties through a trustworthy mechanism to settle the long-standing dispute with the hope that it will achieve an equitable solution for the concerned parties, and this task could

tendency is inconsistent in case law in which sociocultural factors have been raised by the parties. Should we be hopeless and wait to see no progress in the delimitation law?

The answer is no. Due to the dynamic nature of the law of the sea and given the recent development on environmental and human dimensions at sea, more consideration is likely to be further discussed in future jurisprudence, particularly in meeting the objective of an equitable solution in maritime boundary delimitation. While it is vital to have consistency and predictability in the law of maritime boundary delimitation in case law, flexibility is also a cornerstone in the law of the sea, particularly UNCLOS. Therefore, when dealing with relevant circumstances, there should be a legal framework for identifying those relevant circumstances and determining whether those relevant circumstances in question have any potential effect on the exercise of rights over the maritime spaces involved. In other words, international courts and tribunals should consider whether there are factors that underlie the legal rights of coastal states over maritime spaces.<sup>498</sup> While the law needs to be flexible in addressing the relevant circumstances, international courts and tribunals need to be flexible in treating concerns addressed by States particularly those that would help States to exercise their rights under international law.

Although it will take some time for environmental and sociocultural considerations to have a solid place on their own in the delimitation law, one should not forget that the law on maritime boundary delimitation remains a judge-made law. Consequently, how far these two elements can go depends on the flexibility of the international courts and tribunals, whom need to count on factual and legal arguments from States to expand this discussion. Perhaps, it might be helpful if a situation allows us to link environmental and sociocultural factors to other relevant circumstances that are closely interrelated, for example, the navigational concerns of States.<sup>499</sup> This might trigger more attention from the courts and tribunals or at least inspire other forms of arrangement in reaching an equitable solution for maritime boundary delimitation.

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<sup>498</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 336.

<sup>499</sup> in *International Maritime Boundaries Volume I*, Jonatha I. Charney and Lewis M. Alexander, eds. (Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1993), p. 109.

**Annex I: Cases on Maritime Boundary Delimitation from 1969 to 2023**

No.	Name/Parties	Unilateral/ Joint Submission	Year of	Zone Involved	Relevant	Others
International Court of Justice (ICJ)						
1.	North Sea Continental Shelf (Germany/Netherlands)	Joint submission via Special Agreement (1967)	1969	CS		
2.	North Sea Continental Shelf (Germany/Denmark)	Joint submission via Special Agreement (1967)	1969	CS		

7.	Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)	Unilateral submission (1988)	1993	FZ/CS		
8.	Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)	Unilateral submission (1991)	Discontinue	TS/EEZ/CS		Discontinue
9.	Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) <sup>500</sup>	Joint submission via Special Agreement (1987/1990)	2001	TS/CS		
10.	Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)	Unilateral submission (1994)	0 G q225.2			

13.	Territorial and Maritime Dispute (Nicaragua v. Colombia)	Unilateral submission (2001)	2012	EEZ/CS		
14.	Maritime Dispute (Peru v. Chile)	Unilateral submission (2007)	2014	TS/EEZ/CS		
15.	Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)	Unilateral submission (2014)	2018	TS/EEZ/CS		
16.	Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)	Unilateral submission (2014)	2021	TS/EEZ/CS		
17.	Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)	Unilateral submission (2013)	2023	CS beyond 200 nm		
18.	Territorial, Insular and Maritime Claim (Guatemala/Belize)	Joint submission via Special Agreement (2008)				
19.	Land and Maritime Delimitation and Sovereignty over	Joint submission via Special				

	Islands (Gabon/ Equatorial Guinea)	Agreement (2016)				
Arbitration (Ad hoc or Annex VII Arbitration)						
1.	Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic	Joint submission via Special Agreement (1975)	1977	CS		
2.	Case concerning a dispute between Argentina and Chile concerning the Beagle Channel	Joint submission via Special Agreement (1971)	1977	TS		

3. Case concerning the delimitation of the maritime boundary



	Azov, and Kerch Strait (Ukraine v. the Russian Federation)					UNCL OS
International Tribunal for the Law of the Sea						
1.	Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal <sup>501</sup>	Unilateral submission (2009)	2012	TS/EEZ/ CS		Based on UNCL OS
2.	Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte Atlantic Ocean (Ghana v. Côt <sup>502</sup>	Unilateral submission (2014)	2017	TS/EEZ/ CS		Based on UNCL OS
3.	Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)	Joint submission via Special Agreement (2019)	2023	EEZ/CS/ CS beyond 200 nm		
Compulsory Conciliation under Annex V of UNCLOS						
1.	Timor Sea Conciliation (Timor-Leste v. Australia)	Unilateral submission (2016)	2018	EEZ/CS		Based on UNCL OS

<sup>501</sup> The proceeding was unilaterally initiated by Bangladesh; however, the Parties had subsequently agreed to a joint submission before ITLOS.

<sup>502</sup> This case was unilaterally initiated by Ghana; however, the Parties had subsequently agreed to a joint submission before a Special Chamber of ITLOS.



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