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The Demise of Equitable Principles and the Rise of Relevant Circumstances in Maritime Boundary Delimitation

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Contents

Abstract

The tension between the *Equidistance-Special Circumstances* rule (articulated in the 1958 Geneva Convention on the Continental Shelf) and the *Equitable Principles-Relevant Circumstances* rule (declared in the 1969 *North Sea Continental Shelf* cases of the International Court of Justice) prevented the 1982 United Nations Convention on the Law of the Sea from stipulating a specific method for the delimitation of the EEZ or the continental shelf. For this reason, the role or status in maritime delimitation of the equidistance method, equitable principles, and relevant circumstances must generally be determined by reviewing the decisions of international courts and tribunals.

The equidistance method has been employed in international case-law as a means of constructing a 'provisional' line. Analysis of international case-law also shows that the current rule governing maritime delimitation is the 'achievement of an equitable solution' in and of itself. The concept of equity in maritime delimitation is therefore only relevant to the equitability of the 'result' to be reached. Thus, the argument that equitable principles applicable to the examination of relevant circumstances are ascertainable and meaningful in maritime delimitation should be dismissed. Guaranteeing the equitability of principles or processes does not necessarily lead to the achievement of an equitable result.

The remaining concept of significance to the delimitation process is that of 'relevant circumstances', which must be taken into account in order to reach an equitable result. The patterns or processes involved when the delimitation rule is applied by taking account of relevant circumstances are not predictable. The achievement of an equitable solution in maritime delimitation is preceded by the flexible consideration of relevant circumstances.

The increasing importance of relevant circumstances to the delimitation of maritime boundaries is proven by two practical instances. One is the establishment of a single maritime boundary, which constitutes one typical maritime boundary; the other is the delimitation of the outer continental shelf, which has recently been included in international case-law.

In brief, this thesis will show how best to arrive at an equitable solution by drawing attention to the demise of equitable principles and the dominant role of relevant circumstances. The clarification of taking into account relevant circumstances enables us more clearly to understand what is entailed in the task of achieving an equitable solution.

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Declaration

I declare that this thesis has been composed by myself. It is my own work and it has not been submitted for any other degree or professional qualification.

Ki Beom Lee

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Chapter I

Introduction

1. The Meaning of a Maritime Boundary

"The land dominates the sea" is a well-known maxim in international law.[1] It refers to the fact that a State can retain rights to maritime areas adjacent to its own land territory. One practical application of this principle is that maritime rights cannot be separated from land territory when the cession of a State's territory takes place.[2] In the context of the 'classic' international law of the sea, therefore, which recognised only two maritime zones (the territorial sea and the high seas),[3] one of the major concerns of a State was how far its territorial sea could extend. The further its territorial sea extended, the larger the maritime spaces over which the State could exercise sovereignty. The boundary of the territorial sea, which represented the limit of State jurisdiction, was thus as important as any land boundary, even in 'traditional' international law. It is, however, observed that classic international law supporting a dichotomy between the territorial sea and the high seas did not specify maritime boundaries except for the boundary of the territorial sea.

Since the 1945 Truman Proclamation, coastal States have actively claimed new maritime zones with boundaries different to those which define their territorial seas. Such claims have led to the development of novel concepts in international law, such as the Exclusive Economic Zone (hereafter referred to as "EEZ"), the Exclusive Fishery Zone (hereafter referred to as "EFZ"), or the continental shelf.[4] As a result, the boundary of the territorial sea no longer functions as the one and only type of maritime boundary. Currently, a State can, in theory, establish several maritime boundaries, such as the boundary of the territorial sea or the boundary of the continental shelf.

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[1] *I.C.J. Reports 2001*, p.97, para.185.
[2] See Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), pp.499-500, fn.65.
[3] This thesis uses the term 'classic' or 'traditional' international law to denote public international law prior to 1945.
[4] R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999), pp.142-145, 160-162.

At this point, it is important to acknowledge that a maritime boundary is different from a maritime limit.[5] The latter refers to the limit of maritime spaces over which a State can exercise relevant jurisdiction. A State can establish its own maritime limits relating to the territorial sea or the EEZ under the principles and rules of international law. For the purpose of distinguishing between the establishment of a maritime limit and the making of a maritime boundary, the former will be termed 'delineation', and the latter 'delimitation'. Once established, a maritime limit has a 'unilateral' character.[6] By contrast, a maritime 'boundary' reflects the division of relevant maritime areas in relation to another State. It is thus submitted that a maritime boundary has a 'bilateral' or 'multilateral' nature.[7]

2. The Meaning of Maritime Boundary Delimitation

2.1. The Need for Maritime Delimitation

As a 'primary' subject in international law, each State can exercise 'sovereignty' or 'sovereign rights'[8] over its own territory or maritime areas. Under the principles and rules of international law, it can establish its own maritime limits (except for the outer limits of the continental shelf beyond 200 nautical miles (hereafter referred to as "NM")) in the absence of adjacent or opposite States. However, the 'overlapping' of maritime entitlements to the EEZ or the continental shelf between two or more States is almost inevitable, because the majority of States (except for land-locked or isolated island States) have adjacent or opposite States in relation to their maritime areas. A State is also highly likely to define and claim its maritime zones for the purpose of furthering its interests.[9] Given the probability of overlapping maritime entitlements and the resulting conflicts of interests between States, there is a clear need for maritime boundary delimitation determining the oceanic scope of each State's jurisdiction.

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[5] Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2003), pp.6-7.
[6] Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Portland: Hart Publishing, 2006), p.8.
[7] *Ibid*.
[8] The concept of 'sovereign rights' is found in Articles 56 and 77 of the 1982 United Nations Convention on the Law of the Sea. Such rights are regarded as 'sovereign' in a relevant maritime area 'insofar as natural resources, artificial islands and installations, marine scientific research or marine environment are concerned'. Therefore, sovereign rights are considered to be inferior to territorial sovereignty. See Churchill and Lowe, *supra* note 4, pp.151-156, 166-169.
[9] Tanaka, *supra* note 6, p.2.

In addition, it should be noted that the delimitation of maritime boundaries effectively guarantees a State's sovereignty or sovereign rights within its delimited spaces. For example, it may be argued that the issue of maritime delimitation must be settled in order to facilitate navigation or the exploitation of fishery resources.[10]

2.2. The Characteristics of Maritime Delimitation

First, 'delimitation' refers to the process of establishing a maritime boundary between two or more States and results from the overlapping of maritime entitlements between two or more States. In the absence of such an overlap, we would only be interested in delineation: the establishment of a maritime limit. For this reason, it is said that maritime boundary delimitation is 'international' in nature.[11]

Second, the delimitation of maritime boundaries is 'constitutive'.[12] The aim of international courts and tribunals dealing with maritime delimitation is not to ascertain a sole delimitation line, but to arrive at an equitable solution (or equitable result).[13] This indicates that there could be several delimitation lines at sea. Attention should be drawn to the fact that the decisions of international courts and tribunals regarding maritime delimitation 'create' an equitable delimitation line.[14]

3. Attempts to Develop the Rules Governing Maritime Delimitation

3.1. Law-making by Treaties in Relation to the Rules Governing Maritime Delimitation

The delimitation of maritime boundaries has generally been carried out through 'bilateral' agreements between the States concerned. There are many bilateral agreements dealing with maritime delimitation.[15] However, comprehensive analysis of these agreements in search of

[10] *Ibid*.
[11] *I.C.J. Reports 1982*, pp.66-67, para.87; Tanaka, *supra* note 6, p.8.
[12] Antunes, *supra* note 5, p.7; Tanaka, *supra* note 6, pp.12-14.
[13] The terms 'equitable solution' and 'equitable result' are used interchangeably in this thesis.
[14] Antunes, *supra* note 5, p.9.
[15] Malcolm D. Evans, "Maritime Boundary Delimitation: Where Do We Go from Here?", in David Freestone, Richard Barnes, and David M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), p.137; Bilateral agreements regarding maritime delimitation are collected in *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff Publishers, 1993-2011), Volumes I-VI, whose publication was planned by the American Society of International Law.

customary international law has proven unfruitful. Firstly, there is no generally accepted rule for maritime delimitation between adjacent States.[16] Secondly, even in the case of delimitation between opposite States, it is not easy to identify the existence of *opinio juris*.[17] Lastly, and more importantly, States are reluctant to consider a specific rule to be obligatory; they argue instead for the peculiarity of circumstances, including geographical factors, in the course of negotiations to reach a delimitation agreement.[18]

Given the difficulty of determining the rules governing maritime delimitation by researching bilateral delimitation agreements, attention should instead be paid to 'multilateral' agreements. States have endeavoured to establish the rules dealing with maritime delimitation by means of multilateral treaties, such as the 1958 Geneva Convention on the Continental Shelf or the 1982 United Nations Convention on the Law of the Sea (hereafter referred to as "UNCLOS"). The International Court of Justice (hereafter referred to as "ICJ") was reluctant to admit, however, that the rules governing maritime delimitation included in the 1958 Geneva Convention on the Continental Shelf had become customary international law.[19] Moreover, the 1982 UNCLOS appears only to state that the final goal of maritime delimitation regarding the EEZ or the continental shelf is to achieve an 'equitable solution', despite lengthy discussion at the Third United Nations Conference on the Law of the Sea (hereafter referred to as "Third Conference"). This prompts the question of whether multilateral agreements are as unhelpful as bilateral agreements to those seeking to determine the rules governing maritime delimitation. This issue will be discussed in Chapter II.[20]

3.2. Law-making by International Courts and Tribunals in Relation to the Rules Governing Maritime Delimitation

For the reasons listed above, it may be argued that the finding or making of the rules with regard to maritime delimitation has been performed by international courts and tribunals rather than through State practice or treaties.[21] That the uncertainty of maritime boundaries

[16] Tanaka, *supra* note 6, pp.134-136.
[17] Antunes, *supra* note 5, p.412; Tanaka, *supra* note 6, pp.137-138.
[18] Prosper Weil, "Geographic Considerations in Maritime Delimitation", in Jonathan I. Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff Publishers, 1993), Volume I, pp.123, 130.
[19] See *I.C.J. Reports 1969*, pp.43-46, paras.75-82.
[20] It will be demonstrated in Chapter II that the phrase 'to achieve an equitable solution' functions as the rules governing maritime delimitation.
[21] Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law", *The*

prevents States from pursuing their economic interests is a plausible reason for their willingness to refer the task of maritime delimitation to international courts and tribunals, even when these States have failed to reach delimitation agreements. In other words, States have usually turned to the international dispute-settlement system in order to delimit their own maritime boundaries clearly, instead of trying to avoid being engaged in such disputes.[22] As a result, many international judgments or arbitral awards have been made since the 1969 *North Sea Continental Shelf* cases of the ICJ, with some cases still pending in international courts and tribunals.[23]

However, the making (beyond finding) of the rules by international courts and tribunals may attract considerable criticism, because the role of international courts and tribunals is to determine the interpretation and application of law in a specific case.[24] Nonetheless, in the 1969 *North Sea Continental Shelf* cases, the ICJ seemed to declare the rules governing the delimitation of the continental shelf, despite the absence of customary international law to govern maritime delimitation.

An initial task of this thesis is to identify clearly the rules governing maritime delimitation, as the thesis intends to show that the current delimitation rule has accelerated the marked decline of the 'equitable principles' concept, and the rise of 'relevant circumstances'. Whether or not international courts and tribunals make the rules governing maritime delimitation will be demonstrated by analysing the decisions of international courts and tribunals, and this will be carried out in the second chapter.

3.3. Two Irreconcilable Rules

As shown above, there have been considerable attempts to establish the rules governing maritime delimitation. Regrettably, however, these attempts have led to the formation of two rules which do not appear to be reconcilable: the *Equidistance-Special Circumstances* rule[25]

American Journal of International Law, Volume 88 (1994), p.228.

[22] *Ibid.*, p.227.

[23] The *Territorial and Maritime Dispute* (Nicaragua/Colombia) case and the *Maritime Dispute* (Peru/Chile) case. The former was submitted to the ICJ on 6th December 2001 and the latter was submitted to the ICJ on 16th January 2008. Visit http://www.icj-cij.org/docket/index.php?p1=3&p2=1.

[24] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), pp.266, 272.

[25] With respect to the configuration of relevant coasts, Article 6 of the 1958 Geneva Convention on the Continental Shelf divided the lines to be drawn by the application of the equidistance method into two groups: the equidistance line and the median line. However, this thesis intends to avoid using the terms the 'median line' and the 'Median Group', because it finds no reason to make a distinction between the two lines, especially as the concept of the equidistance line can include that of the median

articulated in the 1958 Geneva Convention on the Continental Shelf, and the *Equitable Principles-Relevant Circumstances* rule stated by the ICJ in the 1969 *North Sea Continental Shelf* cases.[26] The conflict between these two rules has interfered with consistent State practice, and made it difficult to identify *opinio juris*. Until recently, international courts or tribunals dealing with referred cases have tried to clarify the position of the two rules and their relationship to one another in international law.

Indeed, the making of the clear rules governing maritime delimitation was one of the chief objectives of the Third Conference. Ultimately, however, the aim was not met. During the Third Conference, one group (known as the 'Equidistance Group') fervently supported the *Equidistance-Special Circumstances* rule, while another (known as the 'Equitable Principles Group') strongly upheld the *Equitable Principles-Relevant Circumstances* rule.[27] Despite lengthy debate, the two groups could not reach a shared conclusion (see Chapter II for a further discussion). The tension between the two rules resulted from a disagreement over the obligatory construction of a provisional equidistance line. Consequently, the President of the Conference had no choice but to propose a new formula which referred to neither 'equidistance' nor 'equitable principles' with regard to the delimitation of the EEZ or the continental shelf.[28] The formula only established the final goal of maritime delimitation, which it termed the 'achievement of an equitable solution'. Therefore, what is now left to us is the phrase 'to achieve an equitable solution', as articulated in the 1982 UNCLOS. Nevertheless, as will be demonstrated in the next chapter, the achievement of an equitable solution currently acts as the one and only delimitation rule.

4. The Approach of International Courts and Tribunals to the Conflict between the Two Delimitation Rules

4.1. The Provisional Construction of an Equidistance Line

The question raised by the disagreement at the Third Conference which resulted in the irreconciled conflict between the two rules, was whether or not the 'equidistance method'[29]

line.
[26] Evans, *supra* note 15, pp.143-147.
[27] Tanaka, *supra* note 6, pp.44-46.
[28] Antunes, *supra* note 5, p.87.
[29] Article 6(2) of the 1958 Geneva Convention on the Continental Shelf referred to the equidistance

is obligatory in the process of carrying out maritime boundary delimitation. Whereas the Equidistance Group maintained that the equidistance method was compulsory, the Equitable Principles Group was opposed to its obligatory use. The position of the Equidistance Group led to the widespread misunderstanding that the equidistance method takes priority in maritime delimitation. For the purpose of refuting the mandatory use of the equidistance method, this thesis seeks to determine both *why* the current delimitation rule (to achieve an equitable solution) should be applied, and *how* this delimitation rule is applied. When the equidistance method is taken to be provisional rather than obligatory, the rules governing maritime delimitation become more flexible. For this purpose, it is necessary to show that the current delimitation rule does not mandate the compulsory use of the equidistance method, and that the ways of applying the present rule are uncertain.

How have international courts and tribunals dealt with the conflict between the *Equidistance-Special Circumstances* rule and the *Equitable Principles-Relevant Circumstances* rule when seeking to apply the delimitation rule? In the 1993 *Greenland/Jan Mayen* case (in which the applicable law was, in part, the 1958 Geneva Convention on the Continental Shelf), the ICJ seemed to acknowledge the special status of the equidistance method.[30] In other words, the Court applied this method 'provisionally' to the 'first' stage of this case, and then took account of special or relevant circumstances in order to adjust the provisional equidistance line. It may be argued that this case led to the way to predictability in maritime delimitation.[31]

In the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case in which the 1982 UNCLOS was the applicable law, the ICJ stated that:

> "[T]he equidistance/special circumstances rule, which is applicable in particular to the

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method as the 'principle' of equidistance, because it regarded the concept of equidistance as one of the elements composing the rules for maritime delimitation. During the 1969 *North Sea Continental Shelf* cases, however, the ICJ stated that the equidistance method (despite its advantages) had not been transformed into the equidistance principle. See *I.C.J. Reports 1969*, p.23, para.23. This thesis will intentionally avoid the expressions, the 'principle of equidistance' and the 'equidistance principle'. The reason for this is that this thesis does not accept the obligatory character of the equidistance method.

[30] *I.C.J. Reports 1993*, pp.58-59, para.46; *I.C.J. Reports 1993*, pp.62-63, para.56.

[31] Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations. Visit http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1. Judge Guillaume, the President of the ICJ, stated that "[a] new stage was then reached with the Judgment delivered on 14 June 1993 in the case between Denmark and Norway concerning the maritime delimitation in the area between Greenland and Jan Mayen".

> delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are *closely interrelated*" [emphasis added].[32]

Acknowledging this statement, Judge Guillaume, the President of the ICJ, confirmed the 'provisional' use of the equidistance method when he delivered his speech at the Sixth Committee of the General Assembly of the United Nations on 31st October 2001.[33] The most recent delimitation case, the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case of the International Tribunal for the Law of the Sea (hereafter referred to as "ITLOS"), also confirmed the 'provisional' construction of an equidistance line.[34]

4.2. The Demise of Equitable Principles and the Importance of Relevant Circumstances to Maritime Delimitation

Although the provisional employment of the equidistance method is generally accepted and, has strengthened predictability in maritime delimitation, several questions must be asked concerning the attitude of the ICJ itself and the President of the ICJ to the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case. What is the meaning of the ICJ's statement that the two delimitation rules are "closely interrelated"? Where can we find out equitable principles? Are relevant circumstances no more than circumstances used to adjust a provisional equidistance line, as Judge Guillaume explained during his speech at the Sixth Committee of the General Assembly of the United Nations? This thesis plans to answer the above questions.

The assumption that the two rules are closely interrelated does not necessarily mean that the construction of a provisional equidistance line is one application of the concept of equitable principles. Thus, we need to clarify the issue of equitable principles and redefine the key role of relevant circumstances. The subject of relevant circumstances has received thorough examination, particularly by Malcolm D. Evans in the late 1980s. In his valuable

[32] *I.C.J. Reports 2001*, p.111, para.231.
[33] Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations. Visit http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1. Judge Guillaume, the President of the ICJ, stated that "the Court, as States also do, must first determine provisionally the equidistance line".
[34] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.85, paras.271-274.

book, *Relevant Circumstances and Maritime Delimitation*, Professor Evans focuses his attention on the 'application' of equitable principles.[35] In other words, he states that "[a]pplication implies process".[36] On the premise that the application of equitable principles indicates the delimitation 'process' 'in and through' relevant circumstances,[37] Professor Evans turns his interest towards relevant circumstances. He argues that equitable principles in themselves are 'applied' in all the relevant circumstances of a given case, making it unnecessary to provide concrete examples of equitable principles. His argument is persuasive primarily because he shifts the emphasis in maritime delimitation from equitable principles to relevant circumstances.

However, the issue of equitable principles today is not the same as in the 1980s when the *Equitable Principles-Relevant Circumstances* rule was in place, because the assimilation of the two delimitation rules has since been accomplished. Since the *Equitable Principles-Relevant Circumstances* rule can be assumed no longer to apply, the devaluation of equitable principles is an inevitable result. This task will be preceded by defining the current delimitation rule, as will be shown in Chapter II.

Does the term 'equitable principles' still have a place in maritime delimitation? While Professor Evans recognises the ineffectiveness of this term,[38] he does not renounce it altogether. Instead, he argues that the application of equitable principles indicates the application of an equitable process.[39] However, this thesis does not intend to prove the equitability of the delimitation process. In other words, if the rules governing maritime delimitation dictate the equitability of the 'result' achieved, we can dispose of the term 'equitable principles' altogether.

After proving that ascertainable equitable principles do not exist in maritime delimitation, or else that so-called equitable principles do not play a pivotal role in delimiting maritime boundaries, this thesis aims to show that the sole remaining concept of significance to the delimitation process is that of 'relevant circumstances'.[40] It follows that only the

[35] Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Oxford University Press, 1989), pp.77-78.
[36] *Ibid.*, p.78.
[37] *Ibid.*, p.77.
[38] *Ibid.*, p.76.
[39] *Ibid.*, p.78.
[40] Despite no marked difference between the concepts of 'special circumstances' and 'relevant circumstances', this thesis avoids using the term 'special circumstances'. The concept of 'special circumstances' was originally linked with the mandatory use of the equidistance method in Article 6(2) of the 1958 Convention on the Continental Shelf. Therefore, this thesis prefers the term 'relevant circumstances', because the equidistance method has 'provisionally' been employed by international

consideration of all relevant circumstances will lead to the achievement of an equitable solution. Since the only concept connected with equity is that of an equitable result or solution, as will be shown in Chapter III, the appropriate examination of all relevant circumstances is only meaningful for the purpose of producing an equitable solution. In order to achieve an equitable result, all relevant circumstances must be identified and weighed up. In addition, the practical method(s) indicated by these relevant circumstances should be applied. Therefore, the argument that relevant circumstances are either used for the purpose of shifting a provisional equidistance line, or objects to which equitable principles should be applied, is not persuasive.

One point to note here is that the careful consideration of all relevant circumstances will not produce an arbitrary result. In order to secure an equitable solution, international courts and tribunals have arrived at three-phase decisions, as will be described in Chapter IV. Moreover, it is evident that previous decisions as to the identification and weighing-up of relevant circumstances could be helpful guides for international courts and tribunals. However, such tools cannot be imperative, because an equitable result can only be achieved by taking account of all relevant circumstances reflecting the unique characteristics of each delimitation case. Hence, an emphasis on relevant circumstances increases the flexibility of application of the rules governing maritime delimitation.

The increased importance of relevant circumstances to maritime delimitation is evident from two practical instances: the establishment of a Single Maritime Boundary (hereafter referred to as "SMB") and the delimitation of the continental shelf beyond 200NM.

5. Practical Cases Proving the Importance of Relevant Circumstances to Maritime Delimitation

5.1. Practical Issue (1): The Establishment of a Single Maritime Boundary

In essence, the EEZ (or the EFZ) and the continental shelf are different from each other.[41]

courts and tribunals unless the relevant circumstances of a given case indicate the inappropriateness of using the equidistance method. Likewise, international courts and tribunals have not used the term 'special circumstances' since the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case of the ICJ.

[41] L. H. Legault and Blair Hankey, "From Sea to Seabed: The Single Maritime Boundary in the Gulf

According to the relevant articles of the 1982 UNCLOS, however, the limits of the EEZ and the continental shelf of a State may coincide at a distance of 200NM. While this does not mean that the limits of the two maritime areas are necessarily the same,[42] a State is likely to claim a single 200NM limit from its baselines in order to further its own interests.[43]

In addition, the assumption that maritime boundaries should ideally be singular has influenced the forming of maritime boundaries between two or more States. States have begun to ask international courts and tribunals to establish SMBs on their behalf, even though the maritime boundaries of the EEZ and the continental shelf between the States involved could, in theory, be different.

There are a number of cases establishing an SMB, beginning with the 1984 *Gulf of Maine* case of the Chamber of the ICJ. This new trend in maritime delimitation was not anticipated by the UNCLOS. However, it is difficult to imagine that international courts and tribunals would fail to establish an SMB even when the States concerned do not request a single line,[44] although the ICJ briefly stated, in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, that the concept of an SMB stems from State practice.[45]

In the 1984 *Gulf of Maine* case, the Chamber of the ICJ had great difficulty in finding the legal basis for an SMB, since the concept itself had not previously existed. The Chamber was thus unable at this time to identify State practice or multilateral treaties which related to the establishment of an SMB. As a consequence, the Chamber sought to clarify the 'fundamental norm' for the purpose of dealing with all future delimitation cases, along with 'neutral factors' commonly relevant to the delimitations of both the EFZ and the continental shelf, rather than to look for the legal basis of an SMB.

The ultimate objective of the fundamental norm is to ensure an equitable result, and this applies to all delimitation cases, including those which seek to establish an SMB.[46] However, the fundamental norm does not adopt a specific method. Therefore, the issue of how relevant circumstances affect the entire process of maritime delimitation is more important than the application of a certain method in establishing an SMB.

Furthermore, international courts and tribunals have tried to take into account factors

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of Maine Case", *The American Journal of International Law*, Volume 79 (1985), pp.979-983.
[42] *Ibid.*, p.989; Churchill and Lowe, *supra* note 4, p.181.
[43] Churchill and Lowe, *supra* note 4, p.181.
[44] Antunes, *supra* note 5, pp.340-342.
[45] *I.C.J. Reports 2001*, p.93, para.173.
[46] *I.C.J. Reports 1984*, pp.299-300, para.112.

common to the delimitations of two maritime spaces. These factors are termed 'neutral factors'. The first port of call in discovering neutral factors is the 'geography' of the coasts concerned, which is the basis of titles to the EEZ (or the EFZ) and the continental shelf. As a result, one might argue that relevant circumstances could be confined to geographical factors in establishing an SMB. Does this lead to the predictable application of the rules governing maritime delimitation? How can non-geographical circumstances be taken into account with regard to the establishment of an SMB? This thesis will argue for the flexible consideration of the relevant circumstances of each case, despite the preference of taking into account neutral circumstances in drawing an SMB.

In sum, this thesis intends to answer two questions. First, what impact does the concept of the fundamental norm have on the significance of relevant circumstances? Second, how does the dominant role of relevant circumstances affect the preference of neutral circumstances? These questions will be addressed in Chapters II and V.

5.2. Practical Issue (2): The Delimitation of the Continental Shelf Beyond 200NM

Article 1 of the 1958 Geneva Convention on the Continental Shelf defined the continental shelf according to its 'exploitability'. The ambiguity of this definition, however, made it an inappropriate legal concept.[47] The subsequent formation of a new definition during the Third Conference gave us Article 76 of the 1982 UNCLOS, which provides a clear legal definition of the continental shelf.[48]

According to the dictates of the UNCLOS, a State can lay claim to the continental shelf extending up to 200NM from its baselines, unless the issue of delimitation arises.[49] In other words, it can possess the continental shelf up to 200NM regardless of the shape of the sea-bed, because the current concept of the continental shelf is derived from the criterion of distance.[50]

In addition to the inner continental shelf, a State may obtain the continental shelf beyond 200NM from the baselines concerned, subject to conditions set by Article 76 of the

[47] Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of Their Establishment* (Heidelberg: Springer, 2008), p.34.
[48] Ted L. McDorman, "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World", *The International Journal of Marine and Coastal Law*, Volume 17 (2002), pp.307-308; Suarez, *supra* note 47, pp.39-74.
[49] Churchill and Lowe, *supra* note 4, p.145.
[50] *Ibid.*, p.148.

UNCLOS.[51] The limits of the outer continental shelf proposed by coastal States can only become final and binding on the basis of the recommendations of the Commission on the Limits of the Continental Shelf (hereafter referred to as "CLCS").[52] However, the CLCS will not examine a submission if a maritime boundary dispute exists, according to Paragraph 5(a) of Annex I of the Rules of Procedure of the CLCS.[53] As a result, if a dispute arises between the States concerned regarding the outer continental shelf, it must be dealt with by an international court or tribunal, and not the CLCS.

The UNCLOS's providing of a means by which States might acquire the continental shelf beyond 200NM potentially leads to claims by the States concerned over the outer continental shelf, and/or disputes over this shelf between two or more States. States, such as the United Kingdom, the United States, and Russia, have laid claim to the continental shelf beyond 200NM, and this increases the likelihood of future international litigations in this area.[54]

Which relevant circumstance plays an important role in delimiting the continental shelf beyond 200NM? This is the concept of 'natural prolongation'. The ICJ's use of this concept provides a further issue to consider with regard to the delimitation of the continental shelf beyond 200NM. In the 1985 *Continental Shelf* (Libya/Malta) case, although the criterion of distance had been decisive in confirming the continental shelf for each of the States concerned, the Court did not completely renounce the concept of natural prolongation.[55] According to the ICJ's reasoning, a State can retain its own continental shelf up to 200NM without regard to the physical conditions of the continental margin, yet it must still manifest natural prolongation in order to claim the continental shelf beyond 200NM.[56] The concept of natural prolongation thus enlarges the range of issues which international courts and tribunals may wish to consider with regard to maritime delimitation. In turn, this may foster a greater flexibility of application of the rules governing the delimitation of the continental shelf beyond 200NM.[57]

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[51] Suarez, *supra* note 47, pp.148-172.
[52] McDorman, *supra* note 48, pp.302-303.
[53] *Ibid.*, p.305.
[54] Churchill and Lowe, *supra* note 4, p.148.
[55] *I.C.J. Reports 1985*, pp.33-34, para.34: "The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf."
[56] Jørgen Lilje-Jensen and Milan Thamsborg, "The Role of Natural Prolongation in Relation to Shelf Delimitation beyond 200 Nautical Miles", *Nordic Journal of International Law*, Volume 64 (1995), p.626.
[57] Alex G. Oude Elferink, "Does Undisputed Title to a Maritime Zone Always Exclude its

It is not fixed in international law how relevant circumstances in determining the delimitation of the continental shelf beyond 200NM are taken into account. Plainly, however, an equitable solution must also be ensured in the delimitation of the continental shelf beyond 200NM. This will be dealt with in Chapter VI.

6. A Concluding Remark

Following the ruling of the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, and the subsequent speech of Judge Guillaume, the President of the ICJ, at the Sixth Committee of the General Assembly of the United Nations in 2001, it is now time to declare the demise of the concept of equitable principles. This concept is not relevant to the ultimate goal of maritime delimitation. Equitable principles cannot mark their right place in the current delimitation rule itself or the delimitation process. The current delimitation rule (which arose from the assimilation of the two delimitation rules) only identifies the final aim of maritime delimitation as an equitable solution, which can be achieved through the consideration of all relevant circumstances.

This thesis intends to show that the one and only meaningful concept connected with equity in maritime delimitation is the concept of an equitable solution. To this end, it will definitively declare the demise of the concept of equitable principles to which the 1945 Truman Proclamation first referred. For the purpose of reaching an equitable solution, the concept of relevant circumstances dominates the whole delimitation process, from the drawing of a provisional equidistance line to the achievement of a final solution.

Although the beginning of the conflict between the two delimitation rules was the deadlock between the compulsory use of the equidistance method and, in opposition, the application of equitable principles, international courts and tribunals have produced equitable outcomes within the analytical framework of taking into account all relevant circumstances. As a result, relevant circumstances are not used simply to adjust a provisional equidistance line. Rather, they dominate the entire delimitation process.

The issues of the establishment of an SMB and the delimitation of the continental shelf beyond 200NM are by no means hypothetical. The making of an SMB to be made

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Delimitation: The Grey Area Issue", *The International Journal of Marine and Coastal Law*, Volume 13 (1998), p.171.

known in international law, starting from the 1984 *Gulf of Maine* case, has become very common in practice. This is proven by the fact that there is no decision of international courts and tribunals regarding the delimitation of only one between the EEZ and the continental shelf since the 1990s. Likewise, it is obvious that there is a high chance of international disputes' being raised with respect to the delimitation of the continental shelf beyond 200NM, because, generally speaking, a State wishes to acquire as much as it can of its outer continental shelf.

Therefore, this thesis intends to research into how relevant circumstances dominate the whole delimitation process, bearing in mind that an equitable solution should be reached even in the areas of the establishment of an SMB and the delimitation of the outer continental shelf.

Chapter II

The Delimitation Rule in International Law

1. Introduction

Did the ICJ make or find out the rules governing maritime boundary delimitation in the 1969 *North Sea Continental Shelf* cases? There has been controversy among international law scholars regarding the question of whether the Court made or discovered the rules in these cases.

The Court implied, in the 1969 *North Sea Continental Shelf* cases, that a rule of customary international law governing maritime delimitation included the concept of 'equitable principles'. This rule, as defined by the ICJ, differed from the delimitation rule stipulated in the 1958 Geneva Convention on the Continental Shelf. Have international courts and tribunals chosen and applied one of these two rules? Or have they applied an altogether different delimitation rule?

Of fundamental importance to understanding maritime delimitation is the question of which delimitation rule is applied in international courts and tribunals. If we corroborate the current delimitation rule in international law, we can easily ascertain why equitable principles have fallen in importance and the significance of relevant circumstances has been acquired in maritime delimitation. In order to do this, this chapter will show which rule has been applied in delimitation cases by international courts and tribunals.

2. Two Rules Governing Maritime Delimitation

Continuous discordance of viewpoints in making the clear rules governing maritime delimitation resulted in the formulation of the two delimitation rules: the *Equidistance-Special Circumstances* rule and the *Equitable Principles-Relevant Circumstances* rule.[1]

[1] Malcolm D. Evans, "Maritime Boundary Delimitation: Where Do We Go from Here?", in David

2.1. The Equidistance-Special Circumstances *Rule*

2.1.1. Pre-1945: Efforts for the Progressive Codification of the Equidistance Method

During the nineteenth and early-twentieth centuries, the equidistance method was found in a number of treaties and the opinions of some international law scholars.[2] However, the equidistance method was not the only method used in international legal documents during this period. Rather, delimitation was carried out using five lines: the equidistance line (or the median line), the line perpendicular to the general direction of the coasts concerned, the prolongation of the land boundary, the *Thalweg*, and the common-zone.[3] Therefore, it is noted that the equidistance method has made room for much discussion since an attempt to codify international law led by the League of Nations (hereafter referred to as "LN").

The LN highly encouraged the 'progressive codification' of international law, and began by calling for the establishment of the Committee of Experts (for the Progressive Codification of International Law) in 1924.[4] Until 1927, this Committee identified and examined subjects 'sufficiently ripe' for progressive codification, out of which the League Assembly finally selected three subjects: Nationality, Territorial Waters, and Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners.[5]

At the moment, the Committee of Experts sought to split the rules of delimitation into two categories: the rules governing the delimitation of adjacent States and those governing the delimitation of opposite States. In the case of adjacent States, the prolongation of the land boundary (or a line drawn perpendicular to the coast from the point at which the

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Freestone, Richard Barnes, and David M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), pp.143-147.

[2] See Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Portland: Hart Publishing, 2006), pp.19-24; D. P. O'Connell, *The International Law of the Sea* (Oxford: Oxford University Press, 1984), Volume II, pp.658-663.

[3] Tanaka, *supra* note 2, pp.19-32.

[4] A Resolution (22nd September 1924) adopted by the Assembly of the League of Nations; reproduced in *The American Journal of International Law*, Volume 41 Supplement (1947), pp.103-104; Shabtai Rosenne (ed.), *League of Nations Conference for the Codification of International Law (1930)* (New York: Oceana Publications, Inc., 1975), Volume I, p.xiii.

[5] A Resolution (27th September 1927) adopted by the Assembly of the League of Nations; reproduced in *The American Journal of International Law*, Volume 41 Supplement (1947), pp.105-107; R. P. Dhokalia, *The Codification of Public International Law* (Manchester: Manchester University Press, 1970), pp.118-119.

frontier between the two States meets that coast) was a preferred method of delimitation.[67] By contrast, in the case of opposite States, the equidistance method seemed to be regarded as a primary method.[8] At that time, the delimitation between opposite States was mainly discussed in relation to the delimitation of the 'strait' because the width of the territorial sea was narrower than at present.

Beginning in 1927, both the Harvard Law School and the Preparatory Committee had independently prepared materials concerning the second subject (Territorial Waters) for the 1930 Conference for the Codification of International Law at The Hague.[9] Article 9 of the 1929 Draft Convention on Territorial Waters, prepared by the Research in International Law of the Harvard Law School, stated that:

> "In the absence of special agreement to the contrary, where two or more states border upon a strait, the territorial waters of each state extend to the *middle* of the strait in those parts where the width does not exceed six miles" [emphasis added].[10]

Moreover, Basis of Discussion No.16 on Territorial Waters (drawn up for the Codification Conference by the Preparatory Committee) stated that "when two States border on a strait which is not wider than twice the breadth of territorial waters, the territorial waters of each State extend in principle up to a line running down the *centre* of the strait" [emphasis added].[11] These preparatory works seemed to envisage the application of the equidistance method with respect to the delimitation of the strait.

However, Annex II of the Report of the Second Committee (Report of the Second Sub-Committee) in the Final Act of the 1930 Conference stated that:

> "[I]t has been thought *better not to draw up any rules* regarding the drawing of the line of demarcation between the respective territorial seas in straits lying within the territory of

[6] League of Nations C.44.M.21.1926.V., *Questionnaire No.2 Territorial Waters*; reproduced in Shabtai Rosenne (ed.), *The Progressive Codification of International Law [1925-1928]* (New York: Oceana Publications, Inc., 1972), Volume II, pp.91, 97.
[7] However, the rules concerning the delimitation between adjacent States were not dealt with during the 1930 Conference for the Codification of International Law at The Hague.
[8] League of Nations C.44.M.21.1926.V., *Questionnaire No.2 Territorial Waters*; reproduced in Rosenne (ed.), *supra* note 6, pp.69, 97, 98.
[9] Dhokalia, *supra* note 5, pp.68-69, 120-121.
[10] Article 9 of the 1929 Draft Convention on Territorial Waters; reproduced in *The American Journal of International Law*, Volume 23 Special Supplement (1929), pp.243-244.
[11] Basis of Discussion No.16 on Territorial Waters by the Preparatory Committee; reproduced in *The American Journal of International Law*, Volume 24 Supplement (1930), p.36.

more than one Coastal State and of a width less than the breadth of the two belts of territorial sea" [emphasis added].[12]

The Committee resisted codification, because several States raised some issues concerning the application of the equidistance method during the 1930 Conference.[13] This outcome prevents us from clarifying what the view of the traditional international law of the sea was, with regard to the delimitation of the strait with a width not exceeding twice that of the breadth of the territorial sea.

2.1.2. Post-1945: The Codification of the Equidistance Method

As soon as the Truman Proclamation was issued in September 1945, States began to strongly claim 'jurisdiction and control' over the continental shelf extending off their coasts.[14] With specific reference to the delimitation of the continental shelf, this Proclamation expressed that "the boundary shall be determined by the United States and the State concerned in accordance with equitable principles".[15] With the emergence of the continental shelf in the international law of the sea, States had to ascertain what the concept of 'equitable principles' was in the delimitation of the continental shelf.

The International Law Commission (hereafter referred to as "ILC"), which has played an important role in the codification and progressive development of international law, was established by the United Nations in 1947.[16] In 1949, the Secretary-General of the United Nations, in collaboration with Hersch Lauterpacht, completed the preparatory work necessary to help the ILC undertake the difficult task of codifying international law.[17] This preparatory work, which was named *Survey of International Law in Relation to the Work of*

[12] Annex II of the Report of the Second Committee (Report of the Second Sub-Committee) in the Final Act of the 1930 Conference for the Codification of International Law at The Hague; reproduced in *The American Journal of International Law*, Volume 24 Supplement (1930), p.252.
[13] League of Nations C.351(b).M.145(b).1930.V, *Minutes of the Second Committee*, the 12th Meeting of the Second Committee (29th March 1930), pp.116-117; reproduced in Rosenne (ed.), *supra* note 4, Volume IV, pp.1318-1319.
[14] Francis A. Vallat, "The Continental Shelf", *The British Year Book of International Law*, Issue 23 (1946), pp.337-338.
[15] Presidential Proclamation No.2667 (28th September 1945) Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf; reproduced in United Nations (ed.), *Laws and Regulations on the Regime of the High Seas* (New York: United Nations Publications, 1951), Volume I, pp.38-39.
[16] Resolution 174(II) of the United Nations General Assembly (21st November 1947); Ian Sinclair, *The International Law Commission* (Cambridge: Grotius Publications Limited, 1987), pp.1, 5-13.
[17] UN Doc. A/CN.4/1/Rev.1, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, para.1.

Codification of the International Law Commission (hereafter referred to as "*Lauterpacht Survey*"), led the ILC to select fourteen topics for codification.[18] The *Lauterpacht Survey* drew attention to the proclamations (about the continental shelf) of some States with respect to the regime of the high seas.[19] This prompted the ILC to raise the issue of the continental shelf which, from the legal perspective, existed under the high seas at that time.[20]

At the 69th meeting (on 17th July 1950) of the ILC, it was questioned how the continental shelf should be delimited where the shelves – or contiguous zones, as the case may be – of the different States overlap.[21] However, the members of the meeting could not arrive at a conclusion because the rules delimiting the continental shelf did not exist at that time.[22] In 1951, the ILC resumed discussions regarding the delimitation of the continental shelf. A line perpendicular to the coasts at the point where the frontier between two States reached the sea, a line perpendicular to the general coastlines, and a prolongation of the boundary line of the territorial sea were presented.[23] Although the equidistance method was advanced by Samuel Whittemore Boggs, in an article published in 1951,[24] the chairman of the 115th meeting (on 2nd July 1951) thought that the delimitation of the continental shelf was "a matter of geography rather than of law".[25] In fact, the members of the ILC could not find out the rules governing the delimitation of continental shelf, because even the legal notion of the continental shelf had not clearly been defined at that time. Therefore, they concentrated their efforts on discussing the ways of settling disputes, as opposed to forming the rules regarding the delimitation of the continental shelf.[26]

Furthermore, the General Assembly requested the ILC to include the regime of the territorial sea in its list of priorities in 1949.[27] Subsequently, the ILC decided to study the

[18] Sinclair, *supra* note 16, pp.21-22.
[19] UN Doc. A/CN.4/1/Rev.1, *supra* note 17, para.72.
[20] *Yearbook of the ILC 1950*, Volume I, the 66th Meeting of the ILC (12th July 1950), pp.214-215, paras.71-76.
[21] *Yearbook of the ILC 1950*, Volume I, the 69th Meeting of the ILC (17th July 1950), pp.232-234.
[22] *Yearbook of the ILC 1950*, Volume I, the 69th Meeting of the ILC (17th July 1950), p.233, paras.51-53.
[23] *Yearbook of the ILC 1951*, Volume I, the 115th Meeting of the ILC (2nd July 1951), pp.286-287, paras.103-131.
[24] Samuel Whittemore Boggs, "Delimitation of Seaward Areas under National Jurisdiction", *The American Journal of International Law*, Volume 45 (1951), pp.240-266.
[25] *Yearbook of the ILC 1951*, Volume I, the 115th Meeting of the ILC (2nd July 1951), p.287, paras.120, 131.
[26] *Yearbook of the ILC 1951*, Volume I, the 116th Meeting of the ILC (3rd July 1951), pp.291-294, paras.31-117.
[27] Resolution 374(IV) of the United Nations General Assembly (6th December 1949).

regime of the territorial sea as well.[28] The ILC also dealt with whether or not the equidistance method may be employed to delimit the territorial sea. The members of the 171st meeting (on 24th July 1952) discussed the application of the equidistance method in the case of the delimitation of the territorial sea between adjacent States.[29] However, they concluded that the technical advice of experts was necessary to discuss this issue further,[30] and hesitated to regard maritime delimitation as a matter of establishing 'legal' rules.

In April 1953, Professor François, Special Rapporteur of the ILC, brought together five experts (called the Committee of Experts) for the purpose of discussing technical issues concerning the regime of the territorial sea.[31] At the discussion, the Committee of Experts concluded that, in relation to the delimitation of the territorial sea, the equidistance method should be a general rule, but should take into consideration 'special' reasons.[32] Furthermore, the five experts suggested that the equidistance method may also be employed for the delimitation of the continental shelf.[33] Following their advice, the 1953 Report of the ILC (to the General Assembly) stated that the equidistance method should be a general rule, qualified by special circumstances, in the delimitation of the continental shelf.[34] At this point, it must be noted that, with regard to the delimitation of the continental shelf, there were some disagreements during the meeting of the ILC with respect to defining what should be regarded as special circumstances.[35] In other words, even in the period of its emergence, the equidistance method was closely connected with the existence of special circumstances.

By 1953, whereas the rules governing the delimitation of the continental shelf were clarified to some extent, the rules in relation to that of the territorial sea were not established because the breadth of the territorial sea had not yet been determined. At its 262nd meeting (on 6th July 1954), the ILC decided that the equidistance method should be applied in the delimitation of the territorial sea, but its 'hesitation' was shown by the fact that, with regard

[28] *Yearbook of the ILC 1950*, Volume II, p.366, para.18.
[29] *Yearbook of the ILC 1952*, Volume I, the 171st Meeting of the ILC (24th July 1952), pp.180-182, paras.1-18.
[30] *Yearbook of the ILC 1952*, Volume I, the 171st Meeting of the ILC (24th July 1952), pp.182-185, paras.19-67.
[31] *Yearbook of the ILC 1953*, Volume II, *Rapport du Comité d'experts sur certaines questions d'ordre technique concernant la mer territoriale*, p.77.
[32] *Yearbook of the ILC 1953*, Volume II, *Rapport du Comité d'experts sur certaines questions d'ordre technique concernant la mer territoriale*, p.79.
[33] *Yearbook of the ILC 1953*, Volume II, *Rapport du Comité d'experts sur certaines questions d'ordre technique concernant la mer territoriale*, p.79.
[34] *Yearbook of the ILC 1953*, Volume II, p.216, para.82.
[35] *Yearbook of the ILC 1953*, Volume I, the 204th Meeting of the ILC (29th June 1953), pp.126, 128, paras.14, 36-38.

to the delimitation of the territorial sea between adjacent States, the equidistance method was adopted by 4 votes to 1, with 8 abstentions.[36]

Until 1955, the ILC had taken the view that the equidistance method should be the rules governing the delimitations of the territorial sea and the continental shelf. Here, some critical points can be summarised. Firstly, it was a very difficult task to discover or make the rules governing the delimitations of the territorial sea and the continental shelf, because the breadth of the territorial sea was not fixed, and the legal concept of the continental shelf was indeterminate. Secondly, many members of the ILC sought to acquire the technical advice of experts rather than to express their own opinions, because they considered technical issues to be fundamental to developing the law of maritime delimitation. Lastly, and more importantly, it must be noted that the concept of flexibility emerged. For instance, the chairman of the 205th meeting (on 30th June 1953) of the ILC noted that:

> "Mr. Lauterpacht considered that the words "as a rule" deprived the text of its juridical significance, whereas Mr. François considered that they were necessary in order to ensure the proper application of the principle in law".[37]

Closing this debate, the ILC chose the phrase 'except where special circumstances call for some other solution', instead of 'as a rule' as of 1953.[38] In other words, special circumstances were regarded as partially constituting the rules, not as exceptions to the rules.[39] It follows that the rules governing maritime delimitation were intended to flexibly be applied whilst predictability (that was reflected in the equidistance method) marked its own place in the application of the rules in maritime delimitation. In spite of the foregoing issues or problems in the legal context, the rules governing maritime delimitation were entering a stage of substantial formulation.

2.1.3. The Formulation of the Equidistance Method

In 1956, the ILC adopted the Draft Articles regarding the law of the sea.[40] These Draft Articles were under review at the First United Nations Conference on the Law of the Sea

[36] *Yearbook of the ILC 1954*, Volume I, the 262nd Meeting of the ILC (6th July 1954), p.103, para.18.
[37] *Yearbook of the ILC 1953*, Volume I, the 205th Meeting of the ILC (30th June 1953), p.131, para.15.
[38] *Yearbook of the ILC 1953*, Volume I, the 205th Meeting of the ILC (30th June 1953), pp.132-133, paras.26, 43, 47.
[39] Faraj Abdullah Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Oxford: Oxford University Press, 1993), p.55.
[40] *Yearbook of the ILC 1956*, Volume II, p.256, para.33.

held in Geneva from 24th February 1958 to 27th April 1958. Articles 12 and 14 of the 1956 Draft Articles dealing with the delimitation of the territorial sea were debated at the First Committee of the Conference, and Article 72 of the 1956 Draft Articles governing that of the continental shelf was discussed at the Fourth Committee.

The First Committee did not cast doubts on the application of the equidistance method with respect to the delimitation of the territorial sea. To allow flexibility to some extent, a great deal of discussion was devoted to the issue of whether or not the reference to 'special circumstances' was needed within the articles which referred specifically to the delimitation of the territorial sea. Representatives of Yugoslavia and Norway argued that the reference to special circumstances should be deleted,[41] while Sir Gerald Fitzmaurice of the United Kingdom stated that "special circumstances did exist which, for reasons of equity or because of the configuration of a particular coast, might make it difficult to accept the true median line as the actual line of delimitation between two territorial seas".[42]

In this context, it must be noted that Yugoslavia's and Norway's reasons for objecting to the inclusion of the reference to special circumstances were different from each other. Yugoslavia, on the one hand, was deeply afraid that States would claim special circumstances for reasons of self-interest.[43] Norway, on the other hand, argued that several circumstances could affect the delimitation of the territorial sea.[44] What Norway was, in fact, apprehensive of was that a State could have an 'extra' territorial sea through the strict application of the equidistance method, because the breadths of the territorial sea of States were not identical.[45] Norway would not have brought forward its proposal if the breadth of the territorial sea had been concluded at the Conference. This meant that even Norway did not oppose the adoption of the equidistance method and the existence of special circumstances. Therefore, at the 61st meeting of the First Committee, Norway made room for special circumstances although it objected to the reference to these circumstances.[46]

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[41] *Official Records of the United Nations Conference on the Law of the Sea*, Volume III, the 60th Meeting of the First Committee (22nd April 1958), pp.187, 190, paras.8, 44.
[42] *Official Records of the United Nations Conference on the Law of the Sea*, Volume III, the 60th Meeting of the First Committee (22nd April 1958), p.189, para.36.
[43] *Official Records of the United Nations Conference on the Law of the Sea*, Volume III, the 60th Meeting of the First Committee (22nd April 1958), p.187, para.8.
[44] *Official Records of the United Nations Conference on the Law of the Sea*, Volume III, the 60th Meeting of the First Committee (22nd April 1958), p.190, paras.44-48.
[45] *Official Records of the United Nations Conference on the Law of the Sea*, Volume III, the 61st Meeting of the First Committee (22nd April 1958), p.192, para.34.
[46] *Official Records of the United Nations Conference on the Law of the Sea*, Volume III, the 61st Meeting of the First Committee (22nd April 1958), p.192, paras.31-32.

After all, during the meetings of the Conference, the equidistance method was introduced without explicit criticisms, in the case of the delimitation of the territorial sea. Rather, States were, in actuality, concerned about exceptions to the application of the equidistance method.

In addition, the Fourth Committee, which dealt with the delimitation of the continental shelf, also accepted the equidistance method without serious disputes. However, there was heated discussion about whether or not the strict application of the equidistance method would be excluded if special circumstances existed.[47] From this, it should be noted that the most important task of the meetings (of the Fourth Committee) was to pursue flexibility in the delimitation of the continental shelf.

In spite of no difficulty during the meetings of the Fourth Committee, two facts should be observed. Firstly, around one-third of States chose abstentions at the adoption of the text. Secondly, the German Representative stated that "his delegation would have preferred the adoption of the Venezuelan amendment". [48] The Venezuelan amendment suggested that "the boundary of the continental shelf appertaining to such States shall be determined by agreement between them or by other means recognized in international law".[49] These two points suggest a certain opposition to the equidistance method since the 1960s, including the German contentions of the 1969 *North Sea Continental Shelf* cases.

After all, originally a mathematical or geometrical concept, the equidistance method was first stipulated in the field of maritime delimitation in the 1958 Geneva Conventions.[50] For instance, Article 6(2) of the 1958 Convention on the Continental Shelf declared that:

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

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[47] *Official Records of the United Nations Conference on the Law of the Sea*, Volume VI, the 32nd Meeting of the Fourth Committee (9th April 1958), pp.93-95, paras.1-24.
[48] *Official Records of the United Nations Conference on the Law of the Sea*, Volume VI, the 33rd Meeting of the Fourth Committee (9th April 1958), p.98, para.38.
[49] UN Doc. A/CONF.13/C.4/L.42, *Official Records of the United Nations Conference on the Law of the Sea*, Volume VI, Annexes, p.138.
[50] See Articles 12 and 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone; Article 6 of the 1958 Geneva Convention on the Continental Shelf.

The equidistance method was destined to be connected with the consideration of 'special circumstances' in the absence of agreement between the States concerned. In other words, this method cannot be employed without taking into account special circumstances. This is the reason why the rule which employs the equidistance method has been called the *Equidistance-Special Circumstances* rule.[51] However, it is, regrettably, true that the ICJ focused on the advantages and disadvantages of only the equidistance method in the 1969 *North Sea Continental Shelf* cases, although the ILC had kept in mind the combination of the equidistance method and special circumstances, as stated above. Ultimately, in the 1977 *Anglo-French Continental Shelf* case, the Arbitral Tribunal confirmed that the two elements (the equidistance method and special circumstances) were combined.[52] In other words, it was concluded that the two elements of this rule were inseparable through the reasoning of the 1977 *Anglo-French Continental Shelf* case.

2.2. The Equitable Principles-Relevant Circumstances *Rule*

2.2.1. The 1969 North Sea Continental Shelf *Cases*

The term 'equitable principles' first appeared in the 1945 Truman Proclamation. The Proclamation stated that:

> "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with *equitable principles*" [emphasis added].[53]

However, it should not be overlooked that the meaning of the term 'equitable principles' was equivocal at that time.

The 1958 Geneva Convention on the Continental Shelf came into force on 10th June 1964. In the 1969 *North Sea Continental Shelf* cases, the legal character of the equidistance method was an important issue because Germany was not a Party to this Convention at the

[51] See *I.C.J. Reports 2001*, p.111, para.231.
[52] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *The United Nations Reports of International Arbitral Awards* (hereafter referred to as "*UNRIAA*"), Volume XVIII, pp.45-46, para.70.
[53] Presidential Proclamation No.2667 (28th September 1945) Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf; reproduced in United Nations (ed.), *supra* note 15, pp.38-39.

time. The ICJ concluded that the application of the equidistance method was not obligatory in all given cases, pointing out, as part of its main reasoning, that such a method could produce an inequitable result.[54] Instead, the Court willingly accepted the concept of equitable principles as part of customary international law.[55] According to the reasoning of the Court, the concept of equitable principles is one element included 'within' a rule of customary international law governing the delimitation of the continental shelf between adjacent States.[56] Nevertheless, it is noted that the concept of equitable principles did not have any content at that time.

The ICJ went on to state that:

> "[I]n short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires *the application of equitable principles*, […] , (*b*) […] taking all the circumstances into account, *equitable principles are applied*, […]" [emphases added].[57]

The Court implied that the 'application' of equitable principles should be carried out by 'taking all the circumstances into account'.[58]

In addition, the ICJ distinguished equitable principles from equity, referring to "giving *some degree of indication* as to the possible ways in which it [equity] might be applied in the present case" [emphasis added].[59] The Court expressed 'some degree of indication', such as concrete factors to be taken into account with regard to the application of equity, and then suggested three factors to be taken into consideration for the purpose of arriving at an equitable result. These were: (a) the general configuration of the coasts, as well as the presence of any special or unusual features; (b) the physical and geological structure, as well as the natural resources, of the continental shelf concerned; and (c) proportionality.[60]

In sum, the ICJ, in the 1969 *North Sea Continental Shelf* cases, concluded that maritime delimitation can be performed by the application of the *Equitable Principles*-

[54] *I.C.J. Reports 1969*, p.37, para.59.
[55] *I.C.J. Reports 1969*, pp.46-47, para.85.
[56] Hugh Thirlway, "The Law and Procedure of the International Court of Justice (1960-1989): Part One", *The British Year Book of International Law*, Issue 60 (1989), p.52.
[57] *I.C.J. Reports 1969*, pp.46-47, para.85.
[58] *I.C.J. Reports 1969*, pp.46-47, para.85.
[59] *I.C.J. Reports 1969*, p.50, para.92.
[60] *I.C.J. Reports 1969*, pp.53-54, para.101.

Relevant Circumstances rule.[61]

2.2.2. The Influence of the Equitable Principles-Relevant Circumstances *Rule*

Following the 1969 *North Sea Continental Shelf* cases, there were a number of opinions contesting, and attempts to oppose, the mandatory application of the equidistance method in maritime delimitation, particularly with regard to the delimitation of the EEZ or the continental shelf. This was clearly shown by the deadlock between the 'Equidistance Group'[62] and the 'Equitable Principles Group'[63] during the Third Conference.[64] Furthermore, for the same period, there was one important case dealing with the delimitation of the continental shelf: the 1977 *Anglo-French Continental Shelf* case of the Arbitral Tribunal.

From the beginning of the Third Conference, there had existed some attempts to reconcile the equidistance method with the concept of equitable principles. In 1974, Provisions 82 and 116 of the *Main Trends*, which was made by the chairman of the Second Committee (of the Third Conference), showed the four formulations concerning the delimitations of the continental shelf and the EEZ.[65] These formulations evidence the tension between the equidistance method and the concept of equitable principles. Hence, Articles 61(1) and 70(1) of the 1975 Informal Single Negotiating Text,[66] Articles 62(1) and 71(1) the 1976 Revised Single Negotiating Text,[67] and Articles 74(1) and 83(1) of the 1977 Informal Composite Negotiating Text (hereafter referred to "ICNT") all sought to assimilate the equidistance method and the concept of equitable principles. For example, Paragraph 1 of Articles 74 (Delimitation of the EEZ) and 83 (Delimitation of the Continental Shelf) of the 1977 ICNT on delimitation stated that:

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[61] *I.C.J. Reports 1969*, pp.53-54, para.101.
[62] See Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijhoff Publishers, 1985), Volume I, p.78.
[63] See *ibid.*, Volume I, pp.78-79.
[64] Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijhoff Publishers, 1993), Volume II, pp.801, 954.
[65] UN Doc. A/CONF.62/L.8/Rev.1, Appendix I (Working Paper of the Second Committee: Main Trends), *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume 3, pp.119-120, 126; Robert D. Hodgson and Robert W. Smith, "Boundaries of the Economic Zone", in Edward Miles and John King Gamble (eds.), *Law of the Sea: Conference Outcomes and Problems of Implementation, Proceedings of the Tenth Annual Conference of the Law of the Sea Institute* (Cambridge, Massachusetts: Ballinger Publishing Company, 1977), pp.193-197.
[66] UN Doc. A/CONF.62/WP.8/Part II, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume IV, pp.162-163.
[67] UN Doc. A/CONF.62/WP.8/Rev.1/Part II, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume V, pp.164-165.

> "The delimitation of the exclusive economic zone [the continental shelf] between adjacent or opposite States shall be effected by agreement in accordance with *equitable principles*, employing, where appropriate, *the median or equidistance line*, and taking account of all the relevant circumstances" [emphases added].[68]

However, both the Equidistance Group and the Equitable Principles Group did not accept all of the texts with respect to the delimitation of the EEZ or the continental shelf from 1975 to 1977. At the Seventh Session of the Third Conference, maritime boundary delimitation was recognised as one of the core issues receiving priority over other issues.[69] In order to deal with articles regarding maritime delimitation, the Third Conference established Negotiating Group No.7 (hereafter referred to as "NG7").[70] Subsequently, since 1978, NG7 had assumed the role of formulating the texts regarding the delimitations of the EEZ and the continental shelf. Starting with the review of the 1977 ICNT, NG7 examined a number of suggestions.[71] However, it shifted to formulating 'neutral' texts because all of the suggestions were rejected by either or both of the two Groups.[72] At this point, it should be noted that the process of making such neutral texts highlighted the importance of a 'solution' which is satisfactory to the States concerned.[73]

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[68] UN Doc. A/CONF.62/WP.10; reproduced in *International Legal Materials* (hereafter referred to as "*ILM*"), Volume 16 (1977), pp.1141, 1143; A. O. Adede, "Toward the Formulation of the Rule of Delimitation of Sea Boundaries between States with Adjacent or Opposite Coast", *Virginia Journal of International Law*, Volume 19 (1979), p.210.

[69] UN Doc. A/CONF.62/62 (Organisation of Work: Decisions Taken by the Conference at Its 90th Meeting on the Report of the General Committee), *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume X, pp.6-8; Adede, *supra* note 68, p.209.

[70] UN Doc. A/CONF.62/62 (Organisation of Work: Decisions Taken by the Conference at Its 90th Meeting on the Report of the General Committee), *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume X, pp.6-8.

[71] First of all, one suggestion supporting equitable principles was submitted by 27 States (including Algeria, Argentina, Bangladesh, Benin, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syria, Somalia, Turkey and Venezuela) and another suggestion relying on the equidistance method was submitted by 20 States (including Bahamas, Barbados, Canada, Colombia, Cyprus, Democratic Yemen, Denmark, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, the United Arab Emirates, the United Kingdom and Yugoslavia). See UN Doc. NG7/2 (20th April 1978) and UN Doc. NG7/10 (1st May 1978); reproduced in Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents* (New York: Oceana Publications, Inc., 1986), Volume IX, pp.392-393, 402. Furthermore, the two informal suggestions (to reconcile the two Groups) were presented by the chairman of NG7. See UN Doc. NG7/9 (27th April 1978) and UN Doc. NG7/11 (2nd May 1978); reproduced in *ibid.*, Volume IX, pp.401, 405; See Adede, *supra* note 68, pp.211-213, 217-222.

[72] Adede, *supra* note 68, p.240.

[73] See UN Doc. NG7/29/Rev.1 (5th April 1979) and UN Doc. NG7/36 (11th April 1979); reproduced in Platzöder (ed.), *supra* note 71, Volume IX, pp.451, 456; See Adede, *supra* note 68, pp.240-244.

In spite of the considerable efforts of NG7, even the 1980 suggestion of the chairman of NG7 was rejected by the Equitable Principles Group, while it was accepted by the Equidistance Group.[74] However, the suggestion was included in the second revision of the ICNT in 1980.[75] The Equitable Principles Group then sent the President (of the Third Conference) a letter rejecting the suggestion.[76] In the end, the President had no choice but to present a new formula, which dispensed with both the terms 'equidistance method' and 'equitable principles', and stressed the phrase 'to achieve an equitable solution', in 1981.[77] In other words, it can be said that the Equitable Principles Group, which had given emphasis to achieving an equitable solution, succeeded in deleting the term 'equidistance', in Articles 74(1) and 83(1) of the 1982 UNCLOS.[78]

Throughout the drafting history of relevant articles of the UNCLOS, it is clear that States had continuously raised objections to the equidistance method. The first reason for the objections was that the equidistance method was not regarded as customary international law in the 1969 *North Sea Continental Shelf* cases.[79] The second was that States, which wanted to maximise their interests, tried to avoid an inequitable result arising out of the strict application of the equidistance method.[80] For these reasons, a number of States were likely to rely on the concept of equitable principles which seemed to pursue flexibility.

In this context, it should be noted that the 1977 *Anglo-French Continental Shelf* case, which was given during the Third Conference, sought to assimilate the combined *Equidistance-Special Circumstances* rule and a rule of customary international law.[81] This case emphasised that the *Equidistance-Special Circumstances* rule and a rule of customary

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[74] *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XIII, pp.77-78; Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2003), p.86; Tanaka, *supra* note 2, pp.45-46.
[75] Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Oxford University Press, 1989), p.28; Nandan and Rosenne (eds.), *supra* note 64, Volume II, pp.812-813, 978; Antunes, *supra* note 74, p.86.
[76] *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XIV, p.8, para.59; Antunes, *supra* note 74, p.86.
[77] UN Doc. A/CONF.62/WP.11; reproduced in Platzöder (ed.), *supra* note 71, Volume IX, p.474. See *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XV, p.39, paras.1-3; Nandan and Rosenne (eds.), *supra* note 64, Volume II, pp.979-980; Tanaka, *supra* note 2, p.47.
[78] Nandan and Rosenne (eds.), *supra* note 64, Volume II, pp.979-980.
[79] Ahnish, *supra* note 39, p.73.
[80] *Ibid.*
[81] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.45-46, para.70.

law have the same objective, which is to achieve an equitable delimitation.[82] In other words, the employment of the equidistance method qualified by special circumstances implied that an equitable result is much more important than the mandatory enforcement of a specific method in a particular case. The sharp tension between the two Groups thus focuses our attention on the importance of an equitable solution.

3. The Assimilation of the Two Rules

Since the 1993 *Greenland/Jan Mayen* case, the ICJ has stopped attempting to ascertain the meaning of equitable principles. The reason for this is that the Court concluded that, with regard to the delimitation of the continental shelf between opposite States, the *Equidistance-Special Circumstances* rule formulated in Article 6 of the 1958 Geneva Convention on the Continental Shelf is not different from the *Equitable Principles-Relevant Circumstances* rule which existed in customary international law.[83] Furthermore, the ICJ assimilated the two rules regarding the delimitation of the EEZ, stating that "[t]hat statement of an 'equitable solution' as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones".[84] Thus, whereas earlier case-law had rejected the notion that use of the equidistance method was obligatory, and sought to clarify the meaning of equitable principles, the 1993 *Greenland/Jan Mayen* case denied the substantial difference between the two rules, and justified the 'provisional' use of the equidistance method.[85]

Following the 1993 *Greenland/Jan Mayen* case, both the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case and the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case crystallised the logic of this assimilation. For instance, in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, the ICJ stated that:

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[82] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.47-48, para.75.
[83] *I.C.J. Reports 1993*, pp.58-59, para.46.
[84] *I.C.J. Reports 1993*, p.59, para.48.
[85] Malcolm D. Evans, "Maritime Delimitation after *Denmark* v. *Norway*: Back to the future?", in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law (Essays in Honour of Ian Brownlie)* (Oxford: Oxford University Press, 1999), p.160.

> "[T]he equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are *closely interrelated*" [emphasis added].[86]

Likewise, the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case of the Court mentioned that:

> "They [The applicable criteria, principles and rules of delimitation] 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"" [emphasis added].[87]

Attempts to understand the meaning of equitable principles have declined since the 1993 *Greenland/Jan Mayen* case because the difference between the two rules is not remarkable. However, it should not be overlooked that international delimitation cases since 1993 have also produced an equitable result by 'taking into account all relevant circumstances' despite the fact that the research into the meaning of equitable principles seems to have quickly diminished. In addition, it is noteworthy that the longstanding term '*Equidistance-Special Circumstances*' has been replaced with '*Equidistance–Relevant Circumstances*', with reference to the rules which these phrases denote, since the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case.

The legal reasoning of the ICJ suggests that the construction of an equidistance line is no more than a first step in the delimitation process, rather than the mandatory method for delimitation. In fact, the equidistance method is one of the methods which can be employed in the process of taking into account relevant circumstances in maritime delimitation. Therefore, the emphasis on the application of equity or equitable principles has also moved towards taking account of all relevant circumstances since the 1993 *Greenland/Jan Mayen* case, irrespective of the provisional employment of the equidistance method. In Chapter IV,

[86] *I.C.J. Reports 2001*, p.111, para.231.
[87] *I.C.J. Reports 2002*, p.441, para.288.

the process of considering these relevant circumstances will be dealt with.

What is the delimitation rule left to us throughout the assimilation of the two delimitation rules? This chapter aims to summarise and clarify the rules governing maritime delimitation currently applied in international courts and tribunals before this thesis shows the demise of equitable principles and the rise of relevant circumstances in maritime delimitation.

4. What is the Delimitation Rule Applied in International Courts and Tribunals?

4.1. The Achievement of an Equitable Solution (or an Equitable Result)

It may be observed that a teleological delimitation rule has been applied in maritime delimitation since the 1977 *Anglo-French Continental Shelf* case. For example, in this case, the Court of Arbitration stated that:

> "[T]he combined character of the equidistance-special circumstances rule means that the obligation to apply the equidistance principle is always one qualified by the condition "unless another boundary line is justified by special circumstances" […] the role of the "special circumstances" condition in Article 6 is *to ensure an equitable delimitation*" [emphasis added].[88]

In other words, it clarified what the aim ('to ensure an equitable delimitation') of the rules governing maritime delimitation was, while the ICJ 'indirectly' expressed the aim in the 1969 *North Sea Continental Shelf* cases.[89] Following these cases, the ICJ (or its Chamber) clearly showed the ultimate aim of the rules governing maritime delimitation in the 1982 *Continental Shelf* (Tunisia/Libya) case and the 1984 *Gulf of Maine* case. For example, the ICJ stated, in the 1982 *Continental Shelf* (Tunisia/Libya) case, that "[t]he *result* of the

[88] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.45-46, para.70.

[89] *I.C.J. Reports 1969*, pp.22-23, para.20: "The delimitation itself must indeed be equitably effected, […]"; *I.C.J. Reports 1969*, pp.48-49, para.88: "Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable."

application of equitable principles must be *equitable*" [emphasis added],[90] and its Chamber presented the fundamental norm of aiming at ensuring an equitable result.[91] Consequently, as the 1982 UNCLOS points out, what is left is 'to achieve an equitable solution'.

Is the phrase ('to achieve an equitable solution') the ultimate objective of maritime delimitation or the delimitation rule in itself? Three opinions regarding this phrase can be presented. The first view contends that the achievement of an equitable result should be no more than the 'aim' or 'goal' of maritime delimitation.[92] Thus, the view focuses on the clarification of another phrase ('on the basis of international law') referred to in Articles 74(1) and 83(1) of the UNCLOS, instead of the achievement of an equitable solution.[93] However, this opinion would reignite the conflict between the two Groups during the Third Conference.

The second view assumes that the achievement of an equitable solution opens the door to the use of equity in maritime boundary delimitation.[94] According to this argument, the term 'equitable solution' is the only substantial concept that can be found in Articles 74(1) and 83(1) of the UNCLOS. Subsequently, the term justifies the employment of equity in maritime delimitation. Philip Allott argues that the concept of equity employed by the term 'equitable solution' would evolve 'equitable principles' on a case-by-case basis.[95]

The third submits that an equitable solution needs another standard, such as proportionality, to confirm the equitability of the result produced.[96] In other words, the result then reached needs the check of its equitability.

However, this thesis assumes that the phrase 'to achieve an equitable solution' in itself has functioned as the rules governing maritime delimitation. As discussed above, since the 1977 *Anglo-French Continental Shelf* case, international courts and tribunals have always sought to reach an equitable result in maritime delimitation. The reason for this is that international courts and tribunals are under an 'obligation' to ensure an equitable delimitation. It is this obligation which guides the process of maritime delimitation. In addition, the concept of an equitable solution is the sole 'constraint' preventing international courts and tribunals from exercising unfettered discretion.

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[90] *I.C.J. Reports 1982*, pp.59-60, para.70.
[91] *I.C.J. Reports 1984*, pp.299-300, para.112.
[92] Antunes, *supra* note 74, pp.90-94.
[93] *Ibid.*, pp.94-97.
[94] Ahnish, *supra* note 39, pp.79-85.
[95] Philip Allott, "Power Sharing in the Law of the Sea", *The American Journal of International Law*, Volume 77 (1983), pp.23-24.
[96] Evans, *supra* note 75, pp.84-86.

Furthermore, because the Chamber of the ICJ explained, in the 1984 *Gulf of Maine* case, that the achievement of an equitable result is one element of the 'fundamental norm', the concept of an equitable result has been regarded as the rules governing maritime delimitation. In other words, the achievement of an equitable result is the sole standard settling several issues, including the establishment of an SMB which the UNCLOS does not deal with.

It is submitted that the assimilation of the two rules (the *Equidistance-Special Circumstances* rule and the *Equitable Principles-Relevant Circumstances* rule) leads to the chief aim of reaching an equitable solution. When international courts and tribunals deal with a delimitation case, they have no choice but to extensively consider how the ultimate aim would be achieved. As will be shown, the rules governing maritime delimitation binding international courts and tribunals look like 'rules' of law, in their outward appearance, but act as 'principles' of law.

4.2. The Structural Characteristics and Open Texture of Rules

4.2.1. The Structural Analysis of the Rules Governing Maritime Delimitation

Being 'rules' in a legal system, the rules governing maritime delimitation should generally ensure the predictability of application.[97] With regard to this important characteristic of rules, Ronald M. Dworkin notes that "[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision".[98]

However, it is not guaranteed that the rules applied in maritime delimitation will generate predictability, in terms of how these rules will be applied, because the 'achievement of an equitable solution' requires the consideration of all relevant circumstances, which are variable in each case. Professor Dworkin also states that "[e]ven those [principles] which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met".[99] The rules governing maritime delimitation, like the operation of principles, follow a path of flexibility in arriving at an equitable result.

Why do the rules in maritime delimitation function in the same way that principles

[97] See H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), pp.261, 263.
[98] Ronald M. Dworkin, "The Model of Rules", *The University of Chicago Law Review*, Volume 35 (1967-1968), p.25.
[99] *Ibid.*

operate in a legal system? The answers can be found in Dworkin's reasoning. Firstly, Professor Dworkin states that "[p]rinciples have a dimension that rules do not – the dimension of weight or importance".[100] Likewise, each relevant circumstance in a certain delimitation case is judged by its weight or importance, as principles compete with each other according to their respective weight or importance. Secondly, he describes a principle as a "standard that is to be observed […] because it is a requirement of justice or fairness or some other dimension of morality".[101] The achievement of an equitable solution, which is the result of application of the rules governing maritime delimitation, functions as a sort of desirable standard to be observed in the area of maritime delimitation. The reason for this is that justice or fairness in this area cannot be achieved unless an equitable solution is produced.

Professor Dworkin accepts that law may logically function as rules and substantially operate like principles.[102] A good example of this is the rules governing maritime boundary delimitation. The reason for this is that the application of the rules leading to the achievement of an equitable solution operates like the weighing-up of principles. Indeed, even when we take another delimitation rule, the *Equidistance-Special Circumstances* rule codified in Article 6 of the 1958 Geneva Convention on the Continental Shelf, the two elements (the equidistance method and the concept of special circumstances) can be regarded as two principles within that rule. As a result, the equidistance method does not necessarily have priority over special circumstances. In a certain case, one principle (special circumstances) can overcome the other principle (the equidistance method).

Furthermore, Professor Dworkin implies that words like 'reasonable' or 'unjust' can make a rule function in the same way that a principle operates.[103] Likewise, the term 'equitable' can also cause a rule to function substantially as the weighing-up of principles. Nevertheless, it should not be overlooked that the rules in maritime delimitation do not evolve into genuine principles.[104] The reason for this is that the term 'equitable' can compel only 'relevant' circumstances to be taken into account, as one way of application of the rules. In other words, the term 'equitable' expresses the 'kind' of circumstances that the rules depend on, excluding 'irrelevant' circumstances. It follows that the term 'equitable' is a 'constraint' which requires an international court or tribunal to take account of relevant

[100] *Ibid.*, p.27.
[101] *Ibid.*, p.23.
[102] *Ibid.*, p.28.
[103] *Ibid.*
[104] See *ibid.*, pp.28-29.

circumstances. International courts and tribunals apply the 'rules' governing maritime delimitation, not the principles of law.

Although Professor Dworkin clarifies the difference between rules and principles, it is clear that there are rules (like the rules governing maritime boundary delimitation) that function in the same way that principles do. Whilst the rules aim to reach an equitable result, the application of these rules is not predictable. It follows that the application of such rules leads to the flexibility of their application.

4.2.2. The Open Texture of the Rules Governing Maritime Delimitation

According to H. L. A. Hart, we have two handicaps: our relative ignorance of fact and our relative indeterminacy of aim.[105] Such human handicaps result in the 'open texture' of law.[106] Although rules should clearly be formulated for their application, how they are applied may prove to be indeterminate in a concrete case. The rules governing maritime delimitation possess open texture for two reasons. Firstly, all special or relevant circumstances cannot be enumerated when the rules with regard to maritime delimitation are formulated. Secondly, an equitable result, which is the final aim of the rules in maritime delimitation, remains indeterminate because it varies from case to case.

With regard to the open texture of law, the late Professor Hart stated that:

> "[T]here are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case".[107]

Likewise, the rules possessing open texture in maritime delimitation have been developed through the decisions of international courts and tribunals since being formulated. International courts and tribunals have made both facts (relevant circumstances) and aim (an equitable result) determinate in concrete cases.

What is the relationship between the concept of flexibility and the open texture of the rules governing maritime delimitation? As will be described in Chapter IV, international

[105] Hart, *supra* note 97, p.128.
[106] Concerning the open texture of law, the late H. L. A. Hart stated that "[w]hichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*". See *ibid.*, pp.127-128.
[107] *Ibid.*, p.135.

courts and tribunals have expanded the list of relevant circumstances and have developed the weighing-up process of relevant circumstances. This approach of international courts and tribunals with respect to relevant circumstances refrains from predictably applying the rules in maritime delimitation. Consequently, it is said that international courts and tribunals applying the rules governing maritime delimitation (which possess the characteristic of open texture) to a concrete case have pursued the flexibility of application of the rules.

5. The Current Place of the Equidistance Method in the Delimitation Process

5.1. The Argument for the Preferential Use of the Equidistance Method

After the two delimitation rules were assimilated, the use of the equidistance method has been proven provisional. Moreover, even the provisional employment of the equidistance method is not obligatory because the current delimitation rule is to achieve an equitable solution. The adoption of the equidistance method is not the application of a legal principle or rule. However, since this issue of using the equidistance method was the outset of the conflict between the two delimitation rules, it requires commentary.

Despite the codification of the equidistance method, the ICJ refused to count this method as a rule of customary international law in the 1969 *North Sea Continental Shelf* cases, touching on this method for the first time.[108] Since these cases, the equidistance method has failed to acquire a more substantial status in the context of international law. There was a lot of opposition to the notion that the application of this method in maritime delimitation was obligatory, particularly relating to the delimitation of the EEZ or the continental shelf. Disagreements during the Third Conference with regard to this issue clearly demonstrate this objection.[109] As a consequence, the 1982 UNCLOS did not articulate the equidistance method in relation to the delimitation of the EEZ or the continental shelf except for that of the territorial sea. In this respect, Jonathan I. Charney describes the rules of the UNCLOS dealing with maritime delimitation as 'indeterminate'.[110]

Some States did not accept the equidistance method because of its potential for

[108] *I.C.J. Reports 1969*, p.46, para.83.
[109] Antunes, *supra* note 74, pp.84-87; Tanaka, *supra* note 2, pp.44-46.
[110] Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law", *The American Journal of International Law*, Volume 88 (1994), p.227.

producing an inequitable result in a specific case. The opposition to the equidistance method is the reason why we should carefully consider the meaning and import of the phrase 'to achieve an equitable solution'. By contrast, other States argued that the concept and content of equitable principles were equivocal, and that so-called equitable principles cannot guarantee predictability concerning maritime delimitation, as will be proven in the next chapter of this thesis.

Nevertheless, some international law scholars and literatures acknowledge the 'preferential' use of the equidistance method for supporting the notion of predictability in the law of maritime boundary delimitation.[111] In fact, law must have the certainty or predictability of application. Therefore, it may be argued that the law of maritime delimitation should obtain the predictability of application.

In addition, Professor Evans indicates that States, which desire to avoid the preferential application of the equidistance method, would need 'forum shopping' because of the ICJ's reliance on the equidistance method.[112] In this respect, in 2001, Judge Guillaume, the President of the ICJ, predicted that the equidistance method for predictability can be applied in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case which was pending at that time.[113] However, his expectation proved to be wrong, and a scholar in favour of the preference of the equidistance method has no choice but to express that the 2007 *Caribbean Sea* (Nicaragua/Honduras) case of the ICJ was 'unconvincing'.[114]

At this point, we must ask whether or not the preferential employment of the equidistance method has been accepted for guaranteeing the predictability of law. This issue will be examined with respect to two points: the provisional use of the equidistance method and the possibility of discovering an alternative method.

5.2. The Provisional Employment of the Equidistance Method

It is axiomatic that the rules of the 1982 UNCLOS do not indicate a specific method to be

[111] Alex G. Oude Elferink, "The Impact of the Law of the Sea Convention on the Delimitation of Maritime Boundaries", in Davor Vidas and Willy Østreng (eds.), *Order for the Oceans at the Turn of the Century* (The Hague: Kluwer Law International, 1999), p.461; Antunes, *supra* note 74, pp.94-97; Tanaka, *supra* note 2, pp.119-121.
[112] Evans, *supra* note 1, pp.139-142.
[113] Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations. Visit http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1.
[114] Yoshifumi Tanaka, "Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (8 October 2007)", *The International Journal of Marine and Coastal Law*, Volume 23 (2008), p.342.

applied in maritime delimitation except for the delimitation of the territorial sea. In light of this fact, State practice regarding maritime delimitation holds relevance, at least in theory, because it can encourage customary international law to be formed.[115] However, it is clear that practices vary between adjacent States, and, furthermore, that it is difficult to identify *opinio juris* even between opposite States. In light of this, of importance are the decisions of international courts and tribunals, as well as the opinions of international law scholars regarding the rules governing maritime delimitation.[116]

It may be assumed that, in order to produce an appropriate outcome, the rules governing maritime delimitation should be detailed. This is not the case: the rules of the UNCLOS are not specific in the case of the delimitation of the EEZ or the continental shelf. Nonetheless, this does not mean that international courts and tribunals are at liberty to tailor individual cases as they see fit even though each delimitation case has its own peculiarities. Thus, Professor Charney stresses that international courts and tribunals should seek to 'refine' the (unclear) rules governing the delimitation of maritime boundaries.[117]

In dealing with cases submitted following the 1993 *Greenland/Jan Mayen* case, the ICJ wanted to establish more structural procedures for applying the rules governing maritime delimitation as in the 2009 *Maritime Delimitation in the Black Sea* case.[118] Even in earlier cases, however, the Court had sought to develop how the rules governing the location of maritime boundaries should be applied. Nevertheless, the central assumption of Court until the 1980s was that an 'equitable' maritime delimitation must be reached through the application of 'equitable' principles.[119] At that time, the approach of the Court seemed to reiterate the adjective 'equitable'.[120]

In the 1993 *Greenland/Jan Mayen* case (in which the applicable law was, in part, the 1958 Geneva Convention on the Continental Shelf), the ICJ seemed to appreciate the special status of the equidistance method.[121] It may be argued that the provisional construction of an equidistance line in the first stage of delimitation led to the way to predictability in maritime

[115] Charney, *supra* note 110, p.228.
[116] *Ibid.*
[117] *Ibid.*, p.233.
[118] See *I.C.J. Reports 2009*, pp.101-103, paras.115-122.
[119] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), pp.225-227.
[120] *I.C.J. Reports 1982*, p.59, para.70: "The result of the application of equitable principles must be equitable."
[121] *I.C.J. Reports 1993*, pp.58-59, para.46; *I.C.J. Reports 1993*, pp.62-63, para.56.

delimitation.[122] Furthermore, the ICJ accepted the primary use of the equidistance method in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case in which the UNCLOS was the applicable law.[123] Likewise, international courts and tribunals seemed to support this primacy in the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case and the 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case.[124]

It might be plausible that the preferential use of the equidistance method was supported out of a perceived need for objectivity in the application of the rules governing maritime delimitation. Judge Guillaume, the President of the ICJ, also expressed this point when he delivered his speech at the Sixth Committee of the General Assembly of the United Nations on 31st October 2001, stating that "the Court proceeded to develop its case law in the direction of greater certainty".[125] This thesis argues, however, that such certainty indicates the 'provisional' use of the equidistance method at the utmost, not the preferential employment of the equidistance method.

At this moment, it should be noticed that the equidistance method seems to be connected with the term 'special' circumstances rather than relevant circumstances.[126] Some international law scholars supporting the preference of the equidistance method prefer the term special circumstances. According to their view, the equidistance method serves as a general rule, while special circumstances are exceptions to the general rule.[127] They further note that the list of special circumstances used to mitigate the strict application of the equidistance method seems to be confined to 'geographical' factors.[128] In order to argue that the law of maritime boundary delimitation has been objective, and that the

[122] Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations. Visit http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1. Judge Guillaume, the President of the ICJ, stated that "[a] new stage was then reached with the Judgment delivered on 14 June 1993 in the case between Denmark and Norway concerning the maritime delimitation in the area between Greenland and Jan Mayen".
[123] *I.C.J. Reports 2001*, p.111, para.231.
[124] *I.C.J. Reports 2002*, p.441, para.288; *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.82, para.265.
[125] Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations. Visit http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1. Judge Guillaume, the President of the ICJ, stated that "the Court proceeded to develop its case law in the direction of greater certainty".
[126] See Evans, *supra* note 1, p.146, fn.46.
[127] See Derek W. Bowett, *The Legal Regime of Islands in International Law* (New York: Oceana Publications, Inc., 1979), pp.149-150; Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995), p.61; Dissenting Opinion of Judge Lachs, *I.C.J. Reports 1969*, p.239.
[128] See Evans, *supra* note 1, pp.156-159.

role of equity in the course of maritime delimitation has been reduced,[129] they adhere to the term special circumstances. However, since this thesis does not support the preferential use of the equidistance method in maritime delimitation, it prefers the term 'relevant' circumstances.

Analysis of the decisions of international courts and tribunals, as will be shown in Chapter IV, arouses the doubt that the provisional use of the equidistance method takes the shape of the preferential employment of the method or the predictability of law according to some publicists. In fact, it is somewhat incautious to regard the use of the equidistance method as preferential, because the adoption of the equidistance method is no more than a first step in the process of delimitation. In this respect, Professor Evans also admits that there exist great possibilities to adjust a provisional equidistance line although this equidistance line may be a starting point.[130] Moreover, an equidistance line might not be a starting line in one certain case as in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case.

Even if the equidistance method is obligatory in the first stage of the delimitation process, an equidistance line is no more than a 'provisional' line. The reason for this is that the final objective of maritime delimitation is not to guarantee predictability by adhering to the strict application of the equidistance method, but to arrive at an equitable solution through the consideration of all relevant circumstances.

5.3. The Possibility of Discovering an Alternative Method

Malcolm D. Evans argues that recent judgments of the ICJ have shown the victory of the equidistance method over equitable principles.[131] In other words, he believes that the Court may declare, in its next judgement, that the *Equidistance-Special Circumstances* rule is an imperative rule in maritime delimitation.[132] This thesis does not share his opinion.

Above all, it should be observed that the achievement of an equitable solution (or equitable result) is more important than the compulsory, provisional employment of the equidistance method. Accordingly, it is not surprising that the ICJ adopted the bisector method as an alternative to the equidistance method in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, although it nevertheless expressed that equidistance remains the general rule. The Court stated that "the equidistance method does not automatically have

[129] Antunes, *supra* note 74, pp.232-234.
[130] Evans, *supra* note 1, p.147.
[131] *Ibid.*, pp.144-147.
[132] *Ibid.*, p.147.

priority over other methods of delimitation".[133] In carefully considering this case, the Court had no option but to adopt a bisector line through a 'clear' interpretation of Article 15 of the 1982 UNCLOS. It meant that the existence of special circumstances may prevent the equidistance method from being automatically applied.[134] It should strongly be stressed that the ICJ did not use the equidistance method even in the delimitation of the 'territorial sea'. The Court reached an 'equitable solution' articulated in Articles 74 and 83 of the UNCLOS, even in the process of delimiting the territorial sea.

The approach of the ICJ in this case emphasised that special circumstances under Article 15 of the UNCLOS mean 'exceptional' conditions to refrain from drawing an equidistance line.[135] In other words, the ICJ weakened the predictability of Article 15 of the UNCLOS in the case of the delimitation of the territorial sea, because an equidistance line is not the one and only provisional one in the delimitation of the territorial sea. At this point, it should be expounded that the reference ("equidistance remains the general rule") of the Court can be interpreted in two ways. The first interpretation is that equidistance is the general rule 'only' in relation to the delimitation of the territorial sea.[136] This implies that the equidistance method is not the general rule with regard to the delimitation of the EEZ or the continental shelf. The second interpretation is that equidistance is the general rule in all the areas of maritime delimitation.[137][138] Insofar as this is the case, the Court put forward the inconsistent proposition that a bisector line other than an equidistance line can also lead to reaching an equitable result. Even if this decision is interpreted in either way, it may be argued that the use of the equidistance method is not the general rule in the law of maritime delimitation, because the ultimate goal of maritime delimitation, including the delimitation of the territorial sea, is to arrive at an equitable solution.

Although it is supported by many scholars, the use of the equidistance method in maritime delimitation, does not guarantee an equitable solution for all the issues relating to maritime delimitation. In fact, the equidistance method is only found in Article 15 among all of the articles of the UNCLOS. Keeping the achievement of an equitable solution in mind,

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[133] *I.C.J. Reports 2007*, p.741, para.272.
[134] *I.C.J. Reports 2007*, pp.743-745, para.280.
[135] Antunes, *supra* note 74, pp.32-35.
[136] This interpretation is an interpretation 'only' within paragraph 281 of this Judgment.
[137] This interpretation is an interpretation in the 'whole' context of paragraphs 262-282 of this Judgment.
[138] Elizabeth A. Kirk, "Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v Honduras*)", *International and Comparative Law Quarterly*, Volume 57 (2008), pp.708-709; Tanaka, *supra* note 114, pp.338-343.

we may thus discover alternative methods to the equidistance method with regard to maritime delimitation. In sum, although the equidistance method has frequently been employed in comparison with other methods in the delimitation process, it is only one of the methods to be employed in order to reach an equitable result in a given case.

An efficacious way of showing how an 'alternative' method is discovered, is to examine relevant circumstances found in emerging or controversial issues which cannot be solved only by reference to the preferential employment of the equidistance method, and this thesis will look at some of these in due course.

6. Why Is the Flexibility of Application of the Rules Governing Maritime Delimitation Necessary?

6.1. Applying the Rules Governing Maritime Delimitation: Predictability versus Flexibility

As noted above, some scholars vigorously uphold the obligatory application of the equidistance method, because they regard it as an effective way of guaranteeing 'predictability' in the delimitation of maritime boundaries.[139] For instance, Professor Evans states that the *Equidistance-Special Circumstances* rule has become 'imperative' since the 1969 *North Sea Continental Shelf* cases.[140] According to the supporters of Evans's argument, although an equidistance line may be shifted where there are relevant circumstances, such an adjustment is preceded by the application of the equidistance method.[141]

The position and argument of advocates of the equidistance method raise several questions: which is a more desirable ideal in maritime delimitation, predictability or flexibility? What relationship does predictability or flexibility have with achieving of an equitable result? In other words, does an equitable result ensue from the predictability of the delimitation process or the flexibility of application of the rules governing maritime delimitation?

In fact, it may be argued that the employment of the equidistance method is at odds with the application of equitable principles. This presupposition seems to be exaggerated

[139] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge: Grotius Publications Limited, 1989), pp.79-81; Antunes, *supra* note 74, pp.411-421; Tanaka, *supra* note 2, pp.130-131.
[140] Evans, *supra* note 1, p.144.
[141] Antunes, *supra* note 74, pp.411-421.

through long-running disputes between the Equidistance Group and the Equitable Principles Group during the Third Conference. To take an extreme position on the matter, it could be believed that the equidistance method only stands for predictability, whereas the application of equitable principles pursues flexibility.

In this regard, Judge Guillaume, the President of the ICJ, stated that:

> "We are all aware that international law is constantly developing, and the law of the sea is not immune in this regard. However, it is encouraging to note that the law of maritime delimitations, by means of these developments in the Court's case law, has reached *a new level of unity and certainty*, whilst conserving the necessary *flexibility*. … In all cases, the Court, as States also do, must first determine provisionally the equidistance line. It must then ask itself whether there are special or relevant circumstances requiring this line to be adjusted with a view to achieving equitable results" [emphases added].[142]

He concluded that predictability and flexibility in maritime delimitation have been reconciled, and that the use of the equidistance method symbolises predictability whilst the existence of special or relevant circumstances points out flexibility. However, this thesis is challenging his conclusion. Is there the concept of predictability in applying the rules governing maritime delimitation if the current delimitation rule is to achieve an equitable solution?

Since the 1985 *Continental Shelf* (Libya/Malta) case of the ICJ, it has become a typical process for international courts and tribunals to firstly draw a provisional equidistance line, and then take account of relevant circumstances to modify that line.[143] In other words, the equidistance method seems to be chosen in order to draw a provisional line in the process of maritime delimitation. Accordingly, the essence of controversy is whether or not the aim of maritime delimitation can be fulfilled if predictability (which is one of the principal characteristics of law) is guaranteed through the use of the equidistance method. Regarding this question, it is submitted that the objective of maritime delimitation is always to reach an equitable solution without regard to the obligatory nature of the equidistance method.[144]

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[142] Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations. Visit http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1.
[143] Weil, *supra* note 139, pp.83, 191-192, 205-208; Tanaka, *supra* note 114, p.338.
[144] L. D. M. Nelson, "The Role of Equity in the Delimitation of Maritime Boundaries", *The American*

It is evident that an equidistance line, which seems to guarantee predictability, has been regarded only as a 'provisional' line by international courts and tribunals. Even in recent case-law, international courts and tribunals have still required the concept of 'flexibility' (different from the concept of subjectivity) by taking account of relevant circumstances in the course of applying the rules governing maritime delimitation.[145] Moreover, even the employment of the equidistance method for drawing a provisional line may be rejected in a specific case. For these reasons, the ICJ stated that the *Equidistance-Special Circumstances* rule and the *Equitable Principles-Relevant Circumstances* rule are closely interrelated.[146] That is to say, the most important task in the delimitation of maritime boundaries is not to guarantee predictability through the employment of the equidistance method, but to arrive at an equitable result by the flexible application of the rules. It is concluded that the use of the equidistance method, if necessary, is no more than a 'starting point' in flexibly applying the rules governing maritime delimitation. Therefore, the late Thomas M. Franck had observed the increased flexibility, in recent years, on the part of international courts and tribunals, since the adoption of the 1982 UNCLOS.[147]

6.2. Criticising the Predictability of Application of the Rules

First of all, the meaning of 'predictability', with reference to the application of the rules governing maritime delimitation, should be defined more clearly. The way in which international courts and tribunals have applied the current delimitation rule could be 'predictable' in the sense that the 'phases' of application of the delimitation rule have been established beforehand, and that the 'list' of relevant circumstances has been limited to some extent, as will be shown in Chapter IV. Predictable stages or patterns of application of the rules prove that maritime delimitation is not an arbitrary decision which international courts and tribunals make. However, it must be noted that the basic role of international courts and tribunals is the interpretation and application of law. With their 'discretionary' power as to the interpretation and application of law, international courts and tribunals pursue flexibility in applying the rules governing maritime delimitation, because this delimitation rule in itself aims at arriving at an equitable result without making reference to a specific method. Thus,

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Journal of International Law, Volume 84 (1990), pp.857-858.

[145] Christopher R. Rossi, *Equity and International Law* (New York: Transnational Publishers, 1993), p.245; Hugh Thirlway, "The Law and Procedure of the International Court of Justice (1960-1989): Part Five", *The British Year Book of International Law*, Issue 64 (1993), pp.37, 41.

[146] *I.C.J. Reports 2001*, p.111, para.231.

[147] Franck, *supra* note 127, pp.68-73.

in treating 'nature' in the context of maritime delimitation, international courts and tribunals can refashion given facts to a certain extent although they cannot 'totally' or 'entirely' refashion nature. In other words, they rewrite nature to a limited extent with their discretion.

Nevertheless, several issues, such as the predictable phases of the delimitation process, the obligatory use of the equidistance method, and the limitation on the list of relevant circumstances, have ceaselessly been presented by international law scholars in favour of the predictability of application of the rules.

It is true that the delimitation process may be relevant to the predictability of the rules governing maritime delimitation. Since the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case and the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case further clarified the relationship between the two delimitation rules,[148] the first phase of delimitation has ended in the construction of a provisional equidistance line, regardless of which of the two rules one chooses to apply. Subsequently, the three-phase system for international decision-making in delimitation cases, including the proportionality check (which is the third phase), has been established by the recent cases of international courts and tribunals.[149] In the sense that international courts and tribunals are not prone to depart from their past decisions unless there is an important reason to do so,[150] the established three-phase system with regard to maritime delimitation is predictable. For this reason, the delimitation process itself may be considered to be predictable. However, does the predictability of the delimitation process mean the predictability of application of the rules?

Even if each phase of application of the rules governing maritime delimitation is determined, a task performed within the phase is not likely to be predictable. For example, in the first phase of delimitation, the drawing of a provisional equidistance line is not compulsory and, in the next phase, the identification and weighing-up of relevant circumstances adjusting the provisional line are carried out on a case-by-case basis. Thus, predetermining phases for applying the rules establish only a 'framework' for dealing with the delimitation of maritime boundaries. This fact acts as a point of departure for criticising the well-developed views of Prosper Weil on the topic.

Professor Weil argues that, in addition to the predictability of the whole delimitation

[148] *I.C.J. Reports 2001*, p.111, para.231; *I.C.J. Reports 2002*, p.441, para.288.
[149] The 2009 *Maritime Delimitation in the Black Sea* case of the ICJ epitomised the three-phase system of delimitation. See *I.C.J. Reports 2009*, pp.101-103, paras.115-122.
[150] James Harrison, "Judicial Law-Making and the Developing Order of the Oceans", *The International Journal of Marine and Coastal Law*, Volume 22 (2007), p.284.

process, 'each' task carried out within 'each' delimitation phase would also be predictable.[151] This contention is based on the assumption that the decisions of international courts and tribunals have themselves made law.[152] It is, however, submitted that this is not the case: rather, international courts and tribunals have influenced the interpretation of law.[153] With regard to maritime delimitation, the role of international courts and tribunals has been more dominant, because Articles 74(1) and 83(1) of the 1982 UNCLOS concerning the delimitations of the EEZ and the continental shelf could be examples of a direct *renvoi* to other rules and principles of international law.[154] Nevertheless, it should be borne in mind that international courts and tribunals have applied the rules that already existed. They have not made new rules of international law regarding maritime delimitation.

As Professor Weil is impressed with the 1985 *Continental Shelf* (Libya/Malta) case, the first normativity which he supports is the drawing of an equidistance line as a provisional line.[155] However, in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, the ICJ seemed to strongly reject his argument.[156] Weil's other normativity in the delimitation process is to verify the equitability of a provisional equidistance line.[157] It follows that this second normativity is highly pertinent to the 'typification' of relevant circumstances.[158] However, as will be examined in Chapter IV, the expansion of the list of relevant circumstances and the inconsistency of weight accorded to relevant circumstances on a case-by-case basis make the consideration of relevant circumstances flexible.

Here, an interesting issue can be raised. Is the predictability of the delimitation process (which has been developed to the three-phase decision-making) undermined if the conduct of both States constructs an actual delimitation line, as in the first sector of the 1982 *Continental Shelf* (Tunisia/Libya) case of the ICJ? According to the ruling of the 2007 *Caribbean Sea* (Nicaragua/Honduras) case of the ICJ,[159] the conduct of both States is no

[151] Weil, *supra* note 139, pp.282-288.
[152] *Ibid.*, p.285.
[153] Harrison, *supra* note 150, pp.284-285, 293-299.
[154] This thesis does not actively support the argument that Articles 74(1) and 83(1) of the UNCLOS regarding the delimitations of the EEZ and the continental shelf could be examples of a direct *renvoi* to other rules and principles of international law. The reason for this is that such an argument focuses on the phrase 'on the basis of international law' referred in Articles 74(1) and 83(1) of the UNCLOS. However, the essence of Articles 74(1) and 83(1) of the UNCLOS is the phrase 'to achieve an equitable solution'.
[155] Weil, *supra* note 139, pp.282-283.
[156] *I.C.J. Reports 2007*, p.741, para.272.
[157] Weil, *supra* note 139, pp.283-288.
[158] *Ibid.*, pp.284-285.
[159] *I.C.J. Reports 2007*, p.741, para.272; *I.C.J. Reports 2007*, pp.742-743, paras.277-279.

more than one of the relevant circumstances to consider in deciding whether or not to refrain from the use of the equidistance method, despite the fact that it can be used to draw an actual delimitation line. It follows that the first phase of the delimitation process is still the construction of a provisional equidistance line. In other words, international courts and tribunals will seek to firstly draw a provisional equidistance line and then, if they fail in their endeavour, will look for an alternative provisional line. In the end, the delimitation process proves to be predictable in the sense that there is a 'trial' of constructing a provisional equidistance line in the first phase. Nevertheless, the predictability of process does not necessarily bring about the predictability of application of the rules.

6.3. Three Reasons Why Flexibility is Essential

Firstly, it is noted that predictable stages or patterns of application of the rules governing maritime delimitation cannot automatically guarantee the achievement of an equitable result. Strict insistence on the predictability of application of the rules may result in producing an inequitable result. The predictability of application of the rules, such as the obligatory employment of the equidistance method, the fixed weight accorded to a certain relevant circumstance, and the compulsory construction of an equidistance line as a provisional line, would prevent the achievement of an equitable result. This point is consistent with a reasoning found in the 1969 *North Sea Continental Shelf* cases: "if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced".[160] As long as the current delimitation rule dictates the achievement of an equitable result, and international courts and tribunals possess the discretion to interpret nature, even predictable stages or patterns that have elaborately been made are not essential to achieving an equitable result. An equitable result can be reached on a case-by-case basis only if international courts and tribunals exercise the discretion to make a decision even when following predictable stages or patterns.

Secondly, rewriting nature flexibly is required to avoid granting too much weight to a small island or a peculiar configuration. The starting point in delimiting maritime boundaries is the given: 'nature'. However, the concept of an equitable result does not mean that one State can gain an unfair advantage bringing about a disproportional disadvantage of the other, due to the presence of a small island or a peculiar configuration. In other words,

[160] *I.C.J. Reports 1969*, p.49, para.89.

nature in itself is not equitable, and the clear reflection of nature is different from the achievement of an equitable result.[161] In fact, through interpreting nature, the legal interests of both States should equitably be balanced. This must be the outcome to be reached after the rules governing maritime delimitation are applied. The flexible application of the rules is required to arrive at an equitable result through the interpretation of nature which could be inequitable. The flexibility of application of the delimitation rule is necessary to artificially avoid the disadvantages of a State which nature could bring about. According to Professor Weil, the purpose of equity is to keep the balance between the faithful reflection of nature and the freedom to rewrite nature totally.[162] Although this thesis does not follow Weil's opinion regarding equity,[163] his argument shows why the flexibility of application of the rules is needed. The late Wolfgang Friedmann asked why the concave coastlines of a State are considered to be 'unnatural' while the differences between coastal and land-locked States, or between States with long and short coastlines, are thought to be natural.[164] Although Friedmann's question was meaningful, the intention behind the dependence on one among several given facts is not to rewrite nature completely. In other words, the application of the current delimitation rule can 'interpret' nature to balance the interests of the States concerned.

Lastly, it should be pointed out that the difference between apportionment and delimitation has been blurred. In the 1969 *North Sea Continental Shelf* cases, the ICJ stated that "its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors".[165] Assuming that there is a sharp difference between apportionment and delimitation, it went on to say that "[d]elimitation is 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

[161] Weil, *supra* note 139, p.28.
[162] *Ibid.*, p.88: Professor Weil stated that "the law has tried to steer a middle course, to respect nature while changing it, to correct geography while still conforming to it".
[163] Whilst Prosper Weil assumes that the need for equity is to keep the balance between the faithful reflection of nature and the freedom to rewrite nature totally, he argues that equity can make law. However, even though equity might create equitable principles, international courts and tribunals need the flexible application of these principles. Accordingly, his presumption ("equity is required to interpret nature flexibly") contradicts his argument ("equity can make the rules of general and predictable application"). See *ibid.*, pp.88, 184.
[164] Wolfgang Friedmann, "The North Sea Continental Shelf Cases – A Critique", *The American Journal of International Law*, Volume 64 (1970), p.239.
[165] *I.C.J. Reports 1969*, pp.21-22, para.18.

such an area".[166] The Court implied that delimitation is a process of discovering the boundaries of the continental shelf that 'already' 'belongs to' a State.[167] According to the view clarified in the Dissenting Opinion of Judge Morelli, apportionment means the right of a State over a certain area of the continental shelf, whereas delimitation should be in conformity with the apportionment of the continental shelf automatically effected by international law.[168] Although this difference is, in theory, clear, it has not been maintained. The most important reason for this is that the concept of an 'equitable' delimitation has been developed. The term 'equitable' has acted as a constraint over delimitation. The ICJ's presenting of the concept of 'proportionality' in the 1969 *North Sea Continental Shelf* signifies the introduction of an equitable delimitation.[169] In addition, the notion of an equitable delimitation described in the 1977 *Anglo-French Continental Shelf* case has strongly been supported.[170] Since then (when the achievement of an equitable solution became the delimitation rule), the difference between apportionment and delimitation has declined in importance. As a consequence, in discord with a reasoning of the 1969 *North Sea Continental Shelf* cases, an equitable result in the field of maritime delimitation means an 'equitable division' of the 'overlapping areas' that have not yet been delimited.[171] It follows that such a division means the 'apportionment' of the overlapping areas. The consideration of all relevant circumstances then plays an important role in producing an equitable delimitation. In other words, international courts and tribunals can exercise a proper 'discretion' to take into account all relevant circumstances for the purpose of determining the apportionment of maritime areas.

For the reasons listed above, flexibility in the application of the delimitation rule aiming at reaching an equitable solution is necessary.

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[166] *I.C.J. Reports 1969*, pp.21-22, para.18.
[167] D. P. O'Connell, *The International Law of the Sea* (Oxford: Oxford University Press, 1984), Volume II, pp.692-693.
[168] Dissenting Opinion of Judge Morelli, *I.C.J. Reports 1969*, pp.204-205, para.9.
[169] O'Connell, *supra* note 167, Volume II, p.697; Thirlway, *supra* note 145, pp.35-36.
[170] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.45-46, para.70.
[171] Thirlway, *supra* note 145, pp.39-40.

7. A Concluding Remark

The rule which international courts and tribunals have applied in maritime delimitation until now is that "the delimitation of the EEZ [the continental shelf] between the States concerned shall achieve an equitable solution". Despite the fact that there were the two delimitation rules (the *Equidistance-Special Circumstances* rule and the *Equitable Principles-Relevant Circumstances* rule) which originated from the 1958 Geneva Convention on the Continental Shelf and customary international law, the sole rule that international courts and tribunals apply in maritime delimitation is the 'achievement of an equitable result'. Since the two rules were assimilated, the equitability of the result to be reached became much more important than the equitability of the principles to be applied in maritime delimitation. Thus, it is 'uncertain' how to apply this delimitation rule for the purpose of producing an equitable solution. It follows that it is flexible to apply the current rule in maritime delimitation.

Where does the flexibility of application of the delimitation rule originate from? The consideration or examination of 'all' relevant circumstances is the starting point in pursuing flexibility. The concept of equity in international law functions only through the concept of an 'equitable solution' in the context of maritime delimitation, as will be shown in the next chapter. Unless the use of the equidistance method is obligatory, only the consideration of all relevant circumstances can lead to the achievement of an equitable result. International courts and tribunals grant 'weight' to given facts on a case-by-case basis when examining all of the relevant circumstances. For example, in the 1969 *North Sea Continental Shelf* cases, the ICJ ignored the Norwegian Trough to support the concept of 'natural prolongation', despite the fact that it was aware of the existence of the Trough.

It is evident that predictable patterns (for example, the existence of the neutral circumstances, such as geographical factors) exist in international case-law. However, in a given case, the relevance of islands (for example, whereas one island is accorded half effect, the other no effect) is still determined by the discretionary power of international courts and tribunals because an equitable result should be reached, and such a result varies from case to case.

The discretion of international courts and tribunals can be discussed in the context of the establishment of an SMB and the delimitation of the outer continental shelf. Does the concept of an SMB restrict the list of relevant circumstances? The answer might be in the affirmative. Nevertheless, even when an SMB is established, the flexibility of application of

the delimitation rule must still be pursued. Although the 'neutral' circumstances, such as geographical factors, have priority over other circumstances in a certain case, international courts and tribunals can determine with their discretion what effect an island would be accorded or how the peculiar shape of the coastlines concerned would be taken into account.

The delimitation of the outer continental shelf may be the extension of the delimitation of the inner continental shelf in a predictable way. Nevertheless, international courts and tribunals still hold the discretionary power to determine which provisional line would be employed or which geomorphological factors would have primacy over others.

To sum up, the two delimitation rules were assimilated, and the current delimitation rule is only to achieve an equitable solution. Therefore, an equitable result cannot be achieved unless international courts and tribunals (which have the discretion to interpret and apply a rule) pursue the flexibility of application of the delimitation rule relied on all of the relevant circumstances in a given case, because each case has its own characteristics, and an equitable result of one case is not the same as that of another.

Chapter III

The Demise of Equitable Principles in Maritime Delimitation

1. Introduction

In one of his articles, L. D. M. Nelson states that "[t]he tension between the need for 'particular justice' arising from the uniqueness of a specific case and the demand for 'universalizable justice' constitutes a general legal problem".[1] He implies that one of the fundamental issues in law is the tension between 'predictability' and 'flexibility'. The late H. L. A. Hart regarded these twin concepts as 'two social needs' in his famous book, *The Concept of Law*.[2] In spite of this tension, it is, basically, expected that law has predictability or certainty because it should generally be applied in order to attain universalizable justice. However, it is also true that the predictability of law could lead to a disappointing result that falls short of the notion of 'justice' or 'fairness' in a specific case. Since it is impossible for law to possess a high degree of both predictability and flexibility, the flexibility of law may be pursued at the cost of predictability, through the application of law named 'principles',[3] or a reliance on the discretion of a court or tribunal to interpret law.[4] At this moment, it must be noted that this thesis does not accept the importance of equitable 'principles', as will be proven in this chapter. Hence, in the law of maritime boundary delimitation, the flexibility of application of law can be achieved through the 'discretion' of international courts and tribunals to interpret and apply the rules aiming at reaching an equitable solution, as will be

[1] L. D. M. Nelson, "The Roles of Equity in the Delimitation of Maritime Boundaries", *The American Journal of International Law*, Volume 84 (1990), p.842.
[2] H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), pp.130-131.
[3] Through the discussion between Hart and Dworkin, the differences between legal principles and legal rules can be perceived. Firstly, legal principles are broad, general or unspecific, whilst legal rules are so specific as to be applied. Secondly, legal principles only implicate purpose, goal or value, whereas we can predict the way of application of legal rules. See *ibid.*, pp.259-263; Ronald M. Dworkin, "The Model of Rules", *The University of Chicago Law Review*, Volume 35 (1967-1968), pp.22-29.
[4] Tomas Rothpfeffer, "Equity in the North Sea Continental Shelf Cases", *Nordic Journal of International Law*, Volume 42 (1972), p.82.

shown.

The tension between predictability and flexibility is an important issue in some areas of international law as well. Those who give priority to securing peace or preventing conflicts in international relations favour predictability in international law, whereas those who intend to bring the concept of justice or fairness to the international community of States prefer flexibility.[5] In this sense, the conflict between predictability and flexibility in some areas of international law is closely connected with what should be the function of international law.

Can we say that maritime boundary delimitation is one legal area requiring flexibility? The answer is in the affirmative.[6] Regarding what should be the function of international law in the context of maritime delimitation, the two delimitation rules were suggested as described in the previous chapter: the *Equidistance-Special Circumstances* rule and the *Equitable Principles-Relevant Circumstances* rule. The former seems more predictable while the latter is flexible. However, both rules include 'indeterminate' concepts: the 'special circumstances' of the former and the 'equitable principles' and 'relevant circumstances' of the latter. Such indeterminate concepts mirror a characteristic of the rules governing maritime delimitation which aim at maximising the interests of all of the States involved.[7] The inclusion of concepts considered to be indeterminate would lead to the flexible application of the rules. Contrary to analysis of the elements constituting the two rules, securing the predictability of application has continuously been sought through the preferential use of the equidistance method, as Judge Guillaume affirmed with firm confidence.[8]

As stated in Chapter II, the current delimitation rule is the achievement of an equitable solution. The equitability of the result produced dominates maritime delimitation. What can we look for if we carefully examine this delimitation rule? The compulsory employment of the equidistance method, the application of equitable principles, *or* the achievement of an equitable solution? The achievement of an equitable solution that we can

[5] J. G. Merrills, "Images and Models in the World Court: the Individual Opinions in the North Sea Continental Shelf Cases", *The Modern Law Review*, Volume 41 (1978), pp.641-644, 647-651.
[6] Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), p.108.
[7] Vaughan Lowe, "The Role of Equity in International Law", *The Australian Year Book of International Law*, Volume 12 (1988-1989), p.73.
[8] Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations. Visit http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1.

only find out is, however, only the ultimate purpose of the rules in maritime delimitation, but the reason for doing so was that States could not accept a strict rule in the context of maritime delimitation in which serious conflicts between the interests of the States concerned frequently occur. Hence, the present rules governing maritime delimitation are arranged in such a way to receive a flexible application. In other words, there are no elements or concepts contained in the rules which guarantee predictability. In sum, the only rule that is recognisable as properly functioning is the concept of an 'equitable solution', in which 'equity' in maritime delimitation is found.

Accordingly, a study of the concept, role and application of equity in international law constitutes the starting point in understanding what is meant by the concept of equitable principles or an equitable result in maritime delimitation. If the true nature of equity applied in maritime delimitation is clarified, the demise of equitable principles can easily be proclaimed, and two propositions in connection with the concept of equitable principles will be abrogated. The two propositions are: one is to guarantee predictability through the typification of equitable principles as in the 1985 *Continental Shelf* (Libya/Malta) case of the ICJ and the other is to regard equitable principles as the principles to deal with the examination of relevant circumstances. Thus, this chapter will start from looking into the concept of equity as a fundamental source of flexibility in international law.

2. The Origin and History of Equity

To a considerable extent, the concept of equity in international law originated in Aristotle's thought,[9] even though traces of concepts relating to equity are found in diverse legal systems, including Islamic, Hindu, Chinese and African law.[10] The reason for this is that international law had commenced in Europe with the rise of sovereign States.[11] Therefore, first and foremost, the view of Aristotle regarding equity must be examined. Aristotle wrote that:

> "What creates the problem is that the equitable is just, but not the legally just but a

[9] M. W. Janis, "The Ambiguity of Equity in International Law", *Brooklyn Journal of International Law*, Volume 9 (1983), pp.7-8.
[10] Christopher R. Rossi, *Equity and International Law* (Irvington, New York: Transnational Publishers, 1993), pp.22-23.; C. Wilfred Jenks, *The Prospects of International Adjudication* (London: Stevens & Sons Limited, 1964), p.316.
[11] Rossi, *supra* note 10, pp.22-23.

> correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct".[12]

A superficial reading of Aristotle's notion of equity suggests that its sole aim should be to temper the rigour of law. However, Aristotle did not consider equity to be a 'corrective': rather, his statement must be understood as referring to equity's dual function, both as a corrective and as an extension of natural (or absolute) justice, based on the premise that law is flawless.[13] Whatever his philosophical understanding of equity was, the sole point to be appreciated here is that Aristotle focused on defining the 'function' of equity (not law), rather than the concept itself, whilst equity in international law is a legal concept 'within' existing law.

Starting with Roman law, the notion of equity has continuously functioned in Common law and Civil law in the European legal tradition. In the Roman law system, the *praetors* made a body of 'law' (known as the *ius honorarium*), which pursued flexibility, and issued edicts supporting, supplementing or correcting existing law.[14] In Common law, equity was regarded as a new system of law.[15] Furthermore, the Common law system went as far as to establish the equity 'court' organisation, as distinct from common law courts.[16] Although Civil law was less concerned with the idea of equity, it incorporated 'equitable principles' into its texts to soften the rigour of law.[17] The European legal system was the true precursor to the concept of equity in international law, although the meaning and significance of the concept in international law are essentially different from those of the various European legal systems.[18]

3. Equity and International Law

3.1. The Incorporation of the Concept of Equity into International Law

It is said that, having developed out of the European legal tradition, international law

[12] Aristotle (translated by David Ross and revised with an Introduction and Notes by Lesley Brown), *The Nichomachean Ethics* (Oxford: Oxford University Press, 2009), Book V, Ch.10, pp.98-99.
[13] Rossi, *supra* note 10, pp.23-24.
[14] *Ibid.*, pp.30-31; Rothpfeffer, *supra* note 4, p.82.
[15] Rossi, *supra* note 10, p.32.
[16] *Ibid.*, p.34.
[17] *Ibid.*, p.38.
[18] *Ibid.*, pp.31, 39-40; Rothpfeffer, *supra* note 4, p.82.

acknowledged the notion of equity from its inception. Beginning with Grotius's accepting the existence of equity in international law,[19] equity has been employed in quite a few decisions of international tribunals (even though an express authorisation for the use of equity was not given).[20] As Aristotle was interested in the role of equity, most modern international law scholars are also more likely to examine the role of equity in international law than to define the term 'equity'. Therefore, it is very difficult to grasp the exact meaning of equity.

Nevertheless, for convenience' sake, the reference of the Arbitral Tribunal to equity, in the 1922 *Norwegian Shipowners' Claims* (Norway/U.S.A.) case, serves as a useful starting point for understanding the meaning of equity. The Tribunal stated that:

> "The majority of international lawyers seem to agree that these words [law and equity] are to be understood to mean *general principles of justice* as distinguished from any particular system of jurisprudence or the municipal law of any State" [emphasis added].[21]

Although this statement did not define the meaning of equity in detail, it has three implications. Firstly, equity has been acknowledged in international law. Secondly, it is distinguished from the concept incorporated into the municipal law of a State. Thirdly, it is closely related to the concept of 'justice'. In sum, the Arbitral Tribunal of this case presented the point of view that equity, which has its own merits in the international law system, is a means of reflecting and attaining justice.

Likewise, the famous Individual Opinion of Judge Hudson in the 1937 *Diversion of Water from the River Muese* case agreed that equity had been a 'source' of international law, stating that "[w]hat are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals".[22] Although it is necessary to discuss whether or not equity, which is a vague and abstract concept, is a source of international law, it is submitted that the presence of equity in international law was noted by Judge Hudson.

In addition, as C. Wilfred Jenks summarised at length in his valuable book, *The Prospects of International Adjudication*, it is evident that the concept of equity has been

[19] Janis, *supra* note 9, p.8.
[20] Michael Akehurst, "Equity and General Principles of Law", *International and Comparative Law Quarterly*, Volume 25 (1976), pp.801-808; Jenks, *supra* note 10, pp.330-336.
[21] *Norwegian Shipowners' Claims* (The Hague, 13th October 1922), *UNRIAA*, Volume I, p.331.
[22] *P.C.I.J. Series A./B.*, No.70 (Judgment of 28th June 1937), p.76.

admitted in many decisions of international courts and tribunals (although he mainly focused on cases in which an authorisation to apply equity had been given).[23]

3.2. The Difference between Equity in Municipal Law and Equity in International Law

Although equity in international law had greatly been influenced by the concept of equity included in Roman, Common and Civil law, equity in such municipal legal systems and equity in international law are not identical concepts.[24] In other words, equity in international law is not the sum of concepts of equity previously applied in many municipal legal systems, but is a 'unique' means of achieving justice or fairness in 'international' law. This is the case even though legal principles reflecting the concept of equity in international law are found in some national legal systems. More importantly, there exist multiple legal principles, regarded as reflecting equity in municipal legal systems, which have not been accepted in international law.[25]

Based on the premise that equity in municipal law and equity in international law are not identical, two questions should be asked: firstly, what is meant by equity in international law and, secondly, whether or not equity is a source of international law. First of all, with respect to the issue of equity in international law, Bin Cheng states that "[i]nternational law, in its operation, seeks to implement the idea of justice, at least formal justice, in the international sphere, whilst equity assists it to achieve subjective justice in individual cases".[26] This more developed reference to equity in international law notwithstanding, it is still impossible to understand the exact meaning of equity in international law.[27] In other words, it is not obvious whether equity in international law means equality, distributive justice or something else.[28] Second of all, whether or not equity is a source of international law is an issue highly relevant to the relationship between law and equity. This will be dealt with in the next section.

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[23] Jenks, *supra* note 10, pp.322-410.
[24] Rossi, *supra* note 10, p.41.
[25] *Ibid.*, p.37.
[26] Bin Cheng, "Justice and Equity in International Law", *Current Legal Problems*, Volume 8 (1955), p.211.
[27] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008), pp.228-230.
[28] *Ibid.*, pp.228-229.

3.3. Law, Justice and Equity in International Law

3.3.1. The Relationship between Law and Equity

As discussed above, the relationship between equity and law needs clarification, although it may be argued that it is almost impossible to separate the two.[29] In relation to this issue, two logical outcomes of the argument can be presented. One view is that equity in international law is not law.[30] For example, in the 1969 *North Sea Continental Shelf* cases, Vice-President Koretsky argued that equity should not be regarded as law.[31] The other is that equity is part of international law, even though equity is not one of the primary sources of law, such as treaties and customary international law.[32]

As the starting point for this discussion, it is necessary to examine Article 38(1)(*c*) of the Statute of the ICJ. This article refers to the 'general principles of law recognized by civilized nations' as one of the standards to be applied to settle disputes. International law scholars tend to seek the legal basis of equity within the general principles of law despite the omission of the term 'equity' in the relevant articles of the Statute of the ICJ or PCIJ.[33] They assume that equity is one of the general principles of law.

However, it is essential to note, through a consideration of historical backgrounds and careful analysis of the relevant articles of the Statute of the ICJ or PCIJ, that equity and the general principles of law are not identical. To give consideration to historical backgrounds, the inclusion of equity as a means to settle disputes was rejected, unlike the general principles of law, as did the Advisory Committee of Jurists and the First Assembly of the League of Nations working on the Statute of the PCIJ in 1920.[34] At that time, the concept of equity was considered to be unnecessary, inappropriate or premature, whereas the general principles of law were not.[35] Moreover, through careful analysis of the relevant articles of the Statute of the ICJ or PCIJ, it is noted that the general principles of law do not need to be equitable, even if both equity and the general principles of law are regarded as criteria for making international decisions.[36] In addition, while the general principles of law are related

[29] Lowe, *supra* note 7, p.54.
[30] Orakhelashvili, *supra* note 27, p.222.
[31] Dissenting Opinion of Vice-President Koretsky, *I.C.J. Reports 1969*, p.166.
[32] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), p.222.
[33] *Ibid.*, pp.222-223; Lowe, *supra* note 7, p.55.
[34] Rossi, *supra* note 10, pp.87-99.
[35] Jenks, *supra* note 10, p.320.
[36] Akehurst, *supra* note 20, p.814.

to 'generalising', equity focuses on 'particularisation'.[37] That is to say, the general principles of law mean legal principles 'common' to diverse municipal legal systems, while equity indicates 'individualised' justice, which should be attained in a specific case. Concerning the general principles of law, Bin Cheng points out that:

> "The Statute [Article 38(1) (*c*) of the Statute of the ICJ] […] assumes that despite the differences in civilisation and legal method of the members of the international society, there are certain legal principles which are accepted by them all as of objective and universal validity".[38]

It is submitted that the general principles of law are very basic principles to be regarded as acceptable without objection by all of the States.

Although equity and the general principles of law are different, as summarised above, we have no choice but to accept that equity is also part of international law for two reasons. Firstly, in many cases, equity has functioned as a criterion to settle international disputes.[39] As Hersch Lauterpacht indicated, the formal acceptance of the general principles of law represents a break with the tradition of positivism which found treaties and customary international law as the only sources of international law.[40] Nevertheless, international law has been clarified through the judgments and arbitral awards of international courts and tribunals. Accordingly, if a measure of realism is adopted, it can be accepted that equity is part of international law.

Secondly, as mentioned by the ICJ in the 1969 *North Sea Continental Shelf* cases, 'actual' rules of (international) law do 'not' aim at "applying equity simply as a matter of abstract justice".[41] Rather, the application of equity may mean "applying a rule of law which itself requires the application of equitable principles".[42] Furthermore, the ICJ concluded that, in cases of maritime delimitation, the rule of law which itself requires the application of equitable principles had become customary international law. Although this thesis does not support the importance of equitable principles, it is apparent that equity has been used as part

[37] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991), p.49.
[38] Cheng, *supra* note 26, p.186.
[39] Jenks, *supra* note 10, pp.320-322.
[40] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co. Ltd., 1927), p.68.
[41] *I.C.J. Reports 1969*, pp.46-47, para.85.
[42] *I.C.J. Reports 1969*, pp.46-47, para.85.

of law in itself. Therefore, in line with the wider argument of this thesis, that equity is part of international law, it is appropriate to focus on the role and application of equity in international law.

3.3.2. The Relationship between Justice and Equity

Since it is not easy to explain the meaning of equity, as shown above, and it is more useful to discern the impact of equity on international law (even if we can grasp the meaning of equity), most writers have focused on the categories (*infra legem*, *praeter legem*, and *contra legem*) or role of equity in international law.[43] Accordingly, the purpose of this part of the thesis is to discern the role of equity in international law. Before proceeding to do this, however, it would be much better to look into whether or not the concept of equity relates to the concept of justice, because we can properly understand the role of equity in international law if we are able to clarify the relationship between equity and justice.

Equity is interwoven with the concept of justice. For understanding the relationship between equity and justice, the statement of Vaughan Lowe is more convenient (although he argues that equity is distinct from law): "What is critical is the attachment of equity to the conception of justice and its detachment from the rules of any particular legal system".[44][45] Adopting an alternative view of the same opinion, Ruth Lapidoth states that "[e]quity may be viewed as measures intended to reduce the gap between law and justice in a specific case".[46] Both scholars assert that equity is related to 'doing justice', based on the proposition that law and justice are different from each other. According to their opinions, equity is thought of as a 'means' to render justice.

At this point, with regard to the thesis that equity is one method of attaining justice, it should be asked which kind of justice equity attains. Is equity relevant to the concept of distributive justice? In the 1982 *Continental Shelf* (Tunisia/Libya) case, the ICJ denied distributive justice, stating that:

> "They [economic considerations] are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time

[43] Cheng, *supra* note 26, pp.202-211; Higgins, *supra* note 32, pp.219-222; Akehurst, *supra* note 20, pp.801-807.
[44] Lowe, *supra* note 7, p.54.
[45] In fact, Professor Lowe argues that equity is not law, stressing that it is irrelevant to the rules of any 'particular' legal system. However, opposed to his expectation, his statement does not necessarily mean that equity is not part of 'international law' although it is a kind of uncertain concept.
[46] Ruth Lapidoth, "Equity in International Law", *Israel Law Review*, Volume 22 (1987), p.163.

> cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource".[47]

In addition, in the 1985 *Continental Shelf* (Libya/Malta) case, the Court clearly stated that "there can be no question of distributive justice".[48] The evidence suggests that international courts and tribunals do not attempt to achieve distributive justice under the pretence of attaining an equitable result. In fact, the concept of an 'equitable result' prevents international courts and tribunals from engaging with the notion of distributive justice. International courts and tribunals cannot attempt distributive justice while making an equal division (in the case of no relevant circumstances to adjust a provisional line) or checking proportionality in a concrete delimitation case. In other words, an equitable result, consisting of an equal division or proportionality, is a standard which overrules distributive justice.

Moreover, a delimitation line in conformity with an equitable result cannot compensate for disadvantages from which the States concerned might suffer. This point was confirmed by the Chamber of the ICJ in the 1984 *Gulf of Maine* case and a Nigerian argument in the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case.[49] It is therefore submitted that the achievement of an equitable result does not entail distributive justice.

To sum up, the application of equity is not relevant to doing distributive justice. In addition, the notion should be ruled out that equity renders justice on the assumption that equity is distinguished from law.

Accordingly, this thesis presupposes that equity in itself is law, and that the application of equity equivalent to the application of law aims at attaining justice. This thesis does not agree with the idea that equity may be employed as a response to injustice resulting from the strict application of law. In other words, equity is part of international law, which needs to flexibly be applied. It follows that we should focus on identifying legal 'areas' which require the application of equity or the achievement of an equitable solution, as will be shown in the next chapter.

[47] *I.C.J. Reports 1982*, pp.77-78, para.107.
[48] *I.C.J. Reports 1985*, pp.39-40, para.46.
[49] *I.C.J. Reports 1984*, p.342, para.236; *I.C.J. Reports 2002*, p.445, para.296.

4. The Category and Role of Equity in International Law

4.1. Equity ex aequo et bono *and Absolute Equity*

In the categories of equity in international law, the concept of equity *ex aequo et bono* should be summarised. This concept is articulated in Article 38(2) of the Statute of the ICJ (or Article 38(4) of the Statute of the PCIJ). If there is the express consent of the contesting Parties, the ICJ can decide a case referred to it based on the sense of fairness (or justice), not existing law.[50] Bin Cheng states that "[d]ecisions *ex aequo et bono* [...] imply decisions based on practical considerations and expediency".[51] According to Professor Cheng, the concept of equity *ex aequo et bono* is a means to settle disputes for the sake of expediency, even if international courts and tribunals disregard existing law or recognised rights. Notably, there is no evidence of this concept at work in the decisions of international courts and tribunals.

In this respect, the 1982 *Continental Shelf* (Tunisia/Libya) case of the ICJ requires commentary. It might be arbitrary that the conduct of the States concerned directly indicated an actual delimitation line in the first sector, and that the equitability of the line was not checked. However, it is questionable whether or not the ruling of the ICJ in the 1982 *Continental Shelf* (Tunisia/Libya) case was one of the applications of equity *ex aequo et bono*. For instance, Robert Y. Jennings and Rosayln Higgins fear that the ICJ might use equity *ex aequo et bono* under the guise of applying equitable principles, without the express consent of the Parties concerned, on the premise that the application of equitable principles is not easily differentiated from the use of equity *ex aequo et bono* in maritime delimitation.[52] However, an arbitrary decision without the express consent of the contesting Parties is not one example of equity *ex aequo et bono*. The application of 'equity *ex aequo et bono*' is always preceded by the 'express' consent of the States concerned. Therefore, we can criticise the arbitrariness of a decision without using the term 'equity *ex aequo et bono*'. For example, in his Separate Opinion of the 1993 *Greenland/Jan Mayen* case, Vice-President Oda also thought that the ICJ had taken a purely arbitrary decision in choosing the delimitation line.[53]

Regarding the 1982 *Continental Shelf* (Tunisia/Libya) case, it can also be asked whether or not the 'new accepted trends' (in the Third Conference) mentioned in the Special

[50] Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, pp.229-230, paras.59-60.
[51] Cheng, *supra* note 26, p.204.
[52] Robert Y. Jennings, "The Principles Governing Marine Boundaries", in Kay Hailbronner, Georg Ress, and Torsten Stein (eds.), *Staat und Völkerrechtsordnung: Festschrift für Karl Doehring* (Berlin: Springer, 1989), p.408; Higgins, *supra* note 32, p.228.
[53] Separate Opinion of Vice-President Oda, *I.C.J. Reports 1993*, pp.114-115, para.91.

Agreement allowed the ICJ to apply equity *ex aequo et bono*. In other words, it must be questioned whether or not the term 'new accepted trends' means the express consent of both States. In this respect, the Court stated that:

> "[T]he Court would have had *proprio motu* to take account of the progress made by the Conference even if the Parties had not alluded to it in their Special Agreement; for it could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law".[54]

That is to say, the ICJ understood the 'new accepted trends' as a rule of customary international law, not a kind of the express consent of both States.

Furthermore, the opinions of Sir Jennings, Judge Higgins, and Vice-President Oda, as introduced above, presume that the concept of equitable principles or an equitable solution is no more than the sense of fairness (or justice). However, the current delimitation rule that we have includes the concept of an equitable solution. In other words, the achievement of an equitable solution is a legal concept within existing law. Based on this analysis of how the idea of an equitable solution functions, the application of equity in maritime delimitation should be differentiated from equity *ex aequo et bono*. In sum, the application of equity is the application of law itself in maritime delimitation, and it respects both the letter of law and the spirit of law.

Other than equity *ex aequo et bono*, the concept of absolute equity, which is found in some arbitral awards, is also noted. According to Professor Cheng, equity *ex aequo et bono* may disregard existing law for the sake of expediency, whilst absolute equity ignores the letter of law in favour of the spirit of law.[55] Therefore, the notion of absolute equity leads to admitting the corrective role of equity. Bin Cheng adds that absolute equity functions as an implementation of existing law.[56]

However, as Judge Weeramantry pointed out, the employment of equity *ex aequo et bono* or absolute equity is not a means of applying international law.[57] These kinds of equities are only needed to better understand the concept of equity in international law.

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[54] *I.C.J. Reports 1982*, p.38, para.24.
[55] Cheng, *supra* note 26, p.204.
[56] *Ibid.*, p.208.
[57] Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, p.231, para.64.

4.2. Three Categories of Equity

It is also necessary to briefly examine the three categories of equity in international law noted by many international law scholars. Throughout this examination, it may be noticed that the three categories of equity is quite irrelevant to the actual role of equity in international law. Generally, most scholars divide the application of equity into three areas: equity *infra legem*, equity *praeter legem*, and equity *contra legem*.[58]

The first one is relevant to choosing one among several interpretations 'within' relevant law.[59] For example, this kind of equity can calculate the measure of damages, make an equitable estimate of the compensation due, and fix a fair rate of interest.[60] However, if equity *infra legem* means that judges can choose one of several interpretations acceptable within relevant law, it is unnecessary to accept the concept of equity *infra legem*. The reason for this is that the choice of a preferred interpretation within relevant law is the basic role of international courts and tribunals. Therefore, the fact that the ICJ accepted this kind of equity in the 1986 *Frontier Dispute* (Burkina Faso/Mali) case was expected, but unnecessary.[61] Can we say that equity used in this case was properly regarded as equity *praeter legem*? In this respect, Ruth Lapidoth argues that equity employed in the 1986 *Frontier Dispute* (Burkina Faso/Mali) case could also be equity *praeter legem*.[62] Lapidoth's view is potentially accurate because equity meant 'equality' in this case in which there was no rule to be applied. However, it is said that equity employed in the 1986 *Frontier Dispute* (Burkina Faso/Mali) case might merely indicate that fairness or reasonableness is one of the roles of equity.[63] In contrast to equity's occasional meaning of fairness, the idea should be refuted that the notion of equitable principles is the application of equity *infra legem*.[64] As will be shown in this chapter, the concept of equitable principles is, in fact, meaningless. As a result, it cannot be discussed in the context of equity *infra legem* which raises the issues of interpretation within existing law. In sum, although the concept of equity *infra legem* cannot be rejected in international law, it is not necessarily differentiated from a choice that international courts and tribunals make regarding the interpretation of existing law, or equity that simply points out fairness as one of the roles of equity.

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[58] Akehurst, *supra* note 20, pp.801-802; Higgins, *supra* note 32, pp.219-220.
[59] Higgins, *supra* note 32, pp.219-220; Rothpfeffer, *supra* note 4, p.87.
[60] Akehurst, *supra* note 20, pp.802-803.
[61] See *I.C.J. Reports 1986*, pp.567-568, para.28.
[62] Lapidoth, *supra* note 46, p.174.
[63] See Schachter, *supra* note 37, pp.55-56.
[64] Cf. Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, pp.232-233, paras.69, 72.

The second type of equity may be used in order to fill gaps where there is no relevant law. What should be noted here is that it is a very problematic issue whether or not there are lacunae in international law.[65] Therefore, those who consider that there is no gap in international law do not need the concept of equity *praeter legem*, while those who acknowledge gaps in international law seek to use equity *praeter legem*. However, most scholars avoid supporting this kind of equity or keep silent concerning the acceptance of equity *praeter legem*.[66] First of all, many writers argue that there is no gap in international law.[67] Second of all, according to the opinion of Professor Lowe, an individual dispute can be settled through several methods provided by international law, including diverse interpretations of existing law, without reference to equity *praeter legem*.[68] For these reasons, it is still controversial whether or not it is essential to apply equity *praeter legem*. In this respect, Judge Weeramantry stated that "[i]ndeed, viewed strictly from that point of view, it ceases to be a category of its own but is merely an application of the law itself",[69] implying that the employment of equity *praeter legem* is, in fact, the application of the general principles of law. Agreeing with his view, this thesis cannot identify a practical use of this category of equity.

The third category of equity holds that equity may be used 'against' existing law. Basically, the matter of equity *contra legem* seems to be open to debate with sole regard to the issue of whether or not an express authorisation is required in order to use such a mode of equity.[70] However, what should be asked here is whether or not there is a need for the application of equity *contra legem*. Regarding this issue, Vaughan Lowe argues that the need might arise to apply equity *contra legem* where the judges or Parties to disputes need the 'reasoning' on equitable grounds rather than the outcome at which relevant law simply aims.[71] However, it is almost impossible to accept equity *contra legem* (where there is no consent of relevant Parties) because equity *contra legem* aims to undermine the existing legal system.

Examining the three categories of equity, it is evident that the arguments relating to these categories of equity are irrelevant to the points which we have discussed so far in this

[65] Akehurst, *supra* note 20, p.805.
[66] *Ibid.*, pp.805-806; Higgins, *supra* note 32, p.220; Rothpfeffer, *supra* note 4, pp.87-88; Lowe, *supra* note 7, pp.58-63.
[67] Akehurst, *supra* note 20, p.806.
[68] Lowe, *supra* note 7, pp.58-63.
[69] Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, p.232, para.67.
[70] Akehurst, *supra* note 20, p.807; Rothpfeffer, *supra* note 4, p.88.
[71] Lowe, *supra* note 7, pp.67-69.

thesis, i.e. the relationship between equity and law, and the relationship between equity and justice. This thesis has already argued that equity is part of international law, and equity attains justice. To the contrary, the study on the categories of equity only concentrates on the 'relationship' between equity and law (for example, *within* relevant law, *without* relevant law, and *against* relevant law), based on the false premise that equity is synonymous with justice. In other word, the research on the three categories of equity in international law is only based on the erroneous presupposition that equity is separated from law. Therefore, we must free ourselves from the three traditional categories of equity, and look into the actual role of equity and its practical uses in international law, relying on the premise that equity is law itself.

4.3. The Role of Equity in International Law

What is the role of equity if the three traditional categories of equity do not accurately reflect the application of international law? In one of his books, Oscar Schachter presents the five uses of equity:

> "(1) Equity as a basis for "individualized" justice tempering the rigours of strict law;
> (2) Equity as consideration of fairness, reasonableness and good faith;
> (3) Equity as a basis for certain specific principles of legal reasoning associated with fairness and reasonableness: to wit, estoppel, unjust enrichment and abuse of rights;
> (4) Equitable standards for the allocation and sharing of resources and benefits; [and]
> (5) Equity as a broad synonym for distributive justice used to justify demands for economic and social arrangements and redistribution of wealth".[72]

In his Separate Opinion of the 1993 *Greenland/Jan Mayen* case, Judge Weeramantry agreed with Schachter's classification.[73] In opposition to their argument, this thesis presupposes that such classifications would be useless in international law. The reasons for this opposition are as follows. In the first definition, equity must be preceded by the existence of the rigours of strict law. However, as stated above, equity in itself is law. International law does not accept the corrective role of equity, as in the 1982 *Continental Shelf* (Tunisia/Libya) case of the ICJ.[74] Equity in the second definition can be accepted in international law. However, as

[72] Schachter, *supra* note 37, pp.55-56.
[73] Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, p.245, para.110.
[74] *I.C.J. Reports 1982*, p.60, para.71.

described above, it is not differentiated from the application of equity *infra legem*. The third definition of equity seems to locate it closer to the general principles of law rather than equity. The definition of equity in the fourth category will be discussed in the sixth section, which will show that equitable standards or equitable principles are unhelpful. Lastly, equity in the fifth concept cannot be admitted because, as argued above, distributive justice has not been acknowledged in international law. In sum, despite his comprehensive categorising of the concept of equity, Schachter's classifications cannot be used in international law.

Judge Weeramantry's observations of the *a priori* and *a posteriori* employments of equity offer a more useful insight into the role of equity in international law.[75] *A priori* employment of equity indicates that equity is positively applied in a given case. This is connected with the predetermined delimitation process or the application of equitable principles.[76] However, *a priori* employment of equity might produce an inequitable result in a specific case.

By contrast, *a posteriori* employment of equity means that the equitability of the result produced can, in the last stage of the delimitation process, be tested so as to avoid producing an arbitrary result. For this test, the case-law of maritime delimitation has presented the concept of 'catastrophic repercussions' or 'proportionality'.

Assuming that *a priori* and *a posteriori* employments of equity might be the role of equity in international law, one question can be asked: via which routes does equity enter into maritime delimitation? This will be discussed in the next section.

5. The Routes of Entry of Equity into International Law

5.1. Equitable Principles Derived from Applicable Law

As discussed above, this thesis does not accept the three categories of equity which have dealt with the relationship between equity and law based on the false premise that equity is distinct from law. In case-law, it is said that equity in international law does not correct or modify the existing legal system. Dealing with this issue, the 1982 *Continental Shelf* (Tunisia/Libya) case of the ICJ stated that:

[75] Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, pp.243-244, paras.103-109.
[76] Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, p.243, para.103.

> "It [Equity] was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law".[77]

That is to say, equity is not a means to correct or modify existing law, but a legal 'principle' directly applicable 'as law'. However, the ruling of the ICJ in the 1982 *Continental Shelf* (Tunisia/Libya) case implied that equity is not applied in a set pattern because it is a legal principle.

Is the concept of equitable principles a route of entry of equity into international law? It is noted that equity may function as law (a legal principle) in itself to the extent that relevant rules require the application of equitable principles, like the *Equitable Principles-Relevant Circumstances* rule presented by the 1969 *North Sea Continental Shelf* cases.

However, the issue of equitable principles raises three questions. Firstly, what principles are equitable principles in international law? Secondly, what will happen if the application of one principle produces an inequitable result even though the principle is regarded as one of the equitable principles? Thirdly, how are equitable principles distinct from the general principles of law?

Since it is impossible to reply to these questions, it is not easy for equity to enter into international law through the concept of equitable principles. In the next section, the decline in importance of equitable principles will be discussed.

5.2. An Equitable Solution at Which Applicable Law Aims

The concept of an equitable solution (or equitable result) should be noted.[78] The adjective 'equitable' is attached to the result of applying the rules of some areas in international law. The most important implication which the notion of an equitable result has is that even the application of equitable principles is subordinate to the achievement of an equitable result. In other words, the application of a principle is subordinate to the achievement of a goal.

Can we find out the rules which lead to attaining a specific goal in international law? To answer this question, the equitable delimitation of maritime areas, the equitable utilisation of international watercourses, and the equitable allocation of fishery resources can be presented. Equity plays an important role in achieving such a goal through its application.

[77] *I.C.J. Reports 1982*, p.60, para.71.
[78] See Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, pp.222-224, paras.31-42.

The role of equity is then performed through *a posteriori* employment of equity, as stated above.

While the ICJ stressed the primacy of an equitable result in the 1982 *Continental Shelf* (Tunisia/Libya) case, it had a complaint about the fact that the adjective 'equitable' is attached to both terms 'principles' and 'result'.[79] Likewise, The ICJ stated, in the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, that:

> "The Court's jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation".[80]

Accordingly, equity in international law properly acts as law itself through the concept of an 'equitable solution'. Equity performs its role for aiming at an equitable result through taking account of all the relevant circumstances in a given case. As a result, equity seeks the equitability of the 'result' reached on a case-by-case basis. It follows that the application of equity pursues the flexibility of application of the rules in international law.

6. The Decrease in Importance of Equitable Principles in Maritime Delimitation

6.1. Introduction

The concept of equity included in the current rules governing maritime delimitation seeks the equitability of the result achieved, and plays a role in increasing flexibility. Before moving on to Chapter IV, the objective of this section is to prove that the concept of equitable principles is 'meaningless' in applying equity in maritime delimitation. In fact, up to the 1985 *Continental Shelf* (Libya/Malta) case of the ICJ, international courts and tribunals sought to clarify the meaning of the concept of equitable principles. However, this attempt fuelled ongoing controversy regarding the concept and content of equitable principles.

If the notion of equitable principles is discarded in maritime delimitation, what

[79] *I.C.J. Reports 1982*, pp.59-60, para.70: "This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result."
[80] *I.C.J. Reports 2002*, p.443, para.294.

remains is the concept of 'relevant circumstances'. Relevant circumstances are concrete facts which must be taken into account in order to reach an equitable solution. Equity operates in attaining the equitability of the result of examining such relevant circumstances, not through the application of equitable principles.

6.2. The Emergence of the Term 'Equitable Principles' in International Law

The term 'equitable principles' first appeared in the 1945 Truman Proclamation. The Proclamation provided that:

> "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with *equitable principles*" [emphasis added].[81]

In fact, the meaning of the term 'equitable principles' (proposed by the United States as a means of determining the delimitation of the continental shelf between the States concerned) was ambiguous. Despite its vagueness, however, the concept of equitable principles was readily accepted as part of customary international law in the 1969 *North Sea Continental Shelf* cases of the ICJ.[82] These cases stated that there is "a rule of law which itself requires the application of *equitable principles*" [emphasis added]. The Court confirmed the concept of equitable principles as one of the elements 'within' a rule of customary international law governing the delimitation of the continental shelf between adjacent States.[83] However, it should be noted that equitable principles were not understood to have any content during the 1969 *North Sea Continental Shelf* cases.

Regarding the ruling of the 1969 *North Sea Continental Shelf* cases, Hugh Thirlway observes, "[t]he Court […] allowed the 'equitable principles' (of undefined content) to move from the sphere of influence on the making of law into the sphere of law proper".[84] He implies that the notion of equitable principles, which did not yet include any content, became law in itself. The widespread acceptance of the term 'equitable principles' has ensured that

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[81] Presidential Proclamation No.2667 (28th September 1945) Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf; reproduced in United Nations (ed.), *Laws and Regulations on the Regime of the High Seas* (New York: United Nations Publications, 1951), Volume I, pp.38-39.
[82] *I.C.J. Reports 1969*, pp.46-47, para.85.
[83] Hugh Thirlway, "The Law and Procedures of the International Court of Justice (1960-1989): Part One", *The British Year Book of International Law*, Issue 60 (1989), p.52.
[84] *Ibid.*, p.62.

the meaning and content of equitable principles have been under scrutiny in maritime delimitation since 1969.

Turning to another area of international law, the inception of the concept of equitable principles can also be traced in the 1957 *Lac Lanoux* case with respect to the equitable utilisation of international watercourses.[85] During this case, the Tribunal stated that:

> "[T]he upper riparian State, under the rules of good faith, has an obligation *to take into consideration the various interests concerned*, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own" [emphasis added].[86]

The process of taking into account the various interests concerned might be termed 'the application of equitable principles' leading to the achievement of an equitable result. How has the law of international watercourses dealt with the application of equitable principles? First, a list of relevant circumstances has been produced. For the first time in the context of international watercourses, the 1966 Helsinki Rules on the Uses of the Waters of International Rivers (hereafter referred to as "Helsinki Rules") made by the International Law Association (hereafter referred to as "ILA") enumerated relevant factors to be taken into account for the equitable utilisation of international watercourses. Second, Article V(3) of the 1966 Helsinki Rules emphasised that "[i]n determining what is reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole". Crucially, the Article indicated that the consideration of 'all' relevant circumstances is necessary to arrive at the equitable utilisation of international watercourses. At this point, one might ask how the application of equitable principles (if the concept of equitable principles is necessary in the law of international watercourses) relates to the consideration of relevant circumstances in the law of international watercourses. The relationship between these two concepts will be discussed in a later part of the present section.

In sum, although the original concept of equitable principles – which first emerged in relation to the delimitation of the continental shelf between adjacent States – did not have any substantial content, it was widely accepted as a component of customary international law. For this reason, the judgments reached and arbitral awards conferred by international

[85] Schachter, *supra* note 37, p.58.
[86] See *Yearbook of the ILC 1986*, Volume II, Part One, pp.118-119, paras.122-124.

courts and tribunals interpreting and applying customary international law are important sources for those who seek to understand the meaning and content of equitable principles. Some international law scholars have pursued their own research into the meaning of the term 'equitable principles'. The next sub-sections will deal with international decisions and the views of certain scholars regarding the concept of equitable principles.

6.3. Equitable Principles in International Courts and Tribunals

6.3.1. Equitable Principles in the Judgements of the ICJ

6.3.1.1. The 1969 North Sea Continental Shelf *Cases*

As mentioned above, the concept of equitable principles did not yet have any specific content in the 1960s. Nonetheless, the 1969 *North Sea Continental Shelf* cases heard by the ICJ offered a useful starting point in exploring the meaning of equitable principles, as these were the first cases predicated on the concept of equitable principles as part of customary international law in maritime boundary delimitation.

During the 1969 *North Sea Continental Shelf* cases, the ICJ rejected the equidistance method as obligatory in customary international law,[87] stating 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*" [emphasis added].[88] The Court then offered the following clarification:

> "[I]n short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires *the application of equitable principles*, […] , (*b*) […] taking all the circumstances into account, *equitable principles are applied*, […]" [emphases added].[89]

Although the term 'equitable principles' might be considered merely rhetorical, the Court set forth as a premise that the application of equitable principles under customary international law determines the delimitation 'agreements' between the States concerned. It is worth noting that the ICJ emphasised two key points, as follows. Firstly, in the 1969 *North Sea*

[87] *I.C.J. Reports 1969*, p.46, para.83.
[88] *I.C.J. Reports 1969*, pp.46-47, para.85.
[89] *I.C.J. Reports 1969*, pp.46-47, para.85.

Continental Shelf cases, 'equitable principles' were not considered synonymous with 'equity'. Secondly, the Court mandated that the 'application' of equitable principles should involve 'taking all the circumstances into account'.[90] These two points are touchstones for a clear understanding of the notion of equitable principles.

Further analysis of the 1969 *North Sea Continental Shelf* cases indicates the grounds on which the ICJ distinguished equitable principles from equity, discussing the need to provide "*some degree of indication* as to the possible ways in which it [equity] might be applied in the present case" [emphasis added].[91] In fact, the ICJ used the concept of equitable principles to fill the vacuum resulting from the inapplicability of the equidistance method. In other words, the application of equitable principles was necessary in order to determine an appropriate 'means' of achieving an equitable delimitation.[92] Lacking their own content, equitable principles were to be 'applied' as a 'process'. The ICJ provided 'some degree of indication', such as factors to be taken into account, as to how such a process should be carried out. This means that a method or methods other than the equidistance method may be identified with the help of 'some degree of indication'. Since the task of the ICJ in these cases was solely to identify the applicable principles and rules of international law, 'some degree of indication' meant little more than 'factors' which 'might' be relevant; not relevant circumstances *per se*. The Court then suggested three factors to be taken into account in order to arrive at an equitable result: the general configuration of the coasts (as well as the presence of any special or unusual features); the physical and geological structure (as well as the natural resources) of the continental shelf concerned; and proportionality.[93]

In sum, the 1969 *North Sea Continental Shelf* cases concluded that a practical method applicable to maritime boundary delimitation can be identified by the application of the *Equitable Principles-Relevant Circumstances* rule.[94] In addition, the ICJ implied that the 'application' of equitable principles, which is required to define a means for arriving at an equitable result, can be carried out by taking all relevant circumstances into consideration. Since the 1969 *North Sea Continental Shelf* cases, the concept of relevant circumstances rather than that of equitable principles has been at the centre of the law of maritime boundary delimitation, because the concept of 'some degree of indication' has been transformed into the concept of relevant circumstances, and the list of relevant circumstances has been

[90] *I.C.J. Reports 1969*, pp.46-47, para.85.
[91] *I.C.J. Reports 1969*, p.50, para.92.
[92] *I.C.J. Reports 1969*, p.50, para.92.
[93] *I.C.J. Reports 1969*, pp.53-54, para.101.
[94] *I.C.J. Reports 1969*, pp.53-54, para.101.

expanded in later cases.[95]

6.3.1.2. The 1982 Continental Shelf *(Tunisia/Libya) Case*

During the Third Conference, the ruling of the 1969 *North Sea Continental Shelf* cases that "delimitation is to be effected by agreement in accordance with equitable principles"[96] made the tension between the equidistance method and equitable principles yet more acute. Moreover, the 1969 Judgment provided a momentum for formulating Article 1 of the Special Agreement, which referred to both equitable principles and relevant circumstances. Article 1 functioned as the rules of the 1982 *Continental Shelf* (Tunisia/Libya) case heard by the ICJ.[97] In this case, the Court stated that "[f]or both Parties, the starting point for a discussion of the applicable principles and rules has been the Court's Judgment of 20 February 1969 in the *North Sea Continental Shelf* cases".[98] With regard to the meaning of equitable principles, three points should be made as regards the 1982 *Continental Shelf* (Tunisia/Libya) case.

Firstly, the ICJ stated that the task of the Court was "to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result".[99] In the 1982 *Continental Shelf* (Tunisia/Libya) case, equitable principles were regarded by the Court as 'part of international law'. As a consequence, equitable principles became not only principles governing delimitation 'agreements' between the States concerned, but also principles binding international courts and tribunals in the process of international 'adjudications'.[100] In short, the application of equitable principles seemed to be regarded as the rules governing the delimitation of maritime boundaries by the ICJ.

Secondly, the ICJ made a famous pronouncement: "The *result* of the application of equitable principles must be equitable [emphasis added]."[101] The Court meant that a principle is not equitable *per se*, but only if it produces an equitable result. The ICJ's adherence to 'the result which is predominant' led to the conclusion that any and all principles could be equitable in light of their outcome. The Court's logic resulted in the misunderstanding that

[95] Malcolm D. Evans, "Maritime Delimitation after *Denmark* v. *Norway*: Back to the future?", in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law (Essays in Honour of Ian Brownlie)* (Oxford: Oxford University Press, 1999), p.162.
[96] *I.C.J. Reports 1969*, pp.53-54, para.101.
[97] *I.C.J. Reports 1982*, pp.21-22, para.2; *I.C.J. Reports 1982*, pp.23-24, para.4; *I.C.J. Reports 1982*, p.37, para.23.
[98] *I.C.J. Reports 1982*, pp.43-44, para.37.
[99] *I.C.J. Reports 1982*, p.60, para.71.
[100] Thirlway, *supra* note 83, p.55.
[101] *I.C.J. Reports 1982*, pp.59-60, para.70.

the examples of equitable principles could be 'ascertainable' in a specific case. However, the content of equitable principles is not ascertainable, as will be discussed at a later stage. Rather, the 'application' of equitable principles is a process because it involves taking into account all of the circumstances relevant to a particular case. For this reason, the Court's interest rapidly shifted to the issue of relevant circumstances, although it had originally intended to regard equitable principles as a set of ascertainable principles.

Thirdly, the ICJ stated that "[b]oth Parties recognize that equitable principles *dictate* that "the relevant circumstances which characterize the area" be taken into account, but differ as to what they are" [emphasis added].[102] The relationship between equitable principles and relevant circumstances can be intuited from this statement. In brief, it may be argued that the 'application' of equitable principles comprises the identification and consideration of relevant circumstances. For this reason, the ICJ did not accept the contention made by both Parties that equitable principles and the principle of natural prolongation had a close relationship.[103] Likewise, it should be emphasised that the Court sought to determine the appropriate 'application' of equitable principles, not their meaning. In this context, the ICJ concluded that:

> "Clearly each continental shelf case in dispute should be considered and judged *on its own merits*, having regard to *its peculiar circumstances*; therefore, no attempt should be made here to overconceptualize the application of the principles and rules relating to the continental shelf" [emphases added].[104]

In this way, the Court justified its preference for explaining the 'application' of equitable principles as a 'process' rather than searching for the meaning or content of equitable principles.

In conclusion, based on the premise that the application of equitable principles is the law governing maritime boundary delimitation, the ICJ perceived that, in order to achieve an equitable result, the application of equitable principles requires international courts and tribunals to consider all relevant circumstances. Thus, in the 1982 *Continental Shelf* (Tunisia/Libya) case, equitable principles did not necessarily entail the practical methods of maritime delimitation. Rather, the Court tried to clarify the meaning of the 'application' of

[102] *I.C.J. Reports 1982*, pp.60-61, para.72.
[103] *I.C.J. Reports 1982*, pp.58-59, para.69.
[104] *I.C.J. Reports 1982*, p.92, para.132.

equitable principles, not the meaning of equitable principles *per se*.

6.3.1.3. The 1984 Gulf of Maine *Case*

In the 1984 *Gulf of Maine* case, the Chamber of the ICJ stated that the 'fundamental norm' of international law governing the delimitation of maritime boundaries can be formulated as follows:

> "(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.
> (2) In either case, delimitation is to be effected by the application of *equitable criteria* and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result" [emphasis added].[105]

According to the Chamber's ruling in the 1984 *Gulf of Maine* case, the concept of 'equitable criteria' is an element of the 'fundamental norm' of international law governing the delimitation of maritime boundaries. However, the Chamber also noted that "[i]t [international law] cannot also be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used for attaining that objective".[106] In other words, the Chamber found that general international law did not provide the content of equitable criteria for a specific case. Thus, the 1984 Judgment preferred the term 'criteria' to the term 'principles' because equitable criteria, in themselves, are not the principles and rules of international law.[107] Three points must be noted concerning the concept of equitable criteria or equitable principles applied in the 1984 *Gulf of Maine* case.

Firstly, the Chamber argued that the appropriateness of particular equitable principles (or equitable criteria) is dependent on the specific characteristics of each case.[108] To this end, it sought to identify relevant circumstances in the 1984 *Gulf of Maine* case,

[105] *I.C.J. Reports 1984*, pp.299-300, para.112.
[106] *I.C.J. Reports 1984*, p.290, para.81.
[107] *I.C.J. Reports 1984*, p.292, para.89.
[108] *I.C.J. Reports 1984*, p.290, para.81; *I.C.J. Reports 1984*, p.313, para.158.

stating that the "equitableness or otherwise [of criteria] can only be assessed in relation to the circumstances of each case".[109] This proved that, contrary to the premise of the 1982 *Continental Shelf* (Tunisia/Libya) case, the equitableness of applicable principles can be determined by relevant circumstances, not by an equitable result. However, it should be observed that the Chamber's explanation of equitable principles was based on the assumption that equitable principles might be 'ascertainable', as in the 1982 *Continental Shelf* (Tunisia/Libya) case. In addition, the Chamber enumerated some examples of equitable principles.[110] The Chamber's view of equitable principles as ascertainable will be shown to be flawed in the relevant part of this thesis. According to this logic, however, on the assumption that equitable principles cannot be found in general international law, the content of equitable principles was understood to be determined by the relevant circumstances of each case. Again, this indicates the extent to which the identification and consideration of relevant circumstances – rather than a search for the meaning or content of equitable principles – become the central issue in maritime boundary delimitation.

The second point to consider regarding the 1984 *Gulf of Maine* case is the relationship between relevant circumstances and practical methods. The Chamber stated that:

> "[T]he Chamber must therefore arrive at the concrete determination of the delimitation line that it is required to draw *(a)* while basing itself for the purpose on the criteria which it finds most likely to prove equitable in relation to the relevant circumstances of the case and *(b)* while making use, in order to apply these criteria to the case, of the practical method or combination of methods which it deems the most appropriate".[111]

The choice of a method (or methods) must be based on its (or their) suitability for giving effect to circumstances regarded as relevant.[112] The relevant circumstances of each case can thus 'indicate' the most appropriate practical method (or methods) to be employed in order to produce an equitable solution.

The third point to note is that, in the final verification stage of the delimitation process, an 'auxiliary' equitable criterion (for example, an economic factor) identified by the Chamber may be considered to be relevant, even though it was not regarded as a relevant

[109] *I.C.J. Reports 1984*, p.313, para.158.
[110] *I.C.J. Reports 1984*, pp.312-313, para.157.
[111] *I.C.J. Reports 1984*, p.326, para.191.
[112] *I.C.J. Reports 1984*, p.329, para.199.

circumstance in this case.[113] In fact, this point proves that the application of equitable principles includes the weighing-up process of relevant circumstances. This process, however, is flexible, as will be discussed in the next chapter.

The 1984 *Gulf of Maine* case weakened the significance of equitable principles, in spite of the premise that equitable principles are ascertainable, because the Chamber implied that the content of equitable principles cannot be found in general international law. In addition, the Chamber's view that relevant circumstances can decide the content of equitable principles, as well as practical methods to be used, should be interrogated. According to the argument of this thesis, which pays attention to the application of equitable principles as a process rather than the search for the detailed content of equitable principles, relevant circumstances cannot determine the content of equitable principles.

In sum, one positive effect of the 1984 *Gulf of Maine* case was that the identification of relevant circumstances became the main task in maritime boundary delimitation. In addition, the Chamber implied that one relevant circumstance must be weighed against another. As a result, the 1984 *Gulf of Maine* case proved that taking account of all relevant circumstances is the most important step in maritime delimitation.

6.3.1.4. The 1985 Continental Shelf *(Libya/Malta) Case*

The 1985 *Continental Shelf* (Libya/Malta) case of the ICJ advanced some controversial issues with regard to the concept of equitable principles. Firstly, the Court stated that:

> "[I]ts application [The application of the rule of law] should display *consistency and a degree of predictability*; […], it also looks beyond it to principles of *more general application*. This is precisely why the courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having *a more general validity* and hence expressible *in general terms*" [emphases added].[114]

According to this statement, equitable principles can 'generally' be applied, on the assumption that they are 'ascertainable'. This was the final conclusion reached by the ICJ in its efforts to clarify the meaning of equitable principles since the 1982 *Continental Shelf* (Tunisia/Libya) case. Furthermore, this conclusion resulted in the enumeration of five

[113] *I.C.J. Reports 1984*, p.342, para.237.
[114] *I.C.J. Reports 1985*, pp.38-39, para.45.

examples of equitable principles, as follows:[115]

(1) No question of refashioning geography;
(2) Non-encroachment on the natural prolongation of another State;
(3) The principle of respect due to all relevant circumstances;
(4) The principle that equity does not necessarily imply equality; and
(5) No question of distributive justice.

However, the ICJ's reasoning in this regard seems to have been based on a misunderstanding of the meaning of equitable principles, because some of the examples suggested by the Court ought to be considered under different headings. For example, physical geography and natural prolongation should be included within 'relevant circumstances' to be taken into account. Also, both concepts of 'no question of refashioning geography' and 'non-encroachment on the natural prolongation of another State' are the aspects or content of an equitable result reached, as will be discussed in the next chapter. In addition, the consideration or examination of all relevant circumstances points out that both equality and distributive justice may not be guaranteed when a final result is achieved in maritime delimitation. Accordingly, the 'principle of respect due to all relevant circumstances' is the only meaningful example of the five listed above. Since 'respect due to all relevant circumstances' can incorporate all of the other four principles suggested by the ICJ, the application of equitable principles (if the concept of equitable principles must be accepted) means, above all, to take into account all the relevant circumstances in each case.

Secondly, the Court stated that "the delimitation of a continental shelf boundary must be effected by the application of equitable principles *in* all the relevant circumstances in order to achieve an equitable result" [emphasis added].[116] Although the expression 'in all the relevant circumstances' was somewhat awkward in comparison with earlier cases ruled by the ICJ,[117] it nonetheless confirmed that the delimitation process is carried out by means of the identification and consideration of relevant circumstances.

Thirdly, the ICJ observed that "[t]he application of equitable principles thus still leaves the Court with the task of appreciation of the weight to be accorded to the relevant

[115] *I.C.J. Reports 1985*, pp.39-40, para.46.
[116] *I.C.J. Reports 1985*, pp.38-39, para.45.
[117] See Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Oxford University Press, 1989), p.75.

circumstances in any particular case of delimitation".[118] In other words, the ICJ concluded that the application of equitable principles entails the weighing-up process of relevant circumstances.

According to the 1985 Judgment, the application of equitable principles can be defined as taking into account all relevant circumstances, even though the ICJ understood equitable principles as a body of ascertainable norms. After the Court stated the rules governing the delimitation of the continental shelf, it sought to determine whether or not certain circumstances invoked by the Parties would be relevant.[119] In addition, in the process of identifying and weighing up all the relevant circumstances of each case, these circumstances can indicate practical methods to be employed. In the 1985 *Continental Shelf* (Libya/Malta) case, the process of assigning weight to each relevant circumstance suggested the use of a provisional line or the modification of the provisional line.

Despite its clear understanding of the application of equitable principles, the ICJ's insistence on equitable principles as empirically ascertainable comes under criticism, because the application of equitable principles is most usefully understood as the 'process' of taking into account all relevant circumstances. The ruling of the Court in its 1985 Judgment on the predictability of equitable principles is also problematic. The contention that the application of equitable principles should be predictable is only correct in the sense that the application of equitable principles entails taking into account all the relevant circumstances in all maritime delimitation cases. In other words, the only predictable factor is that all relevant circumstances must be taken into consideration in all delimitation cases.

6.3.2. Equitable Principles in International Arbitral Awards

6.3.2.1. The 1977 Anglo-French Continental Shelf *Case*

In the 1977 *Anglo-French Continental Shelf* case, the Court of Arbitration was requested to determine, in accordance with the rules of international law applicable in this case, the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom (and the Channel Islands) and to the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian as far as the 1,000

[118] *I.C.J. Reports 1985*, p.40, para.48.
[119] *I.C.J. Reports 1985*, pp.40-43, paras.48-54.

metre isobath.[120] Article 6 (the *Equidistance-Special Circumstances* rule) of the 1958 Convention on the Continental Shelf could be applied in this case, since the two States were both Parties to the 1958 Geneva Convention at that time. However, the effect of the French reservations was such that the Court of Arbitration had to apply customary international law to the delimitation of the continental shelf in the 'Channel Islands region'.[121] According to the ruling of this case, customary international law governing the delimitation of the continental shelf is that "the boundary between States abutting on the same continental shelf is to be determined on *equitable principles*" [emphasis added].[122] It is thus worth noting the application of equitable principles in the case of the delimitation of the continental shelf in the Channel Islands region.

When applying customary international law to the delimitation of the continental shelf in the Channel Islands region, the Court of Arbitration stated that:

> "Moreover, it is clear both from the insertion of the "special circumstances" provision in Article 6 and from the emphasis on "equitable principles" in customary law that the force of the cardinal principle of "natural prolongation of territory" is not absolute, but may be subject to qualification in particular situations".[123]

Here, the Court of Arbitration implied that the concept of special circumstances under the 1958 Convention on the Continental Shelf, and the notion of equitable principles under customary international law, might both be related to the particular context of each case. In other words, the Court's statement in this regard suggested that the application of equitable principles would involve the identification of relevant circumstances in a specific case. Although this case did not clarify the meaning of equitable principles, it showed that the 'application' of equitable principles focused on the identification of 'the features and considerations' pertinent to the Channel Islands region (that is, the identification of relevant

[120] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.5, Article 2(1) of the 1975 Arbitration Agreement.
[121] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.47, para.74.
[122] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.45-46, para.70.
[123] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.91, para.191.

circumstances).[124]

Moreover, the 1977 *Anglo-French Continental Shelf* case looked for practical methods applicable to the delimitation of the Channel Islands region by identifying and considering relevant circumstances. Two relevant circumstances were the oppositeness between the relevant coasts of the two States, and the presence of the Channel Islands.[125] The oppositeness between the relevant coasts then indicated the median line, and the presence of the Channel Islands indicated the boundary of the 12-mile zone.[126] This case is meaningful in that the Court of Arbitration showed that relevant circumstances can 'indicate' practical methods to be applied in a given case.

6.3.2.2. The 1985 Guinea/Guinea-Bissau *Case*

In the 1985 *Guinea/Guinea-Bissau* case, another arbitral award given eight years after the 1977 *Anglo-French Continental Shelf* case, the Arbitration Tribunal drew the course of an SMB between the territorial sea, the continental shelf, and the EEZ appertaining respectively to Guinea and Guinea-Bissau. Concerning the rules governing maritime delimitation, the Tribunal stated:

> "For the Tribunal, the essential objective consists of finding *an equitable solution* with reference to the provisions of Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention of 10 December 1982 on the Law of the Sea. This is a rule of international law which is recognized by the Parties and which compels recognition by the Tribunal. However, in each particular case, its application requires *recourse to factors and the application of methods which the Tribunal is empowered to select*. This nevertheless does not mean that the Tribunal is endowed with discretionary powers or is authorized to decide *ex aequo et bono*. Its findings must be based on considerations of law" [emphases added].[127]

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[124] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.87, para.180.
[125] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.87-88, paras.181-183.
[126] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.94-96, paras.201-203.
[127] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.289, para.88.

The Tribunal's statement raises two significant points. Firstly, a rule of international law regarding maritime delimitation aims to arrive at an equitable solution. The application of the rules for producing an equitable solution entails a recourse to factors (or circumstances) and the choice of a method or methods. In practice, an equitable result can be reached through the identification (and weighing-up) of relevant circumstances and the choice of a suitable method or methods for giving effect to these circumstances. Secondly, a recourse to factors (or circumstances) and the choice of a method or methods carried out by the Tribunal do not mean a decision *ex aequo et bono*. In other words, the decision of the Tribunal should be based on 'the achievement of an equitable solution', which was considered part of international law.

In the 1985 *Guinea/Guinea-Bissau* case, it is evident that a recourse to factors (or circumstances) was sought and the choice of a method or methods was made for the purpose of achieving an equitable result. In order to arrive at an equitable solution, the Tribunal first identified and then assessed relevant circumstances.[128] The presence of islands,[129] the length of relevant coastlines,[130] the coastal configuration and orientation,[131] and a line (the southern limit) included in the 1886 Franco-Portuguese Convention[132] were all established as relevant circumstances. The consideration of these circumstances then indicated practical methods to be employed in this case.[133] The 1985 *Guinea/Guinea-Bissau* case offered another example of the Tribunal's arrival at an equitable result through the identification and consideration of relevant circumstances. Moreover, the Tribunal emphasised the open-endedness of categories of relevant circumstances, recommending that the application of the rules be applied flexibly, since "each case of delimitation is a *unicum*".[134]

[128] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.289-290, paras.89-90.
[129] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.291-292, para.95.
[130] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.292-293, para.97.
[131] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.293, para.98.
[132] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.295-296, para.106.
[133] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.298, para.111.
[134] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.289-290, para.89.

6.3.2.3. The 1992 Saint Pierre and Miquelon *Case*

In the 1992 *Saint Pierre and Miquelon* case between Canada and France, another arbitral award regarding maritime delimitation was given. The two Parties agreed that the fundamental norm "requires the delimitation to be effected in accordance with *equitable principles*, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result" [emphasis added].[135] Following this explanation of the fundamental norm, the Court of Arbitration stated that "[t]he underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method".[136] In other words, the Court of Arbitration implied that the way of application of the delimitation rule is not predetermined in applying the fundamental norm, which requires that the peculiarities of each case be taken into consideration. Thus, emphasising that "[g]eographical features are at the heart of the delimitation process",[137] the Court paid attention to the 'marked disparity in the length of relevant coasts' and the 'relationship between the relevant coasts of two Parties'.[138]

In this case, the Court of Arbitration examined several legal principles which the two States had regarded as equitable principles. For example, France adduced the principle of the sovereign equality of States, and the principle of the equal capacity of islands and mainland States to generate maritime areas; whilst Canada presented the principle of non-encroachment and the principle of proportionality.[139] Both States had incorrectly understood equitable principles to be ascertainable. Nevertheless, an equitable result was obtained by taking into account the 'geographical features' of the case.[140] In other words, the Court of Arbitration arrived at an equitable result through the identification and consideration of relevant circumstances, not through the application of legal principles presented by the two States.

Furthermore, the Court of Arbitration stated that "[r]ules of international law, as well

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[135] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1163, para.38.
[136] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1163, para.38.
[137] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1160, para.24.
[138] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, pp.1161-1162, paras.25-35.
[139] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1164, para.43; *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1166, para.56.
[140] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, pp.1169-1171, paras.66-74.

as equitable principles, must be applied to determine the relevance and *weight* of the geographical features" [emphasis added],[141] implying that the application of equitable principles also includes the process of weighing up relevant circumstances.

6.3.3. Decline in Importance of the Meaning of Equitable Principles in the Decisions of International Courts and Tribunals

Following the 1969 *North Sea Continental Shelf* cases, in which the ICJ first acknowledged the concept of equitable principles in maritime delimitation, the meaning of the term 'equitable principles' was embodied through international case-law. Since the 1993 *Greenland/Jan Mayen* case ruled by the ICJ, however, the importance of the meaning of equitable principles has decreased. Unlike earlier cases, which had tried to enumerate examples of equitable principles or clarify the content of equitable principles, the 1993 *Greenland/Jan Mayen* case focused on the importance of an equitable solution, accepting the 'provisional' use of the equidistance method.[142]

Since that time, two major opinions have predominated with regard to the decisions of international courts and tribunals. The first, held by the supporters of the *Equidistance-Special Circumstances* rule, is that the ICJ has, despite appearances, admitted the obligatory character of the equidistance method.[143] According to this view, the only imperative rule in maritime delimitation is the *Equidistance-Special Circumstances* rule. The second opinion, as argued by scholars in favour of the achievement of an equitable result, stresses that the results produced from the applications of the two rules are not, in fact, dissimilar. In other words, scholars holding this view believe that the two rules have been assimilated or mixed.

Whichever opinion one holds, it is certainly the case that the struggle to clarify the meaning of equitable principles has declined in significance, because the examples (or content) of equitable principles are of no use in achieving an equitable solution. However, it is worth noting that, since the 1993 *Greenland/Jan Mayen* case, international case-law has still produced equitable results through reliance on 'all relevant circumstances', even though it has given up the clarification of the meaning of equitable principles. The only concept that remains applicable to maritime delimitation cases is that of relevant circumstances.

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[141] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1160, para.24.
[142] Evans, *supra* note 95, p.160.
[143] Malcolm D. Evans, "Maritime Boundary Delimitation: Where Do We Go from Here?", in David Freestone, Richard Barnes, and David M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), p.144.

Furthermore, in conflict with the argument made by Professor Evans that there has historically been an obligatory rule in maritime delimitation,[144] the reasoning of the 1993 *Greenland/Jan Mayen* case justified the use of the equidistance method only as the starting point or the construction of a provisional line in the delimitation process.[145] As already pointed out with reference to the 1969 *North Sea Continental Shelf* cases, it is evident that the employment of the equidistance method may bring some advantages, such as practical convenience and the certainty (or predictability) of application in most cases.[146] At other times, however, relevant circumstances may advise against the application of the equidistance method. As shown in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, even the drawing of a provisional equidistance line depends on the relevant circumstances of each case.[147]

Finally, the ICJ confirmed its decision to relegate the construction of an equidistance line to a 'first' step in the delimitation process, depending on the relevant circumstances of a given case. As implied in the 1969 *North Sea Continental Shelf* cases, the equidistance method is just one of the methods that can be employed in the process of considering relevant circumstances with the aim of achieving an equitable result. Since the 1993 *Greenland/Jan Mayen* case, the current delimitation rule has only been applied to reach an equitable result through reliance on the concept of relevant circumstances; neither the equidistance method nor a search for the meaning of equitable principles has been mandatory.

6.4. Views of International Law Scholars Concerning Equitable Principles

Before moving on to summarise the relationship between equitable principles and relevant circumstances, it will be useful to examine the opinions of the former held by some publicists, in order more clearly to understand the meaning of equitable principles.

6.4.1. The Argument for Equitable Principles as Ascertainable

In his Separate Opinion during the 1993 *Greenland/Jan Mayen* case of the ICJ, Judge Weeramantry stated that:

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[144] *Ibid.*, pp.143-147.
[145] Hugh Thirlway, "The Law and Procedures of the International Court of Justice (1960-1989): Part Six", *The British Year Book of International Law*, Issue 65 (1994), pp.83-84.
[146] *I.C.J. Reports 1969*, p.23, para.23; *I.C.J. Reports 1969*, p.49, para.89.
[147] *I.C.J. Reports 2007*, p.741, para.272.

> "Equitable principles are in this discussion taken to include concepts, black-letter rules and standards or principles in the broader sense, as there is no need in this discussion to refine this category further. The important distinction drawn by jurists between black-letter rules and standards or principles is hence not used for the purpose of this classification, and *the term "equitable principles" is to be read as covering all of these*" [emphasis added].[148]

Following this definition of equitable principles, Judge Weeramantry presented some examples relating to the 1993 *Greenland/Jan Mayen* case, such as "equitable principles applicable to the assessment of representations of State policy regarding maritime delimitation which other States have relied upon to their prejudice; equitable principles of interpretation in relation to relevant treaties; and principles of fairness in considering whether large sections of the waters to be demarcated are unusable in consequence of their being frozen over for considerable periods".[149] If equitable principles are understood as 'all' concepts, black-letter rules and standards or principles in accordance with equity, the concept of equitable principles would mean nothing but justice, fairness or reasonableness in an abstract, broad sense. However, as shown in the previous section, the concept of equitable principles could be one of the routes of equity into international law.[150] As already examined

[148] *I.C.J. Reports 1993*, p.219, para.22.
[149] Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, pp.219-220, para.24.
[150] Judge Weeramantry regarded equitable principles as one of the practical applications of equity in maritime boundary delimitation. For instance, he presented four applications of equity: equitable principles, equitable procedures, equitable methods, and equitable results. Here, the concepts of equitable procedures and equitable methods require commentary.

Judge Weeramantry first cited the concept of 'equitable procedures' as one of the applications of equity, stating that "all relevant circumstances will be considered in determining how the maritime space in contention is to be delimited between the Parties, unless this consideration is prevented by a rule of law. […] Whatever may be the eventual conclusion regarding the weight to be given to each factor, Parties are entitled to a consideration of such factors by the Court and in the absence of a legal principle rendering a particular factor irrelevant, the impact of that factor upon the case in hand needs to be assessed". In other words, as regards the 'opportunity of a full and fair presentation of their [Parties'] respective cases to the court or tribunal', he connected the concept of equitable procedures with the assumption that all relevant circumstances can be identified and considered when the factors presented by the Parties are taken into account by international courts and tribunals. However, it is doubtful whether the concept of equitable procedures even exists within international law. The reason for this is that the application of equitable principles leading to an equitable solution – in other words, the identification and consideration of relevant circumstances – is itself a process. This renders the concept of equitable procedures unnecessary.

Secondly, Judge Weeramantry included the drawing of an equidistance line within the category of 'equitable methods'. Although the use of the term 'equitable methods' may not be problematic in a specific case, we cannot conclude that the drawing of an equidistance line is invariably among equitable methods, because an equidistance line cannot be equitable in all the cases of delimitation. Unless the relevant circumstances (for example, geographical factors) of a case indicate the use of an equidistance line, the line cannot be constructed. For this reason, in the 2007

in analysis of international case-law, equitable principles do not have their own content, but might be rather a process used for the application of equity. It follows that equitable principles, in themselves, cannot be ascertainable. In addition, it seems that Judge Weeramantry failed to advance an explanation of the relationship between equitable principles and relevant circumstances.[151]

Similarly, Barbara Kwiatkowska considers diverse 'procedural' and 'substantive' principles applied in maritime delimitation to be equitable principles, on the assumption that the doctrine of equitable principles is a 'fundamental legal norm' governing maritime delimitation.[152] She views equitable principles as a body of ascertainable principles. Accordingly, she concludes that:

> "The above observations permit the conclusion that the doctrine of equitable principles applicable to maritime delimitation has already achieved, both with regard to its procedural and substantive elements, a degree of clarity and predictability […] At the same time, […] the principles listed above do not lay down obligations but simply provide guidelines for achieving an equitable result in delimitation".[153]

Kwiatkowska's argument resembles that of Judge Weeramantry insofar as she includes 'all' of the principles identified through international case-law within the category of equitable principles. This begs a question, however: why does the doctrine of equitable principles provide only guidelines for an equitable result, even though it possesses a degree of clarity and predictability? If equitable principles are no more than guidelines for arriving at an equitable solution, this means that the rules governing maritime delimitation should flexibly be applied in a given case. In fact, since maritime delimitation is carried out through the identification and weighing-up of relevant circumstances, the mere presentation of all relevant principles is of little help in determining the meaning of equitable principles.

Likewise, Prosper Weil states that:

Caribbean Sea (Nicaragua/Honduras) case (*I.C.J. Reports 2007*, p.741, para.272), the ICJ stated that "the equidistance method does not automatically have priority over other methods of delimitation". See Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, pp.219-224, paras.21-42.

[151] Separate Opinion of Judge Weeramantry, *I.C.J. Reports 1993*, pp.267-268, paras.208-212.

[152] Barbara Kwiatkowska, "The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and Its Impact on the International Law of the Sea", in A. Bloed and P. van Dijk (eds.), *Forty Years International Court of Justice: Jurisdiction, Equity and Equality* (Utrecht: Europa Instituut, 1988), pp.127-140.

[153] *Ibid.*, p.158.

> "It is relevant circumstances that give life and body to equitable principles and the courts will often prefer to consider the weight to be given to such and such a fact rather than to formulate equitable principles in the abstract. So, it is *a posteriori*, in the light of relevant circumstances and by implication, that equitable principles can be best understood".[154]

According to Professor Weil, even though equitable principles *a priori* exist in theory, they must be identified *a posteriori* by relevant circumstances. However, any approach that regards equitable principles as ascertainable is meaningless, because the application of equitable principles is a process (which has been established to take into account all relevant circumstances) or the examination of all relevant circumstances in itself.

6.4.2. The Argument for Equating Equitable Principles with Equity

While Prosper Weil, Barbara Kwiatkowska, and Judge Weeramantry consider equitable principles to be a body of ascertainable principles, Robert Y. Jennings understands that equity is synonymous with equitable principles. He refers to the latter as "undefined, and unlisted, but apparently indistinguishable from "equity" in general".[155] On the premise that the function of equity (or equitable principles) is to correct or modify an existing rule of law which would produce an inequitable result if strictly applied,[156] Sir Robert Jennings then explores how equity (or equitable principles) functioned in the 1969 *North Sea Continental Shelf* cases, when the ICJ concluded that the equidistance method was no longer obligatory.[157] Sir Robert Jennings also criticises the ICJ's 1969 Judgment, arguing that the application of equitable principles cannot be differentiated from a decision *ex aequo et bono*.[158] However, his argument requires two provisos. Firstly, as discussed in this chapter, the function of equity in international law is not to correct an existing rule of international law. Secondly, as pointed out above, the application of equitable principles (if the concept of equitable principles must exist) leading to an equitable result is on the basis of an 'actual' rule of international law. In other words, a final result which the application of the delimitation rule produces is different from an arbitrary decision.

Similarly, responding to the premise that equitable principles have an affinity with

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[154] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge: Grotius Publications Limited, 1989), p.212.
[155] Jennings, *supra* note 52, p.401.
[156] *Ibid.*, pp.399, 400.
[157] See *I.C.J. Reports 1969*, pp.45-46, para.82.
[158] Jennings, *supra* note 52, pp.401-408.

the concept of equity, Oscar Schachter states that equitable principles have a 'more specific substantive' and 'legislative' character.[159] In his view, equitable principles are ascertainable. Yet, he also notes that both equitable principles and equity aim to carry out individualised justice. He is interested in the fact that equitable principles and equity work towards the same objective, not the question of whether or not equitable principles are ascertainable. Therefore, it can be said that Schachter regards equitable principles as synonymous with equity.

6.4.3. The Argument for Disregarding the Term 'Equitable Principles'

In his recent book, Nuno Marques Antunes argues that:

> "In case law, the recourse to the term "equitable principles", and its inclusion as part of customary law, was mere formalism. It was an attempt to circumvent difficulties related to the debate on sources of law and on the exercise of judicial discretion in international dispute-settlement".[160]

Antunes, an ardent proponent of the *Equidistance-Special Circumstance* rule, concludes that the key legal element within maritime boundary delimitation is equity, not equitable principles.[161] This thesis can share Antunes's conclusion. However, it has two different reasons leading to the same conclusion that Antunes arrives at. Firstly, there is no meaningful principle resulting in an equitable solution in maritime delimitation except for the principle of taking into account all relevant circumstances. Secondly, the current delimitation rule seeks the equitability of the result to be reached, not the equitability of the principles to be applied in maritime delimitation.

6.4.4. A Concluding Remark

The three views held by the publicists cited above require commentary. Firstly, equitable principles are not a body of ascertainable principles. The 1982 *Continental Shelf* (Tunisia/Libya) case, the 1984 *Gulf of Maine* case, and the 1985 *Continental Shelf* (Libya/Malta) case all contributed to this misunderstanding. In turn, the misunderstanding has generated the argument (as made by Barbara Kwiatkowska) that the application of

[159] Schachter, *supra* note 37, pp.57-58.
[160] Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2003), p.237.
[161] *Ibid.*, pp.237-238.

ascertainable, equitable principles has consistency or predictability. However, the only predictable aspect of application of equitable principles is that all relevant circumstances must be taken into account. In other words, it is only certain or predictable that the application of equitable principles is a process considering all relevant circumstances; *how* equitable principles (if precisely expressed, the 'achievement of an equitable result' as the current delimitation rule because this thesis does not accept the importance of equitable principles) are applied is not predictable.

Secondly, equitable principles may be regarded as synonymous with equity. Equitable principles as an example of equity might appear in 'certain' areas of international law, such as the law of international watercourses or the law of maritime boundary delimitation. Nevertheless, it is questionable whether or not the concept known as equitable principles has its own meaning in these areas of international law.

Lastly, the application of equitable principles is a procedural concept involving the consideration of all relevant circumstances. In other words, the 'application' of equitable principles is another name for a 'process' examining all relevant circumstances. Therefore, there is no need to keep the term 'equitable principles' in order to indicate the process. The reason for this is that the current delimitation rule does not aim at the equitability of the process.

Bearing these three points in mind, the next sub-section will address the research on the relationship between equitable principles and relevant circumstances. It will show that the concept of equitable principles (which are said to have predictability, according to some international law scholars and earlier decisions of international courts and tribunals) has little meaning, and the notion of relevant circumstances (which enables the rules governing maritime delimitation to be applied flexibly) must be the key factor of maritime delimitation.

6.5. The Relationship between Equitable Principles and Relevant Circumstances

6.5.1. The Emergence and Meaning of the Concept of Relevant Circumstances

The 1966 Helsinki Rules introduced a list of 'relevant factors' to be considered in order to arrive at an equitable utilisation in the law of international watercourses.[162] Subsequently, the 1969 *North Sea Continental Shelf* cases of the ICJ used the term 'relevant circumstances' for

[162] See Article V(2) of the 1966 Helsinki Rules.

the first time with regard to the law of maritime boundary delimitation.[163] Since no difference has been found between the terms 'relevant factors' and 'relevant circumstances', this thesis presupposes that the concept of relevant factors is identical to that of relevant circumstances. However, it should be noted that there *is* a difference between relevant circumstances and 'factors to be taken into consideration'.

Since the delimitation of maritime boundaries is determined by the identification and weighing-up of relevant circumstances, relevant circumstances are 'facts' on which international courts and tribunals must rely in the process of delimiting maritime areas. On the other hand, 'factors to be taken into consideration' are 'reasons' presented by the States concerned in relation to maritime delimitation. Among these factors to be taken into consideration, a factor or factors regarded as 'significant' in a given case can then become 'relevant'. For example, even though several factors to be taken into consideration as regards the Channel Islands were presented by both Parties in the 1977 *Anglo-French Continental Shelf* case, the factors considered to be significant were the oppositeness between the relevant coasts of both States and the presence of the Channel Islands close to the French coast.[164] These factors to be taken into consideration thus made themselves relevant in the delimitation process.

Nevertheless, the concept of 'factors to be taken into consideration' is diminishing in importance. Some factors to be taken into account, such as geographical features or the presence of islands, have been included in the list of relevant circumstances. This means that the list of relevant circumstances could be formulated to some extent, even in the law of maritime delimitation. Thus, some examples of factors to be taken into consideration would be included in the list of relevant circumstances, depending on the normative density of relevant circumstances. This point will be discussed in the next chapter.

In sum, while various factors may be presented by the States concerned, not all of these factors are necessarily relevant. Equally, they are not necessarily capable of ensuring that a relevant circumstance (within the catalogue of relevant circumstances) is accorded a certain degree of weight. However, the claims made by Parties of various factors to be taken into consideration may expand the list of relevant circumstances. Any increase in factors to be taken into consideration then plays an important role in enhancing the flexibility of

[163] Weil, *supra* note 154, p.210.
[164] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.87-88, 93-94, paras.181-183, 196-199.

application of the rules governing maritime delimitation in a certain case.

Here, it should be noted that relevant circumstances can be defined in two ways in the context of maritime delimitation, depending on whether or not the use of the equidistance method is considered mandatory. The first view, which supports the obligatory character of the equidistance method, maintains that relevant circumstances are nothing but circumstances which call for an equidistance line to be adjusted. On the other hand, the second opinion, which denies the mandatory character of the equidistance method, concludes that the use of the equidistance method is provisional in the delimitation process, and that relevant circumstances may indicate another provisional line if they point out that it is impossible to draw a provisional equidistance line. This thesis has shown, through analysis of the judgements and arbitral awards made by international courts and tribunals, that the application of equitable principles entails the identification and weighing-up of relevant circumstances. This study supports the second view, and its next section will therefore deal with the indicative role of relevant circumstances.

6.5.2. The Indicative Role of Relevant Circumstances

Malcolm D. Evans classifies the role of relevant circumstances into two categories: amelioration and indication.[165] In their ameliorative aspect, he argues, the role of relevant circumstances is to modify a provisional line. Still, this point can be criticised.

For example, the oppositeness between the coasts concerned as a relevant circumstance requires an equidistance line to be drawn provisionally. Adjusting the equidistance line, however, does not fall under the heading of amelioration. Rather, this example can be understood such that the oppositeness between relevant coasts demands the use of the equidistance method, and then another relevant circumstance calls for the equidistance line to be adjusted. In other words, if a prior, obligatory method does not exist, the ameliorative role of relevant circumstances cannot be valid. Of the two roles of relevant circumstances proposed by Professor Evans, therefore, closer attention should be paid to their indicative role than their ameliorative function.

Fascinatingly, Professor Evans also implies that the indicative role of relevant circumstances is not in fact to indicate but to exclude a specific method.[166] In light of the 1969 *North Sea Continental Shelf* cases of the ICJ, Evans's view seems accurate. The Court

[165] Evans, *supra* note 117, pp.78-83.
[166] Malcolm D. Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances", *International and Comparative Law Quarterly*, Volume 40 (1991), p.16.

made it clear that the geographical circumstances of these cases excluded the equidistance method.[167] In other words, the peculiar characteristics of these cases indicated that the equidistance method must be excluded. However, if delimitation cases since the 1969 Judgment are examined *en masse*, Evans's argument appears less tenable. In fact, relevant circumstances in several cases indicated a specific method. For example, the 1977 *Anglo-French Continental Shelf* case stated that:

> "In other words, even under Article 6 it is the geographical and other circumstances of any given case which *indicate* and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation" [emphasis added].[168]

The indicative role of relevant circumstances was also confirmed during the 1982 *Continental Shelf* (Tunisia/Libya) case of the ICJ, as follows:

> "A finding by the Court in favour of a delimitation by an equidistance line could only be based on considerations *derived from an evaluation and balancing up of all relevant circumstances*, since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods" [emphasis added].[169]

In this case, relevant circumstances (for example, the conduct of the States concerned) were understood to indicate an appropriate line: a *de facto* line dividing the concession areas.[170] In several cases after this one, including the 1984 *Gulf of Maine* case, the 1985 *Continental Shelf* (Libya/Malta) case, the 1985 *Guinea/Guinea-Bissau* case, and the 1992 *Saint Pierre and Miquelon* case, the indicative role of relevant circumstances was consistently acknowledged. The relevant circumstances of each case indicated practical methods or actual delimitation lines which were employed or drawn.

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[167] *I.C.J. Reports 1969*, p.49, paras.89-90.
[168] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.45-46, para.70.
[169] *I.C.J. Reports 1982*, p.79, para.110.
[170] *I.C.J. Reports 1982*, pp.83-84, para.117.

6.5.3. The Importance of Relevant Circumstances as Elucidated by the Relationship between Equitable Principles and Relevant Circumstances

As has been shown above, the concept of equitable principles (if equitable principles must exist) can only be meaningful when these principles are 'applied'. Equitable principles in themselves do not have their own meaning or content. It is possible that one of the applications of equity in maritime delimitation might be named equitable principles. However, it should be noted that the rules governing maritime delimitation do not have a goal to ensure the equitability of the principles to be applied.

Exploring the relationship between equitable principles and relevant circumstances is an essential step in understanding the meaning of equitable principles in maritime delimitation. The application of equity (or equitable principles) is a 'process' by means of which an equitable result is produced in some areas of international law. The process of applying equity (or equitable principles) in maritime delimitation takes all of the relevant circumstances of each case into consideration. It must thus be determined how relevant circumstances are dealt with in the course of applying equity (or equitable principles).

Even before the 1993 *Greenland/Jan Mayen* case, whose outcome implied that the two rules governing maritime delimitation had to some extent been combined, delimitation cases had generally identified and weighed up relevant circumstances, and they had then applied practical methods indicated by these circumstances. Following the 1969 *North Sea Continental Shelf* cases heard by the ICJ, the 'application' of equitable principles became a central concern in maritime delimitation, taking precedence over the meaning of equitable principles *per se*. However, in attempting to define the meaning of equitable principles during its three cases in the 1980s, the ICJ (or its Chamber) tried to present some concrete examples of equitable principles, based on the misconception that equitable principles are a set of ascertainable norms. These attempts were a failure. Despite the ICJ's aim during the 1985 *Continental Shelf* (Libya/Malta) case to present five concrete examples of equitable principles, in order to support the argument for the predictable application of the rules governing maritime delimitation, there was no way to explain the application of equitable principles except in terms of the identification and weighing-up of all the relevant circumstances in a given case.

At this point, it will be necessary to comment on the examples of equitable principles enumerated by the ICJ during the 1984 *Gulf of Maine* case and the 1985 *Continental Shelf* (Libya/Malta) case. The 1984 *Gulf of Maine* case was found to exhibit the

following equitable principles: the criterion that the land dominates the sea; the criterion of non-encroachment on areas too close to the coast of another State; and the criterion of preventing any cut-off of the seaward projection of the coast (or part of the coast) of the States concerned.[171] However, it may be observed that these principles could apply, equally, in the process of taking account of all relevant circumstances. In other words, the application of equitable principles results from taking into account all of the relevant circumstances in a specific case. Likewise, all of the equitable principles presented during the 1985 *Continental Shelf* (Libya/Malta) case (with the exception of the principle of taking into account all relevant circumstances) could apply to the identification and weighing-up of relevant circumstances. Accordingly, even if we accept the assumption that equitable principles are ascertainable, the concrete examples of equitable principles enumerated by the ICJ (or its Chamber) can only apply in the course of taking into consideration all relevant circumstances.

Here, it should be noted that the concrete examples of equitable principles enumerated by the ICJ (or its Chamber) were not principles applied when relevant circumstances were taken into account. In other words, such equitable principles did not examine relevant circumstances. Rather, the result reached after the examination of all relevant circumstances must be in conformity with these principles. All of the principles referred to in the 1984 *Gulf of Maine* case and the 1985 *Continental Shelf* (Libya/Malta) case (except for the principle of taking into account all relevant circumstances) are closer to confirming or showing the equitability of the result produced. This point will be discussed in Chapter IV.

Unlike the ICJ (or its Chamber) in its three cases in the 1980s, international arbitral tribunals in the 1977 *Anglo-French Continental Shelf* case and the 1985 *Guinea/Guinea-Bissau* case were apt to focus on the concept of relevant circumstances. In the 1977 *Anglo-French Continental Shelf* case, the Court of Arbitration implied that, in the Channel Islands region, the application of equitable principles should be carried out through the identification and consideration of relevant circumstances. Likewise, in the 1985 *Guinea/Guinea-Bissau* case, an equitable result was arrived at by identifying and weighing up relevant circumstances, such as the presence of islands, the length of relevant coastlines, the coastal configuration and orientation, and a line (the southern limit) included in the 1886 Franco-Portuguese Convention. Notably, the Tribunal of the 1985 *Guinea/Guinea-Bissau* case stated

[171] *I.C.J. Reports 1984*, pp.312-313, para.157.

that "each case of delimitation is a *unicum*".[172] In other words, the Tribunal emphasised the uniqueness of each case, not a search for a structured system of equitable principles.

Since the 1993 *Greenland/Jan Mayen* case, almost all maritime boundary delimitation cases have constructed a provisional equidistance line as the starting point in the delimitation process. Nevertheless, the identification and weighing-up of relevant circumstances have still been essential steps in the delimitation of maritime boundaries, irrespective of the provisional use of the equidistance method. In other words, the achievement of an equitable result, which is the current rule governing maritime delimitation, still requires that all of the relevant circumstances should be taken into account.

In conclusion, the relationship between equitable principles and relevant circumstances can be understood in the sense that the application of equitable principles is a process which takes account of all the relevant circumstances in each concrete case. Does equity play its lead role or autonomous role in maritime boundary delimitation?[173] The answer is in the negative. Equity in maritime delimitation focuses and relies solely upon the consideration of all relevant circumstances, and it aims at the equitability of the result produced. It follows that the current delimitation rule governing maritime delimitation is flexibly applied through taking account of all relevant circumstances, without respect to the obligatory character of the equidistance method.

7. A Concluding Remark

As has been shown above, the meaning of equitable principles is elucidated by the relationship between equitable principles and relevant circumstances. This thesis assumes that the process of applying so-called equitable principles is synonymous with taking account of all the relevant circumstances in a particular case.

Hence, in the delimitation of maritime boundaries or the utilisation of international watercourses, equitable principles are not a body of ascertainable principles. Rather, equitable principles (if the concept of equitable principles must exist) are only meaningful in their application – that is, the process of considering all relevant circumstances leading to an equitable result.

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[172] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.289-290, para.89.
[173] Cf. Nelson, *supra* note 1, pp.857-858.

The purpose of the application of equity in maritime delimitation is solely to reach an equitable 'solution'. Therefore, there is no reason for clinging to the term 'equitable principles' in order to define the process of considering relevant circumstances as equitable. Whether or not the process itself of taking into account all relevant circumstances is equitable does not mark its place in the course of discussing maritime delimitation. In other words, the subject of maritime delimitation seeks the equitability of the result to be achieved through the flexibility of the rules governing maritime delimitation or through the discretion of international courts and tribunals dealing with all relevant circumstances. Without the term 'equitable principles', we can produce an equitable result by taking into account all the relevant circumstances in a given case. In addition, the reason why equity in maritime delimitation cannot be equity *ex aequo et bono* is that it depends entirely on the examination of 'all' the relevant circumstances in a certain case.

In sum, in some areas of international law, such as the law of maritime boundary delimitation or the law of international watercourses, equity plays its role in arriving at an equitable 'result', through reliance on the examination of all relevant circumstances. Except that the application of equitable principles only means taking into account relevant circumstances in maritime delimitation, we cannot find out any reason for maintaining the concept of equitable principles.

Chapter IV

The Rise of Relevant Circumstances in Maritime Delimitation

1. Introduction

The objective of the previous chapter is to get rid of the misunderstanding about the concept of equitable principles, because the concept of relevant circumstances should be the one and only issue to be observed.

Tenacity for equitable principles has resulted in the argument that they should have predictability. As shown above, however, the application of equitable principles only means that all relevant circumstances must be taken into account. The question whether or not equitable principles have certainty or predictability would not be helpful in achieving an equitable solution in a certain case. Rather, the concept on which we can depend in a delimitation case is that of relevant circumstances. These circumstances are concrete facts that we cannot deny.

Reliance on the notion of relevant circumstances leads to the argument that the rules governing maritime delimitation must be applied flexibly in reaching an equitable solution. The reason for this is that each delimitation case has its own relevant circumstances. Although the normative density of relevant circumstances varies in each area of international law, as will be shown in the next section, the diversity will not eliminate the flexible application of the rules in a certain area for the purpose of producing an equitable result. Moreover, the discussion on the normative density of relevant circumstances will enable us to properly grasp the concept of relevant circumstances in international law.

In order more clearly to understand the process of applying the rules governing maritime delimitation which deals with relevant circumstances, Chapter IV intends to identify and explore the three phases of taking into account relevant circumstances to produce an equitable result. In addition, analysis of international case-law will lead to the discussion of three kinds of delimitation decisions. Among them, three-phase decisions seek

the avoidance of producing an arbitrary result in maritime delimitation.

Nevertheless, this chapter will also show the indeterminacy of an equitable result achieved through the process of application of the rules governing maritime delimitation. The fact that the process of taking into consideration all the relevant circumstances in maritime delimitation has been established is not relevant to enhancing the predictability of the rules in maritime delimitation.

2. The Normative Density of Relevant Circumstances in International Law

2.1. The Highest Level: The Law of International Watercourses

2.1.1. The Emergence of the Doctrine of Equitable Utilisation

International law has brought about several equitable results on the basis of the concept of equity, including the achievement of an equitable delimitation, which functions as the delimitation rule. Of these equitable results, this thesis will first address the concept of equitable utilisation as acknowledged in the law of international watercourses, with reference to the normative density of relevant circumstances.

At this point, it should be stressed that this research intends to regard the concept of equitable utilisation itself as the current rule governing the utilisation of international watercourses. Just as in maritime delimitation, therefore, all relevant circumstances must be taken into account in order to equitably utilise international watercourses. This means that the concept of relevant circumstances is more important than the concept of equitable principles or procedures for the utilisation of international watercourses. Hence, this thesis will prefer the term 'doctrine' or 'objective' of equitable utilisation to the term 'principle' of equitable utilisation.

Even though water was one of the world's most important resources before the twentieth century, its importance increased dramatically after this time due to the growth of population and industry.[1] As a result, certain doctrines or objectives evolved in relation to States' utilisation of water resources. These included the Harmon doctrine, the principle of

[1] Ibrahim Kaya, *Equitable Utilization: The Law of the Non-navigational Uses of International Watercourses* (Aldershot: Ashgate Publishing Limited, 2003), pp.1-2.

absolute territorial integrity (or riparian rights), and the principle of prior appropriation.[2] The doctrine of equitable utilisation, based on the concept of limited sovereignty, was another. The concept of equitable utilisation had received strong support even before the General Assembly of the United Nations adopted the Convention on the Law of the Non-navigational Uses of International Watercourses in 1997 (hereafter referred to as the "UN Convention on International Watercourses").[3]

For instance, the 1966 Helsinki Rules made by the ILA accepted the concept of equitable utilisation. Article IV of the Helsinki Rules stated that "[e]ach basin State is entitled, within its territory, to a *reasonable and equitable share* in the beneficial uses of the waters of an international drainage basin" [emphasis added]. This means that each State concerned has an 'equal right' to a reasonable and equitable share of the beneficial uses of international watercourses.[4] However, this Article did not provide a thorough explanation of the concept of equitable utilisation, despite acknowledging the significance of equal rights to equitable utilisation. Another Article of the Helsinki Rules is worth being examined for the insight that it offered into the meaning of equitable utilisation. Article V(1) of the Helsinki Rules dictated that "[w]hat is a reasonable and equitable share within the meaning of Article IV is to be determined *in the light of all the relevant factors in each particular case*" [emphasis added]. Close attention to this article reveals that the meaning of equitable utilisation, as one possible equitable result, is also determined in the context of 'all the relevant factors in each particular case'. First, an individual relevant circumstance taken into consideration may 'indicate' the 'quantity' of water needed for each State; second, all of the relevant circumstances are weighed up. It is thus an important task to identify and draw up a list of relevant circumstances. In the legal context of international watercourses, unlike maritime boundary delimitation, a list of relevant circumstances was made as early as 1966. For example, Article V(2) of the Helsinki Rules enumerated relevant circumstances

[2] See Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law & the Environment*, 3rd ed. (Oxford: Oxford University Press, 2009), pp.540-546; C. B. Bourne, "International Law and Pollution of International Rivers and Lakes", *University of British Columbia Law Review*, Volume 6 (1971), pp.119-120.

[3] Bourne, *supra* note 2, p.120; H. L. Dickstein, "International Lake and River Pollution Control: Questions of Method", *Columbia Journal of Transnational Law*, Volume 12 (1973), p.492.

[4] In the phrase 'reasonable and equitable' share of the utilisation of international watercourses, the term 'equitable' is related to the quantity of water, while the term 'reasonable' refers to what the State concerned does with water, such as the serious pollution of international watercourses. However, since the list of relevant circumstances concerning the doctrine of equitable utilisation has thus far been closely related to the term 'equitable', this thesis will focus only on the concept of equitable utilisation, not both reasonable and equitable utilisation. See Stephen C. MaCaffrey, *The Law of International Watercourses*, 2nd ed. (Oxford: Oxford University Press, 2007), p.389.

(although not exhaustively) with regard to the doctrine of equitable utilisation. This point can be regarded as the highest level in relation to the normative density of relevant circumstances.

In its next sections, this thesis intends to illustrate the doctrine of equitable utilisation as acknowledged in international law-making processes and the judgements and arbitral awards of international courts and tribunals, in order more clearly to understand the significance of relevant circumstances in achieving equitable utilisation.

2.1.2. The Acknowledgement of the Doctrine of Equitable Utilisation in International Law-making Processes

2.1.2.1. Declarations and Recommendations Adopted by International Conferences

First, the second paragraph of the 1933 Declaration of Montevideo concerning the industrial and agricultural use of international rivers, approved by the seventh International Conference of American States, stated that "[t]his right [the exclusive right to exploit the margin], however, is conditioned in its exercise upon the necessity of not injuring the equal right due to the neighbouring State on the margin under its jurisdiction".[5] According to this declaration, the right of each State was restricted by the condition that the 'equal right' of a neighbouring State should not be affected.

Second, Recommendation 51 of the 'Action Plan for the Human Environment', adopted by the United Nations Conference on the Human Environment in 1972, mandated that "[t]he net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations affected". In other words, this recommendation clearly provided for the doctrine of equitable utilisation.

Likewise, the 'Mar del Plata Action Plan', adopted by the United Nations Water Conference in 1977, referred to the doctrine of equitable utilisation in terms of the management and utilisation of water resources. For example, Recommendation 91 of this Action Plan declared that:

> "In relation to the use, management, and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to

[5] See *Yearbook of the ILC 1974*, Volume II, Part Two, p.212.

equitably utilize such resources as the means to promote bonds of solidarity and co-operation".

The declarations and recommendations cited above were neither legally binding treaties nor instances of customary international law. However, some of the principles underlying these declarations and recommendations may be regarded as the 'established' principles of international law. Moreover, these declarations and recommendations have played an important role in transforming certain principles into the principles of international law – despite their not originally having been accepted as such. Therefore, the doctrine of equitable utilisation put forward in some declarations and recommendations (whether an established objective of international law at that time, or merely a suggested principle) has been included in many treaties concluded at a later date, including the UN Convention on International Watercourses.

2.1.2.2. Treaties

From the late nineteenth century onwards, numerous bilateral agreements were concluded that relied either explicitly or implicitly on the doctrine of equitable utilisation.[6] Analysis of these agreements indicates that the doctrine of equitable utilisation has been applied to diverse subjects, including the industrial or agricultural utilisation of the waters,[7] the prevention of pollution,[8] and the right to fish.[9] By means of extensive studies of existing bilateral agreements, including the decisions of international courts and tribunals and the opinions of international law scholars, the ILA and the Institut de Droit International have sought to formulate the rules regarding the doctrine of equitable utilisation. After all, as discussed above, the ILA formulated an explicit list of relevant circumstances, and acknowledged the doctrine of equitable utilisation in its 1966 Helsinki Rules. The doctrine of equitable utilisation in its codified form can be found in some multilateral agreements, including the UN Convention on International Watercourses in 1997.

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[6] *Yearbook of the ILC 1986*, Volume II, Part One, pp.103-105, para.76.
[7] For example, the Exchange of Notes of 29th August and 2nd September 1912, constituting an Agreement between Spain and Portugal on the Exploitation of Border Rivers for Industrial Purposes. See *Yearbook of the ILC 1986*, Volume II, Part One, p.136.
[8] For instance, the Agreement of 22nd November 1934 between Belgium and the United Kingdom regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi. See *Yearbook of the ILC 1986*, Volume II, Part One, p.135.
[9] For example, the Exchange of Notes of 11th May 1936 and 28th December 1937, constituting an Agreement between the United Kingdom and Portugal regarding the Boundary between Tanganyika Territory and Mozambique. See *Yearbook of the ILC 1986*, Volume II, Part One, p.135.

For example, Article 2(2)(*c*) of the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (of the United Nations Economic Commission for Europe) sought "[t]o ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character". Although it does not fall into the category of multilateral agreements, Article 12 of the 2004 Berlin Rules on Water Resources of the ILA also accepted the doctrine of equitable utilisation.

In relation to areas other than the utilisation of international watercourses, the ILC adopted the Draft Articles on the Law of Transboundary Aquifers in 2008. Article 4 of these Draft Articles also supported the doctrine of equitable utilisation concerning the utilisation of transboundary aquifers or aquifer systems.

2.1.3. The Acknowledgement of the Doctrine of Equitable Utilisation in the Judgements and Arbitral Awards of International Courts and Tribunals

2.1.3.1. The Judgements of International Courts

First, with regard to the judgements of international courts, two cases heard by the PCIJ should be examined: the 1929 *River Oder* case and the 1937 *Diversion of Water from the River Meuse* case. In the 1929 *River Oder* case, the PCIJ was asked to determine whether or not the jurisdiction of the International Commission of the River Oder extended to two tributaries of the Oder located in Poland under the 1919 Treaty of Versailles: the Netze and the Warthe. The PCIJ answered in the affirmative, based on the 'idea of a community of interest of riparian States', not the idea of a right to passage in favour of upstream States. That is to say, the PCIJ stated that:

> "[I]t is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in *that of a community of interest of riparian States*. This community of interest in a navigable river becomes the basis of *a common legal right*, the essential features of which are the perfect equality of all riparian States in the user [use] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" [emphases added].[10]

This case was related to the 'navigational' uses of international watercourses. Can the same

[10] *P.C.I.J. Series A.*, No.23 (Judgment of 10th September 1929), p.27.

logic be applied to the 'non-navigational' uses of international watercourses? The second report on the law of the non-navigational uses of international watercourses, written by Stephen C. McCaffrey, answered this question in the affirmative.[11] Later, the 1997 *Gabčíkovo-Nagymaros* case of the ICJ also applied the logic of the 1929 *River Oder* case to the non-navigational uses of international watercourses.[12] It is likely that the 'common legal right' to which the PCIJ referred meant the doctrine of equitable utilisation.[13] However, it should be noted that a common legal right does not necessarily mean that each State has the same right. Instead, the right of each riparian State depends on the relevant circumstances of each case.[14]

The PCIJ addressed the doctrine of equitable utilisation again in the 1937 *Diversion of Water from the River Meuse* case. Belgium and the Netherlands had concluded a treaty in 1863 concerning the diversion of water from the River Meuse for the feeding of navigation canals and irrigation channels. In this case, the Netherlands alleged that some of Belgium's works and projects were not in accordance with the 1863 Treaty.[15] In contrast, Belgium claimed that the Netherlands had violated the 1863 Treaty by the construction of a barrage, and that another canal (the Juliana Canal) should also be subject to the 1863 Treaty.[16] However, all of the submissions made by both States were rejected by the Court. Although the PCIJ ruled this case only to fall under the 1863 Treaty, not under the general principles of international law,[17] it should be noted that the utilisation regime of the River Meuse was still based on the concept of equitable utilisation, even under the 1863 Treaty. While the Netherlands assumed that it had the 'special privilege' of control over and above the 'right of supervision' with regard to the utilisation regime of the River Meuse,[18] the PCIJ rejected this contention.[19] By granting the Netherlands a 'lesser' right, the Court indicated that the equitable utilisation of the River Meuse was of primary concern.

Subsequently, we must examine the 1997 *Gabčíkovo-Nagymaros* case of the ICJ. In 1977, Hungary and Czechoslovakia (replaced by the Czech Republic and Slovakia in 1993) had concluded a treaty regarding the Construction and Operation of the Gabčíkovo-

[11] *Yearbook of the ILC 1986*, Volume II, Part One, p.114, para.105.
[12] *I.C.J. Reports 1997*, p.56, para.85.
[13] MaCaffrey, *supra* note 4, p.205.
[14] *Ibid*.
[15] *P.C.I.J. Series A./B.*, No.70 (Judgment of 28th June 1937), pp.5-6.
[16] *P.C.I.J. Series A./B.*, No.70 (Judgment of 28th June 1937), p.7.
[17] *P.C.I.J. Series A./B.*, No.70 (Judgment of 28th June 1937), p.16.
[18] *P.C.I.J. Series A./B.*, No.70 (Judgment of 28th June 1937), p.18.
[19] *P.C.I.J. Series A./B.*, No.70 (Judgment of 28th June 1937), p.20.

Nagymaros System of Locks. This treaty was concerned with building one lock at Gabčíkovo (in Czechoslovak territory) and the other lock at Nagymaros (in Hungarian territory).[20] However, this project was never finished, because Hungary abandoned the works at Nagymaros in 1989;[21] as a result, Czechoslovakia proceeded to a 'unilateral diversion' of the River Danube, called 'Variant C'.[22] Although this case raised several issues concerning the law of treaties, the law of State responsibility, and international environmental law, this study intends to focus on the issues pertaining to the doctrine of equitable utilisation. In response to Hungary's argument that 'Variant C' was not in line with the doctrine of equitable utilisation, the ICJ stated that:

> "The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube – with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz – failed to respect the proportionality which is required by international law".[23]

The Court considered the ongoing effects on the 'ecology' of the riparian area of the Szigetköz to be a relevant circumstance. However, this does not necessarily mean that the environmental issue itself became a relevant circumstance. In fact, it was significant primarily in the sense that "the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river".[24] In short, it was likely that Hungary's 'social and economic needs' – which seemed to take precedence over other categories of relevant circumstance, as will be shown below – had been denied by Czechoslovakia. In other words, from the standpoint of social and economic needs, the concept of equitable utilisation is related to the 'quantity' of water (to be allocated or accommodated) as well as the right of access to water, not environmental protection.

Furthermore, in support of Hungary's argument, the ICJ made an important statement with respect to the law of State responsibility. According to the Court, a countermeasure not in accord with the doctrine of equitable utilisation was to be considered

[20] *I.C.J. Reports 1997*, pp.20-23, para.18.
[21] *I.C.J. Reports 1997*, p.25, para.22.
[22] *I.C.J. Reports 1997*, pp.25-27, para.23.
[23] *I.C.J. Reports 1997*, p.56, para.85.
[24] *I.C.J. Reports 1997*, p.54, para.78.

a 'disproportionate' countermeasure. Therefore, this case strengthened the importance of the doctrine of equitable utilisation in international law.[25]

Lastly, it is worth noting the recent case of the ICJ: the 2010 *Pulp Mills* case. In this case, the concept of 'optimum and rational' utilisation to which Article 1 of the 1975 Statute of the River Uruguay refers was examined. The Court implied that the concept of optimum and rational utilisation is broader than that of equitable utilisation:

> "[T]he attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other".[26]

However, this statement of the ICJ does not necessarily mean to weaken the doctrine of equitable utilisation in international law. Rather, the 2010 *Pulp Mills* case raised an environmental issue as well. Therefore, the Court went on to say that:

> "Article 27 embodies this interconnectedness between *equitable* and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development" [emphasis added].[27]

2.1.3.2. The Arbitral Awards of International Tribunals

With regard to the utilisation of international watercourses, perhaps the most famous arbitration case is the 1957 *Lac Lanoux Arbitration* case between Spain and France. This case concerned a hydroelectric project undertaken by France which planned to divert the waters of Lake Lanoux. Spain opposed the project from the very beginning. In response, France proposed that it would withdraw an amount of water equivalent to that which had been diverted. Nevertheless, an arbitration tribunal was established, because Spain continued to oppose the modified project of France. On the subject of these modifications, the Tribunal observed that "[a] withdrawal with return, as contemplated in the French project, does not

[25] See Rosalyn Higgins, "Natural Resources in the Case Law of the International Court", in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999), pp.109-111.
[26] *Pulp Mills on the River Uruguay* (Judgment of the I.C.J., 20th April 2010), p.53, para.175.
[27] *Pulp Mills on the River Uruguay* (Judgment of the I.C.J., 20th April 2010), pp.53-54, para.177.

alter a state of affairs established in response to the demands of life in society".[28] According to the Tribunal, France's 'withdrawal with return' project was in accord with the obligations arising from the relevant treaty between the two States. Addressing the issue of whether or not France (the upper riparian State) had taken the interests of Spain (the lower riparian State) into account, the Tribunal stated that:

> "The Tribunal considers that the upper riparian State, under the rules of good faith, has an obligation to take into consideration *the various interests concerned*, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own" [emphasis added].[29]

The Tribunal thereby implied that, although France was not in violation of its obligations, Lake Lanoux was subject to equitable utilisation, not unlimited sovereignty. However, the Tribunal did not clarify the list of 'various interests' to be taken into account.

2.1.4. The List of Relevant Circumstances in the Law of International Watercourses

As mentioned above, the law of international watercourses had already made a list of relevant circumstances in the 1966 Helsinki Rules. The 1997 UN Convention on International Watercourses included a similar list. The list of relevant circumstances drawn up in Article V(2) of the 1966 Helsinki Rules is as follows:

> "(*a*) The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
> (*b*) The hydrology of the basin, including in particular the contribution of water by each basin State;
> (*c*) The climate affecting the basin;
> (*d*) The past utilization of the waters of the basin, including in particular existing utilization;
> (*e*) The economic and social needs of each basin State;
> (*f*) The population dependant on the waters of the basin in each basin State;

[28] Para.8 (of the Award of 16th November 1957) in partial translations in *Yearbook of the ILC 1974*, Volume II, Part Two, p.196, para.1064.
[29] Para.22 (of the Award of 16th November 1957) in partial translations in *Yearbook of the ILC 1974*, Volume II, Part Two, p.198, para.1068.

(*g*) The comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(*h*) The availability of other resources;

(*i*) The avoidance of unnecessary waste in the utilization of waters of the basin;

(*j*) The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(*k*) The degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State".

Subsequently, Article 6(1) of the 1997 UN Convention on International Watercourses recognised the following as relevant circumstances:

"(*a*) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(*b*) The social and economic needs of the watercourse States concerned;

(*c*) The population dependant on the watercourse in each watercourse State;

(*d*) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;

(*e*) Existing and potential uses of the watercourse;

(*f*) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; [and]

(*g*) The availability of alternatives, of comparable value, to a particular planned or existing use".

Although these two lists of relevant circumstances differ in some particulars, they can be divided into four categories: the social and economic needs of the States; existing uses; efficient utilisation; and natural factors (including geography and hydrology).

Firstly, Article 6(1)(*b*) of the 1997 UN Convention on International Watercourses and Article V(2)(*e*) of the 1966 Helsinki Rules explicitly refer to the 'social and economic needs of the States'. However, other relevant circumstances in the two lists are also connected to these needs. For example, the reference to the 'population dependant on the watercourse' inserted in Article 6(1)(*c*) of the 1997 UN Convention on International Watercourses and Article V(2)(*f*) of the 1966 Helsinki Rules alludes to the social and economic needs of the States concerned. The 'existence of alternative water or other resources' mentioned in Article 6(1)(*g*) of the 1997 UN Convention on International

Watercourses and Article V(2)(*h*) of the 1966 Helsinki Rules may also be a relevant circumstance relating to the social and economic needs of the States involved. Furthermore, the 'extent of irrigated or irrigable land' and the 'extent of the economy of the States which is dependant on the river' have been proposed as relevant to the context of the utilisation of 'national' watercourses, even though they are not included in the two above-mentioned lists of relevant circumstances.[30] With regard to the category of the social and economic needs of the States concerned, it should be noted that the 'domestic uses' of international watercourses, such as drinking, may have priority over other relevant circumstances.[31] This point is connected to the fact that Article 10(2) of the 1997 UN Convention on International Watercourses includes the phrase 'with special regard being given to the requirements of vital human needs'.

Secondly, Article 6(1)(*e*) of the 1997 UN Convention on International Watercourses and Article V(2)(*d*) of the 1966 Helsinki Rules dealt with the 'existing uses' of international watercourses. With respect to the existing uses of international watercourses, the most important issue is whether or not this circumstance has priority over other relevant circumstances. As Ximena Fuentes points out, Article 6(3) of the 1997 UN Convention on International Watercourses clearly implies that no relevant circumstance has an inherent priority over other circumstances.[32] It is also worth noting that the existing uses of international watercourses might not function as a relevant circumstance without respect to other relevant circumstances, because existing uses could include 'historical' elements.[33] In other words, the existing uses of international watercourses may or may not be a relevant circumstance depending on the 'present' social and economic needs of the States concerned.

Thirdly, Article 6(1)(*f*) of the 1997 UN Convention on International Watercourses and Article V(2)(*i*) of the 1966 Helsinki Rules dealt with the 'efficient utilisation' of international watercourses. Here, we can see that the scope of the 1997 UN Convention on International Watercourses is broader than that of the 1966 Helsinki Rules, which only regulated the avoidance of unnecessary waste. What is important, in this context, is that efficiency has little relevance to the 'allocation' of international watercourses, because it would be affected by financial and technical issues, such as the construction of new dams

[30] Ximena Fuentes, "The Criteria for the Equitable Utilization of International Rivers", *The British Year Book of International Law*, Issue 67 (1996), pp.347-348, 349-350.
[31] *Ibid.*, p.351.
[32] *Ibid.*, pp.356-357.
[33] *Ibid.*, pp.372-373.

(assuming that the State concerned does not intentionally waste water resources).[34] In an exceptional case, wilful waste could result in the denial of water resources to the wasteful State, whose behaviour may be considered to evince no need for water. Therefore, except for rare cases in which the State concerned intentionally wastes water resources, efficient utilisation cannot generally be considered a relevant circumstance with regard to the allocation of international watercourses. However, efficiency can play a role in weighing up different uses.[35] In other words, if the two matters of irrigation and power generation conflict, efficient utilisation may prove a relevant circumstance necessary to arrive at equitable utilisation.

Fourthly, Article 6(1)(*a*) of the 1997 UN Convention on International Watercourses, and Article V(2)(*a*), (*b*) and (*c*) of the 1966 Helsinki Rules, are related to 'natural factors', such as the length of river frontage, the extent of the drainage area in the territory of each State, and the contribution of water by each State. Still, such natural factors are no more than 'auxiliary' factors, because other relevant circumstances, such as the social and economic needs of the States concerned, and the existing uses of international watercourses, are regarded as more significant means of attaining the equitable utilisation of international watercourses.[36] If the quantity of water is sufficient, natural factors have no role in determining the quantity of water to be allocated to the States concerned.[37] When water is lacking, however, such natural factors are employed as relevant circumstances to adjust the quantity of water indicated by the social and economic needs of the States concerned, or the existing uses of international watercourses.[38]

As Article 10(1) of the 1997 UN Convention on International Watercourses and Article VI of the 1966 Helsinki Rules clearly indicate, no single relevant circumstance takes inherent priority over other relevant circumstances. However, of the four categories mentioned above, States' social and economic needs seem to take some precedence over the other categories.

2.1.5. A Concluding Remark

As shown above through analysis of the judgements and arbitral awards of international courts and tribunals, the concept of equitable utilisation has been accepted, but no list of

[34] *Ibid.*, pp.379-385.
[35] *Ibid.*, pp.385-389.
[36] *Ibid.*, p.403.
[37] *Ibid.*, pp.401-402.
[38] *Ibid.*, pp.402-403.

relevant circumstances has yet been produced by international courts and tribunals. The reason for this is that, in reality, these cases did not deal with the allocation of shared water. Instead, the ILA (in 1966) and the UN (with the assistance of the ILC in 1997) made their two lists of relevant circumstances with regard to the equitable utilisation of international watercourses.

Case-law on the issue of international watercourses, unlike that regarding maritime boundary delimitation, has not dealt with the examples of relevant circumstances. Nevertheless, the reason for considering the normative density of the law of international watercourses to be the 'highest' with respect to the concept of relevant circumstances is that a list of relevant circumstances has clearly been assumed by the relevant treaties.

Moreover, although the two lists of relevant circumstances cited above are not exhaustive, it is doubtful whether other relevant circumstances, to which the two lists do not refer, can be found. As discussed above, equitable utilisation would generally be guided by the social and economic needs of the States concerned; and in the process of weighing up these 'needs', special regard would be paid to vital human needs. In other words, the list of relevant circumstances with regard to the utilisation of international watercourses has been fixed. For this reason, it can be said that the concept of relevant circumstances included in the law of international watercourses has the highest normative density in international law.

However, the normative density concerning the law of international watercourses is confined to the 'list' of relevant circumstances and the weighing-up 'process' itself. In other words, as will be dealt with below, in spite of the highest normative density of relevant circumstances, the weighing-up of such relevant circumstances must be flexible.

2.2. The Intermediate Level: The Law of Maritime Boundary Delimitation

2.2.1. Non-existence of the List of Relevant Circumstances

It is true that the law of maritime boundary delimitation has not yet made an established list of relevant circumstances. When the 1958 Geneva Convention on the Continental Shelf was concluded, there was insufficient material to do so, in contrast with the law of international watercourses, because the delimitation of maritime boundaries was a new subject in the field of international law at that time. That is to say, international case-law could not be consulted as a source for the list of relevant circumstances. Moreover, the matter of special or relevant circumstances was no more than a secondary issue at this time, since the 1958 Geneva

Convention on the Continental Shelf considered the application of the equidistance method to be the essence of the delimitation process. In other words, relevant circumstances were confined to their ameliorative function under the 1958 Geneva Convention on the Continental Shelf.[39] Furthermore, the 1982 UNCLOS, unlike the 1958 Geneva Convention on the Continental Shelf, did not even articulate the term 'special' or 'relevant' circumstances in relation to the delimitation of the EEZ or the continental shelf (except for the delimitation of the territorial sea).

For these reasons, the examples of relevant circumstances identified in international cases since the 1969 *North Sea Continental Shelf* cases of the ICJ would be helpful in drawing up a list of relevant circumstances. Nevertheless, this thesis will regard the normative density of relevant circumstances in the law of maritime boundary delimitation to be at an intermediate level, because the list of relevant circumstances 'could' potentially be formulated. In this context, it should be noted that this research will examine the normative density of the list of relevant circumstances in maritime delimitation in two ways. One assumes that the list of relevant circumstances could be formulated through the examination of international cases, based on the premise that there is no limit on the categories of relevant circumstances. The other acknowledges that, despite there theoretically being no limit, some limits on the open-endedness of categories of relevant circumstances have been set.

2.2.2. The Open-endedness of Categories of Relevant Circumstances

In the 1969 *North Sea Continental Shelf* cases, the ICJ stated that:

> "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations".[40]

The Court explicitly admitted the open-endedness of categories of the circumstances which 'might' be relevant. In light of this case (in which the ICJ only declared the delimitation rule to be applied in the negotiations of the States involved), it must be noted that the absence of a legal limit on the considerations of which States may take account in their negotiations does not necessarily mean that there is no legal limit on the circumstances which

[39] See Malcolm D. Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances", *International and Comparative Law Quarterly*, Volume 40 (1991), p.3.
[40] *I.C.J. Reports 1969*, p.50, para.93.

international courts and tribunals can take into account. As will be shown below, international courts and tribunals cannot endorse the categories of relevant circumstances as limitless.

Since the 1977 *Anglo-French Continental Shelf* case in which the Court of Arbitration was requested to draw a delimitation line, States have advanced quite a few circumstances which might be relevant, in line with the logic of the 1969 *North Sea Continental Shelf* cases that there is no limit on the list of the circumstances to be considered. Of the circumstances presented by the States involved, some have been regarded as relevant, while others have been rejected by international courts and tribunals. For example, geographical factors have proven to be one of the typical examples of relevant circumstances, whereas security interests have never been considered relevant in international case-law.

One important question concerns whether or not it is permanently impossible to incorporate the categories of the circumstances which have been rejected in the past into the list of relevant circumstances. The answer is perhaps in the negative. Although the 1984 *Gulf of Maine* case made it very difficult for economic factors to be included in the list of relevant circumstances, the possibility of regarding them as relevant to a certain case was not totally eliminated. The reason for this is that each case has its own characteristics. In this context, it is evident that the statement made in the 1985 *Guinea/Guinea-Bissau* case ("each case of delimitation is a *unicum*") [41] justified the open-endedness of relevant circumstance categorisation in maritime delimitation. Therefore, the fact that a certain factor (which might be relevant) has not been regarded as relevant in international case-law does not necessarily mean that the factor will never be one of the relevant circumstances in the future.

In consequence, the open-endedness of categories of relevant circumstances is a useful starting point in the process of achieving an equitable result. Such open-endedness enables the flexible application of the rules governing maritime delimitation. For instance, Professor Evans agrees that the open-endedness of categories of relevant circumstances decreases the likelihood of recourse to the equidistance method.[42] However, despite the theoretical open-endedness of these categories in maritime delimitation, the categories of claims made by the States concerned and accepted in international judgements have led to the 'virtual' formulation of a list of relevant circumstances with regard to the normative

[41] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.289-290, para.89.
[42] Evans, *supra* note 39, p.17.

density of relevant circumstances. This is due to the fact that certain limits have been set on the open-endedness of categories of relevant circumstances. This issue will be discussed in the following section.

2.2.3. Limits on the Open-endedness of Categories of Relevant Circumstances

In the process of taking into account all relevant circumstances, two key factors set limits on the open-endedness of categories of relevant circumstances, as described below.

Firstly, in international cases regarding the delimitation of maritime boundaries, it is evident that certain relevant circumstances have been accorded more weight. For example, since the main practical issue of maritime boundary delimitation has become the establishment of an SMB, so-called 'neutral' circumstances – such as geographical factors, related to both the EEZ and the continental shelf – have been prioritised in the process of taking account of all relevant circumstances. Comparatively little attention has been paid to economic factors and security issues.

Secondly, the relevance of a particular circumstance has usually been determined on the 'basis of title'. For instance, since the concept of natural prolongation was the basis of title to the continental shelf in the 1969 *North Sea Continental Shelf* cases,[43] these cases regarded circumstances relating to the geological context as the circumstances which might be relevant.[44] On the contrary, the 1985 *Continental Shelf* (Libya/Malta) case did not consider geological or geophysical factors within 200NM to be relevant circumstances because the 1985 Judgment of the ICJ was based on the criterion of distance.[45]

In sum, in the process of taking account of all relevant circumstances, the open-endedness of categories of relevant circumstances has been restricted by the weighing-up process and the basis of title to maritime areas. However, in comparison with the law of international watercourses, it is worth asking whether or not the law of maritime boundary delimitation exhibits a 'special regard' (for example, the vital human needs to be prioritised in the law of international watercourses). In relation to the absence of a fixed weight or a special regard, Professor Evans points out that the term 'open-ended' includes "the sense that an example of a factor identified as a special circumstance need not always be treated as such".[46] Thus, the weighing-up process does not necessarily reduce the open-endedness of

[43] *I.C.J. Reports 1969*, p.31, para.43.
[44] *I.C.J. Reports 1969*, p.51, para.95.
[45] *I.C.J. Reports 1985*, p.35, para.39.
[46] See Evans, *supra* note 39, p.5.

categories of relevant circumstances. For these reasons, the normative density of relevant circumstances in maritime delimitation can be regarded as at an intermediate level in comparison with the law of international watercourses. It follows that such an intermediate level of the normative density of relevant circumstances does not eliminate the flexibility of application of the rules governing maritime delimitation.

2.3. The Lowest Level: The Law of High Sea Fisheries

2.3.1. The Emergence of the Concept of Equitable Allocation

The right of States to natural resources (whether living or non-living) was originally based on the concept of 'sovereignty'. This was expressed in Resolution 1803 (XVII) [Permanent Sovereignty over Natural Resources][47] of the UN General Assembly, adopted in 1962, and Resolutions 3201 (S-VI) [Declaration on the Establishment of a New International Economic Order][48] and 3281 (XXIX) [Charter of Economic Rights and Duties of States][49] of the UN General Assembly, adopted in 1974. Moreover, international decisions with regard to fisheries (the 1951 *Norwegian Fisheries* case of the ICJ and the 1893 *Behring Sea Fur-Seals Arbitration* case)[50] have traditionally been founded on the concept of jurisdiction derived from sovereignty. In the 1951 *Norwegian Fisheries* case of the ICJ, the United Kingdom cast doubt on the validity of the limit lines of the Norwegian fisheries zone.[51] The UK's assertion reflected the freedom of the high seas 'outside' the limit lines of Norway.[52] Likewise, in the 1893 *Behring Sea Fur-Seals Arbitration* case, the contention that the United States had the right of protection or property to the fur-seals frequenting its islands in the Behring Sea, when such seals were found 'outside' the ordinary three-mile limit, was rejected.[53]

However, as States and international organisations have begun to express more and

[47] The preamble of this Resolution stated that "the sovereign right of every State to dispose of its wealth and its natural resources should be respected".
[48] Paragraph 4 of this Declaration mandated that "[t]he new international economic order should be founded on full respect for the following principles: […] (*e*) full permanent sovereignty of every State over its natural resources and all economic activities".
[49] Article 2(1) of Chapter II (of this Charter) stated that "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities".
[50] The 1893 *Behring Sea Fur-Seals Arbitration* (Paris, 15th August 1893) case is summarised in *International Environmental Law Reports*, Volume 1 (1999), pp.43-88.
[51] *I.C.J. Reports 1951*, pp.118-119.
[52] *I.C.J. Reports 1951*, pp.119-123.
[53] See *Behring Sea Fur-Seals Arbitration* (Paris, 15th August 1893), *International Environmental Law Reports*, Volume 1 (1999), pp.53, 61, 70.

more interest in environmental issues or the utilisation of natural resources beyond national jurisdiction, greater attention has been paid to the concepts, such as 'shared natural resources', 'common property', and 'common heritage'. With respect to the concept of shared natural resources, Patricia Birnie, Alan Boyle, and Catherine Redgwell state that "[t]hese resources do not fall wholly within the exclusive control of one state, but neither are they the common property of all states".[54] According to the authors, shared natural resources reflect the interests of a relatively limited group of States in geographical proximity (or continuity), whereas common property is concerned with the interests of all States. Therefore, shared natural resources are 'under' the jurisdiction of a number of States, whereas common property is related to spaces 'beyond' national jurisdiction.[55]

In conclusion, the concept of shared natural resources raised the issue of equitable utilisation, whereas the concept of common property resulted in the emergence of the doctrine of equitable allocation. This study will examine the doctrine of equitable allocation applied to the high seas as common property, and the extent to which this doctrine differs from the doctrine of equitable utilisation.

2.3.2. Common Property and the Doctrine of Equitable Allocation

In essence, common property is related to areas beyond national jurisdiction, such as the high seas. Hence, States have traditionally regarded fishery stocks found in the high seas, where the freedom of navigation, fishing or scientific research can be exercised, as common property accessible to all States.[56] However, coastal fishing States have sought to extend their EFZs, which enable them to assert their exclusive rights with regard to fishing. The arguments made by coastal fishing States on this subject have resulted in conflicts with distant water States, which support free access to common property. The 1974 *Icelandic Fisheries* cases of the ICJ highlighted the conflict between coastal fishing States and other States.

By the early 1970s, Iceland's share of the catch of demersal species was slightly over 50 per cent in the waters around Iceland. Accordingly, in 1972, Iceland unilaterally extended its EFZ from 12NM to 50NM.[57] The United Kingdom and Germany, both greatly affected by

[54] Birnie, Boyle and Redgwell, *supra* note 2, p.192.
[55] *Ibid.*, pp.192, 194-195.
[56] *Ibid.*, p.195.
[57] R. R. Churchill, "The Fisheries Jurisdiction Cases: the Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights", *International and Comparative Law Quarterly*, Volume 24 (1975), p.84.

Iceland's action, each referred this matter to the ICJ. Even though the Court did not clearly express that a 50NM EFZ (beyond 12NM) was contrary to international law,[58] it acknowledged the 'preferential rights' of Iceland and the 'historic fishing rights' of the United Kingdom and Germany 'in the waters between the 12NM and 50NM limits'.[59] The ICJ clearly stated that "[t]he characterization of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States".[60] In order to resolve the conflict between the preferential rights of coastal fishing States and the traditional fishing rights of distant water States, the ICJ suggested that a rule of international law be applied which itself requires the application of equitable principles, as noted in the 1969 *North Sea Continental Shelf* cases.[61] In other words, the 1974 *Icelandic Fisheries* cases regarded the application of equitable principles as the existing rule governing the allocation of high sea fisheries.

In terms of the need to balance the conflicting interests of coastal and other States, one important point must be noted. The 'uniqueness' of each case should be taken into consideration in order to reach an equitable allocation of fishing resources.[62] For example, the degree of a coastal State's preference cannot be considered to be fixed.[63] It is evident that this emphasis on the particular situation of each case reflects the flexibility of the rules in the law of high sea fisheries. It can thus be said that the application of equitable principles means to take into account all relevant circumstances, even in the law of high sea fisheries.

2.3.3. The Doctrine of Equitable Allocation and Its Impact on the UNCLOS

The preferential rights of coastal States, one circumstance to be taken into account in order to arrive at an equitable allocation, affected the content of the 1982 UNCLOS.[64] According to Article 56(1) of the UNCLOS, following the introduction of the concept of the EEZ, coastal States have sovereign rights for the purposes of exploring and exploiting, conserving and managing natural resources (whether living or non-living) within 200NM. This means that marine living resources existing within 200NM are no longer regarded as common

[58] That is, the ICJ stated only that the Icelandic Regulations establishing a 50NM EFZ are 'not opposable' to the United Kingdom and Germany. See *I.C.J. Reports 1974*, pp.23-24, para.53; *I.C.J. Reports 1974*, p.29, para.67; *I.C.J. Reports 1974*, p.192, para.45; *I.C.J. Reports 1974*, p.198, para.59.
[59] See *I.C.J. Reports 1974*, pp.26-27, paras.58-59; *I.C.J. Reports 1974*, pp.27-28, para.62; *I.C.J. Reports 1974*, p.29, para.68.
[60] *I.C.J. Reports 1974*, pp.27-28, para.62.
[61] *I.C.J. Reports 1974*, p.33, para.78.
[62] *I.C.J. Reports 1974*, pp.31-32, para.73; *I.C.J. Reports 1974*, p.33, para.78.
[63] *I.C.J. Reports 1974*, p.30, para.70.
[64] See Birnie, Boyle and Redgwell, *supra* note 2, p.196.

property.[65] Rather, relying on the notion of national self-interest, the UNCLOS seeks to ensure the sustainability of marine resources which have previously been considered common property.[66] It should also be noted that the preferential rights of coastal States were transformed into sovereign rights (which are more exclusive than preferential rights).

However, the traditional fishing rights of distant water States (another circumstance to be taken into account when States seek to reach an equitable allocation), as confirmed in the 1974 *Icelandic Fisheries* cases, are decreasing in importance. Article 62(3) of the UNCLOS referred to the 'need to minimize economic dislocation in States whose nationals have habitually fished in the zone', in relation to the traditional fishing rights of distant water States. This statement recalls the argument made by the United Kingdom in the 1974 *Icelandic Fisheries* cases that the exclusion of British fishing vessels from the Icelandic area would affect the British fishing industry.[67] However, the inclusion of Article 62(3) of the UNCLOS is no more than one factor among all of the relevant factors which a coastal State is required to 'take into account' in order to permit other States' access to its EEZ.[68] In other words, compared to the preferential rights of coastal States, the traditional fishing rights of distant water States are not reflected in the UNCLOS. Nevertheless, it should be noted that the doctrine of equitable allocation may at least in part be applied to the law of high seas fisheries, with respect to straddling and highly migratory fish stocks.

Although the importance of the traditional fishing rights of distant water States diminished with the introduction of the EEZ, the preferential rights of coastal States and the traditional fishing rights of distant water States should still be respected in the high seas, as the ICJ confirmed in the 1974 *Icelandic Fisheries* cases. Still, the number of relevant circumstances is small, and the weighing-up process unclear. For these reasons, the present thesis considers the normative density of relevant circumstances in the law of high seas fisheries to be at the lowest possible level.

2.4. A Concluding Remark

The normative density of relevant circumstances has been examined in three areas of international law. Whether or not there is an established list of relevant circumstances makes the normative density of each area diverse. Nonetheless, of importance is that the

[65] *Ibid.*, p.705.
[66] *Ibid.*
[67] *I.C.J. Reports 1974*, p.28, para.64.
[68] David Joseph Attard, *The Exclusive Economic Zone in International Law* (Oxford: Oxford University Press, 1987), pp.170-171.

consideration of all relevant circumstances, not the application of so-called equitable principles, produces an equitable result. Despite the difference of normative density among the three areas, the concept of relevant circumstances is still essential in arriving at an equitable solution.

In the following section, three phases in taking into account such relevant circumstances in maritime delimitation will be examined.

3. Three Phases in the Process of Taking into Account Relevant Circumstances in Maritime Delimitation

3.1. The Identification of Relevant Circumstances

3.1.1. The Concept of Relevant Circumstances

As pointed out in Chapter III, the application of equity in maritime delimitation means taking account of all the relevant circumstances in a delimitation case in order to reach an equitable result. The first phase in this process involves identifying relevant circumstances. In the 1969 *North Sea Continental Shelf* cases, the ICJ only referenced factors which 'might' be relevant because these cases did not aim to draw a delimitation line. However, all international delimitation cases except for the 1969 *North Sea Continental Shelf* cases have sought to identify concretely circumstances regarded as relevant in each case. The reason for this is that it is necessary to consider all the relevant circumstances of a given case in order to construct a delimitation line.

According to the ICJ in the 1993 *Greenland/Jan Mayen* case, the concept of relevant circumstances "can be described as a fact necessary to be taken into account in the delimitation process". [69] Moreover, the Court implied that the concept of special circumstances and that of relevant circumstances are frequently assimilated because both concepts are utilised to achieve an equitable result.[70] The ICJ indicated that these concepts play the same role in the delimitation process, despite the difference between the terms. Both concepts refer to 'facts' which must be taken into consideration in order to produce an equitable result. However, these facts do not necessarily include *all* facts. Only facts deemed

[69] *I.C.J. Reports 1993*, p.62, para.55.
[70] *I.C.J. Reports 1993*, pp.62-63, para.56.

to be relevant in the course of the delimitation operation can be included in the categories of relevant circumstances in any given case. It is worth noting here that the concept of relevant circumstances must be distinguished from the concept of relevant coasts or relevant areas, as will be discussed in detail in the following section.

3.1.2. The Concepts of Relevant Coasts and Relevant Areas

In the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, the ICJ described the concept of relevant coasts as follows:

> "The Court will therefore first determine the relevant coasts of the Parties, *from which will be determined the location of the baselines and the pertinent basepoints* which enable the equidistance line to be measured" [emphasis added].[71]

While this case was interested in technical issues relating to relevant coasts which were to determine the 'baselines' and the 'basepoints' needed to draw a provisional equidistance line, the 2009 *Maritime Delimitation in the Black Sea* case of the ICJ defined the concept of relevant coasts in clearer terms. The Court stated that "the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other Party".[72] In other words, if the projections generated by one State's coasts do not overlap with those generated by the other State's coasts, neither coast can be considered relevant.

The role of coasts is basically to indicate the rights of the States concerned to the EEZ or the continental shelf.[73] Notably, in the 1982 *Continental Shelf* (Tunisia/Libya) case, the ICJ pointed out that "the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it".[74] What is the role of relevant coasts if the role of coasts is associated with generating the rights of the States concerned? The 2009 *Maritime Delimitation in the Black Sea* case referred to the two roles of relevant coasts: one is to determine "what constitutes […] the overlapping claims to these zones [the continental shelf and the EEZ]", and the other is to "check […] whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the

[71] *I.C.J. Reports 2001*, p.94, para.178.
[72] *I.C.J. Reports 2009*, pp.96-97, para.99.
[73] *I.C.J. Reports 2009*, p.89, para.77.
[74] *I.C.J. Reports 1982*, p.61, para.73.

delimitation line".[75]

Even though relevant coasts have two important legal functions, it must be noted that relevant coasts are not relevant circumstances. According to the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, relevant coasts must be defined 'before' relevant circumstances are identified.[76] The most important reason why relevant coasts should not be regarded as relevant circumstances is that the former refers to the 'objective' geographical context of a certain delimitation case. The 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case of the Arbitral Tribunal indicated that the identification of relevant coasts is an 'objective' criterion, like the equidistance method.[77] Bearing the issue of objectivity in mind, the 2009 *Maritime Delimitation in the Black Sea* case did not regard Serpents' Island as one of the relevant coasts, in order to avoid a judicial refashioning of geography.[78]

In sum, the determination of relevant coasts is a 'preliminary' and 'objective' process preceding the identification and weighing-up of relevant circumstances. Therefore, the concept of relevant coasts cannot be equated with that of relevant circumstances.

The concept of relevant areas must also be distinguished from that of relevant circumstances. Basically, relevant areas can be determined by the configuration of relevant coasts.[79] This means, for instance, that a gulf which is not regarded as one of the relevant coasts may be excluded.[80] Also, the maritime areas of the third parties cannot be understood as relevant areas.[81] Why is the concept of relevant areas employed? In the 2009 *Maritime Delimitation in the Black Sea* case, the ICJ implied that the concept of relevant areas is required to check proportionality in the final stage of the delimitation operation.[82] In this final phase, a result proposed by the delimitation process is assessed for its equitability 'by reference to the respective coastal lengths and the apportionment of areas that ensue'.[83]

In short, therefore, the determination of relevant coasts is a preliminary phase, and the concept of relevant areas is needed to check the proportionality of a proposed result obtained through the delimitation operation, as discussed above. In contrast, relevant

[75] *I.C.J. Reports 2009*, p.89, para.78.
[76] *I.C.J. Reports 2002*, p.442, para.290.
[77] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.70, para.231.
[78] *I.C.J. Reports 2009*, pp.109-110, para.149.
[79] *I.C.J. Reports 2009*, pp.99-100, para.110.
[80] See *I.C.J. Reports 2009*, p.100, para.113.
[81] See *I.C.J. Reports 2009*, p.100, para.112.
[82] *I.C.J. Reports 2009*, pp.99-100, para.110.
[83] *I.C.J. Reports 2009*, p.129, para.210.

circumstances are facts which should be taken into consideration during the delimitation process. Why should relevant circumstances be taken into account in this process? The most important reason is that an equitable result cannot be achieved unless relevant facts are taken into consideration.[84] Other explanations have been offered for the significance of facts which may affect the legal rights of States in disputes over maritime areas, such as the EEZ or the continental shelf. During the 1993 *Greenland/Jan Mayen* case of the ICJ, for example, Judge Ranjeva declared that "special or relevant circumstances appear as *facts which affect the rights of States over their maritime spaces* as recognized in positive law, either in their entirety or in the exercise of the powers relating thereto" [emphasis added].[85] The false premise of Judge Ranjeva is that such rights 'already' belong to the States concerned. Crucially, however, the reason why the issue of maritime delimitation is raised is that the States concerned 'all' have 'entitlements' to the maritime areas which will be delimited. It is not logical to 'fully' respect the legal rights of one State *and* only 'partially' respect the legal rights of another State. Respecting each set of legal rights to a different extent would not lead to an equitable result.

Therefore, the reason why we take into account all relevant circumstances is that these facts affect the equitability of the result achieved. In its next section, the thesis will deal with the process of identifying a certain circumstance as relevant in the delimitation operation.

3.1.3. How Does a Certain Circumstance Become Relevant to the Delimitation Process?

If a certain circumstance is necessary to arrive at an equitable result, that circumstance is regarded as relevant to the delimitation process. Since the 1969 *North Sea Continental Shelf* cases, international courts and tribunals have identified the relevant circumstances of each delimitation case by reviewing the arguments of the States concerned. Two broad categories of relevant circumstances have emerged through the accumulation of international delimitation cases: geographical circumstances and non-geographical circumstances. If international courts and tribunals do not take account of geographical circumstances, a refashioning of geography or a cut-off effect may occur. Either outcome would adversely affect the equitability of the result. Non-geographical circumstances, such as economic

[84] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge: Grotius Publications Limited, 1989), p.210.
[85] Declaration of Judge Ranjeva, *I.C.J. Reports 1993*, p.88.

factors, the conduct of the States concerned, and security issues relating to a case, may also be deemed to be relevant if they have an impact on the interests of States which can otherwise be protected in an equitable way.

How do we determine which facts are necessary to achieve an equitable result? If the existence of a fact affects the achievement of an equitable result, it is defined as a relevant circumstance. That is to say, if international courts and tribunals need to take into account the existence of a fact to produce an equitable result, that fact must be considered relevant to a certain delimitation case. For example, if a cut-off effect may result from the presence of islands in a delimitation case, the presence of islands itself becomes a relevant circumstance in that case.

This process of determining the relevance of a circumstance reflects the flexibility of application of the rules governing maritime delimitation. In this context, Professor Evans states that "[c]ommon sense plays a part in this […] the adage 'you know one when you see one' is an honest statement".[86] However, the relevance (or otherwise) of a circumstance is determined not by either or both Parties, but by an international court or tribunal responsible for interpreting the significance of a circumstance and applying the current delimitation rule. Evidently, international courts and tribunals exercise their discretion in the course of identifying relevant circumstances so as to achieve an equitable result. With regard to identifying the relevance of a circumstance, the ITLOS stated in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case that "there is no general rule".[87] International courts and tribunals can determine the relevance of a circumstance to a certain delimitation case on a case-by-case basis, but they must not produce an arbitrary result on the false premise that a specific circumstance is always relevant. Even if the list of relevant circumstances in the law of maritime boundary delimitation could be fixed, flexibility would have to remain a dominant characteristic of the process of applying the rules governing maritime delimitation because the concept of an equitable result is not fixed for any given case. An equitable result may reflect the avoidance of geographical refashioning, non-encroachment on natural prolongation, an equal division, or proportionality.[88] However, the concept of an equitable result is not determined in advance

[86] Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Oxford University Press, 1989), p.90.
[87] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.96, para.317.
[88] Phaedon John Kozyris also categorises non-encroachment as a legal 'conclusion'. See Phaedon John Kozyris, "Lifting the Veils of Equity in Maritime Entitlements: Equidistance with Proportionality

in a given case. In the last section of this chapter, the diversity of an equitable result will be addressed.

At this point, it is appropriate to examine the issue of the 'typification' of relevant circumstances. A list of relevant circumstances could be drawn up through the examination of international case-law; however, in an actual delimitation dispute, a certain circumstance can only be considered relevant to the case if it is necessary to produce an equitable result. For instance, the presence of islands must not be considered a relevant circumstance unless it is required to obtain an equitable result in a particular case, even though the presence of islands is generally discussed in terms of the categories of relevant circumstances. By the same token, an economic factor cannot be a relevant circumstance unless it has a role in properly balancing the legal rights of the States concerned regarding the EEZ or the continental shelf. Hence, it is not appropriate to argue that the 'typification' of relevant circumstances may enhance the predictability of application of the rules in the law of maritime boundary delimitation.[89] The 1985 *Continental Shelf* (Libya/Malta) case of the ICJ suggested that only circumstances 'pertinent' to a maritime space like the continental shelf can be considered to be relevant.[90] The Court intended in this regard to support the typification of relevant circumstances. However, the circumstances necessary to reach an equitable result in one case may not be relevant in another, because different cases have different relevant circumstances. The uniqueness of each set of relevant circumstances – reflecting the fact that each delimitation case is a '*unicum*' – also demands that the application of the rules governing maritime delimitation is flexible. In short, the typification of relevant circumstances is of no use, because a specific circumstance may be relevant to one case but irrelevant to another.

To sum up, a given circumstance becomes relevant to a specific delimitation dispute if the failure to consider that circumstance brings about a refashioning of geography or prevents the interests of the States involved from being protected in an equitable way. Thus, in an actual case, the typification of relevant circumstances could prevent the flexible application of the rules governing maritime delimitation. At this point, it should be noted that awareness of each case as a *unicum* does not necessarily lead to a decision *ex aequo et bono*. A given delimitation case relies on the appropriate consideration of all relevant

around the Islands", *Denver Journal of International Law & Policy*, Volume 26 (1997-1998), Issue 3, p.358.

[89] See Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2003), pp.262-265.

[90] *I.C.J. Reports 1985*, p.40, para.48.

circumstances in order to achieve an equitable result, and thus excludes the consideration of 'irrelevant' circumstances. Identifying all of the relevant circumstances of each case is the first phase of the process of taking into account relevant circumstances in maritime delimitation so as to produce an equitable result.

3.1.4. Might a Delimitation Case Lack Relevant Circumstances Altogether?

If international courts and tribunals declare that they cannot identify any relevant circumstances in the delimitation process, does this mean that no relevant circumstances exist for that case? This question might be asked of the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, the 2009 *Maritime Delimitation in the Black Sea* case, and the areas beyond 12NM up to 200NM of the 2007 *Maritime Delimitation* (Guyana/Suriname) case. In all of these cases, international courts and tribunals declared that no relevant circumstances existed. Here, the concept of 'no relevant circumstances' must be distinguished from that of 'no relevant circumstances to adjust a provisional equidistance line'. It was strongly implied in each of these cases that 'relevant circumstances to adjust a provisional equidistance line' were non-existent, not that the case had 'no relevant circumstances' whatsoever. It is incorrect, therefore, to state that international courts and tribunals failed to identify even a single relevant circumstance in these cases.

In fact, it should not be overlooked that international courts and tribunals have already taken relevant circumstances into account when they draw a provisional equidistance line. Unless 'coastal geography' (not 'relevant coasts') prevents an equidistance line from being regarded as the appropriate provisional line in a given case, that line can provisionally be constructed. It follows that international courts and tribunals identify coastal geography as one of the relevant circumstances in the maritime delimitation process. In the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, the 2009 *Maritime Delimitation in the Black Sea* case, and the areas beyond 12NM up to 200NM of the 2007 *Maritime Delimitation* (Guyana/Suriname) case, for example, international courts and tribunals all concluded that a provisional equidistance line would become the final delimitation line. However, they also clearly identified coastal geography as one of the relevant circumstances of each case. In fact, coastal geography is preferentially taken into account when relevant circumstances are identified. It can be said, therefore, that there is no delimitation case in which relevant circumstances cannot be identified.

If every case possesses relevant circumstances, is coastal geography a relevant

circumstance that should be taken into account in 'all' delimitation cases? The answer is in the affirmative, for two reasons. First, the concept of coastlines is the basis of the 'entitlements' of the States concerned to the EEZ and the continental shelf.[91] Second, coastal geography can indicate whether or not a provisional equidistance line can be drawn. In this regard, it should be observed that earlier cases differ from recent ones in the treatment of coastal geography. In earlier cases, coastal geography was reviewed primarily for the purpose of allowing international courts and tribunals to determine the convexity or concavity of the coastlines involved, and to clarify the coastal relationship between the States concerned.[92] In more recent cases, however, international courts and tribunals have reviewed coastal geography with an emphasis on the question of whether or not a provisional equidistance line can be constructed. For example, the coastal geography of the 2007 *Caribbean Sea* (Nicaragua/Honduras) case indicated that the drawing of a provisional equidistance line would be inappropriate, as certain geographical problems were identified as relevant circumstances, including the absence of viable basepoints at Cape Gracias a Dios.[93]

3.2. The Process of Weighing Up Relevant Circumstances

3.2.1. The Process of Weighing Up Relevant Circumstances with Regard to the Delimitation of the Continental Shelf

The second stage in the process of taking into account relevant circumstances in maritime delimitation is the weighing-up of relevant circumstances. What does this stage involve? Is it necessary to weigh up relevant circumstances only when two or more such circumstances are identified? If two or more relevant circumstances are found *and* there is no conflict between them, is the weighing-up process unnecessary? Does the weighing-up process aim to grant weight to a certain relevant circumstance even when only one such circumstance has been identified?

This section will first examine the process of weighing-up in certain international cases, with regard to the delimitation of the continental shelf. This process was carried out during the 1977 *Anglo-French Continental Shelf* case, the 1982 *Continental Shelf* (Tunisia/Libya) case, and the 1985 *Continental Shelf* (Libya/Malta) case, all of which dealt

[91] See *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), pp.72-73, para.239.
[92] See *I.C.J. Reports 1969*, p.49, para.89; *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.87-88, para.181.
[93] *I.C.J. Reports 2007*, pp.742-743, paras.277-278.

solely with the delimitation of the continental shelf. In the part of the 1977 *Anglo-French Continental Shelf* case relating to the Channel Islands region, for example, two relevant circumstances (the oppositeness of the relevant coasts of the two States, and the presence of the Channel Islands) were taken into account separately, as they were assumed to have no impact on each other.[94] In the Atlantic region of the same case, however, two additional relevant circumstances (the position of the two States in relation to the same continental shelf, and the presence of the Scilly Isles) were weighed up.[95] Since the presence of the Scilly Isles made the drawing of an equidistance line inequitable (despite the fact that the States occupied the same position in relation to the same continental shelf), the Scilly Isles were accorded half effect. In other words, the weighing-up process in the Atlantic region gave more weight to the position of the two States in relation to the same continental shelf.

Similarly, in the second sector of the 1982 *Continental Shelf* (Tunisia/Libya) case, two relevant circumstances were identified: the transformation of the relationship between Tunisia and Libya from that of adjacent States to that of opposite States, and the presence of the Kerkennah Islands.[96] In the weighing-up process, the Kerkennah Islands were given half effect, like the Scilly Isles in the 1977 *Anglo-French Continental Shelf* case.

In contrast to the two cases above, one may question whether or not the weighing-up process took place at all in the 1985 *Continental Shelf* (Libya/Malta) case, because the two relevant circumstances identified (the general geographical context and the great disparity in the lengths of the relevant coasts of the two States) together indicated that the provisional median line should be shifted to the north.[97]

To summarise, in international case-law regarding the delimitation of the continental shelf, the weighing-up process of relevant circumstances has usually only raised the issue of how much weight a certain relevant circumstance (for example, the existence of an island) should be given, based on the premise that coastal geography or an objective geographical context is accorded more weight.

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[94] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.87-88, para.181-183; *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.93-94, para.196-199.

[95] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.113-117, paras.244-251.

[96] *I.C.J. Reports 1982*, pp.88-89, paras.126-129.

[97] *I.C.J. Reports 1985*, pp.50, 52-53, paras.68-69, 73.

3.2.2. The Process of Weighing Up Relevant Circumstances with Regard to the Establishment of an SMB

Since the 1984 *Gulf of Maine* case heard by the Chamber of the ICJ, an SMB has usually been established in the delimitation of maritime boundaries. However, the 1984 *Gulf of Maine* case, the 1985 *Guinea/Guinea-Bissau* case, and the 1992 *Saint Pierre and Miquelon* case were not different in character to previous cases, all of which had dealt solely with the delimitation of the continental shelf. This is due to the fact that these three cases did not consider circumstances other than those commonly pertinent to both the EEZ and the continental shelf to be relevant.[98] It follows that 'geography', which was deemed to have a 'neutral' character, was given special treatment.[99] For example, in the second segment of the 1984 *Gulf of Maine* case, three circumstances arising from geography (the oppositeness of the relevant coasts of the two States, the difference in lengths between the respective coastlines of the two States, and the presence of Seal Island) were understood to be relevant.[100] Throughout the weighing-up of these circumstances, as in the previous continental shelf delimitation cases, 'coastal' geography (especially the oppositeness of the relevant coasts of the two States, and the difference in lengths between the respective coastlines of the two States) was granted more weight, whereas the presence of Seal Island was accorded only half effect. At this point, the 1984 *Gulf of Maine* case requires commentary. In its verification phase, the 1984 *Gulf of Maine* case presented one 'auxiliary' criterion as another possible relevant circumstance: the economic catastrophe that might result from a proposed delimitation line drawn after going through the three phases of taking into consideration all of the relevant circumstances in this case (namely the identification and weighing-up of relevant circumstances, and the application of practical methods indicated by the relevant circumstances). This auxiliary criterion was applied to check the equitability of the proposed result.[101] Since there was deemed to be no potential for an economic catastrophe (that is, no other relevant circumstance was identified), the weighing-up process in the 1984 *Gulf of Maine* case was the same as that in the previous continental shelf delimitation cases. However, the weighing-up process would have been more complicated had the potential for an economic catastrophe been identified in the 1984 *Gulf of Maine* case.

In the 1985 *Guinea/Guinea-Bissau* case, three relevant circumstances (an existing

[98] *I.C.J. Reports 1984*, pp.326-327, paras.192-195.
[99] *I.C.J. Reports 1984*, p.327, paras.194-195; Kozyris, *supra* note 88, pp.346-349.
[100] *I.C.J. Reports 1984*, pp.333-337, paras.216-222.
[101] *I.C.J. Reports 1984*, p.342, para.237.

treaty, the presence of islands, and the shape of relevant coastlines) were identified.[102] However, as in the 1985 *Continental Shelf* (Libya/Malta) case, it is debatable whether or not the process of weighing up relevant circumstances actually took place. Rather, these circumstances were each respected on an individual basis in order to arrive at an equitable result in this arbitral award.

In the 1992 *Saint Pierre and Miquelon* case, the weighing-up process was dominated by the fact that the relevant coasts of France were much shorter than those of Canada.[103] Although the adjacency of the two States was also deemed to be a relevant circumstance in the case,[104] this was only one reason to avoid drawing a provisional equidistance line. After the relevant circumstances were taken into account, France was accorded a 12NM 'radial' zone in addition to the 12NM territorial sea in the first sector,[105] but granted only a 200NM 'frontal corridor' in the second sector.[106] The weight accorded to this particular relevant circumstance (the difference between the lengths of relevant coasts) was thus somewhat arbitrary. Moreover, it is difficult to ascertain the extent to which the contiguous zone given in the first sector and the theory of frontal projection applied to the second sector were in harmony.[107]

To sum up, until the 1992 *Saint Pierre and Miquelon* case, the process of weighing up relevant circumstances had two significant implications. One was that coastal geography should be granted more weight; and the other was that the potential for an economic catastrophe could be considered a relevant circumstance.

However, the 1993 *Greenland/Jan Mayen* case of the ICJ raised different issues in the process of weighing up relevant circumstances. The first question was whether or not a circumstance pertinent 'only' to the fishery zone between the continental shelf and the fishery zone could be considered a relevant circumstance in the course of establishing a *de facto* SMB. The second question, which derived from the first, was whether or not a

[102] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.295-297, 298, paras.106-108, 111.
[103] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1162, para.33.
[104] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1162, paras.34-35.
[105] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, pp.1169-1170, paras.67-69.
[106] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, pp.1170-1171, paras.70-74.
[107] Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Portland: Hart Publishing, 2006), pp.92-94.

circumstance relevant to both the continental shelf and the fishery zone should take priority over a circumstance related to only one maritime zone.

The 1993 *Greenland/Jan Mayen* case identified two relevant circumstances (the disparity in coastal lengths and the access to the capelin fishery resources) necessary to adjust a provisional median line.[108] In the process of weighing up the two relevant circumstances, the access to the capelin fishery resources played a role in shifting the provisional median line to the 'equidistance' line between two lines (namely the provisional median line and the 200NM line calculated from the coasts of eastern Greenland in the first zone).[109] By contrast, the marked disparity in coastal lengths moved the provisional median line only 'one third' eastward between the two lines (namely the median line and the 200NM line calculated from the coasts of eastern Greenland in the second and third zones).[110] The essence of the 1993 *Greenland/Jan Mayen* case is that the access to the capelin fishery resources was given more weight in the first zone, despite the fact that coastal geography had been granted more weight in earlier cases. Therefore, the 1993 *Greenland/Jan Mayen* case showed that an economic factor operating as a relevant circumstance could be regarded as more than merely an auxiliary criterion in the delimitation operation.

Another important point which requires discussion is the predictability of the weight accorded. The 1993 *Greenland/Jan Mayen* case stated that:

> "A court […] will therefore have to determine "the relative weight to be accorded to different considerations" in each case; to this end, it will consult not only "the circumstances of the case" but also previous decided cases and the practice of States. In this respect the Court recalls the need, referred to in the *Libya/Malta* case, for "*consistency and a degree of predictability*" (*I.C.J. Reports 1985*, p.39, para.45)" [emphasis added].[111]

In fact, the 1985 *Continental Shelf* (Libya/Malta) case emphasised that the application of equity, not the weight granted, should display consistency and a degree of predictability.[112] If the weight granted were predictable, would this require a certain relevant circumstance to be accorded a 'fixed' weight? It is clear that relevant circumstances are not granted weight in a predictable way. We might assume, for example, based on the verdict in the 1984 *Gulf of*

[108] *I.C.J. Reports 1993*, pp.65-72, paras.61-76.
[109] *I.C.J. Reports 1993*, pp.79-81, para.92.
[110] *I.C.J. Reports 1993*, pp.79-81, para.92.
[111] *I.C.J. Reports 1993*, pp.63-64, para.58.
[112] *I.C.J. Reports 1985*, pp.38-39, para.45.

Maine case, that the potential for an economic catastrophe would greatly affect the result of a new case, even though circumstances pertinent to coastal geography are generally given more weight. Of course, however, this would not necessarily be the case. Accordingly, the granting of weight to a relevant circumstance in the delimitation process is another issue which reflects the flexibility of taking into account relevant circumstances in maritime delimitation.

As indicated above, in the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, the 2009 *Maritime Delimitation in the Black Sea* case, and the areas beyond 12NM up to 200NM of the 2007 *Maritime Delimitation* (Guyana/Suriname) case, provisional equidistance lines became the final delimitation lines, since no relevant circumstances were found to adjust the provisional equidistance lines. In other words, the weighing-up process did not occur in these cases.

Despite the fact that some delimitation cases since the early 2000s have not identified any relevant circumstances resulting in the adjustment of a provisional equidistance line, recent international case-law has consistently entailed the weighing-up of relevant circumstances when an SMB is established. For example, in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, the ICJ paid attention to the presence of Fasht al Jarim.[113] However, Fasht al Jarim ("which, if given full effect, would "distort the boundary and have disproportionate effects"") was ultimately accorded no effect, because the Court also took into account the fact that the northern coasts of Qatar and Bahrain are not markedly different in character from each other.[114]

In the 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case, the Arbitral Tribunal accepted that coastal frontages and their relative lengths are relevant circumstances requiring the adjustment of a provisional equidistance line.[115] It could not ignore the coastal frontages of the islands of Trinidad and Tobago.[116] How did the Tribunal go through the process of weighing up relevant circumstances? Above all, it presumed that "[t]he degree of adjustment called for by any given disparity in coastal lengths is a matter for the Tribunal's judgment in the light of all the circumstances of the case".[117] In other words, international courts and tribunals still retain their discretion in weighing up relevant circumstances. Exercising this discretion, the Arbitral Tribunal determined the appropriate

[113] *I.C.J. Reports 2001*, p.114, para.245.
[114] *I.C.J. Reports 2001*, pp.114-115, paras.247-248.
[115] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.100, para.327.
[116] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), pp.110-111, paras.372-373.
[117] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.100, para.328.

point (described as '10') of deflection of the provisional equidistance line.[118] This particular adjustment of the provisional equidistance line, in contrast to an unadjusted equidistance line, accorded weight to the existence of coastal frontages,[119] thereby avoiding any cut-off effects.[120]

Furthermore, it must be noted that a provisional bisector line was adjusted around islands in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case of the ICJ.[121] That is to say, the absence of viable basepoints at Cape Gracias a Dios, one circumstance requiring the employment of the bisector method, was weighed up in relation to the presence of islands, the other circumstance taken into consideration in this case.

Lastly, the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case of the ITLOS must be examined. It is important to note that 'most' of the provisional equidistance line was shifted following consideration of the severe concavity of the coastlines involved.[122] Moreover, this relevant circumstance (the severe concavity of the coastlines concerned) affected the delimitation of the outer continental shelf, because changing the provisional equidistance line allowed Bangladesh to gain the access to the continental shelf beyond 200NM to which it was entitled. By contrast, we can assume that the 'access to the continental shelf beyond 200NM', another relevant circumstance, allowed the provisional equidistance line to be deflected. The reason for this is that the direction of the provisional equidistance line was altered to the same azimuth of 215° (from point X) as that of a bisector line proposed by Bangladesh.[123] If this assumption is correct, one must conclude that the access to the continental shelf beyond 200NM was granted more weight by the ITLOS than the concavity of the coastlines concerned. Moreover, it should be noted that St. Martin's Island was granted no effect with respect to the establishment of an SMB in this case. The reason for according no effect to St. Martin's Island is that "a line blocking the seaward projection from Myanmar's coast" should not be constructed.[124] Here, the point of chief interest is that the ITLOS did not regard St. Martin's Island as a relevant circumstance,

[118] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), pp.110-111, para.373.
[119] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), pp.110-111, para.373.
[120] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.111, para.375.
[121] *I.C.J. Reports 2007*, pp.759-760, para.320.
[122] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.99, para.330.
[123] See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.100, para.334.
[124] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.96-97, para.318.

giving no effect to the island.[125] Whereas the ICJ regarded Fasht al Jarim (also accorded no effect) as a relevant circumstance in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, the ITLOS did not accept even the relevance of St. Martin's Island to the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case with regard to the establishment of an SMB. However, it cannot be concluded that the existence of St. Martin's Island was not weighed up in relation to the provisional equidistance line. On the contrary, the ITLOS determined how much weight the presence of St. Martin's Island must be accorded so as to achieve an equitable solution. In sum, international courts and tribunals have continued to weigh up relevant circumstances in recent delimitation cases.

This analysis of international delimitation cases leads to the conclusion that no weighing-up process is necessary if relevant circumstances do not conflict with each other – even when two or more relevant circumstances are found. It is also unclear whether or not the weighing-up process is employed as a means of granting weight to a single relevant circumstance when only one such circumstance can be identified. For instance, the 1992 *Saint Pierre and Miquelon* case reached a somewhat arbitrary result after evaluating only one relevant circumstance.

It seems clear, therefore, that if a given delimitation case involves two or more relevant circumstances which must be weighed up, the weighing-up process enhances the flexibility of application of the rules governing maritime delimitation. This is due to the fact that it is impossible to know in advance how much weight a relevant circumstance will be accorded. Furthermore, the assessment of economic factors other than coastal geography is also flexible.

3.3. The Indication and Application of Practical Methods

3.3.1. The Study of International Delimitation Cases

The third stage in the process of taking into account relevant circumstances in maritime delimitation is the indication and application of practical methods: more precisely, the application of practical methods indicated by relevant circumstances. With the exception of the 1969 *North Sea Continental Shelf* cases, all international courts and tribunals involved in

[125] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.97, para.319.

maritime delimitation have been required to construct a delimitation line for each case. In order to draw the final delimitation line in a given case, relevant circumstances are identified and then weighed up, and lastly practical methods indicated by the identification and weighing-up of relevant circumstances are applied.

For example, whereas two relevant circumstances (the oppositeness of the relevant coasts of the two States, and the presence of the Channel Islands) respectively indicated the median line and the boundary of the 12NM zone in the Channel Islands region of the 1977 *Anglo-French Continental Shelf* case,[126] two other relevant circumstances (the position of the two States in relation to the same continental shelf, and the presence of the Scilly Isles) indicated the inequitable effect of an equidistance line and the need to modify this line in the Atlantic region.[127]

In the 1982 *Continental Shelf* (Tunisia/Libya) case, the ICJ expressed strong approval for the indicative role of relevant circumstances, stating that "[t]he circumstance alluded to in paragraph 113 above which the Court finds to be highly relevant to *the determination of the method of delimitation* is a circumstance related to the conduct to the Parties" [emphasis added].[128] Therefore, the conduct of the Parties, as one relevant circumstance of the first sector, indicated that the delimitation line must be drawn at 26°.[129] Moreover, two relevant circumstances of the second sector (the transformation of the relationship between Tunisia and Libya from that of adjacent States to that of opposite States, and the presence of the Kerkennah Islands) indicated both the construction of a straight line (the 62° line) and the need to modify this line.[130] However, regarding the conclusion of delimitation in the second sector of the 1982 *Continental Shelf* (Tunisia/Libya) case, there is a different interpretation from the above-mentioned one. According to a new interpretation, the bisector method was employed because the presence of the Kerkennah Islands advised against the full effect of a straight line (the 62° line).[131] In short, the existence of the Kerkennah Islands may indicate the employment of the bisector method.

In the first segment of the 1984 *Gulf of Maine* case, the uncertainty of sovereignty

[126] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.87-88, 94-96, para.181-183, 201-203.
[127] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.113-117, paras.244-251.
[128] *I.C.J. Reports 1982*, pp.83-84, para.117.
[129] *I.C.J. Reports 1982*, pp.85-86, para.121.
[130] *I.C.J. Reports 1982*, pp.88-89, paras.126-129.
[131] See *I.C.J. Reports 1982*, pp.92-94, para.133.

over Machias Seal Island and the Parties' choice of point A indicated the inadmissibility of the equidistance method.[132] On the basis of this indication, and presupposing that a 'geometrical' method respecting the geographical situation of the coasts would be required, the Chamber employed the bisector method.[133] Was the choice of the bisector method determined by the indicative role of relevant circumstances? The same issue was raised in the final delimitation of the second sector of the 1982 *Continental Shelf* (Tunisia/Libya) case. This will be discussed at a later point.

In contrast to the delimitation of the first segment, the oppositeness between relevant coasts provisionally indicated a median line in the second segment of the 1984 *Gulf of Maine* case, because it was the most important of three relevant circumstances.[134] However, the other relevant circumstances (the difference in lengths between the respective coastlines of the two States, and the presence of Seal Island) respectively adjusted the provisional median line to the degree indicated by the weight given to each.[135] That is to say, each of the three relevant circumstances played an indicative role. However, in the third segment of the 1984 *Gulf of Maine* case – which applied a geometrical method, drawing a perpendicular line – the indicative role of relevant circumstances was unclear.[136] This point will also be addressed at a later stage.

In the 1985 *Continental Shelf* (Libya/Malta) case, it is evident that two relevant circumstances (the general geographical context and the great disparity in the lengths of the relevant coasts of the two States) indicated the shift of the provisional median line to the north. However, it is unclear why the ICJ decided on a northward transposition by '18´' of latitude. No relevant circumstance indicated such a transposition.

Two relevant circumstances (an existing treaty and the presence of islands) of the 1985 *Guinea/Guinea-Bissau* case indicated the southern limit and the attribution of a 12NM territorial sea to the island of Alcatraz.[137] However, it is questionable whether or not the third relevant circumstance (the shape of the relevant coastlines) indicated a perpendicular line. This point will also be explored in the related section of the thesis.

Two relevant circumstances of the 1993 *Greenland/Jan Mayen* case also indicated

[132] *I.C.J. Reports 1984*, p.332, para.211.
[133] *I.C.J. Reports 1984*, pp.332-333, paras.212-213.
[134] *I.C.J. Reports 1984*, pp.333-334, para.216.
[135] *I.C.J. Reports 1984*, pp.336-337, para.222.
[136] *I.C.J. Reports 1984*, pp.337-338, para.224.
[137] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.298, para.111.

the eastward shift of the provisional median line. However, it is difficult to deduce the indicative role of relevant circumstances from the fact that the marked disparity of coastal lengths shifted the provisional median line 'one third' eastward between the two lines (namely the median line and the 200NM line calculated from the coasts of eastern Greenland in the second and third zones).[138] Rather, the extent to which the provisional median line was shifted seems more closely related to the concept of flexibility in applying the rules in maritime delimitation. In other words, the ICJ exercised its discretion in deciding the extent of the adjustment in this case.

With the exception of the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, all delimitation cases since the 1993 *Greenland/Jan Mayen* case have employed an equidistance line as the provisional line. The employment of a provisional equidistance line means that coastal geography as a relevant circumstance has indicated the use of such a line. Conversely, in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, coastal geography indicated that the use of the equidistance line was inappropriate.

To summarise, the indicative role of relevant circumstances can be confirmed through analysis of international delimitation cases. Still, two further issues require consideration, as below.

3.3.2. The Expansion of the Indicative Role of Relevant Circumstances: Indication over Exclusion

As shown above, relevant circumstances can indicate practical methods to be applied in each delimitation case. At this point, it seems appropriate to examine the argument made by Malcolm D. Evans. According to Professor Evans, the indicative role of relevant circumstances is confined to the 'exclusion' of a specific method.[139] For example, whereas the presence of islands can indicate the inapplicability of the equidistance method, the absence of islands cannot indicate the use of the equidistance method. However, as shown in the 1977 *Anglo-French Continental Shelf* case and the 1982 *Continental Shelf* (Tunisia/Libya) case, the indicative role of relevant circumstances was not restricted to the exclusion of a certain method.

This issue can be summarised as follows. Basically, the indicative role of relevant circumstances can be divided into three aspects: the exclusion of a specific method; the

[138] *I.C.J. Reports 1993*, pp.79-81, para.92.
[139] Evans, *supra* note 39, p.16.

indication of a certain delimitation line; and the indication of the extent to which a provisional equidistance line should be adjusted.

Firstly, the exclusion of a specific method, to which the indicative role of relevant circumstances is limited, as Professor Evans suggests, has been accepted since the 1969 *North Sea Continental Shelf* cases. How, then, can we explain the use of the bisector method or the perpendicular method once a relevant circumstance has indicated the exclusion of the equidistance method? In the first segment of the 1984 *Gulf of Maine* case, the Chamber invoked the bisector method or the perpendicular method as possible geometrical methods reflecting the relevant circumstances of the case after the inapplicability of the equidistance method had been indicated.[140] In other words, the relevant circumstances of this case indicated the 'appropriateness' of the bisector method or the perpendicular method. The reason for this is that either the bisector method or the perpendicular method may produce a result as close as possible to an equal division (which is the very rationale behind the equidistance method), respecting the geographical reality of the coastlines of both States. Therefore, the indicative role of relevant circumstances cannot be restricted to the exclusion of a certain method.

Secondly, the indication of a certain delimitation line is also an aspect of the indicative role of relevant circumstances. For example, one of the relevant circumstances, the presence of the Channel Islands, indicated the 12NM radial zone boundary in the Channel Islands region of the 1977 *Anglo-French Continental Shelf* case.[141] Likewise, the conduct of both States as a relevant circumstance pointed out an actual delimitation line in the 1982 *Continental Shelf* (Tunisia/Libya) case of the ICJ.[142]

Thirdly, it is questionable whether or not relevant circumstances can indicate the extent to which a provisional equidistance line should be adjusted. In fact, this matter is frequently left to the discretion of international courts and tribunals. How else can we explain the northward transposition by 18′ from the provisional median line in the 1985 *Continental Shelf* (Libya/Malta) case, and the shift of the provisional median line 'one third' eastward between the two lines (namely the median line and the 200NM line calculated from the coasts of eastern Greenland) in the 1993 *Greenland/Jan Mayen* case? It must be noted here that these shifts would have been more reasonable if the 'proportionality' of the

[140] *I.C.J. Reports 1984*, pp.332-333, paras.210-213.
[141] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.94-96, para.201-203.
[142] *I.C.J. Reports 1982*, pp.85-86, para.121.

proposed results produced had been checked once more. This is due to the fact that an equitable result can be confirmed by means of a verification stage, such as the proportionality check, even though relevant circumstances do not indicate the extent to which a provisional equidistance line should be adjusted. However, even if relevant circumstances were to indicate the precise adjustment required, the indicative role of relevant circumstances cannot in itself be denied.

3.3.3. The Need for a Geometrical Method

As mentioned above, the indicative role of relevant circumstances, which means that relevant circumstances indicate practical methods to be applied in each delimitation case, is well attested to in international case-law. Another issue to be raised regarding the indicative role of relevant circumstances is the fact that a 'geometrical' method has been invoked in almost all delimitation cases, except for a small number of cases in which certain relevant circumstances, such as the conduct of States, have not indicated geometrical methods. In other words, it can be said that relevant circumstances indicate 'objective' methods to be applied. In this context, the ICJ added that geometrically objective methods are needed even when a provisional line is established.[143]

Two factors supporting the argument for a geometrical method can be suggested. The first is the need, as far as possible, to avoid the subjectivity of delimitation. The 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case illustrated the attempt to minimise subjective delimitation, stating that "the need to avoid subjective determinations requires that the method used start with a measure of certainty".[144] The second reason is that the rationale behind geometrical methods is often one aspect of an equitable result (such as an equal division) *or* the expression of the legal basis of title (including the criterion of distance).[145] In other words, if a geometrical method is applied, an equitable result may more easily be fulfilled.

However, the need for objective methods is not connected with the predictability of application of the rules governing maritime delimitation. The result achieved by the application of objective methods as indicated by some relevant circumstances is no more than the establishment of a provisional line. The provisional line would be adjusted through the examination of other relevant circumstances or by the proportionality check.

[143] *I.C.J. Reports 2009*, p.101, para.116.
[144] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), pp.94-95, para.306.
[145] *I.C.J. Reports 1984*, p.327, para.195; *I.C.J. Reports 1985*, pp.46-47, para.61.

Consequently, even if a geometrical method is employed, the final result of maritime delimitation may subsequently be changed.

Furthermore, the choice of an objective method relies on the relevant circumstances of a specific case. It follows that only the objective method which most closely reflects the relevant circumstances of a certain case can be chosen.

Geometrical methods actually employed in international delimitation cases are the equidistance method, the bisector method, and the perpendicular method. Of these, an equidistance line is the most commonly used provisional line unless relevant circumstances indicate the exclusion of the equidistance method. According to the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, the bisector method may be chosen on the basis of the configuration of, and the relationship between, the relevant coastal fronts and the maritime areas to be delimited in a situation in which the equidistance method is impossible or inappropriate.[146] In line with this statement, the ICJ confirmed that the bisector method is also a possible geometrical approach.[147]

In sum, in order to establish a provisional line, the relevant circumstances of each delimitation case can indicate a geometrical method to be understood as the most appropriate. Nonetheless, it must be noted, in fact, that the indicative role of relevant circumstances closely resembles the exclusion of a certain method, because another geometrical approach cannot be adopted unless the use of the equidistance method is rendered unsuitable by the relevant circumstances of a certain delimitation case.

4. Three Decision-making Processes Undertaken by International Courts and Tribunals

4.1. Single-phase Decisions: The Immediate Establishment of a Final Delimitation Line

In the previous sections, three elements constituting the process of taking into account relevant circumstances in maritime delimitation were examined: the identification of relevant circumstances, the process of weighing up relevant circumstances, and the indication of practical methods. It should be noted that the combination of these three elements can affect

[146] *I.C.J. Reports 2007*, p.746, para.287.
[147] *I.C.J. Reports 2007*, p.746, para.287.

certain aspects of the 'decisions' made by international courts and tribunals. This thesis will divide such decisions into three kinds: single-phase decisions, two-phase decisions, and three-phase decisions.

'Single-phase' decisions are made by international courts and tribunals in situations in which relevant circumstances identified (while the rules governing maritime delimitation are applied) directly indicate practical methods 'without the weighing-up process of relevant circumstances'. In other words, single-phase decisions produce the result of each case 'as soon as' relevant circumstances indicate the practical methods to be used in the case. In the Channel Islands region of the 1977 *Anglo-French Continental Shelf* case, and in the first sector of the 1982 *Continental Shelf* (Tunisia/Libya) case, international courts and tribunals made single-phase decisions. Moreover, in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, the bisector line drawn up to the 12NM arc around islands can also be categorised as the result of a single-phase decision.

Single-phase decisions 'immediately' respond to the assessment of the relevant circumstances of each delimitation case. That is to say, international courts and tribunals choose practical methods which most closely reflect relevant circumstances, as soon as the relevant circumstances have been identified for a particular case. However, it is still questionable whether or not single-phase decisions have achieved an equitable result, since no verification operation – such as checking proportionality – is involved. For example, it is evident that the outcome of the 1992 *Saint Pierre and Miquelon* case was arbitrary. For this reason, single-phase decisions are rarely made by international courts and tribunals.

4.2. Two-phase Decisions: The Construction of a Provisional Line

Two-phase delimitation decisions are made in situations when relevant circumstances indicate practical methods 'through the weighing-up process of relevant circumstances'. In other words, two-phase decisions produce the end result of each case through one important essential element of the delimitation operation: the weighing-up of relevant circumstances. Why are these decisions termed 'two-phase' decisions? Since the process of weighing up relevant circumstances usually takes place in the course of modifying a provisional line, the establishment of a provisional line *and* the shift of the provisional line offer the typical example of a two-phase decision. Clearly, therefore, the construction of a provisional line and the modification of the provisional line equate, respectively, to the two phases of two-phase decisions. The delimitation decisions made in the Atlantic region of the 1977 *Anglo-*

French Continental Shelf case, the second sector of the 1982 *Continental Shelf* (Tunisia/Libya) case, the 1993 *Greenland/Jan Mayen* case, the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, and the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case are all examples of two-phase decisions.

Two-phase decisions tend to prioritise the 'certainty' of the delimitation process. Thus, geometrical methods are invoked in order to draw a provisional line. This frequently leads to the construction of a provisional equidistance line. The provisional line can then be adjusted depending on the weight of other relevant circumstances. To illustrate this point, it is worth ascertaining whether or not the result of the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case is classified as a two-phase decision. In this case, no relevant circumstance that might adjust a provisional line was found. Therefore, the provisional line became the final delimitation line. Still, the outcome of this case can also be regarded as a two-phase decision, since the ICJ sought to identify other relevant circumstances for the purpose of its attempt to weigh up all the relevant circumstances adjusting the provisional line.

Are two-phase decisions related to the flexibility of application of the rules in maritime delimitation? Since geometrical methods are employed in order to establish a provisional line, two-phase decisions seem to guarantee that the application of the delimitation rule must be predictable. However, the certainty of a provisional line cannot be equated with the predictable application of the rules in maritime delimitation, because other relevant circumstances might shift the provisional line during the weighing-up operation. In short, the application of the current delimitation rule remains flexible. It is evident, therefore, that two-phase decisions promote flexibility, because they focus on the identification of a certain relevant circumstance (which is mainly responsible for the selection of a certain provisional line) *and* the weighing-up of relevant circumstances.

4.3. Three-phase Decisions: The Emphasis on Proportionality

With respect to the judgements and arbitral awards of maritime delimitation, three-phase decisions are made by international courts and tribunals when one more verification phase is required to check the equitability of the result reached on the basis of two-phase decisions. One example of this additional verification phase is the proportionality check, which is one typical way to verify the equitability of a proposed result. Therefore, three-phase decisions generally consist of the drawing of a provisional line, the adjustment of the provisional line,

and the checking of proportionality. Such decisions are more effective than two-phase decisions in verifying and thus ensuring the equitability of a proposed result.

In this context, we must ask whether or not the proportionality check is included in the process of taking into account relevant circumstances in maritime delimitation. The 1982 *Continental Shelf* (Tunisia/Libya) case suggested that checking proportionality is an "aspect of equity".[148] Does this statement mean that the checking of proportionality is one stage of the process of applying the delimitation rule? As already pointed out, the process of taking into consideration of all relevant circumstances consists of the identification of relevant circumstances, the weighing-up of relevant circumstances, and the indication and application of practical methods. The effective application of the current delimitation rule governing maritime delimitation requires that all relevant circumstances are taken into account. However, checking proportionality involves examining the result produced *after* applying the delimitation rule, rather than applying the rule itself. This means that the concept of proportionality indicates 'one aspect of an equitable result to be achieved' *or* no more than 'a standard to confirm the equitability of a proposed result'. In other words, we can only inspect that all relevant circumstances have been taken into account through invoking the concept of proportionality. This point will be discussed in the next section.

One important reason for employing the third phase in the decision-making process, such as the proportionality check, is to reach a 'more' equitable result – because there is no such thing as a singular or absolute equitable result. By means of a verification phase, the equitability of a proposed result is enhanced. From a strict legal viewpoint, it follows that the aim of adopting a verification operation is to avoid producing an arbitrary outcome.

In the 2009 *Maritime Delimitation in the Black Sea* case, the check of proportionality was named the "disproportionality test", thereby reflecting the traditional role of proportionality in the delimitation of maritime boundaries.[149] The ICJ made the proviso that "[t]his checking can only be approximate".[150] According to the Court, the proportionality check is not mathematical. It follows that "[t]his is not to suggest that these respective areas should be proportionate to coastal lengths", as the Court stated.[151] A proposed result constructed through the application of the rules governing maritime delimitation is considered equitable if it is not disproportional. In other words, the result of maritime

[148] *I.C.J. Reports 1982*, p.91, para.131.
[149] *I.C.J. Reports 2009*, pp.129-130, paras.210-216.
[150] *I.C.J. Reports 2009*, p.129, para.212.
[151] *I.C.J. Reports 2009*, p.103, para.122.

delimitation cannot be mathematical, because it is merely 'an' equitable result, not 'the' equitable result.

4.4. A Concluding Remark

The fact that the consideration of all relevant circumstances only dominates the whole delimitation process is noticed by examining the three kinds of decisions as has been explained above. In addition, all of the three kinds of decisions made by international courts and tribunals reflect the flexibility of application of the rules governing maritime delimitation. There is no fixed decision-making process in maritime delimitation. The three kinds of decisions are interchangeable depending on all the relevant circumstances of a particular case. In future cases, an international court or tribunal can select one from the three decision-making processes on a case-by-case basis.

One question to be asked here is whether or not single-phase decisions should be avoided and three-phase decisions should be urged. In fact, it is true that the conduct of the States concerned may indicate a delimitation line in a certain case, and the line may be considered the achievement of an equitable solution in light of all relevant circumstances. Insofar as the achievement of an equitable result is the final aim in maritime delimitation, the issue of choosing one from the three decision-making processes is a means to the solution. The law of maritime delimitation has not established the primacy of three-phase decisions. It follows that a predictable or established decision-making process gives way to the achievement of an equitable solution.

5. Indeterminacy of an Equitable Result Achieved by Taking into Account Relevant Circumstances in Maritime Delimitation

5.1. The Meaning of an Indeterminate Equitable Result

Simply put, the flexibility of the rules in the context of maritime delimitation refers to the flexibility of *applying* these rules. The 'indeterminacy' of a proposed result can be addressed in the same light. In short, a result produced from the flexible application of the rules governing maritime delimitation is indeterminate.

The ILC, which began in 1950 to formulate the rules regarding the delimitation of the continental shelf, finally (with the assistance of the Committee of Experts) devised the

equidistance method articulated in Article 6 of the 1958 Geneva Convention on the Continental Shelf. This method was invented because no rule of international law with respect to the delimitation of the continental shelf had previously existed. However, the mandatory nature of the equidistance method has since been challenged on two fronts, as described below. Consequently, the result of maritime delimitation – whose predictability would have been guaranteed by the obligatory use of the equidistance method – cannot be considered determinate.

The first challenge to the obligatory character of the equidistance method came with the 1969 *North Sea Continental Shelf* cases, when the Court did not consider the invocation of the equidistance method to be obligatory under customary international law. According to the ruling made in the 1969 *North Sea Continental Shelf* cases, any suitable method other than the equidistance method may be employed in delimiting maritime boundaries.[152] Hugh Thirlway has stressed that these cases were closely involved with the concept of flexibility. As international courts and tribunals have failed to derive a particular method on the basis of entitlement (for example, natural prolongation or the criterion of distance),[153] Professor Thirlway believes that flexibility is necessary in maritime delimitation cases.[154] In particular, he finds evidence of such flexibility in paragraph 20 of the 1969 Judgment: "The delimitation itself must indeed be equitably effected."[155] Professor Thirlway argues that the ICJ had finally accepted the inclusion of the concept of flexibility in maritime delimitation, despite the fact that the sentence quoted above was written in order to reject the concept of a 'just and equitable share'.[156] Indeed, in the 1993 *Greenland/Jan Mayen* case, the ICJ accepted that there was an 'area of overlapping potential entitlement'.[157] It follows that the indeterminacy of a result produced by the flexible application of the rules governing maritime delimitation can be increased, in the sense that there is the possibility of a 'sharing-out' process to divide an area of overlapping potential entitlement for the purpose of an equitable result.[158]

The second challenge to the mandatory equidistance method is that, as the 1977 *Anglo-French Continental Shelf* case declared, special (or relevant) circumstances may

[152] *I.C.J. Reports 1969*, pp.46-47, para.85.
[153] Hugh Thirlway, "The Law and Procedure of the International Court of Justice (1960-1989): Part Five", *The British Year Book of International Law*, Issue 64 (1993), p.31.
[154] *Ibid.*, p.34.
[155] *I.C.J. Reports 1969*, pp.22-23, para.20.
[156] Thirlway, *supra* note 153, pp.34-35.
[157] *I.C.J. Reports 1993*, p.47, para.19.
[158] Thirlway, *supra* note 153, pp.35-36.

qualify the use of the equidistance method, although its employment is obligatory.[159] Predictability – the underlying notion of the equidistance method – is thus undermined by the flexibility of application of the rules when relevant circumstances are taken into account.

The consequence of denying the obligatory character of the equidistance method is an emphasis on both the achievement of an equitable result, and the indeterminacy of that result. The indeterminacy of an equitable result can be explained in three ways. Firstly, given that the result produced is regarded as equitable unless a proposed result (which is achieved through the drawing of a provisional line, and the identification and weighing-up of relevant circumstances) proves inequitable, all results which remain 'within' some limits may be equitable. For example, the ratio between the relevant areas of two States may be either 49:51 or 51:49, on the assumption that the length of the relevant coastlines of one State is the same as that of the relevant coastlines of the other. Both of these ratios may be equitable. Similarly, in the 2007 *Maritime Delimitation* (Guyana/Suriname) case, the ratio of relevant areas (Guyana 51%: Suriname 49%) was considered to be equitable in relation to the ratio of coastal frontages (Guyana 54%: Suriname 46%).[160] In other words, the term 'equitable' does not mean 'mathematical'. How can the equitable limits of a provisional result be determined? At this juncture, the 'disproportionality test' can be invoked.[161] It follows that the indeterminacy or diversity of a result is enhanced because, according to judicial and arbitral case-law, a proposed result will ultimately become an equitable result unless it is disproportional. It should not be overlooked, however, that the discretion of international courts and tribunals can be exercised with regard to the disproportionality test.[162] There is a fine line between a 'discretionary' decision and an 'arbitrary' decision made by international courts and tribunals. An equitable result cannot be an arbitrary decision insofar as it is produced systematically, with all relevant circumstances taken into account. Even though an equitable result may differ from case to case, it should be regarded as the outcome of a discretionary decision.

Secondly, on the premise that the provisional line constructed can be adjusted, the end result of maritime delimitation cannot be anticipated. The final result will depend on which circumstances are relevant or how much weight the relevant circumstances are given;

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[159] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.45-46, para.70.
[160] *Award of the Arbitral Tribunal* (The Hague, 17th September 2007), p.127, para.392.
[161] See *I.C.J. Reports 2009*, pp.129-130, paras.210-216.
[162] *I.C.J. Reports 2009*, p.129, para.213.

again, the final result will differ from case to case.

Thirdly, the concept of indeterminacy can be discussed with reference to practical examples of an equitable result. Since an equitable result in a certain delimitation case is not fixed but dependent on the particular characteristics of that case, the result is justifiably considered indeterminate. For example, while a result which ensures non-encroachment on natural prolongation may prove an equitable result in one case, a proportional result may be equitable in another. Practical examples of an equitable result will be examined in the following section.

5.2. The Achievement of 'an' Equitable Result

5.2.1. Equitable Principles and an Equitable Result

As discussed above, maritime delimitation is performed not by the application of equitable principles, but by taking account of all relevant circumstances. At this point, it is important to raise the concept of 'equitable principles' once more, because many principles adduced by international courts and tribunals as examples of equitable principles, in fact, mean several aspects of an equitable result.

It should be noted that the concept of equitable principles leads to two key misunderstandings. The first is that certain reasonable, practical methods (including the equidistance method) might constitute equitable principles. This misunderstanding is natural. One year after the 1945 Truman Proclamation, for instance, Francis A. Vallat opined that equitable principles could be constituted by reasonable, practical methods of delimitation, including the equidistance method.[163] However, this misconception was dispelled in the 1969 *North Sea Continental Shelf* cases. In these cases, the ICJ placed the emphasis on the 'application' of equitable principles, in order to stress that various methods other than the equidistance method could be employed in maritime delimitation.[164] This emphasis on a diverse range of methods applicable to maritime delimitation allowed for the possibility that the equidistance method could be inequitable in a specific delimitation case. Conversely, even though the conduct of the States concerned is not generally considered a reasonable, practical method for determining delimitation, it can produce an equitable result in a particular delimitation case. However, as stated above, the application of equitable principles

[163] Francis A. Vallat, "The Continental Shelf", *The British Year Book of International Law*, Issue 23 (1946), p.336.
[164] *I.C.J. Reports 1969*, pp.46-47, para.85.

(if the concept of equitable principles must be kept) indicates to examine all the relevant circumstances of a concrete case. It follows that equitable principles cannot be defined merely as reasonable, practical methods which include the equidistance method.

The second misunderstanding relating to the concept of equitable principles is that certain principles necessary to take into consideration relevant circumstances may themselves be equitable principles. Faraj Abdullah Ahnish describes equitable principles as 'a set of legal delimitatory rules'.[165] According to his view, the concept of equity identifies some applicable principles in relation to maritime delimitation, depending on geographical and other circumstances.[166] That is to say, he equates such applicable principles with equitable principles. Yet, principles, such as no question of refashioning geography, non-encroachment on natural prolongation, and equal division or proportionality (all of which have been adduced as examples of applicable principles), are, in fact, the aspects of an equitable result to be achieved – not equitable principles in themselves.

The 1984 *Gulf of Maine* case found that equitable principles "are not themselves rules of law and therefore mandatory in the different situations".[167] However, equitable principles (as introduced by the Chamber of the ICJ in the 1984 *Gulf of Maine* case), may form part of the content of an equitable result to be achieved in a certain delimitation case. The reason for this is that the principles enumerated by the Chamber relate to the concrete elements of a result that can be considered equitable. In other words, one of the 'principles' enumerated by the Chamber may be one aspect of an equitable result to be obtained in a given case. In this respect, it is worth noting the argument of one scholar. Professor Evans states that:

> "There clearly is a duality in the Court's understanding of equitable principles. In addition to using it as a term which describes the reflection of the relevant circumstances in the particular circumstances of a case, it also uses it to refer to generally applicable norms".[168]

Subsequently, he implies that equitable principles are "standards to which an equitable delimitation will normally conform".[169] Developing his argument, this thesis regards these

[165] Faraj Abdullah Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Oxford: Oxford University Press, 1993), p.78.
[166] *Ibid.*, pp.79-85.
[167] *I.C.J. Reports 1984*, p.313, para.158.
[168] Evans, *supra* note 86, p.76.
[169] *Ibid.*

standards as the aspects or content of an equitable result to be reached. The reason for this is that equitable principles referred to in the 1984 *Gulf of Maine* case and the 1985 *Continental Shelf* (Libya/Malta) case indicate the elements of the equitability of a result produced after all relevant circumstances are taken into account.

This begs the question of how the aspects of an equitable result are related to the indeterminacy of that result. When all relevant circumstances are taken into account in a certain case, some aspects of an equitable result will be accorded greater weight than others, depending on the unique characteristics of that case. For example, in the 2009 *Maritime Delimitation in the Black Sea* case, the ICJ did not regard Serpents' Island as part of relevant coasts, in order to refrain from a judicial refashioning of geography.[170] Moreover, proportionality was checked at the third stage of the delimitation process.[171] The Court considered both the avoidance of geographical refashioning and proportionality to be among the aspects of an equitable result considered especially important in this case. However, another delimitation case might consider other aspects of an equitable result to be decisive. Therefore, the concrete aspects of an equitable result must be determined on a case-by-case basis. This is what constitutes the indeterminacy of a result.

5.2.2. Examples of an Equitable Result

Which aspects of an equitable result have international courts and tribunals identified thus far? Non-encroachment on natural prolongation (no cut-off effect), an equal division, proportionality, no question of refashioning geography, and non-encroachment on a 12NM fishery zone can all be cited.

5.2.2.1. Non-encroachment on Natural Prolongation

Non-encroachment on natural prolongation has been part of the content of an equitable result since the 1969 *North Sea Continental Shelf* cases. In these cases, the ICJ described "a natural prolongation of its land *territory* into and under the sea, *without encroachment on the natural prolongation* of the land *territory of the other*" [emphases added].[172] Since the Court referred to the 'territory' of one State and the 'territory of the other', the 'premise' of these rulings was that there was a 'single (common)' 'geological' continental shelf in the region[173] – even

[170] *I.C.J. Reports 2009*, pp.109-110, para.149.
[171] *I.C.J. Reports 2009*, pp.129-130, paras.210-216.
[172] *I.C.J. Reports 1969*, pp.53-54, para.101.
[173] Evans, *supra* note 86, p.154.

though this was not in fact the case. If a single geological continental shelf does not exist, the issue of non-encroachment on natural prolongation is not relevant to an equitable result to be achieved in a certain case. Where a single geological continental shelf does not exist, only the outer limits of the continental shelf of the States involved need to be identified. Even though the emergence of the criterion of distance refrained from the identification of the outer limits of the continental shelf within 200NM, the issue of non-encroachment on natural prolongation still remains important with respect to the delimitation of the continental shelf 'beyond' 200NM.

The assumption that the North Sea consists of a single geological natural prolongation[174] shows that the non-encroachment (of one) on natural prolongation (of the other) was considered an important aspect of an equitable result to be produced in the 1969 *North Sea Continental Shelf* cases. Likewise, the 1977 *Anglo-French Continental Shelf* case regarded the 'continuous' continental shelf of the French Republic in the Channel Islands region as an aspect of the equitable result to be reached.[175]

At this point, it should be noted that non-encroachment on natural prolongation was considered to be an equitable 'principle' in the 1984 *Gulf of Maine* case and the 1985 *Continental Shelf* (Libya/Malta) case.[176] Whereas the concept of equitable principles might refer to practical norms to be applied in the delimitation process, an equitable 'result' as the final aim of maritime delimitation can be reached unless natural prolongation is encroached on in each case. The concept of non-encroachment on natural prolongation lacks concrete guiding standards leading to an equitable result. Rather, as this thesis assumes, it shows an element of the equitability of the result produced. Therefore, in contrast to the reasoning in the 1984 *Gulf of Maine* case or the 1985 *Continental Shelf* (Libya/Malta) case, non-encroachment on natural prolongation must be considered an aspect of an equitable result. In other words, encroachment on natural prolongation can obstruct the achievement of an equitable result in a given delimitation case.

What is the relationship between non-encroachment on natural prolongation and no cut-off effect? Since the Chamber of the ICJ dealt with these two concepts separately in the 1984 *Gulf of Maine* case,[177] we must assume that non-encroachment on natural prolongation

[174] See *I.C.J. Reports 1969*, pp.20-21, 49, paras.15, 89.
[175] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.95, para.202.
[176] *I.C.J. Reports 1984*, pp.312-313, para.157; *I.C.J. Reports 1985*, pp.39-40, para.46.
[177] *I.C.J. Reports 1984*, pp.312-313, para.157.

differs from no cut-off effect. Non-encroachment on natural prolongation can form part of the content of an equitable result if natural prolongation is a source of title to the continental shelf. In contrast, no cut-off effect refers to the need to ensure as far as possible that the 'seaward' 'projection' of the States concerned is not cut off. For example, the outcome must avoid preventing the States concerned from approaching the continental shelf, if possible. Although the two concepts are not identical, they are often interchangeable.[178] In sum, what must be stressed is that both non-encroachment on natural prolongation and no cut-off effect belong to the aspects of an equitable result to be produced after all relevant circumstances are taken into account.

5.2.2.2. An Equal Division

At the 115th meeting of the ILC on 2nd July 1951, Jean Spiropoulos stated that:

> "In the case of States whose coastlines faced each other and were separated by straits, say twice as wide as the limit of territorial waters, it might be agreed that *half the continental shelf* should belong to each of the two States, in the absence of some other division arrived at by mutual consent" [emphasis added].[179]

Although Spiropoulos's statement was irrelevant to the use of the equidistance method, it is clear that an equal division could well have been one of the aims which the delimitation of the continental shelf sought to achieve. Likewise, the 1969 *North Sea Continental Shelf* cases (which denied the mandatory character of the equidistance method) considered an equal division – which entails dividing overlapping areas equally, in the absence of agreement – to be one aim of maritime delimitation.[180]

Although the concept of an equal division can be discussed without reference to the equidistance method, the equidistance method is in fact one of the key methods of making an equal division.[181] With respect to the relationship of 'opposite' States, this point was strongly supported by the Court of Arbitration in the 1977 *Anglo-French Continental Shelf* case.[182]

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[178] Evans, *supra* note 86, pp.102, 154-155.
[179] *Yearbook of the ILC 1951*, Volume I, the 115th Meeting of the ILC (on 2nd July 1951), p.286, para.112.
[180] *I.C.J. Reports 1969*, pp.53-54, para.101.
[181] Antunes, *supra* note 89, pp.211-212.
[182] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.88, paras.182-183.

At this point, it should be noted that, in the 1984 *Gulf of Maine* case, the Chamber of the ICJ set out the reasoning behind its employment of the bisector method. The reason for choosing the bisector method was to produce "a result which is probably as close as possible to an equal division of the first area to be delimited".[183] In the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, the ICJ cited another paragraph of the 1984 *Gulf of Maine* case, to express its agreement that the employment of the bisector method can lead to an equal division of areas where the maritime projections of both States overlap.[184] In other words, even if the equidistance method is employed, an equal division may still be one aspect of an equitable result to be achieved.

5.2.2.3. Proportionality

The concept of proportionality has a long history in the delimitation of maritime boundaries. One year after the issuing of the 1945 Truman Proclamation, Francis A. Vallat suggested that, in dividing a large bay or a gulf surrounded by several States, "[p]erhaps the most equitable solution would be to divide the submarine area outside territorial waters among the contiguous states in proportion to the length of the coast lines".[185] However, it should not be overlooked that this suggestion was an attempt to regard proportionality as one of the 'methods' to be applied in maritime delimitation.

Subsequently, in the 1969 *North Sea Continental Shelf* cases, the concept of proportionality was considered to be one of the factors to be taken into account with regard to 'some particular geographical conditions' (adjacent coasts, the existence of particular coastal configurations (such as concavity or convexity), and quasi-equality of coastal lengths).[186] Although the concept of proportionality was not a distinct method of maritime delimitation in the 1969 *North Sea Continental Shelf* cases, it was regarded as a useful method of dealing with certain geographical conditions. In other words, whilst proportionality was an auxiliary method applied to particular geographical conditions, these geographical conditions were, in themselves, relevant circumstances. For these reasons, Professor Thirlway implies that proportionality as an auxiliary method may be coupled with the equidistance method in order to ensure the predictable application of the rules in

[183] *I.C.J. Reports 1984*, p.333, para.213.
[184] *I.C.J. Reports 2007*, p.746, para.287.
[185] Vallat, *supra* note 163, p.336.
[186] See *I.C.J. Reports 1969*, pp.53-54, para.101; Yoshifumi Tanaka, "Reflections on the Concept of Proportionality in the Law of Maritime Delimitation", *The International Journal of Marine and Coastal Law*, Volume 16 (2001), p.457.

maritime delimitation.[187]

In the 1982 *Continental Shelf* (Tunisia/Libya) case, however, the function of proportionality in maritime delimitation altered: it took on the role of checking the equitability of a proposed result.[188] Later, the role of proportionality was transformed again, becoming a relevant circumstance in the 1985 *Continental Shelf* (Libya/Malta) case and the 1993 *Greenland/Jan Mayen* case.[189]

In spite of the diverse roles played by proportionality in international case-law relating to maritime delimitation, the concept of proportionality is currently employed as a method of checking the equitability of a proposed result, rather than as a relevant circumstance or an auxiliary method applied to some particular geographical conditions. This was confirmed by the 2009 *Maritime Delimitation in the Black Sea* case.[190]

Indeed, it might be asked why this thesis intends to regard proportionality as an aspect of an equitable result. The reason for this is that an equitable result cannot be defined as such unless it is proportionate. It is evident that proportionality is an important aim to be fulfilled in maritime delimitation, because it is employed to check the equitability of a proposed result *ex post facto*. Furthermore, in the 2009 *Maritime Delimitation in the Black Sea* case, the ICJ invoked the concept of proportionality under the title 'the disproportionality test'. This confirms that an equitable result can only be achieved if it is not disproportionate. Consequently, proportionality is neither a relevant circumstance nor an auxiliary method applied to particular geographical conditions: instead, it becomes an aspect of an equitable result.

In light of this, it should be recalled that the concept of proportionality is not mathematical, as explained above. Therefore, once the disproportionality test has been applied, all results which remain 'within' limited extents can be regarded as equitable. In other words, whilst proportionality (as a method) promotes the indeterminacy of a result, because it is not mathematical, proportionality in itself (as an aim) also constitutes an aspect of an equitable result.

5.2.2.4. Other Examples of an Equitable Result

Other than the three above-cited aspects of an equitable result (non-encroachment on natural

[187] Thirlway, *supra* note 153, pp.41-43.
[188] *I.C.J. Reports 1982*, p.91, para.131.
[189] *I.C.J. Reports 1985*, p.50, para.68; *I.C.J. Reports 1993*, pp.68-69, para.68.
[190] *I.C.J. Reports 2009*, pp.129-130, paras.210-216.

prolongation, an equal division, and proportionality), some aspects of an equitable result can be identified as peculiar to certain cases.

Firstly, one aspect of an equitable result is fulfilled when the maximum extent of the territorial sea or the contiguous zone has been guaranteed. Once a 12NM territorial sea or 24NM contiguous zone has fully been granted, it is considered to be equitable. For example, a 12NM territorial sea was secured in the 1985 *Guinea/Guinea-Bissau* case,[191] and a 24NM contiguous zone was allowed in the 1992 *Saint Pierre and Miquelon* case.[192] In addition, in the 1977 *Anglo-French Continental Shelf* case, the Court of Arbitration aimed at non-encroachment on a 12NM fishery zone.[193] Thus, the maximum extent of the territorial sea or the contiguous zone granted by the 1982 UNCLOS or customary international law to the States concerned can constitute one aspect of an equitable result.

Secondly, no question of refashioning geography, which the ICJ categorised as an equitable 'principle' in the 1985 *Continental Shelf* (Libya/Malta) case, may also be an aspect of an equitable result.[194] In fact, this aim was first presented in the 1969 *North Sea Continental Shelf* cases in relation to the meaning of equity.[195] In the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, the ICJ went on to say that "[t]he geographical configuration of the maritime areas that the Court is called upon to delimit is a given".[196] In later cases, refraining from refashioning geography has repeatedly been confirmed as part of the content of an equitable result. In the 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case, for example, Trinidad and Tobago understood 'Point A' as the turning point of a provisional equidistance line.[197] However, the Arbitral Tribunal in this case did not find any justification for Point A,[198] which in fact seemed to distort the geographical circumstances of the case.[199] Consequently, the Arbitral Tribunal indicated that the avoidance of geographical refashioning constituted an aspect of an equitable result.[200]

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[191] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.298, para.111.
[192] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1170, para.69.
[193] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.95, para.202.
[194] *I.C.J. Reports 1985*, pp.39-40, para.46.
[195] *I.C.J. Reports 1969*, pp.49-50, para.91.
[196] *I.C.J. Reports 2002*, pp.443-445, para.295.
[197] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.106, paras.351-352.
[198] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.107, paras.356, 360.
[199] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.107, para.360.
[200] See Barbara Kwiatkowska, "The 2006 *Barbados/Trinidad and Tobago* Award: A Landmark in

Likewise, in the 2009 *Maritime Delimitation in the Black Sea* case, the ICJ did not count Serpents' Island as part of Ukraine's coastlines because the inclusion of the island may result in a judicial refashioning of geography.[201]

Thirdly, the equitable access to the capelin fishery resources at the heart of the 1993 *Greenland/Jan Mayen* case was considered an aspect of an equitable result.[202] This indicates that the protection of economic interests which might be threatened by a provisional line drawn in a concrete case can also form part of the content of an equitable result.

5.2.2.5. A Concluding Remark

Rosalyn Higgins emphasises that "[w]e are never told, in any of the Court's shelf jurisprudence, what constitutes an equitable result".[203] She goes on to say that "those ends [justifiable and desired ends] must be articulated, and cannot be hidden behind the term 'equitable result'".[204] In short, Judge Higgins argues that the content of an equitable result must be stipulated. However, the nature of an equitable result achieved through the process of taking account of all the relevant circumstances in a concrete case cannot be predetermined, since 'all' relevant circumstances must be considered before an outcome is produced.[205] An equitable result does not appear until the rules governing maritime delimitation have been applied in a flexible manner. In brief, the concept of a singular or pre-determined equitable result is not valid. In his Dissenting Opinion of the 1982 *Continental Shelf* (Tunisia/Libya) case, Judge Oda stated that:

> "[N]o line which could have been suggested by the Court would have been an absolute line in the sense of being the only possible *legal* line, deviation from which would mean encroachment upon the rights possessed *ab initio* by one party or the other".[206]

Judge Oda also supported the concept of *an* equitable result, not *the* equitable result. The concept of an equitable result includes various kinds of equitable results achieved on a case-

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Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", *The International Journal of Marine and Coastal Law*, Volume 22 (2007), pp.50-51.

[201] *I.C.J. Reports 2009*, pp.109-110, para.149.

[202] *I.C.J. Reports 1993*, pp.70-72, paras.72-76.

[203] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), p.225.

[204] *Ibid.*, p.227.

[205] Evans, *supra* note 86, pp.84-86.

[206] Dissenting Opinion of Judge Oda, *I.C.J. Reports 1982*, p.253, para.152.

by-case basis.

Concrete examples of an equitable result can be presented, as shown above. By examining such examples, we can reach a clearer understanding of the meaning and content of an equitable result – the aim of the rules governing maritime delimitation. While an equal division may prove an equitable result in one case, non-encroachment on natural prolongation may constitute an equitable result in another. In this sense, an equitable result reached is indeterminate in a concrete case.

With respect to the indeterminacy of an equitable result, two points must be noted. Firstly, the content of an equitable result is not limited, allowing for the possibility that a new kind of an equitable result may appear in the future. Secondly, the order of priority governing the aspects of an equitable result is not predetermined. This is likely to increase the indeterminacy of a result in maritime delimitation. In short, these two points indicate that an equitable result varies from case to case. An equitable result for a certain case cannot be determined in advance. It follows that the indeterminacy of a result is a valid concept within maritime delimitation.

6. A Concluding Remark

The research carried out on the process of applying the rules governing maritime delimitation demonstrates the leading role of relevant circumstances in order to reach an equitable solution. The three phases involved in the process of taking into account relevant circumstances have been presented. These phases show how international courts and tribunals produce an actual delimitation line through the consideration of relevant circumstances. As the application of the current delimitation rule is not guaranteed to be predictable, the ways involved in applying the rules are various in each phase.

In addition, the three possible decision-making processes reflect the diverse application of the rules in maritime delimitation, relied on the concept of relevant circumstances. The choice of a certain decision-making process belongs to the discretion of international courts and tribunals.

It is clear, therefore, that the flexible application of the rules in the delimitation of maritime boundaries, dominated by the concept of relevant circumstances, results in the indeterminacy of an equitable result. This is an inevitable consequence of the examination of

relevant circumstances on a case-by-case basis in maritime delimitation. Insofar as the achievement of an equitable solution acts as the current rule governing maritime delimitation, it is logically impossible for a result to be determined in advance.

One point to note is that the indeterminacy of an equitable result does not allow international courts and tribunals to exercise an unfettered discretion. Rather, international courts and tribunals have further enhanced the equitability of a result achieved by linking the content of an equitable result (such as the concept of proportionality) with an established decision-making process (such as three-phase decisions). In other words, the aspects of an equitable result or predictable decision-making processes function as the constraint on an arbitrary decision. Therefore, the emphasis on the consideration of relevant circumstances does not necessarily result in the application of equity *ex aequo et bono*.

Chapter V

Delimitation Achieved by Taking into Account Relevant Circumstances (1): The Establishment of a Single Maritime Boundary

1. Introduction

This thesis has demonstrated that, in applying the delimitation rule that is the achievement of an equitable solution, the consideration of relevant circumstances plays a lead role in producing the final result. Because the relevant circumstances of one case are different from those of another, and the ways to consider relevant circumstances are chosen on a case-by-case basis, the rules governing maritime delimitation are flexibly applied in the delimitation of maritime boundaries. This chapter will examine the dominant role of relevant circumstances in relation to the establishment of an SMB.

The construction of an SMB is the most 'typical' pragmatic solution in maritime delimitation. International courts and tribunals have adopted a flexible approach in establishing an SMB. In particular, this chapter will get rid of a possible misunderstanding that the relevant circumstances of an SMB case are confined to 'neutral factors' common to both the EEZ and the continental shelf.

In brief, the various ways in which international courts and tribunals take into account relevant circumstances for drawing an equitable SMB reflect the rise of relevant circumstances in connection with the flexibility of application of the rules in maritime delimitation.

2. A Single Maritime Boundary

2.1. Emergence

The two 1958 Geneva Conventions on the Law of the Sea (the Convention on the

Continental Shelf and the Convention on the Territorial Sea and the Contiguous Zone) showed that two separate lines may be constructed to delimit maritime spaces beyond the territorial sea.[1] According to the rules established by the two Conventions, for example, the final delimitation line dividing the continental shelves of the States concerned may, under special circumstances, depart from an equidistance line, whereas the delimitation line dividing their contiguous zones must remain identical with the equidistance line.[2] However, this situation is little more than hypothetical, as no practical example exists of divergence between continental shelf and contiguous zone delimitation lines.

Since the 1970s, when a number of States began actively to lay claim to the concept of the EEZ or the EFZ, the high seas over each continental shelf have been designated as either an EEZ or an EFZ. This outcome led to the real possibility of a State's having two legally separate areas beyond its territorial sea, up to the maximum distance of the EEZ or the EFZ. As a result, the issue of an SMB was raised in the context of maritime boundary delimitation. The significance of this issue is evident from the fact that the Special Agreement between Canada and the United States requesting the establishment of an SMB was concluded as early as 1979.

The 1982 UNCLOS clarifies two points. First, it clearly articulates the concept of the EEZ; second, it decrees that the legal claim to the continental shelf up to a distance of 200NM must be based on 'geographical adjacency' to the coastlines concerned. According to the UNCLOS, two legal maritime areas may coexist from the maximum distance of the territorial sea up to the limit of the EEZ, and the legal basis for claims to both maritime spaces is identical up to 200NM. At this point, it is worth noting the difficulty of ascertaining the legal ground for an SMB, since the relationship between the EEZ and the continental shelf is not fully clarified. Nevertheless, it can be said that the UNCLOS indirectly supports the concept of an SMB, because there is no rule for managing the two separate delimitation lines.

In 1984, the Chamber of the ICJ made the first international decision regarding the establishment of an SMB. The case involved was the 1984 *Gulf of Maine* case between Canada and the United States. Both Parties requested the Chamber to establish an SMB dividing their continental shelves and fishery zones, under Article II(1) of the Special

[1] See Article 6 of the 1958 Geneva Convention on the Continental Shelf, and Article 24(3) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.
[2] Francisco Orrego Vicuña, *The Exclusive Economic Zone* (Cambridge: Cambridge University Press, 1989), p.190.

Agreement dated 29th March 1979.[3] However, neither Party aimed to materialise a novel concept (that is, an SMB) at that time. As Donald M. McRae points out, the issue of an SMB *per se* was not important to either Canada or the United States.[4] Rather, the two States requested the establishment of an SMB in order to avoid the inconvenience of undergoing separate court proceedings to delimit their continental shelves and their fishery zones: one for the EFZ and the other for the continental shelf.[5] In other words, the establishment of an SMB was a 'pragmatic' solution. Interestingly, however, almost all of the decisions made by international courts and tribunals since the 1984 *Gulf of Maine* case have provided for the establishment of an SMB – with only one exception, the *Continental Shelf* (Libya/Malta) case decided by the ICJ in 1985.

2.2. The Legal Ground for an SMB

In fact, in the 1984 *Gulf of Maine* case, both Canada and the United States seemed unconcerned as to whether or not the concept of an SMB yet existed under the international law of the sea.[6] The President of the Chamber, Judge Ago, queried this legal issue as follows:

> "In the event that one particular method, or set of methods, should appear appropriate for the delimitation of the continental shelf, and another for that of the exclusive fishing zones, what do the Parties consider to be the legal grounds that might be invoked for preferring one or the other in seeking to determine a single line?"

Both Parties found it difficult to reply to the President's question,[7] as they were unable to pinpoint the legal basis for an SMB. In fact, the two States simply presumed that it was both legally and materially possible to establish an SMB.[8] In his Dissenting Opinion, Judge Gros argued that the Chamber itself had failed to provide an adequate answer to Judge Ago's question, which had come to the heart of the matter.[9] According to Judge Gros, therefore, neither the Parties in the case nor the Chamber itself identified any basis or precedent for an

[3] *I.C.J. Reports 1984*, pp.252-255, para.5.
[4] Donald M. McRae, "The Single Maritime Boundary: Problems in Theory and Practice", in E. D. Brown and R. R. Churchill (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation* (Honolulu: The Law of the Sea Institute, University of Hawaii, 1987), p.225.
[5] *Ibid.*
[6] *Ibid.*
[7] See *I.C.J. Reports 1984*, pp.314-315, para.161.
[8] *I.C.J. Reports 1984*, p.267, para.27.
[9] Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.362-363, para.5; Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.368-369, para.14.

SMB in international law.

The research on the legal basis of entitlements to the EEZ and the continental shelf offers a useful starting point in determining the legal ground for an SMB. The matter of title will be addressed before the legal basis for an SMB is explored. Is the legal basis of entitlement to the continental shelf the same as that to the EEZ? Would the legal basis of an SMB be more easily established if the ground for entitlements to the two maritime zones was identical? Seeking to provide adequate answers to these questions, some scholars have examined the legal basis of title to each of these two maritime zones. For instance, L. H. Legault and Blair Hankey argue that the same legal basis exists for claims to the EEZ and the continental shelf alike; namely, 'geographical adjacency measured by the criterion of distance' 'within' 200NM.[10] Likewise, it is meaningful that the 1985 *Continental Shelf* (Libya/Malta) case judged by the ICJ based the legal entitlement to the continental shelf on the criterion of distance: up to a distance of 200NM.[11] Jonathan I. Charney also implies that the legal basis of titles to the EEZ and the continental shelf is identical within 200NM of the coastlines concerned.[12]

At this point, we should look for an answer to the second question: is the legal basis of an SMB more easily established if the basis of title to the continental shelf is the same as that to the EEZ within a distance of 200NM? The answer would be in the negative. There is no logical reason why the two lines should coincide simply due to an identical legal basis of titles to maritime areas that they enclose. If the boundaries of the two maritime areas must be single, this would be incompatible with the significance of each maritime zone that the 1982 UNCLOS acknowledges. The fact that the rights of a State relating to its EEZ are not identical with those relating to its continental shelf indicates that the extent of one State's EEZ may be different from that of its continental shelf. The distinctive characteristic of each maritime area may give rise to a 'grey area' (which is beyond 200NM from the coast of one State but within 200NM from the coast of the other State, however on the former State's side of the delimitation line), as in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case.[13]

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[10] L. H. Legault and Blair Hankey, "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case", *The American Journal of International Law*, Volume 79 (1985), pp.977-978.
[11] *I.C.J. Reports 1985*, pp.55-56, para.77.
[12] Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law", *The American Journal of International Law*, Volume 88 (1994), p.246.
[13] See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.134-137, paras.463-476.

Is there, then, no legal basis for an SMB? In the 1984 *Gulf of Maine* case, the Chamber of the ICJ stated that "there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind".[14] Conceding that there is no rule of international law against an SMB, and that it may be possible in practice to draw a single line of this kind, the Chamber raised no opposition to the implementation of an SMB to divide both Canada and the United States.[15]

Both Parties considered the legal basis of an SMB to lie in their (Special) 'Agreement' to the construction of a single line dividing the continental shelves and fishery zones of the two States.[16] However, Judge Gros believed that such an agreement could not elevate the concept of an SMB to a legal concept.[17] He assumed that, despite their Agreement in this instance, the Chamber could have refused to draw an SMB because a legal reason to authorise the construction of an SMB had not been found.[18]

Judge Gros wondered how both Canada and the United States had been freed from Article 6 of the 1958 Geneva Convention on the Continental Shelf.[19] He advanced an interesting argument that the established regime of the continental shelf was ignored by the new regime of the EEZ.[20] Finally, arguing that an SMB would not be justified if it proved inequitable for either a State's EEZ or its continental shelf rights,[21] Judge Gros concluded that the establishment of an SMB was not directly authorised by the relevant law.[22]

However, L. H. Legault and Blair Hankey identify the logical and functional foundation of an SMB within the concept of the EEZ.[23] According to their research, a 'partial' integration of the EEZ and the continental shelf has been achieved,[24] with the identical legal basis for the two regimes up to a distance of 200NM. For Legault and Hankey, this justifies the establishment of an SMB.[25] Nevertheless, the partial integration of the maritime areas cannot be the sufficient legal basis for an SMB. The notion of partial integration, contingent on the criterion of distance within 200NM, does not deny some

[14] *I.C.J. Reports 1984*, p.267, para.27.
[15] McRae, *supra* note 4, pp.227-228.
[16] See Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.362-363, para.5.
[17] Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.362-363, para.5.
[18] Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.362-363, para.5; Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.370-371, para.17.
[19] Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.368-369, para.14.
[20] Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.368-369, para.14.
[21] Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, pp.373-374, para.20.
[22] Dissenting Opinion of Judge Gros, *I.C.J. Reports 1984*, p.376, para.24.
[23] Legault and Hankey, *supra* note 10, p.962.
[24] *Ibid.*, p.984.
[25] *Ibid.*

distinctive elements of the continental shelf, and is thus inadequate as the legal ground for a single line. Indeed, Judge Gros's argument is theoretically flawless. The fact that the limits of both the EEZ and the continental shelf are determined by the criterion of distance up to 200NM does not necessarily authorise the establishment of an SMB.

Therefore, the establishment of an SMB is no more than a delimitation 'practice', permitted on the assumption that there is no rule against it.[26] This point was reasoned by the ICJ in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case. The Court stated that:

> "[T]he concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them".[27]

Might international courts and tribunals therefore be freely released from such a practice? Turning to the 1993 *Greenland/Jan Mayen* case, it seems that, on the contrary, international courts and tribunals intend to retain the practice of drawing an SMB. At the outset of this case, Denmark unilaterally filed an application instituting proceedings against Norway, because both Parties had already accepted the 'compulsory' jurisdiction of the ICJ.[28] This meant that no agreement to construct an SMB between both Denmark and Norway existed before this case was referred to the Court. During the proceedings of the case, Denmark asked the ICJ to draw an SMB, while Norway argued that two separate lines should be constructed.[29] In favour of Norway's argument, the Court decided to draw two, albeit coincident, lines, concluding that the establishment of an SMB was not relevant to this particular case.[30] In this regard, it must be noted that, in the 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case, the Arbitral Tribunal (which was constituted pursuant to Article 287, and in accordance with Annex VII, of the 1982 UNCLOS) established an SMB when arriving at its decision based on the 'compulsory jurisdiction' of the Tribunal.[31]

How were the rules governing maritime delimitation applied in the 1993

[26] Faraj Abdullah Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Oxford: Oxford University Press, 1993), pp.138-139.
[27] *I.C.J. Reports 2001*, p.93, para.173.
[28] *I.C.J. Reports 1993*, p.41, para.1.
[29] *I.C.J. Reports 1993*, pp.56-57, para.41.
[30] *I.C.J. Reports 1993*, pp.57-58, paras.43-44.
[31] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.59, para.191; *ibid.*, p.67, para.217.

Greenland/Jan Mayen case, in which no agreement was made to establish an SMB? The Court's decision was to draw a provisional median line 'between opposite coasts', irrespective of the nature of each maritime area.[32] Despite the fact that the delimitation of the States' fishery zones was different from that of their continental shelves, the starting line was identical. Furthermore, the two delimitation lines coincided along their 'whole' lengths, even though the relevant circumstances of the three delimited zones differed.[33] Evidently, therefore, the ICJ had constructed a *de facto* SMB in this case.[34]

Since the 1984 *Gulf of Maine* case, the establishment of an SMB has become a common delimitation practice, featuring regularly in the decisions made by international courts and tribunals. The flexible application of the rules governing maritime delimitation, designed to ensure an equitable result in each case, has influenced the identification and weighing-up of relevant circumstances related to an SMB. In short, international courts and tribunals have exercised their discretion in favour of more convenient and pragmatic solutions, despite the lack of the legal ground for the establishment of an SMB.

2.3. Definition

Beyond the territorial sea, the concept of an SMB exists only up to the maximum distance of the EEZ or the EFZ, because two legal maritime areas coexist within the extent of the EEZ or the EFZ.[35] The delimitation of the territorial sea or the continental shelf beyond 200NM should conceptually be excluded from the definition of an SMB. However, this definition rarely suits the actual requests made by States in delimitation cases.

In the 1985 *Guinea/Guinea-Bissau* case, the Arbitral Tribunal stated that:

> "It is not disputed by the Parties that the maritime territories concerned are the territorial sea, exclusive economic zone and continental shelf; that these territories must be delimited by a single line".[36]

Furthermore, in the 1992 *Saint Pierre and Miquelon* case, the Court of Arbitration described a situation in which "the object, as in this case, is to establish *a single, all purpose*

[32] *I.C.J. Reports 1993*, pp.61-62, paras.52-53.
[33] *I.C.J. Reports 1993*, p.79, para.90.
[34] Charney, *supra* note 12, pp.246-247.
[35] Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2003), p.336.
[36] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.272, para.42.

delimitation both of the sea-bed and the superjacent waters" [emphasis added].[37] These two arbitral cases added the delimitation of the territorial sea to the concept of an SMB, which as a result took on a rather different complexion from its use in the 1984 *Gulf of Maine* case. The concept of a 'single all-purpose boundary' started to emerge, and was consolidated by the 1999 *Eritrea/Yemen* case heard by the Arbitral Tribunal.

In the 1999 *Eritrea/Yemen* case, the Arbitral Tribunal stated that "the international boundary shall be a *single all-purpose boundary*" [emphasis added].[38] The Tribunal also authorised the use of a single all-purpose boundary to delimit an area of overlapping 'territorial sea'.[39] A single delimitation line was employed to delimit all of the territorial sea, the EEZ and the continental shelf (if appropriate, including the continental shelf beyond 200NM). While the original concept of an SMB was predicated on a 'vertical' line beyond the territorial sea up to the maximum distance of the EEZ or the EFZ, the definition of a single all-purpose boundary describes instead a 'horizontal' line extending from the coastlines concerned. In other words, a single all-purpose boundary combines the territorial sea boundary, the original SMB, and, if necessary, an outer continental shelf boundary. In this respect, Professor Evans regards a single all-purpose boundary as a 'composite' maritime boundary, as exemplified in the Arbitral Tribunal's 1999 decision to draw two separate sets of boundaries and combine them into a single line.[40]

Here, one of the key issues is whether or not a single all-purpose boundary has its own implications for the development of the law of maritime boundary delimitation. If the concept of a single all-purpose boundary considerably influences the application of the rules for drawing a single delimitation line, it should be differentiated from the original concept of an SMB. Might the development of the concept of a single all-purpose boundary affect the delimitation of the territorial sea or of the continental shelf beyond 200NM? The answer is in the negative.

In fact, the end point of a territorial sea boundary can be the starting point of a 'pure' SMB existing beyond the territorial sea up to the maximum distance of 200NM. It follows

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[37] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1165, para.47.
[38] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.365, para.132.
[39] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, pp.369-370, para.154.
[40] Malcolm D. Evans, "The Maritime Delimitation between Eritrea and Yemen", *Leiden Journal of International Law*, Volume 14 (2001), p.148.

that circumstances relevant to the delimitation of the territorial sea can determine the starting point of a pure SMB. Likewise, if the concept of a single all-purpose boundary must be accepted, the end point of a pure SMB is the starting point of an outer continental shelf boundary. However, it should be noted that circumstances relevant to the delimitation of the territorial sea only affect the drawing of a territorial sea boundary, while circumstances germane to the EEZ or the inner continental shelf only have an effect on establishing a pure SMB. For example, in the 2007 *Maritime Delimitation* (Guyana/Suriname) case, the circumstance (the 10° line established between the Parties) relevant to the territorial sea only influences the construction of the territorial sea boundary.[41] Since the direction of a territorial sea boundary does not need to be the same as that of a pure SMB, a single all-purpose boundary is nothing but the combination of two boundaries (three boundaries including an outer continental shelf boundary, if appropriate).

To summarise, circumstances relevant to the delimitation of the territorial sea or the outer continental shelf do not influence the drawing of a pure SMB. In addition, circumstances pertinent to the establishment of a pure SMB do not have any priority over those relevant to the delimitation of the territorial sea or the outer continental shelf, in relation to the construction of a territorial sea boundary or an outer continental shelf boundary. In other words, the concept of a single all-purpose boundary in itself does not affect the construction of a territorial sea boundary or an outer continental shelf boundary.

The single all-purpose boundary is not a novel concept; it does not affect the flexibility of application of the rules governing maritime delimitation. Conceptually, it is no more than the horizontal extension of a single line. However, in accordance with States' desire to extend a pure SMB to encompass a territorial sea boundary (including an outer continental shelf boundary, if necessary), the concept of a single all-purpose boundary has replaced the original concept of an SMB in maritime delimitation. Consequently, in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, the ICJ defined a single all-purpose boundary as an SMB.[42][43]

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[41] *Award of the Arbitral Tribunal* (The Hague, 17th September 2007), p.97, para.307; *Award of the Arbitral Tribunal* (The Hague, 17th September 2007), p.100, para.313.

[42] *I.C.J. Reports 2001*, p.93, para.173.

[43] Contrary to the trend of the decisions of international courts and tribunals, in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case, the ITLOS regarded a single line only delimiting the EEZ and the inner continental shelf (in accordance with the classical concept of an SMB) as an SMB. See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.59-60, paras.178-181.

2.4. The Importance of Two Separate but Coincident Lines

One interesting question is raised by the 1993 *Greenland/Jan Mayen* case of the ICJ. Despite the fact that the ICJ regarded the establishment of an SMB as irrelevant to this case,[44] it is unclear whether or not the Court actually drew an SMB. There is no practical difference between an SMB and two separate but coincident lines. However, the concept of the latter has an impact on taking into account relevant circumstances in maritime delimitation.

Working on the assumption that the ICJ did not construct an SMB in the 1993 *Greenland/Jan Mayen* case, it is worth noting, first, Judge Shahabuddeen's agreement that circumstances relevant to only one of the two maritime zones should also be taken into account.[45] He implied that the ICJ cannot ignore circumstances pertinent to only one maritime area unless both States ask the Court to draw an SMB.[46] At this point, Judge Shahabuddeen added that the coincidence of two separate lines would occur 'exceptionally'.[47] However, the Court did not clarify why these two separate lines coincide along their 'whole' lengths.[48] According to R. R. Churchill, the ICJ's reasoning on this matter was hardly convincing.[49] Why did the Court regard the delimitation line of the fishery zone as that of the continental shelf in the first zone – thereby only taking into consideration the equitable access to the capelin fishery resources?

At this stage, we need to assess the case from a different angle. Was there any practical benefit to the decision not to draw an SMB in the 1993 *Greenland/Jan Mayen* case? The most important reason why the Court preferred to use two separate but coincident lines is that this method allowed non-neutral relevant circumstances to be taken into consideration. By taking account of circumstances relevant to only one maritime space, the Court was able to disregard the primacy of neutral circumstances mandated by the Chamber of the ICJ in the 1984 *Gulf of Maine* case – despite drawing a single line. Therefore, it is submitted that the use of two separate but coincident lines offers international courts and tribunals a useful means of taking resource-related factors into account, if they intend to include economic factors among the relevant circumstances to be taken into account.

Judge Shahabuddeen argued that international courts and tribunals should be subject

[44] *I.C.J. Reports 1993*, pp.57-58, paras.43-44.
[45] Separate Opinion of Judge Shahabuddeen, *I.C.J. Reports 1993*, p.201.
[46] R. R. Churchill, "The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation", *The International Journal of Marine and Coastal Law*, Volume 9 (1994), p.11.
[47] Separate Opinion of Judge Shahabuddeen, *I.C.J. Reports 1993*, p.201.
[48] *I.C.J. Reports 1993*, p.79, para.90.
[49] Churchill, *supra* note 46, p.26.

to the application of equitable principles, even when both States request the establishment of an SMB.[50] The decisions of international courts and tribunals cannot be based solely on circumstances common to both maritime zones if circumstances germane to only one of the two zones are also 'relevant' to a delimitation case.[51] In this situation, constructing two separate but coincident lines enables international courts and tribunals to take economic factors into consideration at their discretion. In the 1993 *Greenland/Jan Mayen* case, the ICJ thereby exercised its discretion to depart from the constraint of neutral circumstances – despite, in practice, drawing a single line.

3. The Consideration of Relevant Circumstances for the Purpose of Establishing an SMB

3.1. The Construction of a Provisional Line: An Equidistance Line and Other Provisional Lines

Defining the 'fundamental norm' of general customary international law as the rules governing maritime boundary delimitation in the 1984 *Gulf of Maine* case,[52] the Chamber of the ICJ assumed that it had the discretionary power to choose equitable criteria and practical methods capable of ensuring an equitable result, insofar as special international law did not impose any binding legal obligations on international courts and tribunals.[53] The Chamber then confirmed that equitable criteria and practical methods can only be chosen in relation to the 'relevant circumstances' of a given case.[54] As pointed out in Chapter III, the concept of equitable principles or criteria can only be meaningful with respect to the concept of relevant circumstances. The issue of relevant circumstances is at the heart of the delimitation process. Hence, even the drawing of a 'provisional' 'SMB' line is determined by the examination of relevant circumstances.

It is worth examining the methods used by the Chamber to construct provisional lines in the 1984 *Gulf of Maine* case, as this was the first case to allow for the establishment of an SMB. The Chamber of the ICJ warned that:

[50] Separate Opinion of Judge Shahabuddeen, *I.C.J. Reports 1993*, p.200.
[51] Separate Opinion of Judge Shahabuddeen, *I.C.J. Reports 1993*, p.200.
[52] *I.C.J. Reports 1984*, pp.299-300, para.112.
[53] *I.C.J. Reports 1984*, p.312, paras.155-156.
[54] *I.C.J. Reports 1984*, p.313, para.158; *I.C.J. Reports 1984*, p.315, para.163.

> "Nor should one overlook the possibility that, over the whole course of a long delimitation line, various, though related, methods may successively appear more appropriate to the different segments".[55]

Although maritime delimitation could aim at an 'equal' division of relevant maritime areas as one aspect of an equitable result, as pointed out in the previous chapter,[56] the Chamber found that the construction of an equidistance line was not obligatory. In other words, despite the aim to divide relevant areas equally, the drawing of an equidistance line, which seems to be the most appropriate method for an equal division, is not compelled. In terms of establishing an SMB, moreover, the Chamber added that a 'degree of simplification' was required to construct the delimitation line for the EEZ or the EFZ, because "[e]xploitation of the sea's fishery resources calls for the existence of *clear* boundaries of a constant course" [emphasis added].[57] The two key points in the Chamber's reasoning (that is, the non-obligatory character of an equidistance line, and the simplicity of a provisional line) were illustrated in the first segment of the 1984 *Gulf of Maine* case.

The request that an equidistance line be drawn was rejected in the first segment for two reasons. Firstly, the equidistance method has the inherent defect that minor geographical features might be accorded undue weight.[58] Secondly, 'point A' was not equidistant between two basepoints.[59] In other words, point A could not be the starting point for drawing a provisional equidistance line. For these reasons, the Chamber chose another geometrical method: the bisector method, which has the 'advantages of simplicity and clarity' and can produce a 'result as close as possible to an equal division'.[60] The bisector line drawn in the first segment after relevant circumstances were considered was initially a provisional line, but became the final delimitation line in this segment. As no other relevant circumstances were found, no adjustments to the provisional bisector line were required.

At this point, an important question should be addressed with regard to the construction of a provisional line. Can a bisector line be no more than a provisional line? Whereas an equidistance line can be constructed as provisional unless relevant circumstances

[55] *I.C.J. Reports 1984*, p.329, para.200.
[56] *I.C.J. Reports 1984*, p.327, para.195.
[57] *I.C.J. Reports 1984*, p.330, paras.202-203.
[58] *I.C.J. Reports 1984*, p.332, para.210.
[59] *I.C.J. Reports 1984*, p.332, para.211.
[60] *I.C.J. Reports 1984*, p.333, para.213.

indicate its inappropriateness or impossibility, a bisector line is generally constructed in light of all relevant circumstances. In this sense, a bisector line is not provisional but final. However, in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case, the ICJ showed that a bisector line may be adjusted if the line is drawn around islands.[61] This means that another relevant circumstance can be taken into account after the construction of a bisector line. It is thus submitted that a bisector line, like an equidistance line, falls into the category of provisional lines for establishing an SMB.

In the second segment of the 1984 *Gulf of Maine* case, the provisional line employed was an equidistance line because the two States had 'opposite' coasts.[62] Why do international courts and tribunals prefer to use an equidistance line when the coasts of both States are defined as being opposite? As the Chamber pointed out, it would be difficult to envisage a better method than the construction of an equidistance line if the relationship between the coasts is opposite, and the desired result is an equal division of maritime areas 'where the maritime projections of the coasts of both States overlap'.[63] Contrary to the ICJ's reasoning in the 1969 *North Sea Continental Shelf* cases which rejected the concept of apportionment or division,[64] maritime delimitation entails the equitable 'division' of a maritime area to which all of the States concerned are legally entitled. At this point, it should not be overlooked that, in the 1969 *North Sea Continental Shelf* cases and the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case, the drawing of an equidistance line might produce an inequitable result.[65] The reason for this is that the relationship between the coasts is 'adjacent', and the construction of an equidistance line is not an appropriate means for an equal division between the adjacent States concerned. In sum, drawing an equidistance line can be the most effective method of delimitation if the desired result of a case is an equal division of maritime spaces overlapped between the 'opposite' States involved. However, another provisional line can be drawn if an equal

[61] *I.C.J. Reports 2007*, p.748, para.294; *I.C.J. Reports 2007*, p.752, para.305.
[62] *I.C.J. Reports 1984*, pp.333-334, paras.216-217.
[63] *I.C.J. Reports 1984*, p.334, para.217.
[64] *I.C.J. Reports 1969*, pp.21-22, para.18.
[65] In the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case, the ITLOS drew a 'provisional' equidistance line. However, it should be noted that, for the purpose of avoiding an inequitable result, the direction of the provisional line was diverted to the same azimuth of 215° (from point X) as that of a bisector line which Bangladesh had suggested. Moreover, 'most' of the provisional equidistance line was adjusted by relevant circumstances. In other words, although the ITLOS constructed the provisional equidistance line, the line was very similar to the bisector line that Bangladesh had wanted to draw. See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.99-100, paras.329-335.

division does not reflect the most equitable result in a particular case. There is no way of determining in advance which provisional line will be the most appropriate for a specific case.[66]

Does the preference of constructing a provisional equidistance line reduce the discretionary power of international courts and tribunals relating to the establishment of an SMB in situations in which the maritime projections of the coasts of two States overlap? Here, we can account for their discretion in two ways.

Firstly, international courts and tribunals are relatively free to 'interpret' the relationship between the coasts concerned and 'determine' what coasts are relevant to being opposite or adjacent. They determine whether or not the coasts are opposite each other, and if so, where their oppositeness begins and ends. For example, in the second sector of the 1982 *Continental Shelf* (Tunisia/Libya) case (despite the fact that this case was not an SMB case), the ICJ interpreted that the relationship between both Tunisia and Libya is being transformed from that of adjacent States to that of opposite States at one point.[67] In the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case, the ITLOS determined that Myanmar's coast south of Bhiff Cape should be regarded as relevant, contrary to Bangladesh's contention.[68] If Bangladesh's argument had been accepted, the Tribunal could have employed the construction of a bisector line. Since the contention of Bangladesh was not admitted, the ITLOS had no choice but to use a provisional equidistance line.[69] In other words, after the Tribunal exercised its discretion, it constructed the provisional line.

Secondly, international courts and tribunals may decide whether or not the maritime delimitation of a given area is considered expressive of an equitable division where the maritime projections of the coasts of two States overlap. If the main issue at stake is which additional maritime area (such as the contiguous zone) must be attached to an island, as in the 1992 *Saint Pierre and Miquelon* case, an international court may choose whether or not a provisional line is drawn. Furthermore, it should be stressed that it is also at the discretion of international courts and tribunals to look upon an equal division as one aspect of an equitable result in a given case, even though the aim of maritime delimitation is to divide relevant

[66] *I.C.J. Reports 1984*, p.315, paras.162-163.
[67] *I.C.J. Reports 1982*, p.88, para.126.
[68] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.65, para.203.
[69] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.75, para.237.

areas equitably. If non-encroachment on natural prolongation is one dominant aspect of an equitable result as in the 1969 *North Sea Continental Shelf* cases, an international court or tribunal does not need to adopt a provisional equidistance line for an equal division. As a result, although a provisional equidistance line is frequently used for establishing an SMB, international courts and tribunals have the freedom to draw an appropriate provisional line.

To continue with analysing the 1984 *Gulf of Maine* case, it is worth noting that a perpendicular line was drawn in the third segment.[70] As 'special international law' to which the Chamber referred in paragraph 114 of its Judgment was not found, the Chamber drew each provisional line at its own discretion, according to which was deemed the most appropriate in each segment. In fact, no special international law exists within either treaty law or customary international law with respect to the delimitation of the EEZ or the EFZ. Hence, the establishment of an SMB has consistently been governed by 'general' customary international law for the purpose of achieving an equitable solution. In short, international courts and tribunals may still apply the fundamental norm of general customary international law at their discretion.

Since the 1984 *Gulf of Maine* case, the provisional line drawn in most international cases has been an equidistance line. At this point, it should be asked whether or not the rules which mandate the drawing of a provisional equidistance line exist with regard to the establishment of an SMB. In fact, since the drawing of an SMB in itself is simply a convenient or pragmatic solution, such rules do not exist. Are there, then, rules for the drawing of a provisional delimitation line for each maritime zone, such as the continental shelf, the EEZ, or the EFZ? The rules articulated in the 1982 UNCLOS regarding the delimitation of the EEZ (or the continental shelf) do not decree that any special or particular provisional line be drawn. Likewise, there is no customary international law regulating the provisional delimitation line of the EFZ. Except for the fact that the 1958 Geneva Convention on the Continental Shelf accepted the equidistance method with regard to the delimitation of the continental shelf, we cannot find any rule mandating that an equidistance line must function as the provisional line of an SMB. Nonetheless, the construction of a provisional equidistance line in establishing an SMB has been prioritised in the first phase (of two-phase or three-phase decisions made by international courts and tribunals) of taking into account relevant circumstances unless the relevant circumstances indicate the inapplicability of an equidistance line as the provisional SMB line. This is an attempt to

[70] *I.C.J. Reports 1984*, pp.337-338, para.224.

avoid making an arbitrary decision, as confirmed in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case of the ITLOS.[71] However, the discretion of international courts and tribunals is not restricted regarding the establishment of a provisional SMB line, because there is the possibility to draw an alternative provisional line by means of taking into account relevant circumstances.[72]

In light of this, the discretionary power of international courts and tribunals concerning the construction of a provisional SMB line can be summarised in four ways. Firstly, drawing a provisional equidistance line is not compulsory. An equidistance line is nothing but the starting point in the process of reaching an equitable result. International courts and tribunals may choose an equidistance line as a suitable provisional boundary, resulting in an equal division where the maritime projections of the coasts of both States overlap.

Secondly, even when the maritime projections of the coasts of both States overlap, international courts and tribunals are still responsible for considering relevant circumstances in drawing a provisional equidistance line. If the equidistance method appears unsuitable in light of these circumstances, international courts and tribunals may at their discretion refuse to construct an equidistance line.

Thirdly, when the equidistance technique is rejected, international courts and tribunals have the task of looking for another provisional line. The other type of line deemed to be the most appropriate in international case-law is a bisector line. In the process of constructing a bisector line, international courts and tribunals exercise their discretionary power to assess the shape of the coastlines involved (whether convex or concave), and to determine their two end points.

Fourthly, as the 1992 *Saint Pierre and Miquelon* case indicated, international courts and tribunals may decide against drawing a provisional line if such a line is considered unnecessary. In this case, the Court of Arbitration instead devoted its efforts to determining which coastlines should be considered relevant as the starting point when attaching an additional maritime area (such as the contiguous zone) to an island. Even when an equidistance line is chosen as the provisional one, international courts and tribunals are free to determine which coastlines are relevant to being opposite or adjacent.

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[71] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.72-74, paras.226-233.
[72] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.74-75, paras.234-236.

To conclude, the preferred employment of the equidistance method in constructing provisional lines does little to reduce the flexible application of the rules treating relevant circumstances in establishing an SMB.

3.2. The Weighing-up Process: The Preference of Neutral Factors or Circumstances

3.2.1. Neutral Circumstances and the Discretion of International Courts and Tribunals

The next phase in the delimitation process, following the construction of a provisional line, is usually the weighing-up of relevant circumstances. While a provisional line is drawn according to the indicative role of relevant circumstances, the process of weighing-up gives these circumstances an ameliorative as well as an indicative role. That is to say, a provisional line already drawn may be shifted (ameliorated) as a result of weighing up relevant circumstances. In addition, these circumstances may be judged to indicate the delimitation line directly, even when a provisional line does not exist. This defines the indicative role of relevant circumstances. In the first sector of the 1982 *Continental Shelf* (Tunisia/Libya) case (despite the fact that this case was not an SMB case), for example, relevant circumstances indicated that the 26° line should be established.[73] In the 2007 *Maritime Delimitation* (Guyana/Suriname) case, the relevant circumstances concerning navigation, from the starting point to a distance of 3NM, indicated that the 10° line must be drawn.[74]

This raises the most important question of all: what impact does the establishment of an SMB have on the process of considering relevant circumstances? First of all, we must examine the concept of 'neutral' factors or circumstances advanced by the Chamber of the ICJ in the 1984 *Gulf of Maine* case. The Chamber stated that "preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation".[75] It then placed the focus on criteria derived from 'geography'.[76] In this context, the term 'geography' refers to 'coastal' geography.[77] Although the concept of neutral factors or circumstances was originally proposed to assist in seeking equitable criteria for the establishment of an SMB, it has in fact played a pivotal role in

[73] *I.C.J. Reports 1982*, pp.83-86, paras.117-121.
[74] *Award of the Arbitral Tribunal* (The Hague, 17th September 2007), pp.96-97, paras.304-307.
[75] *I.C.J. Reports 1984*, p.327, para.194.
[76] *I.C.J. Reports 1984*, p.327, para.195.
[77] *I.C.J. Reports 1984*, p.327, para.195.

limiting the list of circumstances relevant to maritime delimitation.

As mentioned above, the concept of 'neutral' factors emerged in the course of seeking equitable criteria common to both the delimitation of the continental shelf and that of the EEZ or the EFZ. However, as demonstrated in Chapter III, equitable principles or criteria do not have a meaning independent of their application. The application of equitable principles or criteria entails the consideration of all relevant circumstances. Therefore, the issue of neutral factors begs the question of whether or not the term 'neutral' has limited the list of relevant circumstances with respect to the establishment of an SMB. If this is the case, we must ask whether or not the limitation has affected the discretionary power of international courts and tribunals.

3.2.2. Geography

The consideration of geography – specifically coastal geography – is the starting point for taking into account relevant circumstances in establishing an SMB. Geography indicates which provisional line is appropriate in the first stage of delimitation, as shown in Chapter IV. It is the first relevant circumstance to be taken into account, since the emphasis on 'neutral' factors rather than equitable 'criteria' makes geography the most important relevant circumstance.

Malcolm D. Evans divides geography into two groups: geographical 'factors' and geographical 'features'.[7879] Despite this distinction, which is used to explain the two roles of relevant circumstances (indicative and ameliorative), Professor Evans's theory reflects the importance of the term 'geography' in the delimitation process.

3.2.2.1. Geographical Factors

First of all, we must examine what is understood by geographical factors. Two geographical factors have been considered to be of particular importance in international case-law: the coastal configuration (either convex or concave) and the relationship of the coastlines concerned (either opposite or adjacent). According to Professor Evans, these two factors

[78] Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Oxford University Press, 1989), pp.120-121.

[79] If paragraph 24 of the Decision that the Court of Arbitration made in the 1992 *Saint Pierre and Miquelon* case is noted, both geographical factors and geographical features seem to be interchangeable. However, the concept of geography will be better analysed if the view of Professor Evans is followed.

'indicate' which provisional line is appropriate for a given case.[80] Before the concept of an SMB emerged, they had dominated the process of maritime delimitation, including the drawing of a provisional line. During the 1969 *North Sea Continental Shelf* cases, for instance, the ICJ implied that the concavity of the coastlines involved would make the equidistance method unfavourable to Germany.[81] Likewise, in the 1977 *Anglo-French Continental Shelf* case, the Court of Arbitration assumed that the existence of opposite coasts is a prerequisite for the use of the equidistance method.[82]

With regard to the establishment of an SMB, however, international courts and tribunals have restrained the influence of the two geographical factors. An equidistance line is used as a provisional one, irrespective of the relationship of the coastlines concerned, as in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case judged by the ICJ.[83] Moreover, regarding the issue of coastal configuration, the Arbitral Tribunal overseeing the 2007 *Maritime Delimitation* (Guyana/Suriname) case concluded that international courts and tribunals dealing with maritime delimitation must 'respect nature' rather than simply consider the convexity or concavity of the coastlines involved.[84] Likewise, in the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, the ICJ stated that:

> "The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation".[85]

Does this trend of limiting the influence of the two geographical factors affect the discretionary power of international courts and tribunals in the process of establishing an SMB? Is the provisional use of the equidistance method perpetuated, irrespective of the two major geographical factors? Those who answer in the affirmative could subsequently contend that maritime boundary delimitation is to some extent predictable.

In fact, the increased focus on geography has corrected the bias in the equidistance method which seems unfavourable to concave coastlines. Moreover, the assumption that it is

[80] Evans, *supra* note 78, pp.123-124.
[81] *I.C.J. Reports 1969*, pp.17-18, para.8; *I.C.J. Reports 1969*, p.49, para.89.
[82] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.88, para.182.
[83] *I.C.J. Reports 2001*, pp.91-93, para.170; *I.C.J. Reports 2001*, p.111, para.230.
[84] *Award of the Arbitral Tribunal* (The Hague, 17th September 2007), pp.120-121, paras.373-374.
[85] *I.C.J. Reports 2002*, pp.443-445, para.295.

not equitable to apply the equidistance method when the coastlines concerned are adjacent has been overcome.[86] The equidistance method can be employed even between adjacent States. In short, the importance attributed to geography by the concept of an SMB increases the provisional employment of the equidistance method. However, a concentrated review of coastal geography does not necessarily reduce an international court or tribunal's discretionary power. The power of international courts and tribunals to read nature or interpret geography remains unchanged. International courts and tribunals are still free to interpret geographical factors when identifying relevant coasts (despite the fact that relevant coasts in themselves are not relevant circumstances, as described above). The determination of relevant coasts influences both aspects of maritime delimitation. Firstly, identifying relevant coasts helps an international court or tribunal to decide whether the coastal configuration is peculiar (either convex or concave) or not. In the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, the ICJ did not accept Cameroon's argument that the coastlines of the Gulf of Guinea (from one point in Nigeria to another in Gabon) should be taken into consideration.[87] If Cameroon's contention had been supported, the coastal configuration would have been designated concave. However, in stressing that the relevant coasts in this case were limited to 'part' of the full coastlines of Nigeria and Cameroon,[88] the ICJ understood there to be no particular concavity.[89] Secondly, the length of relevant coasts can influence the check of proportionality in a given case. For example, in the 2009 *Maritime Delimitation in the Black Sea* case, the Court excluded some of Ukraine's gulfs from its definition of relevant coasts.[90] It is submitted that the conclusion reached by the ICJ thus affected the check of proportionality.

In addition, the freedom of international courts and tribunals to interpret geographical factors has been extended to the 'macro-geographical context' or the 'general (overall) geographical framework' in certain cases. According to Professor Evans, there are no exact criteria to explain their difference.[91] However, it can be submitted that the macro-geographical context includes the geography of the region(s) beyond the States concerned, whereas the general geographical framework is limited to the wider context of the geography of the States involved.

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[86] *I.C.J. Reports 2001*, pp.91-93, para.170; *I.C.J. Reports 2001*, p.111, para.230.
[87] *I.C.J. Reports 2002*, pp.442-443, para.291.
[88] *I.C.J. Reports 2002*, pp.442-443, paras.291-292.
[89] *I.C.J. Reports 2002*, pp.445-446, para.297.
[90] *I.C.J. Reports 2009*, p.97, para.100.
[91] Evans, *supra* note 78, p.131.

In the 1985 *Guinea/Guinea-Bissau* case, for example, the Arbitral Tribunal took into account the general configuration of the West African coastlines from the perspective of 'macro-geography', with reference to the two coastal points of Senegal and Sierra Leone.[92] In contrast, the Court of Arbitration paid attention only to the 'general geographical framework' in the 1992 *Saint Pierre and Miquelon* case. In the latter case, the Court of Arbitration confirmed that identifying the general geographical framework was the starting point for the delimitation process.[93] According to the geographical framework set by the Court of Arbitration, Saint Pierre and Miquelon are located 'within' a concavity shaped by Canadian coastlines.[94] Although Saint Pierre and Miquelon may also be entitled to claim the continental shelf and the EEZ up to a distance of 200NM, they are unlikely to be on an equal footing with Canadian territories. In other words, although the Court did not consider the political status of Saint Pierre and Miquelon,[95] their geographical location in relation to the mainland territory of France seemed to be taken into account.[96] Thus, the focus of this case was on which 'additional' maritime areas the two French islands, located within a concavity framed by Canadian coastlines, would be accorded other than the territorial sea. It appears that the unfavourable interpretation given to the two French islands affected the outcome of this case.

Contrary to the two above-mentioned cases, the ICJ disregarded the macro-geographical context in the 2002 *Land and Maritime Boundary* (Cameroon/Nigeria) case, and the Arbitral Tribunal did not consider the general geographical framework in the 2007 *Maritime Delimitation* (Guyana/Suriname) case.[97]

To summarise, in practice, the provisional use of the equidistance method has

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[92] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, pp.297-298, paras.108-111.
[93] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1161, para.25.
[94] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1161, para.26.
[95] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, p.1165, para.49.
[96] See Louise de La Fayette, "The Award in the Canada-France Maritime Boundary Arbitration", *The International Journal of Marine and Coastal Law*, Volume 8 (1993), p.97. She doubted that the Court of Arbitration had considered the geographical location of the islands in relation to their mainland territory in this case. However, since the main question posed in this case was which 'additional' maritime areas the two French islands, located within a concavity framed by Canadian coastlines, would be given other than the territorial sea, this thesis understands that their location respective to mainland territory of France was taken into consideration.
[97] *I.C.J. Reports 2002*, pp.442-443, paras.291-292; *Award of the Arbitral Tribunal* (The Hague, 17th September 2007), p.113, para.352.

increasingly become popular with the emergence of the concept of an SMB. As a result, the two major geographical factors (the coastal configuration and the relationship of the coastlines concerned) have generally diminished in importance. There are two reasons for this development. Firstly, the view that the coastal configuration is a 'given' has become dominant.[98] Therefore, in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case, the construction of a provisional equidistance line was not rejected, although both States are adjacent, and Bangladesh's coast is severely concave. Secondly, a line consisting of a 'complicated or even a zigzag path' is inappropriate as an SMB.[99]

It is not the case, however, that the priority given to the equidistance method has restricted the discretionary power of international courts and tribunals in dealing with geographical factors when an SMB is constructed. As proved above, with regard to the determination of relevant coasts and the choice of either the 'macro-geographical context' or the 'general geographical framework', international courts and tribunals continue to exercise their discretion effectively. The preferential consideration of neutral factors seems to dominate the establishment of an SMB; however, coastal geography, a quintessentially neutral factor, is also the object of necessary legal interpretation. It follows that the interpretation of coastal geography, the most important relevant circumstance, is a source of flexibility with respect to the establishment of an SMB.

3.2.2.2. Geographical Features

As presented above, geographical factors include the coastal configuration (*or* in connection with the definition of relevant coasts), the relationship of the coastlines concerned (*or* in connection with the definition of relevant coasts), and the consideration of the macro-geographical context or the general geographical framework. What can be regarded as geographical features? The most important geographical feature is the existence of an island or islands. When an SMB is established, the treatment of an island or islands will affect the final result, which must be equitable. This thesis intends to show that the treatment of an island or islands in the context of maritime delimitation has an effect on the drawing of an SMB. In addition, the issue of low-tide elevations will be examined.

[98] *I.C.J. Reports 2002*, pp.443-445, para.295.
[99] *I.C.J. Reports 1984*, p.330, para.202.

3.2.2.2.1. The Consideration of an Island or Islands

Before turning to the issue of dealing with an island or islands, the difference between two types of delimitation should be appreciated. One type regards islands as part of a mainland; the other considers them to be the offshore possessions of a mainland. According to the former pattern of delimitation, islands must be treated in the context of the general geographical framework of a given case. Thus, they cannot be geographical features. However, we should not overlook the fact that the 'size' of the islands can affect the establishment of an SMB, as in the 1992 *Saint Pierre and Miquelon* case and the 1993 *Greenland/Jan Mayen* case. Because the islands of Saint Pierre, Miquelon and Jan Mayen are too small in relation to Canada's mainland or Greenland, the SMBs were constructed so as not to divide relevant areas equally.

In the delimitation process, islands are accorded full effect, half effect, partial effect or no effect. Of these effects, above all, the concept of 'half' effect mentioned in the 1984 *Gulf of Maine* case must be explained. In this case, Canada's Seal Island was accorded half effect.[100] The method of half effect had already been used in the 1977 *Anglo-French Continental Shelf* case and the 1982 *Continental Shelf* (Tunisia/Libya) case, both of which involved the delimitation of the continental shelf.

However, two significant points should be noted with regard to the attribution of half effect in the 1984 *Gulf of Maine* case. Firstly, the method of half effect employed in this case was 'different' from that used in the two previous continental shelf delimitation cases. The Chamber 'assumed' that Seal Island lies halfway between its real position and the Canadian coast.[101] However, the two earlier cases employed the half-effect method to draw the delimitation line halfway between one delimitation line (without the use of an island as a basepoint) and the other delimitation line (using the island as a basepoint).[102] In these two continental shelf delimitation cases, therefore, the method of half effect fixed the 'angle' or 'direction' of the final delimitation line. In contrast to these continental shelf delimitation cases, the Chamber adopted the half-effect method in the 1984 *Gulf of Maine* case to avoid a

[100] *I.C.J. Reports 1984*, pp.336-337, para.222.
[101] Technical Report, *I.C.J. Reports 1984*, p.350, para.13.
[102] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.117, para.251. If strictly analysed, in the second sector of the 1982 *Continental Shelf* (Tunisia/Libya) case, the ICJ employed the half-effect method not to draw the delimitation line halfway between two lines, but to draw the delimitation line 'parallel' to the line halfway between two lines. See *I.C.J. Reports 1982*, p.89, para.129.

judicial refashioning of geography.[103] In addition, according half effect to Seal Island played a role in adjusting the division ratio of the closing line of the Gulf.

Secondly, it is questionable why Seal Island, some 14km (about 7.7NM) off the Canadian coast, is a geographical feature incapable of being granted full effect.[104] The Chamber did not clarify a specific reason. In the 1977 *Anglo-French Continental Shelf* case, in fact, the French island of Ushant, which lies about 10NM off the French coast, was granted full effect, although it was assessed in relation to the Scilly Isles of the United Kingdom.[105] In other words, it is doubtful whether the short distance (about 7.7NM) between Seal Island and the Canadian coast can result in a refashioning of geography.

To sum up, in the 1984 *Gulf of Maine* case, the Chamber demonstrated a new application of the half-effect method, and a flexible treatment regarding an offshore island. It appears, therefore, that international courts and tribunals still have the freedom to give appropriate weight to islands when establishing an SMB.

With respect to the treatment of small uninhabited islands, there is a significant difference between international arbitral and judicial cases. In the 1985 *Guinea/Guinea-Bissau* case, the 12NM territorial sea 'to the west' of Alcatraz was granted to the island, despite the fact that the island was small and uninhabited.[106] This is a type of full effect.[107] The reason why this effect must be defined as full effect is that the Arbitral Tribunal could have disregarded the existence of an island, as Qit'at Jaradah was granted no effect in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case.[108] While even a small uninhabited island has potential to obtain the 12NM territorial sea under the 1982 UNCLOS or customary international law, the extent of the territorial sea may equitably be reduced in relation to the maritime areas of another State when an SMB is constructed. For example, in the 1985 *Guinea/Guinea-Bissau* case, the island of Alcatraz was accorded only

[103] *I.C.J. Reports 1984*, pp.336-337, para.222.
[104] Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Portland: Hart Publishing, 2006), p.196.
[105] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.115-117, paras.248-251.
[106] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.298, para.111.
[107] Yoshifumi Tanaka explains that the island of Alcatraz was given 'partial' effect. However, the Arbitral Tribunal could not cross the 1886 limit in the 1985 *Guinea/Guinea-Bissau* case. Considering the 1886 limit, therefore, the Arbitral Tribunal's decision to accord to Alcatraz the 12NM territorial sea to the west of the island is equivalent to a designation of 'full' effect. See Tanaka, *supra* note 104, p.208.
[108] *I.C.J. Reports 2001*, pp.104-109, para.219.

2.25NM territorial sea 'to the north', because of one relevant circumstance, the southern limit of the 1886 Convention.[109] However, in the same case, the 12NM territorial sea 'to the west' of Alcatraz was fully granted.

Along with this analysis of the island of Alcatraz, two other islands should be considered. Firstly, in the 2009 *Maritime Delimitation in the Black Sea* case, the ICJ regarded the small, uninhabited Serpents' Island about 20NM to the east of the Danube delta as irrelevant to the establishment of an SMB.[110] Why did the Court fail to accord Serpents' Island even half effect? It is questionable whether or not Serpents' Island accorded half effect will result in a refashioning of geography. At any rate, the ICJ's conclusion in this case was opposed to the decision of the Arbitral Tribunal in the 1985 *Guinea/Guinea-Bissau* case. Secondly, it should be noted that the Scilly Isles, taken into account in the 1977 *Anglo-French Continental Shelf* case, were accorded only half effect, despite the fact that they were 'inhabited'. This is in stark contrast with the attribution of full effect to the small, uninhabited island of Alcatraz. Consequently, it is difficult to judge whether a small uninhabited island is given full, half or no effect in a given case before all relevant circumstances are taken into account.

Whether islands are 'part of relevant coasts' (not relevant circumstances) in the context of mainland coastal geography is also dependant on the discretion of international courts and tribunals. In the 1999 *Eritrea/Yemen* case, the Dahlak islands[111] of Eritrea, Kamaran (and its satellite islets)[112] of Yemen, the islets to the northwest named Uqban and Kutama,[113] and the off-lying islands of the Bay of Assab[114] were all regarded as part of the relevant coasts of each State. However, the island of al-Tayr and the island group of al-Zubayr were not included within the relevant coasts.[115] In other words, the Arbitral Tribunal had the freedom to choose which effect (ranging from full effect to no effect) would be

[109] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.298, para.111.
[110] *I.C.J. Reports 2009*, pp.122-123, para.187.
[111] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.367, para.139.
[112] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.369, para.150.
[113] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.369, para.151.
[114] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, pp.371-372, para.163.
[115] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.368, paras.147-148.

accorded to each island. This is a type of flexibility demonstrated by the Arbitral Tribunal in the course of assessing islands (in connection with the determination of relevant coasts) 'before' relevant circumstances are taken into consideration. Furthermore, the island of Zuqar was not granted its full 12NM territorial sea due to the need for a geodetic line joining point 13 with point 14.[116]

Similarly, in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, the ICJ exerted its discretionary power in judging the merits of certain islands. For instance, Qit'at Jaradah was granted no effect, as it was felt that anything more would be disproportionate to such an insignificant feature.[117] Moreover, Fasht al Jarim was given no effect in the delimitation process, as this would have distorted the maritime boundary to be constructed.[118] In order to achieve an equitable result in the case, the ICJ determined the effect to be attributed to each island at its discretion.

With respect to the concepts of full effect and no effect, an important point should be made. Analysis of international judicial and arbitral case-law reveals two kinds of 'full effect'. One designates an island as part of relevant coasts (part of a mainland), and the other grants an island its own 'full' (that is, 12NM) territorial sea, which may influence the drawing of a maritime boundary.[119] An example of the former concept is that the Dahlak islands, Kamaran and its satellite islets, the islets to the north-west named Uqban and Kutama, and the off-lying islands of the Bay of Assab were all regarded as part of relevant coasts (part of each State's mainland) in the 1999 *Eritrea/Yemen* case. By contrast, an example of the latter concept is found in the 1985 *Guinea/Guinea-Bissau* case, which granted 12NM territorial sea to the island of Alcatraz, at least to the west of the island.

Likewise, two kinds of 'no effect' can be granted to an island. In the 1999 *Eritrea/Yemen* case, the attribution of no effect to the island of al-Tayr and the island group of al-Zubayr meant that these islands were not regarded as part of Yemen's coast. In the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, however, granting no effect to Qit'at Jaradah and Fasht al Jarim simply indicated that these islands did not have an impact on the delimitation process or the final delimitation line. Similarly, in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case of the

[116] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.371, para.161.
[117] *I.C.J. Reports 2001*, pp.104-109, para.219.
[118] *I.C.J. Reports 2001*, pp.114-115, paras.247-248.
[119] In this context, the concept of 'partial' effect can be presented. This means that an island is accorded the territorial sea less than a distance of 12NM.

ITLOS, the existence of St. Martin's Island did not affect the establishment of an SMB.[120]

In conclusion, the treatment of islands as geographical features relies on the interpretation of international courts and tribunals. It is not fixed which effect might be granted to any given island, among full effect, half effect, and no effect. Two kinds of full effect and no effect may be employed, while the half-effect method does not have a fixed form of application. The treatment of islands is not stereotyped with regard to the definition of relevant coasts even before relevant circumstances are identified and weighed up. Furthermore, in weighing up particular islands, international courts and tribunals have no choice but to depend on the relevant circumstances of a case. This perhaps represents an ultimate flexibility in taking into account the relevant circumstances of a given SMB case.

3.2.2.2.2. The Issue of Low-tide Elevations

In the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case, the issue of low-tide elevations as a geographical feature was raised. Basically, the ICJ declared that low-tide elevations cannot be used as basepoints, stating that "for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded".[121] Nevertheless, a low-tide elevation can certainly be regarded as one of the relevant circumstances if the examples of both Fasht al Azm and Fasht ad Dibal are taken into consideration. The ICJ concluded that it would be inappropriate to cut off Fasht al Azm if it is regarded as a low-tide elevation.[122] Moreover, the Court implied that Fasht ad Dibal, which both Parties considered to be a low-tide elevation,[123] should not be cut off by the delimitation line.[124] This meant that each low-tide elevation must belong in full to one State, even though it could not be used as a basepoint. In other words, the existence of low-tide elevations has the potential to influence the final delimitation line.

3.2.3. Economic Factors

3.2.3.1. The Meaning of Economic Factors

In order to draw an SMB, international courts and tribunals prioritise the consideration of

[120] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.96-97, paras.316-319.
[121] *I.C.J. Reports 2001*, pp.102-103, para.209.
[122] *I.C.J. Reports 2001*, p.104, para.218.
[123] *I.C.J. Reports 2001*, p.100, para.200.
[124] *I.C.J. Reports 2001*, p.109, para.220.

neutral factors or circumstances. Nonetheless, it cannot be said that economic factors are irrelevant to the construction of an SMB, since it may be necessary to consider other factors (including economic issues)[125] in order to arrive at an equitable result when the rules governing maritime delimitation are applied.[126] With reference to the historical development of both the EEZ and the continental shelf, Nuno Marques Antunes stresses that economic factors must be considered because "the driving force behind them [both the EEZ and the continental shelf] was primarily the exclusive access to natural resources".[127] Moreover, even Professor Weil, who takes the legal basis of title very seriously in maritime delimitation, implies that economic factors cannot be ignored.[128]

Before whether or not economic factors are relevant circumstances in the delimitation process is examined, the term itself should be defined. Economic factors can be divided into two broad categories: general and special. The former includes the relative economic strength of the States concerned; the need to maintain a 'level of economic and social development which fully preserves their [people's] dignity';[129] and pre-existing economic dependence, among others. However, there is a lack of clarity regarding general economic factors. Firstly, it is difficult to assess the relative economic strength of a State (whether the State concerned is 'developed' or not).[130] Moreover, even if international courts and tribunals are able to evaluate States' wealth, they do not want to carry out distributive justice. Secondly, the meaning of the imperative to preserve human dignity referred to in the 1985 *Guinea/Guinea-Bissau* case is not clear. It is not predetermined how level of economic development we need so as to preserve human dignity. Thirdly, the issue of pre-existing economic dependence may rely on the conduct of the States concerned.[131] For these reasons, it is altogether impossible to regard general economic factors as relevant circumstances in the delimitation process.

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[125] Surya P. Sharma, "The Relevance of Economic Factors to the Law of Maritime Delimitation between Neighbouring States", in E. D. Brown and R. R. Churchill (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation* (Honolulu: The Law of the Sea Institute, University of Hawaii, 1987), pp.248-250. Therefore, Surya P. Sharma focuses his attention on economic factors generally applicable to all maritime zones.
[126] See Ahnish, *supra* note 26, p.149.
[127] Antunes, *supra* note 35, pp.313, 316-317. However, Nuno Marques Antunes argues that economic factors and access to natural resources are not identical. See *ibid.*, p.314.
[128] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge: Grotius Publications Limited, 1989), p.264. Weil's statement that "resources are where they are, and the boundary is where it is" seems to attribute no significance to economic concerns. See *ibid.*, p.259.
[129] *The Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (The Hague, 14th February 1985), *ILM*, Volume 25, p.302, para.123.
[130] Evans, *supra* note 78, p.186.
[131] *Ibid.*, pp.206-207.

'Special' economic factors refer to circumstances relevant to either the EEZ or the continental shelf. Particular attention has been paid to fishing activities and oil (or gas) concessions as special economic factors. This thesis intends to focus on the impact of such special economic factors on the establishment of an SMB.

3.2.3.2. (Special) Economic Factors and the Establishment of an SMB

In the 1969 *North Sea Continental Shelf* cases, the ICJ referred to the unity of any deposits as one of the circumstances to be taken into consideration, stressing that "[t]he natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal régime established subsequent to the Truman Proclamation".[132] If this statement had been prioritised in the delimitation process, a special economic factor, such as fishing activities or oil (or gas) concessions, may have become the most important relevant circumstance. Its potential to become a relevant circumstance, however, does not mean that it was automatically defined as such. When establishing an SMB or delimiting the continental shelf, international courts and tribunals must examine whether or not the economic factors pleaded by the States concerned are relevant in a given case. In fact, economic factors have not widely been regarded as relevant circumstances in international judicial and arbitral case-law. There are two key reasons for their omission.

The first reason is that international courts and tribunals have sought to avoid carrying out distributive justice when dividing natural resources, as implicated in the 1982 *Continental Shelf* (Tunisia/Libya) case heard by the ICJ.[133] As a result, the presence of natural resources in itself must be understood differently from the impact of these resources on the population involved.[134] The second reason is that international courts and tribunals have sought to find 'neutral' factors or circumstances in the process of establishing an SMB. Since a given natural resource is generally relevant to only one of the maritime areas involved, the existence or absence of the natural resource cannot be deemed to be a neutral circumstance. For example, whereas fishery resources of superjacent waters are obviously relevant to the delimitation of the EEZ or the EFZ, mineral resources are directly relevant to both the EEZ and the continental shelf. Logically, therefore, fishery resources of superjacent waters as one of the economic factors can play no role in establishing an SMB.

In the first SMB case (that is, the 1984 *Gulf of Maine* case), however, the issue of

[132] *I.C.J. Reports 1969*, pp.51-52, para.97.
[133] See *I.C.J. Reports 1982*, pp.77-78, para.107.
[134] See Tanaka, *supra* note 104, pp.267-268.

economic factors was raised, although it did not affect the final delimitation line. In particular, it was put to question whether or not fishing activities pertinent to the EFZ could influence the final establishment of an SMB. The Chamber enquired as to whether or not there might be 'catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned'.[135] In other words, economic factors were examined from a socio-economic perspective. The ruling of the Chamber in the 1984 *Gulf of Maine* case was considered to be restrictive and limited, for two reasons. Firstly, the 'strict' constraint of 'catastrophe' was used as a condition for adjusting the delimitation line resulting from the consideration of geographical circumstances. As pointed out by the Arbitral Tribunal in the 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case, catastrophe does not mean 'injury'.[136] Secondly, economic factors were discussed as simply one of the 'auxiliary' criteria used to check the equitability of the final delimitation line. In other words, the Chamber of the ICJ implied, in the 1984 *Gulf of Maine* case, that the issue of economic factors was not one of the relevant circumstances.[137]

By contrast, in drawing the delimitation line for the 1993 *Greenland/Jan Mayen* case, the ICJ took into account the 'equitable access to the capelin fishery resources for the vulnerable fishing communities concerned'.[138] Why did not the ICJ look for 'catastrophe' in this case, despite directly citing the reasoning of the 1984 *Gulf of Maine* case? Here, a key difference between the two cases should be explained. In the 1993 *Greenland/Jan Mayen* case, the ICJ confirmed that "the principal exploited fishery resource of the area between Greenland and Jan Mayen is capelin".[139] Moreover, it noted that some capelin migrate to the waters between Greenland and Jan Mayen in summer and autumn, and that the capelin fishery was caught in the 'southern' part of the area of overlapping claims.[140] Consequently, it can be said that the 'kind' and 'location' of the disputed fishery resources were both identified – allowing these economic factors to be understood as relevant circumstances. In the 1984 *Gulf of Maine* case, however, the Chamber could not verify either the kind or the location of the disputed fishery resources. According to the Chamber, the areas in which both Canada and the United States had caught some fishery resources were allocated

[135] *I.C.J. Reports 1984*, p.342, para.237.
[136] See *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.83, para.267.
[137] However, in Chapter IV, this thesis accepts the possibility that economic factors (if they had been found) would have been regarded as relevant circumstances in relation to the weighing-up process.
[138] *I.C.J. Reports 1993*, pp.71-72, para.75.
[139] *I.C.J. Reports 1993*, p.70, para.73.
[140] *I.C.J. Reports 1993*, p.70, para.73.

'respectively' to each Party by the delimitation line reached.[141] As a result, there was no area in which the two States competed for a specific kind of fishery resource. Broadly speaking, if the kind and location of the disputed resources are not confirmed, there can be no acknowledged 'catastrophe' for the livelihood and economic well-being of the population. Thus, international courts and tribunals will only take a 'specific' economic factor into account if they regard that factor as relevant to the drawing of the delimitation line. In fact, in most delimitation cases, economic factors affecting the final delimitation line cannot be specified. It follows that international courts and tribunals have no choice but to declare that they cannot identify any potential catastrophe for the livelihood and economic well-being of the population concerned.

At this point, an important question should be asked in relation to the existence of natural resources. In order to be considered an economic factor, must the existence of natural resources be known or readily ascertainable? As observed above, in the 1969 *North Sea Continental Shelf* cases, the ICJ presented the 'unity of any deposits' as one of the circumstances to be taken into account.[142] In addition, with regard to the consideration of natural resources, the Court laid down the condition 'so far as known or readily ascertainable'.[143] As mentioned above in relation to fishery resources, the kind and location of the disputed non-living natural resources should also be identified. In other words, where the existence of non-living natural resources is clear, it is generally considered to be relevant to the delimitation process. Scholars tend to hold one of two views on this issue. Professor Sharma argues that economic factors can be considered relevant in a 'potential' sense, as implied in the 1984 *Gulf of Maine* case.[144] In contrast, Nuno Marques Antunes believes that the concept of the 'equitable access to natural resources' should be prioritised over economic factors, because an equitable result today might be inequitable tomorrow.[145] According to his view, even where the existence of non-living natural resources is clear, it must only be taken into account 'under a strict review'. In fact, a couple of years before the issue of an SMB had fully emerged, the late D. P. O'Connell had already pointed out that it is difficult to assess the existence of non-living natural resources precisely until they begin to be exploited.[146] In

[141] *I.C.J. Reports 1984*, p.343, para.238.
[142] *I.C.J. Reports 1969*, pp.51-52, para.97.
[143] *I.C.J. Reports 1969*, pp.53-54, para.101.
[144] Sharma, *supra* note 125, p.254; *I.C.J. Reports 1984*, p.343, para.239.
[145] Antunes, *supra* note 35, pp.314-315.
[146] D. P. O'Connell, *The International Law of the Sea* (Oxford: Oxford University Press, 1984), Volume II, p.696.

sum, therefore, although the current trend in international judicial and arbitral case-law is to regard the existence of non-living natural resources 'so far as known or readily ascertainable' as a relevant circumstance, different views on the relevance of non-living natural resources can also lead to flexibility in the application of the delimitation rule.

3.2.3.3. A Restrictive View and Flexibility

At this point, this thesis intends to explain the nature of a 'restrictive' view with regard to (special) economic factors. The restrictive economic view can be summarised as follows.

In the 2009 *Maritime Delimitation in the Black Sea* case, the ICJ seemed to retain the same restrictive viewpoint held by the Chamber in the 1984 *Gulf of Maine* case.[147] In other words, the Court reiterated the standard of catastrophic repercussions that the Chamber had proposed for fishing activities.[148] According to the ICJ, no relevant circumstances met the strict condition of potential catastrophe.[149] With respect to oil (or gas) concessions, the decision made by the Arbitral Tribunal of the 2007 *Maritime Delimitation* (Guyana/Suriname) case reflected the current trend in international judicial and arbitral case-law. It concluded that oil (or gas) concessions or oil wells are not generally regarded as relevant circumstances unless they imply 'tacit (or express)' agreements between the States involved.[150]

According to this restrictive view, economic factors can be taken into account in the delimitation process only if 'catastrophic repercussions concerning fishing activities' or 'tacit (or express) agreements concerning oil (or gas) concessions' exist. This point was confirmed in recent case-law. We must ask, therefore, whether or not the 1993 *Greenland/Jan Mayen* case heard by the ICJ was exceptional.

The first important question is as follows. Are there predictable patterns in the application of the delimitation rule when economic factors are treated? Whereas the Chamber stated in the 1984 *Gulf of Maine* case that the 'respective' scale of activities connected with fishing cannot be considered to be relevant circumstances,[151] the ICJ in the 1993 *Greenland/Jan Mayen* case took into account certain facts pertinent to fishing activities. It is thus submitted that international courts and tribunals have not shown a predictable pattern in relation to fishing activities.

[147] *I.C.J. Reports 2009*, pp.125-126, para.198.
[148] *I.C.J. Reports 2009*, pp.125-126, para.198.
[149] *I.C.J. Reports 2009*, pp.125-126, para.198.
[150] *Award of the Arbitral Tribunal* (The Hague, 17th September 2007), pp.124-126, paras.385-390.
[151] *I.C.J. Reports 1984*, p.342, para.237.

Most judgements declaring that no relevant circumstances can be found have also conceded 'exceptions', such as tacit agreements or the condition of catastrophe, in order to avoid prioritising neutral factors or circumstances. However, it is not always clear what is meant by such exceptions. For example, it should not be overlooked that the concept of catastrophe has no fixed meaning. The Arbitral Tribunal of the 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case implied that 'injury' is not synonymous with 'catastrophe'.[152] By contrast, the Arbitral Tribunal of the 1999 *Eritrea/Yemen* case stated that "[n]either Party has succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals".[153] By referring to a 'catastrophic or inequitable effect', the Arbitral Tribunal implied that injury might be equated with, or was at least relevant to, catastrophe.[154]

These trends in case-law reflect the continued flexibility of application of the delimitation rule with respect to taking into account relevant circumstances. That is to say, the right to assess what is meant by oil concessions or fishing activities in a given case belongs to the discretion of international courts and tribunals. Nevertheless, since international courts and tribunals seek to avoid carrying out distributive justice, they advance strict standards, such as 'tacit' agreements or 'catastrophic' repercussions. However, the fact that such strict standards exist does not necessarily mean that economic factors cannot be taken into account in the delimitation process. In fact, the role of international courts and tribunals is not to divide natural resources in accordance with a standard, but to ensure the equitable access to the resources for all of the States concerned. For example, if free access to resources for the fishermen of both States had not been preserved, the issue would have been taken into consideration by the Arbitral Tribunal in the 1999 *Eritrea/Yemen* case. Because free access was guaranteed in the 1998 *Eritrea/Yemen* case, whose judgement was delivered one year before the 1999 *Eritrea/Yemen* case, this had no impact on the final

[152] *Award of the Arbitral Tribunal* (The Hague, 11th April 2006), p.83, para.267.
[153] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.352, para.72.
[154] Barbara Kwiatkowska expresses a different opinion from that promulgated in this thesis. She implies that both the 1999 *Eritrea/Yemen* case and the 2006 *Maritime Delimitation* (Barbados/Trinidad and Tobago) case supported a restrictive standard of 'catastrophic repercussions'. See Barbara Kwiatkowska, "The 2006 *Barbados/Trinidad and Tobago* Award: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", *The International Journal of Marine and Coastal Law*, Volume 22 (2007), pp.44-45.

delimitation line.[155]

It is clear, therefore, that the 1993 *Greenland/Jan Mayen* case submitted to the ICJ was not an exceptional case, despite the fact that it did not take a restrictive view. Once the kind and location of the disputed resources are confirmed as in this case, the issue of the resources can be taken into account in the delimitation process. In fact, as Rosalyn Higgins observes, the allocation of resources is a 'real' task entailed by delimitation.[156] Rather than identifying catastrophe in a specific area, international courts and tribunals examine the kind and location of the disputed resources, and reflect the fact at their discretion. This describes the Court's logic in the 1993 *Greenland/Jan Mayen* case.

The restrictive view thus remains relevant to the concept of flexibility. It only indicates that economic factors can be taken into consideration on the basis of a stricter standard than neutral factors. The discretion of international courts and tribunals to take into account economic factors is not frozen by the existence of neutral factors. Therefore, a specific economic factor (for example, a special fishing activity) may influence the delimitation of a maritime area to which the factor is irrelevant (for example, continental shelf delimitation) if international courts and tribunals accept the economic factor as a relevant circumstance. This would skew the final result of a delimitation case.

4. A Concluding Remark

This chapter has examined the dominant role of relevant circumstances in relation to the construction of an SMB. Although treaties do not articulate the rules for the drawing of an SMB, international judicial and arbitral case-law has dealt with the issue of an SMB as a 'typical' pragmatic solution. Since the 1984 *Gulf of Maine* case, all delimitation cases – with only one exception of the 1985 *Continental Shelf* (Libya/Malta) case – have drawn SMBs. In the course of making an SMB, international courts and tribunals have sought for various means to bring about an 'equitable' SMB.

First of all, it is noted that the employment of the equidistance method is not mandatory for the purpose of drawing an equitable SMB. Relied on the consideration of

[155] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)* (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.361, para.110.
[156] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), p.224.

relevant circumstances, the bisector method may also be used in relation to establishing an SMB.

Second of all, the most widespread misunderstanding with regard to the application of the rules in establishing an SMB must be avoided. The misunderstanding is that the preferential consideration given to neutral factors or circumstances makes the application of the rules more predictable. As shown above, however, even geography – the quintessential neutral factor – is still contingent on the discretionary interpretation of international courts and tribunals.[157] For example, the coastal configuration and the relationship of the coastlines concerned are, in a given case, based on the determination of relevant coasts (despite the fact that relevant coasts are not relevant circumstances) carried out by international courts and tribunals. Likewise, in relation to the interpretation of the 'macro-geographical context' or the 'general geographical framework', international courts and tribunals exercise their discretion. Therefore, the interpretation of coastal geography, the most important relevant circumstance, is a source of flexibility with respect to constructing an equitable SMB.

Third of all, the treatment of islands as geographical features depends on the discretionary interpretation of international courts and tribunals dealing with relevant circumstances. It is not predetermined which effect might be accorded to a particular island. In other words, how relevant circumstances are examined in the establishment of an SMB is diverse even when geographical features are dealt with.

Last of all, economic factors may be relevant in order to obtain an equitable result on a case-by-case basis. In fact, according to the restrictive view as explained above, economic factors can be taken into consideration only if there are 'catastrophic repercussions concerning fishing activities' or 'tacit (or express) agreements concerning oil (or gas) concessions'. Nonetheless, the existence of these strict standards does not inhibit the consideration of economic factors (such as a specific fishing activity) in the delimitation process. Catastrophic repercussions or tacit (or express) agreements may also be taken into account in a future case. It follows that the rules applied in the establishment of an SMB still retain the possibility of taking account of catastrophic repercussions or tacit (or express) agreements. By contrast, it is possible that this restrictive view can be denied as in the 1993 *Greenland/Jan Mayen* case. In other words, the adoption of the restrictive view is also on a case-by-case basis.

In conclusion, it appears that the consideration of relevant circumstances

[157] Orrego Vicuña, *supra* note 2, pp.203-206.

independent of the application of ascertainable equitable principles is necessary to draw an equitable SMB in a delimitation case. The diverse means in which international courts and tribunals take into account relevant circumstances for constructing an SMB make their application of the current delimitation rule far from predictable, in order to ensure an equitable SMB.

Chapter VI

Delimitation Achieved by Taking into Account Relevant Circumstances (2): The Delimitation of the Outer Continental Shelf

1. The Continental Shelf Beyond 200NM (The Outer Continental Shelf)

1.1. Introduction

Article 1 of the 1958 Geneva Convention on the Continental Shelf stated that the continental shelf of a State was dependent on the 'exploitability' of natural resources. However, this definition of the continental shelf was inappropriate as a legal concept, due to a considerable degree of uncertainty:[1] according to such a limitless definition, more and more of the deep ocean floor would disappear as technology evolved.[2] It was thus necessary for the Third Conference to develop a new and unambiguous definition of the continental shelf.[3] The result is Article 76 of the 1982 UNCLOS: a clear legal definition of the outer limits of the continental shelf, despite its complex wording.[4]

In Article 76 of the UNCLOS, the continental shelf is defined legally with reference to two criteria: distance and natural prolongation. The criterion of distance is the same mathematical concept as that used to determine the limits of the EEZ, while natural prolongation concerns the physical fact of the continuation of land territory into and under the sea. Since Article 76 treats the two criteria together, the institution known as the continental shelf can be divided into two kinds: the continental shelf up to a distance of 200NM (the inner continental shelf), and the continental shelf beyond 200NM (the outer

[1] Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of Their Establishment* (Heidelberg: Springer, 2008), p.34.
[2] See Tomas H. Heider, "Legal Aspects of Continental Shelf Limits", in Myron H. Nordquist, John Norton Moore, and Tomas H. Heider (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden: Martinus Nijhoff Publishers, 2004), pp.21-22.
[3] Suarez, *supra* note 1, pp.39-74.
[4] Ted L. McDorman, "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World", *The International Journal of Marine and Coastal Law*, Volume 17 (2002), pp.307-308.

continental shelf).

As discussed in Chapter V, the delimitation of the continental shelf up to 200NM has, on the whole, been superseded by the establishment of the concept of an SMB. However, the issue of the delimitation of the continental shelf beyond 200NM continues to arise, as an outer continental shelf claim in the context of maritime delimitation has its own characteristics. That is to say, the legal basis of title to the continental shelf beyond 200NM differs from the basis of title to the continental shelf up to a distance of 200NM.

Bearing the characteristics of the outer continental shelf in mind, this chapter will deal with the examination of relevant circumstances with regard to the delimitation of the outer continental shelf.

1.2. The Difference between the Inner and Outer Continental Shelves

Under Article 76(1) of the 1982 UNCLOS, a coastal State is entitled to the continental shelf up to a distance of 200NM, unless the issue of delimitation arises.[5] In other words, the State holds the 200NM continental shelf even when the outer edge of the continental margin does not extend as far as 200NM.[6] If the outer edge of a State's continental margin extends beyond 200NM, the State may possess the continental shelf beyond 200NM from the coastlines involved, with complicated qualifications laid down in Article 76(4)-(7).[7] These qualifications are concerned with determining the outer 'limits' of the continental shelf. At this point, it should not be overlooked that the limits proposed by a coastal State for the continental shelf beyond 200NM become final and binding on the basis of the recommendations of the CLCS, although the continental shelf of the coastal State exists *ipso facto* and *ab initio*.[8]

However, it should also be noted that the delimitation of the outer continental shelf cannot be performed by the CLCS. The basic mission of the CLCS is to make recommendations to coastal States regarding the 'delineation' of the outer limits of the continental shelf.[9] In order to obtain these recommendations, States must submit information on the limits of their respective continental shelves beyond 200NM. As of 15th June 2012, sixty-one submissions on the limits of the continental shelf beyond 200NM have been made

[5] R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999), p.145.
[6] *Ibid.*, p.148.
[7] Suarez, *supra* note 1, pp.148-172.
[8] McDorman, *supra* note 4, pp.302-303.
[9] Article 76(8) of the 1982 UNCLOS.

by coastal States (respectively or jointly).[10] In response to these submissions, the CLCS has thus far made eighteen recommendations.[11] The CLCS does not examine a submission when a maritime boundary dispute is already in existence, according to Paragraph 5(a) of Annex I of the Rules of Procedure of the CLCS.[12] It follows that the CLCS will neither formulate nor apply the rules governing the 'delimitation' of the outer continental shelf, except in the context of providing technical assistance in the delimitation process carried out by international courts and tribunals.[13]

In the most recent delimitation case, the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case of the ITLOS, two points were corroborated with regard to the functions of the CLCS. First, although the outer limits of a maritime zone have not been established by either the States concerned or the CLCS, international courts and tribunals can delimit the maritime zone.[14] Second, the delimitation of the outer continental shelf performed by international courts and tribunals does not infringe on the rights of the CLCS.[15] Unless the States concerned reach a delimitation agreement, therefore, the delimitation of the outer continental shelf can only be determined by international courts or tribunals. This point was well illustrated during Bangladesh's oral argument in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case heard by the ITLOS.[16]

How should the continental shelf up to 200NM and the outer continental shelf be differentiated? The biggest difference is that the legal bases of title to these two continental shelves are not identical. Since the legal basis of title to the continental shelf up to 200NM rests on the criterion of distance, other factors (such as the shape of the sea-bed or the type of the subsoil) are meaningless. However, the shape of the sea-bed, and sometimes the type of the subsoil, are decisive factors in determining whether or not the States concerned can obtain the continental shelf beyond 200NM. Their function depends, therefore, on whether or

[10] Visit http://www.un.org/depts/los/clcs_new/commission_submissions.htm.
[11] Visit http://www.un.org/depts/los/clcs_new/commission_submissions.htm; Donald R. Rothwell, "Issues and Strategies for Outer Continental Shelf Claims", *The International Journal of Marine and Coastal Law*, Volume 23 (2008), pp.194, 199.
[12] McDorman, *supra* note 4, p.305.
[13] See Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2003), pp.329, 331, 368-369.
[14] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.110, para.370.
[15] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.111-112, para.377.
[16] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS/PV.11/6 (13th September 2011), p.15.

not relevant circumstances are taken into account. Despite the difference between the legal bases of title to the inner and outer continental shelves, one must ask whether the rules governing the delimitation of the inner continental shelf are different from those governing the delimitation of the outer continental shelf. Jørgen Lilje-Jensen and Milan Thamsborg indicate that a different rule could be applied to the delimitation of the outer continental shelf.[17] However, in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case, the ITLOS made no distinction between rules applicable to the delimitation of the inner continental shelf and those applicable to the delimitation of the outer continental shelf. The Tribunal regarded the achievement of an equitable solution (Article 83 of the 1982 UNCLOS) as law applied equally to both the delimitation of the inner continental shelf and that of the outer continental shelf.[18]

2. International Case-Law Regarding the Delimitation of the Continental Shelf

2.1. Case-Law Regarding the Delimitation of the Inner Continental Shelf

Analysis of international decisions regarding the delimitation of the continental shelf up to a distance of 200NM will form the starting point in addressing the delimitation of the continental shelf beyond 200NM. This analysis will allow us to identify certain characteristics of the continental shelf on which international courts and tribunals have placed emphasis. The instances to be addressed here are as follows: the 1969 *North Sea Continental Shelf* cases, the 1982 *Continental Shelf* (Tunisia/Libya) case, and the 1985 *Continental Shelf* (Libya/Malta) case, all of which were referred to the ICJ; and the 1977 *Anglo-French Continental Shelf* case heard by the Court of Arbitration.

During the 1969 *North Sea Continental Shelf* cases, the ICJ defined the continental shelf according to the terms established by the 1958 Geneva Convention on the Continental Shelf, while applying customary international law to the given cases. Thus, the criterion of

[17] Jørgen Lilje-Jensen and Milan Thamsborg, "The Role of Natural Prolongation in Relation to Shelf Delimitation beyond 200 Nautical Miles", *Nordic Journal of International Law*, Volume 64 (1995), p.630.
[18] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.24, para.54; *ibid.*, pp.131-132, para.454.

depth to 200 metres was applied to the North Sea.[19] While the Court acknowledged the strong arguments in favour of using the criterion of proximity,[20] it made the following proviso:

> "[I]t would seem that the notion of adjacency, so constantly employed in continental shelf doctrine from the start, only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State".[21]

Accordingly, the ICJ concluded that the "natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State […] via the bed of its territorial sea" is a principle more fundamental than proximity to the process of delimiting the continental shelf.[22] In other words, a claim based on natural prolongation may provide a State with the title to the continental shelf. It follows that the equidistance method is not an imperative in the delimitation of the continental shelf.[23] In the cases cited above, the 'extension' of territory (that is, of territory already possessed) defined the institution of the continental shelf.

In the 1977 *Anglo-French Continental Shelf* case, the Court of Arbitration assumed that the 'depth of 200 metres' criterion was still an important standard in defining the continental shelf.[24] In addition to this criterion, the Court seemed to accept the concept of natural prolongation (as the 'extension' of territory) summarised by the ICJ in the 1969 *North Sea Continental Shelf* cases.[25] However, it also stated that the idea of natural prolongation alone could not solve delimitation problems.[26] The Court of Arbitration dealt with the concept of natural prolongation in two ways. Firstly, it exerted its discretion to

[19] *I.C.J. Reports 1969*, pp.13-14, para.4.
[20] *I.C.J. Reports 1969*, pp.29-30, paras.39-40.
[21] *I.C.J. Reports 1969*, pp.30-31, para.42.
[22] *I.C.J. Reports 1969*, p.31, para.43.
[23] *I.C.J. Reports 1969*, pp.31-32, para.44.
[24] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.18, para.3.
[25] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.49, para.79.
[26] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.49, para.79.

determine whether or not a geomorphological feature, such as the Hurd Deep-Hurd Deep Fault Zone, is responsible for disrupting natural prolongation.[27] Secondly, it placed a constraint on the definition of natural prolongation, stating that the existence of this phenomenon is dependent on the relevant circumstances and the relevant law of a given case.[28] In short, therefore, the existence and nature of natural prolongation have been subject to interpretation by international courts and tribunals.

In the 1982 *Continental Shelf* (Tunisia/Libya) case heard by the ICJ, the Court implied that identifying natural prolongation does not necessarily lead to an equitable delimitation.[29] Moreover, the Court stated that it is not possible to identify the natural prolongation of a State 'by reference solely or mainly to geological considerations'.[30]

In the 1985 *Continental Shelf* (Libya/Malta) case, the ICJ confirmed that the distance criterion identifies natural prolongation up to a distance of 200NM, without respect to the physical nature of the sea-bed and the subsoil.[31] In this regard, the Court stated that:

> "[A]t least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial".[32]

In light of this reasoning, David A. Colson argued that "[n]atural prolongation in a physical sense [...] was dead".[33] However, geomorphological and/or geological factors were still understood to be decisive in identifying the continental shelf beyond 200NM. In this case, therefore, it is evident that the ICJ did not altogether discard the concept of natural prolongation, although the distance criterion was made a prerequisite for awarding a State the continental shelf.[34] According to the Court's reasoning, a State can claim its own

[27] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.60-61, paras.107-109.
[28] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, pp.91-92, paras.191-194.
[29] *I.C.J. Reports 1982*, pp.46-47, paras.43-44.
[30] *I.C.J. Reports 1982*, pp.53-54, para.61.
[31] *I.C.J. Reports 1985*, pp.33-34, para.34.
[32] *I.C.J. Reports 1985*, p.35, para.39.
[33] David A. Colson, "The Delimitation of the Outer Continental Shelf between Neighboring States", *The American Journal of International Law*, Volume 97 (2003), p.101.
[34] *I.C.J. Reports 1985*, pp.33-34, para.34: "The concepts of natural prolongation and distance are

continental shelf up to 200NM, irrespective of the physical conditions of the continental margin, whereas natural prolongation is still required to obtain the continental shelf beyond 200NM.[35] The concept of natural prolongation, first formulated by the ICJ in 1969, thus offers a useful starting point in addressing the rules governing the delimitation of the continental shelf beyond 200NM.[36]

Earlier case-law regarding the delimitation of the continental shelf raises two important points. First, it is necessary to prove the physical 'continuity' of land territory in order to gain the title to the continental shelf beyond 200NM, because the concept of natural prolongation is predicated on the extension of the land sovereignty of a State. The second point, however, is that natural prolongation alone is insufficient to provide appropriate methods for delimitation.[37] During the 1977 *Anglo-French Continental Shelf* case, the Court of Arbitration stated that:

> "So far as delimitation is concerned, however, this conclusion [that the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State (*I.C.J. Reports 1969*, pp.46-47, para.85)] states the problem rather than solves it".[38]

This was corroborated by the ICJ in the 1982 *Continental Shelf* (Tunisia/Libya) case:

> "[W]hile the idea of the natural prolongation of the land territory defined, in general terms, the physical object or location of the rights of the coastal State, it would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State".[39]

Therefore, it is submitted that natural prolongation is not linked to the choice of a delimitation method.

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therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf."

[35] Lilje-Jensen and Thamsborg, *supra* note 17, p.626.

[36] Alex G. Oude Elferink, "Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue", *The International Journal of Marine and Coastal Law*, Volume 13 (1998), p.171.

[37] See Colson, *supra* note 33, pp.99-100.

[38] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.49, para.79.

[39] *I.C.J. Reports 1982*, p.46, para.43.

2.2. Case-Law Regarding the Delimitation of the Outer Continental Shelf

On 14th March 2012, the ITLOS made the first decision as to the delimitation of the outer continental shelf, in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case.

Unless the continental shelf of a State extends beyond 200NM throughout the natural prolongation of its land territory, it cannot have its own outer continental shelf. In this respect, 'newly' interpreting Article 76 of the 1982 UNCLOS, the ITLOS concluded that both Bangladesh and Myanmar are entitled to the continental shelf beyond 200NM.[40] In other words, the ITLOS emphasised the close relationship between Paragraphs 1 and 4 of Article 76 of the UNCLOS.[41] This issue will be addressed in detail in the following section.

3. The Consideration of Relevant Circumstances for the Purpose of Delimiting the Continental Shelf Beyond 200NM

3.1. The Construction of a Provisional Line

The notion of natural prolongation identified and developed in earlier case-law does not provide appropriate methods for the delimitation of the continental shelf beyond 200NM. Where all of the States concerned have entitlements to the same outer continental shelf, a proper delimitation method can be employed depending on the relevant circumstances of a given case. Unless these circumstances preclude the use of the equidistance method, it is possible to draw a provisional equidistance line, even in the case of the delimitation of the continental shelf beyond 200NM.[42] In other words, it should be noted that the equidistance method as a means of constructing a provisional line is still effective in delimiting the outer continental shelf. For example, if the distance between two opposite States is more than 400NM, and uninterrupted natural prolongation is verified by the sea-bed and subsoil of the submarine areas beyond 200NM from the coastlines concerned, an equidistance line will be

[40] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.124-131, paras.424-449.
[41] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.128, para.437.
[42] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.132, para.455.

one of the most effective provisional lines.[43]

Which provisional line should be employed between two adjacent States? An equidistance line, as used between opposite States, may again prove useful. However, the concept of the '200NM opening' must be examined before the equidistance method is proposed.[44] In other words, it is crucial to determine whether or not the outer continental shelf lies 'in front of' the 200NM limit line off the States involved. This point is relevant to the verification of entitlement to the outer continental shelf, as implied in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case.[45] If a State has no 200NM opening, it cannot hold the title to the outer continental shelf, even if it is closer to the shelf beyond 200NM. As a consequence, only one State (of two adjacent States) with the 200NM opening can claim the right to the whole outer continental shelf.

A bisector line can also be employed as a provisional line. If relevant circumstances indicate the impossibility or inappropriateness of the use of the equidistance method, as in the 2007 *Caribbean Sea* (Nicaragua/Honduras) case of the ICJ, it may be necessary to use the bisector method instead.[46] During oral proceedings in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case heard by the ITLOS, Bangladesh argued that the equidistance method would prevent it from reaching its outer continental shelf.[47] The fact that Bangladesh is characterised by severely concave coastlines, may also be of relevance. Citing its 'geographical' characteristics – that is, the 'double' concavity of the coastlines concerned[48] – Bangladesh argued that the use of the bisector method would be most appropriate.[49] In other words, the combination of natural prolongation and severely concave coastlines may provide strong justifications for the bisector method. It is thus noted that 'geographical' factors can also play a role in the selection of a provisional line to delimit the outer continental shelf.

Ultimately, however, the ITLOS decided to construct a 'provisional' 'equidistance' line in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of*

[43] Colson, *supra* note 33, p.103.
[44] Antunes, *supra* note 13, pp.330-331.
[45] See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.130, paras.445-446.
[46] *I.C.J. Reports 2007*, p.746, para.287.
[47] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS/PV.11/4 (12th September 2011), pp.32-34.
[48] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS/PV.11/2/Rev.1 (8th September 2011), p.18.
[49] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS/PV.11/5 (12th September 2011), pp.7-13.

Bengal case, despite the strong justifications for Bangladesh's argument during oral proceedings.[50] The most important reason for this outcome was the Tribunal's decision that Myanmar's coast south of Bhiff Cape should be considered relevant, against Bangladesh's contention. If the contention had been accepted, the ITLOS could have employed the bisector method. However, it should also be noted that the direction of the provisional line was diverted to the same azimuth of 215° (from point X) as that of a bisector line suggested by Bangladesh. In addition, 'most' of the provisional equidistance line was altered by a cut-off effect of the double concavity of the coastlines concerned. Although the ITLOS drew a provisional equidistance line, the line was in practice very similar to the bisector line that Bangladesh sought to construct.

In brief, with respect to the delimitation of the continental shelf beyond 200NM, international courts and tribunals have the freedom to choose an appropriate provisional line relying on the relevant circumstances (*or* in connection with the determination of relevant coasts) of a given case.

3.2. Some Issues Regarding the Construction of a Provisional Line

When international courts and tribunals use the equidistance method to draw a provisional line, certain questions arise. Firstly, should an equidistance line be drawn from the coastlines concerned? Or can it be constructed from other lines? The 'foot of the continental slope', for instance, may be suggested as an alternative.[51] This criterion is highly relevant in establishing the outer edge of the continental margin, as laid down in Article 76(4) of the 1982 UNCLOS. The greater the distance between the foot of a State's continental slope and its coastlines (assuming that the foot of the continental slope criterion is adopted), the more likely it is that the State will profit from the use of the equidistance method. For example, if the foot of the slope of State A were located 230NM from the coastlines of State A, and the foot of the slope of State B were located 170NM from the coastlines of State B (where States A and B are opposite and 600NM apart), State A could claim the continental shelf up to a distance of 330NM (whereas State B could claim the 270NM continental shelf).[52] The foot of the continental slope criterion is justified by the concept of natural prolongation, which is the basis of title to the outer continental shelf.

[50] See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.99-100, paras.329-335.
[51] Colson, *supra* note 33, pp.103-104.
[52] See *ibid.*, p.103.

Secondly, in the case of outer continental shelf delimitation for adjacent States, is it possible for the direction of a (provisional) equidistance line beyond 200NM to be changed? This issue is highly relevant to the direction of an equidistance line from the 200NM limit line. In fact, the outer continental shelf boundary should begin from the end-point of the inner continental shelf boundary in the case of the delimitation of adjacent States.[53] This indicates that the direction of a provisional line can be diverted.[54] A useful example of the diversion of a bisector line was provided by oral proceedings in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case heard by the ITLOS, during which Bangladesh argued that the maritime boundary must turn southward from the 200NM limit line.[55] Thus, although the ITLOS did not accept the direction of the delimitation line from the 200NM limit line, it may be argued that the possibility of diversion is not entirely eliminated.

3.3. Geomorphological Factors

Article 76(1) of the 1982 UNCLOS states that the continental shelf of a State "comprises the sea-bed and subsoil of the submarine areas that extend […] throughout the natural prolongation of its land territory to the outer edge of the continental margin". The legal definition of the continental shelf arises from the concept of the 'continental margin'. The late D. P. O'Connell called this definition the 'continental margin doctrine'.[56] According to Article 76(3) of the UNCLOS, the continental margin (including the sea-bed and subsoil of the shelf, as well as its slope and rise) is determined by 'geomorphological' factors.[57] In other words, geological concepts, such as crustal type, are viewed by the UNCLOS as hardly relevant to materialising the legal continental shelf.

The 'foot of the continental slope' is one of the most important criteria in defining the outer continental shelf.[58] According to Article 76(4)(b) of the UNCLOS, the foot of the continental slope is "determined as the point of maximum change in the gradient at its base". The foot of the continental slope is certainly one of the geomorphological concepts.[59] What

[53] Antunes, *supra* note 13, p.331.
[54] Lilje-Jensen and Thamsborg, *supra* note 17, p.643.
[55] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS/PV.11/6 (13th September 2011), pp.28-29.
[56] D. P. O'Connell, *The International Law of the Sea* (Oxford: Oxford University Press, 1982), Volume I, p.491.
[57] Heider, *supra* note 2, pp.24-25.
[58] *Ibid.*, p.20.
[59] Steinar Thor Gudlaugsson, "Natural Prolongation and the Concept of the Continental Margin for the

is the significance of this particular geomorphological concept? Since the limits of the outer continental shelf are determined by geomorphological criteria, it will be useful to examine these criteria with reference to the delimitation of the outer continental shelf. Using the foot of the continental slope as one of the standards in drawing a provisional line, as described above, is a method which 'respects' the geomorphology of a given case.

How does geomorphology – specifically the shape and form of the sea-bed – affect the delimitation of the outer continental shelf? It should be noted that a geomorphological feature alone is insufficient to indicate an appropriate delimitation method.[60] Nevertheless, a geomorphological feature close to the provisional line established is likely to affect the final delimitation line.[61] Geomorphological features – such as the Norwegian Trough addressed in the 1969 *North Sea Continental Shelf* cases – must be taken into account in order to achieve the equitable delimitation of the outer continental shelf. For instance, the ICJ implied in the cases mentioned above that the presence of the Norwegian Trough may indicate the discontinuity of natural prolongation, although the United Kingdom and Norway had disregarded this feature in the process of making their agreement.[62] By contrast, during the 1977 *Anglo-French Continental Shelf* case, the Court of Arbitration ruled that the Hurd Deep-Hurd Deep Fault Zone could only be considered a minor geomorphological feature.[63] It is worth noting, however, that even such a minor feature may be taken into consideration in the process of delimitation. During the 1982 *Continental Shelf* (Tunisia/Libya) case, the ICJ stated that:

> "[C]ertain geomorphological configurations of the sea-bed, which do not amount to such an interruption of the natural prolongation of one Party with regard to that of the other, may be taken into account for the delimitation, as relevant circumstances characterizing the area".[64]

We thus learn from earlier case-law on the delimitation of the continental shelf that a

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Purposes of Article 76", in Myron H. Nordquist, John Norton Moore, and Tomas H. Heider (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden: Martinus Nijhoff Publishers, 2004), p.66.

[60] Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation* (Oxford: Oxford University Press, 1989), p.115.

[61] *Ibid.*, p.113.

[62] *I.C.J. Reports 1969*, p.32, para.45.

[63] *The Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.60, para.107.

[64] *I.C.J. Reports 1982*, p.58, para.68.

geomorphological feature may have an impact on the final delimitation line, at the discretion of international courts and tribunals.

At this point, one should not overlook the fact that the ITLOS took a 'new' approach with respect to the concept of natural prolongation in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case. Bangladesh argued that the landmass of Myanmar and the sea-bed beyond 200NM are geologically discontinuous, and Myanmar did not dispute the scientific evidence of this discontinuity.[65] Instead, Myanmar argued that the presence of geological discontinuity in front of Myanmar's coast is irrelevant to the case.[66] In response, the Tribunal ruled that natural prolongation can be identified by establishing the 'outer edge' of the continental margin because Paragraphs 1 and 4 of Article 76 of the 1982 UNCLOS are closely interrelated.[67] According to the Tribunal, Myanmar is also entitled to the outer continental shelf. In sum, while the ITLOS regarded geomorphological factors as important, it interpreted the concept of natural prolongation in a new way, by placing stress on the 'outer edge' of the outer continental shelf (such as the Gardiner line). This novel emphasis on the outer edge of the continental shelf beyond 200NM also indicates the flexibility involved in taking into account geomorphological circumstances to achieve an equitable solution.

In conclusion, Article 76 of the 1982 UNCLOS (regarding entitlement to the outer continental shelf, and the limits of that shelf) is based primarily on geomorphological factors. Therefore, geomorphological features cannot be disregarded in the process of delimiting the outer continental shelf, in contrast to the delimitation of the continental shelf within 200NM. Nevertheless, the significance of such features is subject to the interpretation of international courts and tribunals on a case-by-case basis.

3.4. Geological Factors

Throughout earlier case-law concerning the delimitation of the continental shelf, international courts and tribunals assumed that the concept of geology, which concerns the composition and structure of the sea-bed, is of little relevance to delimitation. In the 1982 *Continental Shelf* (Tunisia/Libya) case, for instance, the ICJ stated that:

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[65] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.122-123, paras.417-420.
[66] See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.123, para.420.
[67] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.126, para.429; *ibid.*, p.127, para.434.

> "[F]or legal purposes it is not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference solely or mainly to geological considerations. The function of the Court is to make use of geology only so far as required for the application of international law."[68]

In other words, the Court did not attribute a decisive role to geological factors, although it did not completely reject the role of geology. Furthermore, the ICJ implied that only the 'present' state of the sea-bed structure should be taken into consideration, and the role of historical geology excluded.[69]

However, Article 76 of the 1982 UNCLOS leaves room for the consideration of geology, in Paragraph 4(b)'s reference to 'evidence to the contrary'. This proviso may help international courts and tribunals to refine their decisions using geological evidence. If geological information were taken into consideration, for instance, the foot of the continental slope could be fixed at a 'different' point.[70] Since the foot of the slope may play an important role in delimiting the outer continental shelf as shown above,[71] geological factors might well be relevant to the delimitation of the continental shelf beyond 200NM, on the condition that high-quality geological evidence is submitted. This is one way of taking into account geological factors in the process of delimiting the outer continental shelf. Nevertheless, it should be noted that geological factors were not taken into consideration in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case.

4. An Equitable Solution to Be Achieved in Relation to the Delimitation of the Continental Shelf Beyond 200NM

4.1. The 200NM Opening Line and Proportionality

The most important parameter with regard to the delimitation of the outer continental shelf is

[68] *I.C.J. Reports 1982*, pp.53-54, para.61.
[69] *I.C.J. Reports 1982*, pp.53-54, para.61.
[70] See Gudlaugsson, *supra* note 59, p.69; Richard T. Haworth, "Determination of the Foot of the Continental Slope by Means of Evidence to the Contrary to the General Rule", in Myron H. Nordquist, John Norton Moore, and Tomas H. Heider (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden: Martinus Nijhoff Publishers, 2004), p.129.
[71] See Colson, *supra* note 33, pp.103-104.

the concept of the '200NM opening'.[72] According to Jørgen Lilje-Jensen and Milan Thamsborg, however, the possibility exists that a State without the 200NM opening could be granted the outer continental shelf.[73] Another scholar supports their view, arguing that an equitable result is of chief importance. According to Nuno Marques Antunes, the 200NM opening is not an 'absolutely overriding fact', and a provisional equidistance line is the most effective starting point in delimiting the continental shelf beyond 200NM.[74] This is due to the fact that Article 83(1) of the 1982 UNCLOS does not differentiate the outer continental shelf from the inner continental shelf. However, Antunes's argument does not answer the question of how a State with no title to the outer continental shelf can gain access to the shelf.

Accordingly, it is submitted that the concept of the 200NM opening is a decisive parameter. This was illustrated during Bangladesh's oral argument in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case heard by the ITLOS. According to Bangladesh, Myanmar should not be entitled to the continental shelf beyond 200NM because it lacks natural prolongation to the outer continental shelf.[75] Although the ITLOS did not accept this contention, it favoured the concept of the 200NM opening. For example, the Tribunal concluded (without providing the reasoning behind its decision) that the provisional line should be diverted to the same azimuth of 215° (from point X) as that of a bisector line which Bangladesh had proposed. Bangladesh needed the 200NM opening line in order to gain access to its outer continental shelf. To this end, therefore, the direction of the provisional line must have been changed. If this is not the case, it is difficult to explain why the ITLOS chose to adopt the same azimuth as that proposed during Bangladesh's oral argument. The significance accorded to the 200NM opening has two implications. First, in order to achieve an equitable solution, international courts and tribunals may take account of a State's access to the outer continental shelf to which it is entitled. Second, changing the direction of a provisional delimitation line to secure access to the outer continental shelf may affect the delimitation of the 'inner' continental shelf because the change is made within 200NM.

Furthermore, if two adjacent States each have the 200NM opening lines, it may be worthwhile to consider the relative proportions of the two lines. In other words, where two adjacent States both have the legal title to the same outer continental shelf, proportionality

[72] Lilje-Jensen and Thamsborg, *supra* note 17, p.643.
[73] *Ibid.*, p.635.
[74] Antunes, *supra* note 13, pp.330-332.
[75] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS/PV.11/6 (13th September 2011), pp.16-23.

can play a role in delimiting the continental shelf beyond 200NM. However, although the two States involved in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case are both entitled to the same outer continental shelf,[76] the issue of the 200NM opening was not raised in the context of proportionality. Instead, the proportionality check was carried out using the ratio of the lengths of the relevant coasts.[77]

4.2. The Hierarchy of Maritime Entitlements

There is no doubt that the existence of a maritime entitlement is a precondition for the claim to the outer continental shelf. Entitlement to the continental shelf beyond 200NM is based on natural prolongation. The issue of delimitation only arises if the maritime entitlements of the States concerned overlap.[78] Based on this premise, attention has recently turned to another key issue raised by the delimitation of the outer continental shelf: the hierarchy of maritime entitlements. This issue has gained a particular emphasis because, thus far, there has been no general agreement as to whether or not the characteristics of the continental shelf up to 200NM are identical to those of the continental shelf beyond 200NM.[79] From one perspective, the two kinds of continental shelf are identical insofar as they are both 'legal' continental shelves defined as such by the international law of the sea.[80] The opposing argument states that the continental shelf beyond 200NM is no more than a kind of 'extra' shelf accorded by special conditions.[81] From the latter perspective, entitlement to the continental shelf up to 200NM is prioritised over entitlement to the outer continental shelf.

In practical terms, the hierarchy of maritime entitlements may raise a critical issue. If a common continental shelf is said to exist within 200NM of one State *and* beyond 200NM of the other State (where natural prolongation is verified), how should this continental shelf be delimited? It is not clear that the shelf should necessarily belong to the State which holds this shelf up to 200NM from its baselines. In particular, if the State retaining the shelf up to 200NM is a very small island, the outer continental shelf of the other State may be cut off, leading to an extremely inequitable result. According to the argument that two continental shelves are legally identical, a State can claim its outer continental shelf even when that shelf

[76] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.128, para.438.
[77] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.142-143, paras.497-499.
[78] Antunes, *supra* note 13, p.129.
[79] Lilje-Jensen and Thamsborg, *supra* note 17, p.630.
[80] *Ibid.*
[81] *Ibid.*

exists within 200NM of another State. This situation was illustrated in the 1992 *Saint Pierre and Miquelon* case (although this case was not concerned with the delimitation of the outer continental shelf). The Court of Arbitration awarded the tiny French islands of Saint Pierre and Miquelon only an additional 12NM belt other than the territorial sea in the western sector.[82] Moreover, in the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case, this issue of the hierarchy of maritime entitlements was indirectly raised with respect to a grey area. In this area, the ITLOS decided that Bangladesh should have its outer continental shelf while the superjacent waters belong to the EEZ of Myanmar. With respect to the use of the grey area, the ITLOS concluded that the States concerned can adopt such measures as they consider appropriate (such as the conclusion of a specific agreement or the establishment of a cooperative arrangement).[83] In short, Myanmar was not permitted to have its inner continental shelf in the grey area. It follows that the ITLOS implied that the two continental shelves are both 'legal' shelves.[84]

5. A Concluding Remark

The rules governing maritime delimitation ('to arrive at an equitable result') are still applied effectively to the delimitation of the continental shelf beyond 200NM. In applying these rules, international courts and tribunals may take into account the relevant circumstances of a given case at their discretion. The discretion affects the whole process of outer continental shelf delimitation, from the construction of a provisional line to the consideration of geomorphological or geological factors.

During the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case heard by the ITLOS, Bangladesh asked the Tribunal to adopt the bisector method to determine its access to the outer continental shelf. It may be said, therefore, that Bangladesh called upon the Tribunal to make use of the increased flexibility of application of the rules governing maritime delimitation. Although the bisector method was not applied, the ITLOS achieved an equitable result through the consideration of relevant circumstances. In

[82] *The Delimitation of Maritime Areas between Canada and France* (New York, 10th June 1992), *ILM*, Volume 31, pp.1169-1170, paras.68-69.
[83] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), p.137, para.476.
[84] See *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (14th March 2012), pp.136-137, paras.471-475.

other words, as mentioned above, geomorphological (or geological) factors as well as geographical factors may be taken into account in order to produce an equitable result. The function of geomorphological (or geological) factors, which seemed to disappear with the emergence of the distance criterion, is thus revived in the process of delimiting the outer continental shelf.

In the context of outer continental shelf delimitation, therefore, the discretion exerted by international courts and tribunals in taking into account relevant circumstances on a case-by-case basis enables them to reach an equitable solution.

Chapter VII

Conclusion

This thesis has addressed the demise of the concept of equitable principles and the increased significance of relevant circumstances in maritime boundary delimitation. The 1958 Geneva Convention on the Continental Shelf did not put an end to discussion of the delimitation rule in international law; rather, it marked the beginning of an ongoing controversy. Crucially, the issue was not settled because the ICJ, in the 1969 *North Sea Continental Shelf* cases, declared that the use of the equidistance method was not part of customary international law. Attention has also been paid to the conflict between the Equidistance Group and the Equitable Principles Group during the Third Conference. The conflict prevented the equidistance method from acquiring a mandatory character.

The tension between the two delimitation rules (the *Equidistance-Special Circumstances* rule and the *Equitable Principles-Relevant Circumstances* rule) awakened scholarly curiosity as to the concepts of the equidistance method, equitable principles, and relevant circumstances, as well as to the relationship among these three important concepts in maritime delimitation. Nevertheless, the 1982 UNCLOS (the final outcome of the Third Conference) concludes only that the delimitation of the EEZ or the continental shelf should be carried out 'on the basis of international law', in order to 'achieve an equitable solution'.

In addition to the fact that the relevant articles of the UNCLOS have fundamental implications for the current delimitation rule, this thesis has sought to identify the current delimitation rule by focusing on the decisions of international courts and tribunals, which allow us to examine concrete delimitation lines. As the thesis has clarified, the current delimitation rule can be defined as the 'achievement of an equitable solution', despite a lack of clarity as to *how* this rule is applied.

After the ruling of the ICJ regarding the two delimitation rules in the 2001 *Maritime Delimitation and Territorial Questions* (Qatar/Bahrain) case (in which the UNCLOS was the applicable law), Judge Guillaume, the President of the ICJ, confirmed the 'provisional' use of the equidistance method in his speech to the Sixth Committee of the General Assembly of

the United Nations on 31st October 2001.[1]

If we accept Judge Guillaume's statement with respect to the equidistance method, what place do equitable principles and relevant circumstances occupy in maritime delimitation? Is the concept of equitable principles really necessary to delimit maritime boundaries? Can we reach an equitable result despite proclaiming the demise of equitable principles?

Where might the starting point lie in applying the current delimitation rule? Here, we must draw attention to the concept of 'equity'. Equity takes a leading role in maritime delimitation, based on the concept of an 'equitable solution'. In other words, the equitability of the 'result' produced dominates maritime delimitation. In order to understand the function of equity in maritime delimitation, the concept of equitable principles must first be examined. As this thesis has clarified, the application of equitable principles as a process in maritime delimitation means taking into consideration all of the relevant circumstances in a given case. However, this does not mean that the process must also be equitable. Rather, the one and only meaningful idea that remains in maritime delimitation is the consideration of relevant circumstances.

The ICJ had sought to enhance the normativity of the rules dealing with maritime delimitation by guaranteeing the predictability or certainty of equitable principles. Yet, these examples of equitable principles have provoked scholarly controversy. As discussed in this thesis, criteria, such as 'no question of refashioning geography' and 'non-encroachment on the natural prolongation of another State', are the examples of the content or aspects constituting an equitable result to be achieved. Moreover, the consideration of all relevant circumstances does not guarantee 'equality' or 'distributive justice' in maritime delimitation. In other words, there is no need to emphasise that equity is irrelevant to equality or distributive justice, as the examples of equitable principles adduced by the ICJ have often implied. As a result, only the 'principle of respect due to all relevant circumstances' is an appropriate example of equitable principles. In brief, the inclusion of the concept of equitable principles in maritime delimitation cannot be justified except insofar as it entails the consideration of all relevant circumstances.

Therefore, it is submitted that maritime delimitation should only be carried out by taking account of all relevant circumstances. How are these relevant circumstances to be

[1] Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations. Visit http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1. Judge Guillaume, the President of the ICJ, stated that "the Court, as States also do, must first determine provisionally the equidistance line".

dealt with in a given case? Three phases can be presented: the identification of relevant circumstances, the weighing-up of relevant circumstances, and the indication and application of practical methods. In the delimitation process, international courts and tribunals exercise their discretion to examine all relevant circumstances. Regarding the application of the delimitation rule, predictable patterns or interpretations taking into account relevant circumstances are irrelevant to the achievement of an equitable result in international case-law. Rather, international courts and tribunals check and enhance the equitability of a proposed result by employing a method, such as proportionality.

How is the examination of relevant circumstances in maritime delimitation illustrated in a practical context? This thesis has examined the consideration of relevant circumstances in relation to the construction of an SMB. Although multilateral treaties do not stipulate the rules for establishing an SMB, international case-law has typically regarded an SMB as a pragmatic solution. The most widespread misunderstanding regarding the construction of an SMB is that the theoretical priority accorded to 'neutral factors' makes the application of the rules in maritime delimitation more predictable. However, even the interpretation of geography – the quintessential neutral factor – is subject to the discretion of international courts and tribunals. In addition, non-neutral economic factors may be relevant to the task of drawing an equitable SMB. The variety of ways in which international courts and tribunals take into account relevant circumstances in constructing an SMB make the character of these rules far from predictable in order to achieve an equitable solution.

The rules governing maritime delimitation are also applied effectively to the delimitation of the continental shelf beyond 200NM. In applying these rules, international courts and tribunals may take into account the relevant circumstances of a given case at their discretion. This use of discretion affects the whole process of outer continental shelf delimitation, from the construction of a provisional line to the consideration of geomorphological (or geological) factors. During the 2012 *Maritime Delimitation between Bangladesh and Myanmar in the Bay of Bengal* case heard by the ITLOS, Bangladesh asked the Tribunal to adopt the bisector method to determine its access to the outer continental shelf. Although the contention of Bangladesh was not accepted by the ITLOS, the Tribunal took into account all relevant circumstances. As this thesis has proven, geomorphological (or geological) factors, as well as geographical factors, may be taken into consideration in order to produce an equitable result. The significance and function of geomorphological (or geological) factors, which had seemed to vanish with the emergence of the distance criterion, are thus revived in the process of the delimitation of maritime boundaries.

The conclusion of this thesis is that the concept of relevant circumstances dominates the whole delimitation process, without any assistance from the concept of equitable principles. In maritime delimitation which aims at the equitability of the result produced, the consideration of all relevant circumstances, not the equitability of principles applicable to the delimitation process, enables an equitable solution to be achieved.

Appendix I: Table of Cases

Behring Sea Fur-Seals Arbitration (Paris, 15th August 1893); Summarised in *International Environmental Law Reports*, Volume 1 (1999), pp.43-88

Norwegian Shipowners' Claims (The Hague, 13th October 1922), *UNRIAA*, Volume I, p.307

Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Judgment of 10th September 1929, *P.C.I.J. Series A.*, No.23, p.4

The Diversion of Water from the Meuse, Judgment of 28th June 1937, *P.C.I.J. Series A./B.*, No.70, p.3

Fisheries Case (United Kingdom/Norway), Judgment of 18th December 1951, *I.C.J. Reports 1951*, p.116

Lac Lanoux Arbitration (Award of 16th November 1957); Partially Translated in *Yearbook of the ILC 1974*, Volume II, Part Two, pp.194-199

North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20th February 1969, *I.C.J. Reports 1969*, p.3

Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland/Iceland), Judgment of 25th July 1974, *I.C.J. Reports 1974*, p.3

Fisheries Jurisdiction Case (Federal Republic of Germany/Iceland), Judgment of 25th July 1974, *I.C.J. Reports 1974*, p.175

Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (Geneva, 30th June 1977), *UNRIAA*, Volume XVIII, p.3

Case Concerning the Continental Shelf (Tunisia/Libya), Judgment of 24th February 1982, *I.C.J. Reports 1982*, p.18

Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment of 12th October 1984, *I.C.J. Reports 1984*, p.246

Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (The Hague, 14th February 1985), *ILM*, Volume 25, p.252

Case Concerning the Continental Shelf (Libya/Malta), Judgment of 3rd June 1985, *I.C.J. Reports 1985*, p.13

Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22nd December 1986, *I.C.J. Reports 1986*, p.554

Delimitation of Maritime Areas between Canada and France (New York, 10th June 1992), *ILM*, Volume 31, p.1149

Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway), Judgment of 14th June 1993, *I.C.J. Reports 1993*, p.38

Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25th September 1997, *I.C.J. Reports 1997*, p.7

Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation) (The Hague, 17th December 1999), *UNRIAA*, Volume XXII, p.335

Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain), Judgment of 16th March 2001, *I.C.J. Reports 2001*, p.40

Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria), Judgment of 10th October 2002, *I.C.J. Reports 2002*, p.303

Award of the Arbitral Tribunal (Barbados/The Republic of Trinidad and Tobago) (The Hague, 11th April 2006), http://www.pca-cpa.org/upload/files/Final%20Award.pdf

Award of the Arbitral Tribunal (Guyana/Suriname) (The Hague, 17th September 2007), http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf

Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua/Honduras), Judgment of 8th October 2007, *I.C.J. Reports 2007*, p.659

Maritime Delimitation in the Black Sea (Romania/Ukraine), Judgment of 3rd February 2009, *I.C.J. Reports 2009*, p.61

Case Concerning Pulp Mills on the River Uruguay (Argentina/Uruguay), Judgment of 20th April 2010, http://www.icj-cij.org/docket/files/135/15877.pdf

Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14th March 2012, http://www.itlos.org/index.php?id=108'#c964

Appendix II: Bibliography

Articles

Adede, A. O., "Toward the Formulation of the Rule of Delimitation of Sea Boundaries between States with Adjacent or Opposite Coast", *Virginia Journal of International Law*, Volume 19 (1979), pp.207-255

Akehurst, Michael, "Equity and General Principles of Law", *International and Comparative Law Quarterly*, Volume 25 (1976), pp.801-825

Allott, Philip, "Power Sharing in the Law of the Sea", *The American Journal of International Law*, Volume 77 (1983), pp.1-30

Boggs, Samuel Whittemore, "Delimitation of Seaward Areas under National Jurisdiction", *The American Journal of International Law*, Volume 45 (1951), pp.240-266

Bourne, C. B., "International Law and Pollution of International Rivers and Lakes", *University of British Columbia Law Review*, Volume 6 (1971), pp.115-136

Charney, Jonathan I., "Progress in International Maritime Boundary Delimitation Law", *The American Journal of International Law*, Volume 88 (1994), pp.227-256

Cheng, Bin, "Justice and Equity in International Law", *Current Legal Problems*, Volume 8 (1955), pp.185-211

Churchill, R. R., "The Fisheries Jurisdiction Cases: the Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights", *International and Comparative Law Quarterly*, Volume 24 (1975), pp.82-105

_____, "The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation", *The International Journal of Marine and Coastal Law*, Volume 9 (1994), pp.1-29

Colson, David A., "The Delimitation of the Outer Continental Shelf between Neighboring States", *The American Journal of International Law*, Volume 97 (2003), pp.91-107

de La Fayette, Louise, "The Award in the Canada-France Maritime Boundary Arbitration",

The International Journal of Marine and Coastal Law, Volume 8 (1993), pp.77-103

Dickstein, H. L., "International Lake and River Pollution Control: Questions of Method", *Columbia Journal of Transnational Law*, Volume 12 (1973), pp.487-519

Dworkin, Ronald M., "The Model of Rules", *The University of Chicago Law Review*, Volume 35 (1967-1968), pp.14-46

Evans, Malcolm D., "Maritime Delimitation and Expanding Categories of Relevant Circumstances", *International and Comparative Law Quarterly*, Volume 40 (1991), pp.1-33

_____, "Maritime Delimitation after *Denmark* v. *Norway*: Back to the Future?", in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law (Essays in Honour of Ian Brownlie)* (Oxford: Oxford University Press, 1999), pp.153-176

_____, "The Maritime Delimitation between Eritrea and Yemen", *Leiden Journal of International Law*, Volume 14 (2001), pp.141-170

_____, "Maritime Boundary Delimitation: Where Do We Go from Here?", in David Freestone, Richard Barnes, and David M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006), pp.137-160

Friedmann, Wolfgang, "The North Sea Continental Shelf Cases – A Critique", *The American Journal of International Law*, Volume 64 (1970), pp.229-240

Fuentes, Ximena, "The Criteria for the Equitable Utilization of International Rivers", *The British Year Book of International Law*, Issue 67 (1996), pp.337-412

Gudlaugsson, Steinar Thor, "Natural Prolongation and the Concept of the Continental Margin for the Purposes of Article 76", in Myron H. Nordquist, John Norton Moore, and Tomas H. Heider (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden: Martinus Nijhoff Publishers, 2004), pp.61-90

Harrison, James, "Judicial Law-Making and the Developing Order of the Oceans", *The International Journal of Marine and Coastal Law*, Volume 22 (2007), pp.283-302

Haworth, Richard T., "Determination of the Foot of the Continental Slope by Means of Evidence to the Contrary to the General Rule", in Myron H. Nordquist, John Norton Moore, and Tomas H. Heider (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden: Martinus Nijhoff Publishers, 2004), pp.121-137

Heider, Tomas H., "Legal Aspects of Continental Shelf Limits", in Myron H. Nordquist, John Norton Moore, and Tomas H. Heider (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden: Martinus Nijhoff Publishers, 2004), pp.19-39

Higgins, Rosalyn, "Natural Resources in the Case Law of the International Court", in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999), pp.87-111

Hodgson, Robert D. and Smith, Robert W., "Boundaries of the Economic Zone", in Edward Miles and John King Gamble (eds.), *Law of the Sea: Conference Outcomes and Problems of Implementation, Proceedings of the Tenth Annual Conference of the Law of the Sea Institute* (Cambridge, Massachusetts: Ballinger Publishing Company, 1977), pp.183-206

Janis, M. W., "The Ambiguity of Equity in International Law", *Brooklyn Journal of International Law*, Volume 9 (1983), pp.7-34

Jennings, Robert Y., "The Principles Governing Marine Boundaries", in Kay Hailbronner, Georg Ress, and Torsten Stein (eds.), *Staat und Völkerrechtsordnung: Festschrift für Karl Doehring* (Berlin: Springer, 1989), pp.397-408

Kirk, Elizabeth A., "Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v Honduras*)", *International and Comparative Law Quarterly*, Volume 57 (2008), pp.701-709

Kozyris, Phaedon John, "Lifting the Veils of Equity in Maritime Entitlements: Equidistance with Proportionality around the Islands", *Denver Journal of International Law & Policy*, Volume 26 (1997-1998), Issue 3, pp.319-388

Kwiatkowska, Barbara, "The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and Its Impact on the International Law of the Sea", in A. Bloed and P. van Dijk (eds.), *Forty Years International Court of Justice: Jurisdiction, Equity and Equality* (Utrecht: Europa Instituut, 1988), pp.119-158

_____, "The 2006 *Barbados/Trinidad and Tobago* Award: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", *The International Journal of Marine and Coastal Law*, Volume 22 (2007), pp.7-60

Lapidoth, Ruth, "Equity in International Law", *Israel Law Review*, Volume 22 (1987), pp.161-183

Legault, L. H. and Hankey, Blair, "From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case", *The American Journal of International Law*, Volume 79 (1985), pp.961-991

Lilje-Jensen, Jørgen and Thamsborg, Milan, "The Role of Natural Prolongation in Relation to Shelf Delimitation beyond 200 Nautical Miles", *Nordic Journal of International*

Law, Volume 64 (1995), pp.619-645

Lowe, Vaughan, "The Role of Equity in International Law", *The Australian Year Book of International Law*, Volume 12 (1988-1989), pp.54-81

McDorman, Ted L., "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World", *The International Journal of Marine and Coastal Law*, Volume 17 (2002), pp.301-324

McRae, Donald M., "The Single Maritime Boundary: Problems in Theory and Practice", in E. D. Brown and R. R. Churchill (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation* (Honolulu: The Law of the Sea Institute, University of Hawaii, 1987), pp.225-234

Merrills, J. G., "Images and Models in the World Court: the Individual Opinions in the North Sea Continental Shelf Cases", *The Modern Law Review*, Volume 41 (1978), pp.638-659

Nelson, L. D. M., "The Role of Equity in the Delimitation of Maritime Boundaries", *The American Journal of International Law*, Volume 84 (1990), pp.837-858

Oude Elferink, Alex G., "Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue", *The International Journal of Marine and Coastal Law*, Volume 13 (1998), pp.143-192

_____, "The Impact of the Law of the Sea Convention on the Delimitation of Maritime Boundaries", in Davor Vidas and Willy Østreng (eds.), *Order for the Oceans at the Turn of the Century* (The Hague: Kluwer Law International, 1999), pp.457-469

Rothpfeffer, Tomas, "Equity in the North Sea Continental Shelf Cases", *Nordic Journal of International Law*, Volume 42 (1972), pp.81-137

Rothwell, Donald R., "Issues and Strategies for Outer Continental Shelf Claims", *The International Journal of Marine and Coastal Law*, Volume 23 (2008), pp.185-211

Sharma, Surya P., "The Relevance of Economic Factors to the Law of Maritime Delimitation between Neighbouring States", in E. D. Brown and R. R. Churchill (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation* (Honolulu: The Law of the Sea Institute, University of Hawaii, 1987), pp.248-265

Tanaka, Yoshifumi, "Reflections on the Concept of Proportionality in the Law of Maritime Delimitation", *The International Journal of Marine and Coastal Law*, Volume 16 (2001), pp.433-463

_____, "Case Concerning Territorial and Maritime Dispute between Nicaragua

and Honduras in the Caribbean Sea (8 October 2007)", *The International Journal of Marine and Coastal Law*, Volume 23 (2008), pp.327-346

Thirlway, Hugh, "The Law and Procedure of the International Court of Justice (1960-1989): Part One", *The British Year Book of International Law*, Issue 60 (1989), pp.1-157

_____, "The Law and Procedure of the International Court of Justice (1960-1989): Part Five", *The British Year Book of International Law*, Issue 64 (1993), pp.1-54

_____, "The Law and Procedures of the International Court of Justice (1960-1989): Part Six", *The British Year Book of International Law*, Issue 65 (1994), pp.1-102

Vallat, Francis A., "The Continental Shelf", *The British Year Book of International Law*, Issue 23 (1946), pp.333-338

Weil, Prosper, "Geographic Considerations in Maritime Delimitation", in Jonathan I. Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff Publishers, 1993), Volume I, pp.115-130

Books

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

Antunes, Nuno Marques, *Towards the Conceptualisation of Maritime Delimitation* (Leiden: Martinus Nijhoff Publishers, 2003)

Aristotle (Translated by David Ross and Revised with an Introduction and Notes by Lesley Brown), *The Nichomachean Ethics* (Oxford: Oxford University Press, 2009)

Attard, David Joseph, *The Exclusive Economic Zone in International Law* (Oxford: Oxford University Press, 1987)

Birnie, Patricia, Boyle, Alan, and Redgwell, Catherine, *International Law & the Environment*, 3rd ed. (Oxford: Oxford University Press, 2009)

Bowett, Derek W., *The Legal Regime of Islands in International Law* (New York: Oceana Publications, Inc., 1979)

Boyle, Alan and Chinkin, Christine, *The Making of International Law* (Oxford: Oxford

University Press, 2007)

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

Dhokalia, R. P., *The Codification of Public International Law* (Manchester: Manchester University Press, 1970)

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

Franck, Thomas M., *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995)

Hart, H. L. A., *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994)

Higgins, Rosalyn, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994)

Jenks, C. Wilfred, *The Prospects of International Adjudication* (London: Stevens & Sons Limited, 1964)

Kaya, Ibrahim, *Equitable Utilization: The Law of the Non-navigational Uses of International Watercourses* (Aldershot: Ashgate Publishing Limited, 2003)

Lauterpacht, Hersch, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co. Ltd., 1927)

MaCaffrey, Stephen C., *The Law of International Watercourses*, 2nd ed. (Oxford: Oxford University Press, 2007)

Nandan, Satya N. and Rosenne, Shabtai (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijhoff Publishers, 1993), Volume II

Nordquist, Myron H. (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijhoff Publishers, 1985), Volume I

O'Connell, D. P., *The International Law of the Sea* (Oxford: Oxford University Press, 1982), Volume I

_____, *The International Law of the Sea* (Oxford: Oxford University Press, 1984), Volume II

Orakhelashvili, Alexander, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008)

Orrego Vicuña, Francisco, *The Exclusive Economic Zone* (Cambridge: Cambridge University Press, 1989)

Rosenne, Shabtai (ed.), *The Progressive Codification of International Law [1925-1928]* (New York: Oceana Publications, Inc., 1972), Volume Two

_____, *League of Nations Conference for the Codification of International Law (1930)* (New York: Oceana Publications, Inc., 1975), Volume One

_____, *League of Nations Conference for the Codification of International Law (1930)* (New York: Oceana Publications, Inc., 1975), Volume Four

Rossi, Christopher R., *Equity and International Law* (New York: Transnational Publishers, 1993)

Schachter, Oscar, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991)

Shaw, Malcolm N., *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008)

Sinclair, Ian, *The International Law Commission* (Cambridge: Grotius Publications Limited, 1987)

Suarez, Suzette V., *The Outer Limits of the Continental Shelf: Legal Aspects of Their Establishment* (Heidelberg: Springer, 2008)

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

United Nations (ed.), *Laws and Regulations on the Regime of the High Seas* (New York: United Nations Publications, 1951)

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

Documents

League of Nations

A Resolution (22nd September 1924) Adopted by the Assembly of the League of Nations; Reproduced in *The American Journal of International Law*, Volume 41 Supplement (1947), pp.103-104

League of Nations C.44.M.21.1926.V., *Questionnaire No.2 Territorial Waters*; Reproduced in Shabtai Rosenne (ed.), *The Progressive Codification of International Law [1925-1928]* (New York: Oceana Publications, Inc., 1972), Volume Two, pp.54-101

A Resolution (27th September 1927) Adopted by the Assembly of the League of Nations; Reproduced in *The American Journal of International Law*, Volume 41 Supplement (1947), pp.105-107

1930 Conference for the Codification of International Law at The Hague

Bases of Discussion Drawn Up for the Conference by the Preparatory Committee; Reproduced in *The American Journal of International Law*, Volume 24 Supplement (1930), pp.9-74

Annex II of the Report of the Second Committee (Report of the Second Sub-Committee) in the Final Act of the 1930 Conference for the Codification of International Law at The Hague; Reproduced in *The American Journal of International Law*, Volume 24 Supplement (1930), pp.247-253

League of Nations C.351(b).M.145(b).1930.V, *Minutes of the Second Committee*; Reproduced in Shabtai Rosenne (ed.), *League of Nations Conference for the Codification of International Law (1930)* (New York: Oceana Publications, Inc., 1975), Volume Four, pp.1203-1423

General Assembly of the United Nations

Resolution 174(II) (21st November 1947) of the General Assembly of the United Nations

UN Doc. A/CN.4/1/Rev.1, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*

Resolution 374(IV) (6th December 1949) of the General Assembly of the United Nations

International Law Commission

Yearbook of the ILC 1950, Volume I

Yearbook of the ILC 1950, Volume II

Yearbook of the ILC 1951, Volume I

Yearbook of the ILC 1952, Volume I

Yearbook of the ILC 1953, Volume I

Yearbook of the ILC 1953, Volume II

Yearbook of the ILC 1954, Volume I

Yearbook of the ILC 1956, Volume II

Yearbook of the ILC 1974, Volume II

Yearbook of the ILC 1986, Volume II

United Nations Conference on the Law of the Sea

Official Records of the United Nations Conference on the Law of the Sea, Volume III

Official Records of the United Nations Conference on the Law of the Sea, Volume VI

UN Doc. A/CONF.13/C.4/L.42, *Official Records of the United Nations Conference on the Law of the Sea*, Volume VI, Annexes, p.138

Third United Nations Conference on the Law of the Sea

UN Doc. A/CONF.62/L.8/Rev.1, Appendix I (Working Paper of the Second Committee: Main Trends), *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume III, pp.107-142

UN Doc. A/CONF.62/WP.8/Part II, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume IV, pp.152-171

UN Doc. A/CONF.62/WP.8/Rev.1/Part II, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume V, pp.151-173

UN Doc. A/CONF.62/WP.10; Reproduced in *ILM*, Volume 16 (1977), pp.1108-1235

UN Doc. A/CONF.62/WP.11; Reproduced in Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents* (New York: Oceana Publications, Inc., 1986), Volume IX, p.474

UN Doc. A/CONF.62/62 (Organisation of Work: Decisions Taken by the Conference at Its 90th Meeting on the Report of the General Committee), *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume X, pp.6-10

UN Doc. NG7/2 (20th April 1978); Reproduced in Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents* (New York: Oceana Publications, Inc., 1986), Volume IX, pp.392-393

UN Doc. NG7/9 (27th April 1978); Reproduced in Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents* (New York: Oceana Publications, Inc., 1986), Volume IX, p.401

UN Doc. NG7/10 (1st May 1978); Reproduced in Renate Platzöder (ed.), *Third United*

Nations Conference on the Law of the Sea: Documents (New York: Oceana Publications, Inc., 1986), Volume IX, p.402

UN Doc. NG7/11 (2nd May 1978); Reproduced in Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents* (New York: Oceana Publications, Inc., 1986), Volume IX, p.405

UN Doc. NG7/29/Rev.1 (5th April 1979); Reproduced in Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents* (New York: Oceana Publications, Inc., 1986), Volume IX, p.451

UN Doc. NG7/36 (11th April 1979); Reproduced in Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents* (New York: Oceana Publications, Inc., 1986), Volume IX, p.456

Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII

Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV

United States

Presidential Proclamation No.2667 (28th September 1945) Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf; Reproduced in United Nations (ed.), *Laws and Regulations on the Regime of the High Seas* (New York: United Nations Publications, 1951), Volume I, pp.38-39

Harvard Law School

The 1929 Draft Convention on Territorial Waters; Reproduced in *The American Journal of International Law*, Volume 23 Special Supplement (1929), pp.243-245