

World Maritime University

The Maritime Commons: Digital Repository of the World Maritime University

World Maritime University Dissertations

Dissertations

2009

The concept of equidistance/relevant circumstances in the development of the law of maritime delimitation

Aké L. Abe

World Maritime University

Follow this and additional works at: https://commons.wmu.se/all_dissertations



Part of the [Law of the Sea Commons](#)

This Dissertation is brought to you courtesy of Maritime Commons. Open Access items may be downloaded for non-commercial, fair use academic purposes. No items may be hosted on another server or web site without express written permission from the World Maritime University. For more information, please contact library@wmu.se.

WORLD MARITIME UNIVERSITY

Malmö, Sweden

**THE CONCEPT OF
EQUIDISTANCE/RELEVANT
CIRCUMSTANCES IN THE
DEVELOPMENT OF THE LAW OF
MARITIME DELIMITATION**

By

ABE AKE LAZARE

Republic of Côte d'Ivoire

A dissertation submitted to the World Maritime University in partial
Fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

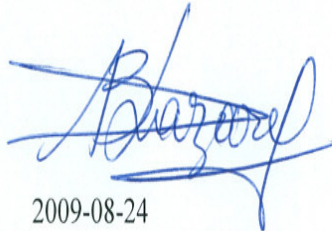
2009

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The content of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

Signature:



Date: 2009-08-24

Supervised by: Neil A. Bellefontaine

World Maritime University

Assessor: John Liljedahl

World Maritime University

Co-Assessor: Dr. Galo Carrera

Dalhousie University (Canada)

ACKNOWLEDGEMENTS

First and foremost, I wish to acknowledge the opportunity given to me by World Maritime University to acquire a basic and strong foundation in maritime affairs.

I wish to express my sincere gratitude to Sasakawa Kaicho and acknowledge the support of the Nippon Foundation, which has brought into reality my dream to study at World Maritime University and provided me with the necessary financial support to complete this work.

I would like to express my deepest gratitude to Professor Neil A. Bellefontaine and Professor Galo Carrera, who always acted as leading lights in the achievement of this dissertation.

Furthermore, I should like to thank the General Directorate of Port and Maritime Affairs/Ministry of Transports of Côte d'Ivoire for the opportunity given to me for studying at World Maritime University.

I thank Professor P.K. Mukherjee and Assistant Professor Max Mejia, who played a major role in building my capacity in maritime law and policy and acknowledge the support of the 14th Rhodes Academy for all the technical support necessary for a better understanding of issues related to maritime delimitation.

Thanks are due to Inger Battista for her care in reviewing the English language of the draft and also to Anne Pazaver, Jennifer Lloyds and Clive Cole for their great support in improving my general English language. Grateful thanks are as well addressed to the staff of the library, Cecilia Denne and Mia Hedin for their tireless assistance.

Finally, it pleases me to express my deepest appreciation to my family, my dearly beloved wife Angèle, my children Josée-Maria and Paul-Michel, my parents, Paul and Joséphine for their understanding and their encouragement during all the period of my studies and research at World Maritime University.

ABE Aké Lazare

ABSTRACT

Title of Dissertation: **The Concept of Equidistance/Relevant Circumstances in the Development of the Law of Maritime Delimitation**

Degree: MSc

This dissertation is a legal analysis of the subject of maritime delimitation in the Law of the Sea as it applies to the concept of Equidistance/Relevant Circumstances. This topic is of current international interests, particularly in a period marked by numerous maritime disputes and increasing number of individual States' submissions for extended continental shelf.

The purpose of this dissertation is to determine whether the concept of Equidistance/Relevant circumstances can be established as the primary rule in the law of maritime delimitation after more than forty years of legal uncertainty and unpredictability. In order to arrive at this conclusion, it was necessary to ascertain if the law of maritime delimitation has gained more consistency and predictability since its engagement in a normative process through the concept of Equidistance/Relevant circumstances.

This resulted in investigating the historical background of the law of maritime delimitation. Then, the definition of the concept of Equidistance/Relevant Circumstances and the relevant jurisprudence related to the emergence and the consolidation of this concept were examined. Particular reference is made to the *Greenland/Jan Mayen* case (1993) in that respect. The degree of consistency, uniformity and predictability of the law of maritime delimitation through the legal approach of Equidistance/Relevant circumstances are analysed using quantitative and qualitative tools and a number of downsides are collated.

Finally, the concluding chapter examines the result of this assessment in the perspective of establishing the concept of Equidistance/Relevant Circumstances as the primary rule in the law of maritime delimitation and for that purpose, makes pertinent recommendations.

LIST OF ABBREVIATIONS

ASIL	American Society of International Law
CLCS	Commission on the Limits of the Continental Shelf
EEZ	Exclusive Economic Zone
FZ	Fishing Zone
ICJ	International Court of Justice
IHO	International Hydrographic Organization
ILC	International Law Commission
ITLOS	International Tribunal on the Law of the Sea
M	International Nautical Miles
PARA	Paragraph
PCA	Permanent Court of Arbitration
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
YILC	Yearbook of the International Law Commission

TABLE OF CONTENTS

Declaration	II
Aknowledgements	III
Abstract	IV
List of Abbreviations	V
Table of Contents	VI
Table of figures	IX
INTRODUCTION	1
Part I	
THE DEVELOPMENT OF THE CONCEPT OF EQUIDISTANCE/RELEVANT CIRCUMSTANCES IN THE LAW OF MARITIME DELIMITATION	6
<hr/>	
CHAPTER I: PRELIMINARY CONSIDERATIONS	6
Section 1: Pre-conventional State Practice of Maritime Delimitation	6
1. Median Line	6
2. Thalweg Line	7
Section 2: Codification of Maritime Delimitation	9
1. The 1958 Geneva Conventions: Equidistance/Special Circumstances	9
2. The 1982 UNCLOS: Equidistance v. Equity	12
Section 3: The Development of the Case Law of Maritime Delimitation: From Equity to Normativity	16
1. Development of the Equitable Principles	16
2. Decline of Equitable Principles and Rise of Normativity	18
CHAPTER II: THE DEVELOPMENT OF THE CONCEPT OF EQUIDISTANCE/RELEVANT CIRCUMSTANCES	20
Section 1: Definition of the Concept	20
1. Equidistance	20
2. Relevant Circumstances	21
3. Equidistance/Relevant Circumstances	22
Section 2: Emergence of the Concept: The <i>Greenland/Jan Mayen</i> case (1993)	23

1. Dispute	23
2. Consideration of Equidistance/Relevant Circumstances	23
Section 3: Consolidation of the Concept	25
1. The <i>Eritrea/Yemen</i> case (1999)	25
1.1 Dispute	25
1.2 Consideration of Equidistance/Relevant Circumstances	25
2. The <i>Qatar/ Bahrain</i> case (2001)	26
2.1 Dispute	26
2.2 Consideration of Equidistance/Relevant Circumstances	27
3. The <i>Cameroon/Nigeria</i> case (2002)	28
3.1 Dispute	28
3.2 Consideration of Equidistance/Relevant Circumstances	28
4. The <i>Barbados/Trinidad and Tobago</i> case (2006)	30
4.1 Dispute	30
4.2 Consideration of Equidistance/Relevant Circumstances	30
5. The <i>Guyana/Suriname</i> case (2007)	31
5.1 Dispute	31
5.2 Consideration of Equidistance/Relevant Circumstances	32
6. The <i>Nicaragua/Honduras</i> case (2007)	33
6.1 Dispute	33
6.2 Exception to the principle of Equidistance/Relevant Circumstances	
: A Bisector Line	34
7. The <i>Romania/Ukraine</i> case (2009)	36
7.1 Dispute	36
7.2 Consideration of Equidistance/Relevant Circumstances	36

Part II

THE ESTABLISHMENT OF THE CONCEPT OF EQUIDISTANCE/RELEVANT CIRCUMSTANCES AS THE PRIMARY RULE OF MARITIME DELIMITATION 39

CHAPTER III: THE RATIONALE FOR ESTABLISHING EQUIDISTANCE/RELEVANT CIRCUMSTANCES AS THE PRIMARY RULE OF MARITIME DELIMITATION 39

Section 1: Consistent and Uniform Approach to Maritime Delimitation	39
1. Analysis of Case Law	39

1.1	Institutional and Legal Considerations	40
1.2	Geographical Considerations	43
2.	Analysis of State Practice	44
2.1	State Practice	44
2.2	Opinio Juris	46
Section 2:	Predictable Approach to Maritime Delimitation	47
1.	The Principle of Jurisprudence Constante	48
2.	The Predictability of the Equidistance Principle	49
3.	The Predictability of Relevant Circumstances	51
3.1	Geographical Factors	52
3.2	Non Geographical Factors	55
CHAPTER IV: THE CRITICAL ANALYSIS OF THE DEVELOPMENT OF THE EQUIDISTANCE/RELEVANT CIRCUMSTANCES CONCEPT		60
Section 1:	Downsides	60
1.	Legal Considerations	60
2.	Technical Considerations: Coastal Lengths and Proportionality	63
3.	Political and Socio-Economic Considerations	65
Section 2:	Recommendations	67
1.	The Necessary Judicial Policy	67
2.	Essential Commitment of the Community of States	69
CONCLUSION		71
APPENDIX I: Summary Chart of Case Law applying the Equidistance/Relevant Circumstances Approach		74
APPENDIX II: Maritime Boundary Agreements in Chronological Order by Date of Signature		75
APPENDIX III: Existing and Future Maritime Boundaries considering Economic and Environmental Factors		84
APPENDIX IV: Statement by the President of the ICJ before the 6th Committee of the UN General Assembly (Legal Committee)		86
BIBLIOGRAPHY		90

TABLE OF FIGURES (between pages 38 and 39)

Figure 1: Strict Median Line between Opposite Coasts

Figure 2: Strict Equidistance Line between Adjacent Coasts

Figure 3: Simplified Equidistance between Opposite Coasts

Figure 4: Modified Equidistance Line (giving full effect to all islands)

Figure 5: Thalweg Line

Figure 6: Method de Lissage (Perpendicular, Bisector, Radial lines)

Figure 7: The *North Sea Continental Shelf* case (1969)

Figure 8: International Maritime Boundary between Greenland and Jan Mayen

Figure 9: International Boundary Line between Eritrea and Yemen

Figure 10: International Maritime Boundary between Qatar and Bahrain

Figure 11: International Maritime Boundary between Cameroon and Nigeria

Figure 12: International Maritime Boundary between Barbados and Trinidad and
Tobago

Figure 13: International Maritime Boundary between Guyana and Suriname

Figure 14: International Maritime Boundary between Nicaragua and Honduras

Figure 15: International Maritime Boundary between Romania and Ukraine

Figure 16: Reasonable Proportionality

Figure 17: Method of Determination of Relevant Coastlines (General Direction of
the Coasts)

INTRODUCTION

Following the period of freedom regime of the sea, founded on the doctrine of *Mare Liberum*¹, the half of the twentieth century was marked by a dramatic change in the use and the role of the sea. The sea became an important means of military strategy between maritime powers in a post world war context, an increasing source of economic and technologic development and was consistently subject to national sovereignty claims, in particular by new independent States. Therefore, these new phenomena gave rise to growing claims over maritime spaces. It is valuable in this regard to quote the former President Harry S. Truman of the United States of America, who proclaimed on 28 September 1945 that the United States Government

“regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control”².

The Truman proclamation was followed by the Santiago Declaration of 1952 when several Latin America States claimed a 200-miles maritime zone³. In the face of States willing to assert their political sovereignty and legal rights over maritime spaces adjacent or far from their coasts, there was a dire need of an international political consensus and legal regime over the sea that would be able to provide a peaceful settlement of claims on maritime boundaries. Consequently, different attempts at codification of the customary law of maritime boundary delimitation and various disputes on overlapping maritime boundaries gave rise to a progressive development of the law of maritime delimitation. The legal body of maritime

¹ The doctrine of *Mare Liberum* was developed in the 17th century by a Dutch scholar Grotius and meant that the open sea beyond a specific area adjacent to the territory of a State cannot be enclosed and subject to the national sovereignty of any state. It is opposed to the Doctrine of *Mare Clausum*, developed by an English Scholar John Seldom. See Churchill, R.R. & Lowe, A.V., *The Law of the Sea*, 3rd Ed. (Manchester: Manchester University Press, 1999) at p. 2.

²United Nations, *The Law of the Sea: Definition of the Continental Shelf: An examination of the UN Convention on the law of the Sea*, (New York: DOALOS, 1993) at p. 1.

³ Francisco O. Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Cambridge: Cambridge University Press, 1989) at p.5.

delimitation is composed of various sources of law, such as the customary international law developed during the 19th century, the 1958 Geneva Conventions starting from the 1930 Hague Conference, the 1982 United Nations Convention on the Law of the Sea, numerous bilateral and multilateral delimitation agreements and various international tribunal decisions stemming from disputes on overlapping titles⁴.

The legal notion of maritime delimitation has been developed over time, in which process the case-law has played an undeniably greater role. In the *North Continental Shelf* case (1969), the International Court of Justice (ICJ) defined maritime delimitation as “a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area”⁵. In other words, the ICJ defined maritime delimitation as the process to determine the maritime space where a State is entitled to assert its sovereignty in accordance with international law in case of competing overlapping titles through the process of negotiation or adjudication. It is a political, legal and technical process involving at least two States as confirmed by the ICJ during the Gulf of Maine case where it declared that “No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States.”⁶ Thus, maritime delimitation is a process mainly related to the determination

⁴ S.P., Jagota, *Maritime Boundary* (Dordrecht: Nijhoff, 1985) at p. 6.

⁵ The *North Sea Continental Shelf* cases (German Federal Republic/Denmark, and German Federal Republic/Netherlands) 1969 ICJ REP, at p. 18. The text of the decision is available on the Court’s website. < <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=cs2&case=52&k=cc>> (25 May 2009).

⁶ Case concerning the Delimitation of the Maritime Boundary in The area of the Gulf of Maine (*Canada v. United States of America*) 1984 ICJ REP., para 112. The text of the decision is available on the Court’s website. < <http://www.icj-ijc.org/docket/index.php?p1=3&p2=3&code=cigm&case=67&k>> (25 May 2009)

of an international maritime boundary normally involving the exclusive economic zone and the continental shelf.⁷

The legal concept of the law of maritime delimitation and specifically the legal principles of delimitation of overlapping titles developed by treaty and jurisprudential sources will be the main focus of this study. In the realm of the law of maritime delimitation stand various principles developed over time to cope with disputes on overlapping titles. The principles stemming from customary law are mainly referred to as equidistance and thalweg line. Under treaty law, i.e. the 1958 Geneva Conventions and the 1982 United Nations Convention on the Law of the Sea (UNCLOS), two main sets of principles have been developed, respectively the Agreement/Equidistance/Special circumstances and the Agreement/Equitable solution. Under case-law, the ICJ and various arbitral tribunals have developed different delimitation principles, mainly referred to as equitable principles, equitable criteria or relevant circumstances and Equidistance/Relevant circumstances.

While contributing to the progressive development of the law of maritime delimitation, this variety of legal principles might be analyzed as the pale reflection of the ineffectiveness of the law of maritime delimitation to deal in a consistent manner with maritime delimitation issues. This ineffectiveness could be attributed to the weaknesses of the functional mechanism peculiar to treaty laws as well as the incapacity of treaty law and case-law to accommodate appropriately the various, complex, and until now, unknown geography and geology of maritime spaces. Today, many analysts consider the law of maritime delimitation as a set of ambiguous rules swinging between “fact-orientedness” and “rule-orientedness”⁸. In this regard, the view of Jonathan I. Charney is worth quoting:

⁷Yoshifumi, Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, (Oxford: Hart Publishing, 2006) at p. 7.

⁸ Robert, Kolb, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries*, Introduction. (The Hague: Nijhoff, 2003) at p. xxiv.

This new language spoke in terms of ‘equitable solutions’, dropping all references to equidistance and special circumstances. A reference to international law provides an ambiguous connection to the old language and customary international law. Litigation and arbitration have produced equally indeterminate results with respects to the operative norm. [...] It would appear that ... no normative principle of international law has developed that would mandate the specific location of any maritime boundary line⁹.

There is a dire need of a more consistent approach in the law of maritime delimitation in order to reconcile this specific law to the basic qualities of “the legal norm” combining *lex generalis* and *lex specialis*, objectivity, predictability and harmony. This need of normativity and consistency in the law of maritime delimitation become more and more a deep concern as expressed by the arbitral tribunal in the *Barbados/Trinidad* case:

The process of achieving an equitable result is thus constrained by legal principle, in particular in respect of the factors that may be taken into account. It is furthermore necessary that the delimitation be consistent with legal principles as established in decided cases, in order that states in other disputes be assisted in the negotiations in search of an equitable solution that are required by articles 74 and 83 of the Convention¹⁰.

The “legal principles as established in decided cases” referred to in the above quoted decision seem more and more crystallized on the concept of Equidistance/Relevant Circumstances. This legal principle of maritime delimitation belongs to the recent trends of tribunal decisions over maritime delimitations since the late 1990’s. It has

⁹ Gerald H., Blake (Ed.), 8th ed., *Maritime Boundaries: World Boundaries (Vol. V)*, (London: World Boundaries Series, 1997) at p. 2 & 9.

¹⁰ Case concerning the Arbitral Award (*Barbados v. Trinidad and Tobago*), Decision of the Arbitral Tribunal, 2006, para 243. The text of the decision is available on the Court’s website. http://www.pca-cpa.org/showpage.asp?pag_id=1152 (20 May 2009).

been adopted in the *Eritrea/Yemen* (1999), *Qatar/Bahrain* (2001), *Cameroon/Nigeria* (2002), *Barbados/Trinidad and Tobago* (2006), *Guyana/Suriname* (2007) and *Romania/Ukraine* (2009) cases.

Consequently, the purpose of this thesis is to determine whether the concept of Equidistance/Relevant Circumstances can be established as the primary rule in the law of maritime delimitation in order to satisfy this need of consistency and predictability. The need of a rational argumentation requires a dissertation structure of two main parts.

Part One traces the historical development of the concept of Equidistance/Relevant Circumstances in the law of maritime delimitation. In this context, the respective contributions of treaty law and case law will be analyzed for the emergence and promotion of this principle.

Part Two focuses on the rationale for establishing the Equidistance/Relevant Circumstances principle as the primary rule of maritime delimitation. For this purpose, it is important to examine under case law and State practices, the normativity, certainty, and predictability as they apply to the legal concept of Equidistance/Relevant Circumstances. On that point, however, the probable downsides inherent to the Equidistance/Relevant circumstances concept like any legal principle will be collated and pertinent recommendations will be made.

The methodology applied to reach the goal of this study is a combined approach of quantitative and qualitative research. The objective of the quantitative research is to assess roughly on the basis of aggregated data the degree of uniformity characterizing the method of Equidistance/Relevant Circumstances in State practice. As to the qualitative research, the aim is to analyze the entire framework surrounding the concept of Equidistance/Relevant Circumstances, specifically the historical and legal aspects, its impact on the law of maritime delimitation and the process of its conversion into a consistent and objective norm.

Part I

THE DEVELOPMENT OF THE CONCEPT OF EQUIDISTANCE/RELEVANT CIRCUMSTANCES IN THE LAW OF MARITIME DELIMITATION

CHAPTER I: PRELIMINARY CONSIDERATIONS

Section 1: Pre-conventional State Practice of Maritime Delimitation

The delimitation of maritime boundaries was entrenched in the practice of states a very long time ago before the adoption of international conventions dealing with this process. It dated back from 11th century with a specific emphasis in the 15th century with the *Treaty of Tordesillas* (1494)¹¹. However, in the scope of this study, the practices from the 19th century will only be considered.

1. Median Line

Numerous systems were used in the 19th and early 20th centuries in the state practices for boundary delimitation, in particular, to the territorial sea, namely the median-line, the thalweg line, the perpendicular line and the prolongation of the land boundary¹². However, the median-line seemed to play a main role in the delimitation methods applied by states (see Figure 1). In the history of maritime delimitation, numerous examples of boundary delimitations based on the median-line are found. For instance, the 1924 Convention between Finland and Norway on the boundary between the province of Finmark and the Territory of Petsamo set up in Article III that:

¹¹ A Treaty between Portugal and Spain pursuant to a delimitation line over the Atlantic ocean running from pole to pole, 370 miles westward of the Cape Verde. The treaty materialized by a bull signed by Pope Alexander VI granted the eastern portion to Portugal and the western one to Spain. See Gerard, Tanja, *The Legal Determination of International Maritime Boundaries: The Progressive Development of Continental Shelf, EFZ and EEZ Law* (Deventer: Kluwer, 1990) at pp. 2-3.

¹² *Supra*, footnote 7 at pp. 20-32.

The dividing line between the territorial waters of the two Contracting States shall be situated at an equal distance from the coasts of the two States, measured from the nearest point on the mainland, island, islets or reefs which is [sic] not perpetually submerged¹³.

In addition, the median-line was used in the peace treaty of 17 September 1809 between Russia and Sweden relative to the Gulf of Bothnia and the Aaland Sea¹⁴. Another example of application of the median-line was to be found in 1925 with the delimitation of the maritime boundary between the State of Maine and New Brunswick by the United States and Canada¹⁵. In the State practice of maritime delimitation, the median line system was often combined with the thalweg line.

2. Thalweg Line

The thalweg line is a concept of river law, defined under customary law either as “the mid-line of the main navigation channel” or as the deepest water line (see Figure 5)¹⁶. The purpose of the thalweg line in matters of delimitation is to ensure an equal share of the navigable channel between two sovereign States taking into account the navigation interests. As compared to the median-line, the thalweg line as single rule was less used for maritime delimitation in State practice; one example is the Alaska Boundary Arbitration between Great Britain and the United States in 1903¹⁷.

However, this delimitation method becomes a subject of interest under customary law where it is sometimes combined with the median-line in order to achieve an

¹³ (1924-25) 30 League of Nations Treaty Series, quoted in *Ibid.*, at p. 7.

¹⁴ *Supra*, footnote 11 at p. 4

¹⁵ Sang-Myon Rhee, “Sea Boundary Delimitation between States before World War II” (1982) 76 *AJIL* 560 cited in *Ibid.*, at p. 4.

¹⁶ Nuno M., Antunes, *Towards the Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Leiden: Nijhoff, 2003) at p.170.

¹⁷ 15 United Nations, *Reports of International Arbitral Awards*, 481-540, quoted in *Supra*, footnote 7 at p. 29-30.

equitable result in matters of delimitation. This is illustrated in the Treaty between Great Britain and the USA adopted on 15 June 1846, which settled that the Oregon boundary passed “through the middle of [the channel which separates the continent from Vancouver’s Island, i.e. the thalweg line] and of Fuca’s Strait, to the Pacific Ocean [the median line]”¹⁸. Several other delimitation agreements adopted the combined rule of the median/thalweg line, in particular in the early 20th century. It is the case for the 1912 Declaration between France and Germany pursuant to the boundary delimitation between the French colonies of Dahomey and the Sudan, and the German possessions of Togo, which used the thalweg line from one point of the river boundary up to the a point in the lagoon combined with a median line for the rest of the frontier¹⁹.

The combined rule of median/thalweg line under customary law of maritime delimitation is worth analyzing because it laid down the basic fundamentals of the Equidistance/Special Circumstances principle, which, shares some similarities with the Equidistance/Relevant Circumstances concept. Under customary law, the median line was widely adopted insofar as it was able to provide an equal share of overlapping river or sea frontiers between two sovereign States. However, due to the peculiarities of the coastal geography and other interests related to navigation or historic rights, it was already admitted under customary law that a rigid application of the median line could not ensure an equitable delimitation. Consequently, the combined rule median/thalweg line was, at that time, perceived where necessary as a solution to overcome those difficulties. These delimitation principles mainly based on the median line, the thalweg and the median/thalweg line

¹⁸ Treaty between Great Britain and the USA for the Settlement of the Oregon Boundary, 15 June 1846, 34 BFSP (1846), 14, quoted in Faraj A., Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Oxford: Clarendon Press, 1993) at p.34.

¹⁹ *Ibid.*, at pp. 34-35

were constantly, sometimes in other forms, referred to during the codification process of the customary international law of maritime delimitation.

Section 2: Codification of Maritime Delimitation

The first attempt at codification of the customary law of maritime delimitation started with the 1930 Hague Conference under the auspices of the League of Nations. The Hague Conference failed to reach its purpose and the following World War II period was not an appropriate period to deal with issues of maritime delimitation. In the aftermath of World War II, the creation of the United Nations Organization (UN) and the multiple individual claims of States over maritime spaces, such as the *Truman Proclamation* and the *Santiago Declaration* raised the need of re-starting the process of codification of the law of maritime delimitation²⁰. The adoption of the 1958 Geneva Conventions which followed was a successful initiative, at least to some extent.

1. The 1958 Geneva Conventions: Equidistance/Special Circumstances

The First United Nations Conference on the Law of the Seas, which was held in Geneva under the auspices of the United Nations from February 24 to April 27, 1958 adopted four important conventions²¹. For the purpose of this study, the focus will be on the Convention on the Territorial Sea and Contiguous Zone and the Convention on the Continental Shelf. Article 12 of the Convention on the Territorial Sea and Contiguous Zone and article 6 of the Convention on the Continental Shelf are pursuant to the delimitation respectively of the territorial sea and the continental shelf. Both read as follows:

²⁰ *Supra*, footnote 16 at p. 15

²¹ The Convention on the Territorial Sea and Contiguous Zone ; the Convention on the High Seas; the Convention on the Continental Shelf and the Convention on Fishing and the Conservation of the Living Resources of the High Seas.

Article 12, Para 1: Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision (see Figure 1).

And

Article 6, Para 1: Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to 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 (*applies mutatis mutandi to the delimitation of two adjacent coasts pursuant to Para 2*). (See Figure 2).

The drafting of both articles calls for an analysis. In the codification process of the law of delimitation of the territorial sea and the continental shelf, the 1958 Geneva Conventions adopted a triple rule “Agreement/Equidistance/Special Circumstances”²².

In other words, understood as the process of determination of the jurisdictional ambit of two opposite or adjacent States on overlapping titles, any maritime delimitation shall be dealt with by inter-states negotiation and not unilaterally. In the absence of agreement, the applicable rule is the Equidistance/Special Circumstances rule, which has been given different meanings. First, it has been interpreted as a combined rule, i.e., equidistance or median-line is the starting point of delimitation; then, it is corrected to take account of specific circumstances peculiar to the geographical area

²² This expression is borrowed from Tanaka in *Supra*, footnote 7 at p. 38

if its rigid application is likely to cause some distortions. The intention to link equidistance and special circumstances as a combined rule was already expressed in the debate of United Nations Conference during the drafting of the delimitation provision as explained by the delegate of the United Kingdom²³.

On the other hand, the Equidistance/Special Circumstances rule has been interpreted as well in the ILC work as two separate rules; with equidistance being the general principle and special circumstances the exception. Therefore, in this context, any special configuration of the coast constituting special circumstances is no longer perceived as a corrective element of the equidistance line but as an exception justifying recourse to another method of delimitation²⁴.

The 1958 Geneva Conventions failed to provide an authoritative definition of “special circumstances”. The interpretation of this expression is based on the *Travaux Préparatoires* of the conference. According thereto, special circumstances mainly referred to islands, exceptional coastal geography, navigable channels, fishery and special mineral exploitation rights, and historic title²⁵.

The Equidistance/Special Circumstances rule must not to be confused with the Equidistance/Relevant circumstances principle born in another context as will be seen later. However, it is a major step towards the emergence of the Equidistance/Relevant Circumstances principle, the core subject of this thesis. Under the 1958 Geneva Conventions, the principle of equidistance had been codified, therefore, consolidated into a strict treaty law. In that way, equidistance has become a legal reference in matters of delimitation. The second remark is that the special

²³ “The median-line would always provide the basis for delimitation. If both the States involved were satisfied with the boundary provided by the median-line, no further negotiation would be necessary; if a divergence from the median-line appeared to be indicated by special circumstances, another boundary could be established by negotiation, *but the median-line would serve as the starting point.*” See *UNCLOS I, Official Records*, vi. 92 (emphasis added), cited in *Ibid.*, at p. 42.

²⁴ *Yearbook of the ILC (YILC)*, 1952, Vol. II, p. 38, Commentary, para 4.

²⁵ *YILC* (1954), i.100; ii 158, cited in *Supra*, footnote 18 at p. 43

circumstances express the imperfection of the equidistance principle, which may need to be deviated in order to secure an equitable result. However, the results achieved under the Equidistance/Special Circumstances were strongly challenged under the 1982 UNCLOS.

2. The 1982 UNCLOS: Equidistance v. Equity

The failure of the 1958 Geneva Conventions and the 1960 UN Conference (UNCLOS II) to settle issues related to the breadth of the territorial sea and the fishery limits, and the emergence of new debates on the exploitation of the international seabed area prompted the United Nations to convene States Parties for a Third United Nations Conference on the Law of the Sea (UNCLOS III)²⁶.

From April 1978 to August 1981, UNCLOS III was the forum, specifically in the Negotiating Group 7 (NG7), of a complex debate for the drafting and adoption of the new conventional law of maritime delimitation. It is worth noting that the orientation of the debate in UNCLOS III was deeply influenced by the recent development of the law of maritime delimitation as fostered by various case law, in particular the *North Sea Continental Shelf* case²⁷, and by major advances in the technologic development, which progressively rendered possible the exploitation of seabed and ocean floor for scientific, economic and military purposes. The Equidistance/Relevant Circumstances principle emerging at that time under case

²⁶ UNCLOS III started its meetings in December 1973 and was opened for signature at Montego Bay (Jamaica) on 10 December 1982.

²⁷ In the *North Sea Continental Shelf* case (1969) the ICJ held that article 6 of the 1958 Convention on the Continental Shelf “did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance/special circumstances basis” and insisted that “delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles”. See the *North Sea Continental Shelf* case, *Supra*, footnote 5, para 89 and 91.

law²⁸, failed on two main aspects to be consolidated in the codification process under UNCLOS III.

In fact, the Equidistance principle codified under the 1958 Geneva Conventions was consolidated under UNCLOS III for the delimitation of the territorial sea (Article 15) but strongly challenged as far as the delimitation of the exclusive economic zone and the continental shelf were concerned. Article 74, Paragraph 1 of the 1982 UNCLOS pursuant to the delimitation of the exclusive economic zone between States with opposite or adjacent coasts, which applies *mutatis mutandi* to Article 83 related to the delimitation of the continental shelf reads as follows :

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

Articles 74 and 83 provide the norm of international law governing any process of maritime delimitation. This should be governed by an agreement between the parties concerned either directly or by means of international judicial authorities, on the basis of legal principles developed under treaty law and customary law in order to achieve an equitable boundary line.

These provisions may be, however, considered as two “empty” rules since they fail to provide any specific method of delimitation of the exclusive economic zone and the continental shelf. The reference to Article 38 of the ICJ Statute is also helpless insofar as this provision fails to specify any precise legal approach of maritime

²⁸ Arbitration between the United Kingdom of Great Britain and Northern Island and The French Republic on the Delimitation of the Continental Shelf, Decision of the Court of Arbitration, 1977, RIAA, Vol. XVIII, pp. 3 et seq.

delimitation but allows for consideration of a broad range of applicable international laws²⁹.

The general wording of articles 74 and 83 of the 1982 UNCLOS was expressly set out during the conclusion of the debates in the NG7 in order to reach a consensus between the proponents of the Equidistance/Special circumstances, on the one hand, and the proponents of the equity/relevant circumstances on the other hand³⁰. Twenty two States (22) expressed themselves at the end of the debate in favour of the Equidistance/Special circumstances, and their proposal of delimitation under Articles 74 and 83, Para 1 reads as follows:

The delimitation of the Exclusive Economic Zone/Continental Shelf between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified³¹.

In contrast, the pro- equity/relevant circumstances³² group composed of twenty nine (29) States made the following suggestion:

²⁹ Under Article 38 of its Statute, the ICJ is directed to apply as international law the following: international treaties, international customs, general principles of law, judicial decisions and scholar articles.

³⁰ Satya N., Nandan & Shabtai, Rosenne (Ed.), *UN Convention on the Law of the Sea 1982: A commentary (Vol. II)*, (Dordrecht: Nijhoff, 1993) at p. 139, para 15.7.

³¹ UN Doc NG7/2/Rev.2, 28 March 1980, members of the NG7/2 (*Pro-equidistance principle*) group were: Bahamas, Barbados, Canada, Cape Verde, Chile, Columbia, Cyprus, Democratic Yemen, Denmark, Gambia, Greece, Guinea-Bissau, Guyana, Italy, Japan, Kuwait, Malta, Norway, Portugal Spain, Sweden, United Arab Emirates, United Kingdom, Yugoslavia. See R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, Vol. IX 5(Oceana: New York, 1986) at p. 394

³² The content of the concept will be detailed later.

The delimitation of the exclusive economic zone/continental shelf 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 solution³³.

Broadly speaking, a schematization of the debate could be featured as follows: on the one hand (1) agreement and (2) special or relevant circumstances as factors to be included in any delimitation process were the points of convergence between both groups. On the other hand, equidistance and equitable principles were the point of divergence. However, it is worth noting that at the conclusion of the debate, a dissension appeared between both opposite groups about the qualification of circumstances. The pro-equity group advocated for the relevant circumstances while the pro-equidistance group sponsored the special circumstances, as noted in the report on consultation on delimitation between delegations of two opposite groups³⁴. Thus, challenged both for diverse reasons on what constituted the two pillars of the concept, i.e. equidistance on the one hand, and the relevant circumstances on the other hand, the concept of Equidistance/Relevant Circumstances was unable to emerge and be consolidated under UNCLOS III.

³³ UN Doc NG7/10/Rev.1, 25 March 1980, Members of the NG7/10 (*Pro-equitable principles*) group were Algeria, Argentina, Bangladesh, Benin, Burundi, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Maldives, Mali, Mauritania, Morocco, Nicaragua, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syrian Arab Republic, Somalia, Turkey, Venezuela and Vietnam. See *Supra*, footnote 31 at p. 403.

³⁴ “The discussions on the other elements followed familiar lines, including questions as to the content of equitable principles, the role of the median line and the relationship between the elements. As to the reference to circumstances delegations from the NG7/10 Group [Pro-equidistance principle] preferred ‘relevant circumstances’ whereas the others [Pro-equitable principles Group] preferred ‘special circumstances’”. UN Doc DEL/2, 22 April 1981, *Report on consultations on delimitation held from 31 March to 15 April 1981 between delegations representing the groups of co-sponsors of Documents NG7/10 and NG7/2*. See *Ibid.*, at p. 473.

Section 3: The Development of the Case Law of Maritime Delimitation: From Equity to Normativity

In parallel with the codification process in the 1958 Geneva Conventions and the 1982 UNCLOS, the law of maritime delimitation was subject to a progressive development through litigation and arbitration. Both processes were at the same time independent and interrelated. The scope of this part is to provide a broad historical background of the evolution of the case law of maritime delimitation in order to better analyze in the following section the conditions, under which the Equidistance/Relevant Circumstances principle had emerged and developed.

1. Development of the Equitable Principles

The wide spectrum of case law on maritime delimitation ranges broadly speaking from equity to normativity. The notion of equity is a “constitutional principle”³⁵ of the law of maritime delimitation developed in the early cases of disputes on overlapping titles. At this point, it is important to know what the definition and the methodology of the legal concept of equity are.

The legal concept of equity in the law of maritime delimitation did not originate from any conventional law before the adoption of the 1982 UNCLOS. It was recognized for the first time as international customary rule in matters of continental shelf delimitation by the ICJ in the *North Sea Continental Shelf* case (see Figure 7) in respect of the *Truman Proclamation* (1945), which read as follows:

The United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another States, or is shared with an adjacent State, the boundary shall be

³⁵ *Supra*, footnote 8 at p. 41.

determined by the United States and the State concerned in accordance with equitable principles³⁶.

On the basis of the Truman proclamation considered in that way as customary rule, the Court set out the legal framework on which a delimitation process ought to be carried out. The first principle is “agreement” and the second is “equitable principles” as expressed in the decision of the ICJ:

[T]hose principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles³⁷.

More explicitly, “equitable principles” contains the idea of equity. The emphasis here is not the method of delimitation but the goal to secure justice in any delimitation process. In so doing, specific factors peculiar to circumstances of the case, otherwise called “equitable principles”, must be taken into account in the process of delimitation, specifically the principle of natural prolongation of the land territory (soil and subsoil), the principle of non encroachment of the territory of another State (soil, subsoil and coastal geography) and the principle of proportionality³⁸. In other words, equity bases any delimitation on the specific circumstances of the case. It is a case-by-case solution. The principle of equity had been confirmed in subsequent cases, for instance the *Continental Shelf* case between Tunisia and Libya, where the ICJ reaffirmed equity as a general principle of international law grafted onto customary law and not assimilable to a decision *ex aequo et bono*:

³⁶ Harry S., Truman, “Presidential Proclamation on the Continental Shelf (No 2667)” (speech, New York, September 28, 1945) < http://www3.law.nyu.edu/kingsburyb/fall01/intl_law/PROTECTED/unit3/intl_law2001_unit3_II.2,b_t_rumanproclam.htm (1 July 2009).

³⁷ *North Sea Continental Shelf* case, *Supra*, footnote 5 at para 85.

³⁸ *Ibid.*, at para 46-47.

Equity as a legal concept is a direct emanation of the idea of justice. [...] the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirement of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*³⁹.

The equitable approach of delimitation was subject to further development in the subsequent case law of maritime delimitation, specifically in the *Tunisia/Libya* case (1982), the *Gulf of Maine* case (1984), the *Libya/Malta* case (1985), the *Guinea/Guinea Bissau* case (1985) and *St Pierre and Miquelon* case (1992). This concept, which declined in the beginning of the 1990's, is not exempt from criticism as will be seen later.

2. Decline of Equitable Principles and Rise of Normativity

An analysis of the historical background of the development of the case law of maritime delimitation shows a progressive shift from equity to normativity in the subsequent cases adjudicated in the beginning of the 1990's. However, in reality, the milestone of the normativity principle in the case law of maritime delimitation had been set out from the *Anglo-French Continental shelf* case (1977) between France and United Kingdom, where the Court of Arbitration held that

The role of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles⁴⁰.

³⁹ The *Continental Shelf* case (*Tunisia v. Libyan Arab Jamahiriya*) 1982, ICJ REP at Para 71. The text of the decision is available on the Court website. < <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=tl&case=63&k=c4>> (1 June 2009)

⁴⁰ *Anglo-French Continental Shelf* case, *Supra*, footnote 28, para 70.

In this particular case, the Court of Arbitration applied to some areas to be delimited Article 6 of the 1958 Convention on the *Continental Shelf* case on the basis that this Convention grafted onto treaty law serves the purpose of equitable principles founded in customary law. Consequently, as stated by Tanaka, “The assimilation of Article 6 to customary law leads to an important consequence: the incorporation of the equidistance method into customary law”.⁴¹

More explicitly, the normative approach founded the law applicable to maritime delimitation on a set of codified rules contained either into the 1958 Geneva Conventions, into the 1982 UNCLOS or into precedent jurisdictional decisions. Normativity advocates equity of the rule and not equity of the particular case as for equitable principles. Consequently, as recognized by Tanaka⁴², the normativization process of maritime delimitation is mainly based on incorporation of a specific method of delimitation into customary law. This method as consolidated under treaty law is the equidistance principle, which has the advantage of certainty and predictability and can, therefore, be used to correct the inequity of the particular case.

Hence, the rise of normativity in the development of the case law of maritime delimitation has led to the drawing up of a specific principle of delimitation, recognized as the Equidistance/Relevant Circumstances. This approach has been reflected in the decisions of relevant cases, such as *Greenland/Jan Mayen* (1993), *Eritrea/Yemen* (1999), *Qatar/Bahrain* (2001), *Cameroon/Nigeria* (2002), *Barbados/Trinidad and Tobago* (2006), *Guyana/Suriname* (2007) and *Romania/Ukraine* (2009).

What characterizes specifically the concept of Equidistance/Relevant Circumstances?
How had it emerged and been developing in the law of maritime delimitation?

⁴¹ *Supra*, footnote 7 at p 63.

⁴² *Ibid.*, at p.63.

CHAPTER II: THE DEVELOPMENT OF THE CONCEPT OF EQUIDISTANCE/RELEVANT CIRCUMSTANCES

The scope of this part is to define the legal concept of Equidistance/Relevant Circumstances and analyze how it has emerged and evolved in the law of maritime delimitation.

Section 1: Definition of the Concept

The concept of Equidistance/Relevant Circumstances is the combination of two competing legal theories of the law of maritime delimitation: the theory of normativity founded in treaty law and the theory of equity founded in customary law. It is convenient for the purpose of clarity to define both concepts separately before determining the scope of their combination.

1. Equidistance

As already explained, normativity in the law of maritime delimitation is based on the principle of equidistance, defined under Article 6 of the 1958 Convention on the Continental Shelf and restated under Article 15 of the 1982 UNCLOS. It is defined as “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 the two States is measured”⁴³.

The geographical concept of equidistance must be distinguished from the political-legal concept. Geographically speaking, equidistance is a geometric line, consisting of a number of segments joining several points, which are drawn from the baselines at equal division between the coasts of two opposite or adjacent States (see Figures 1&2)⁴⁴. From a juridical and political point of view, equidistance is meant as the process of determining the maritime spatial ambit of the coastal State sovereignty

⁴³ Article 15, UNCLOS 1982.

⁴⁴ *Supra*, footnote 16 at p. 155.

and jurisdiction based on the concept of “closer proximity”⁴⁵. At this point, it is not necessary to delve into the debate of clarifying whether equidistance equates to the median-line since from a technical and juridical point of view both concepts are used interchangeably⁴⁶. However, in contrast to the standpoint developed in the first chapter, the Court in the *North Sea Continental Shelf* case (1969) had not recognized the equidistance as a rule of customary law⁴⁷.

2. Relevant Circumstances

The concept of relevant circumstances has originated from the case law of maritime delimitation. It is defined by the ICJ in the *Tunisia/Libya* case (1993) as: “all the circumstances of fact and law that a tribunal considered capable of having any kind of influence on the drawing of a line of delimitation”⁴⁸. More clearly, the concept of relevant circumstances is intimately linked to the principle of equity. The tribunal by drawing the line of delimitation is not bound by any stringent or codified legal norm but enjoys a wide margin of discretion to balance all the circumstances attached to the particular case in order to find an equitable result. Relevant circumstances are a manifestation of the *theory of unicum* whereby the context and requirements of the specific case has predominance over any rule of law in the determination of the line boundary⁴⁹. Numerous relevant circumstances linked to geographical and non geographical factors, as will be seen later, have been developed over time by international courts and tribunals.

⁴⁵ Antunes defines « Closer proximity » as a concept consisting of allocated to a State all points at sea that are closer to its coasts than to the coast of another State. *Ibid.*, at p. 154; 205.

⁴⁶ United Nations, *Handbook on the Delimitation of Maritime Boundaries* (New York: DOALOS, 2000) at p. 47.

⁴⁷ *North Sea Continental Shelf* case, *Supra*, footnote 5, Para. 81.

⁴⁸ *Supra*, footnote 8 at p. 460.

⁴⁹ *Ibid.*, at p. 250.

3. Equidistance/Relevant Circumstances

This is a legal approach of maritime delimitation developed by international courts and tribunals from the *Greenland/Jan Mayen* case (1993) by assimilation of treaty law principles to customary law (Equidistance/Special Circumstances = Equidistance/Relevant Circumstances) in order to achieve an equitable result⁵⁰. This method of delimitation is based on two steps so clearly defined by the Tribunal in the *Barbados/Trinidad and Tobago* case (2006) that it needs to be entirely quoted:

The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case-specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result. This approach is usually referred to as the ‘equidistance/relevant circumstances’ principle. Certainty is thus combined with the need for an equitable result⁵¹.

So defined, in what context has this concept emerged and how has it been consolidated?

⁵⁰ Case concerning the Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark v. Norway*) 1993 ICJ REP. The text of the decision is available on the Court’s website. <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=gjm&case=78&k=e0>> (15 June 2009).

⁵¹ *Barbados/Trinidad and Tobago* case, *Supra*, footnote 10, Para. 242.

Section 2: Emergence of the Concept: The *Greenland/Jan Mayen* case (1993)

1. Dispute

On 16 August 1988, Denmark requested the ICJ to draw a coincident line of delimitation for the fishery zone (FZ) and the continental shelf between Greenland (Denmark) and Jan Mayen (Norway). For the delimitation of the continental shelf, the court applied specifically article 6 of the 1958 Convention on the Continental Shelf and customary law for the FZ, which were not codified under the 1958 Geneva Conventions.

2. Consideration of Equidistance/Relevant circumstances

The choice of an equidistance line to delimit the continental shelf between both areas is justified by two factors. First, article 6 of the 1958 Convention requires application of the Equidistance/Special circumstances rule. Secondly, the court considered article 6 as a particular expression of the customary law, which in circumstances of opposite coasts required a median-line (*Anglo-French Continental Shelf* case)⁵². Therefore, the court held that:

In respect of the continental Shelf boundary in the present case, even if it were appropriate to apply, not article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether ‘special circumstances’ require any adjustment or shifting of the line⁵³.

The court decided to apply the customary law of the EEZ to the delimitation of the FZ. Therefore, by reference to the jurisprudence of the *Gulf of Maine* case related to the delimitation of a single maritime boundary in the context of opposite coasts, the court found necessary to start the process of delimitation of the FZ by a provisional

⁵² *Anglo-French Continental Shelf* case, *Supra*, footnote 28, Para. 87.

⁵³ *Greenland/Jan Mayen* case, *Supra*, footnote 50, Para 51.

median line. Then, the Court considered if there are factors calling for an adjustment of this median line: special circumstances for the continental shelf and relevant circumstances for the FZ; the aim in each situation being to correct the disproportionate effect of the median line in order to achieve an equitable result. Therefore, the provisional median line is shifted eastward to take into account relevant circumstances constituted by the disparity between the lengths of relevant coasts, and more importantly the need to ensure an equitable access to fishery resources for Denmark (Greenland) as well, prejudiced by the initial line (see Figure 8):

In the light of this case-law [*Gulf of Maine* case], the Court has to consider whether any shifting or adjustment of the median-line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned⁵⁴.

In so doing, the Court assimilated special circumstances based on treaty law to relevant circumstances grafted onto customary law. This assimilation led for the first time, as highlighted by Tanaka⁵⁵, to the adoption of Equidistance/Relevant Circumstances as a customary law concept⁵⁶. Secondly, it is the first time that relevant economic factors, understood in the present case as access to fisheries, is brought under the scope of Equidistance/Relevant Circumstances.

⁵⁴ *Ibid.*, at Para 75.

⁵⁵ *Supra*, footnote 7 at p. 98.

⁵⁶ Here, customary law should be apprehended in the meaning of judge-made law and not of the conventional definition requiring *opinio juris* and uniform State practice. See *Supra*, footnote 1 at p. 185.

Section 3: Consolidation of the Concept

1. The *Eritrea/Yemen* case (1999)

1.1 Dispute

Under the Arbitration Agreement of 3 October 1996 between Yemen and Eritrea, the Permanent Court of Arbitration (PCA) was requested to solve a territorial sovereignty dispute and to draw a line of delimitation of the maritime boundary between the two countries. It was the first time that the 1982 UNCLOS was applicable to a dispute of maritime delimitation. Undeniably, the applicable law were article 15 of UNCLOS related to the delimitation of the territorial sea, and articles 74 and 83 pursuant to the delimitation of the EEZ and the continental shelf. However, in the determination of the applicable law, the tribunal did not omit to make reference to the existing jurisprudence⁵⁷.

1.2 Consideration of Equidistance/Relevant Circumstances

After careful analysis, the tribunal decided to draw a single maritime boundary for the EEZ and the continental shelf. Therefore, from the northern to the southern part of the area to be delimited, the tribunal applied a provisional equidistance line by reference to the general equity of the median line between opposite coasts as set out under the *North Sea Continental shelf* case (see Figure 9). This, as well, provided an equitable solution under articles 74 and 83 of the 1982 UNCLOS. This view of the tribunal is worth citing:

The Tribunal has decided, after careful consideration of all the cogent and skilful arguments put before them by both parties, that the international boundary shall be a single all-purpose boundary which is a median line and that it should, as far as practicable, be a median line between the opposite mainland coastlines. This solution

⁵⁷ Case concerning the Arbitral Award (*Eritrea v. Yemen*), Decision of the Arbitral Tribunal concerning the second stage of Proceedings (Maritime Delimitation), 1999, para 1-6. The text of the decision is available on the Court's website. <http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF> (25 June 2009).

is not only in accord with practice and precedent in the like situations but also one that is already familiar to both parties⁵⁸.

The equidistance line was displaced westerly to avoid the Yemen's Zugar-Hahnish islands group considered by the tribunal as relevant circumstances⁵⁹. Here, the tribunal referred to the *Anglo-French Continental shelf* case, considering the group of islands as Special/Relevant circumstances. The other arguments raised by the parties concerning access to fisheries and hydrocarbon resources and security issues were considered as relevant factors by the tribunal but not sufficiently strong to justify a departure from the equidistance line.

In summary, the *Eritrea/Yemen* case, has re-affirmed the applicability of the equidistance principle between facing coasts and for the delimitation of a single all-purpose boundary between the EEZ and the continental shelf either under customary law or treaty law. This represents a step towards the consolidation of the Equidistance/Relevant Circumstances concept in the normative process of the law of maritime delimitation. Furthermore, the present case has stressed the importance of geographical factors as relevant circumstances in the law of maritime delimitation.

2. The *Qatar/ Bahrain* case (2001)

2.1 Dispute

The present dispute is another important case in the development of the legal concept of Equidistance/Relevant circumstances. On 8 July 1991, Qatar filed a claim against Bahrain before the ICJ over territorial sovereignty issues and requested the court to draw the course of a single maritime boundary concerning the EEZ and the continental shelf⁶⁰. The applicable law to the present case was customary law since

⁵⁸ *Ibid.*, para 132.

⁵⁹ “The tribunal decided to continue its line as a mainland coastal line until the presence of Yemen's Zugar-Ahnish groups where it displaced that line to the west and return further south, where there were no median islands, to simple equidistance between the principal coasts [...]. See *Ibid.*, para 123.

⁶⁰ Case concerning the Maritime Delimitation and the Territorial Questions between Qatar and Bahrain (*Qatar/Bahrain*) 2001 ICJ REP, para 1. The text of the decision is available on the Court's

none of the two countries were parties to the 1958 Geneva Conventions and Bahrain has ratified the 1982 UNCLOS but not Qatar. However, considering Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone and Article 15 of the 1982 UNCLOS relating to the delimitation of the territorial sea as part of customary law, the court applied the principle of Equidistance/Special circumstances to delimit the territorial sea of both countries in the southern part (see Figure 10)⁶¹

2.2 Consideration of Equidistance/Relevant Circumstances

For the delimitation of a single maritime boundary in the northern sector, the court retained the distance criteria (200 M) as common to the EEZ and the continental shelf referring to the Libya/Malta case (1985).

Like the approach taken in the *Greenland/Jan Mayen* case, the court drew first a provisional equidistance line and analyzed if there are some relevant circumstances to consider.

Among all the claims raised by the parties, the court considered only as relevant the Fasht al Jarim promontory, but if given full effect, this would cause an extreme deviation of the equidistance and would provide an inequitable result. Therefore, contrary to the approach taken in the previous cases, the equidistance line had not been displaced (see Figure 10). The decision read as follows:

The only noticeable element is Fasht al Jarim as a remote projection of Bahrein's coastline in the Gulf area, which, if given full effect, would "distort the boundary and have disproportionate effects... In the circumstances of the case considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line in the northern sector"⁶².

website. <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=qb&case=87&k=61> (27 June 2009)

⁶¹ *Ibid.*, para 175-176.

⁶² *Ibid.*, para 247-248.

In short, the present case is a step towards the development of the concept of Equidistance/Relevant Circumstances. It is the first time that this concept was applied to a geographical context of adjacent coasts. Furthermore, this case reaffirms the importance of geographical criteria in the consideration of relevant circumstances.

3. The *Cameroon/Nigeria* case (2002)

3.1 Dispute

On 28 March 1994, Cameroon instituted proceedings against Nigeria before the ICJ for a territorial dispute and requested at the same time the drawing of the maritime border line between the two States. As both countries were parties to the 1982 UNCLOS, the applicable law was Articles 74 and 83 related to the delimitation of the EEZ and the continental shelf. However, the court also made reference to equitable principles in the judgment. Concerning the delimitation of the territorial sea, the court based its judgment on the historical and political agreements formerly established between both States⁶³.

3.2 Consideration of Equidistance/Relevant Circumstances

As for the drawing of a single line of delimitation of the EEZ and the continental shelf, the court decided to settle a provisional equidistance line at the first stage of delimitation between the estuaries of *Akwayafe* and *Cross Rivers* (see Figure 11). The court held equidistance as equitable solution provided under articles 74 and 83 of the 1982 UNCLOS and also by reference to the distance criteria of delimitation for a single maritime boundary (*Libya/Malta* case) and the appropriateness of equidistance for adjacent coasts as decided under the *Qatar/Bahrain* case.

⁶³ Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria), 2002 ICJ REP. The text of the decision is available on the Court's website. <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=cn&case=94&k=74> (30 June 2009)

The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result”⁶⁴.

All the circumstances presented by the parties as may be relevant were dismissed by the Court, which found them not strong enough to justify an adjustment of the equidistance line, analyzed as providing an equitable result. Hence, as for the *Qatar/Bahrain* case the court maintained the equidistance line along the single maritime boundary⁶⁵.

In summary, two observations deserve to be made as to the contribution of the present case to the consolidation of the concept of Equidistance/Relevant Circumstances. First, the validity of the equidistance line between adjacent coasts, initiated since the *Qatar/Bahrain* case, is now established under the present dispute. Moreover, this case comes to consolidate the concept of Equidistance/Relevant Circumstances as a valid method of delimitation to achieve an equitable solution under the 1982 UNCLOS.

⁶⁴ *Ibid.*, para 288.

⁶⁵ These circumstances were the concavity of the Gulf of Guinea and Cameroon coastline, the *Boko Island*, the proportionality of coastlines and the oil concessions of the parties, para 305-306.

4. The *Barbados/Trinidad and Tobago* case (2006)

4.1 Dispute

On 16 February 2004, Barbados instituted proceedings against Trinidad and Tobago by a notice of arbitration for the delimitation of the overlapping EEZ and continental shelf. The applicable law in the present case was Articles 74 and 83 of the 1982 UNCLOS pursuant to the delimitation of the EEZ and the continental shelf; reference was made to the precedent jurisprudence in the matter as well. The tribunal decided to draw a single line of delimitation and based the choice of its course mainly on numerous objective criteria developed in precedent cases, such as the distance criteria (*Libya/Malta* case), the configuration of the coasts, the non-encroachment and the proportionality principles (*North Sea Continental Shelf* case)⁶⁶.

4.2 Consideration of Equidistance/Relevant Circumstances

Having considered these basic criteria of delimitation, the tribunal decided to draw, as a starting point, an equidistance line in the short middle and western segments of the boundary, consistent with the requirement of an equitable solution as embodied in Articles 74 and 83 of the 1982 UNCLOS⁶⁷. It is worth noting that the tribunal maintained in the western segment the equidistant line, considering the claims over fishery resources raised by Barbados as not sufficient enough to justify the deviation of the line boundary following the *Gulf of Maine* case (see Figure 12)⁶⁸.

However, the tribunal held in its dispositive a joint exploitation of fishery resources between both countries, consistent with the *Eritrea/Yemen* case and article 63(1) of UNCLOS.

The equidistant line was, then, deflected eastwards in order to take into account the relevant circumstances as considered by the tribunal. Geographical factors were more

⁶⁶ *Barbados/Trinidad and Tobago* case, *Supra*, footnote 10, para 231-241.

⁶⁷ *Ibid.*, para 231-241.

⁶⁸ *Ibid.*, para 266-271.

considered as relevant to justify the deviation of the equidistant line. These are the coastal configuration to avoid any cut-off effect⁶⁹, the proportionality of relevant coastlines to ensure the equity of the delimitation line⁷⁰ but also the delimitation agreement between Trinidad and Tobago and Venezuela establishing the southern limits of its boundary⁷¹. The oil practice raised by Barbados with regards to its offshore exploitation was dismissed following the *Cameroon/Nigeria* case.

In summary, in the light of this case, the concept of Equidistance/Relevant Circumstances is established under treaty law and case law as a consistent and valid approach of delimitation of overlapping maritime boundary. It is a step towards the normativity and consistency of the law of maritime delimitation both for opposite (western sector) and adjacent coasts (eastern sector). It shows as well that geographical factors tend to have primacy over economic factors but gave, at the same time, a legal effect to the joint exploitation of economic resources over boundary.

5. The *Guyana/Suriname* case (2007)

5.1 Dispute

Pursuant to Article 286 and 287 of the 1982 UNCLOS, Guyana initiated a claim before an arbitral tribunal against Suriname concerning disputes over the delimitation of the territorial sea and the single maritime boundary for the continental shelf and the EEZ⁷². As for the delimitation of the territorial sea, the tribunal applied Article 15 of the 1982 UNCLOS having due regard to the 1936 historical arrangement in order to draw an equidistance line on the N10°E line modified at point 2 (6°08.33'N;

⁶⁹ *Ibid.*, para 327.

⁷⁰ *Ibid.*, para 337.

⁷¹ *Ibid.*, para 345-347.

⁷² Case concerning the Arbitral Award (*Guyana v. Suriname*), Decision of the Arbitral Tribunal, 2007, para 1. The text of the decision is available on the Court's website. http://www.pca-cpa.org/showpage.asp?pag_id=1147 (1 July 2009)

57°07.33'W), which takes account of special circumstances constituted by the navigational rights of Suriname on the Corintyne river (see Figure 13).

5.2 Consideration of Equidistance/Relevant Circumstances

As for the delimitation of the single maritime boundary regarding the continental shelf and the EEZ, the tribunal applied Articles 74 and 83 of the 1982 UNCLOS and made reference to specific jurisprudence developed in the precedent cases in order to secure an equitable result⁷³. Thus, in order to delimit the single maritime boundary, the tribunal applied the Equidistance/Relevant Circumstances principle based on a two-step approach as developed in the *Greenland/Jan Mayen* (1993) and *Barbados/Trinidad and Tobago* (2006) cases (see Figure 13)⁷⁴. The tribunal holding is quoted as follows:

Articles 74 and 83 of the Convention require that the Tribunal achieve an “equitable solution”. The case law of the International court of Justice and the 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. The tribunal will follow this method in the present case (para 342).

The Court drew an equidistance line approaching the 200 M basing its approach on the geographical criteria both suitable for the delimitation of the continental shelf and the EEZ (*Gulf of Maine* case) and rejected any geological and geomorphologic factors. The tribunal then considered that neither the coastal configuration nor the oil practice of the parties in the area of delimitation was such as to constitute relevant circumstances requiring an adjustment of the equidistance line (*Cameroon/Nigeria*

⁷³ *Ibid.*, para 334.

⁷⁴ *Ibid.*, para 335.

case). Thus, the tribunal held that the provisional equidistance line was equitable though both parties disapproved⁷⁵.

In summary, the tribunal in the present case remained consistent with the application of the Equidistance/Relevant Circumstances principle in the case of adjacent coasts. As for the previous cases, it based its approach on articles 15, 74 and 83 of the 1982 UNCLOS, with reference made to the neutral criteria of coastal geography as in the *Qatar/Bahrain*, *Cameroon Nigeria* and *Barbados/Trinidad and Tobago* cases.

6. The Nicaragua/Honduras case (2007)

6.1 Dispute

On 8 December 1999, Nicaragua instituted proceedings before the ICJ against Honduras regarding a dispute over territorial sovereignty (over the islands of *Bobel Cay*, *Savanna cay*, *Port Royal Cay* and *South Cay*) and the determination of a single maritime boundary on the territorial sea, the continental shelf and the EEZ between their adjacent coasts⁷⁶. As for the sovereignty issues, the Court dismissed the arguments based on the principle of *uti possidetis juris*⁷⁷ and *colonial effectivités*⁷⁸ respectively claimed by Honduras and Nicaragua and asserted the sovereignty of Honduras over the disputed islands on the basis of *post colonial effectivités*⁷⁹.

⁷⁵ *Ibid.*, para 377; 390; 392.

⁷⁶ Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), 2007 ICJ REP, para 1. The text of the decision is available on the Court's website. <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nh&case=120&k=14> (5 July 2009).

⁷⁷ A general principle of international law affirming the validity of the territorial title inherited upon the independence of any state (Frontier Dispute Burkina Faso/Mali, Judgment, I.C.J, Report 1986, p. 567, para. 26, quoted in *Ibid.*, para 151-153.

⁷⁸ A general principle of international law according to which the conduct of the administrative authorities evidences an effective exercise of territorial jurisdiction in the region during the colonial period (Frontier Dispute *Burkina Faso/Mali*, Judgment, I.C.J, Report 1986, p. 586, para 63, quoted in *Ibid.*, para 165.

⁷⁹ *Ibid.*, para 208.

For the delimitation of the territorial sea and the single maritime boundary, the ICJ decided to apply Article 15 for the territorial sea and Articles 74 and 83 for the continental shelf and the EEZ, both parties having ratified UNCLOS (3 May 2000 for Nicaragua and 5 October for Honduras).⁸⁰

6.2 Exception to the principle of Equidistance/Relevant Circumstances :

A Bisector Line

After a careful examination of the relevant coastal area, the Court discarded the Equidistance/Relevant Circumstances approach for drawing the single maritime boundary because the instable situation of the mouth of the Coco River makes it impossible to identify reliable base points necessary for any equidistance line. Faced with the unfeasibility of an equidistance line, the court relied on the exceptional clause of Article 15 of UNCLOS to draw a provisional bisector line started 3 miles (15°00'52"N and 83°05'58" W) out to sea from the point identified by the mixed Commission in 1962 (*Gulf of Maine* and *Guinea/Guinea-Bissau* cases). (See Figure 14). The decision of the Court as regards this exception is worth quoting:

For all the above reasons, the Court find itself within the exception provided for in article 15 of UNCLOS, namely facing special circumstances in which it cannot apply the equidistance principle. At the same time equidistance remains the general rule. ... thus the court will consider whether in principle some form of bisector of the angle created by lines representing the relevant mainland coasts could be a basis for the delimitation⁸¹.

In order to justify the exception to the rule of equidistance, the Court considered the norm "Equidistance/Special Circumstances" not as a combined rule where special circumstances are meant to correct the inequity of the equidistance line but rather interpreted special circumstances as an exception to the general rule of equidistance. The Court was of the view that:

⁸⁰ *Ibid.*, para 268-271.

⁸¹ *Ibid.*, para 281; 287.

Nothing in the wording of Article 15 suggest that geomorphological problems are per se precluded from being “special circumstances” within the meaning of the exception, nor that such “special circumstances” may only be used as a corrective element to a line already drawn⁸².

In so doing, the Court based its approach on the ILC work during the debate of the 1958 Geneva Convention whereby special circumstances were analyzed as an exception to the principle of equidistance which may require another delimitation method⁸³. This view is closer to the position of the ICJ in the *Tunisia/Libya* case⁸⁴ but opposed to the opinion of the arbitral tribunal in the *Anglo-French Continental Shelf* case⁸⁵, in which Equidistance/Special Circumstances was considered as a combined rule. The course of the provisional bisector line has been then adjusted to take account of special circumstances constituted by the group of islands appertaining to Honduras and Nicaragua in avoiding at the same time any cut off effect on the adjacent areas⁸⁶. In short, the *Nicaragua/Honduras* case may be considered as the exception, which confirms the general rule of Equidistance/Relevant Circumstances established by the jurisprudence regularly followed by the tribunal in delimitation issues.

⁸² *Ibid.*, para 280.

⁸³ *YILC*, 1956, Vol. I, p.284 ; Vol. II, pp. 271, 272 &300. See also the present paper at pp. 9-11

⁸⁴ *Continental Shelf* case (*Tunisia v. Libya*), *Supra*, footnote 39, p.85, para. 121.

⁸⁵ *Anglo-French Continental Shelf* case, *Supra*, footnote 28, para 249.

⁸⁶ *Nicaragua/Honduras* case, *Supra*, footnote 76, para 303-305.

7. The *Romania/Ukraine* case (2009)

7.1 Dispute

On 16 September 2004, Romania instituted proceedings against Ukraine before the ICJ as regards the delimitation of a single maritime boundary on the overlapping continental shelf and EEZ in the Black Sea⁸⁷. The parties had overlapping claims related to the course of the boundary line. Both States being parties to the 1982 UNCLOS, the applicable law determined by the Court was Articles 74 and 83 of the said convention⁸⁸. Before adopting a delimitation methodology, the Court determined the relevant area of delimitation located within the Black Sea, where Romania and Ukraine are both adjacent and opposite limited to the south by Bulgaria and Turkey's entitlements⁸⁹.

7.2 Consideration of Equidistance/Relevant Circumstances

In order to effectuate the delimitation of the single maritime boundary, the Court decided to resort to the settled jurisprudence of Equidistance/Relevant Circumstances based on a two-step approach. Consequently, it drew at the first stage of delimitation a provisional equidistance line between the adjacent coasts of Romania and Ukraine (*Cameroon/Nigeria* case) and then continued with a median line where the two coasts are opposite as in the *Eritrea/Yemen* case (see Figure 15).

In the present case, the Court will thus begin by drawing a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which will then continue as a median line between their opposite coasts⁹⁰.

⁸⁷ Case concerning Maritime Delimitation in the Black Sea (*Romania v. Ukraine*), 2009 ICJ REP, para 1. The text of the decision is available on the Court's website. <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=ru&case=132&k=95> (15 June 2009)

⁸⁸ *Ibid.*, para 41-42.

⁸⁹ *Ibid.*, para 112-114.

⁹⁰ *Ibid.*, para 118-119.

The relevant base points used by the Court for that purpose were the *Sacalin Peninsula* and the landward end of the *Sulina Dyke* on the Romania coasts and *Tsyganka Island*, *Cape Tarkhankut* and *Cape Kherstones* on the Ukrainian coasts (See Figure 15)⁹¹. At the second stage of delimitation, the Court considered if there were relevant circumstances requiring a deviation of the equidistance line in order to secure equity (*Cameroon/Nigeria* case) as prescribed under UNCLOS, Articles 74 and 83.

The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result⁹².

Numerous factors were raised by the parties but considered by the court as not sufficiently relevant to justify the shifting of the equidistance line. Those factors were the disproportion between the length of the coasts, the enclosed nature of the Black Sea and third State interest, the Serpent's Island, the conduct of the parties with regard to natural resources, any cut off effect and security considerations (Para. 158-216). In short, The *Romania/Ukraine* case has capitalized all the principles of delimitation based on the Equidistance/Relevant circumstances concept developed from the previous jurisprudence. With this case, the law of maritime delimitation might be said to arrive at a level of legal certainty and predictability.

Through trial and error from the earlier cases, international courts and tribunals have now arrived at a satisfactory level of certainty and predictability in their legal approach of maritime delimitation based on the concept of Equidistance/Relevant Circumstances. This trend is well-established under the present case law and ought to be fostered in the future maritime delimitation cases either by judicial means or by inter-states agreements.

⁹¹ *Ibid.*, para; 141 ; 148.

⁹² *Ibid.*, para 120.

Therefore, there is a need to establish the concept of Equidistance/Relevant Circumstances as the primary rule of maritime delimitation in order to maintain a more consistent legal approach and avoid any risk of return into the vagaries of the earlier jurisprudence based on the facts. On what criteria might this consistency be analyzed and what is the rationale to erect the concept of Equidistance/Relevant Circumstances as the primary rule of maritime delimitation? The answers to these questions constitute the scope of the second part of this dissertation.

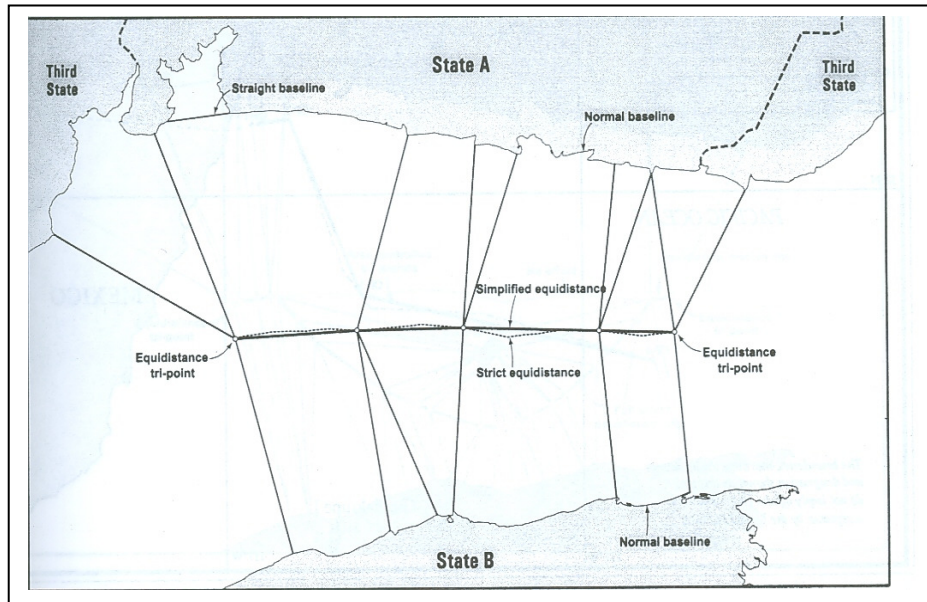


Figure 1: Strict Median Line between Opposite Coasts

Source: United Nations, *Handbook on the Delimitation of Maritime Boundaries* (New York: DOALOS, 2000), Illustration No. 5.

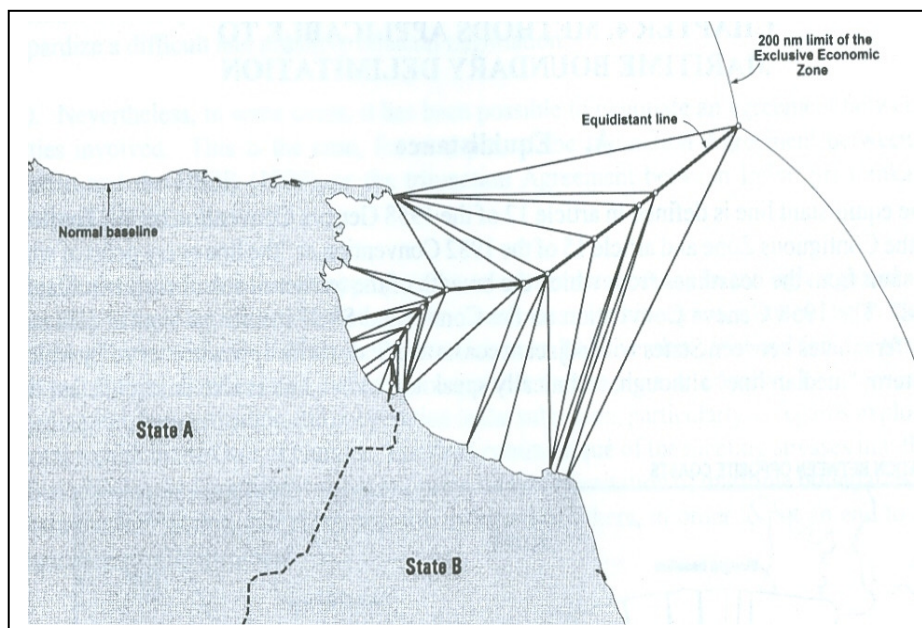


Figure 2: Strict Equidistance Line between Adjacent Coasts

Source: *Ibid.*, Illustration No. 6.

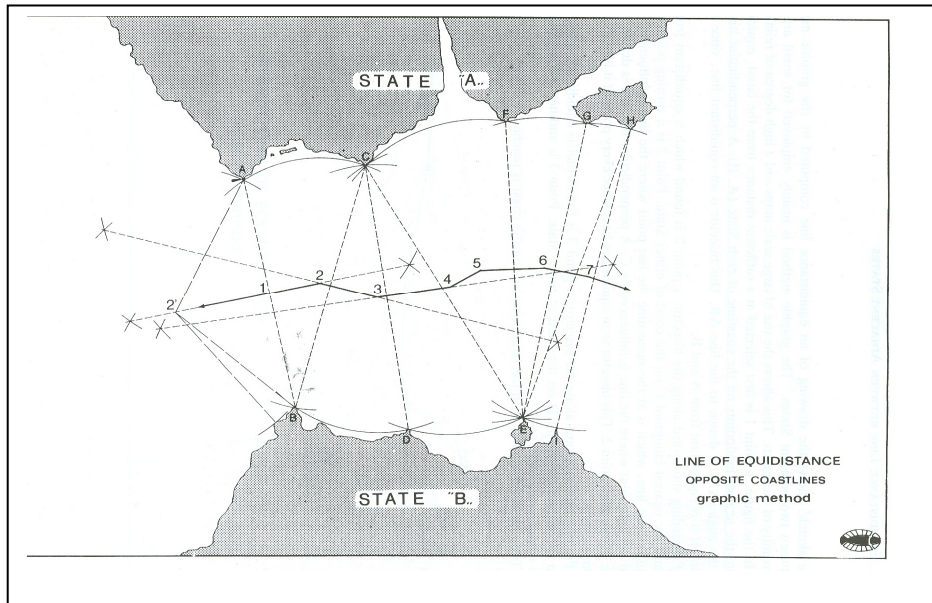


Figure 3: Simplified Equidistance between Opposite Coasts

Source: G. Francalanci & T. Scovazzi (Ed.), *Lines at Sea* (Dordrecht: Nijhoff, 1994), Sketch No. 92.

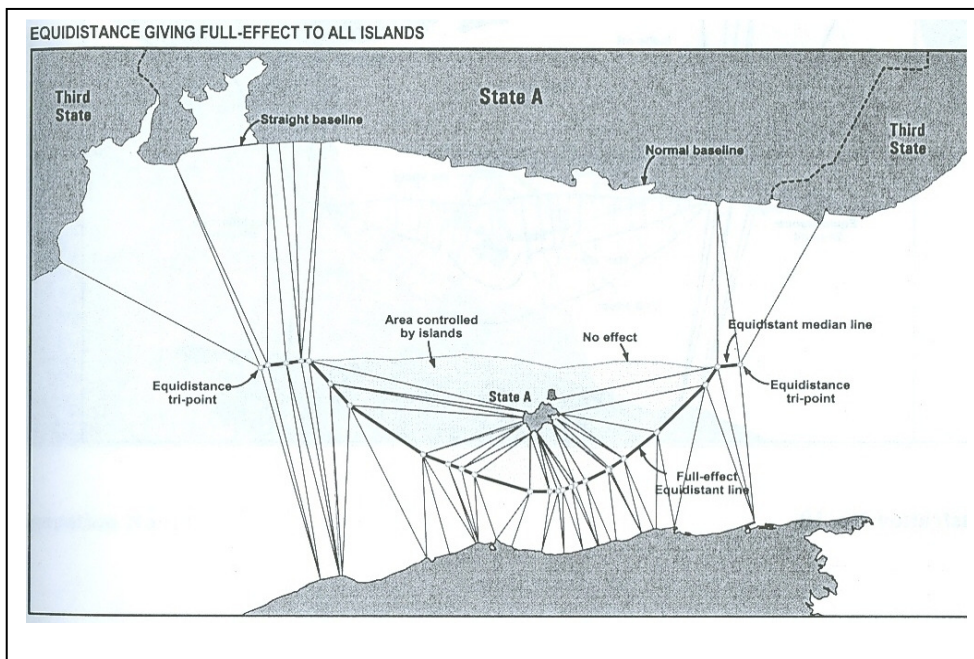


Figure 4: Modified Equidistance Line (giving full effect to all islands)

Source: *Supra*, figure 1, Illustration No. 9.

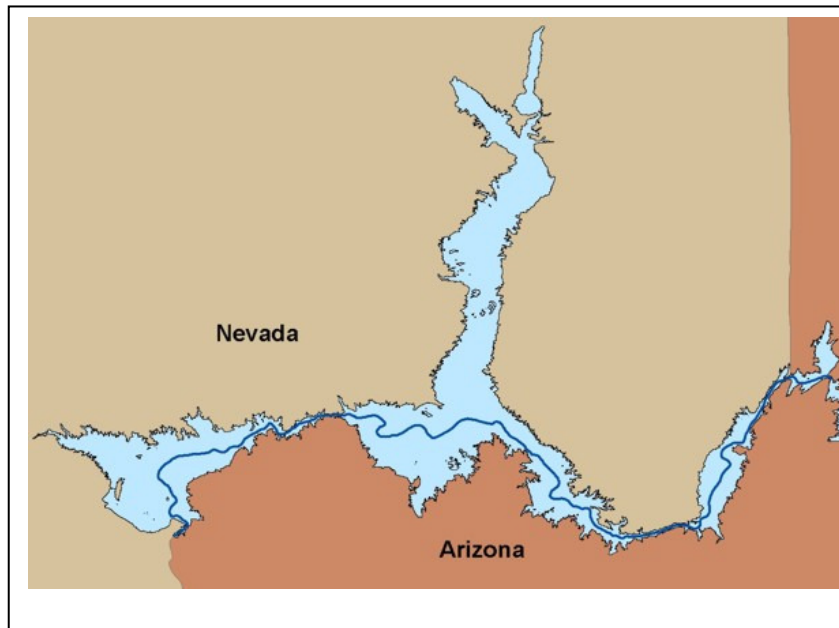


Figure 5: Thalweg Line

Source: United States Geological Survey (USGS), *Mapping the floor of Lake Mead (Nevada and Arizona): Preliminary discussion and GIS data release*, Report 2003 < <http://pubs.usgs.gov/of/2003/of03-320/html/docs/icons/thalweg.jpg> > (17 August 2009)

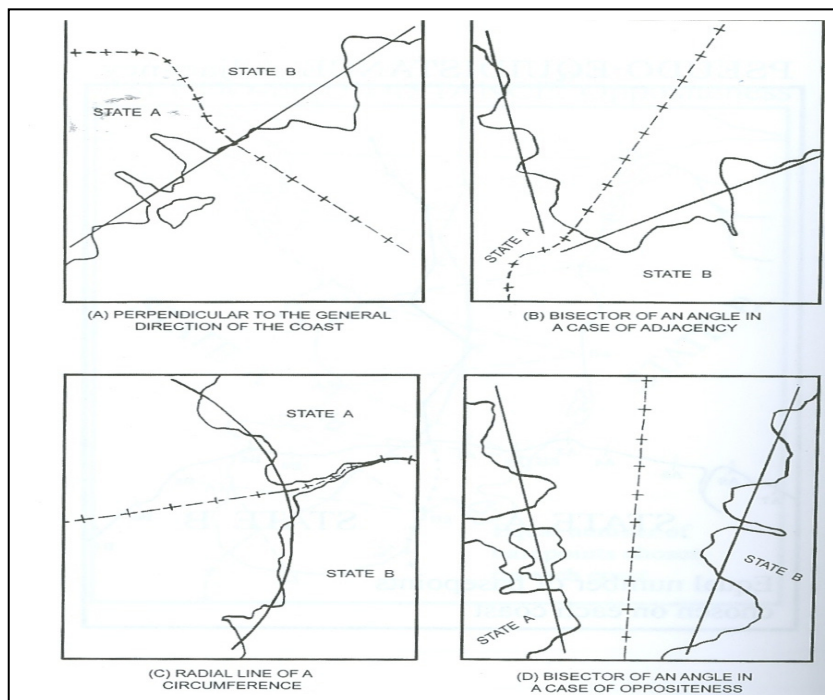


Figure 6: Method de Lissage (Perpendicular, Bisector, Radial lines)

Source: Nuno M., Antunes, *Towards the Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Leiden: Nijhoff, 2003), Figure 60.

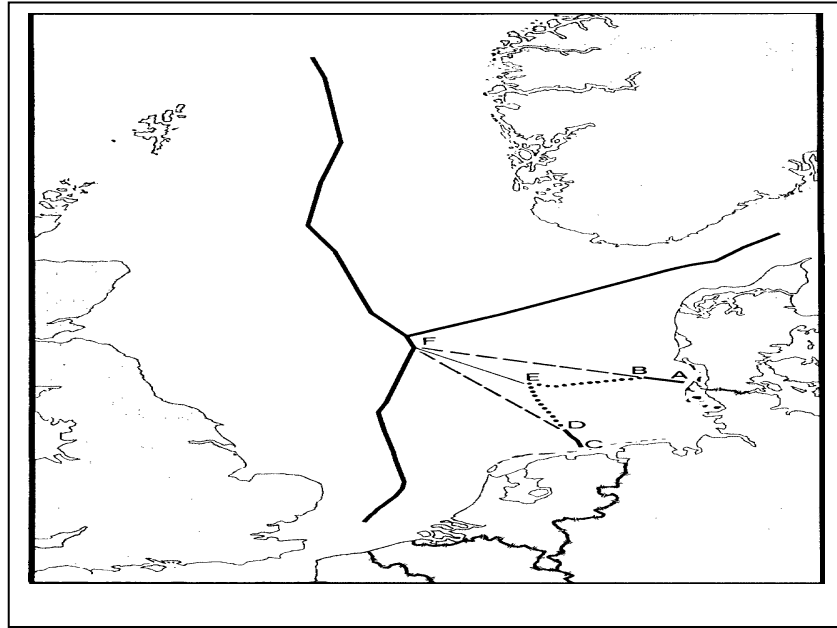


Figure 7: The North Sea Continental Shelf case (1969)

Source: The North Sea Continental Shelf cases (German Federal Republic/Denmark, and German Federal Republic/Netherlands) 1969 ICJ REP

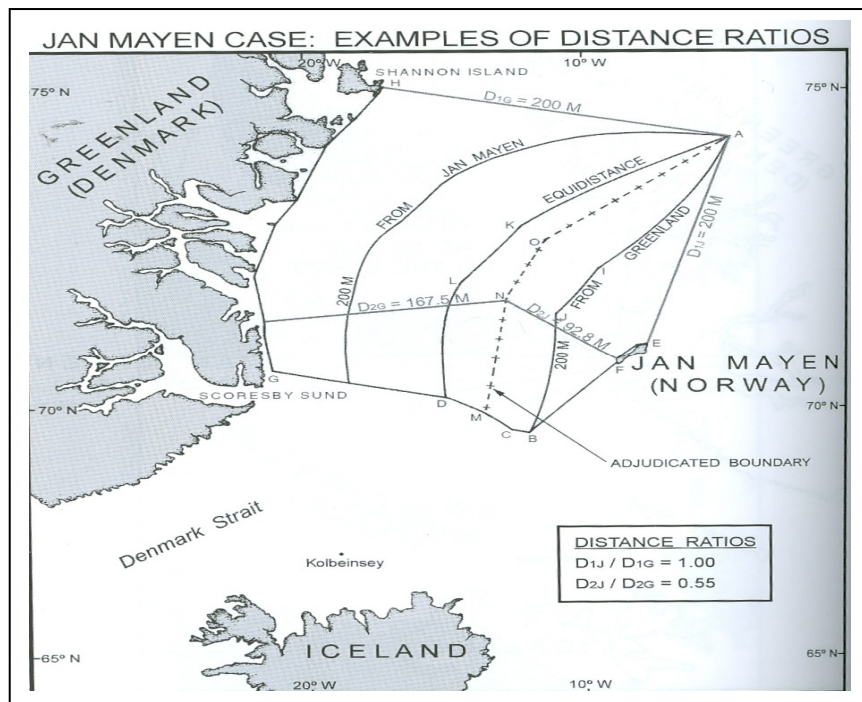


Figure 8: International Maritime Boundary between Greenland and Jan Mayen

Source: Case concerning the Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway) 1993 ICJ REP

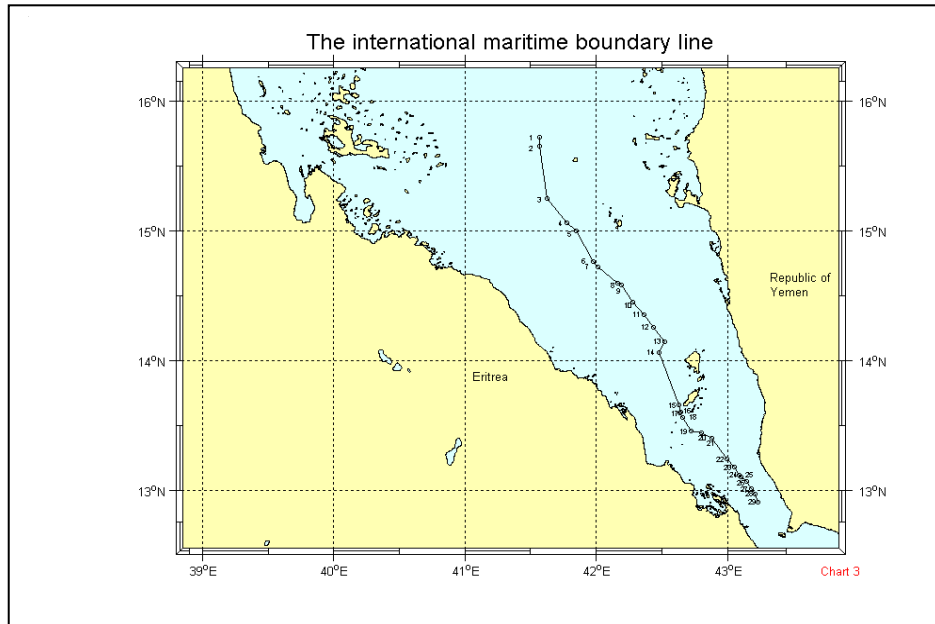


Figure 9: International Boundary Line between Eritrea and Yemen

Source: Case concerning the Arbitral Award (*Eritrea/Yemen*), Decision of the Arbitral Tribunal concerning the second stage of Proceedings (Maritime Delimitation), 1999.

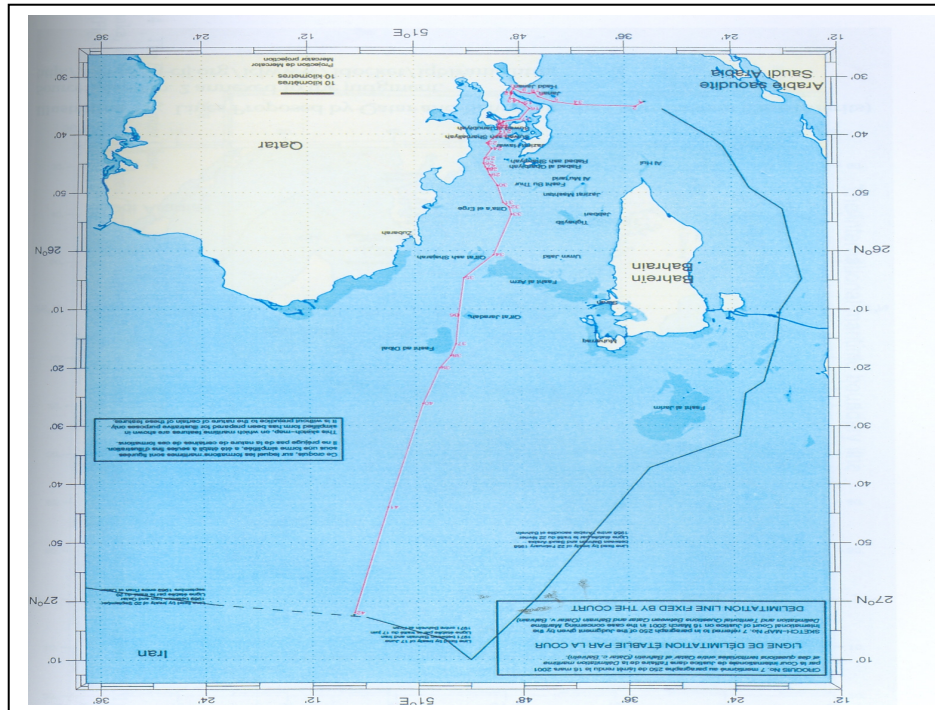


Figure 10: International Maritime Boundary between Qatar and Bahrain

Source: Case concerning the Maritime Delimitation and the Territorial Questions between Qatar and Bahrain (*Qatar/Bahrain*) 2001 ICJ REP

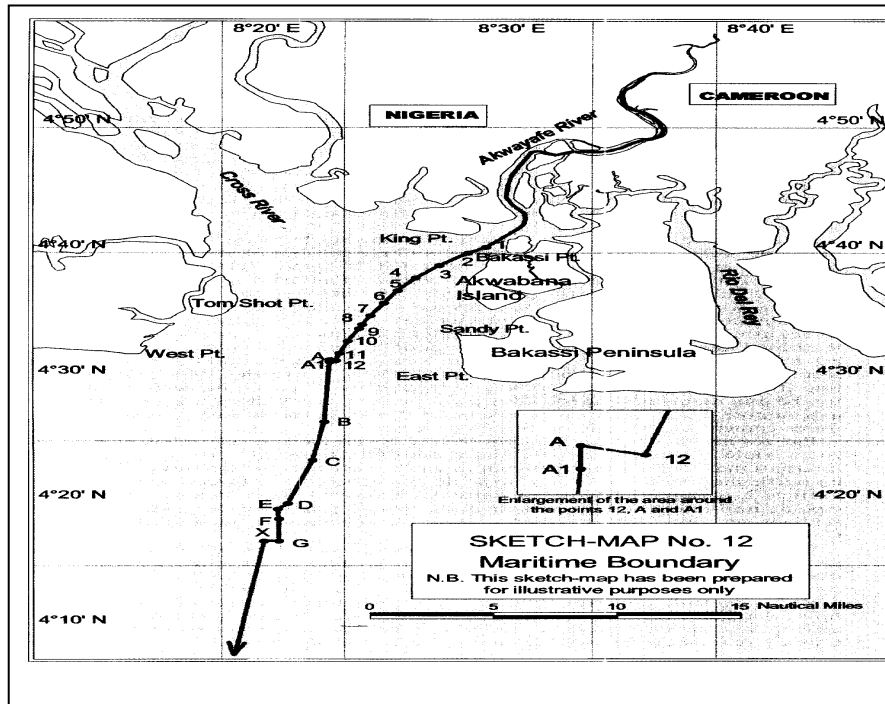


Figure 11: International Maritime Boundary between Cameroon and Nigeria

Source: Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon/Nigeria*), 2002 ICJ REP

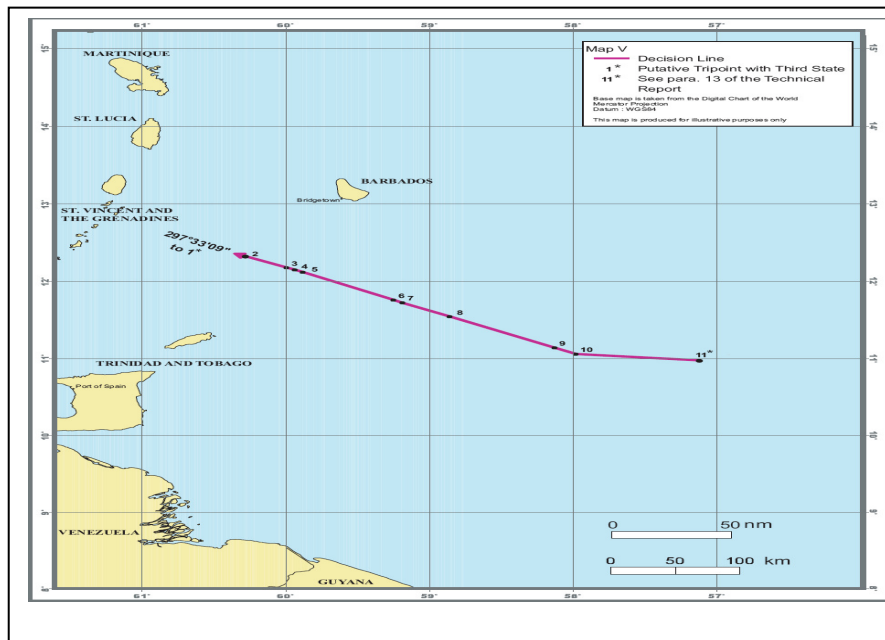


Figure 12: International Maritime Boundary between Barbados and Trinidad and Tobago

Source: Case concerning the Arbitral Award (*Barbados/Trinidad and Tobago*), Decision of the Arbitral Tribunal, 2006.

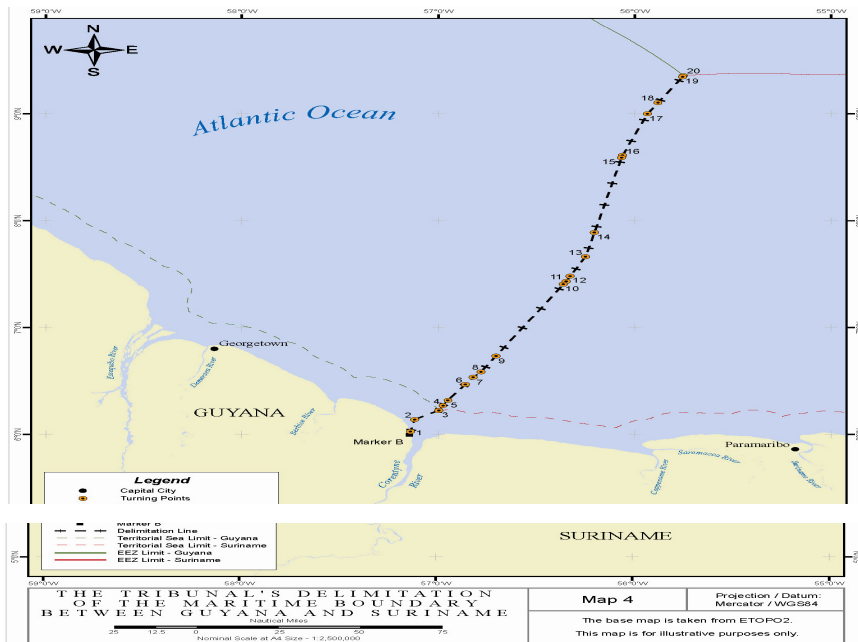


Figure 13: International Maritime Boundary between Guyana and Suriname

Source: Case concerning the Arbitral Award (*Guyana/Suriname*), Decision of the Arbitral Tribunal, 2007.

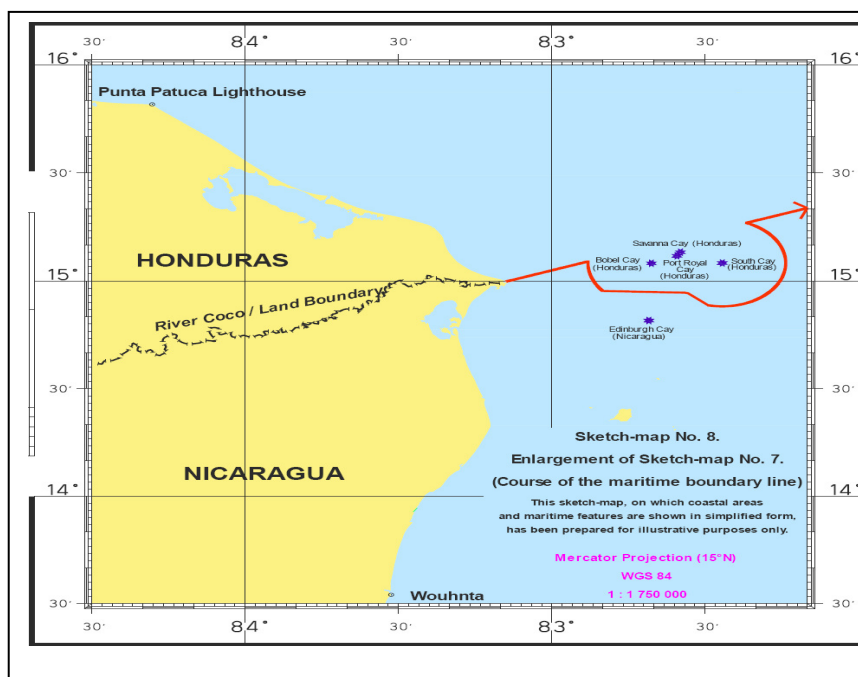


Figure 14: International Maritime Boundary between Nicaragua and Honduras

Source: Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), 2007 ICJ REP



Figure 15: International Maritime Boundary between Romania and Ukraine

Source: Case concerning Maritime delimitation in the Black Sea (*Romania v. Ukraine*), 2009 ICJ REP

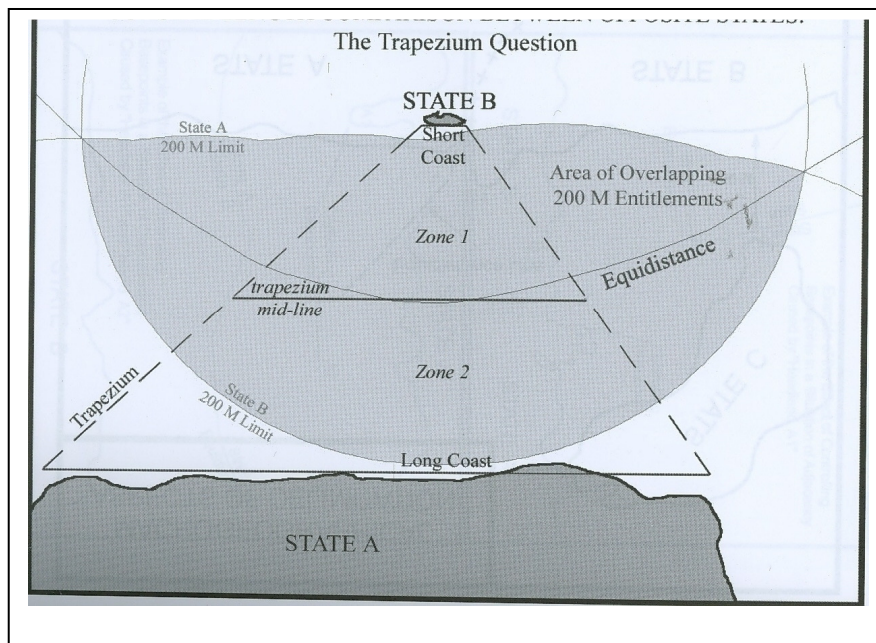


Figure 16: Reasonable Proportionality

Source: *Supra*, figure 6, sketch 88.

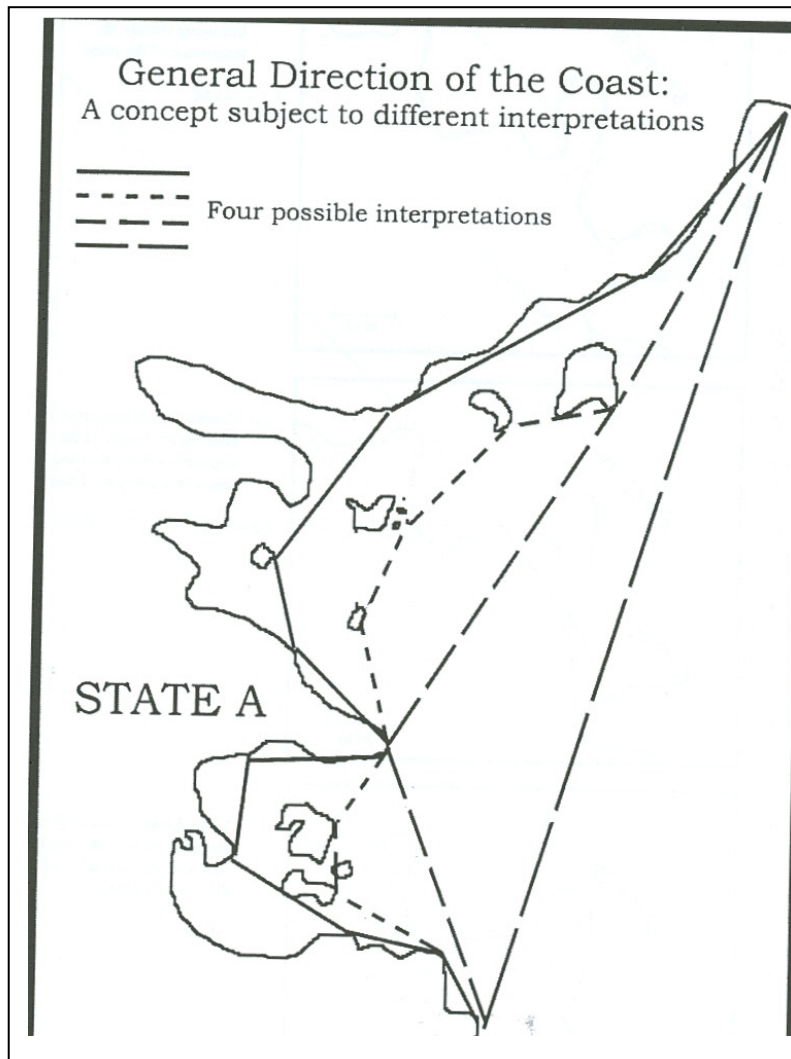


Figure 17: Method of Determination of Relevant Coastlines (General Direction of the Coasts)

Source: *Ibid.*, sketch 75

Part II

THE ESTABLISHMENT OF THE CONCEPT OF EQUIDISTANCE/RELEVANT CIRCUMSTANCES AS THE PRIMARY RULE OF MARITIME DELIMITATION

CHAPTER III: THE RATIONALE FOR ESTABLISHING EQUIDISTANCE/RELEVANT CIRCUMSTANCES AS THE PRIMARY RULE OF MARITIME DELIMITATION

Section 1: Consistent and Uniform Approach to Maritime Delimitation

1. Analysis of Case Law

There is enough ground to consider the principle of Equidistance/Relevant Circumstances as the primary rule of maritime delimitation insofar as it has been consistently adopted by international courts and tribunals since the *Greenland/Jan Mayen* case (1993) to deal satisfactorily with various situations of disputes over overlapping titles. In this regard, the statement of David Anderson is worth quoting:

The four most recent decisions - three by the International Court of Justice and one by an ad hoc arbitral tribunal – display a much more consistent methodology. This is a remarkable development in itself. [...] This consistency is both welcome in itself and all the more surprising since it came about despite some significant legal and geographical differences⁹³.

This consistency will be analyzed as regards legal, institutional and geographical differences, which have characterized seven judicial proceedings from the *Greenland/Jan Mayen* case (1993) to the *Romania/Ukraine* case (2009).

⁹³ David Anderson, « Developments in Maritime Boundary Law and practice », (2005) Vol. V International Maritime Boundaries (Dordrecht, Nijhoff) 3199 at p. 3205.

1.1 Institutional and Legal Considerations

The ICJ and arbitral tribunals have never been so consistent in their legal approach to maritime delimitation since the period of 1993 to 2009 starting from the *Greenland Jan Mayen* case (1993) until the *Romania/Ukraine* case (2009). A brief chronological restatement shows that after the result oriented equity set out by the Court (ICJ) in the *North Sea Continental Shelf* case (1969), the Arbitral Tribunal reversed this approach in the *Anglo-French Continental Shelf* case(1977) in adopting an approach based on the Equidistance principle. In the subsequent cases represented by the *Tunisia/Libya* (1982), *Gulf of Maine* (1984), *Libya/Malta* (1985), *Guinea/Guinea-Bissau* (1985) and *St Pierre and Miquelon* (1992), the judicial settlement carried out either by international courts or arbitral tribunals departed again from the approach taken in the *Anglo-French continental Shelf* case and resorted back to the result oriented equity or an hybrid methodology⁹⁴. The inconsistency of international courts and tribunals in the earlier case law contrasts with the more consistent approach adopted by the ICJ and various arbitral tribunals since 1993. From 1993 to 2009 seven maritime disputes have been settled through four ICJ decisions and three arbitral awards by referring solely to the legal principle of Equidistance/Relevant Circumstances (See Appendix I).

As regards legal considerations, the Equidistance/Relevant Circumstances principle has been consistently referred to by international courts and tribunals for the delimitation of different maritime zones under customary law and treaty law (the 1958 Geneva Conventions superseded by the 1982 UNCLOS). Examples of cases related thereto are the delimitation of territorial sea as in the *Qatar/Bahrain* (2001)⁹⁵ and *Guyana/Suriname* (2007)⁹⁶ cases, the separate delimitation of continental shelves and fishing zones as per the *Greenland/Jan Mayen* case (1993) and single maritime boundaries. Except the *Nicaragua/Honduras* (2007), all cases of delimitation of

⁹⁴ *Supra*, footnote 7, at p.120-121.

⁹⁵ *Qatar/Bahrain* case, *Supra*, footnote 58, para 230

⁹⁶ *Guyana/Suriname* case, *Supra*, footnote 70, para 303-306.

single maritime boundaries from 1993 to 2009 have been settled on the basis of the Equidistance/Relevant Circumstances principle (see Appendix I). Even in the *Nicaragua/Honduras* case, the ICJ analyzed in the first instance the possibility to apply the Equidistance/Relevant Circumstances method as follows:

As to the plotting of a single maritime boundary, the Court has on various occasions made it clear that, when a line covering several zones of coincident jurisdictions is to be determined, the so-called equitable principles/relevant circumstances method [equidistance/relevant circumstances] may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result⁹⁷

In addition, another consideration as regards legal aspects, is that the development of the principle of Equidistance/Relevant Circumstances in the law of maritime delimitation has breached the gap between customary law and treaty law set out from the *North Sea Continental Shelf* case (1969) on the one hand, and may narrow the difference between the pro-equidistance and the pro-equity group during the debate related to UNCLOS, articles 74 and 83, paragraph 1, on the other hand.

The concept of Equidistance/Relevant Circumstances has been applied to different disputes either under customary or under treaty law, reconciling the two legal regimes of maritime delimitation divided from the *North Sea Continental Shelf* case when the ICJ, following Germany's claim, disqualified the equidistance principle as a settled or an emerging norm of customary law:

The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose⁹⁸.

⁹⁷ *Nicaragua/Honduras* case, *Supra*, footnote 76, para 271.

⁹⁸ *North Sea Continental Shelf* case, *Supra*, footnote 5, para 81.

However, in the *Greenland/Jan Mayen* case (1993), the tribunal considered “Equidistance/Special Circumstances” as set out under article 6 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone as equal to customary law based on equity⁹⁹. In so doing, the court assimilated and incorporated the equidistance principle into customary law. On that basis, the Equidistance/Relevant Circumstances was applied as customary rule in delimitation disputes where it was impossible to apply any treaty law as in the *Eritrea/Yemen* (1999) and in the *Qatar/Bahrain* (2001) cases.

Furthermore, the adoption of the specific principle of Equidistance/Relevant Circumstances as a predominant method of delimitation has narrowed the opposition, which prevailed between the pro-equidistance and the pro-equity groups during the UNCLOS debates on Articles 74 and 83. In fact, the need for consensus prompted the drafters of Articles 74 and 83 of UNCLOS to omit any specific method of delimitation in the formulation of these provisions. The jurisprudence of maritime delimitation has tried to fill the gap left by UNCLOS in setting out the Equidistance/Relevant Circumstances as an appropriate method of delimitation providing an equitable solution under UNCLOS. It tends to reconcile both positions by unifying in a single rule the two opposite poles constituted by equidistance and equitable principles. In this regard, the tribunal in the *Guyana/Suriname* case (2007) held that:

Articles 74 and 83 of the Convention [UNCLOS] require that the Tribunal achieve an “equitable” solution. 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. The Tribunal will follow this method in the present case¹⁰⁰.

⁹⁹ See the present paper at pp. 23-24.

¹⁰⁰ *Guyana/Suriname* case, *Supra*, footnote 72, para 342.

1.2 Geographical Considerations

The principle of Equidistance/Relevant Circumstances has been applied by tribunals in a variety of coastal relationships, either in cases of opposite, adjacent or hybrid coasts. The geographical situation of opposite coasts, as in the *Greenland/Jan Mayen* (1993) and *Eritrea/Yemen* (1999) cases was first considered by international courts and tribunals for the application of the Equidistance/Relevant Circumstances principle¹⁰¹. This practice has been extended to the delimitation of adjacent coasts like in the *Cameroon/Nigeria* (2002) and *Guyana/Suriname* (2007) cases and as well for the delimitation of hybrid coasts (opposite/adjacent) regarding the *Qatar/Bahrain* (2001), *Barbados/Trinidad and Tobago* (2006) and *Romania/Ukraine* (2009) cases (see Appendix I). In the latter, the ICJ stated:

When called upon to delimit the continental shelf or exclusive economic zone, or to draw a single delimitation line, the Court proceeds in defined stages.]...So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case. So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts.¹⁰²

This observation shows that the peculiarities of the coastal geography may not constitute a hindrance to the consistent application of the legal principle of Equidistance/Relevant Circumstances for any delimitation purpose. This argument reaffirms the validity of this rule in all geographical situations except, when there are obvious reasons to derogate from. In the recent case of maritime dispute between Newfoundland and Labrador and Nova Scotia, the Tribunal asserted:

¹⁰¹ See the present paper at pp 23-26.

¹⁰² *Romania/Ukraine* case, *Supra*, footnote 87, para 115-116.

In the context of opposite and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments and to adopt some other method of delimitation only if the circumstances justify it¹⁰³.

Thus, the judicial consistency may evidence that the law of maritime delimitation is based on the principle of Equidistance/Relevant Circumstances. However, this consideration needs to be confirmed by an extensive State practice.

2. Analysis of State Practice

The scope of this part is to find some evidence justifying that the concept of Equidistance/Relevant Circumstances, deriving from case law, may be as well considered in State practice as the predominant law of maritime delimitation. In other words, is it possible from the angle of view of State practice, to recognize the concept of Equidistance/Relevant Circumstances as a rule of customary law? The answer requires an examination of this concept with regard to State practice and *Opinio juris*, the two constitutive ingredients of customary international law.

2.1 State Practice

A study of the State practice in delimitation carried out by the *American Society of International Law (ASIL)* has shown that at the end of 2003, around 200 agreements of maritime delimitation have been settled between States throughout the world¹⁰⁴. These are divided between the delimitation of the continental shelf and the single maritime boundary. As regards the delimitation of the continental shelf, 83% out of this total given above applied the equidistance method, strict, simplified or modified between opposite coasts (see Figures 1-4)¹⁰⁵, 46% between adjacent coasts and 88% between coasts with hybrid character (mixing oppositeness with adjacency)¹⁰⁶.

¹⁰³ Award of the Tribunal in the Second Phase, 26 March 2002, para 2.28, quoted in the *Guyana/Suriname* case, *Supra*, footnote 72, para 335.

¹⁰⁴ *Supra*, footnote 7 at p. 133.

¹⁰⁵ Strict or true equidistance line is defined in the present paper at pp. 20-21. A *simplified equidistance* is operated by “reducing the number of turning points, thereby decreasing the number and increasing the length of the straight-line segment forming the boundary”. A *modified equidistance*

Concerning the delimitation of single maritime boundaries, the equidistance method, strict, simplified or modified was adopted for approximately 82% between opposite coasts, 50% between adjacent coasts and almost 90% with coasts of hybrid character. The whole maritime delimitation including territorial sea, continental shelf and single maritime boundary applied equidistance principles for a ratio of 83% in case of opposite coasts and 51% for adjacent coasts (see Appendix II)¹⁰⁷.

The author agrees with Tanaka that concerning the delimitation between opposite coasts, “treaty practice shows, to a large extent, uniformity in favouring the equidistance method for both continental shelf delimitation and the drawing of single maritime boundaries” with a rate of approximately 83% of all the maritime delimitations¹⁰⁸. The equidistance method applied at least at the first stage of delimitation enjoys a substantial State practice. As in the approach developed by international courts and tribunals, the equidistance line in State practice was modified in approximately 30% of the cases to take account of relevant factors (see Appendix II)¹⁰⁹. Therefore, the concept of Equidistance/Relevant Circumstances under case law and the equidistance applied at the first stage of delimitation in State practice are identical as far as the methodology is concerned. The methodology used in both contexts to adjust the provisional equidistance line is either the selectivity in

is a line “based on equidistance principles but composed of segments connecting points whose position is not strictly equidistant from the territorial sea baselines because certain features such as islands, rocks, or low-tide elevations have not been used or have been given reduced effect.” See J. Charney&L. Alexander (Ed.), *International Maritime Boundaries* (Dordrecht, Nijhoff, 1993), Vol. I, at pp. 206-208.

¹⁰⁶ *Supra*, footnote 7 at p.134.

¹⁰⁷ *Ibid.*, at p. 135.

¹⁰⁸ *Ibid.*, at p. 136.

¹⁰⁹ According with the statistics of the years 1980-1993 carried out by the ASIL, 30% of the boundary lines used a modified equidistance out of the total of agreements based on an equidistance method. See also *Supra*, footnote 105 at p. 214.

the choice of the base points¹¹⁰, the half effect method (see Figure 14)¹¹¹ or the ad hoc modification based¹¹² on non geographical factors.

From the above analysis, it may be asserted that the concept of Equidistance/Relevant Circumstances is subject to a substantial State practice, in particular regarding the methodological approach. It should now be verified if such concept evidences the existence of *opinio juris*.

2.2 Opinio Juris

With regard to *opinio juris*, the ICJ refers to as a substantial practice “accepted as law” and Hudson as “the conception that the practice [of States] is required by, or consistent with prevailing international law”¹¹³. In short, do the States apply the concept of Equidistance/Relevant Circumstances in negotiated delimitation agreements out of the belief that international law requires them to act that way? As recognized by many scholars, it is always difficult to find an evidence of *opinio juris* in the practice of States by reason of the subjectivity surrounding this concept¹¹⁴.

However, an evidence of *opinio juris* in State practice may be presumed in the consistent reference by States to principles and methods of delimitation as established under international law mainly composed of customs, ICJ decisions, the 1958 Geneva Convention and the 1982 UNCLOS. This is reflected in the statement of David Colson analysing the legal regime of maritime boundary agreements:

¹¹⁰ A method used in following agreements: Saudi Arabia-Bahrain (22 February 1958), Italy-Yugoslavia (8 January 1986), Iran-Qatar (20 September 1969), Italy-Tunisia (20 August 1971), Denmark-Canada (17 December 1973), Iran-Oman (25 July 1974). *Ibid.*, at p. 208.

¹¹¹ A method used in following agreements: Sweden-USSR (18 April 1988), the Greece-Italy (1977), Iran-Oman (25 July 1974), Ireland-United Kingdom (7 November 1988). *Ibid.*, at p. 209.

¹¹² A method used in following agreements: Sweden-Denmark (9 November 1984), Iran-Saudi Arabia (24 October 1968) and Denmark-German Democratic Republic (14 September 1988), *Ibid.*, at p. 210.

¹¹³ Ian, Brownlie, *Principles of Public International Law*, 6th Ed. (New York: Oxford University Press, 2003) at p. 8.

¹¹⁴ See, *Ibid.* at p. 8; see also *Supra*, footnote 7 at p. 137; 148.

As a general proposition, maritime boundary agreements negotiated prior to the mid-1970s tend to be continental shelf delimitations while those negotiated since then have taken into account the development of international law of the 200-n.m exclusive economic zone (or fisheries zone). This is not surprising as the 200-n.m zone concept was widely discredited until the early 1970s, but gained rapid acceptance once it appeared in the negotiating texts of the Third UN Conference on the Law of the Sea in the mid-1970's¹¹⁵.

An evidence of *opinio juris* may be found in the fact that maritime boundary agreements reflect the development of international law. All sources of international law of maritime delimitation cited above recognized more or less the equidistance method at least at the first stage of delimitation. Therefore, by analogy, it may be presumed an evidence of *opinio juris* in the concept of Equidistance/Relevant Circumstances as applied under State practice. From the above analysis, it may be concluded that the concept of Equidistance/Relevant Circumstances can be recognized as a rule of customary law under State practice.

Section 2: Predictable Approach to Maritime Delimitation

The scope of this part is to show that the principle of Equidistance/Relevant Circumstances might be considered as a predictable approach to the law of maritime delimitation in order to justify its erection as the primary rule of boundary delimitation. Predictability should be understood as the ability of principles guiding maritime delimitation to produce a stable, consistent and equitable outcome by being grafted onto legal principles. In this regard, the arbitral tribunal in the *Barbados/Trinidad and Tobago* case (2006) held the following:

¹¹⁵ *Supra*, footnote 105 at p. 44.

The Tribunal must exercise its judgment in order 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.¹¹⁶

Taking into account this decision of the court, it might be justifiable to consider the principle of Equidistance/Relevant Circumstances as a predictable approach to maritime delimitation as regards three observations. Firstly, international courts and tribunals remain constant in holding this principle of delimitation, secondly, Equidistance *per se* is a predictable method of delimitation and thirdly, the relevant circumstances tend to be constrained by legal principles.

1. The Principle of Jurisprudence Constante

The recent attitude of international courts and tribunals in the implementation of the Equidistance/Relevant Circumstances principle might be interpreted as if applying the legal doctrine of *Jurisprudence Constante*¹¹⁷. Considering the concept of Equidistance/Relevant Circumstances as a generally accepted norm of delimitation, international courts and tribunals have decided to adhere to it in the subsequent cases.

In the *Eritrea/Yemen* case, the Court considered the principle of Equidistance/Relevant Circumstances as a “generally accepted view, as evidenced in both writings of commentators and in the jurisprudence...”¹¹⁸; In other words, the court recognizes this principle as a general principle of international law based on two sources composed of precedent case law and opinions of scholars. In the *Barbados/Trinidad and Tobago* case (2006), the tribunal ruled that “The determination of the line of delimitation *normally* follows a two-step approach ...”.

¹¹⁶ *Barbados/Trinidad and Tobago* case, *Supra*, footnote 10, para 244.

¹¹⁷ A legal doctrine according to which a long series of previous decisions applying a particular rule of law carries great weight and may be determinative in subsequent cases. See Bryan A., Garner (Ed.), *Black's Law Dictionary*, 7th Ed., (St Paul, MN: West Group, 1999), at p. 859.

¹¹⁸ *Eritrea/Yemen* case, *Supra*, footnote 57, para 131.

The word “normally” means that the delimitation is effectuated according to a norm, a legal standard, a general rule as confirmed by the settled jurisprudence and treaty law established under the 1958 Geneva Convention and the 1982 UNCLOS¹¹⁹; this norm being understood as the principle of Equidistance/Relevant circumstances. Moreover, in the *Guyana/Suriname* case (2007) as restated in the *Romania/Ukraine* case (2008), the arbitral tribunal held:

In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the EEZ have come to embrace a clear role for equidistance. The process of delimitation is divided into two stages.¹²⁰

Here, international courts and tribunals clearly opted for the doctrine of *Jurisprudence Constante* in their approach to maritime delimitation. International judges despite their independence have decided to rule maritime delimitation disputes in a more predictable way by standing and adhering in subsequent cases to the settled jurisprudence based on the Equidistance/Relevant Circumstances principle.

2. The Predictability of the Equidistance Principle

The equidistance method *per se* is a predictable rule of delimitation since it uses mathematical methods to determine with a higher degree of precision and certainty the course of the boundary line. The Court in the *Nicaragua/Honduras* case (2007) highlighted these qualities:

¹¹⁹ *Barbados/Trinidad and Tobago* case, *Supra*, footnote 10, para 242.

¹²⁰ *Guyana/Suriname* case, *Supra*, footnote 72, para 335.

The Jurisprudence of the Court sets out the reasons why the equidistance method is widely used in the practice of maritime delimitation: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied¹²¹.

Under the *Barbados/Trinidad and Tobago* case (2006), Equidistance is considered by the Tribunal as “a hypothesis and a practical”, and “a convenient starting point” (*emphasis added*). In the *Romania/Ukraine* case (2009), Equidistance is considered as a “geometrical objective method”. The recognition of the equidistance as the most appropriate geometrical method of delimitation dates back to the development of the EEZ (FZ) concept and single maritime delimitation practices. In fact, these developments have led to a shift of the delimitation criteria from geomorphologic (natural prolongation)¹²² and resource-specific criteria (fisheries)¹²³ to a more neutral criteria of geographical character based on the distance from the baselines identified as “physical realities” at the time of the delimitation¹²⁴. Thus, the entitlement over the 200 M EEZ (Article 74, UNCLOS) corresponds with the entitlement over the continental shelf, constituting the natural prolongation of the State (Article 76, UNCLOS). The predominance of geographical factors in the delimitation process calls for a geometrical method in order to reach an equitable result. Further, the best appropriate geographical method, as restated by the jurisprudence in numerous case law and specifically those cited above, is the equidistance. Robert Kolb in his analysis came to the same conclusion:

¹²¹ *Nicaragua/Honduras* case, *Supra*, footnote 76, para 272.

¹²² *North Sea Continental Shelf* case, *Supra*, footnote 5, para. 19.

¹²³ *Greenland/Jan Mayen* case, See the present paper at pp. 23-24.

¹²⁴ *Gulf of Maine* case, *Supra*, footnote 6, para 194-206. See also the *Romania/Ukraine* case, *Supra*, footnote 87, Para. 131.

A single line delimitation requires that geographical factors be placed at the heart of the process; geographical factors call for geometrical methods; but geometrical methods are not centred on equidistance. The Chamber refused to take the last step, even though it was implicit in the logic, since all geometrical methods based on the real geography belong, in the ultimate analysis to equidistance¹²⁵.

The predictability of the equidistance method is strengthened by the progressive development of more predictable rules in the relevant circumstances, contributing to establishing the Equidistance/Relevant Circumstances as a predictable approach to delimitation.

3. The Predictability of Relevant Circumstances

Under the concept of Equidistance/Relevant Circumstances, the relevant circumstances are arrived at a sophisticated level of certainty and predictability based on the settled jurisprudence and in conformity with the requirement of an equitable solution under Articles 74 and 83 of UNCLOS. Therefore, higher level of predictability calls for the establishment of the principle of Equidistance/Relevant Circumstances as the primary law of maritime delimitation.

In the delimitation methodology settled under the Equidistance/Relevant circumstances principle, the relevant circumstances are assessed by international courts and tribunals at the second stage of delimitation in order to adjust the equidistance line if necessary, with the purpose being to ensure an equitable boundary line. They can be analyzed as geographical and non geographical factors. This part, focused on the most recurrent relevant circumstances, is by no means exhaustive.

¹²⁵ *Supra*, footnote 8 at p. 261.

3.1 Geographical Factors

Geographical factors are defined as “those geographical relevant circumstances which indicate the appropriateness of the delimitation method”¹²⁶. Under the principle of Equidistance/Relevant Circumstances, three geographical factors have been consistently taken into account in judicial and arbitral disputes settlement and thus been subject to more predictable rules.

3.1.1 *General Configuration of the Coast*

Under the general configuration of the coast, international courts and tribunals, in view of the recent jurisprudence, have attached a greater consideration to the situation of oppositeness/adjacency of relevant coasts in disfavour of delimitation based on the general direction of the coast. Thus, so far as the situation of oppositeness/adjacency of the relevant coasts is concerned, two major principles developed by the jurisprudence under the Equidistance/Relevant Circumstances concept may be considered as predictable rules of in the law of maritime delimitation. First, the delimitation of opposite coasts, the provisional delimitation line will consist of a median line between the two coasts (see Figure 8). Second, the delimitation of adjacent coasts, the provisional delimitation line will consist of an equidistance line between the two coasts unless there are compelling reasons to recourse to another method (see Figure 11)¹²⁷.

3.1.2 *Presence of Small Islands*

The jurisprudence under the law of maritime delimitation based on the concept of Equidistance/Relevant Circumstances is more specific as far as small islands are concerned¹²⁸. Under Article 121 of UNCLOS¹²⁹, an island shall generate its own

¹²⁶ M. D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Clarendon Press, 1989) at p. 121.

¹²⁷ *Romania/Ukraine case*, *Supra*, footnote 87, para 116; *Guyana/Suriname case*, *Supra*, footnote 72, para 333-342 and *Barbodos/Trinidad and Tobago case*, *Supra*, footnote 10, para.

¹²⁸ Small islands are those considered as not significant as regard population rate, the economic and political activities. See *Supra*, footnote 7, at pp. 86-187.

territorial sea, EEZ and continental shelf unless it constitutes a rock which cannot sustain human habitation and economic activities of its own. In that case it shall only be entitled to 12 M territorial sea. From the settled jurisprudence based on the concept of Equidistance/Relevant circumstances, three sets of predictable rules are set out so far as the presence of small islands is concerned.

Firstly, small islands cannot serve as baselines for the construction of the equidistance line in the first state of delimitation if they do not form part of the general configuration of the coast (see Figure 15)¹³⁰. Secondly, small islands may not be taken into account or may not be given a full effect, if doing so would result in a disproportionate delimitation line¹³¹. Thirdly, the presence of an island is not considered as relevant circumstance calling for an adjustment of the provisional equidistance line if any entitlement generated by the island is located within the EEZ and the continental shelf of the mainland coast of the party¹³².

3.1.3 Proportionality

Proportionality is a concept established by the Court from the *North Sea Continental Shelf* case (1969) according to which “maritime delimitation should be effected by taking into account the ratio between the maritime spaces attributed to each party and the lengths of their coastlines” (see Figure 16)¹³³. The concept of proportionality has played different functions throughout the development of the law of maritime delimitation. In the jurisprudence based on equity in the earlier case law, the principle of proportionality had served as a final factor to consider in the delimitation process in specific geographical situations (*North Sea Ccontinental Shelf* case).

¹²⁹ Art. 121, para 1 of UNCLOS defines an island as a naturally formed area of land, surrounded by water, which is above water at high tide.

¹³⁰ *Eritrea/Yemen* case, *Supra*, footnote 57, para. 15-28; *Romania/Ukraine* case, *Supra*, footnote 87, para 186.

¹³¹ *Qatar/Bahrain* case, *Supra*, footnote 60, para 219; *Romania/Ukraine*, *Ibid.*, para 185.

¹³² *Romania/Ukraine*, *Ibid.*, para 187.

¹³³ *Supra*, footnote 7, at p. 161.

It had also served as *ex post facto* verification test to ensure the equity of the boundary line (*Libya/Malta; Guinea/Guinea-Bissau; Eritrea/Yemen cases*)¹³⁴. In the *Greenland/Jan Mayen* case (1993), which marked a new era in the law of maritime delimitation, the proportionality principle was taken into account as a relevant circumstance not at the final stage but during the process of delimitation to correct the provisional equidistance line in order to ensure an equitable result faced with the great disparity in the lengths of the relevant coasts¹³⁵. In this way, it served as a true method of delimitation.

After the *Greenland/Jan Mayen* case, all the subsequent case law related to the Equidistance/Relevant Circumstances principle have reaffirmed the concept of proportionality as a relevant factor, which may be taken into account in case of a strong disparity between the relevant coasts in order to correct the provisional equidistance line. However, the difference stands in the fact that international courts and tribunals have taken into account the proportionality of the equidistance line not during the delimitation process but only as a final test in order to check the equitableness of the delimitation line¹³⁶. Hence, the predictable rule set out from the settled jurisprudence thus far, is that the proportionality principle is taken into account as relevant factor in the law of maritime delimitation in case of great disparity between the relevant coastlines only as *ex post facto* disproportionality test in order to ensure at the final stage that the tentative delimitation is not disproportionate¹³⁷.

¹³⁴ *Ibid.*, at pp. 177-178.

¹³⁵ *Greenland/Jan Mayen* case, *Supra*, footnote 50, para 61; 68.

¹³⁶ *Barbados/Trinidad and Tobago*, *Supra*, footnote 10, para 337-338; *Guyana/Suriname* case, *Supra*, footnote 72, para 392; *Romania/Ukraine* case, *Supra*, footnote 87, para 213-215.

¹³⁷ *Romania/Ukraine*, *Ibid.*, para 210.

3.2 Non Geographical Factors

Three non geographical factors have consistently been referred to during the case law based on the Equidistance/Relevant Circumstances principle. Those are the economic factors, the conduct of the parties and the presence of third States.

3.2.1 *Socio-economic Factors*

In the case law of maritime delimitation, socio-economic factors have been consistently referred to as economic dependency on natural resources, poverty, level of economic development, population as well as access to natural resources, such as fisheries, oil, gas and mineral deposits. The question is to ascertain whether under the Equidistance/Relevant Circumstances concept, socio-economic factors may be predictably considered as relevant circumstances at the second stage of delimitation.

In the first instance, it should be noted that the earlier case law and even the recent jurisprudence have been consistent with the approach taken by the court in the *Tunisia/Libya* (1982) and the *Libya/Malta* (1985) cases, where factors relating to economic development have never been considered as relevant circumstances able to affect the delimitation line. Socio-economic factors are considered as an economic and a political process which fall beyond the ambit of the tribunal constrained by Articles 74 and 83 of UNCLOS and its statute to act within the limits of international law¹³⁸.

However, the approach taken by the jurisprudence with regard to access to natural resources such as fisheries and oil deposits is quite ambiguous. Generally speaking, access to natural resources has been considered as a relevant factor by international courts and tribunals but has not been taken into account in the delimitation process¹³⁹, except in the *Greenland/Jan Mayen* case, where the need to allow an

¹³⁸ *Tunisia/Libya* case (1982), *Supra*, footnote 39, para 107; *Libya/Malta* case (1985), para 50; *Gulf of Maine* case, *Supra*, footnote 6, para 237; *Eritrea/Yemen* case, *Supra*, footnote 57, para 64; *Greenland/Jan Mayen* case, *Supra*, footnote 50, para 70.

¹³⁹ *Tunisia/Libya* case, *Ibid.*, para 107 p; *Gulf of Maine* case, *Ibid.*, para 237;.

equitable access to the capelin stock to both parties was considered by the court to adjust the provisional equidistance line (see Figure 8)¹⁴⁰.

In contrast with the *Greenland/Jan Mayen* case, the other subsequent case law such as the *Eritrea/Yemen*¹⁴¹ and the *Barbados/Trinidad and Tobago* cases have not considered access to fisheries as a relevant factor to shift the provisional equidistance line. In the *Barbados/Trinidad and Tobago* case, which may be considered as the predictable rule in the matter, the court of arbitration held that access to fisheries (and other natural resources) is not sufficiently founded in customary law, in the jurisprudence and in treaty law so as to be considered as a relevant circumstance to adjust the equidistance line. This dictum reads as follows:

Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by national of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of the judgment of the International Court of Justice in the *Jan Mayen* case (ICJ Reports 1993, p.38). That is insufficient to establish a rule of international law¹⁴².

3.2.2 *The Conduct of the Parties*

The conduct of the parties covers any acts committed by the respective parties, which may have affected the process of maritime delimitation under judicial or negotiating settlement¹⁴³. The issue here is to analyze under the Equidistance/Relevant Circumstances principle if the conduct of the parties can be considered as a relevant circumstance to modify the equidistance line. With regard to consideration of the conduct of the parties in the delimitation process, earlier and recent jurisprudence has

¹⁴⁰ *Greenland/Jan Mayen* case, *Ibid.*, para 76.

¹⁴¹ *Eritrea/Yemen* case, *Ibid.*, para 526.

¹⁴² *Barbados/Trinidad and Tobago* case, *Ibid.*, para 269.

¹⁴³ *Supra*, footnote 126, at p. 220.

kept a consistent approach based on the following dictum of the Court in the *Cameroon/Nigeria* case:

Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the sitting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line.¹⁴⁴

In other words, unless incorporating an agreement or a *modus Vivendi*, which displays the intention of the parties to consider a specific line as an equitable basis for a future delimitation, the conduct of the parties with regard to natural resources and activities related thereto may not be taken into account as relevant circumstance. This approach has been followed in the *Barbados/Trinidad and Tobago* case where the Court ruled that the conduct of the parties regarding seismic activities and oil concessions in the Atlantic, north of the equidistance line (since not sufficiently evidencing a tacit or express agreement) must not be considered as a relevant factor to shift this equidistance. *Guyana/Suriname* and *Romania/Ukraine* cases followed the same approach. This may be considered as the predictable rule in the law of maritime delimitation under the Equidistance/Relevant Circumstances principle¹⁴⁵.

3.2.3 *The Presence of Third States*

This issue deals with the interests of a third State which claims a specific legal interest in relation to the maritime area subject to delimitation between two neighbouring countries. In the *Tunisia/Libya* and *Malta/Libya* cases, Malta and Italy respectively claimed a specific legal interest in the area to be delimited¹⁴⁶. The question arising under this issue is to determine whether third State presence may be

¹⁴⁴ *Cameroon/Nigeria case*, *Supra*, footnote 63, para 304.

¹⁴⁵ *Barbados/trinidad and Tobago case*, *Supra*, footnote 10, para 366; *Guyana/Surinam case*, *Supra*, footnote 72, para 385-392; *Romania/Ukraine case*, *Supra*, footnote 87, para 198.

¹⁴⁶ *Supra*, footnote 126, at p. 232.

considered as a relevant circumstance in the drawing of the boundary line under the Equidistance/Relevant Circumstances concept. In that respect, the jurisprudence under the equitable principles and the recent Equidistance/Relevant Circumstances concept observe generally speaking the same trend.

Despite considered as *res inter alios acta*¹⁴⁷, the judgments adopted so far by international courts and tribunals consider the presence of third state as a relevant circumstance in order to either shift the provisional equidistance line or most consistently determine the endpoint of the delimitation line. The common practice is to cut off the delimitation line at the point where actual or potential 1/3 states interests come into play (see Figure 15). That trend may be considered as the most predictable rule as far as third State presence is concerned. Thus, in the *Eritrea/Yemen* case, the court held that:

The Tribunal has neither competence nor authority to decide on any of the boundaries between either of the two parties and neighbouring States. It will therefore be necessary to terminate either end of the boundary line in such a way as to avoid trespassing upon an area where other claims might fall to be considered¹⁴⁸.

In the *Barbados/Trinidad and Tobago* case, the tribunal has followed the same approach by considering the 1990 Trinidad-Venezuela Agreement as a relevant circumstance to determine the southern endpoint of the delimitation line (see Figure 12):

It follows that the maximum extent of overlapping areas between the Parties is determined in part by the treaty between Trinidad and Tobago and Venezuela, in so far as Trinidad and Tobago's claim is concerned. This the Tribunal will take into account in determining the delimitation line¹⁴⁹.

¹⁴⁷ Art. 59 of the Statute of the ICJ provides that « The decision of the Court has no binding force except between the parties and in respect of that particular case ».

¹⁴⁸ *Eritrea/Yemen* case, *Supra*, footnote 57, para 136.

¹⁴⁹ *Barbados/Trinidad and Tobago* case, *Supra*, footnote 10, para 348.

The same trend is observed in the *Romania/Ukraine* case, where the Tribunal has taken into account the 1978 Turkey-USSR (Ukraine) Agreement and the 1997 Turkey-Bulgaria Agreement not to adjust but to fix the southward endpoint of the delimitation line (see Figure 15):

The Court will bear in mind the agreed maritime delimitation between Turkey and Bulgaria, as well as between Turkey and Ukraine, when considering the endpoint of the single maritime boundary it is asked to draw in the present case¹⁵⁰.

These geographical and non geographical factors analyzed in this chapter are not exhaustive. However, they have continuously been raised under the jurisprudence founded upon the concept of Equidistance/Relevant Circumstances and have therefore given rise to more predictable rules of maritime delimitation. Considering this high level of predictability, founded upon case law, State practice and treaty law, the concept of Equidistance/Relevant Circumstances deserves to be established as the primary rule of maritime delimitation. However, as any legal concept, the Equidistance/Relevant Circumstance is not exempt from a number of shortcomings. Therefore, before analyzing the legal and political means to erect this concept as the basic rule of maritime delimitation, it is necessary to analyse and highlight any downsides inherent thereto.

¹⁵⁰ *Romania/Ukraine* case, *Supra*, footnote 87, para 177.

CHAPTER IV: THE CRITICAL ANALYSIS OF THE DEVELOPMENT OF THE EQUIDISTANCE/RELEVANT CIRCUMSTANCES CONCEPT

Section 1: Downsides

The scope of this part is to review the problems challenging the development of the concept of Equidistance/Relevant circumstances either in the jurisprudence or under treaty law.

1. Legal Considerations

As thoroughly analyzed in the previous chapters of this dissertation, the law of maritime delimitation seems now to have arrived at a more consistent, certain and predictable level with the development of the concept of Equidistance/Relevant Circumstances. This achievement is reflected in the speech held by the former ICJ President, Judge Guillaume, before the 6th Committee of the UN General Assembly¹⁵¹.

However, despite the strong commitment of the ICJ for the Equidistance/Relevant Circumstances, this concept still remains in reality in a fragile position and may have a long way to go before being consolidated as the primary rule of maritime delimitation. Thus, the subsequent case law, specifically the *Nicaragua/Honduras* case (2007) has shown a strong departure from this concept by adopting the bisector line as method of delimitation¹⁵². This departure has been rendered possible because the Court has given to the Equidistance/Special Circumstances rule (Article 15 of

¹⁵¹ “At the end of this evolution, I believe that the Court reconciled law and equity. It still remains several cases of the same kind subject to our jurisdiction, for instance the *Cameroon/Nigeria* case and the *Nicaragua/Honduras* as well. The International community can be assured that the Court will act in the same spirit [of Equidistance/Relevant Circumstances principles].” Speech held by *Pr. Gilbert Guillaume* before the 6th Committee of the UN General Assembly, 31 October 2001, quoted in Maurice M. K. Kamga, *Delimitation Maritime sur la Cote Atlantique Africaine* (Bruxelles: Bruylant, 2006), at pp. 51-52. (original in French)

¹⁵² See this paper at pp. 33-35.

UNCLOS) another interpretation to the one used to justify the applicability of the Equidistance/Relevant Circumstances principle.

The Court analyzing the difficulty to identify reliable base points, due mainly to the instability of the mouth of the Coco River, has rejected the equidistance method, basing its legal justification on an interpretation of Equidistance/Special Circumstances under Article 15 of UNCLOS, as two separate rules: equidistance as the general rule and special circumstances as the exception; with the instability of the river mouth being conceived as a special circumstance allowing any derogation from the equidistance¹⁵³.

This position of the Court challenges the precedent taken in the *Anglo-French Continental Shelf* and the *Greenland/Jan Mayen* cases where Equidistance/Special circumstances from treaty law and Equidistance/Relevant Circumstances from customary law have been unified on the basis that they both lead to an equitable result¹⁵⁴. It also challenges the precedent taken by the Court in the *Qatar/Bahrain* case, where the Equidistance/Special circumstances (or Equidistance/Relevant Circumstances) has been considered as a combined rule; with special Circumstances/Relevant Circumstances serving as the corrective element of equidistance. The decision read as follows:

Article 15 of the 1982 Convention ... is to be regarded as having a customary character. It is often referred to as the “equidistance/special circumstances” rule. The most logical and widely practiced approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.

In other words, the new approach taken by the jurisprudence under the Equidistance/Relevant Circumstances principle is to adjust the equidistance line in case of Special/Relevant Circumstances making inequitable its strict application, and

¹⁵³ *Ibid.*

¹⁵⁴ See this paper at pp. 23-24.

not to draw another delimitation line. In departing from this approach, the Court under the *Nicaragua/Honduras* case raised the old debate of the relation between equidistance and special circumstances, which dates back to the ILC work prior to the 1958 Geneva Convention. The attitude of the Court under this case may be as well perceived as a return back to the theory of *unicum* in the settlement of maritime disputes where each case was dealt with, not on the basis of the settled rule of law but according to the peculiar circumstances of the case¹⁵⁵. Thus, Judge Ranjeva (ICJ) may be right to assert that “the decision under the *Nicaragua/Honduras* case constitutes a renouncement of the jurisprudence of the court in matters of delimitation of the territorial sea”¹⁵⁶.

Another element to highlight is the negative impact generated by the lack of specificity of Articles 74 and 83 of UNCLOS¹⁵⁷. It is right that both articles, though broad, serve to justify under treaty law, the equitableness of the Equidistance/Relevance Circumstances concept. However, in remaining firmly tied to equity and opened to any method of delimitation satisfying that purpose, they are not able to follow the jurisprudential trend in the process to settle the Equidistance/Relevant Circumstances principle as the primary rule of delimitation. Thus, under Articles 74 and 83 of UNCLOS, any delimitation method is welcome which provides an equitable solution while under case law, the Equidistance/Relevant Circumstances method is to some extent *prima facie* an equitable solution. This dichotomy may challenge the evolution of the jurisprudence towards a higher level of normativity, certainty and predictability in case law and in State practice.

¹⁵⁵ See this paper at p. 21.

¹⁵⁶ Raymond Ranjeva, Separate Opinion, *Nicaragua/Honduras* case (2007), at p. 7. < <http://www.icj-cij.org/docket/files/120/14078.pdf> > 17 August 2009, (original in French)

¹⁵⁷ See this paper at pp. 12-14.

2. Technical Considerations: Coastal Lengths and Proportionality

Coastal lengths and proportionality have often appeared as a source of contention in maritime delimitation disputes; the core issue being that the State having a longer coastline is inclined to claim a larger maritime area. The approach adopted by international courts and tribunals under the settled judicial practice of Equidistance/Relevant Circumstances is to consider the lengths of the coasts as a relevant circumstance only in cases of substantial disparity between the lengths of the relevant coasts appertaining to each party (see Figure 16). In the *Romania/Ukraine* case, the Court held:

Where disparities in the lengths of the coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made¹⁵⁸.

However, the Court made it clear that such adjustment of the maritime area to take account of the great disparity of the respective coastlines should not be based on a mathematical computation¹⁵⁹. This position of the court raised two technical issues: firstly, the inequity of the median line in case of pronounced disparity between two opposite coastlines and, secondly the determination of the relevant coastline for delimitation and proportionality purposes.

A true equidistance line, when applied between two opposite coasts marked by a great disparity, creates disproportionality in the partition of the maritime area in favour of the party having a restricted coastline. The solution of adjusting the provisional median line by moving it closer to the shorter coastline, as made in the *Greenland/Jan Mayen* case, depends on a subjective appreciation of the court, which may be far from being an effective way of guaranteeing equity and a reasonable proportionality (see Figure 8). This is a situation that may create a dichotomy

¹⁵⁸ *Romania/Ukraine* case, *Supra*, footnote 87, para 164. See also *Greenland/Jan Mayen*, *Supra*, footnote 50, para 69 and *Cameroon/Nigeria*, *Supra*, footnote 63, para 301.

¹⁵⁹ *Greenland/Jan Mayen*, *Ibid.*, para 69. See also *Libya/Malta* case, para 68.

between the relevant coasts and the maritime areas related to it disregarding somehow the legal principle of “The land dominates the sea”¹⁶⁰.

In the *Greenland/Jan Mayen* case, the proportion of the respective coastlines was a ratio of 9 (Greenland) to 1 (Jan Mayen) but the maritime area generated by application of the Equidistance/Relevant Circumstances was a ratio of 3 (Greenland) to 1 (Jan Mayen) in favour of Jan Mayen. A proportion of around 0.5 for Jan Mayen would have been more equitable (see Figure 8). The author thus share the dissent opinion of Judge Fisher that “Where the two coastlines are of a proportion of more than 9 to 1, a median line cannot ... be considered equitable, not even as a starting point in the delimitation process”¹⁶¹.

The second technical impediment for an effective implementation of the Equidistance/Relevant Circumstances principle is related to the determination of the relevant coastlines, whose seaward projection produces the maritime delimitation area. In the *Romania/Ukraine* case, the Court, exercising its discretionary power, has rejected, the *Karkinit'ska Gulf* as relevant coastline on the basis that its seaward projection does not abut on the area to be delimited¹⁶². The situation is depicted by Antunes that “what constitutes the relevant coast is therefore unclear”¹⁶³.

In fact, the determination of the relevant coastlines depends on numerous technical factors. The length of the coasts will produce different results if the sinuosities and indentations are computed or not, if the charts are used with different scales, and the method of calculation varies at the limit of subjectivity according to the situation of

¹⁶⁰ It means that the entitlement to a maritime area is function of the coastal projection in the seaward direction. *North Sea Continental Shelf* case, *Supra*, footnote 5, para 96.

¹⁶¹ Paul Fisher, Dissent opinion, *Greenland/Jan Mayen* case (1993), at p. 275. <http://www.icj-cij.org/docket/files/78/6765.pdf>, 15 August 2009.

¹⁶² *Romania/Ukraine* case, *Supra*, footnote 87, para 100.

¹⁶³ *Supra*, footnote 16, at p. 172.

opposite and/or adjacent coasts (see Figure 17)¹⁶⁴. In short, the determination of the relevant coasts is not based on a generally accepted scientific method and still includes a wide degree of subjectivity.

3. Political and Socio-Economic Considerations

Barbara Kwiakowska analyzed the negotiated boundary agreements of maritime delimitations in the framework of the study carried out by the *American Society of International Law*, recognized clearly that “These agreements show that economic and environmental considerations are relevant to maritime boundary delimitation...”¹⁶⁵ However, except navigational rights and security interests to some extent, political and socio-economic factors, as already stated, have yet to be recognized by international courts and tribunals as relevant circumstances in the determination of the delimitation line under the new concept of Equidistance/Relevant Circumstances¹⁶⁶. The necessity to act within the ambit of international law has been raised by judicial bodies to justify this attitude. Notwithstanding this legal constraint, the ICJ and arbitral tribunals may not be deprived of the competence to decide a case *ex aequo et bono* in agreement with the parties¹⁶⁷. The trend of judicial bodies to disregard political and socio-economic factors may constitute an impediment to a more extensive development of the concept of Equidistance/Relevant circumstances in State practice.

Obviously, maritime delimitations in State practice, as documented by the ASIL’s study, are fundamentally influenced by economic and environmental issues, such as fisheries, mineral and oil deposits, exploration and exploitation, navigation, pollution and tourism. Not only do they act as a leitmotiv to prompt delimitation agreements,

¹⁶⁴ *Ibid.*, at pp. 172-173. See also Prosper Weil, *The Law of Maritime Delimitation: Reflections* (Cambridge: Grotius, 1989) at pp. 75-79.

¹⁶⁵ *Supra*, footnote 105, at p. 103.

¹⁶⁶ See the present paper, at pp. 55-56.

¹⁶⁷ Article 38-Para. 2 of the Statute of the International Court of Justice.

but they also exercise a direct or indirect impact on the delimitation method and even the location of the boundary line. In the evaluation realized by the ASIL, approximatively 28% of maritime delimitation agreements are directly influenced by economic and environmental factors (see Appendix III)¹⁶⁸.

In addition, maritime delimitations are sometimes influenced by socio-political factors related to interstate relations, foreign policy, accommodation of interests and the population. In the 1980 France (Guadeloupe and Martinique)-Venezuela Agreement, the important economic interests of France and the significant population of Guadeloupe and Martinique came into play in giving a half effect to the uninhabited and small Venezuelan Island of Aves¹⁶⁹.

The vagaries of the recent case law, the inequity of the Equidistance/Relevant Circumstances method in specific geographical circumstances, the practice of subjective technical methods and the ignorance of political and socio-economic factors may impede a substantial development of the Equidistance/Relevant Circumstances concept and its adoption as the primary rule of maritime delimitation under case law and State practice. Consequently, it is of supreme importance to prompt the adoption of effective policies and actions in order to ensure a rule of law in maritime delimitation, which reconciles equity to normativity and predictability.

¹⁶⁸ *Supra*, footnote 105, at p. 3; pp. 75-113

¹⁶⁹ *Ibid.*, p. 80.

Section 2: Recommendations

The scope of this part is to elaborate about the more effective means to settle the new concept of Equidistance/Relevant circumstances as the primary rule of maritime delimitation under case law and State practice. However, one might in the first instance ask why it is so important to target that purpose?

The law of maritime delimitation needs be grafted onto normative principles in order to provide a higher degree of equitableness, certainty and predictability. It should not return to the vagaries of the earlier case law driven by an equitable result, having as sole method of delimitation the peculiar facts of the specific case and dominated by the discretionary power and subjective decisions of international courts, which sometimes generated conflicting judgments. The unity of the international law of maritime delimitation, international peace, economic development, specifically of poorer countries, most of which have yet to delimit their maritime spaces, and environmental sustainability are at stake. They need to be fostered by an extensive implementation of specific criteria and method of delimitation based on the rule of law. This is why the legal concept of Equidistance/Relevant Circumstances, which is in the process to meet these aspirations, needs to be consolidated and recognized as a universal principle of maritime delimitation. For that purpose, the combined efforts of judicial bodies and the community of States are fundamental.

1. The Necessary Judicial Policy

In his report to the 56th Session of the General Assembly of the United Nations, the former President of the ICJ, Gilbert Guillaume, concluded with the following address:

It was encouraging to note that the law of maritime delimitation, by means of the developments in the Court's case law which he had described, had reached a new level of unity and certainty, while maintaining the necessary flexibility. In all cases, the Court must, as States also did, first determine provisionally the equidistance line and then ask whether there were special circumstances requiring that line to be

adjusted with a view to achieving equitable results; in the case between Qatar and Bahrain, the parties had thanked the Court for managing to reconcile law and equity¹⁷⁰. (see Appendix IV).

The idea underlying this solemn statement of President Guillaume is the commitment of the ICJ, followed by arbitral tribunals and very certainly the International Tribunal of the Law of the Sea (ITLOS), to observe in future case law the principle of *Jurisprudence Constante* as regards the legal concept of Equidistance/Relevant Circumstances described above. The cornerstone of the law of maritime delimitation is no longer the *North Sea Continental Shelf* case with the equitable principles, but the *Greenland/Jan Mayen* case with the Equidistance/Relevant circumstances concept. This policy of the international courts and tribunals is needed to ensure a universal application of this concept. However, much needs to be fulfilled for that purpose.

Primarily, Article 15 of UNCLOS (Equidistance/Special Circumstances rule) needs to be clearly and consistently interpreted by international courts and tribunals as a combined rule and not as two separate rules; with special circumstances being deemed to correct the inequity of the equidistance line. Secondly, the inequity of the equidistance line between two very disparate facing coasts needs to be resolved through adoption by judicial bodies of a generally accepted and objective method of adjustment of this equidistance. Thirdly, generally accepted scientific methods need to be established with the support of technical institutions, such as the Commission on the Limits of the Continental Shelf (CLCS) and the International Hydrographic Organization (IHO) for a more objective determination of the relevant coastlines and the reasonable proportionality.

One of the main difference between case law and State practice with regard to the concept of Equidistance/Relevant Circumstances is the consideration of socio-

¹⁷⁰ UN General Assembly, 12th Meeting of the 6th Committee, Official Records, 9 November 2001 at p. 14 <<http://daccessdds.un.org/doc/UNDOC/GEN/N01/613/24/PDF/N0161324.pdf?OpenElement>> 15 August 2009

economic and political factors as relevant circumstances. A more extensive practice of this concept under negotiated boundary agreements requires the development of legal principles incorporating these specific factors, as much as legally assessable, as relevant circumstances in the delimitation method. Judicial bodies should take into account that maritime delimitation issues are primarily political acts with a strong legal content and as such, may sometimes take a decision *ex aequo et bono* with the agreement of the parties. However, clear and consistent rules need to be developed in this field. The conduct of an appropriate judicial policy is not enough and should, therefore, be supported by a clear political commitment of States.

2. Essential Commitment of the Community of States

The Community of States should, specifically, in the cooperation framework of the United Nations, play a key role for the establishment of the concept of Equidistance/Relevant Circumstances as the basic rule of maritime delimitation and promote its universal application under State practice. This commitment is required by the Charter of the United Nations, which in its preamble calls for establishment of “conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”¹⁷¹. In conformity with this provision, the States have the responsibility to develop the law of maritime delimitation by codifying the principle of Equidistance/Relevant Circumstances into a significant norm of law.

For that purpose, the General Assembly of the United Nations can charge the International Law commission (ILC) with the progressive development and the codification of the Equidistance/Relevant Circumstances¹⁷². In fact, the ILC will have the duty to draw a more precise formulation of the law of maritime delimitation incorporating the new concept of Equidistance/Relevant Circumstances after a careful and comprehensive study; with the general objective being to promote an

¹⁷¹ Charter of the United Nations, Preamble.

¹⁷² Maritime delimitation was in the Agenda of the ILC at its first session in 1949 under the topic of the Regime of Territorial Seas.

extensive development of this new rule in international courts and tribunals and, in particular, in the practice of States. In order to carry out effectively this initiative, the ILC might, firstly, introduce in its work programme the topic of “Draft Articles on Maritime Delimitation”. It may then conduct a study resulting in the publication of a report which should be adopted by the UN General Assembly as “Guidelines for the Implementation of the Provisions of UNCLOS related to Delimitation of Maritime Zones”. This adoption by a majority of States may evidence a general recognition among them of the Equidistance/Relevant Circumstances as the primary rule of law in maritime delimitation.

This soft law instrument would have the effect to consolidate the customary law by assisting and guiding State parties in the implementation of the UNCLOS regime of maritime delimitation. In this way, the lack of specificity of the UNCLOS regime with regard to the method of delimitation can be overcome by the availability of clear principles and methods of delimitation based on the concept of Equidistance/Relevant Circumstances. If effective, this process of codification might, result in an implementing agreement of UNCLOS regime of maritime delimitation with a binding effect on the State parties. Hopefully, the judicial and political initiatives referred to as recommendations would ensure an effective normative development and a universal application of this legal concept which provides the needed equity, certainty and predictability in the law of maritime delimitation.

CONCLUSION

Having analysed the historical background of the law of maritime delimitation, it can be asserted that the concept of Equidistance/Relevant Circumstances originated neither from early customs of maritime delimitation nor from treaty law established under the 1958 Geneva Convention and the subsequent 1982 UNCLOS. The concept has been developed by the tribunal in the *Greenland/Jan Mayen* case (1993) with reference to principles drawn under the *Anglo-French Continental Shelf* case. It is a judge-made law considered as customary international law.

In the *Greenland/Jan Mayen* case, the Court, in order to draw a coincident boundary between the continental shelf and the FZ, assimilated Article 6 of the 1958 Geneva Convention to customary law, considering that both are intended to achieve an equitable result in the delimitation of two opposite coasts. Therefore, the Court held that it was appropriate to begin with a provisional equidistance line and then ask if relevant factors call for its adjustment. In so doing, the Court concluded that relevant factors employed under customary law equate to special circumstances used under Article 6 of the Geneva convention, both aiming at an equitable solution. In that way, the Court achieved a single delimitation line for the continental shelf and the FZ.

This legal concept recognized as Equidistance/Relevant Circumstances has been consistently applied by international courts and tribunals in the subsequent cases, such as *Eritrea/Yemen* (1999), *Qatar/Bahrain* (2001), *Cameroon/ Nigeria* (2002), *Barbados/Trinidad and Tobago* (2006), *Guyana/Suriname* (2007) and *Romania/Ukraine* (2009), with exception of the *Nicaragua/Honduras* case (2007) where the Court provided compelling reasons to derogate from it. With this level of consistency reached by international courts and tribunals in the law of maritime delimitation, it may be considered that the concept of Equidistance/Relevant Circumstances might be established as the primary rule of maritime delimitation. However, the prior requirements should be that this concept satisfies the criteria of consistency, certainty and predictability.

An in-depth analysis of case law from 1993 to 2009 reveals that the concept of Equidistance/Relevant Circumstances has enjoyed a consistent application by the ICJ and arbitral tribunals in the delimitation of various maritime zones, and under different treaty law. Under negotiated boundary agreements, the Equidistance/Relevant Circumstances approach enjoys as well a substantial practice through the method of equidistance applied as least at the first stage of delimitation. This consistent practice combined with the prima facie evidence of *opinio juris* establishes the concept of Equidistance/Relevant Circumstances as a rule of customary law. It has become a unification factor between customary law and treaty law.

In addition, the principle of Equidistance/Relevant Circumstances shows a higher level of predictability grafted onto the settled jurisprudence and treaty law. This predictability is the result of three factors. First, international courts and tribunals are inclined to observe the principle of *Jurisprudence Constante* as regards the concept of Equidistance/Relevant Circumstances. Second, the equidistance method per se is a predictable method, based on mathematical formulae, and third, more and more predictable rules are being generated from the selection and consideration of relevant circumstances divided into geographical and non geographical factors.

Having reached a higher level of unity, consistency, legal certainty and predictability, the concept of Equidistance/Relevant circumstances deserves to be erected as the primary rule of maritime delimitation. However, several challenges of a legal, technical, political and socio-economic nature need to be faced in order to achieve that objective.

From a legal point of view, those challenges are related to the vagaries of the jurisprudence illustrated by the *Nicaragua/Honduras* case, with the confusion contained in the Equidistance/Special Circumstances rule (Article 15, UNCLOS), and the dichotomy between the jurisprudential trend of Equidistance/Relevant Circumstances and treaty law, firmly attached to any equitable method. From a technical standpoint, the shortcomings of this new concept are linked to the

subjective methods used to assess the adjustment of the equidistance line in specific geographical circumstances, to determine the relevant coastlines and to appreciate the proportionality between those coasts and the delimited area. Lastly, political and socio-economic factors have yet to be taken thoroughly into account in the assessment of relevant circumstances under the settled jurisprudence, meanwhile under State practice those have become very influential factors of delimitation.

Those negative factors need to be overcome in order to arrive at a significant norm of maritime delimitation based on the Equidistance/Relevant Circumstances concept, which has the merit to combine a higher degree of consistency, certainty and predictability. International peace, economic development, environmental sustainability and unity of international law of delimitation are at stake. Therefore, a combined action of legal, technical and political dimensions between international judicial bodies and the Community of States are imperative in order to reach this final outcome.

APPENDIX I: Summary Chart of case law applying the Equidistance/Relevant Circumstances Approach

Cases	Judicial Bodies	Coastal Relationships	Type of Delimitation	Applied Law
<i>Greenland/Jan Mayen (1993)</i>	ICJ	Oppositeness	Coincident boundary line for the FZ and the continental shelf (CS)	Customary law for the FZ; Art. 6, Geneva Conv. for the CS
<i>Eritrea/Yemen (1999)</i>	Arbitral Tribunal	Oppositeness	Territorial sea (TS) and Single Maritime Boundary Delimitation (SMBD)	Art. 15, UNCLOS for the TS; Art. 74 and 83, UNCLOS and customary law for the EEZ and CS
<i>Qatar/Bahrain (2001)</i>	ICJ	Adjacency (northern sector)	Territorial sea and SMBD	Customary law by ref. to Art. 15, UNCLOS for the TS; Customary law for the EEZ and CS
<i>Cameroon/Nigeria (2002)</i>	ICJ	Adjacency	SMBD for the EEZ and the CS	Art. 74 and 83, UNCLOS (and customary law)
<i>Barbados/Trinidad and Tobago (2006)</i>	Arbitral Tribunal	Hybrid	SMBD for the EEZ and the CS	Art. 74 and 83, UNCLOS (and customary law)
<i>Guyana/Suriname (2007)</i>	Arbitral Tribunal	Adjacency	Territorial sea and SMBD for the EEZ and CS	Art. 15, UNCLOS for the TS; Art. 74 and 83, UNCLOS (and customary law)
<i>Romania/Ukraine (2009)</i>	ICJ	Hybrid	SMBD for the EEZ and the CS	Art. 74 and 83, UNCLOS (and customary law)

Source: Author

APPENDIX II: Maritime Boundary Agreements in Chronological order by Date of Signature

Report Number	Agreements	Type of Agreement						Geographical Relationship		Method of Delimitation		Remarks
		Continental Shelf Boundary	Maritime Boundary	Territorial Sea	Opposite Coasts	Adjacent Coasts	Opp/Adj Coasts	Equidistance Simplified	Modified Equidistance	Non Equidistance	Equidistance* Mentioned	
8-1	Cyprus/United Kingdom 16 August 1960			X		X		X				Simplified perpendiculars to general direction of the coast.
9-11	Netherlands/Federal Republic of Germany 1 December 1964		X				X	X				The boundary is a 26-mile extension of the territorial sea boundary from the Ems estuary.
7-10	Sharjah/Umm al Qaywayn Undated 1964		X				X			X		The boundary, which follows the angular bisector of lines drawn to terminal points of adjacent land frontiers, illustrates a different form of the equidistance method. After 1970, the seaward segment of the boundary was amended to follow the outer limit of the territorial sea extending from the island of Abu Musa.
9-15	Norway/United Kingdom 10 March 1965		X			X		X			X	The boundary is 359 miles in length. It commences at the Norway/Denmark/UK tripoint and terminates at the 100-fathom contour. The Norwegian Trench was disregarded.
10-4(1)	Finland/USSR (Gulf of Finland) 20 May 1965			X		X		X			X	Within the territorial sea the boundary has been determined by the 1940 treaty and the 1947 Treaty of Peace. Beyond the territorial sea the boundary is equidistant.
9-8	Denmark/Federal Republic of Germany (North Sea) 9 June 1965		X				X	X				The boundary commences at the outer limit of the territorial sea and extends in a straight line for 26 miles.
10-1	Denmark/Federal Republic of Germany (Baltic Sea) 9 June 1965		X			X		X				The boundary is 65 miles in length and has been derived from straight baselines in addition to the normal baselines.
9-13	Netherlands/UK 6 October 1965 Amended 25 November 1971		X					X	X		X	The boundary is a simplified equidistance line 225 miles in length.
9-9	Denmark/Norway (North Sea) 8 December 1965 Amended 24 April 1968		X					X	X		X	The boundary is 255 miles in length commencing at the Norway/Denmark/Sweden tripoint. The Norwegian Trench was disregarded.
9-10	United Kingdom/Denmark 3 March 1966 Amended 25 November 1971		X			X		X			X	The boundary is an arc of a great circle 16 miles in length.
10-4(2)	Finland/USSR (Baltic Sea and Gulf of Finland ext.) 5 May 1967		X			X		X			X	The boundary is an extension of the boundary established in the 1965 agreement and is 45 miles in length.
8-7(1)	Italy/Yugoslavia 8 January 1968		X			X				X		Near-shore islands given full effect. Selective treatment for offshore islands. Pelagosa group given partial effect.
7-1	Abu Dhabi/Dubai 18 February 1968		X				X				X	The boundary has been displaced 10 kilometers southwest from the land boundary terminus.
9-14	Sweden/Norway 24 July 1968		X					X	X		X	The boundary has been simplified resulting in an exchange of equal areas between the parties. The Norwegian Trench was disregarded.
7-7	Saudi Arabia/Iran 24 October 1968		X			X				X		Excluding both the adjustment to follow the outer limit of the territorial sea in the vicinity of Farzi, and the area surrounding the Feridoon

224
L. Legault and B. Hankey

Method, Oppositeness and Adjacency, and Proportionality

Report Number	Agreements	Type of Agreement	Geographical Relationship					Method of Delimitation	Remarks				
			Continental Shelf Boundary	Maritime Boundary	Territorial Sea	Opposite Coasts	Adjacent Coasts	Opp/Adj Coasts	Equidistance Strict or Simplified	Modified Equidistance	Non Equidistance	Equidistance* Mentioned	
10-6(1)	Poland/German Democratic Republic 29 October 1968			X				X	X			X	G.D.R straight baselines have been disregarded for purposes of delimitation.
7-9	Qatar/UAE (Abu Dhabi) 30 March 1969			X					X				Turning points A, B, and D are equidistant, point C is non-equidistant. The island of Daiyina has been awarded a 3-mile territorial sea.
10-8	Poland/USSR 28 August 1969			X					X	X			The boundary is 77 1/2 miles in length and terminates 3 miles short of the Poland/Sweden/USSR tripoint.
7-6	Iran/Qatar 10 September 1969			X				X					The boundary is 130 miles in length and disregards Iranian, Qatari and Abu Dhabi islands as basepoints.
5-9	Malaysia/Indonesia (Malacca Strait, Western South China Sea) 27 October 1969			X				X		X			The first and second segments of the boundary are 399 and 310 miles in length, respectively. Straight baselines have been utilized for purposes of delimitation.
5-9	Malaysia/Indonesia (Eastern South China Sea) 27 October 1969			X					X				The Indonesian Natuna Island group has been given partial effect.
1-5	Mexico/USA 23 November 1970					X		X	X			X	12-mile sea boundary in Gulf of Mexico and Pacific. Simplified equidistance.
9-8	Federal Republic of Germany/Denmark 28 January 1971			X				X					The boundary is 169 miles in length and was negotiated on the basis on the judgment of the Court in the North Sea Continental Shelf cases.
9-11	Netherlands/Federal Republic of Germany 28 January 1971			X				X					The agreement was negotiated on the basis of the judgment in the North Sea Continental Shelf cases. The boundary is 151 miles in length.
6-2(2)	Australia/Indonesia (Timor and Arafura Seas) 18 May 1971			X					X	X			In the Arafura Sea two segments combine to form a boundary 506 miles in length, which terminates at the 100-fathom contour.
6-2(1)	Australia/Indonesia (Pacific Ocean) 18 May 1971			X				X	X				The boundary segment in the Pacific Ocean is 30 miles in length. It became a maritime boundary by virtue of Article 7 of the 1973 agreement.
7-2	Iran/Bahrain 17 June 1971			X				X					Points 1 and 4 are non-equidistant between Iran and Bahrain but coincide with point 1 of the Saudi Arabia/Iran and point 2 of the Qatar/Iran boundaries.
8-6	Italy/Tunisia 20 August 1971			X				X				X	The Italian islands of Pantellaria, Linosa and Lampedusa were awarded 13 miles and Lampione 12 miles of territorial sea and shelf.
9-12	Federal Republic of Germany/United Kingdom 25 November 1971			X				X					The boundary is controlled by basepoints on the Danish and Netherlands coasts.
6-13(1)	Thailand/Indonesia 17 December 1971			X				X	X				The boundary is 89 miles in length. It was extended four days later (21 December) to a Indonesia/Thailand/Malaysia common point. The boundary was completed by the agreement of 11 December 1975.
5-9	Malaysia/Indonesia (Malacca Strait ext.) 21 December 1971			X				X					The boundary is 35 1/2 miles in length. It is an extension of the 1969 boundary to the Malaysia/Thailand/Indonesia common point.

Report Number	Agreements	Type of Agreement	Geographical Relationship					Method of Delimitation	Remarks				
			Continental Shelf Boundary	Maritime Boundary	Territorial Sea	Opposite Coasts	Adjacent Coasts	Opp/Adj Coasts	Equidistance Standard or Simplified	Modified Equidistance	Non Equidistance	Equidistance* Mentioned	
5-13(1)	Malaysia/Thailand (Andaman Sea) 21 December 1971	X						X			X		The boundary commences at the Malaysia/Thailand/Indonesia common point and extends inshore for a distance of 90 miles.
1-2	Canada/France (St. Pierre and Miquelon) 27 March 1972					X	X				X	X	Roughly equidistant between mainland coasts. 5 turning points equidistant, 4 negotiated. Many potential turning points disregarded because of offlying islets, rocks, low-tide. Actual basepoints negotiated.
3-4	Uruguay/Brazil 21 July 1972			X				X				X	The boundary is a rhumb line approximately perpendicular to the coast as represented by a line joining Cabo Plonio to Albarado.
10-3	Finland/Sweden 29 September 1972	X					X				X	X	The agreement states that the boundary shall in principle be a median line taking account of special circumstances.
6-2(2)	Australia/Indonesia (Timor and Arafura Seas ext.) 26 January 1973	X					X					X	The boundary is an extension of the 1971 line to the land boundary terminus.
8-10(1)	USSR/Turkey 17 April 1973					X		X				X	The boundary follows an azimuth of 290 degrees from the land boundary.
5-11	Indonesia-Singapore 25 May 1973					X	X					X	Three turning points on the east are generally equidistant and two on the west are slightly closer to Indonesia.
3-2	Argentina/Uruguay 19 November 1973			X			X		X			X	The boundary is an equidistant line constructed from the common baseline from which the territorial sea is measured.
1-1	Denmark/Canada 17 December 1973	X					X				X	X	The modified portion of the boundary effects an exchange of equal areas between the parties.
9-2	Spain/France (Bay of Biscay) 29 January 1974	X						X	X		X	X	Two methods were used. The boundary is equidistant for 39 percent of its length to the foot of the continental slope. The Cap Breton Trench was disregarded.
5-12	Japan/South Korea 30 January 1974	X					X		X				The boundary is 264 miles in length. The island of Tsu Shima, which lies closer to Korea than to Japan, has been given full effect as a basepoint.
8-5	Italy/Spain 19 February 1974	X					X		X			X	The boundary consists of nine geodesic lines connecting turning points and is 137 miles in length.
6-10(1)	India/Sri Lanka 26-28 June 1974					X	X					X	Divides historic waters in Palk Bay and Palk Strait.
10-5	Federal Republic of Germany/German Democratic Republic 29 June 1974					X		X				X	Boundary takes account of established navigational route so as to place entire navigational route to FRG port on FRG side of boundary.
7-5	Iran/Oman 25 July 1974	X					X					X	Umm al Fayarin has been disregarded as a basepoint for turning point 18 but given half-effect for turning point 19.
6-6(1)	India/Indonesia 8 August 1974	X					X		X				The first of two agreements. The boundary is 47 1/2 miles in length.

Report Number	Agreements	Type of Agreement							Geographical Relationship	Method of Delimitation	Remarks
		Continental Shelf Boundary	Maritime Boundary	Territorial Sea	Opposite Coasts	Adjacent Coasts	Opp/Adj Coasts	Equidistance Strict or Simplified			
7-8	Iran/United Arab Emirates (Dubai) 13 August 1974		X					X		X	The equidistant line has been modified between turning points 3 and 4 to follow the outer limit of the territorial sea measured from the island of Sirri.
4-1	Cameroon-Nigeria 30 May-1 June 1975					X		X		X	
4-2	Senegal/The Gambia 4 June 1975			X				X		X	The northern boundary follows the parallel of 13° 35'36" north latitude and the southern boundary follows the parallel of 13° 03'27" north latitude.
3-7	Colombia/Ecuador 23 August 1975			X				X		X	The agreement established a 10-mile wide fisheries buffer zone on either side of the boundary which follows the parallel of 01° 27'24" north latitude.
6-13(2)	Indonesia/Thailand (Andaman Sea ext.) 11 December 1975*		X					X		X	This portion of the boundary is an extension of that established in the 1971 agreement. Divergence from equidistance appears to be based on seabed morphology.
9-7	Portugal/Spain 12 February 1976*		X					X		X	The northern boundary follows the parallel of 41° 51'57" north latitude and the southern boundary follows the meridian of 07° 23'48" west longitude.
6-10(2)	India/Sri Lanka 23 March 1976			X				X	X		In the Indian Ocean the boundary is 292 miles in length and terminates at the India/Sri Lanka-Maldives tripoint. The Bay of Bengal boundary is 214 miles in length.
4-6	Mauritania/Morocco 14 April 1978*		X					X		X	The boundary follows the 24th parallel of north latitude.
4-5	Kenya/Tanzania 9 July 1976			X				X	X	X	The boundary divides the 50-mile territorial sea claimed by Tanzania from the 200-mile EEZ claimed by Kenya. Boundary follows a parallel of latitude and prevents equidistance cut-off of Kenya coast by Pemba Island.
6-9	India/Maldives/Sri Lanka 23, 24, 31 July 1976			X		X		X		X	Fixes trijunction between 3 states in Gulf of Manaar.
2-8	Cuba/Mexico 26 July 1976			X				X	X	X	The boundary is 350 miles in length and extends from the Gulf of Mexico to the Cuba/Mexico/Honduras tripoint.
2-5	Colombia/Panama (Caribbean Sea) 20 November 1976			X				X		X	The equidistant portion of the boundary is 229 miles in length. Thereafter the boundary is a modified equidistant line giving half effect to cays.
2-5	Colombia/Panama (Pacific Ocean) 20 November 1976			X				X	X	X	Two methods were used. The boundary is equidistant for 39 percent of its length. The remaining 61 percent follows the parallel of 5 degrees north latitude.
6-8	India/Maldives 28 December 1976			X				X	X		The boundary commences at the India/Sri Lanka/Maldives tripoint and is 496 miles in length.
6-6(2)	India/Indonesia 14 January 1977		X					X	X		The agreement extends the boundary northeastward and southeastward for a total length of 296 miles.

* Agreement not yet entered into force.

Report Number	Agreements	Type of Agreement	Geographical Relationship	Method of Delimitation	Remarks
		Continental Shelf Boundary Maritime Boundary Territorial Sea Opposite Coasts Adjacent Coasts Opp/Adj Coasts Equidistance Simplified Modified Equidistance Non Equidistance Equidistance* Mentioned			
3-6	Colombia/Costa Rica 17 March 1977*	X	X	X X	Albuquerque Cays appear to have been given full effect for purposes of delimitation. The meridian of 82° 14' west conflicts with the terms of the Colombia-Nicaragua Treaty of 1930. The use of meridian/parallels was influenced by third country boundary considerations.
8-4	Italy/Greece 24 May 1977	X	X	X X	The equidistant boundary line has been modified to give partial effect to small Greek islands.
9-3	France/UK 30 June 1977	X	X	X X	Decision of Court of Arbitration. Modified equidistance (half effect to Scilly Islands) in Western Approaches area. 12-mile enclave (fishing zone limits) on seaward side of Channel Islands.
2-7	Haiti/Cuba 27 October 1977	X	X	X X	Navassa, a small island under US sovereignty, has been disregarded as a basepoint in the construction of the meridian line. The Cayman Trench was disregarded.
1-4	US/Cuba 16 December 1977*	X	X	X	The boundary is a compromise equidistant line based on two equidistant lines constructed respectively between normal baselines and straight baselines.
2-2	Colombia/Dominican Republic 13 January 1978	X	X	X	The boundary is 103 miles in length.
2-3	Colombia/Haiti 17 February 1978	X	X	X	The boundary utilizes the equidistance method but denies Morant Cays status as a basepoint for Jamaica. Described as simplified.
2-14	Venezuela/US 28 March 1978	X	X	X	65 percent of the boundary is equidistant between Venezuela (Aves Island) and US Virgin Islands. The Netherlands islands of Curacao and Bonaire have been utilized by Venezuela as basepoints for the remaining 35 percent. The Muertos Trough was disregarded.
2-12	Venezuela/Netherlands (Netherlands Antilles) 30 March 1978	X	X	X X	Proportionality was decisive factor in adapting modified and non-equidistance methods which allocated to Netherlands Antilles 56 percent of space that would have been allocated by strict equidistance. Aves Island, which cannot sustain human habitation without external support, has been given full effect as a basepoint.
1-5	US/Mexico (Caribbean Sea) 4 May 1978*	X	X	X X	Arrecife Alacran, an extensive reef containing five islets situated 66 miles off the Yucatan peninsula, has been given full effect as a basepoint. The Sigsbee Deep was disregarded. Same boundary as 1976 Exchange of Notes.
1-5	US/Mexico (Pacific Ocean) 4 May 1978*	X	X	X X	The boundary is 270 miles in length and has been simplified by reducing the turning points from thirteen to three. Equal exchanges of areas resulted from the simplification.
6-11	India/Thailand 22 June 1978	X	X	X	The boundary is equidistant between India and Indonesia from turning point 1 to 2, and between India and Thailand between points 2 to 8. The boundary disregards a submarine depression between India and the boundary.

Report Number	Agreements	Type of Agreement	Geographical Relationship						Method of Delimitation	Remarks			
			Continental Shelf Boundary	Maritime Boundary	Territorial Sea	Opposite Coasts	Adjacent Coasts	Opp/Adj Coasts	Equidistance Strict or Simplified	Modified Equidistance	Non Equidistance	Equidistance* Mentioned	
10-7	Sweden/German Democratic Republic 22 June 1978				X	X			X			X	The boundary terminates to the east and to the west at the Denmark/Sweden/GDR tripoints.
8-10(2)	Turkey/USSR 23 June 1978		X					X	X			X	The boundary is 448 miles in length and terminates 30 miles short of the USSR/Turkey/Romania tripoint.
5-3	Australia/Papua New Guinea 18 December 1978*				X	X						X	The equidistance method has been utilized for the first three points in the Arafura Sea. Thereafter the boundary is non-equidistant.
9-15	Norway/UK 22 December 1978		X					X	X				The boundary is an extension of the 1965 boundary, 142 miles in length terminating at the UK/Denmark/Norway tripoint.
2-9	Venezuela/Dominican Republic 3 March 1979				X	X					X		The boundary comprises two segments. Venezuela has utilized Curacao on the east and Aruba on the west as basepoints for determining the boundary.
1-3	Canada/US (Gulf of Maine) 29 March 1979			X				X				X	Adjudicated. Equidistance played some role, particularly in inner area (bisector of angle formed by lines representing direction of coasts). Proportionality applied to middle/outer areas.
9-9	Denmark (Faroes)/Norway 15 June 1979				X	X		X				X	The boundary is 33 miles in length and extends from the UK/Denmark/Norway tripoint to a point 200 miles from Denmark and Norway.
5-13(1) and (2)	Malaysia/Thailand (Gulf of Thailand) 24 October 1979		X		X	X						X	The boundary is 90 miles in length and terminates at the Indonesia/Malaysia/Thailand common point.
5-8	France/Tonga 11 January 1980			X				X	X			X	The agreement stipulates that the delimitation be in accordance with the equidistance method and in conformity with the application of fair principles.
2-6	Costa Rica/Panama (Caribbean Sea) 2 February 1980			X		X				X	X	X	In accordance with the agreement, the boundary is a 'median line whose points are all equidistant from the points nearest the base from which the width of the territorial sea of each State is measured'.
2-6	Costa Rica/Panama (Pacific Ocean) 2 February 1980			X		X				X	X	X	In accordance with the agreement, the boundary is a 'median line whose points are all equidistant from the points of land nearest to the base from which the width of the territorial sea of each State is measured.'
10-4(3)	Finland/USSR 25 February 1980			X	X				X			X	Applies 1965 continental shelf boundaries to fisheries jurisdiction. Adds further segment of 19 miles.
6-5	Mauritius/France (Reunion) 2 April 1980			X				X	X			X	The boundary is 362 miles.
5-5	US (American Samoa)/Cook Islands 11 June 1980			X	X				X				Rose Island and Suvorov Island are uninhabited but have been given full effect as basepoints.
2-11	Venezuela/France (Guadeloupe and Martinique) 17 July 1980			X	X						X		The boundary is constituted by the meridian of 62°48'50" west longitude. It appears that the boundary is formed of two segments to allow for delimitation with Dominica. The Grenada Basin was disregarded.

Report Number	Agreements	Type of Agreement							Geographical Relationship	Method of Delimitation	Remarks
		Continental Shelf Boundary	Maritime Boundary	Territorial Sea	Opposite Coasts	Adjacent Coasts	Opp/Adj Coasts	Equidistance Strict or Simplified			
6-4	Burma/Thailand 25 July 1980			X					X X	X	The boundary terminates short of the Burma/Thailand/India tripoint.
5-14	New Zealand/Tokelau/US (American Samoa) 2 December 1980			X					X X		The boundary, 318 miles in length, has been simplified by reducing the number of turning points from 22 to 8. Virtually no exchange of areas was involved.
5-10	Indonesia/Papua New Guinea 13 December 1980		X						X X		The boundary is an extension of the 1971 boundary to 200 miles from the baselines from which the territorial sea is measured.
3-3	France (French Guiana)/Brazil 30 January 1981			X				X		X	The outer limit of the boundary is not specified. The boundary to 200 miles effects an exchange of areas of approximate equivalence.
2-10	St. Lucia/France (Martinique) 4 March 1981			X					X X	X	The boundary commences at the St. Lucia/France/Venezuela tripoint and terminates at the St. Lucia/France/Barbados tripoint.
9-4	Norway (Jan Mayen)/Iceland 22 October 1981		X			X				X	Where the distance between Island and Jan Mayen is less than 400 nautical miles, the continental shelf boundary is constituted by the outer limit of the Icelandic EEZ. A submarine depression between the Jan Mayen Ridge and Iceland was disregarded.
5-1	France (New Caledonia)/Australia (Coral Sea) 4 January 1982			X					X	X	The boundary in non-equidistant between turning points R18 and R19, where the boundary traverses Lord Howe Rise beyond 200 miles from the coasts of the parties.
5-1	France (New Caledonia)/Australia (Indian Ocean) 4 January 1982		X	X					X X		The line delimits the boundary between the French EEZ and the Australian 200-mile fishing zone.
8-9	Libya/Tunisia 24 February 1982		X						X	X	Judgment of ICJ. Inner segment based on "modus vivendi" line. Outer segment, based on general direction of Tunisian coast, gives half-effect to island of Kerkennah.
9-3	France/UK 24 June 1982		X			X			X		Permanent harbor works and low-tide elevations within 12 miles of the coasts of the parties were utilized as basepoints.
5-7	France (Polynesia) - UK (Pitcairn) 25 October 1983			X		X			X		Strict equidistance line between two small, distant islands.
8-3	France/Monaco 16 February 1984		X			X				X	Boundary formed of parallel azimuths in order to prevent cut-off of Monaco continental shelf by converging boundaries with France on either side.
2-1	Costa Rica/Colombia 6 April 1984			X		X			X	X	
10-2	Denmark/Sweden 9 November 1984			X		X				X X	Equidistance has been modified to take account of economic (navigation and fishing) interests.
3-1	Argentina/Chile 29 November 1984			X		X				X	Negotiated on basis of papal mediation. One turning point is equidistant. Most of boundary follows meridians and parallels. Prevents cut-off of Argentinian coastal front by equidistant line.
4-3	Guinea/Guinea-Bissau 14 January 1985			X		X				X	Established by arbitral tribunal. Utilizes (a) thalweg, (b) parallel of latitude ('historic boundary') and (c) straight line perpendicular to general direction of the coast.

Report Number	Agreements	Type of Agreement			Geographical Relationship	Method of Delimitation		Remarks				
		Continental Shelf Boundary	Maritime Boundary	Territorial Sea		Opposite Coasts	Adjacent Coasts		Opp/Adj Coasts	Equidistance Strict or Simplified	Modified Equidistance	Non Equidistance
10-4(4)	Finland/USSR 5 March 1985			X	X		X		X			Refers to their earlier boundary agreements and states line contained therein delimits continental shelf, fishery zone and EEZ.
3-8	Costa Rica/Ecuador 12 March 1985			X	X		X		X			
5-15(1)	USSR/North Korea 17 April 1985				X	X			X			Boundary appears to be the bisector of an angle formed by artificial straight baselines, the bisector then being adjusted by 4 degrees in the direction of the Korean coasts.
10-12	Poland-Sweden-USSR 30 June 1985			X			X		X			Modified equidistance boundary give 3/4 effect to Swedish island of Gotland.
10-8	Poland/USSR 12 July 1985			X		X	X					
2-13(2)	Trinidad and Tobago/Venezuela 4 August 1985			X			X	X	X	X		The boundary consists in varying parts of meridians and parallels, strict equidistance and modified equidistance, and includes technically rectified version of the boundary agreed in 1942.
5-15(2)	USSR/North Korea 22 January 1986		X			X			X			Negotiated line drawn in two straightline segments approximates in part an equidistance line drawn from hypothetical straight baselines.
2-4	Colombia/Honduras 2 August 1986			X	X				X			Uses stepped parallels and meridians for geo-political reasons. Two turning points are equidistant. Other states in area use same method.
8-8	Libya/Malta 10 November 1986		X		X				X			Negotiated settlement based on ICJ judgment of 3 June 1985. Taking account of need to avoid excessive disproportion between lengths of relevant coasts and sea area appertaining to each party, the Court found an equitable result to be achieved by transposing median line through 18 minutes of latitude northward, thus giving 1/4 effect to Malta beyond hypothetical equidistant line between Libya and Sicily.
8-2	France/Italy 28 November 1986				X	X	X		X			
6-3	Burma/India 23 December 1986			X	X		X					Southern part of boundary is equidistant. In northern part Narcondam Islands (claimed by India, disputed by Burma) were generally disregarded, although in some sections given half-effect. Proportionality may have played a role.
8-10(3)	USSR/Turkey 23 December 1986 6 February 1987			X			X	X				In an exchange of notes, the parties agreed that the line delimiting their continental shelves in the Agreement of 23 June 1978 shall also delimit their EEZs.
2-15	Dominica-France 5 May 1987			X			X	X	X			The boundary between Guadeloupe to the north and Martinique to the south is a simplified equidistant line where the coasts are opposite, and quasi-parallel straight lines in the Atlantic region where the relationship of the coasts is adjacent.
10-9	Sweden/USSR 18 April 1988			X	X				X	X		Gave 3/4 effect to 2 large, populated Swedish islands.

Report Number	Agreements	Type of Agreement	Geographical Relationship					Method of Delimitation	Remarks				
			Continental Shelf Boundary	Maritime Boundary	Territorial Sea	Opposite Coasts	Adjacent Coasts	Opp/Adj Coasts	Equidistance Strict or Simplified	Modified Equidistance	Non Equidistance Equidistance* Mentioned		
5-4	Australia-Solomon Islands 13 September 1988*				X		X		X			Equidistant lines drawn from two control points on Australian's Mellesh Reef and six on Solomon Islands Indispensable Reef. Point V (only turning joint in line) is slightly off strict equidistance.	
10-11	Denmark/German Democratic Republic 14 September 1988				X		X		X			Most of boundary is simplified equidistant line; a deviation consisting of an indentation into Adler Grund was based on coastal proportionality and giving less than full effect to the Danish island of Bornholm.	
9-3	France/UK 2 November 1988					X	X		X			Agreement modifies status of boundary in Straits of Dover from continental shelf to territorial sea boundary.	
9-5	Ireland/UK 7 November 1988		X					X			X	X	Negotiated line follows medians and parallels.
4-7	Tanzania/Mozambique 28 December 1988				X	X		X	X			X	Follows median line for 22.5 n.m, then parallel of latitude.
10-10	Poland-Sweden 10 February 1989				X		X				X		Modified equidistant boundary gives 3/4 effect to Swedish island of Gotland.
10-6(1)	German Democratic Republic-Poland 22 May 1989				X	X		X				X	This boundary replaces and departs from a continental shelf boundary agreement signed in 1968. It departs from equidistance in order to take account of the navigational interests of Poland.
6-2(5)	Australia-Indonesia 11 December 1989		X				X					X	Establishes a provisional joint zone of cooperation pending the delimitation of a boundary.

Source: Charney J. & Alexander L. (Ed.), *International Maritime Boundaries* (Dordrecht, Nijhoff, 1993), Vol. I.

APPENDIX III: Existing and Future Maritime Boundaries considering Economic and Environmental Factors

Economic and Environmental Considerations 111

ANNEX

EXISTING BOUNDARIES
(according to report number)

Kind/Year Boundary	No. of Report	Stated	Presumed	Minerals	Navi- gation	Fishe- ries	Env.	General Econ.
CS 1973	1-1	X		X**			X	
MB 1976	1-5(2)	X				X		
MB 1978	2-7		X			X		
MB 1980	2-11		X					X
MB 1978	2-12	X		X				
MB 1989	2-13(2)	X		X				
MB 1990	2-13(3)							
MB 1978	2-14	X		X**		X**		
MB* 1984	3-1	X			X			
MB 1973	3-2		X		X			
MB*1985	4-3	X			X			
CS 1958	5-2	X		X				
CS 1969	5-9	X		X				
TS 1973	5-11	X			X			
CS 1974	5-12	X		X				
CS 1989	6-2(5)	X		X				
MB 1986	6-3		X	X				
CS 1981	6-7		X	X				
CS 1978	6-11		X		X			
CS 1975	6-13(2)		X	X				
CS 1958	7-3	X		X				
CS 1969	7-7	X		X				
CS 1974	7-8		X	X				
CS 1969	7-9	X		X				
CS 1978	8-6		X			X		
CS 1970	8-7(1)		X	X				
TS 1975	8-7(2)	X			X			
CS* 1982	8-9	X		X				
MB* 1981	9-4	X		X		X		X
CS 1971	9-8	X		X				
CS 1971	9-11	X		X				
MB 1985	10-2	X			X			
TS 1974	10-5	X			X			
MB 1989	10-6	X			X			
MB 1988	10-9		X			X		
MB 1989	10-10		X			X		
MB 1989	10-11	X		X				
TOTAL	36	24	12	21	9	7	1	2

EXISTING BOUNDARIES
(chronologically)

Kind/Year Boundary	No. of Report	Stated	Presumed	Minerals	Navi- gation	Fishe- ries	Env.	General Econ.
CS 1958	5-2	X		X				
CS 1958	7-3	X		X				
CS 1969	5-9	X		X				
CS 1969	7-7	X		X				
CS 1969	7-9	X		X				
CS 1970	8-7(1)		X	X				
CS 1971	9-8	X		X				
CS 1971	9-11	X		X				
CS 1973	1-1	X		X**			X	
MB 1973	3-2		X		X			
TS 1973	5-11	X			X			
CS 1974	5-12	X		X				
CS 1974	7-8		X	X				
TS 1974	10-5	X			X			
CS 1975	6-13(2)		X	X				
TS 1975	8-7(2)	X			X			
MB 1976	1-5(2)	X				X		
MB 1978	2-7		X			X		
MB 1978	2-12	X		X				
MB 1978	2-14	X		X**		X**		
CS 1978	6-11		X		X			
CS 1978	8-6		X			X		
MB 1980	2-11		X					X
CS 1981	6-7		X	X				
MB* 1981	9-4	X		X		X		X
CS*1982	8-9	X		X				
MB*1984	3-1	X			X			
MB* 1985	4-3	X			X			
MB 1985	10-2	X			X			
MB 1986	6-3		X	X				
MB 1988	10-9		X			X		
MB 1989	2-13(2)	X		X				
MB 1990	2-13(3)							

FUTURE BOUNDARIES

Kind/Year Boundary	No. of Report	Stated	Presumed	Minerals	Navi- gation	Fishe- ries	Env.	General Econ.
MB	5-2		X	X				
MB	5-9		X			X		
MB	9-7		X		X			
TS	9-11		X		X			
TS	10-1		X		X			


* = impartial settlement

** = influence exerted by lack of a given factor (existence of given factor influenced all other boundaries not marked by indicator)

In cases where multiple considerations are indentified, the 'stated' or 'presumed' indicator applies to all such considerations.

Source: *Ibid.*

APPENDIX IV: Statement by the President of the ICJ before the 6th Committee of the UN General Assembly (Legal Committee)

United Nations	A/C.6/56/SR.12
 General Assembly Fifty-sixth session Official Records	Distr.: General 9 November 2001 Original: English

Sixth Committee

Summary record of the 12th meeting
Held at Headquarters, New York, on Wednesday, 31 October 2001, at 10 a.m.

Chairman: Mr. Abdalla (Vice-Chairman) (Sudan)
later: Mr. Lelong (Chairman) (Haiti)


Contents

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

Statement by the President of the International Court of Justice

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

01-61324 (E)


65. With reference to chapter VIII, he felt that in the light of the vast variety of possible unilateral acts of States, international law might best be served by listing the more-frequently-encountered such acts and the rules by which they were governed.

Statement by the President of the International Court of Justice

66. **Mr. Guillaume** (President of the International Court of Justice) said that the situation with regard to the proliferation of international judicial bodies and its impact on international law had not improved since the previous year and indeed, as the swordfish stocks dispute between Chile and the European Union and the Southern Bluefin Tuna cases had shown, the risks of “forum shopping” had become worse.

67. The risks of conflicting case law had also grown and the Court had just been seized of an application by Liechtenstein instituting proceedings against Germany in respect of a case, certain aspects of which had been heard and decided by the European Court of Human Rights.

68. The proliferation of international judicial bodies could endanger the unity of international law. International lawmakers and judges should exercise great caution in that field in the future, although such caution might not suffice and procedures would have to be established to enable the Court to rule on questions submitted to it for a preliminary ruling by specialized international courts.

69. On 16 March 2001 the Court had decided a territorial dispute between Qatar and Bahrain concerning sovereignty over certain islands and the maritime delimitation to be established between the two States.

70. Delimitation of maritime areas had long been considered a secondary question involving the fixing of the boundaries between narrow territorial areas. In the past 30 years, however, it had become one of the main territorial issues, owing to technological developments and the extension of State jurisdiction to the high seas.

71. In making such delimitations, two methods had been recommended. Some had looked to the “equidistance method”, pursuant to which the maritime boundary between States must follow the median line every point of which was equidistant from the nearest points on the coasts. Others had pointed out that, while

the equidistance method was acceptable for the delimitation of the territorial seas between States with opposite coasts which were comparable in length, it could yield inequitable results in other circumstances. Accordingly, they had advocated maritime delimitations based on equitable principles or producing equitable results.

72. The boundary between the territorial sea and the high seas had traditionally been fixed at three nautical miles from the coasts (currently often increased to 12 nautical miles). The question, however, was which coasts should be taken into account in fixing the boundary in order to ensure appropriate delimitation. There were two methods for identifying the starting-points of the territorial sea: the normal baseline method and the straight baseline method.

73. The normal baseline ordinarily used for measuring the breadth of the territorial sea was the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. Nevertheless, the Court, in its Judgment of 18 December 1951 in the *Anglo-Norwegian Fisheries* case, had preferred the straight baseline method to the traditional one. While noting that the normal baseline method could be applied without difficulty to an ordinary coast which was not too jagged, the Court had added that where a coast was deeply indented and cut into or was bordered by an archipelago, the baseline became independent of the low-water mark and could only be determined by means of a geometrical construction. For those situations the Court had adopted the straight baseline method, which had later been incorporated into the 1958 Convention on the Territorial Sea and the Contiguous Zone and then into article 7, paragraph 1, of the United Nations Convention on the Law of the Sea. In its Judgment of 16 March 2001, the Court had had its first opportunity to apply those provisions, which it deemed to be part of customary law.

74. Bahrain had contended that the various maritime features lying off the coast of its main islands could be regarded as similar to a fringe of islands constituting a whole with the mainland. It had concluded that it was entitled to draw straight baselines connecting those features.

75. The Court had disagreed with Bahrain on that point. While recognizing that the maritime features in question were part of Bahrain’s overall geographical

configuration, it had observed that they were not part of a deeply indented coast, that they could not be characterized as a fringe of islands, and that the situation was therefore different from the one described in the United Nations Convention on the Law of the Sea. It had concluded that Bahrain was not entitled to draw straight baselines and that, accordingly, the equidistance line between Bahrain and Qatar must be drawn by reference to normal baselines. Bahrain's internal waters had been reduced accordingly.

76. In addition to clarifying the rules for fixing the external limits of territorial seas, the Judgment also addressed the question of the delimitation of the territorial waters of neighbouring States. That question was governed by customary law as codified by the Geneva Conventions and the United Nations Convention on the Law of the Sea. Article 15 of that Convention established the principle that territorial seas must be delimited in accordance with the equidistance method, but added that the equidistance provision did not apply where special circumstances made it necessary to delimit the territorial seas of the two States in a different way.

77. In the case between Qatar and Bahrain, the Court, confirming its case law, had refused to apply the method of mainland-to-mainland calculation in drawing the equidistance line. It had identified each of the maritime features having an effect upon the course of the equidistance line and had fixed that line by reference to the appropriate baselines and basepoints. To that end, it had identified the islands and islets under the sovereignty of each of the States.

78. A new difficulty had arisen, however, as a result of the presence in the area of low-tide elevations. As defined by the United Nations Convention on the Law of the Sea, a low-tide elevation was a naturally formed area of land which was surrounded by and above water at low tide, but submerged at high tide. Pursuant to the Convention, where a low-tide elevation was situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation might be used as the baseline for measuring the breadth of the territorial sea. Where a low-tide elevation was wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it had no territorial sea of its own.

79. In the case between Qatar and Bahrain, certain low-tide elevations were situated in the area where the territorial seas of the two States overlapped. In principle, therefore, each of them had a right to use the low-water line of those low-tide elevations for measuring the breadth of its territorial sea. For the purposes of delimitation, the competing rights of the two States had appeared to cancel each other out. Nevertheless, Bahrain had contended that it had taken possession of the majority of the low-tide elevations, which had thus come under its sovereignty, and that it alone was permitted to take them into account for purposes of fixing the equidistance line.

80. The Court had not accepted that argument. It had held that a State could not acquire sovereignty by appropriation over a low-tide elevation situated within the limits of its territorial sea where the same low-tide elevation was also situated within the limits of the territorial sea of another State. Accordingly, it had concluded that those low-tide elevations could not be used for determining the basepoints and drawing equidistance lines.

81. With regard to the delimitation of the continental shelf and the exclusive economic zone, the Court had also established a case law which was now authoritative. In the *North Sea Continental Shelf* case (1969), the Court had initially inclined towards a delimitation of that shelf in accordance with equitable principles, taking account of all the relevant circumstances. The same approach had been adopted in subsequent cases. Those decisions had influenced the solution adopted by the United Nations Conference on the Law of the Sea, as reflected in articles 74 and 83 of the United Nations Convention. At that stage, however, case law and treaty law had become unpredictable, prompting the Court to develop its case law in the direction of greater certainty.

82. A new stage had been reached in the Judgment rendered on 14 June 1993 in the case between Denmark and Norway concerning the maritime delimitation in the area between Greenland and Jan Mayen. In that case it had been proposed to delimit the continental shelf in accordance with the 1958 Geneva Convention on the Continental Shelf (equidistance/special circumstances) and the fishing zones in accordance with customary law (equitable solution, having regard to relevant factors). The Court had stressed that, in both cases, an equitable result must be reached. To that end, it had held that it was appropriate to start from the

equidistance line, subsequently making all the necessary corrections to it, having regard to the relevant factors. Lastly, it had stated that those factors were comparable to the special circumstances envisaged by the 1958 Convention. On that basis, the Court had arrived at a single delimitation line for the continental shelf and the fishing zone, and had drawn that line to the east of the median line.

83. The solution arrived at in the case between Denmark and Norway had been applicable from then on with regard to the delimitation of the continental shelf and the fishing zones of States with opposite coasts. It had remained to be seen whether the same would apply in the case of adjacent coasts.

84. The Court had ruled affirmatively on the matter in the case between Qatar and Bahrain, again deciding that an equidistance line should first be provisionally drawn, consideration then be given to whether there were relevant circumstances leading to an adjustment of that line. In the event, it had ruled out a number of circumstances invoked by the parties and had retained only one, concerning a maritime feature known as Fasht al Jarim, which constituted a projection of Bahrain's coastline in the Gulf area. The Court had decided that, given the circumstances of the case, equity required that Fasht al Jarim should have no effect in determining the boundary line.

85. It was encouraging to note that the law of maritime delimitations, by means of the developments in the Court's case law which he had described, had reached a new level of unity and certainty, while maintaining the necessary flexibility. In all cases the Court must, as States also did, first determine provisionally the equidistance line and then ask whether there were special circumstances requiring that line to be adjusted with a view to achieving equitable results. In the case between Qatar and Bahrain, the parties had thanked the Court for managing to reconcile law and equity.

The meeting rose at 1 p.m.

BIBLIOGRAPHY

The Case Law (including separate and dissenting opinions of international judges)

The *North Sea Continental Shelf* cases (German Federal Republic/Denmark, and German Federal Republic/Netherlands) 1969 ICJ REP, at p. 18, < <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=cs2&case=52&k=cc>> (25 May 2009).

Arbitration between the United Kingdom of Great Britain and Northern Island and The French Republic on the Delimitation of the Continental Shelf, Decision of the Court of Arbitration, 1977, RIAA, Vol. XVIII, pp. 3 et seq.

Case concerning the Delimitation of the Maritime Boundary in The area of the Gulf of Maine (*Canada v. United States of America*) 1984 ICJ REP., para 112, < <http://www.icj-ijc.org/docket/index.php?p1=3&p2=3&code=cigm&case=67&k> > (25 May 2009)

The *Continental Shelf* case (*Tunisia v. Libyan Arab Jamahiriya*) 1982, ICJ REP at Para 71, < <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=tl&case=63&k=c4>

Case concerning the Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark v. Norway*) 1993 ICJ REP, < <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=gjm&case=78&k=e0>> (15 June 2009).

Case concerning the Arbitral Award (*Eritrea v. Yemen*), Decision of the Arbitral Tribunal concerning the second stage of Proceedings (Maritime Delimitation), 1999, para 1-6, <http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF> (25 June 2009).

Case concerning the Maritime Delimitation and the Territorial Questions between Qatar and Bahrain (*Qatar/Bahrain*) 2001 ICJ REP, para 1, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=qb&case=87&k=61> (27 June 2009)

Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria), 2002 ICJ REP, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=cn&case=94&k=74> (30 June 2009)

Case concerning the Arbitral Award (*Barbados v. Trinidad and Tobago*), Decision of the Arbitral Tribunal, 2006, para 243, http://www.pca-cpa.org/showpage.asp?pag_id=1152 (20 May 2009).

Case concerning the Arbitral Award (*Guyana v. Suriname*), Decision of the Arbitral Tribunal, 2007, para 1, http://www.pca-cpa.org/showpage.asp?pag_id=1147 (1 July 2009)

Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), 2007 ICJ REP, para 1, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nh&case=120&k=14> (5 July 2009).

Case concerning Maritime Delimitation in the Black Sea (*Romania v. Ukraine*), 2009 ICJ REP, para 1, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=ru&case=132&k=95> (15 June 2009)

Paul Fisher, Dissenting opinion, *Greenland/Jan Mayen* case (1993), at p. 275 <<http://www.icj-cij.org/docket/files/78/6765.pdf>> 15 August 2009.

Raymond Ranjeva, Separate opinion, *Nicaragua/Honduras* case (2007), at p. 7. <http://www.icj-cij.org/docket/files/120/14078.pdf> > 17 August 2009

Books

Ahnish, Faraj A., *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Oxford: Clarendon Press, 1993).

Antunes, Nuno M., *Towards the Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Leiden: Nijhoff, 2003).

Blake, Gerald H., (Ed.), 8th ed., *Maritime Boundaries: World Boundaries (Vol. V)*, (London: World Boundaries Series, 1997).

Brownlie, Ian, *Principles of Public International Law*, 6th Ed. (New York: Oxford University Press, 2003)

Charney J. & Alexander L. (Ed.), *International Maritime Boundaries* (Dordrecht, Nijhoff, 1993), Vol. I.

Churchill, R.R. & Lowe, A.V., *The Law of the Sea*, 3rd Ed. (Manchester: Manchester University Press, 1999).

Evans, M. D., *Relevant Circumstances and Maritime Delimitation* (Oxford: Clarendon Press, 1989).

Garner, Bryan A., (Ed.), *Black's Law Dictionary*, 7th Ed., (St Paul, MN: West Group, 1999).

Jagota, S.P., *Maritime Boundary* (Dordrecht: Nijhoff, 1985).

Kanga, Maurice K., *Delimitation Maritime sur la Cote Atlantique Africaine* (Bruxelles: Bruylant, 2006).

Kolb, Robert, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries*, Introduction. (The Hague: Nijhoff, 2003).

Platzöder, R. *Third United Nations Conference on the Law of the Sea: Documents*, Vol. IX 5(Oceana: New York, 1986).

Satya N., Nandan & Shabtai, Rosenne (Ed.), *UN Convention on the Law of the Sea 1982: A commentary (Vol. II)*, (Dordrecht: Nijhoff, 1993).

Tanaka, Yoshifumi, *Predictability and Flexibility in the Law of Maritime Delimitation*, (Oxford: Hart Publishing, 2006).

Tanja, Gerard, *The Legal Determination of International Maritime Boundaries: The Progressive Development of Continental Shelf, EFZ and EEZ Law* (Deventer: Kluwer, 1990).

Vicuna, Francisco O., *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Cambridge: Cambridge University Press, 1989).

Weil, Prosper, *The Law of Maritime Delimitation: Reflections* (Cambridge: Grotius, 1989).

Articles

Anderson, David, « Developments in Maritime Boundary Law and practice », (2005) Vol. V *International Maritime Boundaries* (Dordrecht, Nijhoff).

Rhee, Sang-Myon, “Sea Boundary Delimitation between States before World War II” (1982) 76 *AJIL* 560.

Treaty Instruments

Charter of the United Nations, Preamble

Convention on Fishing and the Conservation of the Living Resources of the High Seas, 1958.

Convention on the Continental Shelf, 1958.

Convention on the High Seas, 1958.

Convention on the Territorial Sea and Contiguous Zone, 1958.

United Nations Convention on the Law of the Sea, 1982

Texts and Documents

(1924-25) 30 League of Nations Treaty Series.

15 United Nations, *Reports of International Arbitral Awards*, 481-540.

Harry S., Truman, “Presidential Proclamation on the Continental Shelf (No 2667)” (speech, New York, September 28, 1945) <
http://www3.law.nyu.edu/kingsburyb/fall01/intl_law/PROTECTED/unit3/intl_law2001_unit3_II,2,b_trumanproclam.htm > (1 June 2009)

UN General Assembly, 12th Meeting of the 6th Committee, Official Records, 9 November 2001 <
<http://daccessdds.un.org/doc/UNDOC/GEN/N01/613/24/PDF/N0161324.pdf?OpenElement>> 15 August 2009

UNCLOS I, Official Records.

United Nations, *Handbook on the Delimitation of Maritime Boundaries* (New York: DOALOS, 2000).

United Nations, *The Law of the Sea: Definition of the Continental Shelf: An examination of the UN Convention on the law of the Sea*, (New York: DOALOS, 1993).

Yearbook of the ILC (YILC), 1952, Vol. II, p. 38, Commentary.

YILC (1954), i.100; ii 158.