Delimitation of maritime boundaries between adjacent States

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Part I. Introduction

> Law of the sea is as old as nations, and the modern law of the sea is virtually as old as modern international law. For three hundred years it was probably the most stable and least controversial branch of international law.[1]

The law of the sea is a difficult and multiform branch of law, which comprises the norms regulating the rights and obligations of States in the marine area. Every coastal State has jurisdiction over the oceans and seas, the limits of which are defined by international conventions and national regulations must confirm to international law. The law of the sea, in its essence, divides the seas into zones and specifies the rights and duties of States and ships flying their flags in those zones.

Cooperation on maritime issues by States is very important in contributing to the maintenance of peace, security and economic well-being for all the nations of the world.

Prior to 1945, there was variety in State's practice with respect to claiming maritime zones in which they could exercise full sovereignty over the seabed and subsoil, the water column, and the airspace. But, after World War II, this situation was soon changed. The scarcity of land-based natural resources forced States to concentrate on the exploitation opportunities of offshore resources. Scientific and technological progress had shown the potential importance in this respect of the natural resources of the continental shelf. Furthermore, States began to realize the growing importance of the non-living resources of the high seas as being vital to their economic development. These factors resulted in the emergence of the new concept, the continental shelf (CS).

The substantial role for the emergence of CS, and the establishment of national jurisdiction on it, was played by the 1945 Truman proclamation. President Truman of the United States proclaimed that the Government of the United States regarded the natural resources of the subsoil and the seabed of the CS beneath the high seas, and

[1] Henkin. L. *How nations behave* 212. 2 ed. 1979

contiguous to the cost of the United States, as appertaining to the United States, subject to its jurisdiction and control.[2] The majority of States in a short period of time, made the similar declarations and the CS soon became accepted as customary international law.

Commercial exploitation of CS oil and gas deposits began in the 1940s and has become significant since the late 1950s with the rapid development of deep-water recovery technology. During the 1960s, again as a result of technological development, most fish stocks in the seas, which are concentrated over CS, were subject to intensive exploitation by distant-water fishing fleets. Coastal State efforts to acquire exclusive rights to manage and exploit these living resources were inevitable. The result was the emergence of the new off-shore zone, the exclusive economic zone (EEZ).[3]

The emergence of the new maritime zones significantly increased the importance of maritime boundary delimitation in contemporary international law. The most notable feature of these new zones is their great distance from the coast. International law permits a State to extend its EEZ seaward to a distance of 200 nautical miles from its baseline, as defined by article 57 of the 1982 LOS Convention.[4] Also the CS seaward extension is at least 200 nautical miles from the baseline, and perhaps considerably farther when international law so permits.[5]

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[2] President Truman proclamation No.2667, 28th September, 1945. "Policy of the United States with respect to the natural resources of the subsoil and the seabed of the continental shelf." Repr. www.oceanlaw.net.

[3] Edward Collins, Jr. and Martin A.Rogoff. The international law of maritime boundary delimitation. *Maine law review* 34, 1982. PP. 1-2.

[4] International Convention on the Law of the Sea. Done in Montego Bay, 10 December, 1982. Hereafter: 1982 LOS Convention.

[5] 1982 LOS Convention, Article 76.

> *(1) The continental shelf of the coast State comprises the seabed and subsoil of the submarine area that extends beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical mile form the baselines from which the breadth of the territorial sea is measured where the outer limit of the continental margin does not extend up to that distance.*
>
> *(5) The fixed points comprising the line of the outer limit of the continental shelf on the seabed,[…] either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.*

Those maritime zones of two States frequently meet and overlap, and the line of separation has to be drawn to distinguish the rights and obligations between the States. Therefore, delimitation is a process involving the division of maritime areas in a situation where two (or more) States have competing claims. For both States, this act may imply restriction of their perceived sovereign rights.

The maritime delimitation process is a complicated subject, because of both the number of real and potential situations throughout the world, and the complexities of the delimitation process. The delimitation process itself involves several types of issues. One concern is the source of authority. A second issue involves the principal methods by which delimitation is carried out, and finally there are technical questions regarding the determination of the actual lines in space.[6]

Maritime boundary delimitation can arguably be viewed as an essential precursor to the full realisation of the resource potential of national maritime zones and the peaceful management of the oceans and seas. With regard to the seabed resources, which could prove crucial to the well-being and political stability of coastal States, extensive overlapping claims forestall development while maritime boundaries remain unsettled.[7]

It is obvious that delimitation by agreement remains the primary rule of international law. The negotiating process is very important for achieving agreement. The delimitation process must be effected by agreement between parties on the basis of international law, as it is recognised by 1982 LOS Convention.

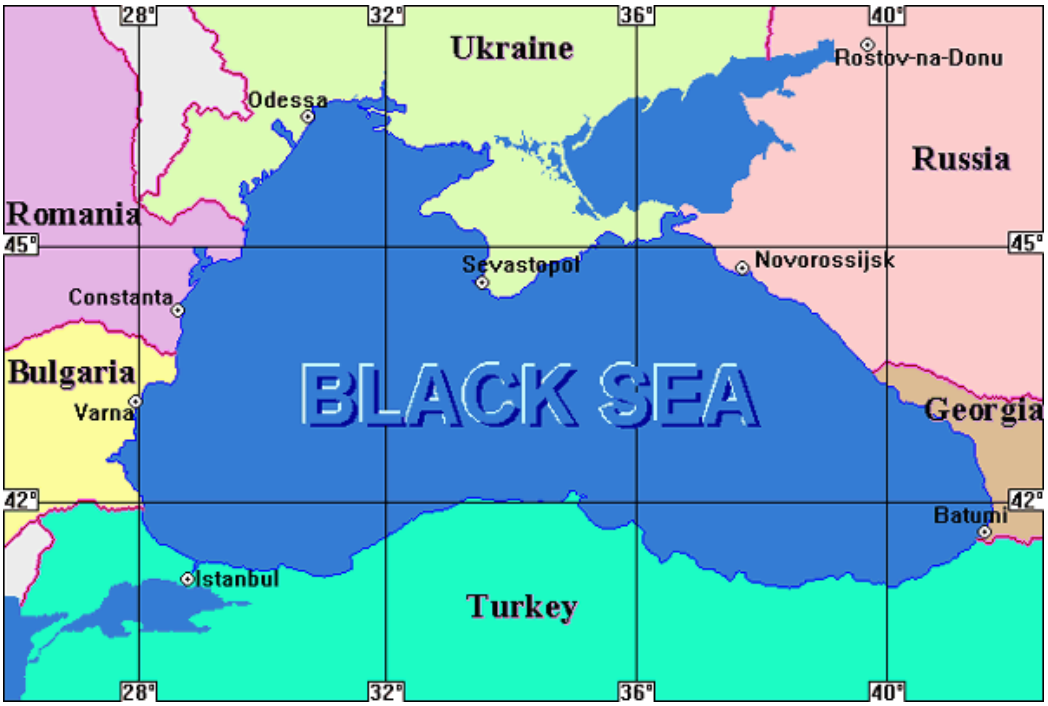
> The delimitation of the exclusive economic zone/continental shelf with the opposite or adjacent coasts shell be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.[8]

[6] Alexander L. M. The delimitation of maritime boundaries. *Political geography quarterly* 5, 1986. PP. 1-2.
[7] Prescott V and Schofield C. *The maritime political boundaries of the world* . 2005. P. 216.
[8] Articles 74 and 83 of the 1982 LOS Convention.

Also the fundamental procedural principle of general application forming part of the International Court Justice's[9] doctrine, and as indicated in 1982 LOS Convention, is the principle of effecting maritime boundary delimitation by agreement. The principle constitutes a special application of the general principle of peaceful settlement of international disputes and puts emphasis on a State obligation to negotiate in good faith with a view to conclude agreement.

This article will analyse the legal principles and methods which are pertinent and considered by the ICJ and States for the delimitation of maritime boundaries between adjacent States. Georgia and Russian Federation are adjacent States on the Black Sea and in the future, after the States will finish the delimitation process on the land boundary, the maritime delimitation process will take the place.

- **Black Sea Region**



Source: Online access at < http://www.blackseaweb.net/maps/content12.htm>

Before analysing the above-mentioned principles, methods and relevant circumstances, it will be useful to make a small overview towards the formulation of conventional norms for delimitation of maritime boundaries.

[9] United Nations International Court of Justice. Hereafter: ICJ.

Part I provides an overview of the formulation of the conventional rule of delimitation of sea boundaries between States. It begins with The Hague Codification conference of 1930 and ends with relevant discussions held during the Third United Nations Conference on the Law of the Sea (UNCLOS III).

Part II is concerned with the consideration of the fundamental principals and methods of maritime delimitation: the principles of equity and equidistance/median line. These author will try to analyse these principles and methods and their applicability for the delimitation between adjacent States and it will be shown that equity principles identified in the 1969 North Sea Continental Shelf Case and equidistance/special circumstances identified in the 1958 Geneva Convention on the Continental Shelf have the same object: to achieve an equitable result. Furthermore it will be shown that the controversy between the customary international law and conventional law has subsequently been subsumed by the International Court of Justice into the equitable principle/relevant circumstances rule.

The next section is concerned with the use of the method of single maritime boundary, developed after the emergence of the EEZ. States found it convenient and simple to delimit the two different zones (CS and EEZ) by a single maritime boundary. The recourse to this method is also supported by the fact of parallelism of the EEZ and CS and by the identical language employed in articles 74 and 83 of the 1982 LOS Convention.

The present paper will then turn to the method of proportionality. Proportionality is taken into account in the process of delimitation, or at the end of the process to test that the result is equitable. It will not be an exaggeration to say that proportionality is incorporated in maritime delimitation and it is an applicable criterion for both the adjacent and opposite States in maritime delimitation process. The Court tests the used line by comparing the ratio between the length of each coastline of the respective States and the area shelf or water column allocated to them. If the delimitation line produces a boundary that results in the concerned States received areas of the shelf and sea that are roughly proportionate to the length of their coastlines, the delimitation line is seen to be an appropriate boundary. The test of proportionality itself seems to be an overall element to verify that the delimitation line achieved is not grossly

inequitable. Also, the use of proportionality in the delimitation process may insure the equitable access to resources, for example, not to put the fishermen of one State at a gross disadvantage compared to the fishermen of the other State.

The second half of part II will examine the relevant circumstances; in other words what circumstances are taken into account by States and the ICJ in the delimitation process for adjacent States and under what conditions. These circumstances include geographical circumstances, most relevant and dominant (the length and configuration of coastlines, the factor of islands), and non-geographical circumstances, such as the geological factor, historical rights, the unity of deposits and socio-economic circumstances. Relevant circumstances are taken into account in the achievement of an equitable result, and usually serve to shift an equidistance/median line. But there is no closed list of relevant circumstances, and during the delimitation process, especially during the negotiation process, States are free to take into account those circumstances which they find relevant and none of them is obligatory for the States and the Court to accept as each case is unicum.

In the conclusion, after carefully examining the methods, principles and relevant circumstances of maritime delimitation, the author will try to ascertain which methods, principles and circumstances are relevant for the maritime delimitation between Georgia and the Russian Federation, two adjacent States on the Black Sea.

Before analysing the above-mentioned principles, methods and relevant circumstances, it will be useful to provide a small overview of the formulation of Conventional norms for the delimitation of maritime boundaries.

Part II. Towards the formulation of the rule of delimitation of sea boundaries

1. The Hague Codification Conference.

Although without success, the earliest attempt by the international community to codify delimitation rules and methods was the Hague Codification Conference of 1930. This codification effort was concentrated on the territorial waters and on the delimitation between opposite States.

In a report of the Sub-committee of the Committee of Experts for the Progressive Codification of International Law, it was pointed out that under normal circumstances application of the median line would have a satisfactory result.[10] However, a deviation might be justified by reasons of geographical, historical and other circumstances. A draft convention on territorial waters was presented by the Harvard Law School, which also preferred the median line for opposite coasts.[11] With respect to lateral boundaries, the Convention suggested the principle of division by lines perpendicular to the general configuration of the coastline. The expert's views were different and the topic of lateral delimitation was excluded from the draft proposals submitted by the Sub-committee.

As a result, the preparatory committee for the Hague Codification Conference inserted the draft proposal on opposite delimitation of the Sub-committee. The various delegations disagreed on the proposed draft articles. Despite efforts, the participants to the Conference could not agree on the drafting of a delimitation article.[12]

[10] Jagota S. P. *Maritime Boundary*. PP. 49-50
[11] Gerard J. Tanja. *The legal determination of international maritime boundaries.* 1990. Par. 2.3. P. 6.
[12] *Ibid*. P. 7.

2. The International Law Commission (1949-1956) and the 1958 Geneva Conference.

The earliest opportunity to carry on and finish the work of the Codification Conference came with the end of the Second World War and the establishment of the United Nations (UN) in 1945. Within the framework of the UN General Assembly, and under its auspices, the International Law Commission (ILC) was responsible for the codification of international law and for its progressive development.

At an early stage, the ILC recognised the importance of an effort to codify the international law of the sea. At its first session, the ILC drafted a provisional list which included the regime of the high seas which then included, *inter alia*, the CS. The regime of territorial waters was added later. The ILC established committee of experts on technical questions relating to maritime delimitation of the territorial sea. According to the ILC, these experts should keep in mind that the proposed guidelines would be equally valid and appropriate for the delimitation of the CS.[13]

It appears that despite the totally different character of the two regimes, the ILC discussed the topic of the delimitation of the CS on the basis of the report prepared by non-legal experts on technical methods which may be used for the demarcation of the territorial sea.[14]

The committee met in The Hague, in 1953, and adopted certain guidelines. The committee had made clear in its report that it favoured the use of a median line in an opposite situation, but also indicated that special reasons such as navigational interests and fishing rights might call for the use of a different method. A lateral boundary should be drawn by making use of the principle of equidistance from the respective coastlines.

The recommendations of the committee of experts were welcomed by the majority of the ILC members. They used this method both for the territorial sea and the CS. Some members insisted on the preference and general use of the equidistance/median line, but other members were unable to support the rather rigid formula for lateral as well

[13] Yearbook of the ILC, 1952, I, p. 185.
[14] Gerard J. Tanja. *Op cit.* P. 25.

as opposite situations, stressing that it was not possible to provide a general rule to cover all cases although they recognised the practical advantage of the method.[15]

Finally, the ILC seemed to be of the opinion that the existence of numerous exceptions and special circumstances legally justified a departure from the median/equidistance rule and they included in the draft report the formula "unless special circumstances justify another boundary."[16] It seems that the ILC considered equidistance to have a residual character, the application of equidistance method was considered mandatory unless States agreed otherwise and, once it was established, that special circumstances were absent.[17]

After finishing the drafting process, the ILC called upon the General Assembly to convene a diplomatic conference on the international law of the sea (the First United Nation Conference on the Law of the Sea). The conference was convened in accordance with a General Assembly's resolution N1009 (XI) of 21 February 1957.

The Conference adopted the respective conventions with little modifications to the ILC draft articles. For CS delimitation, they left the two provisions for opposite and adjacent coasts.[18] For the territorial sea, they combined the two provisions in to one, Article 12, and the reference to the special circumstances in the ILC draft was expanded to refer to "historic title or other special circumstances."[19]

During the conference, the predominant feeling of the delegations was that a reference to special circumstances was legally necessary because it was considered an inherent element of the delimitation rule to be adopted. The essence of the draft provisions of the ILC could be preserved, but the legal reasoning behind the ratio of this provision had changed. An equidistance rule based on the general principle of equidistance which allowed for some exceptions had been replaced by what was later called a combined equidistance/special circumstances rule.[20]

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[15] Yearbook of the ILC, 1953, I, p. 106.
[16] Jagota S. P. *Op. cit.* P. 55.
[17] Yearbook of the ILC, 1952, II, p. 216.
[18] Jagota S. P. *Op. cit.* P. 56.
[19] *Ibid.* P. 55.
[20] Gerard J. Tanja. *Op. cit.* P. 42.

> 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/median line from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.[21]

This combined rule consisted of two substantive elements, equidistance and special circumstances.

As a result of this discussion, the Conference finally adopted the 1958 Geneva Conventions relating to respective maritime zones.[22]

3. The third United Nations Conference on the Law of the Sea 1973-1982.

The Third United Nations Conference on the Law of the Sea (UNCLOS III) led to the adoption of the most comprehensive convention on the law of the sea to date.

UNCLOS III was not only important for the development of the international law of the sea, it can also be considered as a landmark in the history of the politico-diplomatic negotiating system, and was the most innovative international law-making project ever undertaken.

One of the reasons for the convening of the conference was the growing number of young States as a result of the decolonization process in the 1950's and 1960's. Most of the new States had not been involved in the treaty-making process of UNCLOS I. Compared to 86 States participating in 1958, 165 States participated in UNCLOS III.[23]

Secondly, these States wanted to reform the traditional negotiating and multilateral treaty-making process so as to establish a more democratic and equitable international

[21] Article 6 of the Convention on the Continental Shelf. Done at Geneva, on 29 April, 1958.
[22] Convention on the Territorial Sea and Contiguous Zone. Done at Geneva, on 29 April, 1958. Convention on the Continental Shelf. Done at Geneva, on 29 April, 1958.
[23] The official text of the 1982 UN LOS Convention with annexes and index is repr. in UN Sales Publ. No.E.83.V.5. (1983)

order and among other things, and to revise the traditional law of the sea to reflect this new order.

A Sea-Bed Committee was established by the General Assembly in 1968. This Committee was considered a preparatory committee for the new law of the sea. The Sea-Bed Committee became overburdened with official statements, working papers and government proposals for draft articles on a great variety of issues. Between 1971 and 1973, the various proposals for draft articles were included in the list merely to serve as points of reference for negotiations and consultations to be conducted within a future conference. The Sea-Bed Committee was under no pressure to try to reach agreement on the various proposals, since it was obvious that a comprehensive law of the sea conference would be held shortly.

Due to, the Sea-Bed Committee could not complete its preparatory work and UNCLOS III was convened in December 1973. The contradiction between the so-called pro-equidistance States and States favouring a concept of equity seriously hampered the negotiations and became a hard issue on the agenda of UNCLOS III.

Several negotiating groups were established to achieve a solution, but it seemed that two groups of States with opposite positions worked without success in achieving a solution. During the conference, many draft proposals were presented by these two groups of States. Of course, the proponents of the equidistance line (for example: Denmark, Norway, United Kingdom, Canada, Greece, Italy, Japan) favoured the treatment of the equidistance/median line as a standard of delimitation. They insisted that it was the principle of international law governing delimitation cases, relying on Article 6 of the 1958 Convention on the Continental Shelf. They considered that the equitable principle standard was vague and subjective.[24]

Supporters of the equitable approach (for example: France, Turkey, Ireland, Kenya, Liberia, Libyan Arab Jamahiriya, Poland, Romania) objected to the very mention of the equidistance/median line as a standard for delimitation and rejected the elevation of that standard to the status of a basic principle.

[24] Adede. A.O. Toward the formulation of the rule of delimitation of sea boundaries between states with adjacent or opposite coasts. *Virginia journal of international law* 19, 1979. P. 214.

The supporters of the equitable principle were relying on the decision of the ICJ in the 1969 North Sea Continental shelf case. In this case, the ICJ minimised the importance of the median/equidistance line of article 6 of the 1958 Continental Shelf Convention, and emphasized the equitable principle as customary international law on delimitation.[25]

After long and difficult negotiations, a compromise formula for the delimitation was finally reached. The tenth session of UNCLOS III was held in New York from 9 March to 10 April. There appeared to be some agreement on a reference to international law in the delimitation criteria, but the question of its link with the delimitation agreement and with equitable principles could not be resolved. The other elements of the delimitation criteria could also not be resolved. The two Co-chairmen (Ireland for equity group and Spain for the equidistance group) reported separately on the inconclusive outcome of these negotiations to the President. Informal negotiations were also held by the Chairmen of two interest groups with the President of the Conference.[26]

The interventions by UNCLOS III President Koh were considered necessary in order to protect the fragile consensus on the slowly crystallizing Conference text, thus continued during the resumed tenth session and eventually produced the long search for a compromise formula. Together with the help of the representative of Fiji, Koh proposed the following substantive provision on delimitation:[27]

> 74/83 Delimitation of the EEZ/Continental shelf between States with opposite or adjacent coasts:
>
> The delimitation of the EEZ/Continental shelf zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.[28]

[25] *Ibid.* P. 213; P. 215. Also see: 1969 North Sea case
[26] Jagota S.P. *Op. cit*. P. 241.
[27] Gerard J. Tanja. *Op. cit.* P. 114.
[28] Article 74 and 83 of the 1982 LOS convention

The compromise text was eventually incorporated in the 1982 LOS Convention.

The representative of Ireland, Chairman of the equity group, said that he could confirm that the proposal did indeed enjoy widespread and substantial support in the group. Similarly, the representative of Spain, Chairman of the equidistance group, reported that he now fully supported the comments made by the representative of Ireland and that there was indeed general support in his group for the President's proposal.[29]

The adoption of the delimitation provision for the territorial sea was not so problematic, since the distance does not exceed 12 nautical miles and a projection of the land border which is used, which in practical terms means a median line. So Article 15 of the 1982 LOS Convention remained mostly the same as it was in the 1958 Geneva Convention. Failing agreement, and in the absence of historical titles or other special circumstances, the boundary is the median line.

The new compromise formula would protect the interests of the two conflicting groups, as well as any party to a delimitation case. It may be contended that this reference to international law and an equitable solution is too vague, and that the precise factors to be taken into account in delimitation, including the value or effect to be given to them, have not been specified or clarified. The solution proposed by President Koh and accepted by a large section of the Conference, although not perfect, is workable.[30]

However, it seems that the compromise formula is too vague and it invests the Court and tribunals with a wide power of discretion in addressing delimitation disputes. However, this compromise article is more convenient for States. If there was one prescribed method of delimitation, in many cases it would lead to inequitable results. The States are free during the negotiation process to agree on any method or methods which they consider to be equitable for them.

[29] Jagota S.P. *Op. cit*. P. 242.
[30] *Ibid.* P. 245.

At the same time, diplomats know that during the negotiation process, they may resort to third party dispute settlement for maritime delimitation disputes. This, more than for any other area of international law. This awareness limits them to positions they may credibly take during negotiations by devaluing those that would be untenable if presented for third party dispute settlement.[31]

Also, the task of the judge is to produce an equitable and just result in the particular case. To reach such a result, the judge has to take into account the relevant circumstances of each case, not only by balancing the various circumstances, but also by balancing or composing the interests of the State in dispute.

[31]Jonathan I. Charney. Progress in international maritime boundary delimitation law. *American journal of international law*, Vol. 88. 1994. P. 228.

Part III. Principles and methods of delimitation

1. Equidistance

The 1958 Territorial Sea Convention defines equidistance as "the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each of the two States is measured."[32] The 1958 Continental Shelf Convention contains a similar definition. This Convention employs the term "median line" for an equidistant line between opposite States and refers only to a boundary determined by application of the principle of equidistance in the case of adjacent States.[33] It seems that the use of equidistance methods depends on the baselines along the coasts of the respective States whose offshore areas are to be separated by the boundary. There may be difficulties here if one State utilizes normal baselines, following the sinuosities of the coasts, and the other employs a straight baseline system connecting the outermost islands, promontories and rocks.[34]

According to the 1958 Conventions, the use of the equidistance method was obligatory in the absence of an agreement, historical titles or special circumstances. This was called the combined equidistance/special circumstances rule.[35]

The emergence of the equidistance principle in early treaty law, such as in the 1958 Conventions, may be explained by the fact that this principle struck a certain balance between predictability and flexibility, objectivity and discretion. Moreover, the combined rule generally respected the principle of equal division of the area of converging or overlapping claims, in the absence of inequities resulting from aberrant coastal features or major differences in coastal lengths. Finally, it took account of adjacency or proximity to the coast as the legal basis of title for the territorial sea and as an integral part of the basis of title for the CS. Later, with the appearance of the EEZ doctrine, the factor of adjacency was dubbed the distance principle and assumed

[32] 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Article 12.
[33] 1958 Geneva Convention on the Continental Shelf. Article 6.
[34] Lewis M. Alexander. The delimitation of maritime boundaries. *Political geography quarterly*. 1986. Vol. 5. P. 22
[35] Article 12. 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Article 6. 1958 Geneva Convention on the Continental Shelf.

even greater theoretical importance for delimitation purposes as it became the single common element in the basis of title to all offshore zones within the 200 nautical mile limit.[36]

The emergence of the principle of distance gives pertinence in normal situations to the equitable method of the equidistance/median line. However, notwithstanding the recognition of the principle of distance as the basis of entitlement to both the EEZ and the CS within 200 nautical miles, the privileged role of equidistance was strongly objected by the ICJ and dissenting judges.[37] The privileged status of equidistance method was diminished by the ICJ and arbitral tribunals, it was considered as a method which in some cases may lead to inequitable and unreasonable results. In the majority of cases, it was declared that equidistance was not a binding rule of law, but merely one method among others and it was not regarded as part of customary international law which plays the major role in delimitation process. The defects of the equidistance method, even tempered by the notion of special circumstances, led to its undoing. The demolishing and toning down of equidistance went so far that the terms "equidistance" and "median line" have disappeared from the text of Article 74 and 83 of the 1982 LOS Convention. It remains only in Article 15 of the 1982 LOS Convention. This was called "a holy war against equidistance" by the French author Prosper Weil.[38]

In spite of the diminishing role of equidistance, it found its way into State practice. The majority of bilateral treaties on maritime delimitation still use a line based on simplified or modified equidistance. In many cases, governments begin the negotiations by considering an equidistance line, while subsequently at liberty to modify it.[39] Even in most ICJ cases and arbitral awards, judges found it convenient to use the equidistance line as the starting point in the delimitation process. As Judge Jimenes De Arechaga declared "naturally, in all cases the decision-maker looks at the

[36] Legault L. and Hankey B. Method, oppositeness and adjacency, and proportionality in maritime boundary delimitation. In *International maritime boundaries*. Edited by Jonathan I. Charney and Lewis M. Alexander. Vol I. 1993. P. 204.
[37] Kwiatkowska, Barbara. Equitable maritime delimitation – A legal perspective. *International journal of estuarine and coastal law*. (3) 1988. P. 300.
[38] Weil P. *The law of maritime delimitation-reflections.* 1989. P. 205.
[39] Nelson L.D.M. The roles of equity in the delimitation of maritime boundaries. *American journal of international law*. 84 (4), 1990. P. 844.

line of equidistance, even if none of the parties has invoked it."[40] Thus, the point of departure should be the line of equidistance, and this line should be altered only if it is found to produce inequitable results.[41]

The first case brought before the ICJ in 1969 was the case between three adjacent States,[42] and was the case which started the demolition of the equidistance principle. Through this case, it ceased to be a principle and became merely one method among others.

The parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out delimitations on that basis. [43] The Court rejected the contention of Denmark and the Netherlands to the effect that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in Article 6 of the 1958 Geneva Convention on the Continental Shelf, holding:

> That the Federal Republic, which had not ratified the Convention, was not legally bound by the provisions of Article 6;
>
> That the equidistance principle was not a necessary consequence of the general concept of continental shelf rights, and was not a rule of customary international law.[44]

Rejecting the contentions of Denmark and the Netherlands, the Court considered that the principle of equidistance, as codified in Article 6 of the 1958 Geneva Convention on the Continental Shelf, had not been proposed by the International Law Commission as an emerging rule of customary international law. This article could not be said to have reflected or crystallized such a rule. This was confirmed by the fact that any State might make reservations in respect of Article 6, unlike Articles 1, 2 and 3, on signing, ratifying or acceding to the 1958 Geneva Convention on the Continental Shelf.[45]

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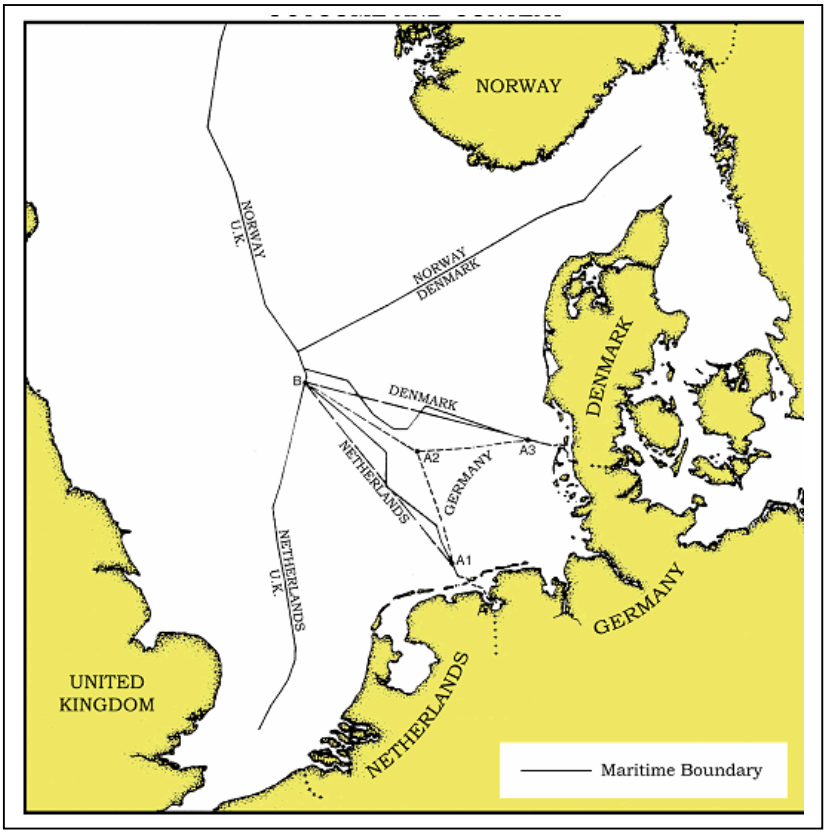
[40] 1982 ICJ Continental shelf case (Tunisia/Libyan Arab Jamahiriya). Separate opinion of Judge Jimenes de Arechaga. Par. 18. P. 105.
[41] *Ibid.* Par. 18. P. 105.
[42] North Sea Continental Shelf Case (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands). Judgment of 20 February, 1969. Hereafter: 1969 North Sea case.
[43] 1969 North Sea case. Merits of Judgment of 20 February 1969. Preamble. Par. 2.
[44] *Ibid.* Par. 3.
[45] *Ibid.* Par. 61.

- **1969 North Sea case**



Source: Nuno Marques Antunes. *Towards the conceptualisation of maritime delimitation.* P. 444.

The Court found the use of the equidistance line inapplicable, because the particular coastal configuration of States was taken into account. The coasts of Denmark and the Netherlands were convex, while that of the Federal Republic of Germany was concave.[46] In such a case, the use of equidistance left Germany an exceptionally small part of the North Sea CS and the delimitation process would not achieve an equitable result.

However, the Court commented that it "has never been doubted that the equidistance method of delimitation is a very convenient one"[47] and that "it would probably be true

[46] Masahiro Miyoshi. Consideration of equity in maritime boundary cases before the ICJ. In *Liber Amicorum Judge Shigeru Oda*. 2002. P. 1092.
[47] 1969 North Sea Cases. Par. 85.

to say that no other method of delimitation has the same combination of practical convenience and certainty of application."[48]

The second case involving adjacent States was in 1982, concerning the delimitation of the CS between Tunisia and Libyan Arab Jamahiriya[49]. The two parties asked the Court to clarify what are the principles and rules of international law which may be applied for the delimitation of a CS between two States and during the process to apply equitable principles and relevant circumstances, as well as recent trends admitted at UNCLOS III. Also, the parties requested the Court to show the practical way how to apply the indicated rules and principles so as to enable the experts of the two States to delimit those areas without any difficulties.[50]

For the use of equidistance, the Court reviewed the developments since the 1969 North Sea Continental Shelf Case involving adjacent States and noted that:

> Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea, leads to the conclusion that equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed.[51]

Following this view, the Court did not consider that the case:

> […] required, as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers that results of an equidistance line to be inequitable [...] since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods.[52]

Since equidistance was neither a mandatory legal principle nor a privileged method, its use in the present case could only be based on the evaluation and balancing of all relevant circumstances. Also, both parties discarded the use of equidistance and made formal submission indicating that its use would result in an inequitable result, but at the same time added that this would not prevent the Court from adopting an

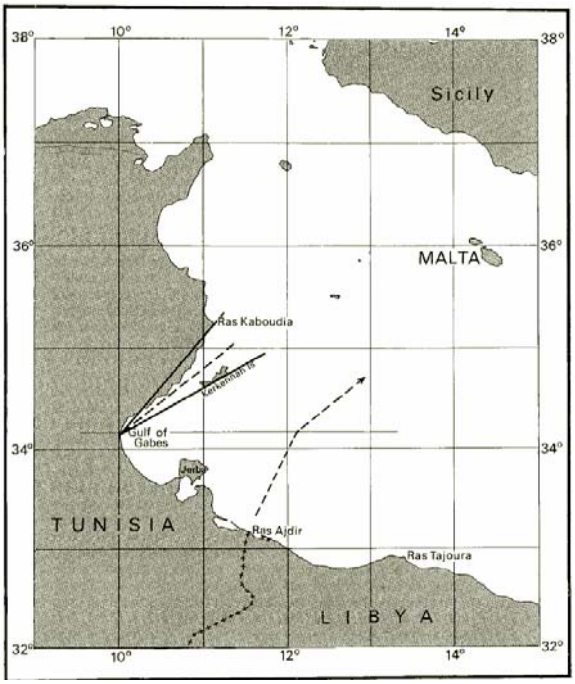
[48] *Ibid.*
[49] ICJ.24 February, 1982. Case concerning the continental shelf (Tunisia/Libyan Arab Jamahiriya). Hereafter: 1982 Continental Shelf case.
[50] 1982 Continental Shelf Case. P. 7. Art. 1.
[51] *Ibid.* Par. 109.
[52] *Ibid.* Par. 110.

equidistance line if that would "bring about an equitable solution of the dispute."[53]

This is indeed how the Court decided to generally proceed in the second sector of the boundary line, where the situation of adjacency between the coast of Libya and Tunisia has been modified to that of opposite States by the geographical configuration of the Tunisian coast, and where the Court decided to give a half-effect to the Kerkennah Islands of Tunisia.[54] This modification produced "a situation in which the position of equidistance line becomes the factor to be given more weight in the balancing of equitable consideration than would otherwise be the case."[55]

However, since the Court considered that equidistance was not a privileged method, it applied the modified equidistance line in the second sector as a measure of equity. It seems that the Court realised that in the case of opposite coasts, the use of equidistance in combination with relevant circumstances could led to an equitable result.

- **Map of 1982 Tunisia/Libya Continental Shelf Judgment**.



Source: ICJ judgment on 1982 Tunisia/Libya case. Online at: <http://www.icj-cij.org/icjwww/icases/itl/itl_ijudgment/itl_ijudgment_19820224.pdf>. Accesses on 15 January 2007.

[53] *Ibid.* Par. 110.
[54] Jagota S.P. *Op. cit*. P.185. Also see: 1982 continental shelf case. Par. 126.
[55] 1982 continental shelf case. Par. 126.

In 1984, an ICJ Chamber was requested by two adjacent States, the Unites States of America and Canada, to draw a single maritime boundary in the Gulf of Maine for both the continental shelf and fishery zones.[56]

The parties requested the Chamber to pronounce, in accordance with the principles and rules of international law applicable in the matter between the parties, on the following: "what is the course of the single maritime boundary that divided the continental shelf and fisheries zone between the respective States."[57]

In its submission, Canada invoked the application of the equidistance line based on Article 6 of the 1958 Convention on the Continental Shelf, which was in force for both States. According to the Canadian view, the equidistance/special circumstances method should be applied as a treaty rule for the CS and as a general norm for the delimitation of the adjacent fishery zone. The Chamber said as treaty law for the CS this principle could be valid, but to accept the latter

> […] would amount to transforming the combined equidistance/special circumstances rule into a rule of general international law, and thus on capable of numerous application, whereas there is no trace in international custom of such transformation having occurred.[58]

The Chamber also pointed out that equidistance

> […] can not have such mandatory force even between States which are parties to the convention, as regards to a maritime boundary concerning a much wider-subject than the continental shelf alone.[59]

The Chamber also took into account the view expressed in the 1969 North Sea case, that equidistance was not a principle of customary international law, thus not a method to be given priority,[60] and later added that it has no "intrinsic merits which could make it preferable to another in the abstract."[61]

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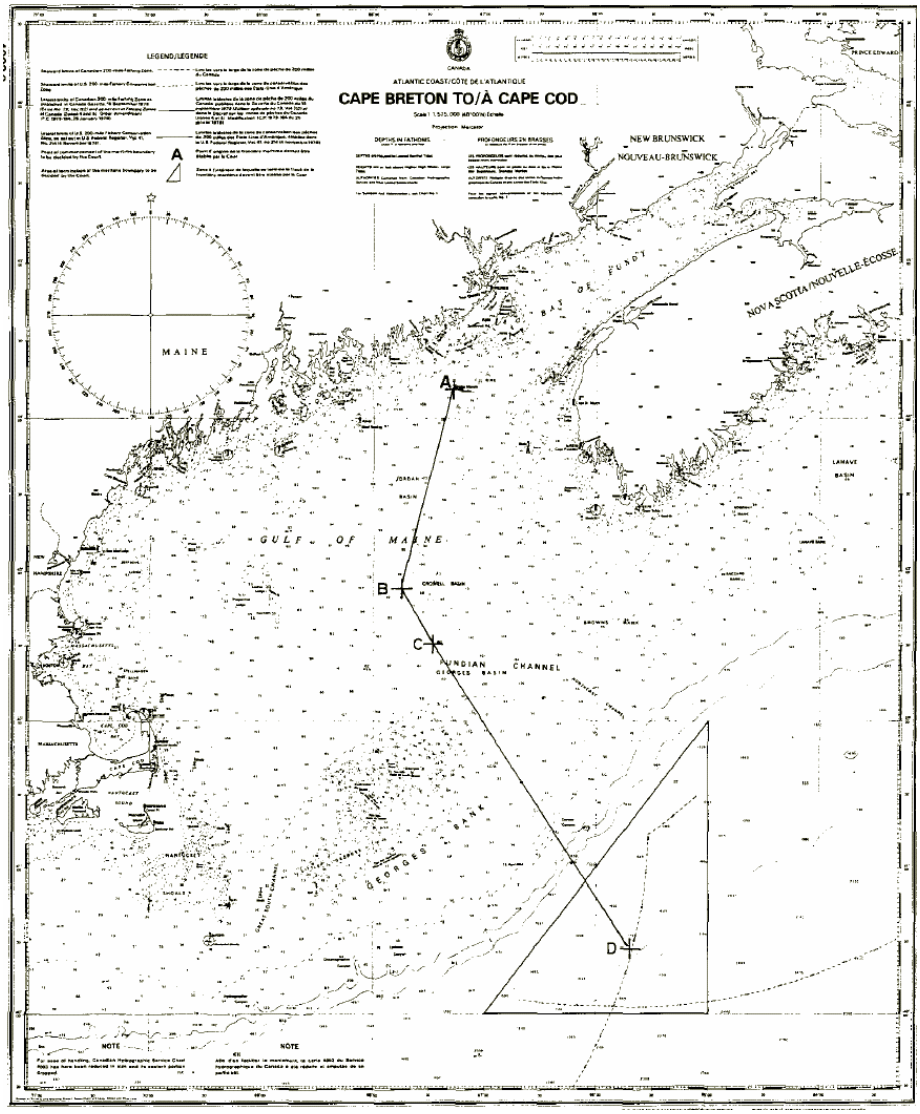
[56] Case concerning delimitation of the maritime boundary in the gulf of Maine area (Canada/United States of America). 12 October, 1984. Hereafter: 1984 Gulf of Maine Case.
[57] 1984 Gulf of Maine case. Article II of the special agreement. P. 253.
[58] Jagota S.P. *Op. cit*. P. 307. Also see: 1984 Gulf of Maine case. Par. 122.
[59] 1984 Gulf of Maine case. Par. 124.
[60]. *Ibid.* Par. 107.
[61] *Ibid.* Par. 162.

The Chamber drew a single maritime boundary for three sectors, as was indicated by the parties in their special agreement. For the first sector, the Chamber did not favour the equidistance method which, apart from not being a mandatory rule for a single delimitation, would give undue importance to islands, uninhabited rocks or low-tide elevations as base points for the drawing of a line intended to equally divide a given area.[62]

- **1984 Gulf of Maine case. Delimitation line drawn by the Chamber**



Source: ICJ judgment on 1984 Gulf of Maine case. Online at: <http://www.icj-cij.org/icjwww/icases/icigm/icigm_ijudgment/icigm_ijudgment_19841012.pdf>. Accessed on 15 January 2007.

[62] Jagota S.P. *Op. cit*. P. 313.

In the second sector, the sudden change in the direction of the coastline in the north-eastern part of the Gulf of Maine transformed the initial lateral adjacency situation into an opposite relation. In such a situation, the Chamber noted that since the geographical relationship was that of opposite States, only an equidistance/median line could have the appropriate result.[63] Consequently location of the equidistance line was adjusted taking into account the proportionality of the length of the coasts of the respective States, and by correcting this line so as to give half-effect to two tiny islands in front of the Canadian coast.[64]

For the third sector, the ICJ also did not favour the equidistance line. Instead, it found it equitable to draw a perpendicular line because this line reflected to a certain extent the general direction of the United States coast and the perpendicular line was, in practice, a true equidistance line.[65]

In this case, the Chamber used the equidistance line in the situation where the coast transformed in opposite relation, as with the 1982 Tunisia/Libya case, and corrected it according to the relevant circumstances.

On 18 February 1983, the two adjacent States of Guinea and Guinea-Bissau concluded a Special Agreement with the purpose to establish an Arbitral Tribunal.[66] The parties asked the Tribunal to decide, in accordance with the relevant rules of international law, whether the Convention of 12 May 1886 between France and Portugal and the protocols annexed to that Convention established the maritime boundary between the respective States. Furthermore, and according to the answer given to the firs issue, what should be the course of the maritime boundary between the States?[67] When the 1886 Convention was concluded, these parties were colonial states of France and Portugal respectively.

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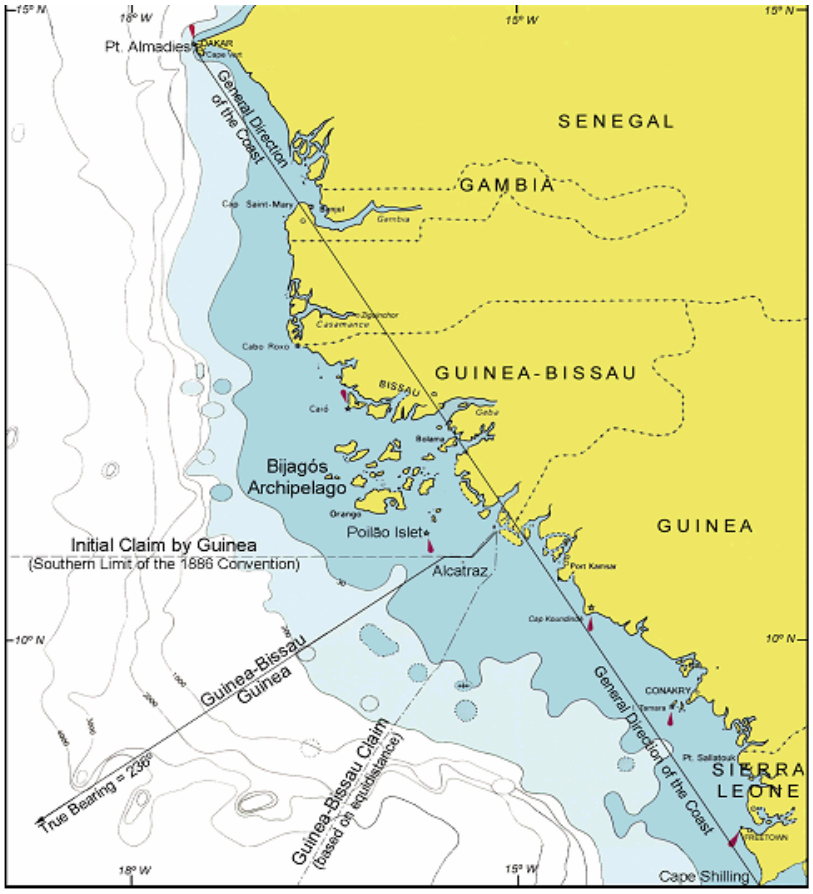
[63] Gerard J. Tanja. *Op. cit.* PP. 232-233. Also see: 1984 Gulf of Maine case. Par. 216.
[64] 1984 Gulf of Maine case. Par. 218-222.
[65] Gerard J. Tanja. *Op. cit.* P. 233. Also see: McHugh, Paul D. International law-delimitation of maritime boundaries. *Natural recourses journal.* 25, 1985. PP. 1033-1034.
[66] Award of 14 February, 1985 arbitration for the delimitation of the maritime boundary between Guinea and Guinea Bissau. Hereafter: 1985 Guinea/Guinea-Bissau Case.
[67] *Ibid. Article II of the1983 special agreement.* P. 256 .25 International Legal Materials, 1986.

The use of the equidistance line was proposed only by one party, Guinea-Bissau. It argued that the coast of the two States are opposite and the preference for equidistance was found in the argument that equidistance faithfully reflects the coastal configuration and complies with the requirements of the equitable principle not to refashion nature. Guinea-Bissau also acknowledged that the existence of special circumstances might lead to an adjustment of the provisional equidistance line.[68]

> The Tribunal itself considers that the equidistance method is just one among many and there is no obligation to use it or give it priority, even though it is recognised as having a certain intrinsic value because of its scientific character and the relative easy with which it can be apply.[69]

- **1983 Guinea/Guinea-Bissau arbitration**



Source: Nuno Marques Antunes. *Towards the conceptualisation of maritime delimitation.* P. 449.

[68] *Ibid.* Par. 99.
[69] *Ibid.* Par. 102.

After carefully examining the general direction and configuration of the coastline, the Tribunal observed the existence of special circumstances, such as the concave coasts of the States, if taken the whole configuration of the West African coast and the presence of some islands. Taking into account these circumstances and the situations of adjacency, the Tribunal rejected to apply the equidistance method, as it would yield an inequitable result.[70]

In 2002, the ICJ gave judgment on the maritime boundary between two adjacent States of Cameroon and Nigeria.[71] The States asked the Court to draw a single maritime boundary for each respective zone. The parties also agreed upon the method of delimitation: to draw an equidistance line and then consider whether there are factors calling for adjustment of that line to achieve an equitable result.[72] But the States disagreed about the existence of special circumstances necessary for the shifting of equidistance line.

In its judgment, the Court relied on previous cases that "made it clear what are the applicable criteria, principles and rules of delimitation" for a single maritime boundary which "are expressed in the equitable principle/relevant circumstances method […] which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea."[73]

Beyond the territorial sea, the Court referred to the case between Qatar and Bahrain,[74] where it had stated that

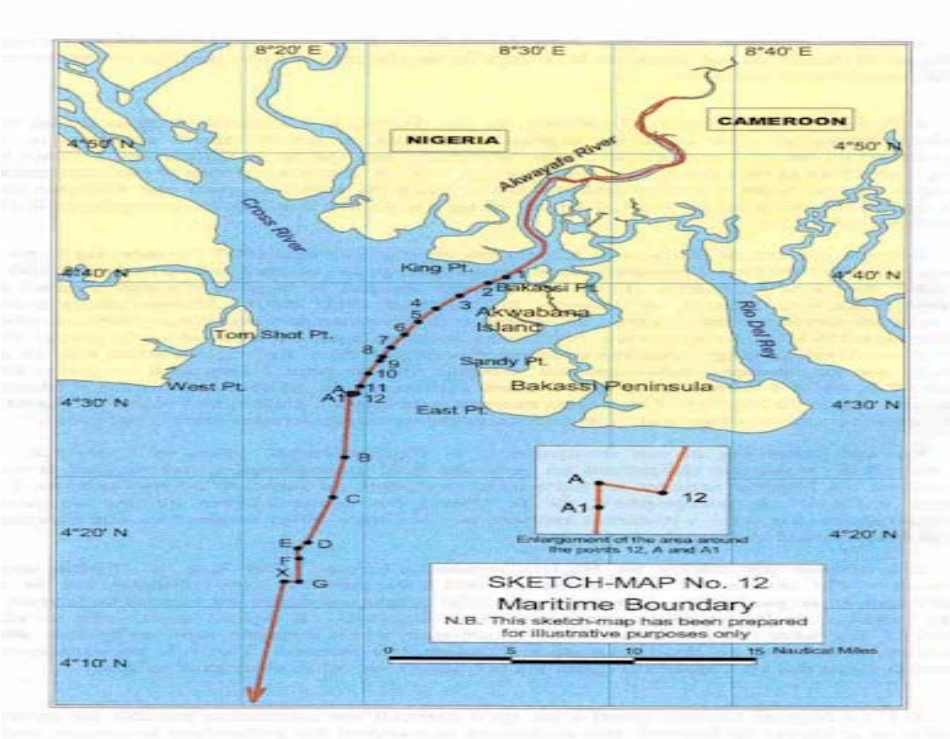
> […] for the delimitation of maritime zones beyond the 12 mile zone it would first provisionally draw an equidistance line and then consider whether there were circumstances which must lead to an adjustment of that line.[75]

[70] *Ibid.* Par. 103-108.
[71] Land and Maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria; equatorial Guinea intervening). Judgment of 10 October 2002-Merits. Hereafter: 2002 Cameroon/Nigeria Case.
[72] *Ibid.* P. 4.
[73] *Ibid.* Par. 88.
[74] Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain). Judgment of March 2001 – Merits. Hereafter: 2001Qatar/Bahrain case.
[75] 2002 Cameroon/Nigeria case. Par. 289.

The Court found it convenient to apply the same method in the present case. For the delimitation of the territorial sea Court considered that there existed a valid international agreement between the States,[76] thus leaving it with the delimitation of the EEZ and CS of the respective States.

Before drawing the equidistance line, the Court found it necessary to define the relevant coastlines and the location of the base points for the construction of that line. Once the relevant coasts and base points had been established, the Court begun to look for relevant circumstances necessary for the adjustment of the equidistance line.[77]

- **2002 Cameroon/Nigeria case**



Source: ICJ judgment on 2002 Cameroon/Nigeria case. Online at: <http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010_sk12.jpg>. Accessed on 15 January 2007.

[76] *Ibid* . Par. 263.
[77] *Ibid* .Par. 290-292.

The Court looked first for the existence of geographical circumstances. It rejected the argument of Cameroon regarding the concavity of its coastline as a special circumstance for the modification of the equidistance line. The relevant coastlines for the delimitation area were already determined by the Court and according to this "the Court noted that the sectors of coastline relevant to the present delimitation exhibit no particular concavity"[78], as the concave sector of Cameroon's coast was outside the delimitation area.

For the same reason the Court did not regard the presence of the Bioko islands as a circumstance justifying the shifting of the equidistance line. Also, this island did not belong to either of the States party to the dispute.[79]

Another argument presented by Cameroon for the shifting of the equidistance line was the disparity between the length of its coastline and that of Nigeria. The Court noted "that in the present case, whichever coastline of Nigeria is regarded as relevant, the relevant coastline of Cameroon is not longer than that of Nigeria. There is therefore no reason to shift the equidistance line in favour of Cameroon on this ground."[80]

A final argument for the shifting of the equidistance line invoked by Nigeria was with respect to the oil practices of the two parties, but the Court was of the opinion that the oil practice was not a factor to been taken into account in the present case.[81]

Finally, the Court found no other reason and circumstances necessary for the adjustment of the equidistance line and decided "that the equidistance line represents an equitable result for the delimitation of the area in respect of which it has jurisdiction to give a ruling."[82]

The 2002 Cameroon/Nigeria case was the first case between adjacent States in which the ICJ applied the equidistance line without modification.

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[78] *Ibid.* Par. 297.
[79] *Ibid.* Par. 299.
[80] *Ibid.* Par. 300-301.
[81] *Ibid.* Par. 304.
[82] *Ibid.* Par. 305-306.

After reviewing relevant ICJ Cases and arbitral awards concerning maritime delimitation between adjacent States, it is possible to conclude that the equidistance method is not a general rule of customary international law and not a privileged method among others. This view was expressed not only in the cases between adjacent States, but also between the States with opposite coasts. In cases with opposite States, the Court and Tribunal found it convenient to use the equidistance method as a starting point, and in the 1977 arbitration between the United Kingdom and the France, the Tribunal pointed out that the equidistance-special circumstances methods have the same goal as the general rules of customary law to achieve an equitable result.[83] The same view was expressed by the Court in 2001, during the Qatar/Bahrain case as it noted

> […] that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.[84]

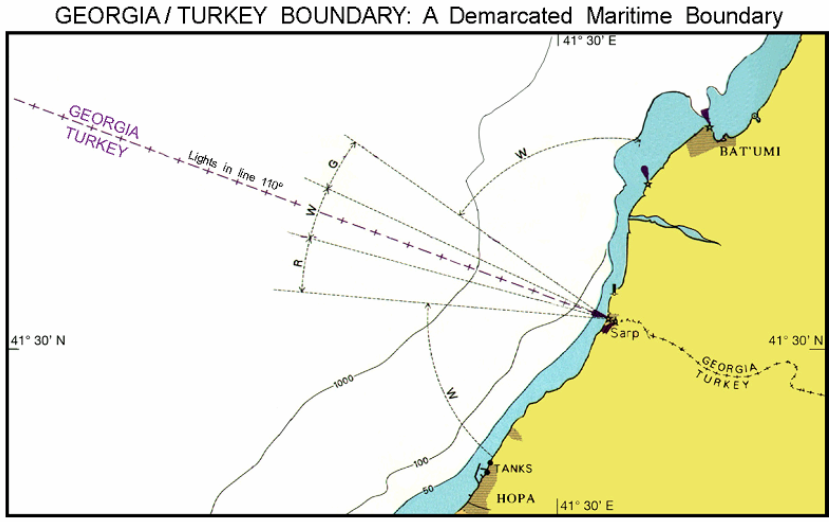
Despite the fact that, in some cases, the equidistance/special circumstances method was subsumed into the equity principle/special circumstances rule, the Court emphasized that the equidistance method may lead to an equitable result in particular cases and not in general.

In respect to the use of the equidistance method in State practice, it is useful to look at the maritime delimitation treaties concluded by adjacent States in the Black Sea region and in the regions which have nearly the same geographical characteristics, such as the Baltic Sea and the Mediterranean Sea.

Turkey and Georgia concluded an agreement at Tbilisi in July 1997 concerning their maritime boundaries that confirmed the validity of the maritime boundary agreements

[83] Decision of 30 June 1977 Judicial and Similar Proceedings: France-United Kingdom: Arbitration on the delimitation of the Continental shelf. Par. 70. Repr.18, International Legal Materials, 1979.
[84] 2001 Qatar/Bahrain case. Par. 231.

which had been previously concluded between Turkey and the former Soviet Union during the period 1973-1987.[85]



Source: Nuno Marques Antunes. *Towards the conceptualisation of maritime delimitation.* P. 485.

On 17 April 1973, Turkey and the Soviet Union signed a protocol concerning the territorial sea boundary between the two States in the Black Sea. The maritime boundary departs from equidistance. Although the precise reasons for the location of the delimitation line are unknown, it might be an approximate prolongation of the general direction of the last course of the land boundary.[86]

On 23 June 1978, the same two States concluded an agreement on the delimitation of the CS in the Black Sea. With slight simplifications, the boundary line follows a general east-west direction and is equidistant from the nearest points on the territory of the parties. The agreement is based on geographic considerations and on the method of equidistance.[87]

[85] Jonathan I. Charney and Robert W. Smith. *International Maritime Boundaries*. 2002. Vol. IV. P. 2865.
[86] *Ibid.* Vol. II. P. 1683.
[87] *Ibid.* Vol. II. PP. 1993-1969.

By exchange of notes dated 6 February 1987, Turkey and the Soviet Union agreed that the boundary line of their CS, as indicated in the agreement of 1987, should also be valid with respect to their respective EEZ-s.[88]

These three bilateral agreements came into force between Georgia and Turkey in 1999 and establish a single maritime boundary between the two States, using the equidistance method, for all purposes.

Another treaty concluded by adjacent States in the Black Sea region is the treaty between Turkey and Bulgaria. The two respective States agreed on 4 December 1997 to delimit the boundary in the mouth area of the Mutlidere/Rezovska River and the maritime areas in the Black Sea.

The agreement concerning the delimitation of the maritime areas between the two adjacent States is based on a simplified equidistance line to produce an equitable and just delimitation.[89]

On 17 July 1985, Poland and the Soviet Union signed an agreement on the delimitation of the territorial sea, the economic zone, the fishery zone and the CS in the Baltic Sea. An all-purpose and single maritime boundary is established by this agreement between the adjacent States and it is an equidistance line, although this is not explicitly specified in the agreement itself.[90]

Two treaties were signed on 24 October 1997 by Lithuania and Russia. One concerns the delimitation of the State border, which also establishes a territorial sea boundary. The second treaty delimits the EEZ and the CS between these two States in the Baltic Sea.

The agreement on the State border establishes the territorial sea boundary between the parties by means of a single segment and is based on the method of equidistance. The second agreement establishes a single maritime boundary, dividing the EEZ and the

[88] *Ibid.* Vol. II. P. 1701.
[89] *Ibid.* Vol. IV. P. 2876.
[90] *Ibid.* Vol. II. P. 2040.

CS. The delimitation was guided by the equidistance method. The presence of oil deposits lies at the heart of the agreement. Because the Russian Federation was primarily interested in the rapid exploitation of the oil field located close to the coast, the delimitation of the first segment of the boundary was guided by the method of drawing a line perpendicular to the general direction of the coast. The second segment is a hypothetical equidistance line.[91]

On 12 July 1996, Estonia and Latvia also concluded a treaty on the maritime delimitation in Gulf of Riga, the Strait of Irbe and the Baltic Sea. The delimitation line was influenced by the specific geographical configuration of the costs and historical considerations. The existence of a historic boundary between Estonia and Latvia which was established during the 1920's was also taken into account.

The boundary begins between adjacent coasts, but quickly turns into a situation of opposite coasts inside the Gulf. Outside the Gulf, the coasts once again become adjacent. Thus, the delimitation line is a combination of methods and the equidistance line is applied inside the Gulf of Riga, except for a short segment at its entrance.[92]

In 1999, Latvia and Lithuania concluded an agreement on the delimitation of the territorial sea, EEZ and CS in the Baltic Sea. The agreement establishes a single maritime boundary, dividing the territorial sea, EEZ as well as the CS. The delimitation of the territorial sea was achieved through modified equidistance line. The azimuth which delimits the EEZ and CS represents the perpendicular to a line which the parties agreed to represent the general direction of their coast.[93]

The geographical situation in the Mediterranean Sea seems to be almost the same as in the Black Sea. But there is a difference created by the presence of hundreds of islands, a factor which constitutes one of the most difficult considerations in the delimitation of maritime areas.

[91] *Ibid.* Vol. IV. P. 3069.
[92] *Ibid.* P. 2995.
[93] *Ibid.* P. 3107.

According to an analysis made by the Italian scholar Umberto Leanza, the majority of the delimitation treaties in this region "are based on the criterion of equidistance or a median line, modified to take into consideration the presence of island or the curvature of the coastline."[94]

Lastly, in consideration of the use of the equidistance method in State practice, the author relies on the research of S.P. Jagota. After analysing State practice, Jagota concludes that in 100 agreements concluded among 59 States, the equidistance method, whether true or modifying was privileged.[95]

The situation concerning the use of the equidistance method is different in State practice. States found a practical advantage, simplicity and convenience of the equidistance method and thus it was given a privileged status as the starting step during negotiations on maritime delimitation, with the possibility to modify it subsequently. State practice supports the conclusion that the applicable principles and rules of maritime delimitation between States should be settled by agreement with equitable principles and that the proper use of equidistance method would generally lead to an equitable solution.

In conclusion, it is possible to note, whether in State practice or third-party delimitation, that the first step has long been to see what a line of equidistance would produce, simply because parties must start somewhere.[96] The equidistance method, even if not obligatory, has proved to be the most popular delimitation method. The reasons for this relate to its mathematical precision, lack of ambiguity and its equitable results where the States' coastlines are broadly comparable. Where the coastlines in question are not comparable and a strict equidistance line would result in an inequitable delimitation, the equidistance method has frequently been used as a starting point and then modified.[97]

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[94] Umberto Leanza. The delimitation of the continental shelf of the Mediterranean Sea. *International journal of marine and coastal law*. 8 (3) August, 1993. P. 385.
[95] Jagota S.P. *Op. cit.* P. 122.
[96] Weil P. *Op. cit.* P. 207. Also see: Dissenting opinion of Judge Gros. 1982 Tunisia/Libya Case.
[97] Prescott V. and Schofield C. *Op. cit.* P. 240.

One issue concerning State practice is the normative character of this practice. The Court pronounced several times that State practice alone could not create a customary rule because of lack of *opinion juris:* an essential element of custom, which requires that custom be regarded as State practice amounting to a legal obligation which distinguishes it from mere usage.[98] The Court is also right to emphasize that, because of the specific nature of each situation, the formation of a customary rule on the basis of treaty delimitations must be approached with extreme caution.[99]

Furthermore, the agreements are binding only between parties, as is recognized by Article 34 of the 1969 Vienna Convention on the Law of Treaties and the law relating the maritime delimitation is not *jus cogens*, but *dispositivum*, one cannot conclude from the establishing of a boundary in a particular manner that the parties claimed or recognised that it was in any way obligatory for them to use these particular methods. States are unwilling and reluctant to recognise that certain conduct is required or permitted by general law, because it may preclude them from asserting the contrary at a later stage.[100]

2. Equity and the equitable principle

The notion of equity is at the heart of the delimitation of the CS and entered into the delimitation process with the 1945 proclamation of US President Truman, concerning the delimitation of the CS between the Unites States and adjacent States. President Truman proclaimed that:

> The United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United states, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another States, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles.[101]

[98] 1969 Nort Sea case. Par. 78. 1984 Gulf of Maine case. Par. 159.
[99] Weil P. *Op. cit.* P. 153.
[100] Mendelson M. On the quasi-normative effect of maritime boundary agreements. In *Liber Amicorum Judge Shigeru Oda*. 2002. P. 1069-1086.
[101] See *supra* at note 2.

The Truman proclamation inspired the Court during the 1969 North Sea case, when the Court stated that "delimitation is to be effected by agreement in accordance with equitable principles, and taking into account all the relevant circumstances."[102] This idea became doctrine and was reiterated and confirmed by the ICJ and arbitral tribunals in subsequent cases.

Articles 74 and 83 of the 1982 LOS Convention concerning the delimitation of the EEZ and the CS provides for effecting the delimitation by agreement, in accordance with international law and in order to achieve an equitable result.

The ICJ and arbitral tribunals tried several times to determine the concept of equity:

> Equity as a legal concept is a direct emanation of the idea of Justice. The Court is bound to apply equitable equity as a part of general international law. When applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice.[103]

The Court further stated that "[I]t is not a question of applying equity simply as a meter of abstract justice, but of applying a rule of law" during the 1969 North Sea case,[104] and later, during the 1985 Libya/Malta case, it reiterated that "[t]he Justice of which equity is an emanation, is not abstract justice but justice according to the rule of law."[105]

It thus appears that equity is applied by the Courts as a part of international law and as a rule of law for the delimitation of the CS. To explain why the law made equity its own, and perhaps to give it greater force, the Judgments emphasize that law and equity are close because they start from, and give expression to, the same idea: the *idea* of justice.[106] The Court's jurisprudence shows that in disputes relating to

[102] 1969 North Sea Case. Par. 101.
[103] 1982 Tunisia/Libya case. Par. 71.
[104] 1969 North Sea case. Par. 85.
[105] 1985 Libya/Malta case. Par. 45.
[106] Weil P. *Op. cit*. P. 164.

maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation.[107]

The problem with the idea of equity is that it does not provide any precise principle or criteria for the achievement of an equitable result. With respect to the delimitation of EEZ and CS 1982 LOS Convention sets only a goal which must be achieved and stipulates nothing on how to achieve the result. This vagueness gives some scholars the possibility to assert that there is a loss of normativity in the idea of equity and this idea allows the level of normativity to rise and fall.[108]

The definition of equitable principles is closely related to the idea of *unicum*, which means that geographical features of each delimitation case varied so greatly that it is difficult, if not impossible, to posit any fixed principles applicable for the establishment of maritime boundaries between States. The idea of the uniqueness of each boundary finds significant support in the jurisprudence of the ICJ and arbitral tribunals.

The equitable principles that the Court felt obliged to apply in 1982 were subordinated to an equitable result. They were equitable not in abstract but only as a function of satisfactory result that they enabled the Court to reach. Consequently, the equitable principles had to be evaluated in the circumstances of the particular case, and all generalisations were to be avoided:

> It is the result, which is predominant; the principles are subordinate the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. Each continental shelf case […] should be considered and judged on its own merits […] no attempts should be made here to overconceptualize the application of the principles.[109]

The idea of *unicum* and that it is not possible to define equitable principle for all maritime boundary delimitation cases was reiterated and expressed more clearly in

[107] 2002 Cameroon/Nigeria case. Par. 294.
[108] Kolb R. *Case law on equitable maritime delimitation*. 2003. P. 171. Also See: Weil P. *Op. cit.* P. 162.
[109] 1982 Tunisia/Libya case. Par. 70 and 72.

subsequent ICJ cases an arbitral awards. In the 1984 Gulf of Maine case, the Chamber stated:

> […] that each specific case, in the final analysis, different from all the others, that it is monotypic […] most appropriate criteria (principle) can only be determined in relation to each particular case.[110]

In 1985 Guinea/Guinea-Bissau arbitration, the tribunal expressed the same idea: "the factors [the equitable principles] and methods result form the legal rules, however none of them is obligatory for the Tribunal since each of delimitation is unicum."[111]

It seems that there is no equitable principle in maritime delimitation which is applicable for all cases; but rather an equitable result must be sought for each case. It is the idea that Judge Jimenes de Arechaga had in mind when he noted that "the judicial application of equitable principles means that a court should render justice in the concrete case."[112] The search for universally applicable principles becomes otiose, the particularity of each case effectively impedes the formation of such principles. Judge Waldock also made this point quite clearly in stated that "the difficulty is that the problem of delimiting continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances."[113]

Indeed, there were cases when the Court cited several equitable principles, such as the principle of non-encroachment; the principle not to refashion the geography; and not to seek to make equal what nature has made unequal.[114] Even the use of those principles is not obligatory for the Courts and arbitral tribunals, because of their highly variable adaptability to each specific case.[115]

The use of those principles is also not obligatory for States. There is no limit to the factors which States can take into account during their negotiation process on maritime boundary delimitation in order to achieve an equitable result. The lack of

[110] 1984 Gulf of Maine case. Par. 81.
[111] 1985 Guinea/Guinea-Bissau case. Par. 89.
[112] Seperate opinion of the Judge Jimenes de Arechaga. 1982 Tunisia/Libya case. Par. 24.
[113] Nelson L.D.M. *Op. cit.* P. 839.
[114] 1969 North Sea cases. Par.91. Also see: 1985 Libya/Malta case. Par. 46.
[115] 1984 Gulf of Maine case. Par. 157.

such limits corresponds to the private autonomy of States, an autonomy which applies to States and to them alone.[116]

This idea that it is difficult to define an equitable principle applicable for all maritime delimitation cases raises suspicions about the wide power and judicial discretion of the Courts. But it is not the fault of the Court or judge, it was the international community that opted the judges this wide power because it found it difficult, even impossible, to define a universally applicable principle. Even the Court and tribunal find it difficult to elaborate such a principle. This situation increases the responsibility of the Court in dealing with disputes concerning the delimitation of maritime boundaries, as the line of delimitation produced by a judicial organ must constitute an equitable result not only in the view of the Court, but also must appear equitable in the eyes of the litigants.

With respect to the idea that there is a lack of normativity regarding the concept of equity,[117] the continuing series of judgments and awards may progressively refine the legal rules and principles, and refinements in the application of law may improve the normative situation. The improved situation, in turn, should produce results that are relatively consistent, fair and responsive to the variety of circumstances in which maritime boundaries must be delimited. It should also encourage the settlement of maritime boundaries.[118]

Finally, concerning the equity and equitable principles, one may conclude that at present it is not possible to produce a structured system of equity and a clear body of equitable principles. The choice of, and weight to be attributed to, any equitable principle are too dependent upon the vagaries of geography to allow any systematic body of such principles to develop. It is more prudent to rely on the idea expressed by the Chamber in the 1984 Gulf of Maine case with respect to the role equitable criteria (principle) that "their equitableness can only be assessed in relation to the

[116] Kolb R. *Op. cit*. P. 49.
[117] See *supra* at note 108.
[118] Jonathan I. Charney. Progress in international maritime boundary delimitation law. *American journal of international law*. 88(2) April, 1994. P. 233.

circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases."[119]

3. Single maritime boundary

Following the emergence of the doctrine of the EEZ, there has been an increasing trend among States to adopt, in the interest of simplicity, certainty and convenience, a single maritime boundary to divide their maritime zones beyond the territorial sea. In the case of adjacent coasts, a line drawn seaward from the coast will usually separate only the territorial waters of the two States for the first twelve nautical miles. Beyond that, if States agree, the same may separate the two maritime zones between them.[120]

The recourse of the single maritime boundary is supported by the parallelism and similar character between the EEZ and the CS up to 200 nautical miles. Under the 1982 LOS Convention (Articles 57 and 76), the 200 nautical mile distance criterion governs the attribution of legal title to both the EEZ and the CS in cases where the continental margin extends up to 200 nautical miles. Also, to refer to Article 56 of the 1982 LOS Convention, the notion of the EEZ comprises both the sea-bed and water column and the legal regime of the CS is virtually identical to the corresponding rights and duties of States in their EEZ (with regard to the sea-bed resources, artificial islands, scientific research). Indeed, Articles 74 and 83 concerning the delimitation of the EEZ and CS are identical. The establishment of the distance criterion by the ICJ in the 1985 Libya/Malta case as the sole basis of title to the sea-bed and subsoil within 200 nautical miles is also in favour of the single maritime boundary between the two zones.[121]

Those who oppose the unity of the two regimes, the EEZ and CS within the 200 nautical mile limit, argue that these regimes developed separately in the past and the latter newer concept has not modified the former concept, which remains intact, or

[119] 1984 Gulf of Maine case. Par. 158.
[120] Sharma, Surya P. The single maritime boundary regime and the relationship between the continental shelf and the exclusive economic zone. *International journal of estuarine and coastal law 2,* 1987. P. 203. Also see: Weil P. *Op cit.* P. 118.
[121] 1985 Libya/Malta case. Par. 34.

that the two legal regimes are distinct and separate.[122] A variety of grounds are invoked to support these arguments.

Article 76 of the 1982 LOS Convention sets out two criteria in the definition of the CS: the idea of natural prolongation of the land territory and the notion of distance. Since the idea of natural prolongation precedes the distance criteria in the above provision, while Article 57 sets only distance criteria for EEZ. It has been proposed that the two concepts are separate.

Proponents of the theory of separate regimes also point to certain differences between the two regimes to prove that the concept of the CS within 200 nautical miles of the coast remains intact. While CS rights exist *ipso facto* and *ab initio*, as such they need not be proclaimed. In the case of the former, Article 77 of the 1982 LOS Convention clearly provides that the rights of the coastal States do not depend on any express proclamation. There is no parallel provision in the case of the EEZ, implying that there must be some declaration by the coastal States for claiming rights in this zone.[123] And finally, it must be stated that the notion of a single maritime boundary does not exist in the law of sea but, at the same time, there is no rule in customary law or conventional law, which prohibits the use of single boundary for different maritime zones.

The first case concerning a single maritime boundary between adjacent States was the 1984 Gulf of Maine case. The 1969 North Sea case covered only CS. The 1982 Tunisia/Libya case also did not involve two maritime zones, but it is noteworthy and instructive in that the judges in their separate unions touched upon the relationship between two zones, EEZ and CS, which is closely related to the use of a single maritime line. Judges Jimenez de Arechaga, Oda and Evensen said that they were in favour of the unity of delimitation, for reasons connected as much with the increasing absorption of the CS concept into that of the EEZ as for practical motives.[124]

[122]Sharma, Surya P. *Op. cit*. P. 209.
[123] *Ibid.* P. 210. Also see: Kwiatkowska, Barbara. *Op. cit.* P. 296; Attard D.J. *Exclusive economic zone in international law.*1987. P. 141.
[124] 1982 Tunisia/Libya case. Arechaga, separate opinion. Par. 56 and Par. 99; Oda, dissenting opinion. Par. 126; Evensen, dissenting opinion. Par. 9-10.

In the 1984 Gulf of Maine Case, the Chamber of the Court was requested to delimit a single maritime boundary dividing the CS and fisheries zones of Canada and the Unites States in the Gulf of Maine area in accordance with the principles and rules of international law.[125] The Chamber stated "that there is certainly no rule in international law to the contrary, and, in the present case there is no material impossibility in drawing the boundary of this kind."[126]

The Chamber noted the increasing number of States adopting an EEZ and general demand for single delimitation in State practice; it considered the fisheries zone in the light of EEZ when it declared that:

> It can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their neutral character, are best suited for use in a multi-purpose delimitation.[127]

While the Chamber's task was to draw the single boundary for two different zones, it started by searching for criteria and methods of delimitation which were not exclusively linked to either of these zones, and subsequently did not give preferential treatment to the application of one at the detriment of the other.[128] The Chamber successfully avoided the problem of weighing the equities of the CS against the equities of the fishing zone by giving primacy to the "neutral" factor of geography, in particular the geography of the coasts were best suited for use in a multi purpose delimitation.[129]

In 1983 Guinea and Guinea-Bissau had requested the Tribunal to delimit the territorial sea, EEZ and CS by a single line.[130] As in the Gulf of Maine case, the Tribunal did not see it impossible to draw a single line for different zones and drew a single maritime boundary without raising any of the problems connected with this

[125] See *supra* at note 57.
[126] 1982 Gulf of Maine case. Par. 27.
[127] *Ibid.* Par. 194.
[128] *Ibid.* Par. 193-194.
[129] *Ibid.* Par. 195.
[130] 1985 Guinea/Guineas Bissau case. Par. 42.

concept.[131] The Tribunal delimited a single line without any reference to the separate nature of the regimes of the CS or EEZ, or any fusion of them. In a way, the Tribunal seemed to perceive the single boundary as a fact of the current law of the sea, against which it saw no need to rise, or even examine, any objection.[132]

In 2002, the Court determined the course of a single boundary for the CS and the EEZ between Cameroon and Nigeria, which was asked for by the parties in their written pleadings.[133] The Court relied on previous cases when it declared that "the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice." It also quoted the 1982 Gulf of Maine case in formulating its opinion in the delimitation of such a line: "can only be carried-out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of the zones"; adding that "preference would henceforth be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation."[134]

The Court did not find it impossible, as in previous cases, to draw a single line for the EEZ and the CS. For the drawing of such a line, the Court relied on the equitable principles/relevant circumstances method, which is very similar to the equidistance/special circumstances method, applicable criteria for a single maritime boundary.[135]

As outlined above, after the emergence of the concept of the EEZ, States found it convenient to use the multi-purpose line (single line) for their maritime boundary delimitation.

Georgia and the Republic of Turkey concluded an agreement on 14 July 1997 concerning their maritime boundaries that confirmed the validity, among themselves, of the maritime boundary agreements which had been previously concluded between

[131] *Ibid.* Par. 87.
[132] Sharma, Surya P. *Op. cit.* P. 216. Note 64. Also see: Weil P. *Op. cit.* P. 126.
[133] 2002 Cameroon/Nigeria case. Par. 286.
[134] *Ibid.* Par. 287.
[135] *Ibid.* Par. 288.

Turkey and Soviet Union during the period 1973-1987. This bilateral agreement between the two States establishes a single maritime boundary for all purposes.[136]

Similarly, the 1997 agreement between the Republic of Bulgaria and the Republic of Turkey establishes a single maritime line for the territorial sea, EEZ and CS between two adjacent States.[137]

In the Baltic Sea region, there are a number of bilateral agreements between adjacent States which establish a single maritime boundary.[138] Also, the majority of treaties concluded in Mediterranean Sea between the respective States establish a single maritime boundary for the various zones.[139]

There are also some exceptions created when States agree to establish a separate boundary for the EEZ and the CS. For example, the 1978 treaty between Australia and Papua New Guinea, which establishes two separate lines: one for the sea-bed and the other for fisheries jurisdiction. The treaty also establishes a protected zone across the fishing and sea-bed jurisdiction lines for protecting the rights of traditional fishing and free movement of traditional inhabitants and for regulating the exploitation and sharing of commercial fisheries.[140]

Finally, it is possible to observe that more and more often States are no longer content to delimit their CS, but agree on a single maritime boundary for all their zones. Agreements defining a single maritime boundary, with various names but all covering the same reality, have for several years outnumbered those dealing simply with the delimitation of one maritime zone.[141]

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[136] Jonathan I. Charney and Robert W. Smith. *International Maritime Boundaries*. 2002. Vol. IV. P. 2865.
[137] *Ibid.* P. 2871.
[138] *Ibid.* P. 2995; P. 3057; P. 3107.
[139] *Ibid.* Vol II. *Mediterranean/Black Sea.* P. 1559.
[140] Jagota S.P. *Op. cit*. P. 92.
[141] Weil P. *Op. cit*. P. 131.

4. Proportionality

Some rules of international law leave judgment on the legality of an act to the consideration of the specific situation of the case, and offer only a general notion of the criteria for evaluation. One of these rules is the concept of proportionality. The concept of proportionality plays an important role in various domains of international law and the law of the sea, and in particular maritime delimitation. The concept of proportionality has been taken into account in every judgment relating to maritime delimitation.[142]

According to that concept, maritime delimitation should be effected by taking into account the ratio between the water and CS areas attributed to each party and the length of their respective coastlines. Thus, the Court and tribunals have to estimate roughly, or calculate exactly, the lengths of the relevant coastlines and compare that ratio to the ratio of the provisionally delimited relevant water and CS areas. If the proportion of the relevant maritime zones does not roughly coincide with the relative length of the coastlines, further analyses or adjustment would be considered.[143] However, the concept of proportionality was not considered in every ICJ case and arbitration tribunal award.

The 1969 North Sea case is the first of the maritime delimitation cases between adjacent States to apply the concept of proportionality. The Federal Republic of Germany (FRG) formulated this concept in the case by contending that each State concerned should have a "just and equitable share" of the available CS, proportionate to the length of its coastline or sea frontage.[144]

The ICJ rejected FRG's argument of a "just and equitable share." It did accept the concept of proportionality as a final factor to be taken into account and introduced the idea of proportionality between the CS attributed to each of the States and the

[142] Ryuichi Ida. The role of proportionality in maritime delimitation revisited: the origin and meaning of the principle from the early decision of the court. In *Liber Amicorum Judge Shigeru Oda.* 2002. P. 1037. Also see: Tanaka Yoshifumi. Reflections on the concept of proportionality in the law of maritime delimitation. *International journal of marine and coastal law.* 16(3) September, 2001. P. 433.
[143] Jonathan I. Charney. Progress in international maritime boundary delimitation law. *American journal of international law.* Vol. 88. 1994. P. 241.
[144] 1969 North Sea case. Par. 15.

length of respective coast following the general direction of the coast.[145] The Court suggested three geographical features which justified the recourse to proportionality: 1) the coasts of the States concerned are adjacent to each other; 2) the coastlines of the FRG are concave; and 3) the coastline of the States abutting on the North Sea are comparable in length.[146] The idea of proportionality was to use it as a corrective element for inequitable results in order to avoid an unreasonably inequitable result deriving form geographical particularities of the coasts. Also, it should be noted that the Court regarded proportionality not as a distinct principle of delimitation, but as one of the factors ensuring delimitation in accordance with equitable principles, in other words: proportionality is a test of the equity.

In the 1982 Tunisia/Libya case, the ICJ stated that "the court considered that the element (proportionality) is indeed requested by the fundamental principle of ensuring an equitable delimitation between the States concerned."[147] In this sentence the term "fundamental principle" should be noted, as the Court appeared to highlight proportionality at the level of a general rule. No reference was made to the particular geographical conditions of the coast in this judgment. The coastline of the parties was neither concave nor comparable to that of the North Sea.

The Court saw the role of proportionality as one of an *ex post facto* check of the equitableness of a delimitation line. The Court used a very precise calculation for testing results of the delimitation line by the proportionality principle. According to the decision, the length of the relevant coastlines for Libya and Tunisia was 31:69. The ratio between the costal fronts of the respective States, represented by a straight line connecting the respective points, was 34:66. The ratio of the extent of each CS resulted in 40:60, and the Court found that this satisfies the proportionality criteria.[148] The reasoning of the Court is apparently logical. The proportionality test does not always accompany a neat calculation in numbers. It is essential to establish a reasonable relation between the extent of the attributed area and the length of the coast. However, as a test of the results of delimitation, a rough appreciation of equity

[145] *Ibid.* Par. 101.
[146] Tanaka Yoshifumi. *Op. cit.* P. 435.
[147] 1982 Tunisia/Libya case. Par. 103.
[148] Tanaka Yoshifumi. *Op. cit.* PP. 438-439.

by way of proportionality seems sufficient. The non-existence of apparent disproportion means that the line is equitable. [149]

Nevertheless, the method for calculating proportionality is giving rise to some misunderstanding. First, while reaffirming that the CS in the legal sense did not comprise the sea-bed areas under the internal and territorial waters, the Court considered these zones as parts of the CS for the purpose of calculating proportionality. According to the Court, the question is not one of definition, but of proportionality as a function of equity, and the only absolute requirement of equity is that one should compare comparable things. Thus, in the Court's view, if the CS areas below the low-water mark of the Libyan coast are compared to the areas around the Tunisian coast, this requirement is fulfilled. Nevertheless, it may appear more appropriate to compare the parties' CS in the legal sense.[150] If to calculate the CS from the low watermark line, the extent should differ slightly from the calculating from the outer limit of the territorial sea measured from the straight base line. In this sense, the Court's choice apparently lacks coherence. Such a difference in the starting line, though it seems very small and even negligible, will amplify the difference of the extent of the area attributed to each of the States, a disparity which becomes evident when the calculation is shown in numbers.[151]

Secondly, it is unclear how the coastal lengths and relevant areas were calculated. On this point, the Court stated in a general way that only the coasts of overlapping maritime areas were deemed relevant.[152] In the process of calculation no explanation was given for the fact that the Kerkennah Archipelago was totally disregarded. The problem is more complex when considering the existence of third States. As the outer limits of the delimitation area remains indeterminate, owing to the existence of third States, the size of the relevant area will change.[153]

In the 1984 Gulf of Maine case, the Chamber took proportionality into account for the second segment, where the situation was one of opposite coasts by stating that:

[149] Ryuichi Ida. *Op. cit.* P. 1050.
[150] Tanaka Yoshifumi. *Op. cit*. P. 439.
[151] Ryuichi Ida. *Op. cit.* P. 1042.
[152] 1982 Tunisia/Libya case. Par. 75.
[153] *Ibid.* Dissenting opinion of Judge Evensen. Par. 23.

> A maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective length of the coasts belonging to the parties in the relevant area, but is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction. In the Chamber's opinion, the need to take this aspect into account constitutes a valid ground for correction.[154]

The Chamber calculated, for the second segment, the difference in the length of the coasts facing each other, gave half-effect to Seal Island off Nova Scotia (Canada) and the median line initially traced was transposed following the proportion estimated from this calculation.[155] This was a pure and simple application of proportionality. It is not used here as a test of equity, but as a criterion of equity, even of decisive value for drawing the delimitation line and verifying the latter's equitableness. However, the subject of calculation and comparison was only the length of the coast, and was not a question of referring to the extent of the area, at least not in numbers. As the second sector constituted a quadrangle, the ratio in question reflected automatically the size of the maritime space of each party.[156]

In the Gulf of Maine case, proportionality was applied for the first time in case law as a factor of correcting the median line for both the CS and fishery zone. The Chamber enlarged the concept of proportionality in both its geographical and functional aspects. First, regarding the geographical conditions, the Chamber made no mention of special geographical circumstances that would justify the consideration of proportionality. Secondly, always in respect of the role of proportionality, the Chamber reaffirmed the earlier Court's doctrine according to which proportionality was not a direct basis for delimitation but a means for verifying the latter's equitableness.[157]

The judgment in the Gulf of Maine case raises another problem concerning the calculation of the coastal front of each State. The reason was not clear why the Chamber took into account the coast of the Bay of Fundy, which had never been the

[154] 1984 Gulf of Maine case. Par. 185.
[155] *Ibid.* Par. 221-223.
[156] Ryuichi Ida. *Op. cit.* P. 1048.
[157] Tanaka Yoshifumi. *Op. cit.* PP. 444-445.

subject of overlapping claims.[158] As Judge Schwebel indicated, however this approach distorted the calculation of proportionality.[159]

There was one interesting issue in this case concerning proportionality. The Chamber's decision pointed out, in outlining the economic importance of the area, that if the overall results are radically inequitable, they are likely to cause catastrophic repercussions for the livelihood and economic well-being of the population. The term proportionality was not explicitly used here. However, should such a radically inequitable result be revealed through the verification of results, proportionality as a test, that is as a tool of verification, implies inevitably qualitative appreciation of results, and not only quantitative. In case of such an inequitable result, the delimitation line would be adjusted in order to wipe out such inequity.[160]

In the 1985 Guinea/Guinea-Bissau case, the Tribunal considered the proportionality issue at the verification stage. Thus it regarded proportionality as *ex post facto* test of equitableness. The Tribunal stated that "proportionality must be considered in the assessment of factors which enter into the equation leading an equitable result"[161] and later added that "the only relevant proportionality is that between the length of the coastlines and the surface area of the zone to be attributed to each State."[162]

The Tribunal clearly pointed out that the proportionality rule was not a mechanical rule based only on the figures transcribing the lengths of the coasts, and noted that proportionality should play its role in a reasonable degree, taking into account other relevant circumstances. In fact, the Tribunal compared solely the coastal lengths of the parties taking into account costal islands and the Bijagos islands, without calculating the maritime surface. Then, it merely stated that the coastlines of the two States were of the same length and that neither party could claim any advantage.[163]

One issue emerging from this judgment is that the Tribunal considered as relevant not only the coast of the two States, but also the configuration of the rest of the West

[158] 1984 Gulf of Maine case. Par. 221
[159] *Ibid.* Seperate opinion of judge Schwebel. PP. 356-357.
[160] Ryuichi Ida. *Op. cit.* P. 1050.
[161] 1985 Guinea/Guinea-Bissau case. Par. 118.
[162] *Ibid.* Par. 120.
[163] *Ibid*. Par. 120.

African coast,[164] although these coasts were used for the operation of delimitation as a whole and not simply for proportionality. It is noteworthy that in this judgment, the Tribunal rejected the idea that proportionality should be considered in relation to the landmasses behind the relevant coast.[165]

In the 2002 Cameroon/Nigeria case, it is difficult to comprehend the rational process by which proportionality was applied. The parties invoked the difference between the coastlines of two States for the adjustment of the provisionally drawn line, but the Court considered that they failed to respect the criteria of proportionality. Also, the Court noted that in previous cases a substantial difference between lengths of the coasts of respective States was a factor taken into consideration. The Court further noted that in the present case, the coastlines of two States were relevant and there is therefore no reason to shift the equidistance line in favour one or another State.[166]

The use of proportionality in State practice remains exceptional, and such practice tends to remain silent on this matter. An explanation may be that there are practical difficulties in calculating relevant areas and ratios of the coasts and maritime zones for delimitation process.

For example, in 1971 two agreements between Denmark and the Federal Republic of Germany, and between the latter and the Netherlands, were concluded pursuant to the 1969 North Sea judgment. The Court indicated proportionality as a factor to be considered in the negotiations. Nevertheless, the delimitation lines established in the two agreements were due to a political compromise rather that to considerations of proportionality.[167]

A good example of the use of proportionality in State practice is the 1974 agreement between France and Spain in the Bay of Biscay. In drawing the CS boundary proportionality was taken into account. In order to establish the relevant area, a "box" was created by construction lines. The parties drew a starting line, and then a closing line was drawn between points chosen by the States. For the calculation of the length

[164] *Ibid*. Par. 110.
[165] *Ibid.* Par. 119.
[166] 2002 Cameroon/Nigeria case. Par. 300-301.
[167] Tanaka Yoshifumi. *Op. cit.* PP. 458-459.

of the coasts, the States also drew lines between agreed points which created "artificial coastlines." In other words, those lines were the fruit of negotiations. After that, the States calculated the ratio of the respective coasts; the length of French coastal length between two points was 213 miles, while the Spanish coast was 138 miles long, so the ratio between coasts was 1.54 to 1 in favour of France and the ratio of the maritime spaces allocated was approximately 1.63 to 1. The requirement of proportionality was satisfactory for the States. This example represents an interesting application of proportionality, as the coasts and areas to be considered for calculating proportionality were determined by agreement rather than by an objective criterion.[168]

On the whole, it is possible to say that the concept of proportionality is a sound test to ensure that the delimitation results are equitable. One can thus conclude that for the use of proportionality it is reasonable to define the relevant coasts of States and it is not necessary to take into account the totality of the coast. It seems better to exclude from the evaluation of proportionality those segments of the coastline which are not within the overlapping maritime areas. In respect to those areas, it would be reasonable to exclude the internal waters and territorial seas from the calculation of proportionality for the purpose of the delimitation of CS and single maritime boundaries, since the CS and EEZ are areas that extend beyond territorial waters. It would not meet the requirements of equity to shift the delimitation line and give more maritime areas to the State with a longer coastline without calculating and comparing the ratio of the attributed areas to the relevant coasts. It is true that a State with a long coast will normally have an area of maritime jurisdiction greater than if it had a short coastline.

5. Other methods

The perpendicular line to the general direction of the coast is also one of the methods used for drawing the maritime boundary between adjacent coasts. This method was used by the ICJ in some cases and has also found its place in State practice. The use of the perpendicular line is more frequent in the case of adjacent States which present

[168] *Ibid.* PP. 454-455.

coasts that are more or less straight. A lateral delimitation based on a perpendicular line, however, will only lead to a mutually acceptable result when the coast at the point of termination of the land frontier is relatively straight and the general direction of the coastline rather easy to determine. For such delimitation, the locations of the baselines are important in determining the general direction.[169]

Unless the use of a straight baseline system is accepted by the two adjacent States, application of a perpendicular line rule will be difficult to conceive when concave or convex coastlines are at issue, or when various islands are situated in front of the coast of the States. The use of the perpendicular method is debatable in the case of a coast which is not altogether straight, for it presupposes a preliminary decision on the general direction of the coast between two points which have to be chosen. This is a difficult issue, and it is easy to understand why the Committee of Experts consulted by the International Law Commission preferred the equidistance method to the perpendicular one.[170]

The earliest case in which the perpendicular line was used is the Grisbadarna Case between Sweden and Norway on the delimitation of the territorial sea in 1909. The Permanent Court of International Arbitration was asked to decide whether the maritime boundary was fixed, in whole or in part, by the boundary treaty concluded between the two States in 1661; and if not, to determine the correct boundary in accordance with circumstances of fact and the principles of international law. After rejecting the equidistance method, which had not achieved sufficient standing in international law at that time and thus could not have been in the mind of the negotiators of the 1661 treaty, the tribunal decided that the line should be drawn perpendicular to the general direction of the coast. Furthermore, drawing of the perpendicular line was not based on the coastal direction; the more decisive fact was the historical use and fishing interests of the parties in the Grisbadarna banks.[171]

The perpendicular line method for the delimitation of the CS was used by ICJ for the first time in the 1982 Tunisia/Libya case. For the determination line in the first sector,

[169] Tanja G.J. *Op. cit.* P. 5. Also see: Lewis M. Alexander. Baseline delimitations and maritime boundaries. *Virginia Journal of International Law*. 1983. Vol. 23. P. 532.
[170] Weil P. *Op. cit.* P. 275.
[171] Edward Collins, Jr. and Martin A. Rogoff. *Op. cit*. PP. 56-58.

closest to the coast, the Court was conscious that the CS should start from the outer limits of territorial sea.[172] For this segment, the Court found that, in principle, a line perpendicular to the coast could serve as an equitable boundary taking into account the rather uniform conduct of the parties in the past and the line established by this conduct was also roughly perpendicular to the coast.[173]

In the 1984 Gulf of Maine case, the Chamber noted that "the method of the perpendicular was probably the oldest method to come to mind when problems arose in the delimitation by adjacent States for their territorial sea." [174] In this case the Chamber drew the delimitation line for three sectors. In the first sector, closest to the coast, the Chamber decided to adopt the method of a bisector of the reflex angle formed by perpendiculars drawn from point already determined by States to the long and short sides to the rectangle. This method would be more suited to the production of the desired result, namely the equal division of the area of overlap.[175]

For the delimitation of the third and final sector, which was situated in the open ocean and against the Gulf, the Chamber preferred a line perpendicular to the closing line of the Gulf which was in conformity with the general direction of the two coasts. The starting point of the perpendicular line was determined to coincide with the point where the corrected median line in the second sector meets the Gulf's closing line: "it would be unthinkable that the dividing line should not follow or continue the line drawn within the gulf by reference to the particular characteristics of its coast."[176]

The terminal point was specified in the special agreement referring the dispute to the Chamber. As for the *terminus ad quem*, the decisive criterion was, in the Chamber's view, that the delimitation must equitably divide the areas in which the maritime projections of the parties' coast overlapped. This was where the last point of the said perpendicular reached within the overlapping 200 nautical mile zones of the respective parties.[177]

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[172] 1982 Tunisia/Libya case. Par. 116.
[173] *Ibid.* Par. 119-120.
[174] 1984 Gulf of Maine case. Par. 175.
[175] *Ibid.* Par. 212-213.
[176] *Ibid* .Par. 224-225.
[177] *Ibid.* Par. 228.

In the 1985 Guinea/Guinea-Bissau case, the tribunal adopted the line which was "grosso modo perpendicular to the line joining Almadies point and Cape Shilling. This would give just one straight line bearing 236 degrees."[178] This line which joined these two points was used by the tribunal, since it better reflected the general configuration of the coastline and would reduce the risk of enclavement to a minimum.[179]

In the Black Sea region, the perpendicular line was not applied by States in their maritime delimitation agreements. In the Baltic Sea, there are some agreements between adjacent States which make use of the perpendicular line. For example, in the 1996 agreement between Estonia and Latvia, the perpendicular line was applied outside the Gulf of Riga. Inside the Gulf, a historical consideration prevailed and the delimitation line is a negotiated one.[180]

In the 1997 agreement between the Republic of Lithuania and the Russian Federation concerning the delimitation of the EEZ and the CS the perpendicular line was also applied. Because the Russian Federation was primarily interested in the rapid exploitation of the oil field located close to the coast, the first segment of the boundary was guided by the method of drawing the perpendicular to the general direction of the coast. Lithuania, on the other hand, strongly sought a corridor to the middle of the Baltic Sea without being enclosed by the maritime zones of Latvia and Russia. The second segment created this corridor by relying on the Lithuanian view on the nature of the perpendicular to the general direction of the coast.[181]

In the 1999 agreement between Latvia and Lithuania on the delimitation the territorial sea, EEZ and CS, the perpendicular line was also applied for the delimitation of the EEZ and CS. The parties agreed that this line represents the general direction of their coasts. Moreover, the latter seems to have been arrived at in such a manner that Lithuania secured an area of maximum reach, extending to Sweden's EEZ, while at

[178] 1985 Guinea/Guinea-Bissau case. Par. 111.
[179] *Ibid.* Par. 111.
[180] Jonathan I. Charney and Robert W. *International Maritime Boundaries*. 2002. Vol. IV. P. 3008.
[181] *Ibid.* P. 3069.

the same time taking into account Latvia's interests in the non-living resources of the area.[182]

Finally, it is possible to observe that the perpendicular line can also, in certain cases, be useful for the delimitation of maritime zones between adjacent States. This line seems to be close to the equidistance line. A line of equidistance between two points is, by definition, the perpendicular bisecting the straight line between those two points. Thus the line of equidistance method is simply a series of perpendiculars. It would scarcely be an exaggeration to say that the equidistance method is the scientific development of the perpendicular line.[183]

Latin American agreements present another method for the drawing of maritime boundaries which is notable. On 28 August 1962, Chile, Peru and Ecuador signed the Santiago Declaration on the Maritime Zone claiming as a principle of their international maritime policy sole sovereignty and jurisdiction over at least a 200 nautical mile area, including the sea-bed and subsoil. The maritime boundary between the parties to this Declaration was to follow the parallel of latitude drawn from the point where the land frontier between them reached the sea. This principle and practice were followed in South America in the maritime boundary agreements between Chile and Peru (1954), Peru and Ecuador (1954), and Colombia and Ecuador (1975). A combination of latitude and longitude was also followed for setting the boundary in the agreement between Colombia and Panama (1976). [184]

6. Relevant circumstances

The study of relevant circumstances has been dominated by perceptions of the role that they play within the delimitation process. The subject is dominated by the view that relevant circumstances have an effect upon delimitation and that "it is virtually

[182] *Ibid.* P. 3122.
[183] Weil P. *Op. cit*. P. 275.
[184] Jagota S.P. *Op. cit*. P. 102.

impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area."[185]

Relevant circumstances never have been the sole disseminator and self-sufficient factor in delimitation. They often appeared to operate only within a framework of equitable principles or equidistance.[186]

It is accepted that the maritime delimitation process in most cases may begin with a line of equidistance, but it does not necessarily end with one. Equidistance line drawn at the starting phase may become unequitable in light of particular circumstances of the case in question. That's why the International Law Commission envisaged special circumstances while drafting the 1958 Geneva Convention, which was a reasonably small and well-defined body of exceptions to a rule of equidistance/median line. One function of relevant circumstances is to shift a provisionally drawn equidistance/median line when it leads to inequitable result. [187]

Also, equitable principles acquire substance only by reference to relevant circumstances in the case, and the relevant circumstances in the case operate only with the help and in the context of equitable principles. In practice, however, relevant circumstances and the equitable principle go hand in hand. Without the help of equitable principles, relevant circumstances would be powerless to produce any assessment of the equity of a situation.[188] As Judge Jimenez de Arechaga indicated:

> Equity is nothing other that the taking into account of a complex of historical and geographical circumstances the consideration of which does not diminish justice but, on the contrary, enriches it.[189]

For a delimitation to be equitable, account must be taken of all the relevant circumstances of the case.

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[185] 1982 Tunisia/Libya case. Par .71-72.
[186] Evans M.D. Maritime delimitation and expanding categories of relevant circumstances. *International and comparative law quarterly.* 40(1) January 1991. P. 3.
[187] *Ibid.* PP. 4-5.
[188] Weil P. *Op. cit*. PP. 211-212.
[189] 1982 Tunisia-Libya case. Separate opinion of Jimenez de Arechaga. Par. 24.

The concept of relevant circumstances, introduced into the vocabulary of the law of the sea by the Court in its 1969 North Sea judgment "delimitation is to be effected by agreement in accordance with equitable principles, and taking into account all the relevant circumstances"[190] has shown so much validity that it has become an integral part of the language of the Court. Even thought it does not figure in Articles 74 and 83 of the 1982 LOS Convention, its importance in the maritime delimitation process remains intact. In most ICJ cases and arbitral tribunals, the States asked the Court to take into account the relevant circumstances of the case, so as to achieve an equitable result. Article 15 of the 1982 LOS Convention for the delimitation of the territorial sea also includes the term "historic titles", distinct from relevant circumstances.

From the ICJ cases, it seems possible to divide relevant circumstances between geographical and non-geographical circumstances. The most dominant relevant circumstances are the geographical circumstances existing in the case, especially in cases where a single line covers different maritime zones. The provisional delimitation line is established by the Court in accordance with equitable principles and taking account relevant circumstances that are mainly geographical in nature. The case law looks at the overall geographical relationship of the parties' coasts and the specific characteristics of each coast to establish the equitable principles and relevant circumstances which are used to select the method or methods to delimit the boundary.

Of the geographical circumstances, the most relevant seems to be the coastal configuration and the consideration of islands, as well as the length of the coast. These factors were taken into account by Judges in all cases. The length of coasts closely related to the concept of proportionality which was discussed in section 5.

[190] 1969 North Sea Case. Par. 101.

6.1 Geographical circumstances

(a) Configuration of coasts

In the 1969 North Sea case, the Court considered the general configuration of the coasts of the parties as the relevant circumstances necessary to take into account:

> It is necessary to examine closely the geographical configuration of the coastline of the countries […] since the land is the legal source of power which may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extension.[191]

The Court found that the coasts of Denmark and the Netherlands were both convex, while that of the Federal Republic of Germany was concave. In such a case, the use of equidistance left Germany an exceptionally small part of the North Sea CS and the goal of the delimitation process, to achieve an equitable result, would not being satisfied.

The general configuration of the parties' coasts had also been considered a relevant circumstance in the 1982 Tunisia/Libya case. The ICJ found that the marked change in the direction of the Tunisian coastline modified the lateral relationship of the two States and should be taken into account in the balancing-up process and was justified and legally sound.[192]

In the 1984 Gulf of Maine case, geography and geographical circumstances were undoubtedly leading considerations and were implicitly regarded as having a preferential status. The Chamber considered geographical criteria as excellent examples of neutral circumstances, suitable for a multi-purpose delimitation. It mentioned first the geographical configuration of the area and then other relevant circumstances.[193]

[191] 1969 North Sea case. Par. 96.
[192] 1982 Tunisia/Libya case. Par. 122.
[193] 1984 Gulf of Maine case. Par. 112.

In this case, the United States based an important part of its criticism of the equidistance line advocated by Canada on the concavity of the Gulf as a whole. The Chamber, however did not endorse this view. It was not this concavity of the gulf which caught its attention, but rather its more or less rectangular appearance.[194]

Also, the sudden change of the costal configuration in the second sector, when the initial lateral adjacency situation transformed into an opposite relation, was taken into account by the Chamber as a relevant circumstance.[195]

In the 1985 Guinea/Guinea-Bissau case, the costal configuration again played an important role. The Tribunal observed that if taken together, the coasts of the two States were rather concave despite the convex form of the Guinea-Bissau coastline. The concave form of the coastlines of the parties as such, however, was considered a relevant circumstance, but the Tribunal arrived at this observation after it had ruled that it should take account of the overall shape of the West African coastline which was undoubtedly convex. In such a situation the Tribunal concluded:

> When if Sierra Leone is taken into consideration - there are three adjacent States along a concave coastline the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented form extending its maritime territories far as international law permits.[196]

In the 2002 Cameroon/Nigeria case, the Court noted that the geographical configuration of the area was "not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation."[197]

In this case, Cameroon contended that the concavity of the Gulf of Guinea in general and of Cameroon's coastline in particular, created a virtual enclavement of Cameroon. This factor, in the view of Cameroon, constituted a special circumstance which needed to be taken into account in the delimitation process. The Court relied on previous cases and did not deny that the concavity and special coastal configuration

[194] *Ibid.* Par. 184, 213 and 218.
[195] *Ibid.* Par. 216.
[196] *Ibid.* Par. 104.
[197] 2002 Cameroon/Nigeria case. Par. 295.

may be a circumstance relevant to the delimitation. The Court determined that the coastlines relevant to the delimitation between Cameroon and Nigeria did not include all of the coastlines of the two States within the Gulf of Guinea. The Court also noted that the sectors of coastline relevant to the present delimitation exhibited no particular concavity. Consequently, the Court did not consider that the configuration of the coastlines relevant to the delimitation represented a circumstance that would justify shifting the equidistance line.[198]

Geographical circumstances, and especially coastal configuration, play an important role in State practice as well. The 1971 agreements concluded between the Federal Republic of Germany and Denmark, and between the Federal Republic of Germany and the Netherlands following the 1969 Judgment of the ICJ constitute the most profound examples of treaties where the configuration of the coastlines was taken into account.[199]

In the 1997 agreement between Georgia and Turkey, which is the treaty concluded between the Soviet Union and Turkey during the period 1973-1987, the coastal configuration does not constitute relevant circumstance for the adjustment of the delimitation line. The coasts of the States are not concave or irregular and there are no promontories on the coasts. With slight simplification, the boundary line follows the general direction and is equidistant from the nearest points on the territory of the parties. For the territorial sea, the parties established the 290^0 azimuth and it has been suggested that this method probably relies on an approximate prolongation of the general direction of the last part of the land frontier. The chosen method departs slightly from an equidistance line.[200]

In the 1997 agreement between the Republic of Turkey and the Republic of Bulgaria, the coastal configuration was also reflected on maritime boundary. The lateral boundary was delimited between the States along the concave coast of Begendik/Rezovo Bay. The land territory has changed by accretion or avulsion at the mouth area of the river. This changed the length of the coasts of the riparian states and

[198] *Ibid.* Par. 296-297.
[199] Tanja G.J. *Op. cit*. P. 58.
[200] Elferink Alex G.O. *The law of maritime delimitation: A case study of the Russian Federation.* 1994. P. 293.

the natural configuration of the Begendik/Rezovo Bay, and as a result affected the delimitation.[201]

In the delimitation area between Estonia and Lithuania, the geographical configuration of the coast is rather complex, as there is a change in the geographic relationship between the coasts. Inside the Gulf of Riga, both coasts start as adjacent, but later become opposite. Outside the closing line, the coasts once again turn to an adjacent configuration. Furthermore, some segments of Estonian mainland coast are irregular. These factors had a small affect on the delimitation process. The most decisive circumstances in the 1996 agreement between these States were historical and economical circumstances.[202]

In the 1997 treaty between the Republic of Lithuania and the Russian Federation, the boundary is influenced by base points on the mainland coasts of the two States. The geographical configuration of the coasts in the boundary area is complicated by a small promontory. The parties considered the promontory as a relevant coastline for the delimitation. Taking into account the coastal configuration in the area of relevance for the delimitation, an equidistance line, which is approximately perpendicular to the general direction of the coasts of the area of relevance, seems to offer an equitable solution to the delimitation of the maritime boundary.[203]

Coastal configuration is not a decisive factor in the 1999 agreement between the Republic of Latvia and the Republic of Lithuania. The coasts of both States in the area being delimited are adjacent and rather smooth. In a symmetrical manner, the mainland coasts start out as concave in the area near the terminal point of the land boundary, but each appear in their entirety to be convex when viewed from a boarder perspective. The only special feature in the area is a promontory, which is not connected to the Lithuanian mainland and does not affect the delimitation line.[204]

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[201] Jonathan I. Charney and Robert W. Smith. *International Maritime Boundaries*. Vol. IV. P. 2873.
[202] *Ibid*. PP. 3004-3005.
[203] Elferink Alex G. O. *Op. cit.* P. 191. Also; Franckx, Erik. Baltic Sea; new maritime boundaries concluded in the Eastern Baltic Sea since 1998. *International journal of marine and coastal law*. 16(4) December 2001. P. 649.
[204] Jonathan I Charney and Robert W. Smith. *International Maritime Boundaries*.2002. Vol. IV. P. 3116.

In the 1985 agreement between Soviet Union and Poland, the concave coast within the Gulf of Gdansk and a long thin promontory influenced the course of the maritime boundary between these States.[205]

(b) Islands

According to Article 121 of the 1982 LOS Convention:

> An island is a naturally formed area of land, surrounded by water, which is above water at high tide [and it enjoys its territorial sea, EEZ and continental shelf]. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.[206]

It is necessary to note that the present paper only addresses dependent islands, i.e. islands under sovereignty of one or the other States. The problem is fundamentally different in the case of island States. In such a situation, the delimitation process will be held between opposite States and whether it is a large continental State or a small independent island, in every case its Statehood gives it the same potential for generating maritime projection under the condition laid down by international law.

The existence of an island or islands in the delimitation area may have a distortion effect on the delimitation line. Its presence constitutes a relevant circumstance, and needs to be taken into account fully, partly or be ignored by States or the Court. Also, it is noteworthy that islands can not play a role in the maritime delimitation process between Georgia and Russian Federation, because there are no islands in the delimitation area.

In State practice, as in legal theory, the effect given to islands for delimitation purposes differs from one island to another. Depending on circumstances, the island may be given full or partial effect. In certain cases, it may even be ignored. In others, it may be enclaved, which means that the delimitation may be carried out between the mainlands as if the island did not exist, and the island may then be given its own

[205] Elferink Alex G. O. *Op. cit*. P. 198.
[206] 1982 LOS Convention. Art. 121.

maritime space around its coasts.[207] In the 1977 France/UK case, the political independence or autonomy (or measure of self-government) of the Channel Islands resulted in a decisive criterion.[208]

The Courts apply the theory of special geographical features to islands. If the island appears as an integral part of the general coastal configuration, it is treated for the purpose of delimitation on the same footing as the mainland and given full effect. If, on the other hand, it seems to be an aberrant geographical feature in relation to the general configuration, or an insignificant feature, it is given partial effect or ignored. Also, the size, population and economy of island are important factors in the delimitation process, as well as its position relative to the equidistance/median line.

In the 1982 Tunisia/Libya case, the Court attributed a half-effect to the Kerkennah Islands because of "their size and position."[209] Despite its size and population, the island of Jerba, in contrast, had no influence on the delimitation line because the conduct of parties indicated a result which obviated the need for it to be considered as a relevant circumstance.[210]

In the 1984 Gulf of Maine case, the Chamber decided to discount certain minor geographical features, in particular "tiny island, uninhabited rocks or law-tide elevations, sometimes lying at a considerable distance from terra firma."[211] On the other hand, it considered that it could not discount Seal Island "by reason both of its dimensions and, more particularly, of its geographical position", as well as the fact that it is "inhabited all the year round." It was therefore given half-effect.[212]

The question of taking or not islands into account may arise for determining the delimitation line, general configuration of the shore line, and calculating the coastal length. In the 1982 Tunisia/Libya case, the island of Jerba was not taken into account

[207] Weil P. *Op. cit.* P. 230.
[208] Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the delimitation of the continental shelf. Decision of the Court of Arbitration, 30 June, 1977. Par. 186.
[209] 1982 Tunisia/Libya case. Par. 128.
[210] *Ibid.* Par.120; Par. 129.
[211] 1984 Gulf of Maine case. Par. 201.
[212] *Ibid.* Par. 222.

in establishing the general direction by reference to which was drawn the perpendicular which was to constitute the line of delimitation, but it was taken into account when the Court came to calculate the length of coastal fronts. As to the Kerkennah Islands, although they were given half-effect for drawing the line, they were ignored in one of the calculations of proportionality.[213]

In the 1985 Guinea/Guinea-Bissau case, the Court made a distinction between three categories of islands: [214]

a) The coastal islands, which are separated from the continent by narrow sea channels or narrow watercourses and are often joined to it at low tide;
b) The Bijagos islands; and
c) The more southerly islands scattered over shallow areas.

With respect to the first category of islands, the Court observed that they should be considered as forming an integral part of the continent. The second group, the Bijagos archipelago, was taken into account when determining the coastal configuration. For example, the coast of Guinea-Bissau could only be described by the Tribunal as convex because the Bijagos islands were included.[215] As for the scattered islands further to the south, these were simply ignored when it was a question of determining the shape of the shore line and measuring its length, but one of them, the island of Alcatraz, played a more important role in defining the line than the larger Bijagos islands most of which were inhabited.[216]

Thus, case law seems to indicate that the effect granted to islands depends on whether they have a distorting effect on delimitation line and whether they can help to achieve an equitable result. This observation is noted by the Court in the 1969 North Sea case:

> It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects

[213] 1982 Tunisia/Libya case. Par. 131.
[214] 1985 Guinea/Guinea-Bissau case. Par. 95.
[215] *Ibid.* Par. 103.
[216] Ibid. Par. 107.

> of an incidental special feature from which an unjustifiable difference of treatment could result.[217]

In State practice, the situation concerning islands is mostly the same as in case law. Small coastal islands and islets have been ignored in a number of boundary determinations. In the India-Sri Lanka maritime boundary agreement, for example, the small Adams Bridge islands on both sides of the boundary were disregarded for delimitation purposes. A number of small islands were ignored in the delimitation of the Iran-Qatar boundary, and the somewhat larger island of Ven was ignored in the boundary settlement between Denmark and Sweden.[218]

In the Italian-Greek maritime boundary delimitation, partial effect was given to the Greek islands. In the Mediterranean Sea, some use has been made of the arcs technique. Along the Italian-Yugoslav maritime border, the Yugoslav islands are located very close to where the median line boundary would be. If all the Yugoslavian islands had been used as base points, the median line would have lain to Yugoslavia's advantage, much closer to the Italian coast. Finally the Yugoslavian claims for the two islands, Pelagosa and Caiola were limited to arcs with a radius of 12 nautical miles. In a boundary agreement between Italy and Tunisia, a 12 nautical mile arc was described around the Italian island of Lamione.[219]

In 2004, Romania brought a case against Ukraine to the ICJ in a dispute the subject of which is described in the application as concerning the establishment of a single maritime boundary between the two States in the Black Sea, thereby delimiting the CS and the EES appertaining to each.[220] There is the presence of Snake Island in the delimitation area and it is interesting how this island will affect the delimitation process and if the Court will regard it as a relevant circumstance.

In the 1996 agreement between the republic of Estonia and the republic of Latvia the islands were taken into account in the delimitation process. Many islands are present in the area to be delimited and all of them belong to Estonia. Only the Ruhnu Island,

[217] 1969 North Sea cases. Par. 91.
[218] Lewis M. Alexander. Baseline delimitations and maritime boundaries. *Virginia Journal of International Law*. Vol. 23. 1983. P. 524.
[219] Umberto Leanza. *Op. cit*. PP. 379-380.
[220] ICJ press release 2004/31.

which is bigger and populated, was granted a 12 nautical mile territorial sea. Also, on the Estonian side, the base points used were all islands, whereas on the Latvian side the mainland served this purpose.[221]

6.2 Non geographical circumstances

(a) Geology and geomorphology

Geological and geomorphologic factors may constitute relevant circumstance in CS delimitation. These factors are closely related to the concept of natural prolongation, which played an important role in the 1969 North Sea case as the basis for the entitlement for CS. It is also necessary to note that, during this time, the notion of the EEZ had not emerged.

The Court stated that one of the factors needed to be taken into account by States in their negotiation process is the "physical and geological structure of the continental shelf areas involved."[222] But, at the same time, the other two factors noted by the Court were the geographical factors, such as costal configuration and "the element of a reasonable degree of proportionality."[223]

In the 1982 Tunisia/Libya case, both parties invoked in their submissions the factor of natural prolongation as the basis for entitlement to the CS, and accordingly geological and geomorphological circumstances as relevant factors for the delimitation of their CS. [224]

The Court found that the relevant area of delimitation constituted the common CS of both parties and stated that "no criterion for delimitation of shelf areas can be derived form the principle of natural prolongation as such."[225] In its view, the principle that the natural prolongation of the coastal State was a basis of its legal title to the CS did

[221] Jonathan I. Charney and Robert W. Smith. *International Maritime Boundaries*. 2002. Vol. IV. P. 3005.
[222] 1969 North Sea cases. Par. 101.
[223] *Ibid.* Par. 101
[224] 1982 Tunisia/Libya case. Tunisian memorial, at P.12. Also. Par. 63.
[225] *Ibid.* Par. 133.

not necessarily provide "criteria applicable to the delimitation of the areas appertaining to adjacent States."[226] The Court was unwilling to regard a determination of the limits of natural prolongation as constituting *per se* an equitable delimitation. It ruled that "the satisfying of equitable principles and identification of the natural prolongation are not to be placed on a plane of equality."[227] The Court further ruled that the argument of geology as well as geomorphology were unhelpful in enabling it to identify the division between the continental shelves of the two States. While rejecting the contentions of the States concerning the geological factors, the Court concluded as follows:

> Despite the confident assertion of the geologists on both sides that a given area is "an evident prolongation" or "the real prolongation" or the one or the other State, for legal purposes it is not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference solely or mainly to geological considerations.[228]

The Court added that in the present case the geographical configuration must be considered.

In the 1984 Gulf of Maine case, the parties agreed in principle that the Georges Bank formed part of the geology of the North American CS.[229] This unity of the seabed area in question is, furthermore, demonstrated by geomorphologic evidence. In the words of Chamber:

> According to generally accepted scientific findings, this shelf is a single continuous, uniform and uninterrupted physiographical structure, even if here and there it features some secondary characteristics resulting mainly from glacial and fluvial action.[230]

Nevertheless, the Unites States had to convince the Chamber that the Northeast Channel constituted a geomorphological fault which should be taken into consideration because it formed a natural boundary in the seabed.[231]

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[226] *Ibid.* Par. 48.
[227] *Ibid.* Par. 44.
[228] *Ibid.* Par. 61.
[229] 1984 Gulf of Maine case. Par. 44.
[230] *Ibid.* Par. 44.
[231] *Ibid.* Par. 52.

The Chamber refused to accept such an extension of the operation of a geological circumstance. If to take into account the limited importance, the Chamber evidently attributed to circumstances in this case which only addresses one aspect of single maritime boundary delimitation, it seems proper to conclude that geology and geomorphological peculiarities became even less important for a single maritime boundary. The following observation of the Chamber clearly evidences this approach:

> In a concrete situation where distinctive geological characteristics can be observed in the continental shelf, such as might have special effect in determining the division of that shelf and the resources of its subsoil, there would in all likelihood be no reason to extend the effect of those characteristics to the division of the superjacent volume of water, in respect to which they would not be relevant.[232]

When considering the geological factors and natural prolongation, it is important to note the 1985 Libya/Malta case. In this case, the Court finally refused, and downplayed, the concept of the natural prolongation for the entitlement of CS within 200 nautical miles and the geology and geomorphology as relevant circumstances in the maritime delimitation. The Court established the distance criterion as the sole basis of title to the seabed and its subsoil within the 200 nautical mile limit.[233]

The Court recognized the validity of the 200 nautical mile limit in Article 76 of the 1982 LOS Convention as a basis for a legal title to the CS rights and indicated in a rather absolute terminology that geological and geomorphological circumstances will no longer play any role in CS delimitation:

> The Court however, considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far 200 nautical miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation between their claim.[234]

[232] *Ibid.* Par. 193.
[233] 1985 Libya/Malta case. Par. 33.
[234] *Ibid.* Par. 39.

The dissenting opinion of Judge Shigeru Oda regarding the above seems interesting and useful. Judge Oda reviews the evolution of the law of the sea during the UNCLOS III negotiations, including references to the *travaux preparatories*, and concludes accurately that the language of Article 76 (1) of the 1982 LOS Convention was intended to provide all coastal States an entitlement to a CS of 200 nautical miles regardless of the geology and geomorphology of the sea-bed and subsoil.[235]

In all subsequent cases, the Court and arbitral tribunal never regarded the geological and geomorpological factors as relevant circumstances for maritime delimitation. However, the States may claim a CS beyond the 200 nautical miles on the basis of natural prolongation within the parameters provided for in the article 76 of the 1982 LOS Convention. In a situation when two adjacent States are going to delimit the CS beyond the 200 nautical miles, they may use the existence of geological factors, such as gap or trough, as the natural boundary of the CS between them.

State practice shows the same situation concerning the geological and geomorphological factors for maritime delimitation. In most agreements, these factors are not taken into account. The Norwegian trough or trench was ignored for the purpose of delimitation in the agreements between Norway and the United Kingdom (1965) and Norway and Denmark (1965).[236] The agreement between France and Spain disregards the Cap Breton Trench. The agreement between Cuba and Haiti establishes an equidistance line without taking notice of the Cayman trench. The India-Thailand delimitation takes no account of the Andaman Basin. The agreements between the Dominican Republic and Columbia and the Dominican Republic and Venezuela ignore the Aruba Gap.[237]

The geological and geomorphological considerations do not play a role in the maritime delimitation agreements existing in the Black Sea region, the Baltic Sea area and the Mediterranean Sea region.[238] There is an exception however, the

[235] Jonathan I. Charney. International maritime boundaries for the continental shelf: The relevance of natural prolongation. *In Liber Amicorum Judge Shigeru Oda.* 2002. PP. 1026-1027.
[236] Jagota S.P. *Op. cit.* 1985. P. 114.
[237] Nelson L. D. M. *Op. cit.* P. 847.
[238] Jonathan I. Charney and Lewis M. Alexander. *International maritime boundaries*. Vol. II. 1993. P. 1559-1701. Also see: Vol. IV. P. 2863-2887; P. 2995-3129.

Australian-Indonesian agreement of 1972. In establishing the maritime boundary between these two States, this agreement takes the Timor Gap into account, in particular by regarding the Gap as establishing the natural limit of the Australian shelf.[239] This exception shows that geomorphology and geology may therefore still be important within the confines of the maritime areas. Fundamentally, it is up to States concerned to take into account whatever factors they consider to be relevant.

(b) Socio-economic circumstances

Economic and social factors may play an important role in maritime negotiation process between States, but these factors are considered by the Court as largely irrelevant to delimitation due to the fact that equity does not operate in this case as distributive justice. In all cases brought to the ICJ and arbitral tribunals, the Court was asked to draw maritime boundary lines applying the principles and rules of international law. The Court did not regard as relevant the existence, importance or location of natural resources. In most cases, there was no reason for adjusting the delimitation line simply because an oil deposit or a fishery resource straddled the line, or because all the resources were to be found on one side. If the provisional line cuts across a resource, dividing it in two, this is not the circumstance which reasonable to take into consideration. There are, suggested the Court, possible way of solving the problem of the "unity of any deposits."[240] They consist, in implementing the principle of cooperation. In any case, products much in demand today may tomorrow fall into disrepute because of economic, technological and market changes. To draw a boundary on this basis would imply that if these circumstances changed the boundary would need to be reconsidered, which, quite apart from good sense, would be at odds with the principle of the permanence and stability of boundaries, maritime as much as land.

It is understandable why the Court should have excluded from the category of relevant circumstances, and thus of equitable principles, anything which might seem to relate to an apportionment of resources, a division of wealth, an allocation of

[239] Jonathan I. Charney. International maritime boundaries for the continental shelf: The relevance of natural prolongation. In *Liber Amicorum Judge Shigeru Oda*. 2002. P. 1021.
[240] 1969 North Sea cases. Par. 97.

shares.[241] The Court's reluctance to consider socio-economic factors is also due to the fact that Courts are not concerned with distributive justice or the task of establishing a regime of equitable allocation of resources, for that is a legislative rather than a judicial task.[242]

In the 1982 Tunisia/Libya case, the parties emphasized the role of economic factors in the delimitation process. Tunisia raised the issue of economic considerations such as, "the relative poverty *vis-à-vis* Libya in terms of absence of natural resources" and pointed out that fishing resources "must necessarily taken into account as supplementing its national economy in eking out its survival as a country."[243]

The Court refused to take into account the relative poverty of Tunisia, observing that:

> They are virtually extraneous factors, since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as the result of an event such as the result of an event such as the discovery of a valuable economic resource.[244]

In the 1984 Gulf of Maine case, the judgment noted that the "real subject of the dispute" was Georges Bank, because of the potential resources of its subsoil and, even more, its enormous fishery resources.[245]

The Unites States stressed that consideration had to be given to the continuous human presence which took the form of harvesting, conservation and management of fisheries and thus sought to avoid any division of this bank, which it claimed in its totality. [246] Canada, more that the Unites States, claimed that the loss of the bank, especially the richer part, would ruin the economy of a region which depended on the line which the boundary took.[247]

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[241] Weil P. *Op. cit*. PP. 259-260.
[242] Nelson L.D.M. *Op. cit.* P. 855. Note 79.
[243] 1982 Tunisia/Libya case. Par. 106.
[244] *Ibid.* Par. 107.
[245] 1984 Gulf of Maine case. Par. 232.
[246] *Ibid.* Par. 233.
[247] *Ibid.* Par. 234.

The Chamber decided this case without taking any account of the vast mass of fishery information and statistics presented by the parties. At the same time, the Chamber indicated that economic and social factors could only be taken into consideration if the applied criteria and methods of delimitation would "be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."[248] However, in the Chamber's opinion, this was not the case in the Gulf of Maine - the richest fishing ground in the world.

In the 1985 Guinea/Guinea-Bissau case, the Tribunal did not regarded economic factors as relevant circumstances because delimitation cannot be based on the "evaluation of data which changes in relation to factors that are sometimes uncertain."[249] The Tribunal noted that it

> […] does not have a power to compensate for the economic inequalities of the States concerned by modifying a delimitation which it considers is called for by objective and certain considerations. [250]

The Tribunal reaffirmed the traditional doctrine of case law, but it seems perhaps to reduce its scope when it stated that

> […] can nevertheless not completely lose sight of the legitimate claims by virtue of which economic circumstances are invoked, not contest the right of the peoples concerned to a level of economic and social developments which fully preserves their dignity.[251]

The significance of this qualification should not, however, be exaggerated, since although it may have led the Tribunal to encourage the parties to a "mutually advantageous cooperation,"[252] it does not seem to have had any influence on the delimitation itself.

[248] *Ibid.* Par. 237.
[249] 1985 Guinea/Guinea-Bissau case. Par. 122.
[250] *Ibid.* Par. 123.
[251] *Ibid.* Par. 123.
[252] *Ibid.* Par.123

An interesting case when the socio-economic circumstances had been taken into account for the adjustment of provisionally drawn median line was the 1993 case between Greenland and Jan Mayen.[253]

In this case, the Court found that capelin was the most important commercially fished species in the disputed area. Both States emphasized the importance and dependence of their respective economic and local population on the exploitation of the resources. At the same time, there was an agreement concluded between Denmark, Norway and Iceland on 12 June 1989 which established a joint conservation and management regime for capelin stock and established catch quotas for each State. [254]

The Court relied on the 1984 Gulf of Maine case, when the Chamber noted that the delimitation should not entail "catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."[255] In light of this case-law, "the Court has to consider whether any shifting or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned."[256]

In the Gulf of Maine case, the Chamber delimited the maritime boundary on the basis of coastal geography, thus dividing the valuable resources. It refused to draw the line in ways that might have followed natural boundaries between the resources, and also refused to adjust the boundary on the basis of economic dependence of coastal communities. However, the boundary that was adopted gave both States access to the prime resource areas.

In the 1993 Greenland/Jan Mayen case the Court found that:

> The median line is too far to the west of Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway the whole of the area of overlapping claims. For this reason also the median line this requires to be adjusted or shifted eastwards.[257]

[253] ICJ Judgment of 14 June 1993. Case concerning maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway). Hereafter: Greenland/Jan Mayen case.
[254] *Ibid.* Par. 73-74.
[255] *Ibid.* Par. 75.
[256] *Ibid.* Par. 75.
[257] *Ibid.* Par. 76.

The determination of the maritime boundary in this case appears to have reintroduced socio-economic considerations into maritime boundary law. As Judge Schwebel noted in his separate opinion:

> It was not claimed or shown, that if Greenland were not to be accorded fuller access to the ice-free area where capelin may be fished in season, Greenland would be confronted by catastrophic economic repercussion, so even that 'legitimate scruple' did not come into play. It follows that the Court by this holding of distributive justice has departed from the accepted law of the matter, as fashioned pre-eminently by it.[258]

Nevertheless, the human and resource impacts of the maritime boundary delimitation cannot be ignored. Coastal States that do enter into maritime boundary agreements may address these impacts through separate agreements designed to complement the boundary settlement. The general rejection of considerations other than coastal geography in maritime boundary delimitation cases is the preferable course. Natural resources, environmental and similar concerns, may be best addressed on their own merits, in light of, but apart from, the maritime boundary delimitation.[259]

From a consideration of the case law, it is possible to conclude that since the pronouncement of the doctrine of equitable principles, the Court has consequently declined to ascribe any decisive weight for the purpose of delimitation, to the factors pertinent to the economic and social developments of States and the distribution of natural resources. Judge Oda noted, in his dissenting opinion in the 1985 Libya/Malta case, that "this is a matter of future policy of world social justice which does not fall within the purview of a judiciary which has to employ solely the principles and rules of international law unless requested to decide a case *ex aequo et bono*."[260]

In State practice, the socio-economic factors may be regarded as relevant circumstances in their negotiation process on maritime delimitation. In the 1969 North Sea case, the Court noted "there is no legal limits to the considerations which States

[258] 1993 Greenland/Jan Mayen case. Separate opinion of Judge Schwebel. P. 120.
[259] Jonathan I. Charney. Progress in international maritime boundary delimitation law. *American Journal of International Law*. Vol. 88. 1994. P. 240.
[260] 1985 Libya/Malta case. Dissenting opinion of Judge Oda. Par. 66.

may take account for the purpose of making sure that they apply equitable procedures."[261]

During the negotiating process, States are free to choose the relevant circumstances which they think are relevant for the achievement of equitable result. At the same time, social and economic factors can not play any role in the maritime delimitation process between Georgia and Russian Federation, because there is no oil or gas in Black Sea, as well as other valuable resources and the local population has never been dependent on fishing activities.

State practice also shows an interesting and meaningful trend for overcoming resource conflicts and simplifying delimitation between States: the establishment of joint development or management zones. One good example is the State practice in the Gulf of Persia. In the 1969 agreement between Qatar and Abu Dhabi a boundary point was located on a known petroleum field which was to be under Abu Dhabi's jurisdiction, but revenues from which were to be equally shared by the parties. In the 1958 agreement between Bahrain and Saudi Arabia, although a specified area was exclusively under the sovereignty and administration of Saudi Arabia, half of the net revenues from the exploitation of its resources were to be given to Bahrain.[262]

Another example can be found in the Association in South East Asian Nations (ASEAN) region. ASEAN in general, and Malaysia in particular, have been keen to ensure that territorial disputes do not escalate into armed conflict. Joint Development Authorities have been established in areas of overlapping claims to jointly develop as well as explore these areas and ensure profit sharing without settling the issue of sovereignty over the area.[263] This approach has been particularly succesful in the gulf of Thailand, where the cooperative agreements were signed for the Malaysia-Thai and Malaysia-Vietnam Joint Development Areas.[264]

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[261] 1969 North Sea case. Par. 93.
[262] Jagota S.P. *Op. cit*. PP. 76-77.
[263] Stein Tonnesson. "Locating the South China Sea, "in *Locating Southeast Asia: Geographies of Knowledge and Politics of Space*, ed. Paul Kratoska, Henk Schulte Nordholt, and Remco Raben (Ohio University Press, March 2005).
[264] Kreil, Erik. *South China Sea* (March 2006 [cited 24 April 2006]); available from http://www.eia.doe.gov/emeu/cabs/South_China_Sea/pdf.pdf.

The establishment of a joint exploitation zone in the maritime delimitation area when there are natural resources is a very useful approach. Oil and gas companies are generally reluctant to operate in contested areas, so two States may very well agree to share the proceeds and management of the resources in the potentially contested zone, this without prejudice to any future adjudication or arbitration.[265]

In such circumstances, it is thus easy to agree with the view that

> Joint exploitation and development is a pragmatic solution capable of accomplishing the avoidance of confrontation and its wasteful consequences, through focusing on positive approaches and the initiation on productive activity from which tangible benefits accrue to all concerned.[266]

(c) Conduct of the States

In the absence of any maritime boundaries formally agreed between States, their conduct prior to the delimitation dispute may be a circumstance of considerable relevance. The State's behaviour and arrangement may be relevant to the law of acquiescence and estoppel. A State's knowledge of the public conduct or assertion of rights of the other party in dispute, and failure to protest in the face of that conduct, may involve a tacit acceptance of the legal position represented by the other party's conduct or assertion of rights. With respect to the maritime delimitation process, the conduct of the States may indicate whether the State itself:

> (a) has identified those considerations which any equitable solution must protect;
> (b) has demonstrated their attitudes towards what would be a fair or equitable balancing of their relevant considerations; and
> (c) has established a *de facto* boundary.[267]

The 1982 Tunisia/Libya judgment was the first to acknowledge the conduct of the paries as a relevant circumstance applicable for the achievement of an equitable result. Both Tunisia and Libya advanced lines which they claimed reflected their State

[265] Mendelson M. *Op. cit*. P. 1077.
[266] Pinto M.C.W. Maritime Boundary issues and their resolutions. In *Liber Amicorum Judge Shigeru Oda*. 2002. P. 1142. Note 34.
[267] Attard D.J. *Op. cit*. P. 273.

conduct. In the view of the absence of agreed and clearly specified maritime boundaries, the Court was prepared to concede that the presence of a boundary established in 1919,

> […] which was never formally contested by either side though out the long period of time, could warrant it acceptance as historical justification for the choice of the method for delimitation of the continental shelf between the two states, to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the *modus vivendi* line.[268]

The Court adopted for the inner sector of the delimitation a *de facto* line that had emerged in the parties' practice concerning petroleum exploration concession and which itself was reflective of an earlier *de facto* fisheries jurisdiction limit. This factor was tacitly respected for a number of years and thus "constituted a circumstance of great relevance for the delimitation."[269]

In subsequent cases between adjacent States, the Court did not find the conduct of parties as relevant circumstance for the maritime delimitation. In this respect, the 1984 Gulf of Maine case is particularly relevant.

In the 1984 Gulf of Maine case, Canada invoked the conduct of the parties in support of the equidistance line. The Canadian Government did, until 1977, make use of a *de facto* equidistance line with respect to the issuing of concessions in the Gulf of Maine area. According to the Canadian Government, the Unites States had also made use of such a line during the 1960s and 1970s. In the opinion of Canada, the common practice of issuing gas and oil exploration permits had resulted in a *modus vivendi* between the parties based on equidistance.[270]

In order to further strengthen its position, Canada submitted that the United States had consented to this *de facto* line by its conduct in the years following the issuance of the first Canadian permits. The Canadian Government therefore submitted that under the particular circumstances of the case, acquiescence and estoppel could only lead the

[268] 1982 Tunisia/Libya case. Par. 95.
[269] *Ibid.* Par. 96. Par. 117-118.
[270] 1984 Gulf of Maine case. Par. 65.

Chamber to the conclusion that application of equidistance was mandatory between two States.[271]

The Unites States denied the existence of any *de facto* or *modus vivendi* line. For its part, the United States maintained during the proceedings that Canada was aware of its intention to delimit the CS by agreement in accordance with equitable principles - as was stated in the 1945 Truman Proclamation - and that the United States considered the 100 fathom depth line as the outer limit of its CS. Since Canadian activities on the Georges Bank fell within the100-fathom line, the Canadian Government should have been aware of the fact that these undertakings would not be approved by the United States authorities.[272]

The Chamber found that there was not a situation of an accepted *de facto* line between two States. In this respect, the Chamber also touched on the arguments put forward by Canada that the United States had, by its conduct, acquiesced in the use of the equidistance line for the delimitation. According to the Chamber, the requirements allowing for the invocation of the doctrine of acquiescence and estoppel had not been satisfied. The Chamber, therefore, did not deny that tacitly accepted lines might be refereed to as relevant circumstance when the legal situations sanction their invocation.[273]

In the 2002 Cameroon/Nigeria case, the Court did not consider the conduct of parties concerning the oil concessions as relevant circumstance necessary for the adjustment of provisional delimitation line. The Court stated that:

> Although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.[274]

[271] *Ibid.* Par. 126.
[272] *Ibid.* Par. 62; 126; 153.
[273] *Ibid.* Par. 140-142; 148; 151.
[274] 2002 Cameroon/Nigeria case. Par. 304-305.

In this case, there was no agreement between parties regarding oil concessions.

It is difficult to find in bilateral agreements an article which takes into consideration the conduct of States for the establishment of maritime boundaries. However, in State practice, the conduct of States may be taken into account in the maritime delimitation process. As previously noted, States are free in their negotiating process to take into account whatever factor they consider relevant for the achievement of an equitable result.

(d) The interest of third States and security (political) consideration

Maritime delimitation can not be carried out in a vacuum, cut off from the world around it and isolated from other delimitations already implemented, or still to be made. In the 1969 North Sea case, the Court recommended that the Federal Republic of Germany, the Netherlands and Denmark take account the effects, actual or prospective, of any other CS delimitations between adjacent States in the same area.[275]

In the 1982 Tunisia/Libya case, the Court expressly included among other relevant circumstances to be taken into consideration "the existence and interest of other States in the area, and the existing or potential delimitation between each of the Parties and such States."[276] In order to take account of future delimitations in the region, the Court left a question mark in the form of an arrow as to where the maritime boundary between two States should terminate.[277]

In the 1985 Guinea/Guinea-Bissau case, the Tribunal relied not on the interests of third States, but on the other delimitations in the region to justify, not the restriction of the geographical area of its decision, but the extension of its investigation beyond the case itself. Starting with the concept of a "long coastline" which took in Sierra Leone and, still more, the general configuration of the western coast of Africa, the Tribunal

[275] Weil P. *Op. cit.* P. 252.
[276] 1982 Tunisia/Libya case. Par. 81.
[277] *Ibid.* Par. 130-133.

sought a delimitation which, instead of being looked at on its own, would in the words of the Tribunal:

> Be suitable for integration into existing delimitations of the West African region, as well as into future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions.[278]

Taking into account delimitations affecting third States thus covers two concepts and two approaches which should be carefully distinguished. On the one hand, it may lead the Court to limit its decision so as not to encroach upon future delimitations affecting States not party to the case. On the other hand, it may lead the Court to extend its investigation to geographical facts falling outside the dispute before it.

Security and political considerations are closely interrelated. Security and political considerations were recognised in the 1945 Truman Proclamation on the CS. The proclamation states that "self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources."[279]

As Judge Jimenes de Arechaga noted:

> There was an immediate and almost instinctive rejection by all coastal States of the possibility that foreign States, of foreign companies or individuals, might appear in front of their coasts, outside their territorial sea but at a short distance from their ports and coastal defences, in order to exploit the seabed and erect fixed installations for that purpose.[280]

Governments have had no hesitation in raising concerns regarding sovereignty before the Courts as relevant circumstances. Faced with this pressure, the Courts at first reacted firmly, but gradually less and less so.[281]

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[278] 1985 Guinea/Guinea-Bissau case. Par. 109
[279] See *supra* at note 2.
[280] 1982 Tunisia/Libya case. Separate opinion of Judge Arechaga. Par. 72.
[281] Weil P. *Op. cit*. P. 264.

In the 1984 Gulf of Maine case, the United States put forward the argument that a maritime boundary too close to its shores would interpose Canadian maritime areas between those shores on the one hand, and the high seas and Europe on the other. The judgment however contained no echo of this highly political concern.[282]

In the 1985 Guinea/Guinea-Bissau case, the tribunal found that whilst the EEZ and CS were not zones of sovereignty, and added that this consideration is not without interest. Going still further, is stated forcefully "its prime objective has been to avoid that either party should see rights exercised opposite its coast or in the immediate vicinity thereof, which could compromise its security."[283]

In State practice, the interest of third State in the delimitation area, as well as security and political considerations, are reflected in the delimitation line. In the Black Sea region, where the maritime area is not large, the factor of third States may be taken into account in the maritime delimitation process. Between Georgia and the Russian Federation, the factor of third States seems to have no influence on the delimitation line. Between Georgia and Turkey, the maritime delimitation agreement is already in force and the delimitation area between Georgia and Russia does not affect the delimitation line with Turkey. The political and security factors, which may affect the maritime delimitation process between these two States will be addressed in the conclusion.

In the Mediterranean Sea, there are hundreds of islands, some of dependent and others not. Thus, the factor of third States is a circumstance which may affect the delimitation process in such a restricted area.

In the Baltic Sea, the interests of third States was taken into account in the maritime delimitation agreement and trilateral agreements (Estonia-Latvia-Sweden). The Baltic States do not consider themselves as the successors of the former Soviet Union, but as the successors to the pre-World War II States bearing the same names. As a consequence, these States have sought to reinvigorate the boundary treaties that were

[282] *Ibid.* P. 265.
[283] 1985 Guinea/Guinea-Bissau case. Par. 124.

concluded during the Soviet period. This political factor played a role in maritime delimitation process involving these three States.[284]

The statements of the ICJ and Arbitral Tribunals, as well as State practice, show that security and political considerations, as well as the interest of third States in the delimitation area, may be relevant in maritime delimitation for the assessment of the equitableness of a delimitation line.

(e) Historic title

The mention of historic title in the delimitation rule applicable to the territorial sea[285] justifies its further examination. Historical maritime title depends upon the existence of a *pessesio longi temporis*, carried out carried out *a titre de souverain*, to which it has to be given due notoriety, and to which the international community as a whole has acquiesced. As derogation from international law, namely to the principle of the freedom of the high seas, the title is then dependent up on the acquiescence of the great majority of States.

The factors to weight in the determination of a historical title are:

(i) exercise of authority for a long period and in accordance with the maritime title that is being claimed;
(ii) notoriety and continuity of such display of authority;
(iii)reaction or lack of it of another State.[286]

Whereas historic titles are opposable *erga omnes*, historic rights are advanced merely *inter partes*, and their scope falls short of sovereignty. The latter are non-exclusive rights, which may be categorizes into two main types: historic rights of passage and historic fishing rights. A historic title signifies that no other State can potentially be entitled to exercise powers over the area to which the title is referred. Historic titles exclude the existence of any other title. Conversely, historic rights have a non-

[284] Jonathan I. Charney and Robert W. Smith. *International maritime boundaries.* 2002. Vol. IV. PP. 2995-3129.
[285] Article 15 of the 1982 LOS Convention.
[286] Nuno Marques Antunes. *Towards the conceptualization of maritime delimitation. Legal and technical aspects of a political process.* 2003. P. 36.

exclusive nature and are reconcilable with a maritime title vested in another State.[287] This possibility is clearly stipulated by Article 51 (1) of the 1982 LOS Convention, which is prescribes that a State exercising sovereignty over archipelagic waters "shall recognize traditional fishing rights" of other States.

Despite having the notion of historic bays at its root, the concept of historical title "can apply to waters other than bays, i.e., to straits, archipelagos, and generally to all those waters which can be included in the maritime domain of a State."[288] Referring primarily to internal waters, the claims of historic title can undoubtedly also be put forward in relation to the territorial sea.

Notably, historic title seems to allow States to claim sovereignty over areas that lie beyond the limits of what would be their normal maximum territorial sea entitlement. The existence of such sovereignty would only depend upon the proof of existence of the historical title. With the advent of the 1982 LOS Convention, the territorial sea entitlement was extended up to 12 nautical miles, and the existence of a historic title beyond that limit became very unlikely. With regard to the EEZ and the CS, the existence of a historic title is difficult to conceive in practice. Inasmuch as the juridical validity of any claims would have to be assessed in light of the general theory of historic title, their existence becomes highly improbable. A sufficiently long possession over those areas is at least problematic and requisite of acquiescence or recognition by the international community as a whole could not yet have been met.[289]

Where referring alternatively to "historic title or other special circumstances" the textual element of the delimitation rule seems to indicate that historic title is just another type of special circumstances which may or may not justify a departure from equidistance/median line. It seems hard to support this view because the overlapping of potential entitlements is a *condition sine qua non* for the delimitation, and because historic titles are exclusive in nature, it may be affirmed that the existence of a historic title precludes any delimitation of the area pertaining thereto. Furthermore, if historic

[287] *Ibid*. P. 36.
[288] *Juridicial Regime of Historic Waters, Including Historic Bays*. ILC Yearbook, 1962 (I). P. 6.
[289] Nuno Marques Antunes. *Op. cit.* P. 37.

title has a juridical relevance equivalent to that of an explicit agreement, the formal equidistance/special circumstance rule should not be applied.[290]

Finally, concerning to the relevant circumstances it is possible to say, that without taking into account circumstances which are pertinent to the concrete case equitable result will not be achieved. As it was discussed above, geographical circumstances play an important role in maritime delimitation process. But there is also notable difference whether delimitation process was settled by third party settlement or negotiation. During negotiation, States may take into account relevant circumstances, both geographical and non-geographical or ignore both of them.

[290] *Ibid*. P. 37.

Part IV. Conclusion

The foregoing considerations allow for the conclusion that maritime delimitation is a very complex and multiform subject. The international community and the Courts, in spite of their endeavours, find it difficult to produce a general principle applicable to all maritime delimitation processes. The 1982 LOS Convention sets forth only the goal to achieve maritime delimitation, and says nothing about the principles and methods for the achievement of equitable result. Customary law, which plays an important role in the delimitation process, also establishes that delimitation must be in accordance with equitable principles, taking into account the relevant circumstances. Equitable principles do not lay down obligations, but simply clarifies the guidelines for achieving an equitable result in the delimitation and the relevant circumstances are relevant only for particular cases. At the same time, case law and especially State practice, supports the use of equidistance/relevant circumstances rule and shows that primacy must be accorded to the geographical factors in delimiting maritime boundaries because each case is unicum. A single rule or method may not be applicable in all circumstances, irrespective of geographical and other facts. A maritime boundary, to be durable, must be fair and equitable and take into account the special circumstances in the area relevant to delimitation.

The primary rule for maritime delimitation accepted both by conventional law and customary law is that the delimitation must be effected by agreement. Maritime boundaries between States, to be secure and stable, have to be settled by agreement between them. The negotiation process between States is very important for the achievement of positive results. The subject of maritime boundary, like the subject of land boundary, is a sensitive one and should be handled carefully and with understanding of the opposite viewpoints. Despite serious and meaningful negotiations if difficulties and disputes arise, the parties may resort to the third-party settlement procedures.

After consideration the topic the following points on the maritime delimitation between Georgia and the Russian Federation may be noted.

The use of equidistance/median line, as it is prescribed in the Article 15 of the 1982 LOS Convention, is the best solution for the delimitation of the territorial sea. Beyond the territorial sea, for the EEZ and the CS, a single line based on the equidistance method seems to produce an equitable result. It is necessary to examine what relevant circumstances exist in the delimitation area, which are necessary to take into account to shift the equidistance line so as to avoid an unequitable result.

The coasts of both States are adjacent to the whole perimeter, and are smooth with no significant irregular or concave coastlines. To look at it from a macrogeographical perspective, the coast of Georgia, the Russian Federation, and Turkey are slightly concave, with Georgia lying at the back of this concave coast, which might result in a certain cut-off effect of the maritime area of Georgia if a strict equidistance is applied. This factor may be taken into account and justify a shift in the provisional equidistance line. The coasts of relevance for the delimitation of maritime zones between the States appear to be the same length, with Georgia's coast measuring 315 km and Russia's 475 km. The proportionality between costal lengths is 1:1.5; it is not a difference which may serve for the adjustment of the equidistance line. After drawing the provisional equidistance line, the States may compare the ratio between the maritime area and the costal length and, if the test of proportionality will not meet their requirements, they may shift the line.

There are no islands in the delimitation area and no oil, gas or other natural resources which may constitute relevant circumstances for delimitation process and the local population has never been dependent on fishing activities. Given the above, the socio-economic circumstances are irrelevant.

As case law and State practice shows, the geological and geomorpholigical factors have been found to be irrelevant for maritime delimitation up to 200 nautical miles.

The interest of any third State in the delimitation area is also excluded. The only possible third State is the Turkey, which abuts the delimitation area. The maritime delimitations between Georgia and Turkey and that between the Russian Federation and Turkey are completed and the respective agreements are in force.

From the legal perspective, the maritime delimitation between Georgia and the Russian Federation does not seem difficult, but there are political factors which currently impede the delimitation process. To give a better and clearer picture of the political issues, it is necessary to provide a short overview of the current political situation.

The maritime delimitation area between Georgia and Russia is situated in the region of Abkhazia, which is an integral part of Georgia. Nowadays, Abkhazia exists as a *de facto* republic under the governance of a separatist government, not recognized by the international community. The separatist movement in this region began in 1991 when Georgia gained its independence and separatists were supported by some political groups in Russia. This continuous today. The Abkhazian Government hopes, with the support of Russia, to separate from Georgia and become an independent State. In spite of the fact that the Russian Federation, on several occasions, declared in official statements that it recognizes the territorial integrity of Georgia, the reality is different. The delimitation of the land boundary between Georgia and the Russian Federation in this region is not yet completed and Russia is not very eager to complete the process. The establishment of State boundaries would clearly indicate that Abkhazia exists within the State borders of Georgia, and that Russia recognizes Abkhazia as an integral part of Georgia.

It is obvious that until the delimitation of the land boundary is not completed, it is impossible to delimit the maritime boundary. However, in the near future Georgia will restore its territorial integrity and State sovereignty over the whole territory recognized by the international community. After that, it will be easier to complete the delimitation of the land boundary and to start to negotiation process on maritime delimitation. If, during the negotiations, the parties negotiate in good faith trying to understand the opposing view and respecting each other's interests, it seems quite possible to achieve an equitable result and conclude an agreement, which will strengthen the good relationship between the neighbour States.

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