“Equitable Solution for Delimiting the Exclusive Economic Zone and Continental Shelf: The Role of Environmental and Sociocultural Factors as Relevant Circumstances in Case Law”

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ABSTRACT

Since 1969, international courts and tribunals have applied different approaches to maritime boundary delimitation in the EEZ and continental shelf to achieve an equitable solution or result. Even though the "equitableness" should be determined by balancing up all the relevant circumstances of a particular case, existing case laws have regarded geographical factors to possess a privileged status as compared to non-geographical factors (i.e. environmental and sociocultural factors). This paper aims to assess the roles of environmental and sociocultural factors and explores the way forward for these factors in the law of maritime boundary delimitation. Essentially, this paper sets out a summary of the evolution of rules governing delimitation in the EEZ and continental shelf. Then, it examines to what extent States and international courts and tribunals have considered environmental and sociocultural factors as relevant circumstances over the past five decades and discusses the way forward for environmental and sociocultural factors in the law of maritime boundary delimitation.

This paper observes that international courts and tribunals have been reluctant to consider environmental and sociocultural factors as relevant circumstances in reaching equitable solutions or results for delimiting the EEZ and continental shelf. It further notes the inconsistency in treating environmental and sociocultural factors in the delimitation process as shown in the *Gulf of Maine case*, the *Greenland and Jan Mayen* case, the *Eritrea/Yemen* case, the *Barbados v. Trinidad and Tobago* case, and the *Bangladesh v. India case*. Nonetheless, with the assertiveness of States in using duty to protect the marine environment to influence maritime boundary delimitation and the response of the international community concerning climate change in recent years, environmental factors will likely play a more significant role in the delimitation process. Additionally, it is likely that these sociocultural factors, particularly the artisanal fishing rights and the attachment of the coastal communities, will have a more consistent role to play in the delimitation process if the States are able to overcome the strict evidentiary rules established by the existing case laws.

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LIST OF ACRONYMS

1958 Geneva Conventions	Convention on the Territorial Sea and the Contiguous Zone, Convention on the Continental Shelf, Convention on the High Seas, and Convention on Fishing and Conservation of the Living Resources of the High Seas
CS	Continental Shelf
CS*	Continental Shelf beyond 200nm
CS Convention	Convention on the Continental Shelf
ed./eds.	Editor/Editors
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishery Zone
IACHR	Inter-American Commission on Human Rights
Ibid.	Ibidem
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
No.	Number
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
RIAA	Reports of International Arbitral Awards
TS	Territorial Sea
SMB	Single Maritime Boundary
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	The First United Nations Conference on the Law of the Sea
UNCLOS II	The Second United Nations Conference on the Law of the Sea
UNCLOS III	The Third United Nations Conference on the Law of the Sea
v.	Versus
vol.	Volume

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INTRODUCTION

Background

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

For example, Articles 74(1) and 83(1) of the United Nations Convention on the Law of the Sea ("UNCLOS") contain an identical rule governing the delimitation in the EEZ and continental shelf. However, neither of these two articles provide a clear method for delimitation besides calling for an agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice (the "ICJ") in order to achieve an equitable solution. This allows international courts and tribunals to exercise their discretions on what the applicable method should be; however, international courts and tribunals are still guided by a paramount objective under UNCLOS which is 'to achieve an equitable solution.' On the contrary, Article 6 of the Convention on the Continental Shelf ("CS Convention") calls for an agreement between the parties or failing such agreement, an application of the median line or the principle of equidistance unless another boundary line is justified by special circumstances. It appears that the CS Convention contains a method for delimitation of the continental shelf; however, it does not address the delimitation in the EEZ. A general observation for the two conventions is that they are based on a fundamental rule that delimitation should be first effected by an agreement between the States concerned, making an agreement a cornerstone of maritime boundary delimitation.[1] However, when an agreement could not be reached, the two instruments enable the States concerned to have a suitable mechanism for the peaceful settlement of disputes to determine the appropriate delimitation line and the delimitation method.

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

[1] *Handbook on the Delimitation of Maritime Boundaries* (United Nations publication, 2000), p. 16.

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

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

[2] Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law", *The American Journal of International Law*, vol. 88, No. 2 (April 1994), p. 230.
[3] See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement, I.C.J Reports 1969*, p. 46, para. 85; *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII*, pp. 45 and 46, para. 70; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p.44, paras. 38 and 39; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 293, para. 91; and *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, I.C.J. Reports 1985*, pp. 38 and 39, para. 45.
[4] Donald McRae, "The Applicable Law", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?,* Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 97.
[5] *Handbook on the Delimitation of Maritime Boundaries* (United Nations publication, 2000), p. 17.
[6] See *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, I.C.J. Reports 1985*, pp. 38 and 39, para. 45.
[7] Donald McRae, "The Applicable Law", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?,* Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 97.
[8] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 78 and 79, para. 109.
[9] Malcolm D Evans, "Maritime Boundary Delimitation", in *The Oxford Handbook of the Law of the Sea*, Rothwell R Donald and others, eds. (Oxford University Press, 2015), p. 258.

Yoshifumi Tanaka[10] that the approach provides excessive subjectivity of the judgment and unpredictability of the law, which undermine certainty in the law of delimitation.

On the contrary, subsequent case law decided in 1993 onward has shifted the focus from the outcome of delimitation to the process of delimitation itself, reflecting a corrective equity approach.[11] Although the focus has been shifted but the aim for delimitation remains with 'equitable solution'.[12] For instance, the ICJ declared in the 1993 judgment of the *Greenland and Jan Mayen case* that *prima facie*, a median line could generally result in an equitable solution for delimitation between opposite coasts,[13] and the 2002 judgment of the *Qatar/Bahrain case* that the equidistance line would provide the starting point for the delimitation between adjacent States.[14] Furthermore, in its 2009 judgment in the *Black Sea case*, the ICJ made an unprecedented move by developing a maritime delimitation methodology to assist the ICJ in carrying out its task, which is known as the three-stage approach.[15] This three-stage approach was also endorsed by subsequent decisions of the international courts and tribunals involving maritime boundary delimitation cases and it proceeded from (i) drawing the provisional equidistance line, then (ii) adjusting the provisional equidistance line by taking into account relevant circumstances, before (iii) applying a final proportionality test. While it is relatively easy to draw the equidistance line and to apply a proportionality test at the first and last stage of the delimitation process, the second stage receives a lot of discussion, particularly on what constitutes relevant circumstances as neither the CS Convention nor UNCLOS defines these terms. However, leaving the discussion on the contents of relevant circumstances aside, it seemed that relevant circumstances function as a bridge between the starting line of equidistance, which might not always be equitable, and the finishing line of delimitation, which must be equitable.

[10] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 123 and 125.
[11] Ibid., pp. 119 and 120.
[12] See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 59, para. 48, in which the ICJ noted that: *"That statement of an 'equitable solution' as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones."*
[13] Ibid., p. 66, para. 64.
[14] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J Reports 2001*, pp. 103 and 104, para. 215.
[15] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J Reports 2009*, pp.101 – 103, paras. 115 – 122.

Whether result-oriented equity approach or corrective equity approach has been adopted by the international courts and tribunals, they have always dealt with relevant circumstances in the course of delimitation. Starting from the 1969 *North Sea Continental Shelf cases* to the 2023 *Mauritius/Maldives case*, international courts and tribunals have developed a list of factors constituting relevant circumstances and it could be classified into two categories - geographical or non-geographical categories[16] – and narrowed down into six in nature: (i) geographical factors, (ii) economic factors. (iii) historical rights and conduct of parties, (iv) security interests and navigational aspects, (v) environmental considerations, and (vi) sociocultural considerations.[17] While there is abundant literature in judicial proceedings on the four factors, less attention has been paid to the last two factors: environmental and sociocultural considerations despites these two factors have been raised by States since the early 1980s.

Environmental factors have been invoked by States in the *Gulf of Maine case*, the *Bangladesh v. India case*, and the *South China Sea Arbitration case*. In its pleadings in the early 1980s in the *Gulf of Maine case*, the United States advanced the argument that an ecogeographical criterion should be accounted in the delimitation process.[18] It went further to argue that prospective boundaries must ensure the optimum conservation and management of living resources while reducing potential disputes between the United States and Canada.[19] Three decades later, Bangladesh claimed that placing the basepoints in a highly unstable coastal area affected by sea-level rise might mean that the equidistance line would be susceptible to change in the foreseeable future.[20] A few years later, the Philippines invoked harmful practices to marine life and the environment in the disputed waters of the South China Sea as grounds for accusing China of breaching its obligations under UNCLOS.[21] At the time of writing this paper, two new cases involving environmental considerations as a core component of maritime disputes are pending before the ICJ[22] and Annex VII Arbitration.[23]

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[16] Yoshifumi Tanaka, *The International Law of the Sea,* 3rd ed. (Cambridge, New York, Cambridge University Press, 2019), pp. 250 – 267.

[17] García Ch., María Catalina, and Joyeeta Gupta. Environmental and Sociocultural Claims within Maritime Boundary Disputes. *Marine Policy* 139, (2022), p. 3.

[18] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984,* p. 276, para. 51.

[19] Ibid., p. 298, para. 110.

[20] *In the Matter of the Bay of Bengal Maritime Boundary (Bangladesh v. India), Memorial of Bangladesh, vol. I,* paras. 6.81 – 6.83.

[21] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award, 12 July 2016, RIAA, vol. XXXIII*, p. 502, para. 894.

[22] *Guatemala's Territorial, Insular and Maritime Claim (Guatemala v. Belize).*

[23] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation).*

Compared to environmental factors, sociocultural factors have been raised more often. The first instance was the 1984 *Gulf of Maine case*, in which Canada requested the Chamber of the ICJ to assess the human dimension rather than purely the economics of the fishing practices in the region to be considered as relevant for the delimitation, particularly the catastrophic repercussions' the delimitation might cause for the affected communities.[24] Later, Denmark asserted the overwhelming reliance of the Greenland coastal communities and economy on the seasonal capelin fishery and their attachment to the surrounding sea as relevant elements in the course of delimitation in the 1993 *Greenland and Jan Mayen case*.[25] In the 1999 *Eritrea/Yemen case*, the Tribunal was asked to consider the artisanal nature of fishing practices including the local consumption of fish as part of traditional fishing regimes and local legal traditions.[26] Similarly, in the 2006 *Barbados v. Trinidad and Tobago case*, Barbados claimed for the importance of traditional fishing right for Barbadian fisherfolk and fish vendors, whose livelihood depends on seasonal fishing in the disputed areas as circumstances affecting the delimitation process.[27] A decade later in the 2016 *South China Sea Arbitration case*, the Philippines called for protection of traditional fishing and argued that China has prevented its fishers from pursuing their livelihoods and interfered with traditional practices.[28] Last but not least, in the pending case between Ukraine and the Russian Federation before Annex VII Arbitration, Ukraine has claimed its right concerning the underwater cultural heritages and the impacts on its fishers' livelihoods. These cases regardless of how international courts and tribunals decided on the weight to be given in the course of maritime boundary delimitation, illustrate the important roles played by sociocultural factors and demonstrate how this factor should be treated in future cases.

The author noted that both the environmental and sociocultural considerations have been discussed in the *South China Sea Arbitration case*. However, given that this case was not

[24] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 298, para. 110 and p. 341, para. 234.
[25] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 73, para. 79.
[26] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, pp. 347 – 349, paras. 52 – 60.
[27] *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados v. Trinidad and Tobago), Award, 11 April 2006, RIAA, vol. XXVII*, p. 163, para. 58.
[28] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award, 12 July 2016, RIAA, vol. XXXIII*, pp. 221 and 222, para. 112.B.10.

consider directly as a case dealing with a maritime boundary delimitation; therefore, its discussion will be excluded from this paper.

Research Questions and Objective

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

- What can we learn from the practices of international courts and tribunals concerning maritime boundary delimitation in the EEZ and continental shelf?
- To what extent have States and international courts and tribunals considered environmental and sociocultural factors as relevant circumstances over the past five decades? and
- What would be the way forward for environmental and sociocultural factors in the law of maritime boundary delimitation?

In order to respond to the above research questions and to achieve the research objective mentioned earlier, the discussion in this research will be in two folds. First, it will review existing literature and jurisprudence concerning the evolution of applicable rules governing delimitation in the EEZ and continental shelf, particularly Article 6 of the CS Convention, Articles 74(1) and 83(1) of UNCLOS, and customary international law. It will also discuss two emerging practices– the single maritime boundary and the three-stage approach - created by case law in delimiting the EEZ and continental shelf. It will then examine the legal basis and substance of equitable principles and relevant circumstances developed by case law since the 1969 *North Sea Continental Shelf cases* to the recent decision in the 2023 *Mauritius/Maldives case*. Second, it will provide an analysis of approaches taken by the parties and international courts and tribunals when dealing with environmental and sociocultural factors. This paper aims to conclude that although environmental and sociocultural factors has not been properly recognized by international courts and tribunals in achieving an equitable solution for delimiting the EEZ and continental shelf, these two factors do have a role to play and there should be further consideration on them, regardless of the weight they should be given.

This research is an additional brick to be added to the wall of the law on maritime boundary delimitation. It aims to influence law of the sea practitioners to understand how States and international courts and tribunals interpret and apply environmental and sociocultural factors as relevant circumstances in the course of achieving an equitable solution of maritime boundary delimitation in the EEZ and continental shelf. Furthermore, effective ocean governance could be easier to achieve when environmental and sociocultural considerations are taken into consideration in the course of maritime boundary delimitation.

The author would like to note that this research is not intended to provide a comprehensive study of how relevant circumstances operate within the delimitation process nor intended to exhaustively discuss its usage or weight that should be given for each case. It also has no intention to discuss the influence of environmental and sociocultural factors in the course of maritime boundary delimitation in State practices.

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

Although the essential concepts of maritime boundary delimitation emerged in the 19th century via State practices[29] and case law,[30] the discussion at that time merely focused on the delimitation in the territorial sea. Continental shelf delimitation only emerged on the international stage at the First United Nations Conference on the Law of the Sea ("UNCLOS I"). UNCLOS I was held in Geneva from 24 February to 29 April 1958 and participated by 86 States and observed by several specialized agencies of the UN and inter-governmental bodies. It was the first time in the early development of the law of the sea, that 54 out of 86 States represented at UNCLOS I, called for a codification of new international law governing the ocean and sea.[31] It was also the first time that newly independent States from Asia and African continents played a role in shaping international law of the sea which was normally dominated by the traditional Western-oriented law. There were several points of discussion and divergent views among the participants at UNCLOS I relating to the territorial sea, contiguous zone, innocent passage through international straits, fisheries and their conservation, and continental shelf. Regardless of these differences, four Geneva Conventions and one Optional Protocol were adopted at the end of UNCLOS I, one of which is the CS Convention in which the definition of the continental shelf and methodology for delimiting the continental shelf were agreed upon.

Two years after UNCLOS I, States came together again in 1960 for the Second United Nations Conference on the Law of the Sea ("UNCLOS II") to further discuss the remaining unsettled questions at UNCLOS I, particularly on the limits of the territorial sea and fishery limits. Unfortunately, due to the huge gap in political or economic interests among the participants, UNCLOS II was known as a failed conference as there was no agreed answer to the unsettled questions.[32]

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[29] *See* the 1809 Peace Treaty of Fredrikshamn between Sweden and Russia, the 1846 Treaty of Limits, Westward of the Rocky Mountains between the United States of America and the British Government, the 1924 Convention concerning the Frontier between the province of Finmark and the Territory of Petsamo between Finland and Norway, etc…

[30] *See* the 1903 *Alaska Boundary arbitration between Great Britain and the United States* and the 1909 *Grisbadarna case (Norway/Sweden)*.

[31] R. P. Anand, *Origin and Development of the Law of the Sea*, vol. 7 (The Hague, Boston, London, Martinus Nijhoff Publishers, 1982), p. 176.

[32] Ibid., p. 189.

Regardless of the failure of UNCLOS II, its outcome did not affect the agreed formula for delimiting continental shelves between opposite or adjacent States as provided in Article 6 of the CS Convention. However, three years after the entering into force of the CS Convention, the agreed formula on continental shelf delimitation was challenged through the institution of the proceedings with the ICJ in 1967. By an Order of 26 April 1968, the Court joined the proceedings in the two cases after having found that Denmark and the Netherlands were in the same interest.[33] Almost a year after this Order, the Court in the *North Sea Continental Shelf cases* rendered a judgment rejecting the application of Article 6 of the CS Convention and denied its status as a rule of customary international law. However, the Court affirmed the rights of the coastal State concerning the continental shelf zone as a natural prolongation of its territory under the sea *exists ipso facto and ab initio* by virtue of the sovereignty of the State over its territory.[34]

Four years after the decision in the *North Sea Continental Shelf cases*, the Third United Nations Conference on the Law of the Sea ("UNCLOS III") commenced its first session in 1973 and worked for several months each year until the adoption of UNCLOS in 1982. It was a common understanding that UNCLOS III had its origin in the Sea Bed Committee established by the United Nations General Assembly in 1967 to study the question of the deep sea lying beyond the national jurisdiction (i.e., beyond the continental shelf).[35]

UNCLOS III was divided into three main committees, and the second committee was tasked with the maritime zone regime (i.e., territorial sea and contiguous zone, exclusive economic zone, continental shelf, and high seas), fishing and conservation of the living resources in the high seas, and the specific aspects such as the questions of straits and archipelagic States.[36] Compared to other maritime zones, the EEZ was a newly developed concept from State practices of the Latin American and African States[37] and further developed during UNCLOS III. This concept of the EEZ had its own background story and existed in parallel with the

[33] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Order of 26 April 1968, I.C.J Reports 1968,* pp. 9 and 10.
[34] René-Jean Depuy, *The Law of the Sea – Current Problems* (Leiden, A.W. Sijthoff International Publishing Company B. V., 1974), p. 73.
[35] R.R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester, Manchester University Press, 1999), pp. 15 and 16.
[36] Yoshifumi Tanaka, *The International Law of the Sea,* 3rd ed. (Cambridge, New York, Cambridge University Press, 2019), p. 33.
[37] Ibid., p. 149.

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

Since the 1960s several proceedings on maritime boundary delimitation particularly on the EEZ and continental shelf came before the international courts and tribunals.[39] These proceedings centered around the discussion on the applicable law and principle governing the EEZ and continental shelf delimitation (Chapter 1), particularly the interpretation and application of Article 6 of the CS Convention, Articles 74(1) and 83(1) of UNCLOS and customary international law. International courts and tribunals substantively dealt with the relationship between customary international law and treaty provisions on the delimitation of the EEZ and continental shelf and agreed that the aim for each delimitation was an equitable result or equitable solution.[40] To achieve this equitable result or equitable solution, the legal basis and substance of equitable principles and relevant circumstances (Chapter 2) were substantially explained from the early day of the ICJ in the *North Sea Continental Shelf cases* to the most recent ITLOS decision on the *Mauritius/Maldives case*.

Chapter 1: The Applicable Law and Principle Governing the EEZ and Continental Shelf Delimitation

Rules on the delimitation of the continental shelf were first introduced at UNCLOS I and incorporated in Article 6 of the CS Convention of 1958. However, the formula available under Article 6 of the CS Convention was later challenged at UNCLOS III. It took almost a decade of negotiation for States to finally agree on a new provision for delimiting the continental shelf.

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[38] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Separate Opinion of Vice-President Oda, I.C.J. Reports 1993,* p. 106, para. 62.

[39] See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement, I.C.J Reports 1969; Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII*; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgement, I.C.J. Reports 1982; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984; Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgement, I.C.J. Reports 1985; and Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgement, I.C.J. Reports 1993 etc…*

[40] Donald McRae, "The Applicable Law", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?,* Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 105; and *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 62, para. 184.

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

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

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

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

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

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

[41] Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, "The Judiciary and the Law of Maritime Delimitation – Setting the Stage", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?,* Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 3.

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

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

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

[42] R.R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester, Manchester University Press, 1999), p. 184.
[43] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement, I.C.J Reports 1969*, p. 38, para. 62; *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII*, p. 45, para. 70; and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, pp. 59 and 60, para. 49.
[44] Yoshifumi Tanaka, *The International Law of the Sea*, 3rd ed. (Cambridge, New York, Cambridge University Press, 2019), p. 239.
[45] Yoshifumi Tanaka, *The International Law of the Sea*, 2nd ed. (Cambridge, New York, Cambridge University Press, 2015), p. 199.
[46] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement, I.C.J Reports 1969*, p. 17, para. 6.

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

It should be noted that although the term 'special circumstances' was incorporated on various occasions in the text of the 1958 Geneva Conventions, neither of them provided a clear list of what should be included as special circumstances. However, the idea of such incorporation of the term 'special circumstances' was to mitigate the possible inequitable results produced by a strict equidistance line[50] or in order word to avoid inequitable results from a mechanical application of the median or equidistance line.[51]

In the aftermath of the adoption of the CS Convention, international courts and tribunals have provided substantial contribution to the interpretation and application of Article 6, particularly the 1969 ICJ Judgments in the *North Sea Continental Shelf cases*, involving two parties (Denmark and the Netherlands) and a non-party (Germany) to the CS Convention. The judgments provided two important points: first, the Court concluded that Article 6 of the CS Convention could not apply as the treaty law between the parties to the dispute as Germany, a non-party to the CS Convention, could not accept the regime of Article 5 in a manner binding upon itself.[52] Second, the Court examined the legal status of Article 6 of the CS Convention under customary international law and concluded that the 'equidistance – special circumstances' rule did not correspond to customary international law. The Court went further

[47] Yoshifumi Tanaka, *The International Law of the Sea,* 3rd ed. (Cambridge, New York, Cambridge University Press, 2019), p. 239.
[48] Ibid.
[49] *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII,* pp. 44 and 45, para. 68.
[50] *Handbook on the Delimitation of Maritime Boundaries* (United Nations publication, 2000), p. 14.
[51] Yoshifumi Tanaka, *The International Law of the Sea,* 2nd ed. (Cambridge, New York, Cambridge University Press, 2015), p. 199.
[52] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement, I.C.J Reports 1969,* pp. 25 – 27, paras. 28 – 33.

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

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

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

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

[53] Ibid., p. 38, para. 62.
[54] *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII*, p. 42, para. 61.
[55] Ibid., para. 62.
[56] Ibid., p. 44, para. 65.
[57] Ibid., p. 45, para. 70.
[58] Ibid., pp. 44 and 45, paras. 68 – 70.
[59] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 58, para. 45.

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

When discussing the relationship between Article 6 of the CS Convention and customary international law, it might be interesting to address the relationship between the term 'special circumstance' under the CS Convention and 'relevant circumstances' under customary international law. The ILC considered 'special circumstances' as embracing exceptional configurations of coasts and the presence of islands and navigable channels.[62] On the other hand, 'relevant circumstances' have been regarded to contain a wider scope referring to those circumstances that are relevant to the continental shelf and are primarily geographical in character.[63] The ICJ even suggested that there was no limit to the kind of circumstances that might be taken into account in effecting an equitable delimitation.[64]

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

The drafting history of Articles 74(1) and 83(1) of UNCLOS shows the divergent views among the drafters and their formulations were one of the most contentious issues in the drafting history of UNCLOS.[65] There were two major groups of supporters, the 'equidistance' group and the 'equitable principles' group. The 20 States[66] that advocated for the rule of equidistance proposed that: "*The delimitation of the Exclusive Economic Zone Continental Shelf between adjacent or opposite States shall be effected by agreement employing, as a general principle,*

[60] Ibid., para. 46.
[61] Ibid., pp. 60 and 61, para. 51.
[62] See *Yearbook of the International Law Commission, 1956, vol. I* (United Nations publication, Sales No.1956.V. 3, Vol. II), p. 300.
[63] R.R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester, Manchester University Press, 1999), p. 188.
[64] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J Reports 1969*, pp. 50 and 51, para. 94.
[65] Alexander Prölss, ed., *The United Nations Convention on the Law of the Sea: A Commentary* (München, Nomos Verlagsgesellschaft, 2017), p. 566.
[66] The 20 States include Bahamas, Barbados, Canada, Columbia, Cyprus, Democratic Yemen, Denmark, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, the United Arab Emirates, the United Kingdom, and Yugoslavia.

the median or equidistance line, taking into account any special circumstances where this is justified."[67] The other 27 States[68] defended the equitable principles, suggesting that: "*The delimitation of the exclusive economic zone between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution.*"[69]

In the seventh session, the Chairman of Negotiating Group 7, Mr. Ero J Manner reported that there is at least a general agreement on two of the various elements of delimitation: first, the consensus seems to prevail to the effect that any measure of delimitation should be effected by agreement and second, all the proposals presented refer to relevant or special circumstances as factors to be taken into account in the delimitation process.[70]

The confrontation between the two groups not only concerned this issue but also concerned another major issue, the dispute settlement mechanism. While the supporters of equidistance favored the establishment of a compulsory third-party system for the settlement of maritime boundary disputes, the supporters of equitable principles rejected the idea of compulsory judicial procedures. It should be noted that the Chairman of Negotiating Group 7 prepared an informal proposal suggesting that: "*The delimitation of the exclusive economic zone/continental shelf between opposite or adjacent States shall be effected by agreement with a view of reaching a solution based upon equitable principles, taking account of all the relevant circumstances, and employing, where local conditions do not make it unjustified, the principle of equidistance.*"[71] Although this formula seemed to incorporate all the elements proposed by the two supporter groups, no compromise was reached on this issue.

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[67] Renate Platzöder, ed., *Third United Nations Conference on the Law of the Sea: Documents*, vol. IX (New York, Oceana, 1986), pp. 392 and 393 (UN Doc NG7/2 dated 20 April 1978).
[68] The 27 States include Algeria, Argentina, Bangladesh, Benin, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syria, Somalia, Turkey, and Venezuela.
[69] Renate Platzöder, ed., *Third United Nations Conference on the Law of the Sea: Documents*, vol. IX (New York, Oceana, 1986), p. 402 (UN Doc NG7/10 dated 1 May 1978). 20 April 1978).
[70] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Separate Opinion of Vice-President Oda, I.C.J. Reports 1993*, p. 107, para. 64.
[71] Renate Platzöder, ed., *Third United Nations Conference on the Law of the Sea: Documents*, vol. IX (New York, Oceana, 1986), p. 405 (UN Doc NG7/11 dated 2 May 1978).

Another proposal was suggested by the Chairman of Negotiating Group 7 in the ninth session of 1980 and this proposal was eventually included as Articles 74/83 of the Informal Composite Negotiating Text (ICNT)/Revision 2 of 11 April 1980. The proposal provided: "*The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.*"[72]

Despite the efforts taken by the Chairman of Negotiating Group 7, no agreement has been reached even one year prior to the adoption of UNCLOS. In 1981, the President of UNCLOS III, Ambassador Tommy Koh, proposed another draft article with the intention to bring a compromise, and this draft was incorporated into the Draft Convention on 28 August 1981.[73] The Drafting Committee has suggested a few modifications and this Draft was later approved by the Plenary Conference on 24 September 1982.[74]

The identical rules for delimiting the EEZ and continental shelf under Articles 74(1) and 83(1) of UNCLOS provided:

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

In the early days after the adoption of UNCLOS, these newly agreed rules for delimiting the EEZ and continental shelf received significant criticisms, mostly due to the lack of specificity on the method for delimitation. For example, Judge Gros called these provisions 'an empty formula'.[75] Other commentators critiqued that these articles contained no specific reference to either equidistance or equitable principles.[76] Additionally, the reference to 'Article 38 of the Statute of the International Court of Justice' failed to provide any helpful guidance besides

[72] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XIII (A/CONF.62/L.47).
[73] Ibid., vol. XV (A/CONF.62/L.78).
[74] Ibid., vol. XVII (A/CONF.62/L.160).
[75] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Dissenting Opinion of Judge Gros, I.C.J. Reports 1984*, p. 365, para. 8.
[76] R.R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester, Manchester University Press, 1999), p. 191.

making it possible to look into the CS Convention for the delimitation of the continental shelf. However, this reference to 'Article 38 of the Statute of the International Court of Justice' then became unhelpful when it dealt with the delimitation of the EEZ as there was no treaty law before UNCLOS regulating the matter. Added to this, it was unlikely to establish any customary rule governing the EEZ delimitation given the divergent views and confrontations during the negotiation of UNCLOS III.

On the positive side, the fact that Articles 74(1) and 83(1) of UNCLOS did not include a clear formula for delimiting the EEZ and continental shelf, at least emphasized the objective for the delimitation – to achieve an equitable solution. This opened the door to the unwritten law not only to preserve a series of principles which has been accounted for equitable in the past[77] but also to further determine by international courts and tribunals.[78]

In fact, even before the entry into force of UNCLOS in 1994, Vice-president Oda in his separate opinion in the 1993 *Greenland and Jan Mayen case* explained three points concerning the interpretation of Articles 74(1) and 83(1) UNCLOS. First, the words 'in order to achieve an equitable solution' cannot be interpreted as indicating anything more than the target of the negotiation to reach an agreement and that the consideration of some relevant or special circumstances may be required if one is to arrive at an 'equitable solution'.[79] Second, the meaning of the provision that agreement must be reached 'on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice' simply enables the negotiating parties to freely negotiate and reach an agreement on whatever they wish, employing all possible elements and factors to strengthen their positions. "*In other words, there is no legal constraint, hence no rule, which guides the negotiations on delimitation even though the negotiations should be directed to achieve an equitable solution*." [80] Third, the 'equitable solution' can be reached differently as the special or relevant circumstances to be taken into

[77] René-Jean Dupuy and Daniel Vignes, eds., *A Handbook on the New Law of the Sea*, vol. 1 (Dordrecht, Boston, Lancaster, Martinus Nijhoff Publishers, 1991), p. 486.
[78] Tullio Treves, "International Courts and Tribunals and the Development of the Law of the Sea in the Age of Codification", in *Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos*, Lilian del Castillo, ed. (Brill Nijhoff; Leiden, Boston, 2015), p. 86.
[79] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Separate Opinion of Vice-President Oda, I.C.J. Reports 1993*, pp. 108 and 109, paras. 67 and 68.
[80] Ibid.

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

The Virginia Commentary provided that the first paragraph of Article 74 sets out the element that constitute the fundamental rule for delimitation – delimitation is to be effected 'by agreement' between the States concerned and is to be based on 'international law', with the objective of achieving 'an equitable solution.'[83] The requirement to achieve an equitable solution emphasizes on the objective of the delimitation instead of on the method of delimitation; therefore, parties negotiating an agreement and those deciding on delimitation are free to choose any method that will lead to an equitable solution .[84]

After the entry into force of UNCLOS, the international courts and tribunals gradually explained the simple and imprecise formula under Articles 74(1) and 83(1) of UNCLOS[85] and later confirmed that Articles 74(1) and 83(1) of UNCLOS correspond to customary international law.[86] Judge Tullio Treves commented that such customary status applied especially to the methodology of delimitation where jurisprudences adopted an 'equitable principles – relevant circumstances' rule to be implemented in three steps.[87]

Section B: The Emerging Practices from Case Law for the EEZ and Continental Shelf Delimitation

[81] Ibid., p. 109, para. 69.
[82] Barbara Kwiatkowska, "Equitable Maritime Boundary Delimitation – A Legal Perspective", in *Law of the Sea*, Hugo Caminos ed. (Burlington, Ashgate Publishing Company, 2001), p. 245.
[83] Satya N. Nandan and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea – A Commentary*, vol. II (Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1993), pp. 813 and 982.
[84] Ibid., pp. 814 and 983.
[85] See *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados v. Trinidad and Tobago), Award, 11 April 2006, RIAA, vol. XXVII*, p. 210, para. 222; and *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Judgment, 12 March 2012, ITLOS Reports 2012*, p. 61, para. 183.
[86] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014,* p. 65, para. 179; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 674, para. 139; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001,* p. 91, para. 167.
[87] Tullio Treves, "International Courts and Tribunals and the Development of the Law of the Sea in the Age of Codification", in *Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos*, Lilian del Castillo, ed. (Brill Nijhoff; Leiden, Boston, 2015), p. 86.

Subsection B.1: The Single Maritime Boundary

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

Professor Weil suggested that the problem of single boundary have been endorsed since the 1977 *Anglo-French Continental Shelf case* as the *ad hoc* Court of Arbitration took into account the fisheries zones established in the area when delimiting the continental shelf around the Channel Island even though the *ad hoc* Court of Arbitration's competence as provided in the Special Agreement only concerned the delimitation of the continental shelf between France and the United Kingdom and not their respective fisheries zones.[89] The *ad hoc* Court of Arbitration seemed to have preferred not to separate the continental shelf and the fishery zones as their limits were fixed to coincide with each other.[90]

Later in the 1982 *Tunisia/Libya case*, the relationship between the EEZ and the continental shelf emerged in the oral proceedings despite the fact that the ICJ was exclusively tasked with the delimitation of the continental shelf.[91] For instance, Judge Oda asked the parties during the oral proceedings whether the delimitation of the EEZ and continental shelf might be or ought not to be different and whether circumstances to be taken into consideration in delimiting the two zones could or could not be different from one another in view of the identity of the two provisions in the draft UNCLOS. Judge Schwebel further asserted whether, assuming that Tunisia enjoyed historic rights over the sedentary fisheries, could Libya have the exclusive rights of exploitation in the sub-soil of the place where these fisheries were located.[92] The responses of the parties diverged from each other. While Libya seemed to have argued for a connection between the two zones although the two boundaries need not necessarily coincide,

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[88] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001,* p. 93, para. 173.
[89] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge, Grotius Publications Limited, 1989), p. 119.
[90] See *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII,* pp. 89 and 95, paras. 187 and 202.
[91] See Special Agreement between the Socialist People's Libyan Arab Jamahiriya and the Republic of Tunisia for the Submission of the Question of the Continental Shelf between the Two Countries to the International Court of Justice dated 1 December 1978.
[92] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge, Grotius Publications Limited, 1989), p. 120.

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

Regardless of this background, it seemed that the concept of a single maritime boundary was clearly recognized in the 1984 *Gulf of Maine case*, in which the Chamber of the ICJ was requested by the parties to establish a single maritime boundary delimiting the continental shelf and the Exclusive Fishery Zone ("EFZ") between the United States and Canada. At that time neither State realized the full implications of this request nor did they realize that this request would so preoccupy the Chamber.[97] Consequently, the Chamber had great difficulty in finding the legal basis for a single maritime boundary since the concept had not previously been dealt with and the parties did not put forward any argument in support of their assumptions for the drawing of this coincide delimitation line.[98] Therefore, rather than focusing on the legal basis for a single maritime boundary, the Chamber sought to clarify the fundamental norm to deal with all future cases along with neutral factors commonly relevant to the delimitation of both the continental shelf and the EFZ.[99] The Chamber concluded that Article 6 of the CS Convention, although in force between the parties, did not entail any legal obligation to apply

[93] ICJ Memorials, Tunisia/Libya, vol. V, pp. 503, 507 and 508; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Dissenting Opinion of Judge Oda, I.C.J. Reports 1982,* p. 232, para. 127.
[94] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p.48, para. 48 and p. 73, para. 100.
[95] Ibid., pp. 70 and 71, paras. 93 – 95.
[96] See *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Separate Opinion of Judge Jiménez de Aréchaga, I.C.J. Reports 1982,* p. 115, para. 56 and p. 130, para. 99; *Dissenting Opinion of Judge Oda*, pp. 231 and 232, para. 126, pp. 233 – 234, para. 130 and pp. 247 – 249, para. 146; *Dissenting Opinion of Judge Evensen*, pp. 286 – 288, paras. 9 and 10.
[97] Donald M. McRae, "The Single Maritime Boundary: Problems in Theory and Practice" in *The UN Convention on the Law of the Sea: Impact and Implementation,* E.D. Brown and R. R. Churchill, eds. (US, Law of the Sea Institute, 1987), p. 225.
[98] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984,* p. 267, para. 27.
[99] Ki Beom Lee, "The Demise of Equitable Principles and the Rise of Relevant Circumstances in Maritime Boundary Delimitation", PhD dissertation, University of Edinburgh, 2012, p. 11.

them to the single maritime boundary delimitation.[100] The Chamber noted that the ultimate objective was to ensure an equitable result in all delimitation cases including those seeking to establish a single maritime boundary.[101] The Chamber went further to state that, "*there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind."*[102] The Chamber did not object to the establishment of a single maritime boundary between the United States and Canada as there was no rule of international law preventing the establishment of this kind of boundary.

Although the EFZ is not the same as the EEZ, this decision remains significant because it is the first time an international court is tasked with delimiting both the superjacent water column and the seabed beyond the limits of the territorial sea.[103] Also, the decision serves as an important contribution to the development of a single boundary, determined by the application of the same 'neutral criteria' of the coastal geography and by resorting to the same 'neutral methods' of a geometrical character.[104]

A year later, in the 1985 *Guinea/Guinea-Bissau case,* an Arbitral Tribunal composed of three judges of the ICJ had to determine 'the course of the line delimiting the maritime territories' appertaining to each of the two countries. The Arbitral Tribunal not only applied the same rules for delimiting the EEZ and continental shelf but also drew a single boundary for the two zones without questioning the legal basis for such an application nor asking whether this concept rested on the will of the parties. It seemed that the Arbitral Tribunal perceived the single maritime boundary as a recognized concept in the current law of the sea, where there was no further need to raise or even examine any objection to it.[105]

A decision rendered in the same year by the ICJ in the 1985 *Libya/Malta case* also suggested a link between the two zones although the task of the ICJ merely concerned effecting a delimitation of the continental shelf. The Court ruled that the principles and rules underlying the EEZ cannot be left out of consideration for the delimitation of the continental shelf even

[100] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984,* p. 303, para. 125.
[101] Ibid., pp. 299 and 300, para. 112.
[102] Ibid., p. 267, para. 27.
[103] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 74.
[104] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge, Grotius Publications Limited, 1989), p. 125.
[105] Ibid., p. 126.

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

Another ICJ judgment involving delimitation in the continental shelf and fishery zone was issued in the 1993 *Greenland and Jan Mayen case*. Contrary to the *Gulf of Maine case*, there was no agreement between the parties for the establishment of a single maritime boundary. Therefore, the Court had to deal with the applicable law governing those regimes separately and attempted to achieve assimilation at three levels. At first, the Court equated Article 6 of the CS Convention with customary international law by relying on the *Anglo-French Continental Shelf case*. Later, the Court equated the customary law governing the EFZ with that of the EEZ on the basis of the agreement of the parties. Finally, the Court assimilated the law of continental shelf delimitation with that of the EFZ at the customary level by relying on the award in the *Anglo-French Continental Shelf case*.[108] Although the Court decided that for the delimitation in the continental shelf and the EFZ, it was proper to begin the process of delimitation by a median line provisionally drawn,[109] the Court concluded that the establishment of a single maritime boundary was not relevant to the case at hand and drew two, albeit coincident lines.[110] Vice President Oda commented that although there was a possibility for coincide delimitation lines between the EEZ and the continental shelf, one could not presume a single delimitation line for these two separate and independent zones unless there was an agreement between the concerned States.[111] Regardless of this reasoning, the Court had constructed a *de facto* single maritime boundary in the case as the provisionally drawn delimitation lines were identical and the two delimitation lines coincided along their whole lengths even though the relevant circumstances of the three delimited zones differed.[112]

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[106] *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, I.C.J. Reports 1985,* p.33, para. 33.
[107] Ibid., pp. 33 and 34, paras. 33 and 34.
[108] Yoshifumi Tanaka, *The International Law of the Sea,* 2nd ed. (Cambridge, New York, Cambridge University Press, 2015), p. 205.
[109] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993,* p. 62, para. 53.
[110] Ibid., pp. 57 and 58, paras. 43 and 44.
[111] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Separate Opinion of Vice-President Oda, I.C.J. Reports 1993,* p. 109, para. 70.
[112] Ki Beom Lee, "The Demise of Equitable Principles and the Rise of Relevant Circumstances in Maritime Boundary Delimitation", PhD dissertation, University of Edinburgh, 2012, p. 165.

Since then the establishment of a single maritime boundary has become a common practice in the case law as international courts and tribunals have decided to exercise their discretions in favor of more convenient and pragmatic solutions, regardless of the lack of legal basis for the establishment of a single maritime boundary. In fact, the single maritime boundary has subsequently been used in the 1999 *Eritrea/Yemen case*, the 2001 *Qatar/Bahrain case*, the 2002 *Cameroon/Nigeria case*, the 2006 *Barbados v. Trinidad and Tobago*, the 2007 *Guyana v. Suriname case*, the 2007 *Nicaragua v. Honduras case*, the 2009 *Black Sea case*, the 2012 *Bangladesh v. Myanmar*, the 2012 *Nicaragua v. Colombia case*, the 2014 *Peru v. Chile case*, the 2014 *Bangladesh v. India case*, the 2014 *Somalia v.* Kenya, the 2017 *Ghana v. Côte d'Ivoire*, and the 2023 *Mauritius/Maldives case*.

Obviously from a practical point of view, there are good reasons for using the same line for regulating the various activities at sea, i.e. fishery, pollution control, and oil and gas operations. This is because the existence of different boundaries for different purposes would result in a situation of overlapping functional jurisdiction, which could easily lead to practical problems calling for certain monitoring and cooperating arrangements.

Subsection B.2: The Three-Stage Approach

Since the *North Sea Continental Shelf cases*, international courts and tribunals have gradually developed maritime boundary delimitation methodology with the aim of achieving an equitable solution. In several judgments and awards, they have established a process for appraising the equitable solution for each case through what has been known as a two-stage process involving: drawing a provisional equidistance line between the respective coasts and assessing this equidistance line's equitableness. This two-stage process has been outlined in several decisions, notably the 1993 *Greenland and Jan Mayen case*, the 2006 *Barbados v. Trinidad and Tobago case*, and the 2007 *Guyana v. Suriname case.*

Nonetheless, it was only in the 2009 *Black Sea case* that the ICJ took an unprecedented move by refining the two-stage process into a three-stage approach. The Court adopted this three-stage approach under Articles 74(1) and 83(1) of UNCLOS and it is considered as a variation of the equidistance/relevant circumstances approach.[113] The three-stage approach includes: (1)

[113] Alexander Prölss, ed., *The United Nations Convention on the Law of the Sea: A Commentary* (München, Nomos Verlagsgesellschaft, 2017) p. 575.

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

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

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

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

[114] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J Reports 2009,* p. 99, para. 110.
[115] Ibid.
[116] Donald R Rothwell and Tim Stephens, *The International Law of the Se*a (Oxford, Portland, Oregon, Hart Publishing, 2010), p. 399.
[117] David H. Anderson, "Recent Judicial Decisions Concerning Maritime Delimitation", in *Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos*, Lilian del Castillo, ed. (Brill Nijhoff; Leiden, Boston, 2015).
[118] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J Reports 2007,* p. 743, para. 280.

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

It seems that the bisector line method is favored by the parties on various occasions even if it has later been rejected by international courts and tribunals. For example, in the *Guyana v. Suriname case*, the Arbitral Tribunal rejected Suriname's argument because the general configuration did not present unusual geographical peculiarities.[120] In the *Bangladesh v. Myanmar case*, the ITLOS Tribunal dismissed Bangladesh's argument for the usage of the angle-bisector method on the grounds that the geographical circumstances were not possible or appropriate.[121] As for the *Nicaragua v. Colombia case*, the Court denied Nicaragua's argument in attempting to make a second type of exception on the grounds that Colombia's islands facing Nicaragua should all be enslaved.[122] In the *Peru v. Chile case*, the Court referred to the need for compelling reasons preventing the drawing of the provisional equidistance line.[123] From these cases, it is clear that the drawing of the provisional equidistance line remains a general rule within the three-stage approach. Also, the three-stage approach could be argued to provide a better framework for balancing predictability and flexibility in the law of maritime delimitation.

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

Since the 1960s, cases on maritime boundary delimitation in the EEZ and continental shelf have been determined based on customary international law, the CS Convention, UNCLOS, or a mixture of both custom and treaty law. From the adoption of the CS Convention until the entry into force of UNCLOS, international jurisprudences have gradually developed to be in line with the transition of the law. For instance, where emphasis upon 'natural prolongation' was heavily reflected in submissions made in the *North Sea Continental Shelf cases* and *Anglo-French Continental Shelf case*, the argument for such a concept was later replaced by an acceptance that all States are entitled to a 200 nm continental shelf. However, what remains

[119] Ibid., pp. 745 – 749, paras. 283 – 298.
[120] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award, 17 September 2007, RIAA, vol. XXX*, p. 120, para. 372.
[121] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Judgment, 12 March 2012, ITLOS Reports 2012*, pp. 74 - 76, paras. 234 – 239.
[122] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 691 and 692, para. 180.
[123] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 61, para. 180.

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

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

This chapter will, therefore, explore the content of these two concepts, particularly by looking into the approaches to equitable principles (Section A) as developed by case law. Given that by its nature, the concept of equity varies from one context to the other and it seems that there is no uniform interpretation of this concept. In the context of maritime boundary delimitation, equity was given a role by hydrographers and not by lawyers.[125] Consequently, in the law of maritime boundary delimitation itself, there is a certain degree of difference between adjudicators in judging the equitableness of maritime boundaries or the approach toward equitable principles. Jurisprudences suggested that approaches to equitable principles can be divided into two major phases: from the *North Sea Continental Shelf case* to the *St. Pierre and Miquelon case* and from the *Gulf of Maine case* to the *Mauritius/Maldives case.*

The chapter will later examine the roles and categories of another major element that international courts and tribunals have to take into consideration for a delimitation to reach an equitable solution, the relevant circumstances (Section B). The case law suggests that relevant circumstances have dual roles in the maritime boundary delimitation process. The first role is to serve as factors that affect how primary methodology is to be applied, while the second role is to use as a means of determining the primary methodology or identifying the applicable method.[126] These dual roles are not competing but complementary to each other as relevant circumstances could serve as potential elements within the delimitation process and/or an

[124] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge, Grotius Publications Limited, 1989), pp. 211 and 212.
[125] Research Centre for International Law at the University of Cambridge, *International Boundary Cases: The Continental Shelf*, vol. one (Cambridge, Grotius Publications Limited, 1992), p. 43.
[126] Malcolm Evans, "Relevant Circumstances", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 229.

indicator of the method or determinant of the process.[127] It seems that from the *North Sea Continental Shelf case* to the *Guyana v. Suriname case*, the role played by relevant circumstances in the process of delimitation is relatively unclear as compared to a later decision starting from the *Black Sea case*, where the ICJ has placed relevant circumstances in the second stage of the delimitation process. While there are no limits to categories of relevant circumstances in negotiations, this is not the case in adjudication as international courts and tribunals are required to decide the matter on the basis of international law to those rendered *ex aequo et bono*.

Section A: Approaches to Equitable Principles – From Result-Oriented to Corrective Equity Approach

Subsection A.1: From the North Sea Continental Shelf Cases to the St. Pierre and Miquelon Case

In the 1969 *North Sea Continental Shelf cases*, the ICJ rejected the equidistance method as a mandatory rule of customary international law and argued for a "*delimitation to be effected by agreement in accordance with equitable principles and taking account of all the relevant circumstances.*"[128] Although the substances of equitable principles were vaguely explained by the ICJ, the Court pointed out that it was necessary to seek not one method of delimitation, but one goal,[129] i.e. the achievement of equitable results.[130] From the explanation, the approach for maritime boundary delimitation was "*the rejection of any obligatory method and the emphasis on the results*",[131] reflecting a result-oriented equity approach.[132] Through this approach, the international courts and tribunals were able to decide, case by case, how to achieve equitable results without being bound by any maximum flexibility of the law of maritime delimitation.

Since then and until the 1990s, the equitable principles became the core discussion of the law of maritime boundary delimitation before the ICJ. In the 1982 *Tunisia/Libya case*, the ICJ received a specific request from the parties to take into account the equitable principles and the

[127] Ibid., p. 230.
[128] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J Reports 1969*, pp. 46 and 53, paras. 85 and 101(C)(1).
[129] Ibid., p. 50, para. 92.
[130] Yoshifumi Tanaka, *The International Law of the Sea*, 2nd ed. (Cambridge, New York, Cambridge University Press, 2015), p. 202.
[131] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 59
[132] Yoshifumi Tanaka, *The International Law of the Sea*, 2nd ed. (Cambridge, New York, Cambridge University Press, 2015), p. 202.

relevant circumstances that characterized the area.[133] The Court's approach to equitable principles was clearly stated in paragraph 70 of the judgment, the relevant part provided:

> "[…] The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result that is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in light of its usefulness to arrive at an equitable result. It is not every such principle that is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result."[134]

From this paragraph, the Court's approach to equitable principles was the predominance of the result over the method of delimitation. Thus, the Court remained consistent with its previous decision in the *North Sea Continental Shelf cases* and denied the mandatory character of the equidistance method and its privileged status as compared to other methods of delimitation.[135] However, such a conclusion from the Court received significant comments from several judges in their dissenting opinions, particularly on the lack of a delimitation method.[136] For instance, Judge Oda raised that "*the problem is what principles and rules of international law should apply in order to achieve an equitable solution?*"[137] Judge *ad hoc* Evensen questioned the approach of the Court in this judgment for its failure to examine whether the equidistance principle could be fruitfully used, adjusted by principles of equity and the relevant circumstances characterizing the region concerned to bring about an equitable result.[138] Similarly, Judge Gros criticized the judgment for its failure to clarify its reasoning for rejecting equidistance.[139]

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

[133] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 21, para. 2.
[134] Ibid., p. 59, para. 70.
[135] Ibid., pp. 78 and 79, paras. 109 and 110.
[136] It is interesting to note that this Judgment has received significant numbers of dissenting opinions: Judges Forster, Gros, Oda and Judge *ad hoc* Evensen.
[137] Ibid., *Dissenting Opinion of Judge Oda, I.C.J. Reports 1982,* p. 255, para. 155.
[138] Ibid., *Dissenting Opinion of Judge Evensen, I.C.J. Reports 1982,* p. 297, para. 15.
[139] Ibid., *Dissenting Opinion of Judge Gros, I.C.J. Reports 1982,* p. 149, para. 12.

the relevant circumstances in the area, to produce an equitable solution.[140] On the other hand, Canada has submitted that the delimitation needs to conform with equitable principles, having regard to all relevant circumstances, in order to achieve an equitable result.[141] It should be noticed that in case law before the ICJ, the terms 'equitable result' and 'equitable solution' are not used in the same way. While 'equitable result' normally appeared as part of the method of delimitation (the second stage), 'equitable solution' is commonly known for the entire process of delimitation.[142] In the end, the Chamber suggested slightly different terms from what had been submitted by the parties and instead stressed the need to apply equitable criteria and practical methods capable of ensuring an equitable result for the delimitation of the single maritime boundary in the EFZ and continental shelf.[143] When it came to the equitable criteria, it seems that the Chamber took a flexible approach by explaining that the assessment of the equitableness of those criteria or otherwise should be done in the light of the circumstances of each case. The Chamber went further to state that for the same criterion, it was possible to arrive at a different or even opposite conclusion in different cases.[144] Moreover, "*international law only required that recourse be had in each case to the criterion, or the balance of different criteria, appearing to be most appropriate to the concrete situation.*" [145] As for the practical method, the approach was the same as those of equitable criteria, and it would be selected on a case-by-case basis, depending on the actual situation.[146] Thus, the Chamber once again echoed the result-oriented equity approach as the law neither defined the equitable criteria nor the practical method and simply advanced the idea of an equitable result.[147]

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

[140] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 258.
[141] Ibid., p. 295, para. 99.
[142] Lucie Delabie, "Role of Equity", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 161.
[143] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 300, para. 113.
[144] Ibid., p. 313, para. 158.
[145] Ibid.
[146] Yoshifumi Tanaka, *The International Law of the Sea*, 2nd ed. (Cambridge, New York, Cambridge University Press, 2015), p. 204.
[147] Ibid.

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

The Court went on to state that the application of equitable principles enables the Court to weight the relevant circumstances in any particular delimitation case.[150] At the same time, the Court also stressed the need to display consistency and a degree of predictability even though it looked with particularity to the peculiar circumstances of an instant case when applying equitable principles.[151] These statements suggested a clear desire to limit the subjectivity of the concept of equitable principles.[152]

What is interesting about this decision is the Court's reiteration of examples of equitable principles which include: "*the principle that there is to be no question of refashioning geography or compensating for the in inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstance es; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, 'equity does not necessarily imply equality'* ".[153] Even with this explanation, however, it is still not helpful as the concept itself remains highly abstract and provides no specific method of delimitation. Although the precise content of 'equitable principles' remains unclear, it is worth mentioning that the ICJ did its best to clarify the concept.

Although the Court has rejected the mandatory nature of equidistance principles or other methods for maritime boundary delimitation and seemed to apply equitable principles in a result-orient equity approach. At the operational stage of establishing the continental shelf

[148] *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, I.C.J. Reports 1985,* p. 38, para. 45.
[149] Ibid., para. 44.
[150] Ibid., p. 40, para. 48.
[151] *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, I.C.J. Reports 1985,* p. 39, para. 45.
[152] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 77.
[153] *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, I.C.J. Reports 1985,* p. 39, para. 46.

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

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

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

[154] David Anderson, "Developments in Maritime Boundary Law and Practice", in *International Maritime Boundaries – Volume V*, David A. Colson and Robert W. Smith, eds. (Leiden, Boston, Martinus Nijhoff Publishers, 2005), p. 3209.
[155] *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Award, 14 February 1985, RIAA, vol. XIX,* p. 182, para. 89.
[156] *Delimitation of maritime areas between Canada and France, Award, 10 June 1992, RIAA, vol. XXI,* p. 282, para. 38.
[157] *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII,* p. 45, para. 70.
[158] M. D. Blecher, "Equitable Delimitation of Continental Shelf", *American Journal of International Law*, vol. 73, No. 1 (January 1979), p. 70.
[159] Donald R Rothwell and Tim Stephens, *The International Law of the Se*a (Oxford, Portland, Oregon, Hart Publishing, 2010), p. 391.

result.[160] Particularly, the *ad hoc* Court of Arbitration stated in paragraph 249 of the Award that: *"The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection…Consequently, it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation."*[161] Thus, it seems that the *ad hoc* Court of Arbitration implied a derivation from a result-oriented equity approach and moved toward a corrective-equity approach.

From the above explanation, it could be observed that two contrasting approaches to equitable principles were developed from 1969 to 1992. The ICJ and international tribunals except the *ad hoc* Court of Arbitration in the *Anglo-French Continental Shelf case*, seemed to center the approach to equitable principles around a result-oriented equity approach where no specific method of delimitation had to be identified and the goal for each delimitation case was equitable result. Under this result-oriented equity approach, international courts and tribunals have a larger discretion to use any method of delimitation as they are not bound by any particular method. However, such discretion runs the risk of too much flexibility and too little predictability in the law of maritime boundary delimitation. On the contrary, the *ad hoc* Court of Arbitration's approach was the corrective-equity approach where the equidistance method is applied at the first stage of the delimitation and the equidistance line may be shifted if relevant circumstances warranted such need at the second stage of the delimitation. This approach not only echoed the primary role of the equidistance principle but also ensured a predictable result in the delimitation process.

Subsection A.2: From the Greenland and Jan Mayen case to the Mauritius/Maldives Case

Although the *Anglo-French Continental Shelf case* changed the approach adopted by the ICJ in the *North Sea Continental Shelf cases*, result-oriented equity approach remained important in subsequent case law. It was only in the 1993 *Greenland and Jan Mayen case*, that case law

[160] Alexander Prölss, ed., *The United Nations Convention on the Law of the Sea: A Commentary* (München, Nomos Verlagsgesellschaft, 2017), p. 574.
[161] *Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Award, 30 June 1977, RIAA, vol. XVIII,* p. 116, para. 249.

demonstrated a constant and clear application toward the corrective-equity approach. In fact, the ICJ in the *Greenland and Jan Mayen case* echoed the approach adopted in the *Anglo-French Continental Shelf case* by applying the equidistance/relevant circumstances rule making it a turning point of case law relating to maritime boundary delimitation, where equity no longer functioned as result-oriented equity approach but shifted toward corrective-equity approach.

It should be noted that the judgment in the *Greenland and Jan Mayen case* was remarkable not only in the shift of approaches to equity but also in its detailed explanation of the various roles and use of equity in case law. The ICJ discussed the application of equitable procedures,[162] the effecting of an equitable division,[163] the need to arrive at an equitable result,[164] the ensuring of an equitable solution,[165] and the process of evolving such a solution.[166] Not only did the main judgment itself provide substantive coverage of various roles of equity in maritime boundary delimitation, but the separate opinion provided also played a major role in shaping and guiding the discussion on equity.[167]

As Judge Weeramantry clarified in his separate opinion in the *Greenland and Jan Mayen case*, the application of equity for the case comprised four elements: The application of an equitable principle, the adoption of an equitable procedure, the use of an equitable method, or the securing of an equitable result.[168]

The equitable principle refers to the concepts, black-letter rules, and standards or principles in the broader sense.[169] The general application of equitable principle could be the assessment of representations of State policy regarding maritime delimitation which other States have relied upon to their prejudice, equitable principles of interpretation in relation to relevant treaties, and

[162] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, pp. 79 – 81, para. 92.
[163] Ibid., pp. 66 and 67, para. 64.
[164] Ibid., pp. 62, para. 54 and p. 79, para. 90.
[165] Ibid., p. 67, para. 65.
[166] Ibid., p. 66, para. 63.
[167] See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Separate Opinion of Judge Weeramantry, I.C.J. Reports 1993*, pp. 211 – 279.
[168] Ibid., p. 219, para. 21.
[169] Ibid., para. 22.

principles of fairness in considering whether large sections of the waters to demarcate are unusable in consequences of their being frozen over for considerable periods.[170]

The equitable procedure referred to a form of equity that ensured that in the process of inquiry and investigation leading to a decision, the parties enjoyed the opportunity of a full and fair presentation of their respective cases to the court or tribunal.[171] The ICJ once stated that "*there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures.*"[172] Therefore, all relevant circumstances should be considered in determining how the maritime space is to be delimited between the Parties. In the event of an absence of a legal principle rendering such relevant circumstances irrelevant, the impact of those factors needs to be assessed.[173]

The equitable method included any practical method for boundary delimitation and it could be an equidistance or median line, a line perpendicular to the coast or the general direction of the coast, or other practical method stemming from equitable considerations.[174] Equitable principles, equitable procedure, and equitable methods are regarded as means to achieve equitable result. What could be used as a test to achieve equitable result varied in the previous decision of the ICJ; however, there was at least a common position that in any maritime boundary delimitation, the ultimate goal is to achieve equitable result or solution.

This corrective-equity approach was subsequently taken by the 1999 *Eritrea/Yemen case* in which the arbitral tribunal applied the corrective-equity approach under Articles 74 and 83 of UNCLOS.[175]

In the 2001 *Qatar/Bahrain case*, the ICJ adopted the applicability of the corrective-equity approach as customary law in the delimitation between adjacent States by first provisionally drawing an equidistance line and then considering whether there are circumstances that must

[170] Ibid., p. 219 and 220, para. 24.
[171] Ibid., p. 220, para. 25.
[172] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J Reports 1969,* p. 50, para. 93.
[173] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Separate Opinion of Judge Weeramantry, I.C.J. Reports 1993*, p. 220, para. 26.
[174] Ibid., p. 221, paras. 28 and 29.
[175] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, p. 335 and 365, paras. 131 and 132.

lead to an adjustment of that line.[176] A year later, in the 2002 *Cameroon/Nigeria case*, the ICJ made a noticeable move by applying a corrective-equity approach under Articles 74 and 83 of UNCLOS.[177] The Court referred to the previous practices of the ICJ and called the principles and rules of delimitation for a line covering several zones of coincident jurisdictions an 'equitable principles/relevant circumstances method'.[178]

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

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

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

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

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[176] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J Reports 2001,* p. 91, para. 167 and p. 111, para. 230.
[177] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* pp. 441 and 442, paras. 288 – 290.
[178] Ibid., pp. 441, paras. 288.
[179] *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados v. Trinidad and Tobago), Award, 11 April 2006, RIAA, vol. XXVII*, pp. 214 and 215, para. 242.
[180] Ibid., pp. 230 and 231, para. 306.
[181] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award, 17 September 2007, RIAA, vol. XXX*, p. 93, para. 335 and p. 95, para. 342.
[182] Ibid., pp. 743 and 744, para. 280.
[183] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J Reports 2007,* p. 745, para. 281

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

In the 2009 *Black Sea case*, the ICJ developed the three-stage approach for the delimitation of a single maritime boundary under Articles 74 and 83 of UNCLOS. This three-stage approach was regarded as a variation of the corrective-equity approach developed through judicial practices in the field of maritime boundary delimitation,[185] and it was later adopted by international courts and tribunals and is alternatively known as the 'equidistance/relevant circumstances method'. This approach was later echoed in the 2012 *Bangladesh v. Myanmar case*[186] the 2012 *Nicaragua/Colombia case*,[187] the 2014 *Peru/Chile case*,[188] the 2014 *Bangladesh v. India case*,[189] the 2017 *Ghana v. Côte d'Ivoire case*,[190] the 2018 *Costa Rica v. Nicaragua case*,[191] the 2021 *Kenya v. Somalia case*, [192]and the 2023 *Mauritius/Maldives case*.[193]

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

[184] Ibid., pp. 751 and 752, paras. 303 and 304.
[185] Yoshifumi Tanaka, "Reflections on Maritime Delimitation in the *Romania/Ukraine* Case before the International Court of Justice", *Netherlands International Law Review*, vol. 56, No. 3, (December 2009), pp. 419 and 420.
[186] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Judgment, 12 March 2012, ITLOS Reports 2012*, p. 76, para. 240.
[187] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012,* pp. 695 – 698, paras. 190 – 199.
[188] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014,* pp. 61 – 65, paras. 180 – 195.
[189] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII,* p. 106, paras. 345 and 346.
[190] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 103, para. 360.
[191] *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018,* p. 190, para. 135.
[192] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021,* p. 252, para. 131.
[193] *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Judgment, 28 April 2023, ITLOS Reports 2023*, pp. 41 and 42, paras. 96 – 98.

framework for balancing predictability and flexibility and reached a new level of unity and certainty in the law of maritime boundary delimitation.[194]

Table 1

Approaches to Equity in Case Law from 1969 to 2023

No.	Year of Decision	Court or Tribunal	Case Name	Type of Boundary	Configuration of Coast	Approach to Equity
1.	1969	ICJ	*North Sea Continental Shelf cases*	CS	Adjacent	Result-Oriented
2.	1977	*Ad hoc* Court of Arbitration	*Anglo-French Continental Shelf case*	CS	Adjacent/ Opposite	Corrective
3.	1982	ICJ	*Tunisia/Libya case*	CS	Adjacent/ Opposite	Result-Oriented
4.	1984	ICJ	*Gulf of Maine case*	SMB (EFZ, CS)	Adjacent/ Opposite	Result-Oriented/ Corrective
5.	1985	ICJ	*Libya/Malta case*	CS	Opposite	Result-Oriented/ Corrective
6.	1985	*Ad hoc* Tribunal	*Guinea/Guinea-Bissau case*	SMB	Adjacent	Result-Oriented
7.	1992	*Ad hoc* Tribunal	*St. Pierre and Miquelon case*	SMB	Adjacent	Result-Oriented
8.	1993	ICJ	*Greenland and Jan Mayen case*	SMB (EFZ, CS)	Opposite	Corrective
9.	1999	*Ad hoc* Tribunal	*Eritrea/Yemen case*	SMB	Opposite	Corrective

[194] Gilbert Guillaume, President of the International Court of Justice, Speech to the Sixth Committee of the General Assembly of the United Nations, New York, 31 October 2001; Yoshifumi Tanaka, *The International Law of the Sea,* 2nd ed. (Cambridge, New York, Cambridge University Press, 2015), pp. 208 and 209.

10.	2001	ICJ	*Qatar/Bahrain case*	TS/ SMB	Adjacent/ Opposite	Corrective
11.	2002	ICJ	*Cameroon v. Nigeria case*	TS/SMB	Adjacent	Corrective
12.	2006	Annex VII Tribunal	*Barbados v. Trinidad and Tobago case*	SMB/CS*	Adjacent/ Opposite	Result-Oriented/ Corrective
13.	2007	Annex VII Tribunal	*Guyana v. Suriname case*	TS/SMB	Adjacent	Corrective
14.	2007	ICJ	*Nicaragua v. Honduras case*	TS/SMB	Adjacent	Result-Oriented/ Corrective
15.	2009	ICJ	*Black Sea case*	SMB	Adjacent/ Opposite	Corrective
16.	2012	ITLOS	*Bangladesh v. Myanmar case*	TS/SMB/ CS*	Adjacent	Corrective
17.	2012	ICJ	*Nicaragua v. Colombia case*	TS/SMB	Opposite	Corrective
18.	2014	ICJ	*Peru v. Chile case*	TS/SMB	Adjacent	Corrective
19.	2014	Annex VII Tribunal	*Bangladesh v. India case*	TS/SMB/ CS*	Adjacent	Corrective
20.	2017	ITLOS	*Ghana v. Côte d'Ivoire case*	TS/SMB/ CS*	Adjacent	Corrective
21.	2018	ICJ	*Costa Rica v. Nicaragua case*	TS/SMB	Adjacent	Corrective
22.	2021	ICJ	*Somalia v. Kenya case*	TS/SMB	Adjacent	Corrective
23.	2023	ITLOS	*Mauritius/Maldives case*	SMB/CS*	Opposite	Corrective

Section B: The Roles and Categories of Relevant Circumstances in Reaching an Equitable Solution

Subsection B.1: From the North Sea Continental Shelf cases to the Guyana v. Suriname case

Neither the 1958 Geneva Conventions nor UNCLOS contained an explicit reference to 'relevant circumstances' as this concept was merely a product of case law. To be specific this concept found its way in the 1969 *North Sea Continental Shelf cases*, in which the ICJ rejected the customary law nature of Article 6 of the CS Convention which called for an 'agreement, median or equidistance line, and special circumstances' rule. Given the situation of the case, the ICJ articulated a different approach for maritime boundary delimitation and stated that: "*Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all relevant circumstances*."[195] Although the Court did not elaborate further on what the Court referred to as 'taking account of all relevant circumstances' or the substances of relevant circumstances as the Court was not called upon to draw a delimitation line, the Court listed the general configuration of the coasts of the parties, the physical and geological structure, the natural resources, the unity of deposits, and a reasonable degree of proportionality as factors to be taken into account in a negotiation.[196]

Later in the 1982 *Tunisia/Libya case*, the ICJ stated that *"A finding by the Court in favour of a delimitation by an equidistance line could only be based on considerations derived from an evaluation and balancing up of all relevant circumstances."*[197] From this statement, the Court seemed to treat relevant circumstances as a means to identify what the primary methodology was to be. When it came to what the Court considered as relevant circumstances to be taken into account in achieving an equitable delimitation, the Court acknowledged: the area relevant to the delimitation and the rights of third States being reserved, the general configuration of the coasts of the parties specifically changes in coastal direction, the presence of island, the position and direction of the land frontier and the parties conducts in the grant of petroleum concessions, and geomorphological configurations of the seabed.[198] The Court left open the question of historic rights[199] and rejected economic factors as relevant circumstances.[200] The Court also denied the unity of deposits as a relevant circumstance in itself but considered it as

[195] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J Reports 1969,* p. 53, para. 101(C)(1).
[196] Ibid., pp. 53 and 54, para. 101.
[197] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 79, para. 110.
[198] Ibid., p. 93, para. 133.
[199] Ibid., pp. 76 and 77, para. 105.
[200] Ibid., pp. 77 and 78, para. 107.

a factor to be taken into account by the parties in the delimitation process.[201] With this approach, Professor Evans commented that: "*…the ICJ took an extremely liberal view of relevant circumstances, in line with its belief that an equitable solution could be achieved only by a consideration of all the relevant circumstances.*"[202]

In the 1984 *Gulf of Maine case*, the Chamber of the ICJ concluded that *"the delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."* [203] This statement and subsequent explanations in the judgment suggested that the role of relevant circumstances was to indicate how the delimitation might be undertaken. It should be observed that the parties, the United States and Canada, had expanded categories of relevant circumstances to include geographical, environmental, geological, and geomorphological factors, the conduct of parties, navigational, security, and economic interests. However, the Chamber took a narrow approach to relevant circumstances and indicated that equitable criteria for a delimitation were derived from geographical factors only.[204] Thus, the Chamber denied the parties' submissions on other factors as relevant circumstances for the delimitation of the superjacent water and the continental shelf. The Chamber suggested that economic considerations might be a relevant equitable criterion, but only if the drawing of a particular boundary would be likely to entail catastrophic repercussions for the livelihood and economic well-being of the population.[205]

A year after in the 1985 *Libya/Malta case*, the ICJ issued another judgment where relevant circumstances seemed to be used as factors that affect how a primary methodology is to be applied.[206] The Court ruled that circumstances and factors to be taken into account in achieving an equitable delimitation include: the general configuration of the coasts of the parties, the disparity in the lengths of the relevant coasts of the parties and the distance between them, and

[201] Ibid., pp. 77 and 78, para. 107.
[202] Malcolm D. Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances", *International and Comparative Law Quarterly*, vol. 40, No. 1 (January 1991), p. 8.
[203] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, pp. 299 and 300, para. 112 (2).
[204] See Ibid., p. 278, para. 59 and pp. 340 – 342, paras. 233 – 235.
[205] Louis B. Sohn and John E. Noyes, *Cases and Materials on the Law of the Sea* (US, Transnational Publishers, Inc., 2004), p. 325.
[206] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 48, para. 65 and p. 57, para. 79 (C).

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

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

Another award rendered by the *ad hoc* Court of Arbitration in the 1992 *St. Pierre and Miquelon case* involved a drawing of a single maritime boundary in which the *ad hoc* Court of Arbitration applied the neutral criterion as echoed in the 1984 *Gulf of Maine case*. The *ad hoc* Court of Arbitration rejected the Canadian invocation of proportionality as a relevant circumstance; however, considered that it was proper to use it as a test of proportionality as described by the ICJ in the *Libya/Malta case.*[215] Thus, the *ad hoc* Court of Arbitration relied on the geography of the area concerned as relevant circumstances and considered economic factors at the

[207] Ibid., para. 79 (B).
[208] Ibid., p. 56, para. 78.
[209] Ibid., p. 41, para. 50.
[210] *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Award, 14 February 1985, RIAA, vol. XIX*, pp. 191 and 192, para. 116.
[211] Ibid., p. 194, para. 123.
[212] Ibid., p. 189, paras. 108 and 109.
[213] Ibid., p. 182, para. 91.
[214] Ibid., pp. 187 and 188, para. 106.
[215] Jonathan I. Charney and Lewis M. Alexander, eds. *International Maritime Boundaries, vol. III*, (The Hague, Boston, London, Martinus Nijhoff Publishers, 1998), p. 2145.

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

A year later in the 1993 *Greenland and Jan Mayen case*, the concept of relevant circumstances was again interpreted in a broad sense by various judges[219] and it seemed to echo the view of the Court in the 1969 *North Sea Continental Shelf cases*.[220] The Court slightly distinguished the roles of 'special circumstances' and 'relevant circumstances'. The Court explained that from the standpoint of the CS Convention, there was a requirement to investigate any special circumstance; on the other hand, customary law was based upon equitable principles and required an investigation of relevant circumstances.[221] According to the Court, special circumstances refer to *"those circumstances which might distort the result produced by an unqualified application of the equidistance principle."*[222] On the contrary, relevant circumstances can be defined as *"a fact necessary to be taken into account, in the delimitation process, to the extent that it affects the rights of the Parties over certain maritime areas."*[223] Regardless of their origins and names, the two terms were intended to enable the achievement of equitable result.[224] This approach by the Court provided a ground for subsequent case law to conclude that 'relevant circumstances' potentially encompassed more broad-ranging factors and reflected a connection with a more equitable oriented as compared to 'special circumstances' in the context of Article 6 of the CS Convention. As for the categories of relevant circumstances, the Court took into consideration an equitable access to the resources[225] and rejected access to marine resources due to the presence of ice,[226] socio-economic and

[216] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 346.
[217] *Delimitation of maritime areas between Canada and France, Award, 10 June 1992, RIAA, vol. XXI,* p. 294, para. 84.
[218] Ibid., pp. 293 – 295, paras. 83 – 88.
[219] See *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* Separate Opinion of Judge Weeramantry, I.C.J. Reports 1993, pp. 261 and 262, para. 182; Separate Opinion of Judge Oda, I.C.J. Reports 1993, p. 116, para. 98; Separate Opinion of Judge Ajibola, I.C.J. Reports 1993, p. 301.
[220] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J Reports 1969,* p. 50, para. 93.
[221] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993,* p. 62, para. 54.
[222] Ibid., *Summaries of Judgement,* p. 52.
[223] Ibid.
[224] Ibid., *Judgment, I.C.J. Reports 1993,* p. 62, para. 56.
[225] Ibid., p. 79, para. 90.
[226] Ibid., p. 73, para. 78.

cultural factors,[227] security consideration,[228] and conduct of the parties[229] as relevant circumstances.

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

As for the 2001 *Qatar/Bahrain case* and the 2002 *Cameroon/Nigeria case*, the ICJ took into consideration geographical factors only to draw the delimitation line between the concerned parties. In the *Qatar/ Bahrain case,* the Court did not consider the existence of pearling banks predominantly exploited by Bahrain fishermen in the past as relevant circumstances affecting the provisional equidistance line.[232] As for the *Cameroon/Nigeria* case, the Court rejected the conduct of the parties concerning oil concessions as a relevant circumstance,[233] a position different from the judgment made 20 years ago in the 1982 *Tunisia/Libya case*, in which the Court considered the conduct of Libya and Tunisia in issuing oil exploration concessions in certain areas, tacitly respected by both parties as a relevant circumstance of great relevance for the delimitation.[234]

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[227] Ibid., pp. 73 and 74, paras. 79 and 80.
[228] Ibid., p. 74 and 75, para. 81.
[229] Ibid., p. 76 and 77, para. 86.
[230] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, p. 365, para. 132.
[231] Ibid., p. 352, paras. 72 and 74.
[232] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J Reports 2001,* pp. 112 and 113, para. 236.
[233] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 447 and 448, paras. 304 and 305.
[234] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 71, para. 96.

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

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

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

[235] *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados v. Trinidad and Tobago), Award, 11 April 2006, RIAA, vol. XXVII*, pp. 212 and 213, para. 233.
[236] David Anderson, "Recent Decisions of Courts and Tribunals in Maritime Boundary Cases", in *International Maritime Boundaries Volume VI*, David. A Colson and Robert W. Smith, eds. (Leiden, Boston, Martinus Nijhoff Publishers, 2011), p. 4130.
[237] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award, 17 September 2007, RIAA, vol. XXX*, p. 93, para. 335 and p. 95, para. 342.
[238] Ibid., p. 105, para. 377.
[239] Ibid., pp. 105 –109, paras. 378 – 391.
[240] Ibid., p. 109, para. 392.
[241] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J Reports 2007,* p. 745, para. 283.

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

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

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

It could be noted that proportionality had on several occasions referred to relevant circumstances. However, this should not be the suitable placement of proportionality within the delimitation process. As explained by Professor Evans, "*the concept of proportionality takes its place as another means of demonstrating to the watchful world that the delimitation line settled upon – by the application of other methods and circumstances – has an equitable 'feel' to it."*[244] Therefore, proportionality should have nothing to do with the process of generating the line, especially at the first stage of the delimitation, and should instead operate

[242] David Anderson, "Recent Decisions of Courts and Tribunals in Maritime Boundary Cases", in *International Maritime Boundaries – Volume VI*, David A. Colson and Robert W. Smith, eds. (Leiden, Boston, Martinus Nijhoff Publishers, 2011), p. 4127.
[243] Malcolm D. Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances", *International and Comparative Law Quarterly*, vol. 40, No. 1 (January 1991), p. 27.
[244] Malcolm D Evans, "Maritime Boundary Delimitation: Where Do We Go From Here?", in *The Law of the Sea – Progress and Prospects*, David Freestone, Richard Barnes, and David Ong eds. (New York, Oxford University Press, 2006), p. 155.

at the last stage of the delimitation process just like what was developed in the 2009 *Black Sea case*.

It is also observed that in the cases decided in the early 2000s, international courts and tribunals seemed to diminish the impact of relevant circumstances. Particularly, international courts and tribunals rejected the relevance of all potentially relevant circumstances and adopted the provisional equidistance line as the final delimitation line. For instance, in the *Cameroon v. Nigeria case*[245] *Guyana v. Suriname case,*[246] and *Nicaragua v. Honduras case*.[247]

Subsection B.2: From the Black Sea case to the Mauritius/Maldives case

In the *Black Sea Case,* the ICJ has developed a delimitation methodology for delimiting the EEZ and continental shelf by proceeding in three stages, the second stage is concerned with relevant circumstances where the Court has referred to those factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result, and that those factors have usually been referred to in the jurisprudence of the Court since the *North Sea Continental Shelf cases*.[248]

The Court made clear that "*at this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances…*"[249] and it seemed to suggest that relevant circumstances applied only at the second stage of delimitation and not at the other stages, the first and the last stage. However, when examining the approach of the Court, it suggested that instead of constraining the application of relevant circumstances to just the second stage as a means of determining whether the provisional equidistance line is in need of an adjustment, relevant circumstances had effected the entire process of the three-stage approach. This is because previous case law suggested that the concept of 'relevant coasts' and 'relevant area' has been understood as being relevant to the first and the second stage of the three-stage approach.

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[245] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* pp. 443 – 448, paras. 293 – 306.
[246] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award, 17 September 2007, RIAA, vol. XXX,* p. 127, para. 392.
[247] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J Reports 2007,* p. 748, para. 292.
[248] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J Reports 2009,* pp. 101 – 103, para. 120 and p. 112, para. 155.
[249] Ibid., p. 101, para. 118.

In the *Bangladesh v. Myanmar case*, the ITLOS Tribunal ruled that the appropriate method for delimiting the EEZ and continental shelf between the two parties is the equidistance/relevant circumstances method, following the three-stage approach as developed in case law on maritime boundary delimitation. [250] Thus, the ITLOS Tribunal began with the drawing of the equidistance line in the first stage and adjust it with relevant circumstances at the second stage of delimitation and finally apply the proportionality test at the third stage. At the second stage of delimitation, Bangladesh invoked three geographical and geological features as relevant circumstances, while Myanmar submitted that there were no relevant circumstances that lead to an adjustment of the provisional equidistance line.[251] Among the relevant circumstances invoked by Bangladesh, the ITLOS Tribunal treated the concavity of the coast of Bangladesh as a relevant circumstances[252] as it produced a cut-off effect on the maritime projection of Bangladesh and if the provisional equidistance was not adjusted, it would result in inequitable solution.[253] The ITLOS Tribunal, however, denied the St. Martin's Island[254] and the Bengal depositional system[255] as relevant circumstances.

In the *Nicaragua v. Colombia case*, Nicaragua argued for a deviation from the three-stage approach on the grounds that the construction of the provisional equidistance line would be wholly artificial and it would completely disregard the substantial part of the relevant area.[256] On the other hand, Colombia responded that the Court should adopt the three-stage approach as the current case did not render the construction of a provisional equidistance line impossible or even difficult.[257] The Court found that this case is not a case in which the construction of the provisional equidistance is not feasible like the one in the *Nicaragua v. Honduras case*. [258] The Court stressed that the question in the current case is whether the construction of the provisional equidistance line is an appropriate starting point for the delimitation[259] and found that factors

[250] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Judgment, 12 March 2012, ITLOS Reports 2012*, p. 76, paras. 239 and 240.
[251] Ibid., p. 87, paras. 276 and 278.
[252] Ibid., p. 92, para. 297.
[253] Shunji Yanai, "International Law Concerning Maritime Boundary Delimitation", in *The IMLI Manual on International Maritime Law*, vol. I, The Law of the Sea, David Joseph Attard, ed. (Oxford, Oxford University Press, 2014), p. 329.
[254] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Judgment, 12 March 2012, ITLOS Reports 2012*, p. 97, para. 319.
[255] Ibid., para. 322.
[256] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II),* pp. 693 and 694, para. 185.
[257] Ibid., p. 694, para. 187.
[258] Ibid., pp. 696 and 697, para. 195.
[259] Ibid.

discussed by Nicaragua are those factors that may be considered at the second stage of the delimitation.[260] After examining the parties' positions on relevant circumstances, the Court took into consideration disparity in the lengths of the relevant coasts[261] and overall geographical context[262] as relevant circumstances and recognized that legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast of a State.[263] On the other hand, the Court rejected the conduct of the parties,[264] equitable access to natural resources[265] and delimitation already effected in the area[266] as relevant circumstances in the second stage of delimitation.

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

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

[260] Ibid., p. 697, para. 196.
[261] Ibid., p. 702, para. 211.
[262] Ibid., p. 704, para. 216.
[263] Ibid., p. 705, para. 222.
[264] Ibid., p. 705, para. 219.
[265] Ibid., p. 706, para. 223.
[266] Ibid., p. 707, para. 227
[267] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 39, para. 102.
[268] Ibid., p. 42, para. 111.
[269] Ibid., p. 61, para. 177.
[270] Ibid., p. 62, para. 184.
[271] Ibid., 65, para. 192.
[272] Donald McRae, "The Applicable Law", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 104.

a provisional equidistance line at the first stage of the delimitation. Although the Tribunal ultimately decided that the provisional equidistance line was to be used in preference to an angle-bisector line due to its transparency,[273] and not because it is a requirement. The fact that the Arbitral Tribunal rejected the argument of Bangladesh on the impractical or unreliable coastal configuration[274] suggested that the Arbitral Tribunal considered both the availability of basepoints and the general geographical situation to be relevant.[275] The Tribunal also made interesting comments on the connection between 'special circumstance' and 'relevant circumstances. Particularly, the Tribunal suggested that the 'special circumstances' for the purpose of delimiting territorial sea might be dissimilar to 'special/relevant circumstances' for the purpose of delimiting the continental shelf.[276] Given the different nature between the EEZ and the continental shelf, factors that are relevant in the EEZ delimitation might differ from the continental shelf delimitation and different weights should be accorded to those factors depending on which zone is at issue. However, it is theoretically arguable that factors that are relevance to the delimitation of the continental shelf have a potential impact on the delimitation of the EEZ but not vice versa. This conclusion might not be the case, however, for the single maritime boundary delimitation situation, where the tendency developed is to merge the approach to relevant circumstances.

As for the relevant circumstances in the current case, Bangladesh argued that the instability and concavity of its coastline[277] and economic considerations specifically the heavily dependence of its people on fish from the Bay of Bengal constituted relevant circumstances. The Tribunal rejected coastal instability as relevant circumstances[278] and refused to adjust the provisional equidistance line based on economic considerations due to the lack of sufficient evidence from Bangladesh on its dependences on fishing in the Bay of Bengal.[279] As for the concavity of the coastline, the Tribunal went into detail discussing the effect of this concavity and concluded that "*as a result of the concavity of the coast, the provisional equidistance line*

[273] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII*, p. 106, para. 345.
[274] Ibid., para. 346.
[275] Malcolm Evans, "Relevant Circumstances", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 239.
[276] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII*, p. 57, para. 191.
[277] Ibid., p. 112, para. 371.
[278] Ibid., p. 120, para. 399.
[279] Ibid., p. 126, para. 424.

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

As for the *Ghana v. Côte d'Ivoire case*, the Special Chamber of ITLOS denied all the relevant circumstances advocated by the parties as relevant circumstances, particularly concavity/convexity and the potential cut-off, [281] the geography of Jomoro as an island on the wrong side of an equidistance or as a peninsula protruding into the sea,[282] location, and distribution of hydrocarbon resources,[283] and conduct of the parties.[284]

A year later in the *Costa Rica v. Nicaragua case*, the parties agreed that relevant circumstances in the current case would be geography in nature. Therefore, Costa Rica argued for Corn Islands and their locations from the mainland coast as relevant circumstances,[285] while Nicaragua invoked the cut-off effect caused by the convex and north-facing nature of Costa Rica's coastline at Punta de Castilla immediately adjacent to Nicaragua's concave coastline as relevant circumstances that required an adjustment of the provisional equidistance line at the second stage of the three-stage approach.[286] After reviewing the submissions by the parties, the Court denied the overall concavity of Costa Rica's coast and its relations with Panama as relevant circumstances and adjusted the provisional equidistance line by granting a half effect to the Corn Islands.[287]

In the *Somalia v. Kenya case*, Somalia submitted that there existed no relevant circumstances that may justify the adjustment of the provisional equidistance line.[288] On the other hand, Kenya invoked five circumstances including: the cut-off effect due to the construction of the provisional equidistance line, the regional practice of using parallels of latitude to define the maritime boundaries of States on the Eastern African coast, security interest particularly

[280] Ibid., p. 123, para. 408.
[281] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, pp. 119 and 120, para. 421 – 425.
[282] Ibid., p. 123, para. 434.
[283] Ibid., p. 128, para. 455.
[284] Ibid., pp. 133 and 134, paras. 478 and 479.
[285] Ibid., p. 195, para. 151.
[286] *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, pp. 193 and 194, para. 148.
[287] Ibid., pp. 196 and 197, para. 156.
[288] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021*, p. 260, para. 148.

security threats of terrorism and piracy, the conduct of parties in relation to oil concessions, naval patrols, fishing and other activities, and the devastating repercussions for the livelihoods and economic well-being of Kenya's fisherfolk. [289]

The Court stated that Kenya's reliance on those five factors as a relevant circumstance to seek a maritime boundary based on the parallel of latitude.[290] The Court denied the non-geographical factors as relevant circumstances[291] and accepted the potential cut-off effect raised by Kenya as relevant circumstances warranting some adjustment to the provisional equidistance line.[292]

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

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

[289] Ibid., pp. 261 and 262, paras. 149 – 153.
[290] Ibid., p. 262, para. 156.
[291] Ibid., p. 263 and 264, paras. 157 – 160.
[292] Ibid., p. 268, para. 171.
[293] *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Judgment, 28 April 2023, ITLOS Reports 2023*, pp. 88 and 89, paras. 238 – 242.
[294] Ibid., p. 88, paras. 238 – 240.
[295] Ibid., p. 89, para. 244.
[296] Ibid., paras. 245 and 247.

Despite the development of the three-stage approach in the *Black Sea case*, this author took the same view as other maritime boundary delimitation scholars that: the approach itself failed to provide concrete guidance on key questions in the maritime boundary delimitation process – 'what weight is to be given to particular factors that arguably affect the equity of the final result?'[297]

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

Before the 2009 *Black Sea case*, proportionality was said to have relevance for maritime delimitation and considered as special/relevant circumstances within the framework of the 'equidistance/special circumstances rule'.[299] For example, the Court in the 1969 *North Sea Continental Shelf cases* expressed that the application of equitable principles entailed a reasonable degree of proportionality between the areas appertaining to the parties and the coastlines of the parties.[300]

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

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[297] Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, "Conclusion", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?,* Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 381.
[298] Louis B. Sohn and others, *Law of the Sea in a Nutshell*, 2ed ed. (US, Thomson Reuters, 2010), pp. 165 – 166.
[299] Malcolm D Evans, "Maritime Boundary Delimitation: Where Do We Go From Here?", in *The Law of the Sea – Progress and Prospects*, David Freestone, Richard Barnes, and David Ong eds. (New York, Oxford University Press, 2006), p. 154.
[300] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J Reports 1969*, pp. 53 and 54, para. 101(c)(3).

Table 2

Categories of Relevant Circumstances before International Courts and Tribunals from 1969 to 2023

No.	Year of Decision	Case Name	Categories of Relevant Circumstances as Accepted by International Courts and Tribunals	Categories of Relevant Circumstances as Rejected by International Courts and Tribunals
1.	1969	*North Sea Continental Shelf cases*	Configuration of coasts	
2.	1977	*Anglo-French Continental Shelf case*	Presence of islands (half effect)	Presence of third states
3.	1982	*Tunisia/Libya case*	Presence of islands (half effect) Conduct of the parties Historic rights	Presence of islands
4.	1984	*Gulf of Maine case*	Presence of islands (half effect)	Economic factor Environment
5.	1985	*Libya/Malta case*	Configuration of coasts Security interest	
6.	1985	*Guinea/Guinea-Bissau case*		Presence of islands
7.	1992	*St. Pierre and Miquelon case*		Economic factor
8.	1993	*Greenland and Jan Mayen case*	Economics factor Security interest	
9.	1999	*Eritrea/Yemen case*	Presence of islands (full effect) Navigation	Traditional fishing regime
10.	2001	*Qatar/Bahrain case*	Presence of islands (full effect)	Presence of islands

11.	2002	*Cameroon v. Nigeria case*		
12.	2006	*Barbados v. Trinidad and Tobago case*		Artisanal fishing
13.	2007	*Guyana v. Suriname case*		
14.	2007	*Nicaragua v. Honduras case*	Presence of islands (full effect)	
15.	2009	*Black Sea case*	Security interest	Presence of islands
16.	2012	*Bangladesh v. Myanmar case*	Configuration of coasts	
17.	2012	*Nicaragua v. Colombia case*		Presence of third states
18.	2014	*Peru v. Chile case*		
19.	2014	*Bangladesh v. India case*	Configuration of coasts	
20.	2017	*Ghana v. Côte d'Ivoire case*		
21.	2018	*Costa Rica v. Nicaragua case*		
22.	2021	*Somalia v. Kenya case*		
23.	2023	*Mauritius/Maldives case*		

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

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

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

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

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

Section A: The *Gulf of Maine Case*

Subsection A.1: The Position of the Parties

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

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

[301] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, pp. 273 and 274, para. 45.
[302] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 319.
[303] Ibid.
[304] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Oral Proceedings, vol. VI, 1984*, p. 276.
[305] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Memorial of the United States of America, 27 September 1982*, pp. 112 and 113, para. 296.
[306] Ibid., pp. 16 – 22, paras. 38 – 58.
[307] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 276, para. 52.

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

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

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

[308] David A. Colson, "Environmental Factors: Are They Relevant to Delimitation?" in *The UN Convention on the Law of the Sea: Impact and Implementation,* E.D. Brown and R. R. Churchill, eds. (US, Law of the Sea Institute, 1987), p. 221.
[309] Ibid.
[310] Ibid., pp. 221 and 222.
[311] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Memorial of the United States of America, 27 September 1982*, p. 82, para. 212.
[312] David A. Colson, "Environmental Factors: Are They Relevant to Delimitation?" in *The UN Convention on the Law of the Sea: Impact and Implementation,* E.D. Brown and R. R. Churchill, eds. (US, Law of the Sea Institute, 1987), p. 222.
[313] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Oral Proceedings, vol. VI, 1984*, p. 450.
[314] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Memorial of the United States of America, 27 September 1982*, p. 82, para. 212.
[315] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Oral Proceedings, vol. VI, 1984*, p. 455.

relevant circumstance.[316] Canada submitted that defining natural boundaries based on the physical character of the offshore environment has no place in the law.[317] In fact, Canada's submission was that the only possible scenario in which the idea of a natural boundary can have a basis in the law is within the legal framework of natural prolongation, in which the parties at least were in agreement that it was factually inapplicable in the current case.[318] Furthermore, responding to the United States' reliance on the analogy drawn in the *Tunisia/Libya case* in which the Court noted the hypothetical possibility that a sea-bed features could be considered as one of the elements leading to an equitable solution, Canada clarified that what the ICJ had in mind was not a natural boundary but an equitable boundary.[319] Canada also responded to the United States' submission on the usage of a natural feature as a means to determine a land boundary by arguing that such choice *"has been prompted by functional considerations that have no counterpart at sea".*[320] Canada emphasized that the dominant trend in land boundary practice concerning inland waterways and river systems lay *"in the direction of equitable division rather than exclusive appropriation."*[321] Therefore, the United States failed to justify how the Northeast Channel forms a significant natural feature in the Gulf of Maine area.

On the second ground, Canada argued that these two principles, that the delimitation should facilitate the conservation and management of the resources and minimize the potential for international disputes, were not delimitation principles *per se*, but standards of responsible international conduct.[322] Canada further contended that even if the situation described by the United States were to be true, which Canada believed it was not, these principles could not be applied to those facts to establish in law the boundary proposed by the United States. [323] Canada further submitted that although its environmental protection regime might not be as complex as that of the United States, it has proven itself to be effective and could even be in some ways superior to the system of the United States.[324] This is evidenced by the existence of various government departments complementing each other responsibilities to protect the environment

[316] Ibid., p. 276.
[317] Ibid., p. 39.
[318] Ibid.
[319] Ibid.
[320] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Counter-Memorial of Canada, 28 June 1983*, p. 222, para. 531.
[321] Ibid., para. 532.
[322] Ibid., pp. 205 and 206, para. 496.
[323] See Ibid., pp. 206 – 225, paras. 498 – 538.
[324] Ibid., p. 360, para. 64.

and fit into the system of checks and balances.[325] Canada also claimed that the basis for environmental objectives between the United States and Canada are compatible. This is demonstrated by the fruitful cooperation in developing measures for the protection of the marine environment, i.e. the East Coast Oil Spill Contingency Plan and the International Joint Commission established under the 1909 Boundary Water Treaty.[326] Therefore, contrary to the United States' assertion, Canada and the United States have similar aims and concerns in protecting the marine environment that serves as a solid foundation for cooperation.[327]

Subsection A.2: The Decision of the ICJ

In the 1984 ICJ's judgment on the *Gulf of Maine case*, it could be observed that the Chamber of the ICJ invoked a variety of legal and factual grounds to reject the arguments submitted by the parties on the relevance of environmental factors. For the first submission by the United States on the natural boundary on the maritime environment and the distinct ecosystem of the Georges Bank by Canada, the Chamber explained its reasoning from paragraphs 46 to 56 and denied such arguments of both parties. The Chamber decided that there were no geological, geomorphological, ecological, or other factors sufficiently important, evident, and conclusive to represent a single, incontrovertible natural boundary.[328] The Chamber explained that the Northeast Channel did not have the characteristics of a real trough marking the dividing line between the two geomorphological distinct units and that the situation in the current case differed from the *Tunisia/Libya case*. [329] The Chamber further noted that it was not convinced of the possibility of discerning any genuine, sure, and stable natural boundary in such a fluctuating environment and found it unnecessary to seek data derived from the biogeography of the relevant waters that would provide sufficient elements to confer the property of a stable natural boundary.[330] Furthermore, the Chamber rejected the possibility of basing a natural boundary delimiting both the seabed and the water column, that is serving a double purpose, on geomorphological grounds.[331] The Chamber went further to note that even if there was a natural boundary in the seabed, the facts did not show a natural boundary in the superjacent

[325] Ibid., p. 361, para. 65.
[326] Ibid., pp. 360 and 361, para. 65.
[327] Ibid.
[328] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 277, para. 56.
[329] Ibid., pp. 274 and 275, paras. 46 – 58.
[330] Ibid., p. 277, para. 54.
[331] L. H. Legault and Blair Hankey, "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case", *American Society of International Law*, vol. 79, No. 4 (October 1985), p. 969.

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

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

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

[332] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 277, para. 54.
[333] Ibid., para. 55.
[334] Ibid., para. 56.
[335] Ibid.
[336] Barbara Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations", in *International Maritime Boundaries Volume I*, Jonatha I. Charney and Lewis M. Alexander, eds. (Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1993), p. 103.
[337] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, pp. 298 and 299, para. 110.

international law to provide a ready-made set of rules that can be used for solving any delimitation problems that arise.[338] Occasionally, the Chamber had referred to the cooperative behaviors between the parties; therefore, it is doubtful whether the Chamber would have considered the environmental issues differently had the two parties had an unfriendly and non-cooperative relationship.

The decision of the Chamber to reject the environmental factors called for a few comments. First, the Chamber only applied geographical facts, relationships, and principles in deciding the equitable criteria and choice of method submitted by the parties. Second, it seemed that the Chamber rejected the ecological criterion primarily because it was not in line with the neutral criteria for drawing a single maritime boundary in the superjacent water and the seabed.[339] Third, the Chamber was reluctant to incorporate ecological factors as criteria for the purpose of achieving equitable results in delimitation. This is evidenced by the fact that contrary to socio-economic considerations, the Chamber avoided examining the marine environment and did not indicate whether the result of its application could lead to disastrous environmental consequences for one country or the other in the last stage of delimitation. Fourth, regardless of the exclusion of the relevance of environmental factors in the current case, it seemed that the Chamber reserved the possibility for their applications in future cases as at least the Chamber did not expressly deny its relevance in the delimitation law.

Section B: The Bangladesh v. India case

Subsection B.1: The Position of the Parties

Before diving into the discussion on the legal position of the parties, it might be helpful to recall that within 3 months in 2009, Bangladesh initiated two proceedings concerning maritime boundary delimitation against its neighboring countries, India and Myanmar respectively. The first proceeding against India commenced with a Notice and Statement of Claim dated 8 October 2009 in which Bangladesh requested the Annex VII Arbitral Tribunal:

> *"to delimit, in accordance with the principles and rules outlined in UNCLOS, the maritime boundary between Bangladesh and India in the Bay of Bengal, in the territorial sea, the EEZ, and the continental shelf, including the portion of the*

[338] Ibid., p. 299, para. 111.
[339] See Ibid., pp. 326 and 327, para. 193.

continental shelf pertaining to Bangladesh that lies more than 200 nautical miles from the baselines from which its territorial sea is measured."[340]

The second proceeding against Myanmar started with a letter dated 13 December 2009 which Bangladesh notified the President of ITLOS concerning declarations made by Bangladesh and Myanmar consenting to the jurisdiction of ITLOS in accordance with the provisions of Article 287(4) UNCLOS.[341] The two declarations confirmed the parties' agreement to accept the jurisdiction of the ITLOS for the settlement of the dispute between Bangladesh and Myanmar relating to the delimitation of their maritime boundary in the Bay of Bengal.[342]

Although starting almost at the same time, Bangladesh had to submit its Memorial for the latter proceeding against Myanmar on 1 July 2010 while the due date for the proceeding against India was 31 May 2011, approximately 10 months different. In its Memorial and Reply in the *Bangladesh v. Myanmar case*, the effect of climate change was not an issue although Bangladesh had in one instance each referred to it, particularly on its influence on the delta[343] and the selection of basepoints by Myanmar.[344]

Contrary to its position in the *Bangladesh v. Myanmar case*, Bangladesh relied on climate change and sea level rise as a major factor against the application of the provisional equidistance line/relevant circumstances method. Bangladesh submitted that the most appropriate method for delimitation is the angle-bisector line.[345] Bangladesh supported this position by asserting that placing the basepoints in a highly unstable coastal area affected by sea level rise might mean that the equidistance line would be susceptible to change in the

[340] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII*, p. 73, para. 210.
[341] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Judgment, 12 March 2012, ITLOS Reports 2012*, pp. 9 and 10, paras. 1 – 4.
[342] Ibid., paras. 3 and 4.
[343] See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Memorial of Bangladesh, 1 July 2010,* pp. 41 and 42, para. 2.11.
[344] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Reply of Bangladesh, 15 March 2011,* pp. 85 and 86, para. 3.104.
[345] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII*, p. 73, para. 210.

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

Contrary to Bangladesh's submission, India did not question the issue of instability of coastlines and instead chose some of its base points on the low-tide elevations located at some distance from the coast.[348] India's choice received criticism from Bangladesh as Bangladesh was of the view that those low tide elevations chosen by India would have disappeared or changed in a few years.[349]

Subsection B.2: The Decision of the Tribunal

The Tribunal in the *Bangladesh v. India case* was not convinced by Bangladesh's reliance on the instability of the coastline and the possible impact of climate change as relevant circumstances. The Tribunal was of the view that the issue was not about the effect of climate change on the parties' coastlines in the years or centuries to come.[350] The issue was rather the choice of base points located on the coastline and whether it is feasible for these base points to reflect *"the general direction of the coast in the present case at the present time"*.[351] The Tribunal supported its position by referring to the ICJ's decision in the *Black Sea case* and stressed that the Tribunal need not address the issue of future instability of the coastline but the physical reality at the time of delimitation.[352] The Tribunal further noted that similar to land boundaries as reflected in the *Temple of Preah Vihear case*,[353] maritime boundary delimitation must be stable and definitive to ensure a peaceful relationship between the concerned States in the long term.[354] The Tribunal noted the feasibility of the parties to identify appropriate base points and that they were able to construct the proposed provisional equidistance line that was in close proximity to each other.[355] Therefore, the Tribunal concluded that the instability of

[346] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Memorial of Bangladesh. I,* paras 6.81 – 6.83.
[347] Mark E. Rosen and Douglas Jackson, *Bangladesh v. India: A Positive Step Forward in Public Order of the Seas*, (CNA, 2017), p. 10.
[348] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII*, p. 72, para. 209.
[349] Ibid., p. 73, para. 213.
[350] Ibid., pp. 73 and 74, para. 214.
[351] Ibid.
[352] Ibid., pp. 73 and 74, paras. 214 and 215.
[353] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34.
[354] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII*, p. 74, para. 216.
[355] Ibid., pp. 74 and 75, para. 220.

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

It seemed that the Tribunal did not intervened much on the parties' choice for drawing the provisional equidistance line as compared to other tribunals.[357] The Tribunal rejected only two basepoints as they were on low-tide elevations and adopted most of the base points presented by the parties.[358]

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

> *"Natural evolution, uncertainty, and lack of predictability as to the impact of climate change on the marine environment, particularly the coastal front of States, make all predictions concerning the amount of coastal erosion or accretion unpredictable. Future changes of the coast, including those resulting from climate change, cannot be taken into account in adjusting a provisional equidistance line".*[359]

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

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

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[356] Ibid., p. 120, para. 399.
[357] Donald McRae, "The Applicable Law", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?,* Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 105.
[358] Ibid, pp. 104 and 105.
[359] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII,* p. 120, para. 399.
[360] Jonathan I. Charney and Alexander Yonah, eds, *International Maritime Boundary, vol. I* (Leiden, Boston, Brill/Nijhoff, 1993), pp. 937 – 975 and pp. 1162 – 1165.

Contrary to the practices of the Pacific island countries, sociocultural considerations were not considered in the majority of cases that appeared before the international courts and tribunals in which sociocultural factors were raised by the parties concerned. Apart from the reluctance to give weight to sociocultural considerations by international courts and tribunals, States' position on the importance of this factor is worth noticing. For instance, forty years ago, the parties in the *Gulf of Maine case* argued for the relevance of activities pursued by its nationals, particularly the coastal communities in the delimitation areas.[361] Almost ten years after the *Gulf of Maine case*, Denmark used the attachment of the people of Greenland in addition to access to fishing in the disputed area as relevant circumstances justifying the shifting of the median line.[362] Similarly, the parties in the *Eritrea/Yemen case* and *Barbados v. Trinidad and Tobago case* relied on the existence and non-existence of traditional fishing as one of the grounds for supporting its claim in the delimitation area.[363] For further information on these cases, this Chapter approaches the discussion by exploring the legal position of the parties and the decision of the international courts and tribunals starting with the *Gulf of Maine case* (Section A), the *Greenland and Jan Mayen case* (Section B), the *Eritrea/Yemen case* (Section C), and the *Barbados v. Trinidad and Tobago case* (Section D).

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

Section A: The *Gulf of Maine Case*

Subsection A.1: The Legal Position of the Parties

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

[361] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, pp. 340 and 341, paras. 233 and 234.
[362] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, pp. 73 and 74, paras. 79 and 80.
[363] Yoshifumi Tanaka, "Barbados/Trinidad and Tobago Maritime Delimitation", *Hague Justice Journal*, vol. 2, No. 1 (2007), p. 54; and *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, p. 346, para. 48.

conservation and management of fisheries, and other maritime-related activities in the delimitation area.[364] According to the United States, all these activities should be regarded as a major relevant circumstance for the purpose of reaching an equitable solution.[365]

On the contrary, Canada did not respond to the so-called 'historic rights' – as referred to by the Chamber in its judgment and instead focused on the importance of socio-economic aspects of fishing in the relevant area. Canada claimed that fishing resources were important for the people of Nova Scotia, while the economy of New England in the United States showed no comparable dependence as those of their population.[366] Therefore, Canada submitted that the Chamber should aim to avoid in any way harming the economic and socio-development of the Nova Scotia population in carrying out the delimitation.[367]

Responding to this argument, the United States argued that the law of maritime boundary delimitation has rejected the economic dependence and relative wealth due to their unpredictable and variable character.[368] Consequently, the United States pleaded that Canada's submission was incomplete and misleading.[369]

Subsection A.2: The Decision of the ICJ

In the *Gulf of Maine case*, the Chamber looked into the historic rights and relevance of the socioeconomic dependence of coastal communities on the fishery resources of the delimitation area and explicitly rejected the submissions by both sides.[370] The Chamber rejected both sides' arguments by stating that the criteria to be applied for the purpose of delimiting the single maritime boundaries essentially concerned the geographical features of the area.[371] Therefore, other factors could come into play only once the Chamber has envisaged a delimitation line

[364] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, pp. 340 and 341, para. 233.
[365] Ibid.
[366] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Counter-Memorial of Canada, Pleadings*, vol. III, p.112, para. 318, p. 129, para. 355.
[367] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 341, para. 234.
[368] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 269.
[369] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Counter-Memorial of the United States of America, Pleadings*, vol. IV, p. 6, para. 9, and p. 142, para. 342.
[370] Ibid., pp. 341 and 342, para. 235.
[371] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 270.

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

Although the Chamber did not consider the relevance of these fishery resources at the operational stage, the Chamber looked into it at the verification stage when testing the equitableness of the delimitation line. The Chamber noted that it would only consider fisheries as a relevant circumstance if the Chamber's provisional line *"entails catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."*[374] Consequently, at the verification, stage the Chamber came up with a negative answer for the test.[375] Although the test conducted by the Chamber was a simple one as it was limited merely to check whether the test would lead to a radically inequitable result,[376] the Chamber developed a threshold for further consideration in later cases.

Section B: The *Greenland and Jan Mayen Case*

Subsection B.1: The Position of the Parties

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

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[372] Ibid.
[373] L. H. Legault and Blair Hankey, "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case", *American Society of International Law*, vol. 79, No. 4 (October 1985), p. 971.
[374] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 342, para. 237.
[375] Ibid., pp. 343 and 344, paras. 238 – 241.
[376] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 270.
[377] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 71, para. 75.

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

An additional point to the access to fishery resources in the area, Denmark used the population factor and the attachment of the people of Greenland as relevant circumstances. First, Denmark submitted that Jan Mayen had no population nor could sustain an economic life of its own. [381]In addition to the fact that only meteorologists, engineers, and other technicians manning the island's meteorological station, LORAC C station, and the coastal radio station, there were no fishermen nor other settled population on Jan Mayen.[382] Consequently, Norwegian fishing should be regarded as irrelevant in so far as the delimitation is concerned.[383] Furthermore, Norwegian fishing in the area could not be seen as traditional fishing under international law by referring to the 1951 *Fisheries case.*[384] Second, Demark averred on cultural factors, particularly the attachment of the people of Greenland to their land and the surrounding sea, which have sustained the life of the people.[385] Therefore, it would be difficult for the people of Greenland to accept that the sea area within the 200 nm zone off their coast should be curtailed in deference to the interest of the people of a remote and highly developed industrial State.[386]

After supporting its position on the importance of access to the fishery and the cultural factors that need to be taken into consideration as relevant factors, Denmark submitted the rule applicable to the delimitation between Greenland and Jan Mayen was the one that brought

[378] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Memorial Submitted by the Government of the Kingdom of Denmark, vol. I, 31 July 1989*, p. 48, para. 181.
[379] Ibid., pp. 40 – 42, para.160.
[380] Ibid., p. 50, para. 184.
[381] Ibid., p, 97, para. 302.
[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Ibid., p. 101, para. 313.
[386] Ibid.

about equitable results and not the median line as claimed by Norway.[387] Denmark concluded that Greenland was entitled to a full 200-mile fishery zone and continental shelf areas vis-à-vis the island of Jan Mayen.[388]

For its part, Norway submitted that the parties have expressly recognized and adopted the median line as a boundary line.[389] Norway pleaded for this median line to delimit the relevant area in the continental shelf and the fishery zone between the parties.[390] Responding to Denmark's submission on the importance of fishing in the disputed area, Norway also pleaded for the importance of Jan Mayen for its economy and its population. Particularly Norway submitted that Norwegian had traditionally relied on whaling in the waters in the vicinity of Jan Mayen,[391] sealing for hooded seals and harp seals in the water off Jan Mayen,[392] and fishing for Herring species in the region of Jan Mayen and Iceland,[393] Blue Whiting in the Norwegian Sea,[394] Shrimp in the water off Greenland and off Jan Mayen, and Capelin in waters between Jan Mayen, Iceland, and Greenland.[395] Norway further stressed the importance of whaling, sealing, and fisheries to Norway.[396] To be specific, capelin fisheries contributed to the fragile economy of the Norwegian coastal communities, whose dependent on the utilization of marine living resources for maintaining employment opportunities.[397]

Contrary to Denmark's submission on the importance of fisheries for Greenland, Norway argued that, first, Denmark failed to demonstrate that catches of capelin did not focus on the fishing areas between the opposite coasts of Jan Mayen and Greenland.[398] Second, of the total Danish fishing effort in the North Atlantic, only a small fraction came from the disputed area, and far less compared to that of Norway.[399] Third, income derived from licensing of capelin

[387] Ibid., p. 95, para. 294.
[388] Ibid., p. 125, para. 379.
[389] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Counter-Memorial Submitted by the Government of the Kingdom of Norway, 11 May 1990*, p. 114, para. 391.
[390] Ibid., p. 201.
[391] Ibid., p. 35, para. 120.
[392] Ibid., p. 37, para. 124.
[393] Ibid., p. 40, para. 132.
[394] Ibid., p. 41, para. 135.
[395] Ibid., p. 42, para. 141.
[396] Ibid., pp. 165 – 167, paras. 573 – 580.
[397] Ibid., p. 166, para. 579.
[398] Ibid., p. 167, para. 582.
[399] Ibid., para. 583.

fishing off the East Greenland coast north of 68° North constituted less than one percent of the value of fisheries in the whole of the Greenland zone.[400]

As for the argument submitted by Denmark on the issue of population particularly on Jan Mayen, Norway replied that the existence of major communications and rescue facilities on Jan Mayen served as a means of protecting and assisting fishing vessels and others who might in the future be engaged in exploitation of natural resources in the region.[401] Norway particularly stressed the importance of the safety of the fishing fleet operating in the waters around Jan Mayen, which might from time to time depend on services upon the facilities associated with the Island.[402]

Subsection B.2: The Decision of the ICJ

In the *Greenland and Jan Mayen* case, the Court noted the parties' strong emphasis on the importance of equitable access to marine resources in the overlapping claimed area, particularly access to capelin stock, a migratory species with migratory patterns that vary with climatic conditions.[403] To that effect, the Court identified the area of prime commercial value and considered the migratory patterns of Capelin during fishing season.[404] The Court echoed the previous position held in the *Gulf of Maine case* where the Chamber of the ICJ took into consideration the effects of the delimitation on the parties' respective fishing activities by ensuring that the delimitation should not entail catastrophic repercussions for the livelihood and economic well-being of the concerned population.[405] The Court, therefore, found that to delimit the fishery zone, they had to consider whether any shifting or adjustment of the median line would be required to ensure equitable access to the capelin stock for the vulnerable fishing communities concerned.[406]

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[400] Ibid., para. 584.
[401] Ibid., p. 168, para. 586.
[402] Ibid., paras. 588 and 589.
[403] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 70, para. 73.
[404] Jonathan I. Charney, "Maritime Delimitation in the Area between Greenland and Jan Mayen", *American Journal of International* Law, vol. 88, No. 1 (January 1994), p. 109.
[405] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 342, para. 237.
[406] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, pp. 71 and 72, para. 75.

The Court also considered the presence of ice in the waters of the region, specifically the waters off the northern segment of the east coast of Greenland. The Court noted that the parties agreed that ordinary navigation and all fishing activity were made impossible during a certain period of the year.[407] The Court further noted Denmark's argument that the 200 nautical miles zone off the coast of Greenland would not provide Greenland with 200 nautical miles of exploitable sea and that the median line proposed by Norway would leave Denmark only 10 percent of the waters in which fishing is made possible by the absence of ice.[408] The Court agreed that compact ice has permanently covered the area and the water current runs south along the east coast carrying enormous quantities of drifting polar ice.[409] It further confirmed that ice constitutes a considerable seasonal restriction of access to the waters; however, for the current case it did not *"materially affect access to migratory fishery resources in the southern part of the overlapping claims."*[410]

Having considered the parties' cases for access to fisheries particularly the seasonal migration pattern of the capelin stock, the Court noted that the median line would attribute to Norway the whole area of the overlapping claim.[411] Therefore, the Court found that the median line needs to be adjusted or shifted eastwards to ensure equitable access to the capelin stock for Denmark.[412]

As for Denmark's population and cultural factor arguments, first, the Court noted that Denmark did not contest that Jan Mayen had no entitlement to a continental shelf or fishery zone, but pleaded for a partial effect to be given to it.[413] However, the Court found that argument to be unacceptable.[414] The Court also found that cultural factor was not a relevant circumstance.[415]

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[407] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), pp. 262 and 263.
[408] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 72, para. 77.
[409] Ibid., p. 72, para. 77.
[410] Ibid., pp. 73 and 74, para. 78.
[411] Ibid., p. 72, para. 76.
[412] Ibid.
[413] Ibid., p. 74, paras. 80.
[414] Ibid.
[415] Ibid.

From this decision, it seemed that the Court considered the potential relevance of the effect of ice flows upon access to fishery resources at the harvestable stage.[416] Thus, hypothetically, it is arguable that should the drift ice hampered access to resources during the fishing season, it could then be considered as a relevant circumstance that rendered an adjustment of the delimitation line. It was also a bit disappointed that the Court did not provide any good reason on why access to fishing resources should have been taken into account in relation to a boundary applying to be the continental shelf.[417]

As for the cultural factor, particularly on the attachment of the coastal communities, it seemed that Denmark failed to provide sufficient evidence to support its coastal communities' attachment to the relevant disputed areas; consequently, it is not surprising that the Court did not consider cultural factor as a relevant circumstance nor provide detail explanation on it.

Section C: The *Eritrea/Yemen Case*

Subsection C.1: The Position of the Parties

Under Article 2 of the Arbitration Agreement, Eritrea and Yemen agreed to have the proceedings commenced in two phases. In the first phase, the Tribunal was tasked with the questions of territorial sovereignty and further ruled that the traditional fishing regime in the region was to be perpetuated.[418] Based on this, Yemen was obligated to ensure that, in a loosely defined area around certain specified islands, the traditional fishing regime of free access and enjoyment for fishermen of both countries was preserved.[419] Then in the second phase, the parties requested the Tribunal to delimit the maritime boundary between them by taking into account the opinion it has formed in the first phase, UNCLOS, and any other pertinent factor.[420]

The parties seemed to take a common position that the median line is a method of delimitation; however, they had different applications of the method creating their claimed line to follow

[416] Malcolm D. Evans, "Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), *International and Comparative Law Quarterly*, vol. 43, No. 3 (July 1994), p. 701.
[417] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Summaries of Judgment*, p. 56.
[418] *First stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Award*, RIAA, vol. XXII, pp. 329 and 330, para. 526.
[419] David Anderson, "Developments in Maritime Boundary Law and Practice", in *International Maritime Boundaries – Volume V*, David A. Colson and Robert W. Smith, eds. (Leiden, Boston, Martinus Nijhoff Publishers, 2005), p. 3217.
[420] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, p. 337, para. 6.

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

The parties had advanced evidence and legal arguments essentially to demonstrate that their proposed delimitation line should be a preferred one taking into consideration the historical practice, the catastrophic effect on local fishermen or the national economy, and the effect on the regional diet of the population concerned. Each party had presented 5 arguments on this traditional fishing namely: fishing in general, the location of fishing areas, the economic dependency of the parties on fishing, consumption of fish by the populations of the parties, and the effect of fishing practices on the lines of delimitation proposed by the parties.

For the first point on fishing in general, Eritrea submitted that its fishing industry was essentially important for its economy and it was not merely dependent on freshwater fishery as raised by Yemen.[423] Eritrea further claimed that Yemen's fishing industry in the Red Sea was not as significant as the one in the Indian Ocean and that Yemen's fishing industry was well established and not dependent on protection on the particular delimitation line as proposed by Yemen.[424] On the contrary, Yemen argued that Yemen's traditional fishing activities had long dominated the Red Sea and were greater than those conducted by Eritrea, whose fishing activities were largely dependent on fishing closer to inshore.[425] Yemen also claimed that the most active market for fisheries production from both nationals was the Hodeidah, which is located in Yemen.[426]

[421] Yoshifumi Tanaka, "Reflections on the *Eritrea/Yemen* Arbitration of 17 December 1999 (Second Phase: Maritime Delimitation)", *Netherlands International Law Review*, vol. 48, No. 2 (August 2001), p. 202.
[422] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, pp. 338 – 340, paras 12 – 21.
[423] Ibid., p. 347, para. 52.
[424] Ibid.
[425] Ibid., para. 53.
[426] Ibid.

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

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

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

For the last ground on the effect of fishing on the delimitation line, both sides focused their submission on the need to achieve equitable results of the delimitation line. Eritrean submitted that Eritrean's proposed line not only respected the historical practice of the parties but also

[427] Ibid., p. 348, para. 54.
[428] Ibid.
[429] Ibid.
[430] Ibid., para. 56.
[431] Ibid., pp. 348 and 349, para. 57.
[432] Ibid.
[433] Ibid., p. 349, para. 58.
[434] Ibid.

did not displace or adversely affect Yemen's fishing activities; therefore, created an equitable result for both parties.[435] On the contrary, Yemen's proposed line would deprive its fishermen of valuable fishery areas that had long been important resources for their trade.[436] Eritrea further submitted that Yemeni fishermen had never engaged in substantial fishing activity; therefore, the delimitation line proposed by Yemen would create an inequitable result.[437] For its part, Yemen submitted that its proposed line correctly reflected the historical practices of the parties as it did not grant Yemen what it did not have before nor penalize existing or past Eritrean fishing activities; therefore, respecting the existing rights and constituting an equitable result.[438] On the other hand, Eritrean's proposed line not only encroached on Yemen's traditional fishing grounds without justification but also deprived Yemeni fishermen of its fishing activities in the west of the mid-sea islands.[439]

Subsection C.2: The Decision of the Tribunal

The Tribunal approached the delimitation by dividing the area into three parts: the northern, the central, and the southern segments. For the northern and the southern segments, the delimitation was essentially a delimitation between two opposite coasts where questions of relevant circumstances were not substantially an issue between the parties. However, in the central segment, the delimitation process became complicated due to the presence and proximity of the mid-sea islands and the parties' argument on traditional fishing as a relevant circumstance. The Tribunal, therefore, examined this matter by referring to the 5 arguments submitted by the parties as described in the previous subsection.

As to fishing in general, the Tribunal recalled the First Phase Award which recognized the importance of fishing activity for both parties, yet the Tribunal viewed that *"the fishing practices of the Parties from time to time are not germane to the task of arriving at a line of delimitation."*[440] The Tribunal also found it unnecessary nor possible for them to conclude the economic dependency on fishing of either Eritrea or Yemen to such an extent that would suggest any particular delimitation line.[441]

[435] Ibid., para. 59.
[436] Ibid.
[437] Ibid.
[438] Ibid., para. 60.
[439] Ibid.
[440] Ibid., p. 350, paras. 62 and 63.
[441] Ibid., para. 64.

For the location of the fishing areas, the Tribunal looked into the evidence submitted in both proceedings and held that fishermen of both sides conducted their fishing activities commonly around the Dahlak archipelago, and as far west as Mohabbakhs, the Haycocks and the South West Rocks.[442] This conclusion of the Tribunal concurred with its previous award in the First Phase Proceeding in which the Tribunal expressed concern on the maintenance of the traditional fishing regime in the region as a whole.[443]

As for the consumption of fish by the population, the Tribunal noted the parties' intention to persuade the Tribunal that the delimitation line proposed by the other side would deprive the population of the other party of its diet.[444] The Tribunal found that the evidence presented by the parties on this issue was conflicting and uncertain.[445] Consequently, the Tribunal decided that they found no significant reason for either accepting or rejecting the parties' arguments on this matter as relevant to the line of delimitation.[446]

Finally, on the effect of fishing the delimitation lines proposed by the parties, the Tribunal ruled that *"Neither Party has succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals."*[447] Ultimately, the Tribunal neither accepted nor rejected the delimitation proposed by either party on fisheries grounds.[448]

From the two awards rendered by the Tribunal, it is fair to conclude that the Tribunal expressed a strong view on the need to maintain a traditional fishing regime that enables fishermen of both sides to fish and conduct ancillary activities according to traditional artisanal patterns, without reference to the boundary established by the Tribunal and the normal rules on access to foreign maritime zones stipulated under UNCLOS.[449] Furthermore, from the wording of the

[442] Ibid., p. 351, paras. 65 – 69.
[443] See *First stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Award*, RIAA, vol. XXII, pp. 330 and 331, para. 527 (vi).
[444] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, p. 351, para. 70.
[445] Yoshifumi Tanaka, "Reflections on the *Eritrea/Yemen* Arbitration of 17 December 1999 (Second Phase: Maritime Delimitation)", *Netherlands International Law Review*, vol. 48, No. 2 (August 2001), p. 203.
[446] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, p. 351, para. 71.
[447] Ibid., para. 72.
[448] Ibid., para. 73.
[449] Ibid., pp. 359 – 361, paras. 103 – 109.

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

On an unrelated point to the effect of traditional fishing on maritime boundary delimitation, it seemed that the parties have agreed to a rather odd choice of law,[450] specifically their agreements to include "other pertinent factors" as a choice of law.

The award in the Second Phase Proceeding helps to identify what constitutes artisanal fishing and clarifies the obligation to protect the traditional fishing regime although the parties remained uncertain on their exact scope of application. The Tribunal described 'artisanal fishing' as 'diving carried out by artisanal means, for shells and pearls' and 'the use of islands for drying fish, for way stations, for the provision of temporary shelter, and for the effecting of reparis.'[451]

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

Subsection D.1: The Position of the Parties

In the *Barbados v. Trinidad and Tobago case*, the two States are parties to UNCLOS as they had ratified the Convention on 25 April 1986 and 12 October 1993 respectively. They agreed that under international law and for maritime boundary delimitation cases, the court and tribunal applied an equidistance/special circumstances approach to achieve an equitable result and the starting point for any delimitation is a median or equidistance line.[452] However, the parties disagreed as to whether the provisional equidistance line should be shifted after taking into consideration the relevant or special circumstances.[453] While Trinidad and Tobago

[450] W. Michael Reisman, "Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)", *American Journal of International Law*, vol. 94, No. 4 (October 2000), p. 727.
[451] *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award*, RIAA, vol. XXII, p. 359, para. 103.
[452] *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados v. Trinidad and Tobago), Award, 11 April 2006, RIAA, vol. XXVII*, p. 182, para. 118.
[453] Yoshifumi Tanaka, "Barbados/Trinidad and Tobago Maritime Delimitation", *Hague Justice Journal*, vol. 2, No. 1 (2007), p. 54.

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

Barbados advanced their arguments in three folds. First, they submitted that there existed a centuries-old history of artisanal fishing in the waters off the northwest, north, and northeast coasts of the island of Tobago by their fisherfolk.[454] Barbados stated that their artisanal fishing was done for the flying fish, a species that moves seasonally to the waters off Tobago. Barbadian fisherfolk had transported their catches home on ice or used preservation methods such as salting and pickling before transporting them home.[455] They supported this historical nature of artisanal fishing by providing evidence showing their fisherfolk's ability to fish off Tobago and a record of public recognition by government ministers and officials from Trinidad and Tobago of Barbadian fisherfolk in the claimed area.[456] Second, they submitted that those Barbadian fisherfolk are dependent upon fishing in the claimed area off Tobago,[457] as the flying fish formed a staple part of their diet and constituted an important element of the history, economy, and culture of Barbados.[458] Barbados submitted affidavits and videos confirming how their fisherfolk attached to the tradition and vital nature of Barbadian fishing for the flying fish and argued that without the flying fish, the concerned fisherfolk would suffer severe economic disruption and in some cases, a loss of livelihood.[459] Finally, they contrasted the situation between their fisherfolk and those of Trinidad and Tobago and claimed that the fisherfolk of Trinidad and Tobago did not rely on fishing in the area claimed by Barbados for their livelihoods.[460] Barbados used the testimony of its fisherfolk and statements by Trinidad and Tobago fishing officials to claim that fishing is not a major revenue earner and that fisherfolk of Trinidad and Tobago generally do not rely on flying fish.[461]

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

[454] *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados v. Trinidad and Tobago), Award, 11 April 2006, RIAA, vol. XXVII*, p. 184, para. 125.
[455] Ibid., p. 185, para. 126.
[456] Ibid., para. 127.
[457] Ibid., p. 184, para. 125.
[458] Ibid., p. 185, para. 128.
[459] Ibid.
[460] Ibid., p. 184, para. 125.
[461] Ibid., p. 185, para. 129.

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

> *"…under either the Jan Mayen or the Gulf of Maine standard, an adjustment in favor of Barbados to protect the traditional artisanal fishing rights of its nationals would be appropriate and indeed, warranted by international law in the absence of an alternative arrangement to guarantee these crucial economic facts."*[463]

Trinidad and Tobago rejected all the threefold arguments submitted by Barbados on the existence of artisanal fishing on the island of Tobago. First, they used extensive documentary evidence to deny Barbados's claims of a centuries-old history of artisanal fishing and argued that Barbadian fishing in the waters off Tobago was of recent origin and highly commercial.[464] Second, they denied the economic importance of flying fish for Barbados's economy.[465] Finally, they refused Barbados's claim on the importance of fishing for Trinidad and Tobago fisherfolk, particularly for those residing in Tobago.[466] They submitted a report from Tobago's Department of Marine Resources and Fisheries and asserted that all the coastal communities on the island of Tobago depend greatly on fishing particularly flying fish which account for about 70 – 90% of the total weight of pelagic landing at beaches.[467]

Furthermore, Trinidad and Tobago contended that Barbados's fishing practices are of no consequence as a legal matter and therefore it was not a special circumstance that warranted the adjustment of the equidistance line.[468] They further argued that even if the Tribunal were to find that there existed artisanal fishing historically, Barbados could not acquire fishing rights by artisanal fishing practices of its fisherfolk in waters near Tobago as those waters previously had the status of the high seas and therefore *res communis*.[469]

[462] Ibid., pp. 189 and 190, para. 141.
[463] Ibid., p. 190, para. 142.
[464] Ibid., pp. 185 and 186, para. 130.
[465] Ibid., p. 186, para. 131.
[466] Ibid., para. 132.
[467] Ibid.
[468] Ibid., p. 190, para. 143.
[469] Ibid., para. 144.

Subsection D.2: The Decision of the Tribunal

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

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

> *"Within those constraints imposed by law, the Tribunal considers that it has both the right and the duty to exercise judicial discretion in order to achieve an equitable result. There will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation."*[473]

From the above aim, the Tribunal approached the delimitation on the Western segment and looked into whether artisanal fishing constitutes a special or relevant circumstance. The Tribunal found that the parties held common positions that the line of delimitation is a provisional equidistance line between their opposite coasts.[474] The Tribunal noted the different views between the parties particularly that Trinidad and Tobago maintained the delimitation line to be the provisional equidistance line while Barbados claimed for an adjustment of that line due to the existence of artisanal fishing. Unfortunately, the Tribunal did not discuss the question of whether artisanal fishing could be considered as a special or relevant circumstance in the current case. The Tribunal found that Barbados' claims were not proven,[475] and concluded that the delimitation line in the Western segment is an equidistance line.[476]

[470] Ibid., pp. 210 and 211, para. 223.
[471] Ibid.
[472] Ibid.
[473] Ibid., p. 215, para. 244.
[474] Ibid., pp. 215 and 216, para. 246; and p. 182, para. 118.
[475] Ibid., p. 221, para. 265.
[476] Ibid., p.223, para. 271.

Although the Tribunal missed the opportunity to provide a substantial discussion on the relevance of artisanal fishing, the Tribunal did provide a quick comment in paragraph 269 of the Award that even if Barbados had succeeded in establishing artisanal fishing in the waters off Tobago, its case would not be conclusive enough as a matter of law to render an adjustment of the provisional equidistance line. The Tribunal further cited Sir Gerald Fitzmaurice and the *Greenland and Jan Mayen case* as *"insufficient to establish a rule of international law."*[477] With such an approach, the Tribunal at the same time was cautious with its wording as the Tribunal stressed that the current case was without prejudice to boundaries between either of the parties and any third State that did not fall within the Tribunal's jurisdiction.[478]

[477] Ibid., pp. 222 and 223, para. 269.
[478] Barbara Kwiatkowska, "The 2006 Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits) Award", in *Law of the Sea, Environmental Law and Settlement of* Dispute, Tafsir Malick Ndiaye and Rüdiger Wolfrum, eds. (Martinus Nijhoff Publishers, Leiden, Boston, 2007), p. 943.

Conclusion

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

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

Starting from the first case in the *North Sea Continental Shelf case* to the *St. Pierre and Miquelon case*, the international courts and tribunals took an inconsistency approach to the method for delimiting the maritime boundary in the EEZ and continental shelf; however, the approach adopted generally reflect a result oriented equity approach, where the focus for each maritime boundary delimitation case is to achieve an equitable solution and not to follow any specific method. The role of the equidistance method was not recognized as a mandatory step in the delimitation process. Exceptions, however, were saved for the *Anglo-French Continental Shelf cases*, where the *ad hoc* Court of Arbitration applied the equidistance method at the first stage of the delimitation and adjusted the provisional delimitation line due to the existence of relevant circumstances at the second stage.

[479] Donald McRae, "The Applicable Law", in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch, eds. (United Kingdom, New York, Cambridge University Press, 2018), p. 105.

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

While the equidistance method has become part of the methodology for achieving an equitable solution, the other element that should not be ignored is the existence of relevant circumstances. Relevant circumstances have been referred to since the *North Sea Continental Shelf cases* although the substance and roles of this term are developing from time to time in case law. This development corresponds with the development of the methodology for delimiting maritime boundaries where there is no fixed rule to apply. It was until the *Black Sea case* in which the ICJ developed a methodology for delimiting the EEZ and continental shelf through a three-stage approach: first, construct a provisional equidistance line; second, adjust the provisional equidistance by taking into consideration the existence of any relevant circumstances; and finally, conduct a proportionality test. From this three-stage approach, it appeared at the outset that relevant circumstances function in the second stage of delimitation. However, relevant circumstances, in fact, could play a role even at the first stage of the delimitation process, particularly in the selection of basepoints.

Although relevant circumstances could either be geographical or non-geographical factors, international courts and tribunals provided more attention to geographical factors than non-geographical factors in the course of maritime boundary delimitation regardless of the applicable law. The non-geographical factors commonly played a modest role with limited influence on the second stage of delimitation, particularly after the provisional equidistance line or in a few cases the bisector line has already been drawn. Narrowing down to the role of non-geographical factors, by specifically focusing on environmental factors, it seems that international courts and tribunals have not considered them although their relevance has not

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

As for the *Bangladesh v. India case*, the Tribunal was not convinced by Bangladesh's submission of the relevance of potential climate change and coastal instability in the delimitation area. The Tribunal made a strong statement that *"neither the prospect of climate change nor its possible effects can jeopardize a large number of settled maritime boundaries throughout the world. This applies equally to maritime boundaries agreed between States and to those established through international adjudication."*[482] This conclusion by the Tribunal was not surprising as there seemed to be limited evidence and legal position submitted by Bangladesh to support its claim. Furthermore, Bangladesh's position on the issues of coastal instability and the effect of climate change was inconsistent, which might affect its credibility on the matter.

Even if environmental factors have not received much attention in adjudicated cases concerning maritime boundary delimitation, State practices offered a different narrative. For example, a study conducted thirty years ago into international maritime boundaries revealed that environmental considerations provided an important leitmotif for a significant number of maritime boundary delimitation agreements.[483] This conclusion remains true even today as recent State practices also suggest that the duty to protect the marine environment is a matter of cooperation between concerned States, and this duty has been increasingly incorporated in

[480] Yoshifumi Tanaka, *The International Law of the Sea*, 3nd ed. (Cambridge, New York, Cambridge University Press, 2019), p. 268.
[481] David A. Colson, "Environmental Factors: Are They Relevant to Delimitation?" in *The UN Convention on the Law of the Sea: Impact and Implementation*, E.D. Brown and R. R. Churchill, eds. (US, Law of the Sea Institute, 1987), p. 220.
[482] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India, Award, 7 July 2014, RIAA, vol. XXXII*, p. 74, para. 217.
[483] See Barbara Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations", in *International Maritime Boundaries Volume I*, Jonatha I. Charney and Lewis M. Alexander, eds. (Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1993), pp. 75 – 113.

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

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

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

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

[484] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 435.
[485] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation).*
[486] *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize).*
[487] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984.*
[488] See *Request for an Advisory Opinion on Climate Change Emergency and Human Rights to the Inter-American Court of Human Rights from the Republic of Colombia and the Republic of Chile*, IACHR, 9 January 2023.
[489] See *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS, 12 December 2022.
[490] See UNGA Resolution A/RES/77/276 dated 4 April 2023, Resolution adopted by the General Assembly on 29 March 2023 Requesting for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change.

of Maine case, the Camber of the ICJ rejected sociocultural factors as a relevant circumstance; however, it seemed that that the Chamber had created a test that later applied by the Court in the *Greenland and Jan Mayen case*, in which the Court adjusted the median line to enable Denmark's access to capelin fish stock. The standards that both cases looked into were whether the intended delimitation line "*entails catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."*[491] Therefore, it seemed that sociocultural considerations could play a role not only in the first stage of delimitation but also in the verification stage.

On the other hand, practices from the Tribunals in the *Eritrea/Yemen case* and the *Barbados v. Trinidad and Tobago case* differed from those of the ICJ, although the goals for all of these cases were to reach an equitable solution for delimitation. Although the Tribunal in the *Eritrea/Yemen case* made a strong statement on the existence of a customary international rule concerning the survival of traditional artisanal fishing rights,[492] the Tribunal was not convinced by the parties' submission on the adjustment of the delimitation line due to traditional artisanal fishing right. The Tribunal, in the *Barbados v. Trinidad and Tobago case*, was even more reluctant to look further into discussing whether traditional artisanal fishing rights could constitute a relevant circumstance. Given the inconsistency in these four cases, States who wish to rely on sociocultural considerations will face difficulty on how to approach this complex and delicate matter.

The inconsistency and reluctant of the international courts and tribunals to treat sociocultural considerations, specifically access to fishery as relevant circumstances could probably because fishing rights are not an exclusive right,[493] particularly the right of access to fish stocks seems to have diminished with the emergence of the EEZ and its focus on distance from the coast as the basis for the maritime zone entitlement.[494] Although international law particularly

[491] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, p. 342, para. 237.
[492] W. Michael Reisman and Mahnoush H. Arsanjani, "Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation", in *Law of the Sea, Environmental Law and Settlement of* Dispute, Tafsir Malick Ndiaye and Rüdiger Wolfrum, eds. (Martinus Nijhoff Publishers, Leiden, Boston, 2007), p. 663.
[493] Leonardo Bernard, "The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation", paper presented at the LOSI-KIOST Conference on Securing the Ocean for the Next Generation, Seoul, South Korea, 2012, p. 19.
[494] Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford, Portland, Oregon, Hart Publishing, 2010), p. 406.

UNCLOS has expanded coastal States' jurisdiction to its resources, fishing rights have never been an exclusive right solely reserved for the coastal States.

It should be noted that despite the fact that historic fishing rights and artisanal fishing have not yet been recognized as relevant circumstances in delimitating the EEZ and continental shelf for the purpose of achieving an equitable solution, the traditional character of the different fishing types carried out by the population concerned was given some weight in arriving at the final delimitation.[495] The case has not been the same for cultural rights, particularly the attachment of the people to the sea and its surroundings. As there was only one case in the last 5 decades that this factor has been put forward by the parties, it would be interesting to see how and to what extent international courts and tribunals entertain this argument in the near future. The closest is the pending case of the *Ukraine v. the Russian Federation*, in which Ukraine will illustrate how maritime waters contain intangible and cultural values for their people.[496]

Notwithstanding that environmental and sociocultural factors played a limited role in adjudicated case law; it does not mean that such claims on environmental and sociocultural factors may not retain their relevance – the current situation is more on that their relevance is not acknowledged or identified in those cases. One of the factors influencing this is that international courts and tribunals are reluctant to rely on non-geographical factors as the parties failed to provide conclusive legal and factual evidence to meet the high threshold for each case. It seemed that the international courts and tribunals had developed strict evidentiary standards for the parties requesting an adjustment of the provisional delimitation line to fulfill. Consequently, the author is of the opinion that the parties who wish to rely on environmental and sociocultural factors need to establish: first, what are the environmental and sociocultural factors that might be relevant; second, how are they said to have affected the delimitation process, and last, what are the consequences should these factors be ignored.

Concurrently, international courts and tribunals need to expand the categories of relevant circumstances in the delimitation law. It is undeniable that international courts and tribunals focus heavily on geographical factors, particularly coastal geography, and not on geological or

[495] Shi Jiuyong, "Maritime Delimitation in the Jurisprudence of the International Court of Justice", *Chinese Journal of International Law* (2010), p. 289, para. 67.
[496] García Ch., María Catalina, and Joyeeta Gupta. Environmental and Sociocultural Claims within Maritime Boundary Disputes. *Marine Policy* 139, (2022), p. 6.

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

Given that each maritime boundary delimitation case is unique and there is no single method that could applied to all cases, it is understandable that international courts and tribunals have often faced lacunae in the law, particularly regarding the effect to be attributed to those relevant circumstances in the framework of equitable solution. The task of the international courts and tribunals is to produce an equitable solution for each case, and in no way should generalize its application to another case. Consequently, achieving an equitable solution would require the international courts and tribunals to take into account the various geographical and non-geographical factors of each case by weighing and balancing the various relevant circumstances and by balancing or composing the interests of the parties. If the parties' interests consistently include environmental and sociocultural factors, the international courts and tribunals will have to address the matter in the course of the delimitation process; otherwise, the solution will not eventually solve the complexity of the dispute.

Expanding the understanding of the international courts and tribunals on the environmental factors, particularly on the marine environment in the delimited area, is useful for the understanding of the depth of water, the current, the water temperature, and the plants and animals that live in the water. However, the mere fact that environmental factors are interesting and descriptive does not necessarily mean they are legally relevant.[497] Therefore, the tasks of the parties in supporting environmental consideration claims need to rely on a concrete legal basis. But how could the parties put forward a legal basis under the current legal system where the tendency is more on ignoring it? This is like a chicken-and-egg discussion. Similarly, the

[497] David A. Colson, "Environmental Factors: Are They Relevant to Delimitation?" in *The UN Convention on the Law of the Sea: Impact and Implementation,* E.D. Brown and R. R. Churchill, eds. (US, Law of the Sea Institute, 1987), p. 220.

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

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

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

[498] Yoshifumi Tanaka, *Predictability and Flexibility in the law of Maritime Delimitation* (Oxford, Portland, Oregon, Hart Publishing, 2006), p. 336.
[499] Barbara Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations", in *International Maritime Boundaries Volume I*, Jonatha I. Charney and Lewis M. Alexander, eds. (Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1993), p. 109.

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

No.	Name/Parties	Unilateral/ Joint Submission	Year of Decision	Maritime Zone Involved	Relevant Circumstance	Others
International Court of Justice (ICJ)						
1.	North Sea Continental Shelf (Germany/Netherlands)	Joint submission via Special Agreement (1967)	1969	CS		
2.	North Sea Continental Shelf (Germany/Denmark)	Joint submission via Special Agreement (1967)	1969	CS		
3.	Aegean Sea Continental Shelf (Greece v. Turkey)	Unilateral submission (1976)	1978	CS		No jurisdiction
4.	Continental Shelf (Tunisia/Libya)	Joint submission via Special Agreement (1977)	1982	CS		
5.	Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)	Joint submission via Special Agreement (1979)	1984	FZ/CS		
6.	Continental Shelf (Libya/Malta)	Joint submission via Special Agreement (1976)	1985	CS		

7.	Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)	Unilateral submission (1988)	1993	FZ/CS		
8.	Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)	Unilateral submission (1991)	Discontinue	TS/EEZ/CS		Discontinue
9.	Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)[500]	Joint submission via Special Agreement (1987/1990)	2001	TS/CS		
10.	Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)	Unilateral submission (1994)	2002	TS/EEZ/CS		
11.	Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)	Unilateral submission (1999)	2007	TS/EEZ/CS		
12.	Maritime Delimitation in the Black Sea (Romania v. Ukraine)	Unilateral submission (2004)	2009	EEZ/CS		

[500] This case was unilaterally submitted by Qatar; however, based on the Judgment of 1 July 1994, the Court delivered the first Judgment stating in the relevant part that the 1987 letter and 1990 minutes constituted international agreements and that the Parties had undertaken to submit to the Court the whole of the dispute between them.

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

	Islands (Gabon/ Equatorial Guinea)	Agreement (2016)				
Arbitration (Ad hoc or Annex VII Arbitration)						
1.	Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic	Joint submission via Special Agreement (1975)	1977	CS		
2.	Case concerning a dispute between Argentina and Chile concerning the Beagle Channel	Joint submission via Special Agreement (1971)	1977	TS		
3.	Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau	Joint submission via Special Agreement (1983)	1985	TS/EEZ/ CS		
4.	Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal	Joint submission via Special Agreement (1985)	1989	TS/CS		
5.	Case concerning the delimitation of maritime areas between Canada and the French Republic (St. Pierre and Miquelon)	Joint submission via Special Agreement (1989)	1992	EEZ/CS		

6.	In the matter of an Arbitration pursuant to an Agreement to Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government of the Republic of Yemen	Joint submission via Special Agreement (1996)	1999	TS/EEZ/ CS		
7.	In the Matter of an Arbitration between Barbados and the Republic of Trinidad and Tobago	Unilateral submission (2004)	2006	EEZ/CS		Based on UNCLOS/ Annex VII
8.	In the Matter of an Arbitration between Guyana and Suriname	Unilateral submission (2004)	2007	TS/EEZ/ CS		Based on UNCLOS/ Annex VII
9.	Territorial and Maritime Arbitration between Croatia and Slovenia	Joint submission via Special Agreement (2009)	2017	TS		
10.	In the matter of the Bay of Bengal maritime boundary arbitration (Bangladesh v. India)	Unilateral submission (2009)	2014	TS/EEZ/ CS		Based on UNCLOS
11.	Dispute Concerning Coastal State Rights in the Black Sea, Sea of	Unilateral submission (2016)	Pending			Based on

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

[501] The proceeding was unilaterally initiated by Bangladesh; however, the Parties had subsequently agreed to a joint submission before ITLOS.

[502] This case was unilaterally imitated by Ghana; however, the Parties had subsequently agreed to a joint submission before a Special Chamber of ITLOS.

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