Durham E-Theses

Towards the conceptualisation of maritime delimitation: legal and technical aspects of a political process

Antunes, Nuno Sergio Marques

How to cite:

Antunes, Nuno Sergio Marques (2002) *Towards the conceptualisation of maritime delimitation: legal and technical aspects of a political process*, Durham theses, Durham University. Available at Durham E-Theses Online: http://etheses.dur.ac.uk/4186/

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a link is made to the metadata record in Durham E-Theses
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the full Durham E-Theses policy for further details.

Academic Support Office, Durham University, University Office, Old Elvet, Durham DH1 3HP
e-mail: e-theses.admin@dur.ac.uk Tel: +44 0191 334 6107
http://etheses.dur.ac.uk

Nuno Sérgio Marques Antunes

Towards the Conceptualisation of Maritime Delimitation:
Legal and Technical Aspects of a Political Process
PhD Thesis – 2002

•

ABSTRACT

The United Nations Convention on the Law of the Sea sets a normative framework for an integrated governance of the oceans, with far-reaching implications for states. Its implementation – as to navigation rights, preservation of marine environment, exploitation of resources, economic jurisdiction, or any other marine issues – depends however on one central issue: the spatial allocation of authority. This thesis examines one specific aspect of this international legal problem – *maritime boundary delimitation.*

A major challenge for this thesis lies in the fact that its subject has been extensively and thoroughly reviewed, both in scholarship and in jurisprudence. Notwithstanding this, a closer look reveals a paucity of conceptual analysis. Drawing on historical elements, as well as on state practice and case law, the present thesis endeavours to further the understanding of maritime delimitation from a conceptual standpoint.

Focusing on the development of conventional provisions on delimitation, Part I eventually argues that the so-called 'equitable principles doctrine' is not customary law. What is part of customary law is an obligation of result: maritime delimitations must result in equitable solutions. The distinction between these propositions becomes clear in Part II. By deconstructing the subject into its three core issues – concept, methods and normativity, this thesis submits that the said obligation is to be met through the optimisation of two legal principles: the principle of maritime zoning and the principle of equity. Whilst suggesting that the watchword is *reasonableness*, it proposes that the reasonableness of the boundary be objectified by reference to a novel concept: the average 'distance ratio' of the line. As a denouement, Part III investigates the 'discovery' of boundary-lines. Recognising that the legal determination of maritime boundaries consists of a multiple-factor analysis, in which the sphere of discretion conferred upon courts is critical, it aims at improving reasoning discourse through 'multicriteria decision-making' and the utilisation of 'yardsticks'. After discussing which elements of the 'factual matrix' are legally relevant, and how they bear on the 'discovery' of the boundary-line, this thesis offers a test study intended to validate the conceptualisation proposed.

Towards the Conceptualisation of Maritime Delimitation:

Legal and Technical Aspects of a Political Process

2 VOLUMES – VOLUME I

29 JAN 2003

Nuno Sérgio Marques Antunes

Thesis submitted in fulfilment of the requirements of the degree of
Doctor of Philosophy

Department of Law and Department of Geography
University of Durham

2002

The copyright of this thesis rests with the author.
No quotation from it should be published without
his prior written consent and information derived
from it should be acknowledged.

CONTENTS

VOLUME I

General Introduction ... 12

I. DELIMITATION LAW IN THE LOSC: THREE DECADES OF DEVELOPMENT
Introduction to Part I ... 20

Chapter 1 – The 1958 Conventions ... 21
1.1. Introduction ... 21
1.2. The ILC Pursuit of Normative Standards ... 22
1.2.a) Pre-1958 State Practice ... 22
1.2.b) First Drafts ... 24
1.2.b)(i) The Continental Shelf ... 24
1.2.b)(ii) The Territorial Sea ... 28
1.2.c) Subsequent Development of a General Substantive Rule ... 29
1.3. The First Conference on the Law of the Sea ... 33
1.3.a) Draft Articles ... 33
1.3.b) The Debates in the Conference ... 36
1.3.c) *Ratio Legis* of the Delimitation Rules ... 38
1.3.c)(i) Equidistance and Special Circumstances ... 39
1.3.c)(ii) Historic Title ... 41
1.3.c)(iii) Delimitation of the Contiguous Zone ... 44
1.3.c)(iv) Oppositeness and Adjacency in Continental Shelf Delimitation ... 45
1.3.c)(v) The 'Procedural Element' ... 45

Chapter 2 – Relevant Case Law Pre-1982 ... 46
2.1. The Selected Case Law ... 46
2.2. The *Grisbadarna* Arbitration ... 47
2.2.a) Overview: The Dispute and the Award ... 47
2.2.b) Critical Analysis ... 49
2.3. The *North Sea Continental Shelf* Cases ... 51
2.3.a) Overview of the Judgment ... 51
2.3.a)(i) The Dispute ... 51
2.3.a)(ii) The Reasoning ... 52
2.3.a)(iii) A Brief Initial Comment ... 54
2.3.b) The Assessment of Customary Law ... 55
2.3.b)(i) Summary of State Practice Post-1958 ... 55
2.3.b)(ii) The Court's Approach ... 56
2.3.c) Equidistance-Special Circumstances *versus* Natural Prolongation ... 62

2.3.d) Normative Standards of Delimitation 66
2.4. The *Anglo-French* Arbitration 70
2.4.a) Overview 70
2.4.a)(i) The Dispute 70
2.4.a)(ii) The Award 71
2.4.b) Some Points of Contrast with the *North Sea* Cases 73
2.4.b)(i) A Different Task 73
2.4.b)(ii) The Clarification of Certain Issues 74
2.4.b)(iii) The Contribution to International Law 75
2.4.c) Article 6 of the CS Convention 76
2.4.c)(i) Interpretation 76
2.4.c)(ii) Conventional and Customary Law 80
2.4.c)(iii) Special Circumstances, Geography and Equity 82

Chapter 3 – Maritime Delimitation in the LOSC 86
3.1. Introduction 86
3.2. Brief Notes on Treaty Interpretation 87
3.3. EEZ and Continental Shelf 89
3.3.a) Drafting History 89
3.3.b) The Interpretation of Articles 74(1) and 83(1) 92
3.3.b)(i) Common Intention of the Parties 92
3.3.b)(ii) The Text and the Context 94
3.3.b)(iii) Normativity and Equitable Solution 95
3.3.b)(iv) The Standards of Delimitation in International Law 99
3.4. Territorial Sea: Crystallisation of a Balanced Rule 102
3.5. Contiguous Zone: The Non-Existence of a Delimitation Rule 105
3.6. The 'Procedural Element' of Delimitation Rules 107
3.6.a) Introductory Remarks 107
3.6.b) Agreements in Maritime Delimitation 108
3.6.c) Is There an Obligation to Negotiate? 109
3.6.d) Is the Justiciability of Maritime Boundary Disputes Conditioned? 111

Conclusions to Part I 114

II. CORE ISSUES: CONCEPT, METHODS AND NORMATIVITY
Introduction to Part II 120

Chapter 4 – The Concept of Maritime Delimitation 122
4.1. The Need for Conceptualisation 122
4.2. Delimitation: A Two-Phase Operation 123
4.2.a) Delimitation: Political-Legal Determination and Technical Definition 123
4.2.b) Case Law 124
4.2.b)(i) *North Sea Continental Shelf* Cases 124
4.2.b)(ii) *Anglo/French* Arbitration 124

4.2.b)(iii) *Dubai/Sharjah* Arbitration 125
4.2.b)(iv) *Tunisia/Libya* Case 125
4.2.b)(v) *Gulf of Maine* Case 126
4.2.b)(vi) *Jan Mayen* Case 127
4.2.c) State Practice 127
4.2.d) Technical Support to Maritime Delimitation 128
4.2.e) Legal Significance: Compliance of the Definition with the Determination 129
4.3. Object-Matter of Delimitation: The Overlapping of Entitlements 131
4.3.a) Early Developments in Case Law 131
4.3.b) Overlapping of Entitlements and Overlapping of Claims 133
4.3.c) Title, Entitlement and Delimitation 136
4.3.d) The Inexorable 'Amputation' of Potential Entitlements 141
4.3.d)(i) Overlapping of Entitlements: A Situation of Concurrence of Rights 141
4.3.d)(ii) Maritime Delimitation: 'Amputation' of Entitlements of the Same Type 143
4.3.d)(iii) Precedence between Different Entitlements: Case Law and State Practice 145
4.3.d)(iv) Precedence between Different Entitlements: Rationale 145

Chapter 5 – Methods and Line-Defining Techniques 150
5.1. Introductory Notes 150
5.1.a) The Need for Technical Expertise 150
5.1.b) Methods and Line-Defining Techniques 152
5.1.c) Technicalities and Law 154
5.2. Equidistance and Equidistance-Related Methods 155
5.2.a) Method of Equidistance 155
5.2.a)(i) A Proper Historical-Technical Background 155
5.2.a)(ii) Contents and Technical Aspects 157
5.2.b) Simplified and Modified Equidistance 160
5.2.c) Adjustment of Baselines and Partial-Effect Adjustments 162
5.2.d) "*Méthodes de Lissage*" 165
5.2.d)(i) Perpendicular-Lines 165
5.2.d)(ii) Bisector-Lines 167
5.2.d)(iii) Radial-Lines of a Circumference 168
5.2.d)(iv) Appraisal and Rationale 169
5.2.e) Pseudo-Equidistance 170
5.2.f) Equiratio Method 171
5.3. Other Methods and Line-Defining Techniques 173
5.3.a) Enclaving 173
5.3.b) Navigable Channel (*Thalweg*) 174
5.3.c) Coastal Length Comparison (Proportionality) 176
5.3.d) *Ad Hoc* Approaches 178
5.3.d)(i) Basic Notion 178
5.3.d)(ii) Parallels, Meridians and Other Straight Lines 179
5.3.d)(iii) 'Corridor-Solutions' 180

Chapter 6 – Normativity in Maritime Delimitation ... 182
6.1. The Delimitation Process: Choice of Procedural Means ... 182
6.1.a) Preliminary Notes ... 182
6.1.b) Negotiation *versus* Adjudication: Outstanding Considerations ... 182
6.1.b)(i) Operative Distinction between Negotiation and Adjudication ... 182
6.1.b)(ii) Normativity in Negotiated Agreements ... 184
6.1.b)(iii) Adjudication: *Realjurisprudenz* or Judicial Reasoning? ... 186
6.2. The Dogmatics of Normativity and Maritime Delimitation ... 189
6.2.a) Key Aspects ... 189
6.2.b) Legal Systems: Principles and Rules ... 190
6.2.c) Normativity in Maritime Delimitation ... 194
6.2.c)(i) Brief Appraisal ... 194
6.2.c)(ii) General Principles of Law and Principles of International Law ... 198
6.3. The Principle of Maritime Zoning ... 200
6.3.a) Maritime Jurisdiction ... 200
6.3.a)(i) Basic Concept ... 200
6.3.a)(ii) Ambit of Interest for This Study ... 200
6.3.b) Maritime Zoning: the Spatial Allocation of Maritime Jurisdiction ... 201
6.3.b)(i) Introductory Remarks ... 201
6.3.b)(ii) The Paramountcy of Proximity in Maritime Zoning ... 202
6.3.c) Maritime Zoning *versus* Maritime Delimitation ... 206
6.3.c)(i) Maritime Entitlement and Overlapping of Entitlements ... 206
6.3.c)(ii) Overview of Case Law: The Pre-LOSC Period ... 206
6.3.c)(iii) Overview of Case Law: The Post-LOSC Period ... 208
6.3.d) Equidistance ('Closer Proximity') as a Legal Concept ... 210
6.3.d)(i) Recent Trend in Case Law ... 210
6.3.d)(ii) A Corollary Emanating from to the Principle of Maritime Zoning ... 212
6.3.d)(iii) Equidistance as the Reference Point for the Third-State Issue ... 215
6.3.d)(iv) The Equitable Normative Content of Equidistance ... 216
6.4. The Principle of Equity in Maritime Delimitation ... 220
6.4.a) Key Thoughts on the Concept of Equity ... 220
6.4.a)(i) An 'Indefinable' Concept ... 220
6.4.a)(ii) Legal Systems, Normativity and Equity ... 221
6.4.a)(iii) Justice *In Casu* and 'Normative Equity' ... 223
6.4.a)(iv) Functions and Bounds of 'Normative Equity' ... 226
6.4.a)(v) Reasonableness as the Scope of 'Normative Equity' ... 229
6.4.b) 'Normative Equity' in Maritime Delimitation ... 232
6.4.b)(i) First Period (1945-1969) ... 232
6.4.b)(ii) Second Period (1969-1993) ... 234
6.4.b)(iii) Third Period (1993 to date) ... 238
6.4.b)(iv) A Requiem for the Term "Equitable Principles" ... 240

Conclusions to Part II 245

III. DENOUEMENT

Introduction to Part III 260

Chapter 7 – Delimitation Process: A Proposal for Rationalisation 262
7.1. Determination of a Line: The Key Issue 262
7.2. Choice of Factors: 'Factual Matrix' and 'Legal Matrix' 264
7.2.a) The Notion of *Unicum* 264
7.2.b) Delimitation Factors: Preliminary Approach 265
7.2.c) Delimitation Factors: A Basis for Objective 'Typification' 268
7.3. The 'Weighing-Up Process' 271
7.3.a) A Legal Multiple-Factor Analysis 271
7.3.b) Deciding in an Extra-Legal Context: 'Multicriteria Decision-Making' 272
7.3.c) From Objectivity to 'Subjectivity': An Inevitable Step 274
7.4. *Modus Operandi* of the Delimitation Factors: The Choice of Line 278
7.4.a) 'Multicriteria Decision-Making' in the Legal Context: Justification 278
7.4.b) Framework for Reasoning Discourse 282
7.4.c) The Determination of the Boundary 285

Chapter 8 – The Quest for a Boundary-Line 295
8.1. Elements Germane to the 'Weighing-Up Process' 295
8.2. Facts Related with the Basis of Maritime Entitlement 296
8.2.a) Coastline 296
8.2.b) 'Controlling Basepoints' 298
8.2.c) Islands 299
8.2.d) General Direction of the Coast and Façades 304
8.2.e) Coastal Length (and Its Role in Proportionality) 307
8.2.f) Macrogeography (and Entitlements of Third-States) 313
8.2.g) Natural Prolongation: Geology and Geomorphology 315
8.3. Facts Related with the Regime of Exclusiveness 318
8.3.a) Natural Resources: Petroleum and Fisheries in Particular 318
8.3.b) Defence and Security 322
8.3.c) Navigation 325
8.3.d) Historical Regimes 326
8.4. Complementary Delimitation Elements 330
8.4.a) Delimitation Area and Geographical Scope to Redress Inequities 330
8.4.b) Continental Shelf Beyond 200 Nautical Miles 333
8.4.b)(i) Areas Beyond 200 Nautical Miles: Entitlement and Overlap 333
8.4.b)(ii) Overlapping of Two Entitlements Beyond 200 M 335
8.4.b)(iii) 200 M Entitlement *versus* Entitlement Beyond 200 M 338
8.4.c) The Single Maritime Boundary Issue 340
8.4.c)(i) Towards the 'Territorialisation' of Maritime Boundaries 340
8.4.c)(ii) All-Purpose Line: Single Boundary and Dual-Coincident Boundary 343

8.4.d) The Emergence of 'Grey Areas' 348
8.4.e) Other Issues 351
8.4.e)(i) Simplicity of the Boundary-Line 351
8.4.e)(ii) Agreement on Aspects of the Boundary-Line 352
8.4.e)(iii) Joint Zones 354

Chapter 9 – Test Study: Maritime Delimitation between Australia and East Timor 356
9.1. Introductory Notes 356
9.2. Background Aspects 357
9.2.a) The Geographical Setting of the Timor Sea 357
9.2.a)(i) Coastal Geography 357
9.2.a)(ii) Seabed Aspects 358
9.2.b) Political-Legal Developments Concerning the Continental Shelf 359
9.2.b)(i) Emergence of the Australian Theory of the 'Two Shelves' 359
9.2.b)(ii) The 1972 Australia/Indonesia Seabed Boundary Agreement 360
9.2.b)(iii) The Portuguese Approach 361
9.2.b)(iv) The 1989 'Timor Gap' Treaty 364
9.2.b)(v) The 2001 Timor Sea Arrangement 366
9.2.c) Jurisdiction over the Water Column: Brief Notes 369
9.3. Starting Point for the Delimitation 371
9.3.a) The Overlapping of Entitlements 371
9.3.a)(i) Entitlements Based on Distance 371
9.3.a)(ii) The Australian Theory of the 'Two Shelves': What Relevance? 372
9.3.b) The 'Third-State Issue': Aspects Relating to Indonesia 374
9.3.c) The Provisional Equidistance-Line 377
9.4. Relevant Facts 379
9.4.a) Coastal Length and Proportionality 380
9.4.a)(i) Coastal Lengths 381
9.4.a)(ii) Proportionality 382
9.4.b) Natural Prolongation: the Timor Trough 383
9.4.b)(i) Timor Trough: Brief Geomorphological and Geological Account 383
9.4.b)(ii) Timor Trough: Relevance for Continental Shelf Delimitation 385
9.4.c) Basepoints Unrepresentative of Coastal Relationships 387
9.4.c)(i) The Lateral Equidistance-Lines 387
9.4.c)(ii) Australian Basepoints to the East of Cape Londonderry 389
9.4.d) Macrogeographical Considerations 390
9.4.e) Natural Resources: Petroleum 391
9.5. The Choice of Boundary-Line 394
9.5.a) Delimitation Factors 394
9.5.a)(i) *Factor A* – Coastal Length and Proportionality 395
9.5.a)(ii) *Factor B* – Natural Prolongation (the Timor Trough) 395
9.5.a)(iii) *Factor C* – Cut-Off Effect of the 'Lateral-Equidistances' 395
9.5.a)(iv) *Factor D* – Effect of the Islands East of Timor 395

9.5.a)(v) *Factor E* – Holothuria Reefs 396
9.5.a)(vi) *Factor F* – Macrogeography 396
9.5.a)(vii) *Factor G* – Natural Resources 397
9.5.b 'Discovery' of an *Equitable Solution* 397
9.5.b)(i) The 'Decision-Matrix' 397
9.5.b)(ii) Recourse to 'Yardsticks' 399
9.5.b)(iii) The Boundary-Lines 405

Conclusions to Part III 408

General Conclusions 416

VOLUME II

APPENDICES

1. Sketch-Maps and Illustrations 429
2. State Practice in Maritime Delimitation 544
3. Aspects of Chart Projections 568
4. Glossary of Abbreviations and Acronyms 573
5. Bibliographic References 579

LIST OF TABLES AND GRAPHICS

TABLES

Table 1 – Maritime Zoning and Maritime Delimitation: Analogical Relationships 213
Table 2 – 'Decision-Matrix': Analysis of the Parties' Claims 286
Table 3 – 'Decision-Matrix': 'Weighing-Up' of the Delimitation Factors 289
Table 4 – Average 'Distance Ratio' in Certain Adjacent Boundaries 291
Table 5 – 'Negotiation-Matrix': Identification of Goals of States A and B 293
Table 6 - 'Decision-Matrix': Delimitation between Australia and East Timor 398

GRAPHICS

Graphic 1 – Intensity of Powers of the Coastal State versus Distance from the Coast 147
Graphic 2 – Principle of Maritime Zoning *versus* Principle of Equity 250

DECLARATION

None of the material contained in this thesis has previously been submitted for a degree in this or any other university. The thesis is entirely the author's own work and research. Material and quotations from the work of others have been duly indicated.

STATEMENT OF COPYRIGHT

The copyright of this thesis rests with the author. Consultation is authorised only under the terms agreed by the author. Any quotations from this thesis may only be published with the author's prior written consent, and information derived from it should be duly acknowledged.

WORKING NOTES FOR THE THESIS

CROSS-REFERENCES: All cross-references in the text use the abbreviation "para." followed by a number/letter combination correspondent to the paragraph, section and sub-section in question – e.g. para.4.4.c)(ii) *infra*.

CITATIONS/BIBLIOGRAPHY: All references to bibliography are identified by a combination *Author(s)/Year* (e.g. Lucchinni/Vœlckel/1996) or *Source/Year* (e.g. ILC/Yearbook/1953). The full bibliographic references are provided in Appendix 5. Where there are consecutive sentences that include citations and/or information from the same bibliographic source, in principle, to avoid unnecessary repetition, only one footnote is inserted at the end of the last sentence of each group. The abbreviations by which publications are identified appear in Appendix 4. Unpublished references are explicitly indicated.

SECOND VOLUME: This thesis was bound in two volumes for practical reasons. The second volume includes information that complements the main text of the thesis. Its incorporation in a separate volume was aimed at facilitating access to it in parallel with the reading of the text.

GENERAL INTRODUCTION

Maritime delimitation – the process that consists of "establishing lines separating from each other the maritime areas in which coastal states exercise [sovereignty or] jurisdiction"[1] – is one of the most extensively researched fields in international law. The decision to undertake this research was therefore taken with some trepidation. However, a number of factors *prima facie* justified a further examination of several issues.

The paramount importance of boundaries in international affairs is the first reason. Indelibly intertwined with the political notion *par excellence* – the state, and with one of its fundamental elements – the territory[2], boundary delimitation bears an intrinsic political dimension[3]. Its political significance is such that DeLapradelle described it as a formal and juridical means of expression of the state[4]. Without a doubt, boundary delimitation affects and interacts with *inter alia* political issues, historical and cultural factors, strategic and security concerns, primary economic interests, and interests of population groups. Its political consequences may be seen on three levels: peace between neighbour states; reaffirmation of independence by them; and security created by a quasi-sacred line[5].

With respect to maritime delimitation, Higgins has suggested that the task "of determining whose claim is well founded is only the preliminary to the *real* task of allocating resources between claimants"[6]. This is perhaps an over-simplification of maritime delimitation – although for exclusive economic zone (hereinafter "EEZ") and continental shelf delimitation such a view may often be not far from the reality. In territorial sea delimitation, where more than economic resources are in question, this view is less accurate. From a more balanced perspective, Oxman considers that "maritime boundary issues do not normally seem to engage the same level of political attention as many disputes over land territory", that the "resultant agreements are often viewed as economic or

(1) Caflisch/1989, p.212. Lucchini and Vœlckel argue that, strictly speaking, dividing-lines regarding jurisdiction areas should be termed limits, and that the term boundary should regard only areas of sovereignty (cf. Lucchini/Vœlckel/1996, p.24). In contrast, Bedjaoui affirms that "maritime delimitations produce genuine 'frontiers', [and that though] the extent of state jurisdiction is undoubtedly different for maritime limits and for land frontiers, [such a difference] is one of degree and not one of kind, even if certain maritime limits do not 'produce' an exclusive and complete state jurisdiction". Notwithstanding this, he also considers that the two types of boundaries are "of a different nature or category" (cf. Dissenting Opinion, *Guinea-Bissau/Senegal* arbitration, ILR/83/1990, pp.58, 64).

(2) Cf. Kelsen/1998, pp.299-314; Zippelius/1984, pp.37-45; Jellinek/1973, pp.295-304. The territorial sea is part of the territory of a state. Insofar other maritime zones entail a spatial extension of state jurisdiction (although not sovereignty) the analogy is valid.

(3) Cf. Nguyen/Daillier/Pellet/1999, pp.460-463; Kelsen/1998, p.307; Jennings/Watts/1997, pp.661-662; Weil/1989, pp. 30-31; Prescott/1985 p. 10; Bardonnet/1984, p.4; Zippelius/1984, pp.42-43; Dipla/1984, pp. 235-236; DeLapradelle/1928, pp.9-17.

(4) DeLapradelle/1928, p.55.

(5) Adler/2001, p.2. On this issue, cf. also DeLapradelle/1928, pp.56-65.

(6) Higgins/1994, p.224. Bowett appears to have a similar resource-oriented perspective (cf. Bowett/1987b, p.27).

technical" and that "few maritime boundary agreements are regarded as overwhelmingly political"[7].

That maritime boundaries differ from land boundaries in some aspects is beyond doubt. Notwithstanding this, it is also doubtless that some disputes over maritime boundaries are highly charged with political concerns. The dispute between Greece and Turkey in the Aegean Sea is a clear illustration. Similarly, the emerging difficulties between Australia and East Timor appear to result from Australia's concerns as regards the possibility of having to renegotiate its boundaries with Indonesia. The suggestion that "the dominant political and legal approach to formal accommodation of states' competing claims to use and control on land" is extended to oceanic spaces, and influences its management, seems thus to reflect the reality of state practice[8]. Maritime zones have been somewhat 'territorialised', and maritime boundaries have become ever more a political boundary at sea[9]. Clearly, the emergence of new boundaries, or changes to existing boundaries, results always from a certain political scenario. That the choice of the boundary location always results from a precise political balance, and that this balance may be altered in time, can hardly be disputed[10]. Thirlway presents an excellent example of how political settings govern the delimitation of maritime boundaries. He observes hypothetically, referring to the *North Sea* cases, that if the territories of Denmark and Germany were to become part of one state, the maritime area currently held jointly by them "would not be the same as that which would be allotted to Germany/Denmark on the basis of a delimitation *de novo* with the Netherlands"[11].

Taking into account the relevancy of this key political issue, it is striking to note that the body of research suffers from a certain imbalance. Whereas jurisprudence and state practice have been widely studied, theoretical examinations are a rarity. As Evans observed, "the process of maritime delimitation is less commonly approached or presented from a theoretical perspective, either by the ICJ or by commentators, but is the subject of more practically oriented analyses of state practice"[12]. However, developments in *Law*, whatever the field, should rely on theoretical studies as much as on practice-oriented analyses. In undertaking this study a key aim was to meet this need for theoretical investigation. This

(7) Oxman/1993, p.12. For examples of agreements which might have been influenced by political considerations, cf. pp.13-15.

(8) Oxman/1993, p.4. Bardonnet has compared in-depth land and maritime boundaries, and concludes that the distinction between the two types seems to be fading (cf. Bardonnet/1989). However, Judge Bedjaoui asserts that maritime delimitation creates "frontiers of a different nature or category". He argues that, "[i]n the matter of frontiers, [...] the law of the sea [does] not comply with the same principles, rules and patterns as the law of land frontiers", and that "the rules applicable to achieve such delimitations must necessarily be *adapted to the environment* to which they will apply and to the material element specific to that environment" (cf. *Guinea-Bissau/Senegal* arbitration, Dissenting Opinion, ILR/83/1990, pp.64-65).

(9) Bardonnet/1989, pp.39-54.

(10) Nguyen/Daillier/Pellet/1999, pp.463-464.

(11) Thirlway/1993, pp.9-10.

(12) Evans/1999, p.156.

theoretical investigation is also justified on another ground. Whilst noting that "[v]arious theoretical models have been proposed in order to channel the reasoning of tribunals, but none has been successful"[13], Vicuña has drawn attention to the fact that questions still hang over reasoning discourse. The conviction that such concerns could be overcome is thus another leitmotiv.

A second reason that justifies this study is the fact that these concerns are somewhat reflected in the 1982 United Nations Convention on the Law of the Sea (hereinafter "LOSC"[14]). One motivation for convening the Third United Nations Conference on the Law of the Sea (hereinafter "Third Conference") was the need to re-examine the limits of the maritime zones under sovereignty or jurisdiction of coastal states. Needless to say, this issue turned into a *maritime zoning* process whereby states sought to safeguard their maritime interests, whilst setting up a comprehensive legal partition of the oceanic space. The way in which the 'appropriation' of the ocean by coastal states evolved bore witness to the emergence of a concept of 'maritime territory', and to the aforementioned 'territorialisation' of maritime boundaries. Special attention was drawn, during the Third Conference, to the rules for delimiting boundaries separating the maritime spaces of neighbouring states with adjacent or opposite coasts. The provisions dealing with the delimitation of the EEZ and of the continental shelf were a particularly difficult matter – which remained unresolved until the final stages of the conference. The main issue, which reflected previous conventional law and the developments in case law, was whether equidistance and/or equitable principles should be given prominence in the LOSC[15]. Disagreements were eventually overcome by a *sui generis* compromise, the interpretation of which however, leaves various unanswered questions – and room for dissention.

Amongst the unanswered questions (illustrative of the legal-conceptual concerns aforementioned), are the following: Why has equidistance been deemed to be a mere method, when under the conventional provisions that refer to the 'equidistance-special circumstances formula' what is at issue is a legal norm? Why, despite the emphasis placed by courts on the 'fact' that equidistance is a mere method, has equidistance become the most commonly utilised starting point for negotiated delimitations? Why significantly does the 'equidistance-special circumstances formula' seem to have crystallised as the *de facto* operative formula for determining maritime boundaries in recent case law? Why has reference often been made to 'equitable principles' in case law, while references thereto in

(13) Vicuña/1990, p.614

(14) The LOSC was signed on 10 December 1982, and entered into force on 16 November 1994 (1833 UNTS 31363). For an explanation on the utilisation of the acronym LOSC, instead of UNCLOS, cf. Edeson/2000.

(15) LOSC, Articles 74(1) and 83(1). Article 15, which refers to territorial sea delimitation, makes explicit reference to equidistance. Incidentally, unless otherwise indicated or otherwise clear from the context, all references to articles with no explicit mention of the convention in question should be understood as referring to the LOSC.

conventional law and in state practice are scarce? What is the role of equity, especially in light of the reference to 'equitable principles'? Why has the solution (a boundary-line) for each case been required to be necessarily unique, when almost paradoxically, there is more than one solution that meets the requirements of delimitation law? Why has maritime delimitation law been seen as leading to unpredictable outcomes? How may the factual elements relevant for delimitation be identified, and how are they to be assessed? What is the scope for discretionary assessments within the normativity that governs the maritime boundary adjudication?

These questions underlie the third justification for this research. Clear answers thereto are required for very practical reasons. The world maritime political map is still in its infancy[16]. Comprehensive research carried out under the auspices of the American Society of International Law identified 167 maritime delimitation agreements[17]. Between 1997 and 2001, other 20-odd agreements were concluded[18]. More than a half of the world's potential maritime boundaries are therefore yet to be delimited[19]. Taking into account that on average only 3 or 4 maritime boundaries have been agreed per year, maritime delimitation is likely to remain an important issue in international affairs for at least the next quarter of a century. Further, as illustrated by the fact that the docket of the *International Court of Justice* (hereinafter "ICJ", "Court", "International Court") includes at present three cases in which the question of maritime delimitation is raised[20], many delimitation disputes will be resolved by adjudication[21]. Clearly, a solid understanding of the theoretical framework is required.

As to the present and future importance of the delimitation provisions of the LOSC, it suffices to note that this convention has been ratified, or acceded to, by some 80% of the world's coastal states, and is moving to universal acceptance[22]. The rules embodied therein are indeed likely to become central to future delimitations, even between those states which are not parties to the LOSC. A good example is that of the *Eritrea/Yemen* arbitration.

(16) Blake/1987, p.1.

(17) *International Maritime Boundaries* (hereinafter "IMB"). The first two volumes (1993) contain information on maritime boundaries delimited until 1991; the third volume (1998) updates that information to 1996. Roughly, 103 boundary agreements had been concluded by 1985 (cf. Jagota/1985, pp.331-344). In 1988, the total number thereof was estimated in more than 130 (cf. Johnston/1988, p.xiii).

(18) Appendix 2, Table F.

(19) In 1982, the number of potential maritime boundaries at world level was estimated as being 376 (Smith/1982, p.3). Prescott advances a very similar figure (374); cf. Prescott/1985, pp.155, 354. For a comparative view of three different assessments as to the number of potential boundaries, cf. Blake/1987, p.7. There are some 420 potential maritime boundaries worldwide; cf. Carleton/1999 (unpublished), para.5.10; Blake/1998 (unpublished). The emergence of new states has generated new maritime boundaries, and with the extension of the continental shelf beyond 200 nautical miles in certain areas, new boundary delimitations might be required (even in areas where delimitations up to 200 nautical miles have already been effected).

(20) The maritime boundaries at issue are those between: Cameroon and Nigeria, Nicaragua and Honduras, and Nicaragua and Colombia. Of these states, only Colombia is not a party to the LOSC.

(21) This study uses the term "adjudication" as encompassing both judicial and arbitral settlement of disputes. All references to a specific arbitral court or tribunal will use the term "Tribunal", as opposed to "Court" which refers to the ICJ.

(22) By March 2002, 137 states (15 of which are landlocked states) had ratified or acceded to the LOSC. States have been called upon to become parties thereto "in order to achieve the goal of universal participation" (UN Doc., A/Res/55/7, 30 October 2000).

Although not party to the LOSC, Eritrea agreed that the adjudication of its maritime boundary with Yemen would be effected by reference to these rules. In the *Qatar/Bahrain* case, similarly, although Qatar was not party to the LOSC, it concurred with the idea that the relevant conventional provisions reflected customary law.

This research, whilst examining a number of conceptual issues concerning maritime delimitation, contributes to resolving several outstanding issues, with a view to facilitating the future delimitation of maritime boundaries[23]. Part I, which serves as a springboard for the discussion on conceptualisation, includes three chapters which argue that the delimitation provisions in the LOSC ought to be seen as the outcome of three decades of developments (which form its contextual framework). Returning to the 1958 Conventions, Chapter 1 delves into the preparatory work of the ILC, and the provisions stemming therefrom. Chapter 2 analyses the case law pre-dating 1982, which focuses upon the *North Sea* cases and the *Anglo/French* arbitration. The work of the Third Conference, and the provisions incorporated in the LOSC, are the subject matter of Chapter 3. Part II of this work attempts to deconstruct the delimitation problem into three core issues: the concept of maritime delimitation (Chapter 4); the technical definition of boundary-lines (Chapter 5); and the normative standards applicable to maritime delimitation (Chapter 6) [24], which this study argues are the *principle of maritime zoning* and the *principle of equity*[25]. The primary issue, that of determining the boundary-line, is examined in detail in Part III, which dwells on the process whereby such a line is legally 'discovered'. The attempt made to rationalise aspects of the justification discourse (Chapter 7), and to discuss relevant factual circumstances (Chapter 8), is supplemented by a case study that seeks to test the propositions advanced in this thesis (Chapter 9). Each part presents its own set of conclusions, which provide integrated elaborations of arguments advanced in its chapters.

For clarity of exposition, some points concerning the scope of and the terminology used in this study should be made from the outset.

As regards scope, it must be first noted that the delineation of limits of maritime zones, despite being interwoven with the subject matter of this thesis, is not specifically addressed. As recognised in jurisprudence, the "normal and ordinary meaning" of the term *boundary* should not be confused with "what is usually called a *maritime limit*"[26].

(23) As the research progressed, it became clear that the goal of conceptualising all aspects of maritime delimitation was too ambitious, especially in the light of the constraints imposed by the word-limit. Space has indeed precluded us from covering certain legal and technical aspects (e.g. dispute-settlement mechanisms – in particular questions relating to jurisdiction, and the essential technical notions utilised in this field). The following text is thus a shortened version of the initial draft.

(24) The term "normative standards" is used to comprise both rules and principles of positive law. The term "standard" is not used in the stricter juridical-technical sense sometimes given thereto in Anglo-American law (a special type of legal rule).

(25) Unless explicitly stated, the term "equity" is not used in the juridical-technical sense that is given to it in Anglo-American law.

(26) Eritrea/Yemen-II, para.129; cf. also para.161 *in fine*.

Boundaries are lines that separate the sphere of jurisdiction of adjoining states[27]. Limits are lines that separate the sphere of jurisdiction of one state from maritime areas not subject to state authority. Whereas maritime boundaries (regardless of the procedural means whereby they are determined) always have a bilateral character, maritime limits are defined by states unilaterally[28]. Establishing maritime boundaries is thus an operation that should be differentiated from the establishment of (inner and outer) limits of maritime zones[29]. Conceptually, the term 'delimitation' should be used to refer strictly to the establishment of boundaries between neighbouring states[30].

On another level, it must be emphasised that the delimitation process is understood here as being constitutive in nature. It entails the *ex novo* determination of the course of a boundary. Bravender-Coyle suggests that the determination of the existence of an express or a *de facto* agreement determining a boundary should be a part of a "system of priorities which collectively constitutes the emerging general rule of customary international law relating to the delimitation of maritime boundaries between states"[31]. But if the dividing lines are already established, for example, by means of an international treaty, due to the application of the *uti possidetis juris* principle, or as a result of acquiescence, recognition or estoppel, or by any other means, one should not speak of delimitation. As Charney states, these aspects are preliminary issues to the delimitation[32]. Throughout this study, the absence of a dividing line thus is taken as a *conditio sine qua non* for speaking of delimitation *proprio sensu*.

As for deciding whether or not such a dividing line exists, it is important not to overlook the distinction between "boundary-lines" and "lines of allocation". Lines of allocation were often "delimited through the high seas or unexplored areas for the purpose of allocating lands without conveying sovereignty over the high seas"[33]. But they are not boundaries in the sense adopted here. This distinction emerged, for example, during the *Guinea/Guinea-Bissau* arbitration. Whereas Guinea argued that the line defined in Article I of the Franco-Portuguese Convention of 1886 constituted a boundary, Guinea-Bissau

(27) The term "jurisdiction" might be used in this study with a wider scope, to comprise not only mere jurisdiction, but also sovereignty and sovereign rights.

(28) *Gulf of Maine* case, ICJ/Reports/1984, pp.292, 299, paras.87, 112(1). In the *Fisheries* case, the ICJ averred the international relevance of unilateral definitions of maritime limits, and the need for these unilateral claims to abide by international law (ICJ/Reports/1951, p.132).

(29) Referring to "two types of maritime delimitation" – "maritime limit" and "maritime boundary", cf. Thamsborg/1998, p.223. Mentioning "ocean boundaries" – which include "seaward limits, baselines and *lateral* boundaries", cf. Johnston/1988, p.75. Cf. Lucchni/Vœlckel/1996, pp.6-10; Roubertou/1996, p.372; Tanja/1990, p.xvi; Caflisch/1983, p.36; Jennings/1969a, pp.376, 428.

(30) Jonhston/1988, p.9.

(31) Bravender-Coyle/1988, pp.172-177, Appendix A. When mentioning express or *de facto* agreement, he apparently refers to all cases in which a boundary-line is adopted by means other than a formal boundary treaty.

(32) Charney/1994, p.234. Often, disputes emerge because one of the states considers that the boundary has already been delimited, whereas the other contends that it has to be delimited *ex novo*. The decision regarding the existence of a boundary precedes the delimitation, which is only required when it is concluded that no boundary is yet in place.

(33) Jones/1945, p.143, 149-150.

argued that such line was merely a line of allocation of sovereignty over islands. Taking into account the evidence available, the Tribunal concluded that the line had not been established as a maritime boundary, which seems to mean that the limit was viewed as a *line of allocation*[34].

We must allude, moreover, to the inescapable dualism and the interdisciplinary nature of the subject, which bears on the terminology used. Among geographers, McMahon refined the 'boundary terminology' with the distinction between "delimitation" and "demarcation"[35]. In the 1940's, Jones referred to the "continuity of the boundary-making process"; he advanced a four-stage description thereof: allocation, delimitation, demarcation and administration[36]. This view continues to be adopted today[37]. From a slightly different approach, DeLapradelle refers to three stages: preparation, decision and execution. Delimitation corresponds essentially to the "decision" stage (although some aspects might be identified in the stage of "preparation"), which is to take place through either treaty or adjudication[38]. In this study, delimitation *proprio sensu* – as a stage of the boundary-making process, is seen as consisting of "*the determination of a boundary-line*" (that is, "*the choice of a boundary site*") and "*its [technical] definition*"[39]. But technical definition should not be confused with demarcation[40], which consists of marking the boundary on the ground, by construction and/or identification of conspicuous marks[41].

Finally, it is certainly emphasised that the concept of boundary herein adopted is purely political. As Jones notes, "the most unreal of boundary classifications is the too-familiar one of *natural* and *artificial*"[42]. Natural facts produce no legal consequences[43]. The political-legal significance of natural features is derived from decisions of states. Boundaries in general are political and man-made. At sea, even more than ashore, boundaries are a political phenomenon that can hardly be seen as having any natural

(34) ILM/25/1986, pp.275-282, paras.46-67.

(35) McMahon/1935, p.4.

(36) Jones/1945, p.5.

(37) Nguyen/Daillier/Pellet/1999, p.462; Sharma/1989, pp.11-20; Prescott/1987, pp.13-14, 68-77; Johnston/1988, p.8.

(38) DeLapradelle/1928, pp.72-73; on the stage of "decision", cf. also pp.105-143.

(39) Jones/1945, p.57; Boggs/1940, p.32; emphasis added. Cf. para.4.2. *infra*.

(40) On the distinction between delimitation and demarcation, cf. e.g. Nguyen/Daillier/Pellet/1999, pp.462-463; Brownlie/1998a, p.122; Jennings/Watts/1997, p.662; Lucchini/Vœlckel/1996, p.30; Adler/1995, pp.2-6, 9-17; Sharma/1989, pp.8-12; Prescott/1987, p.13; Bardonnet/1984, pp.4-6; Brownlie/1979, p.4; Rousseau/1977, pp.235, 269-272; Cukwurah/1967, pp.78-83; Jones/1945, p.57; Boggs/1940, p.32. Elaborating extensively on demarcation, cf. Jones/1945, pp.165-225. "Demarcation" appears to correspond to the stage "execution" in DeLapradelle's classification (DeLapradelle/1928, pp.25-26).

(41) Sea boundaries are difficult to demarcate. Setting up marks in deep-sea waters often is an impossible task. Even if shore-based marks are used, because they are not visible at long distances from the coast, they are in many cases ineffective. For a demarcated maritime boundary, cf. e.g. Georgia (ex-USSR/Turkey), Appendix 2, D60, F35; Figure 43. This creates a crucial distinction between land and maritime boundaries in that as no marks can be set along a maritime boundary the latter cannot be object of 'densification' (construction of marks along the boundary so that consecutive marks are within sight distance of each other); cf. Bardonnet/1984.

(42) Jones/1945, p.7.

(43) *Gulf of Maine* case, ICJ/Reports/1984, p.296, para.102. Cukwurah/1967, pp.12-15.

character, especially because there are no visible natural features to which 'abstract boundary-lines' can be attached[44]. As Judge Bedjaoui affirmed unequivocally[45]:

> The idea of 'natural boundaries' formed by mountains, waterways or various accidents of nature, has never been able to commend itself to states for purposes of their land frontiers, although these limits are visible to the naked eye. Legal science is unlikely to accept for maritime spaces what it rejects for land spaces and to confer legal standing on those 'natural boundaries' constituted by an important and significant geological feature when that boundary is not even visible to the naked eye. Having always shunned land relief despite the fact that it is visible, man cannot but shun still more underwater relief which is out of his sight.

(44) Lucchini/Vœlckel/1996, p.25. Bardonnet/1989, p.2. Analysing how the distinction between land and sea bears upon geodesy, cf. Roubertou/1996, pp.324-328.

(45) *Guinea-Bissau/Senegal* arbitration, Dissenting Opinion, ILR/83/1990, p.101, para.114.

I

DELIMITATION LAW IN THE LOSC: THREE DECADES OF DEVELOPMENT

INTRODUCTION TO PART I

The provisions of the LOSC on delimitation – Articles 15, 74(1) and 83(1) – form today the primary legal reference in maritime delimitation. Naturally, the conceptualisation herein attempted must adequately consider them. It should be observed, nevertheless, that the legal regime of maritime delimitation, as most regimes in international law, appears as the result of a *continuum*. Unexpected 'shifting-developments', although existent, were a seldom occurrence. When they seem to have happened, close scrutiny leads to conclude that they were less marked than they look at first glance. In effect, the provisions of the LOSC ought to be assessed within its wider context.

Seeking to provide this assessment, Part I looks into the three decades of evolution of maritime delimitation law, prior to the advent of the LOSC. The initial developments, from the preparatory works undertaken by the International Law Commission in the early 1950's to the 1958 Conventions, are examined in Chapter 3. Because case law has played a crucial part in shaping the contents of and the debate on maritime delimitation law, to the point of making it known as 'judge-made law', Chapter 4 looks into three cases – the *Grisbadarna* arbitration, the *North Sea* cases, and the *Anglo/French* arbitration – that have played a part in the process towards the conventional provisions (although the relevance of the latter two is admittedly much more significant than that of the former). In Chapter 5, the work and outcome of the Third United Nations Conference on the Law of the Sea is appraised.

The objective of this part, therefore, is to provide a sound interpretation of the LOSC provisions, in light not only of the historical element and the common intention of the parties, but also of the specific legal system embedded in the LOSC.

Chapter 1

THE 1958 CONVENTIONS

1.1. Introduction

The regimes of the high seas and of the territorial waters were amongst the provisionally selected topics of international law whose codification was considered by the International Law Commission (ILC) as "necessary or desirable"[1]. Several events explain the need for codification at the time. The first is the failed attempt at codification at the 1930 Hague Conference. The subsequent period, characterised by the collapse of the League of Nations and the outbreak of World War II, was far from being propitious for any type of cooperation at the international level. The creation of the United Nations (UN) in the aftermath of World War II, the Truman Proclamation of 1945 concerning the "jurisdiction over natural resources of the subsoil and sea bed of the continental shelf", and the 'reaction' of states around the globe to this declaration (e.g. the Santiago Declaration of 1952), sparked for a second time the debate on law of the sea issues[2].

The ILC decided to give priority to three topics. Among them was the regime of the high seas, which included the continental shelf. François was elected Special Rapporteur[3]. Considering that "the regime of the high seas and the regime of the territorial waters [were] closely related", the General Assembly of the UN recommended the inclusion of the latter in the study to be carried out by the ILC[4]. The recommendation was accepted by the ILC in 1950, and the study of the regime of territorial waters was initiated in parallel with that of the high seas in 1951. François was also appointed the Special Rapporteur for this study. The process started by the ILC eventually led to the First United Nations Conference on the Law of the Sea (hereinafter "First Conference") and to the 1958 Conventions.

The rules dealing with the legal determination of international maritime boundaries underwent a process of codification, and indeed of progressive development, during both the First Conference and its *travaux prèparatoires*[5]. From this process stemmed the first

(1) ILC/Yearbook/1949, pp.280-281.

(2) For an overview of the reaction of the states, cf. e.g. Auguste/1960, pp.57-72, 105-165, Attard/1987, pp.1-11, Brown/1992, pp.56-62; ILC/Yearbook/1950(II), pp.49-50.

(3) ILC/Yearbook/1949, p.281.

(4) UN Doc., GA Res.374(IV), of 6 December 1949.

(5) The Commission recognised, in general terms, that some of its proposals were *de lege ferenda*. However, it also remarked that trying to identify which draft articles were merely codification and which were progressive development had proved impossible since some of the articles did not belong to either category (ILC/Yearbook/1956(II), pp.255-256).

codified rules on delimitation of maritime zones, which were incorporated in the Geneva Conventions[6]. Unsurprisingly, the First Conference and the ILC preparatory work have been extensively examined[7]. A re-examination is thus outside the purpose of this study. Nevertheless it is evident that the conclusions arrived at, particularly by publicists, are by no means unanimous. A different approach to several issues is possible.

The analysis provided here is primarily intended to underline and emphasise certain features of the development of those rules – which arguably bear upon the interpretation of both the 1958 and the LOSC provisions[8]. A set of arguments may *ab initio* be put forward to support this view. First, the rules embodied in the 1958 Conventions form an essential part of a background against which the debates that characterised the Third Conference have to be understood. Secondly, the LOSC rule applicable to the delimitation of the territorial sea is almost identical to its 1958 equivalent. Thirdly, since the LOSC does not include any provision dealing specifically with the delimitation of the contiguous zone, it is necessary to investigate whether the 1958 provision is in any measure still applicable. Finally, it must be enquired whether the 1958 rule on continental shelf delimitation is to any extent relevant in interpreting the equivalent 1982 rule, and that concerning the EEZ.

One major idea summarises the First Conference and its *travaux prèparatoires* as regards delimitation of maritime zones: it was a quest for material criteria of delimitation. And since "the regime of the high seas and the regime of the territorial waters [were considered as] closely related", that quest concerned simultaneously the delimitation of all maritime zones[9]. As a result of that evolving process, all rules embodied in the Geneva Conventions prescribe, to one extent or another, the recourse to equidistance. The different delimitation rules must then be analysed jointly. The correct understanding of the process that led to their approval, and their contents, depends on a parallel and integrated analysis[10].

1.2. The ILC Pursuit of Normative Standards

1.2.a) Pre-1958 State Practice

The 1929 Draft Convention on Territorial Waters prepared by the Harvard Law School included an article on delimitation of territorial waters in straits, which stated: "in the absence of special agreement to the contrary [...] the territorial waters of each state

(6) TS/CZ Convention, Articles 12(1) and 24(3); CS Convention, Article 6(1)(2).

(7) Oude Elferink/1994, pp.13-26; Caflisch/1991, pp.439-477; Tanja/1990, pp.21-45; Jayewardene/1990, pp.260-277, 282-283, 285-308; Evans/1989, pp.8-15; McDougal/Burke/1987, pp.427-437, 725-729; Jagota/1985, pp.49-57; Dipla/1984, pp.131-151; O'Connell/1989, pp.673-677, 684-685, 699-705; Bowett/1979, pp.143-160; Whiteman/1958, pp.651-654.

(8) Cf. LOSC, Articles 15, 33, 74(1), 83(1), TS/CZ Convention, Articles 12(1), 24(3); CS Convention, Article 6(1)(2).

(9) UN Doc., GA Res.374(IV), of 6 December 1949.

(10) Noting the relationship between the continental shelf and the territorial sea, cf. ILC/Yearbook/1950(I), p.233.

extend to the *middle* of the strait"[11]. The Basis of Discussion No. 16 presented at the 1930 Hague Conference adopted a similar wording, and referred to "a line running down the *centre* of the strait"[12]. Although, prior to 1958, state practice in maritime delimitation was scarce, as to territorial waters it seemed to show preference for this equidistance-based approach. The Peace Treaty with Italy of 10 February 1947, for example, refers to "a line placed *equidistant* from the coastlines of the Free Territory of Trieste and Yugoslavia"[13].

When the ILC preparatory works started, the only agreement on delimitation of maritime areas beyond the territorial sea that was known was the 1942 Anglo/Venezuelan treaty concerning the Gulf of Paria. Lacking precedents, this agreement seems to have followed a *sui generis* approach that, insofar as it did not advance "any general principle or method for boundary making", became "rather limited in scope as a potential precedent for future delimitations"[14]. In fact, as far as continental shelf delimitation was concerned, state practice comprised essentially unilateral acts. The first reference to delimitation criteria was made in the Truman Proclamation, which asserted: "where the continental shelf of one state 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". What was meant by "equitable principles" was never clarified. By 1945, it was not possible to ascertain what rules of law were applicable in the delimitation "of even traditionally recognised maritime areas such as the territorial sea". It is perfectly acceptable to assume that the reference to equitable principles envisaged no more than "to provide for the negotiation of a fair and reasonable boundary"[15]. Notably, the United States' understanding of delimitation in accordance with equitable principles seemed associated with the use of equidistance. Writing in 1951, Boggs suggested that equidistance "would provide the 'equitable principles' for [reaching] accord between the United States and a neighbour state"[16]. Furthermore, as the 1958 Conventions referred, without exception, to the use of equidistance in delimitation, the United States ratification of all four Conventions in 1961 may also be seen as a token of this idea.

(11) Article 9, AJIL/1929/23(Supp.-Special), pp.243-244, emphasis added.

(12) AJIL/1930/24(Supp.), p.36, emphasis added. No reference was made to delimitation between adjacent states.

(13) UNTS/1950/49, p.139, emphasis added. References to other agreements may be found in ICJ/Pleadings/1968(I), pp.263-265: Yugoslavia/Trieste (1947), Italy/Turkey (1932), United States/Canada (1925 and 1908), and Norway/Finland (1924). Although using different terminology, they all convey the same notion of equidistance (e.g. "equidistant", "halfway", or "middle").

(14) Anderson/1988, p.231; Nweihed, IMB/Report 2-13(1), p.645. See Figure 16.

(15) Brown/1992, p.57. It must be mentioned that, by 1930, the concept of *delimitation* was viewed as always comprising also the problem of unilateral delineation of the outer limits of maritime zones (Boggs/1930).

(16) Boggs/1951, p.262, fn.34. Although Boggs' writings are not legal opinions, they must be seen in the light of Article 38(1)(d) of the Statute of the ICJ, which refers to highly qualified doctrine as a subsidiary means of interpreting rules of law. He was the Special Adviser on Geography for the U.S. Department of State. His views, crucial for interpreting the United States' practice, greatly influenced the development of the international law of delimitation of maritime zones (cf. Boggs/1930, Boggs/1937). He was a member of the Committee of Experts that proposed the use of equidistance to the ILC, and his work was cited on various occasions during the ILC debates on maritime delimitation (e.g. ILC/Yearbook/1950(I), p.233; ILC/Yearbook/1951(I), pp.268, 287; ILC/Yearbook/1952(I), pp.180-182; ILC/Yearbook/1953(I), p.128).

Following the Truman Proclamation, other states made reference to the term "equitable principles" (or similar expressions) in their legislation regarding the continental shelf. This is the case with Iran, Nicaragua, Saudi Arabia, and the Arab states of the Persian Gulf under the protection of the United Kingdom[17]. It has to be kept in mind that this state practice was not disregarded by the ILC. On the contrary, the process that led to the approval of the Geneva provisions took due account of the historical development of the continental shelf and related state practice[18]. Equally, it is important to say that there is no record whatsoever regarding the recourse to natural prolongation as the delimitation standard in state practice.

Finally, it is important to note the reaction of some states on the western coast of South America to the Truman declaration and the emergence of the concept of *continental shelf.* Because of a phenomenon of subduction between two tectonic plates, these states have no geological continental shelf. In 1952, this led Chile, Peru and Ecuador to claim an area up to 200 M from the coast. The paramount consideration was an exclusive access to fishing resources in the area. Attempting to assert and further their maritime claims, these states decided also to delimit their boundaries by recourse to parallels of latitude. As will be seen, at that time, the use of equidistance as a delimitation standard was not yet widely and clearly understood, even by the ILC members.

1.2.b) First Drafts

1.2.b)(i) The Continental Shelf

In 1950, during the second session of the ILC, the Special Rapporteur presented his first report on the regime of the high seas. When discussing the continental shelf, the report offered a survey of state practice which led François to conclude that, even in relation to the very notion of continental shelf, "*la plus grand incertitude*" subsisted. According to him, that uncertainty extended to the criteria for delimitation between states. Observing that *the only guidance offered by state practice was that delimitation should be effected by agreement between the states involved,* he considered it advisable to ask governments their views on how delimitation was to be effected in cases of overlapping claims[19].

The fact that the ILC members were initially faced with the idea that no clear legal definition of continental shelf existed at the time cannot be overemphasised. During the

(17) Appendix 2, A1-A12.

(18) ILC/Yearbook/1950(II), pp.49-50, 91-93. Three other delimitation agreements on areas beyond the territorial sea were signed before 1958 (Appendix 2, A13-A15). Two of them referred to an area that, at the time, was not recognised under international law (the 1952 Chile/Peru and Ecuador/Peru agreements). Related to the Santiago Declaration, they did not concern continental shelf delimitation but rather the delimitation of a 200-mile zone. The other agreement was signed in 1957 between Norway and the USSR. Since the ILC draft articles were finalised in 1956, it had no influence on the wording of those articles.

(19) ILC/Yearbook/1950(II), pp.49-51.

discussion of the points raised by François' first report, recognising that there was no definition of continental shelf, Yepes observed that "such definition could be given only by geologists and geographers, not by the International Law Commission, which *did not have the requisite knowledge*", and added that "if scientists provided a definition, they would know what rights over the continental shelf could be vested in states"[20]. This seems to make clear that the quest of the ILC was centred not only on the delimitation standards, but also on the juridical notion of continental shelf. That a right to claim a submerged area adjacent to the land territory had emerged since 1945 is an acceptable idea. By contrast, to assert that in the early 1950's the legal concept of continental shelf (in terms of spatial extension) was part of customary law is highly questionable.

Not surprisingly, the opinions of the ILC members also reflected uncertainty as regards continental shelf delimitation. Alluding to the conclusions contained in the Report of the 44th Conference of the International Law Association (ILA), Hudson observed that "custom and theory gave no enlightenment on the subject, and in his view the question should therefore be set aside". In response, El-Khoury stated that, "as a general rule, when two states were separated by waters, the frontier was fixed in the middle of those waters". He argued that the same rule would apply where continental shelves overlapped[21]. Hudson raised serious objections to this view, emphasising the idea in the said report as to *the need to study and develop delimitation criteria.* In his opinion, that showed that no rule or principle of delimitation existed. Only one idea seemed to gather consensus within the Commission: if required, *delimitation had to be effected by agreement.* As to the desirability of developing delimitation criteria, opinions remained divided[22]. In this light, therefore, attempting to demonstrate that delimitation standards existed in customary law, by the early 1950s, is equally questionable[23].

At this juncture, it is worth characterising the point of departure of the ILC in its search for delimitation criteria. These are ideas that remained present throughout the work of the ILC. They play, even today, an important part in understanding the delimitation rules. Support for the idea that delimitation was to be effected by agreement between the states concerned was unanimous. The majority of members seemed to believe that international law prescribed no material principle applicable to continental shelf delimitation. And the possibility of developing delimitation criteria was expressly admitted. It is noteworthy that, despite the references that were made to the Truman Proclamation, no suggestion of using

(20) ILC/Yearbook/1950(I), p.228.
(21) It follows apparently the proposal presented at the 1930 Hague Conference, although no explicit reference is made to it.
(22) ILC/Yearbook/1950(I), pp.232-234.
(23) This issue relates to some assumptions made by the ICJ in the *North Sea* cases, which are examined later (para.2.3.b)(ii) infra).

equitable principles as delimitation criteria was advanced either by the Special Rapporteur, or by any other member of the ILC.

The debates in the third session (1951) were based upon the Second Report of the Special Rapporteur. As to continental shelf delimitation, various points deserve attention. The legal definition of continental shelf proposed therein *comprised the seabed and subsoil of territorial waters*[24]. This seemed a straightforward transposition of the geomorphological concept, thus reinforcing the idea that the legal concept of continental shelf was far from being clear. It was Hudson who stressed that it was "necessary to stipulate that, from the legal standpoint, the continental shelf only consisted of that part [of the seabed and subsoil] which lay outside territorial waters". Indicating that the same misconception was also present in a bill before the United States Congress, he affirmed that the adoption of that perspective "would be very regrettable and not justified by the historical development of the law in the matter"[25]. Interestingly, the juridical notion of continental shelf was not clear even within the state that had first claimed rights over the seabed and subsoil.

The basis of discussion suggested by the Special Rapporteur distinguished between situations of adjacency and of oppositeness. The median line was proposed for the latter case, on the basis of an analogy with delimitation in straits. For adjacency situations, the proposed solution was the recourse to the prolongation of the territorial sea boundary. The note to draft Article 9 mentions the *Grisbadarna* arbitration however, suggesting that the reference was to the prolongation of the perpendicular to the coast at the terminus of the land boundary. Nevertheless, the possibility for states to delimit their boundaries in a different manner, by agreement, continued to be acknowledged[26].

The role of agreements was repeatedly reaffirmed[27]. It was Amado who, quoting an article that analysed the Truman Proclamation, raised the idea that boundaries were to be delimited by agreement on the basis of *equitable principles*[28]. To him, however, this expression meant solely that a mutually acceptable agreement was required[29]. No further references were specifically made to equitable principles during the debate.

The ILC members were clearly aware of the non-existence of normative guidance in maritime delimitation[30]. Whether to adopt rules that would become applicable by default in the absence of an agreement was still an unresolved question that divided the Commission. Transposing from geography to law the concept of delimitation proved to be a daunting

(24) Para.162, Article 1, ILC/Yearbook/1951(II), p.102.
(25) ILC/Yearbook/1951(I), pp.268-269.
(26) ILC/Yearbook/1951(II), pp.102-103, Article 9 and Note. The prolongation of the land boundary, or the use of perpendiculars to the general direction of the coast, had already been suggested in scholarship (DeLapradelle/1928, pp.215-216).
(27) Cf. e.g. the statements of Spiropoulos, Yepes, Scelle, Hudson, ILC/Yearbook/1951(I), pp.286-288, 290.
(28) *Ibid.*, p.285.
(29) *Ibid.*, p.293.
(30) Cf. e.g. El-Khoury, Córdova, Spiropoulos, Sandström, and Hudson, *Ibid.* pp.289-293.

task. As recognised by Hudson, until then "the problem had been tackled by geographers". The Chairman, Brierly, went even further and stated that delimitation was actually "a matter of geography rather than of law"[31]. When examining the various potential delimitation standards, references were made to the perpendicular to the general direction of the coast, the prolongation of the territorial waters boundary, the prolongation of the land boundary, and the use of an equidistance-line[32]. The Commission eventually rejected the inclusion of delimitation standards in the draft article[33]. In the commentary, nonetheless, allusion was made to the use of the median line in cases of adjacency.

It was Hsu who brought up the issue of the *equitableness of the delimitation*, in the 116th Meeting. He asked "whether it was equitable to extend seawards the dividing-line between the territorial waters". Incisively, he also pointed out that the "dividing-line would be relatively unimportant in the case of territorial waters, which were a narrow belt, but *might take on great significance and cause injustice if applied to continental shelves which were sometimes of considerable extent*". His conclusion was that delimitation should be effected, "failing agreement, by arbitration *on a fair and equitable basis*"[34].

Since the prevailing view was that no substantive criteria existed, the ILC had to turn to compulsory arbitration as a means of resolving situations where no agreement could be reached[35]. Scelle affirmed that he "could not agree to stating bluntly that two states must reach agreement"; this would create the danger of leaving "the strong free to exert pressure on the weak"[36]. The recourse to agreement and *ex aequo et bono* arbitration in the relevant draft article may be explained by the concatenation of three aspects[37]. One was the primacy given to agreements. The second was the non-existence of delimitation standards. The third was the need to contemplate a mechanism that, failing agreement, would ensure that delimitations would not be effected unfairly or through recourse to political pressure.

The two equally important aspects of delimitation had finally surfaced. On the one hand, its intrinsic geography-related character became axiomatic. On the other hand, it was acknowledged that delimitation should not lead to a manifestly unreasonable boundary. It must be emphasised that, although almost subliminally, the need to balance *geography* and *fairness* surfaced during the ILC work. Indeed it appeared at a very early stage. Whatever the solution adopted in the end, it definitely took account of this primary equilibrium. In

(31) *Ibid.*, p.287.
(32) Cf. e.g. the statements of Spiropoulos, Córdova, Sandström, and Hudson (ILC/Yearbook/1951(I), pp.286-287). François introduced the work of Boggs on the use of the median line in continental shelf delimitation (ILC/Yearbook/1951(I), p.268).
(33) ILC/Yearbook/1951(I), p.291. Cf. Article 7 of the Draft Articles (ILC/Yearbook/1951(II), p.143).
(34) ILC/Yearbook/1951(I), p.288-290, emphasis added.
(35) *Ibid.*, pp.291-294.
(36) *Ibid.*, pp.288-289.
(37) ILC/Yearbook/1951(II), p.143, commentary to Article 7.

short, by the end of the 1951 session, the issue of delimitation standards remained unclear. Hesitancies were many, and certainties were few and far between.

1.2.b)(ii) The Territorial Sea

The debate on the regime of the territorial sea was initiated in 1952, when François presented his First Report on the matter. With regard to delimitation, distinction was made between straits, mouths of rivers, and adjacent states[38]. In the case of straits, the draft article (which was identical to the one proposed at the 1930 Conference) seemed to deal with the definition of the seaward limits of the territorial sea in straits, and not with delimitation between states. And the same occurred with the cases of mouth of rivers.

In relation to situations of adjacency (which had not been considered during the 1930 Conference), draft Article 13 of the report prescribed the use of the median line as proposed by Boggs. The commentary stressed that such a line *would not be retained in cases where a special configuration would demand modifications*[39]. As can be deduced from this statement, the ILC members were conscious of the existence of special situations that would require departing from equidistance. The case of a navigable channel running in the vicinity of the boundary was presented as an example where a *thalweg*-based line would probably be more appropriate. The recourse to a perpendicular line in the *Grisbadarna* arbitration was cited. Also important were also François' observations regarding the need to consider "*arguments historiques*", in the presence of which *delimitation rules would not be applicable*[40]. As in relation to the continental shelf, attention was devoted to the role of equity. References to "unfairness of delimitation" (Hudson), to "fair and equitable basis" (Hsu), or to "settling [...] differences equitably" (El Khoury), show that the need to prevent inequitable delimitations remained one of the concerns of the Commission[41].

In the 171st Meeting, while introducing the delimitation provisions incorporated in his report, François referred to the concept of equidistance, as analysed by Boggs in his writings. His references to a "geometric concept" that raised difficulties to "laymen" were a first clear suggestion that maritime delimitation was also a geographical issue, requiring technical expertise. Doubts remained however as to the possibility of finding a regime of worldwide application. Affirming that the use of equidistance "would not be satisfactory in a number of cases", Hudson was manifestly against the idea of finding a general principle upon which to base the drawing of boundary-lines. Intervening in this debate, Lauterpacht stated that "the Commission was not the appropriate body to discuss such technical issues".

(38) ILC/Yearbook/1952(II), pp.37-38.
(39) This idea seems to have stemmed from Gidel's writings in the 1930's (Gidel/1934, pp.769-771).
(40) ILC/Yearbook/1952(II), p.38. Cf. paras.1.3.c)(ii), 2.2.b) *infra*.
(41) ILC/Yearbook/1951(I), pp.287-290.

Considering that expert advice was required, he proposed that a small committee formed for example by Hudson, François, Boggs and "an expert cartographer" would provide the ILC with the necessary technical recommendations[42]. This proposal was strongly supported by François (who stated that "he could do no further useful work [...] without expert advice"), Córdova, Yepes, and Hsu. This 'know-how-related deadlock' led the Commission to eventually vote in favour of obtaining expert advice[43].

Two other outstanding points came to light during this fourth session of the ILC. The fact that states "would not be prepared to submit a question to compulsory arbitration which would not be based on specific legal rules" was emphasised by Lauterpacht[44]. This commentary reflected the position assumed by the Government of the United Kingdom in relation to the draft Article 7 on the continental shelf, and transmitted in 2 June 1952 to the Permanent Delegation in the United Nations[45]. As will be shown, the comments made by states to the draft articles confirmed this idea. Even more important is Hsu's assertion that "*if the Commission was unable to deduce general rules from practice, it must derive them from legal principles*"[46]. It suggests that, although the ILC's quest for delimitation rules might have amounted to progressive development, it was nonetheless based on legal foundations. Deriving specific rules from principles, although not without difficulties, is undeniably a juridically sound way of establishing a legal regime[47].

1.2.c) Subsequent Development of a General Substantive Rule

Before the 1953 session, the hesitancies in the ILC as to the inclusion of substantive criteria in the delimitation provisions remained. Technical aspects were also a source of difficulty. Doubts continued to exist, moreover, in respect of the way in which the disputes between states were to be resolved. In an attempt to tackle the problems that had emerged, in its 172nd Meeting (1952), the ILC decided to ask states to furnish information regarding their practice on territorial sea delimitation and to submit any observations that they might wish to make in that respect.

In 1953, the Commission proceeded, *inter alia*, with its work on continental shelf delimitation. By then, it had to examine and discuss both the outcome of the consultation with Governments regarding the project on the continental shelf, and the recommendations made by the Committee of Experts on the delimitation rules.

(42) ILC/Yearbook/1952(I), pp.180-181.
(43) *Ibid.*, pp.181-185.
(44) *Ibid.*, p.184.
(45) ILC/Yearbook/1953(II), p.267.
(46) ILC/Yearbook/1952(I), p.184, emphasis added.
(47) The rule devised by the ILC seems indeed to stem from the concatenation of two principles. Cf. Conclusions to Part II *infra*, General Conclusions. On the distinction between rules and principles, cf. para.6.2.b) *infra*.

Confirming Lauterpacht's viewpoint, the recourse to *ex aequo et bono* arbitration was almost unanimously rejected or considered as not advisable by states. Belgium, for example, stated that "legal provisions should be laid down as a basis for arbitration and for possible recourse to the International Court of Justice". Israel stressed the fact that states had "in the past shown little propensity to proceed to arbitration or judicial settlement *ex aequo et bono*". The Netherlands considered the "it would very definitely be advisable to lay down specific rules of law upon which arbitrators could base their decisions". South Africa, on the other hand, observed that resorting to judicial settlement on the basis of law was "more likely to contribute to the orderly development of international law than [was] the creation of a network of *ad hoc* arbitral awards based upon political rather than legal considerations". The statements of Denmark, Egypt, Sweden, United Kingdom and United States of America all supported this same standpoint. Notably, states from different legal traditions had common views in this matter, and went even further in their comments. Egypt drew "attention to the advantage of working out a set of rules to be applied in delimiting the zones of each state". And Israel observed that the draft articles "should proceed from a *more positive attitude towards established principles of law*", and at least "from an examination into the problem of how far these established principles can be regarded as having application" in delimitation[48].

These statements are consonant with Hsu's point as regards how the ILC should continue its work, i.e. to derive rules from legal principles. The statements of states encouraging the ILC *to identify or develop substantive delimitation standards* to assist them in negotiations and to be applied by courts in adjudications arguably constitute an 'atypical mandate' given to the ILC; consequently it must be duly taken into consideration in the international law-making process. It amounts to a *rejection of non-normative approaches to delimitation, and emphasises the need for certainty*. As Shaw observes, the "comments made by governments on drafts produced by the International Law Commission" constitute state practice from which customary law may emerge[49].

These strong objections raised by states against *ex aequo et bono* arbitration, led François to alter the draft provision on continental shelf delimitation[50]. The new wording

(48) For the comments sent by Governments, cf. ILC/Yearbook/1953(II), pp.241-269.

(49) Shaw/1997, p.65. Although it may be argued that no formal juridical value can be attributed to this 'mandate', it is certainly an element of interpretation of the evolving process that was underway, an element to be weighed within the peculiar international law-making process and the manner in which it operates. Thirlway suggests that "the work of the International Law Commission [...] cannot be equated with state practice, or evidence of an *opinio juris*", and that what it does "is put into shape and give expression and definition to a more or less amorphous state practice" (Thirlway/1990, pp.59-60). The idea that this type of state practice is to be given some value in the law-making process is sometimes implicitly endorsed (e.g. Nguyen/Daillier/Pellet/1999, pp.321-323; Brownlie/1998a, p.5; Brownlie/1998b, p.20; Malanczuk/1997, pp.39-41; Pereira/Quadros/1993, pp.159-160; Wolfke/1993, pp.71-72; Danilenko/1993, pp.85-94). As to what type of acts constitute state practice, cf. ILA, Final Report of the Committee on the Formation of Customary (General) International Law, pp.13-19.

(50) Draft Article 7 (and commentary), ILC/Yearbook/1953(II), pp.48-49.

was largely the same, but referred to conciliation instead of *ex aequo et bono* arbitration. However, when he introduced draft Article 7 for debate in the Commission, during the 201st Meeting, he proposed a text referring to "arbitration". In the meantime, he had consulted with the Committee of Experts, which had advanced a proposal for having recourse to equidistance as a generally applicable criterion. Apparently, there would no longer be a question of *ex aequo et bono* arbitration; the arbitration was to consider the principles that were being laid down[51]. Eventually, the ILC approved the inclusion of an additional draft Article 8, which provided for a normative settlement of disputes (including delimitation disputes), and which could be requested by "any of the parties"[52].

The debate on draft Article 7 was resumed in the 204th Meeting, and centred on the proposal of the Committee of Experts to resort to equidistance as the generally applicable criterion of delimitation[53]. Following the decision taken by the Commission, François had met the Committee of Experts before the beginning of the 1953 session, to obtain expert advice on the technical difficulties related to delimitation[54]. This consultation was based on a number of questions posed to the Committee of Experts[55]. The objective was, as Alfaro put it in the previous session, to leave "to *the experts to decide the technical question* precisely how the line was to be drawn in each case, and that *the Commission confine itself to seeking to formulate a juridical principle* which would be applicable in all cases"[56]. Sensibly, the Commission sought to address the legal aspects of delimitation only after securing a more complete technical picture.

How to delimit the territorial sea boundaries between states in cases of oppositeness and adjacency was the fundamental question posed to the Committee. For delimitations between opposite coasts, the Committee advised that the boundary "should as a general rule be the median line every point of which is equidistant from the two coasts". Attention was nonetheless drawn to the existence of "special reasons" that would justify departing from the median line, amongst which were "interests of navigation" and "fishing"[57].

When the ILC formulated the question in relation to adjacent coasts, it made explicit reference to different possibilities of defining the boundary: the prolongation of the land boundary; the perpendicular to the coast on the point where the land boundary intersected the coast; the perpendicular to the general direction of the coast; the median line. Such

(51) ILC/Yearbook/1953(I), p.106.
(52) ILC/Yearbook/1953(I), pp.118-124; ILC/Yearbook/1953(II), pp.213-217.
(53) On the technical notion of equidistance, cf. para.5.2.a) infra, and Figures 48 to 56.
(54) The Committee was integrated by Mr Boggs (USA), Professor Asplund (Sweden), Commander Kennedy (United Kingdom), Mr Couillault (France), Vice-Admiral Pinke (The Netherlands).
(55) For the Report of the Committee of Experts on technical matters, which is presented as part of addendum 1 to the second report on the regime of the territorial sea (ILC/Yearbook/1953(II), p.77-79).
(56) ILC/Yearbook/1952(I), p.182, emphasis added.
(57) By the 1930s, Boggs had already made reference to the relevance of navigation and fisheries in maritime delimitation (Boggs/1930, p.542; Boggs/1937, p.446).

multiplicity of possible criteria seems to have flowed from the commentaries of states on delimitation standards[58]. The conclusion of the Committee was that the boundary should be defined by reference to the principle of equidistance, considering the coastlines on both sides of the terminal point of the land boundary. It was observed, however, that in some situations it would prove difficult *to achieve an equitable solution*; another line would have to be looked for by negotiation. Although no further explanation is given in the report as to what this expression was intended to cover, the concern with equitableness of the boundary was consistent with the previous debates in the ILC[59]. Presumably, it was intended to cover, under a general caption, situations where the equidistance would have to be adjusted.

Having also been asked whether islands and low-tide elevations should be taken into consideration in delimitation, the Committee stated that unless states would agree otherwise all islands and all low-tide elevations located within the territorial sea had to be accounted for. Finally, it was affirmed that the designated solutions applied not only for territorial sea delimitation, but also for continental shelf and contiguous zone delimitation.

A revised version of draft Article 13, included in the amendment to the second report on the regime of the territorial sea, transcribed the Committee of Experts' findings virtually verbatim[60]. In the 1953 session, however, the Commission only addressed the question of continental shelf delimitation. The expert advice was duly taken into account and played a crucial role in the debates. How to transpose into legal language the technical advice of the Committee was a central question. This 'legalisation' of scientific-technical concepts and terminology is not as strange as it might seem at first glance. The legal notion of continental shelf, for example, was also derived from its geomorphological concept, albeit in a modified form. Indeed, this process of 'appropriation' of scientific-technical concepts was taken even further with the LOSC.

Related to this last point is the observation made in the Committee's report as to the fact that it considered it as often impracticable to establish any 'general direction of the coast'. This would depend on the scale of the chart being used, and on arbitrary decisions as to the extension of the coastline to be considered[61]. Technically, this is an indisputable assertion[62]. Without surprise, the Commission abandoned all references to perpendiculars to the direction of the coast. Inasmuch as the Commission had been mandated by states to identify and develop *normative delimitation standards*, the conclusion that this standard

(58) Cf. e.g. Belgium, Burma, Denmark, France, Norway, Sweden, United States, and Yugoslavia (ILC/Yearbook/1953(II), pp.80-89, 241, 246, 264, 269).
(59) Para.1.2.b)(i) *supra*.
(60) ILC/Yearbook/1953(II), p.77.
(61) ILC/Yearbook/1953(II), p.78.
(62) Para.5.2.d)(i) *infra*.

was "*too vague for the purposes of law*" thus is paramount[63]. Importantly, it strengthens the idea that the adopted delimitation rules were not only legal rules, but rules that (as required by states) stressed certainty in particular.

The quest of the ILC for a generally applicable rule may be summarised in a few ideas. The main difficulty that it had to face was to combine the two focal points conveyed by the Committee of Experts: the recourse to equidistance; and the need to provide for cases where departures from it would have to be considered. One needs scarcely point out that while the former epitomised the relevance of geography, the latter stemmed from concerns with equity. It is quite remarkable that technical experts and lawyers, although approaching delimitation from different backgrounds, arrived at analogous ideas. This fact has to be duly weighed when assessing the Commission's work.

1.3. The First Conference on the Law of the Sea

1.3.a) Draft Articles

The 1953 debates are central to understanding the provisions on delimitation included in the draft articles before the 1958 Conference[64]. They are a key element in the interpretation of the delimitation provisions of the 1958 Conventions. Consequently, they become the point of departure for the final part of this chapter.

The amended text for draft Article 7, which was presented to the Commission in 1953, evidenced the ideas of the Committee of Experts as to standards of delimitation. No reference was however made to the situations in which departure from equidistance would be possible. Notwithstanding this, François emphasised that the Committee "had agreed that the rules might give rise to doubts in certain specific cases, but had recognised that it would be impossible to devise a universally applicable method"[65]. Whether allowance should be made for "*special cases where the application of the normal rule would lead to manifest hardship*" was the issue that Sandström raised[66]. Noting that the Committee's reference to "navigation interests" and "fishing" were issues related only with territorial sea delimitation François agreed that attention had to be paid to some special cases. He affirmed that, though "a general rule was necessary, [...] it was also necessary to provide for exceptions to it"[67].

(63) ILC/Yearbook/1954(II), p.158, commentary to Article 16, emphasis added. This statement was kept in the commentary to the 1956 draft Article 14 (ILC/Yearbook/1956(II), p.272). As stated in the commentary to draft Article 72 (p.300), the principles adopted for continental shelf delimitation were the same as those adopted for the territorial sea.
(64) ILC/Yearbook/1956(II), pp.271-272, 300.
(65) ILC/Yearbook/1953(I), p.106.
(66) *Ibid.*, p.126, emphasis added.
(67) *Ibid.*, pp.127-128.

Quite clearly, the use of the term "general rule" in the paragraph relating to cases of oppositeness was intended to allow departures from the median line[68]. An equivalent term – "as a rule" – was proposed for the paragraph dealing with situations of adjacency[69]. Lauterpacht raised doubts, however, as to whether the expression "general rule" would not deprive such a rule of its legal character[70]. With regard to the term "as a rule", he asserted that "no judge or arbitrator could interpret a text so worded". Noting that "he appreciated the point that some mention had to be made of exceptions", he suggested that "it would be better to specify the cases rather than to open the door to difficulties of interpretation". Agreeing, Yepes stated that "a reference to exceptions should be included, but it should be worded differently"[71]. Owing to this criticism, these expressions were abandoned.

Irrespective of whether this was the right option, it ought to be noted that years later the views of the Commission as to the normative character of the expression "general rule" changed. Article 31 of the Vienna Convention on the Law of Treaties of 1969 (VCLT) contains a "general rule of interpretation" which can be departed from, according to Article 32(b), when it "leads to a result which is manifestly absurd or unreasonable". These articles were adopted by the Conference with no material changes in relation to the proposal of the ILC. The purpose in quoting this provision is to suggest that the Commission could have easily adopted a similar structure with respect to the delimitation rule. Had it been adopted, the expression "general rule" would in no way have deprived the delimitation provision of its normative nature. Its effect would have been simply to recognise the existence of cases where equidistance would not be applicable owing to the manifestly inequitable nature of the resulting boundary. Equidistance would appear as the *starting point* of all delimitations, but not necessarily as the final line. The correspondence between "general rule" and "starting point" is explicit in the commentary to draft Article 27 (general rule of interpretation) of the project of convention on the law of treaties, which states that "the starting point of interpretation [should be] the elucidation of the meaning of the text"[72]. As will be shown, after a somewhat 'tortuous' development, the idea of equidistance as a starting point for all delimitations eventually prevailed[73].

How to define the exceptions to the use of equidistance was the major substantive issue faced by the ILC members. Whether to describe those exceptions in general terms, or to opt for an exhaustive enumeration, was the problem that had to be tackled. Considering the arguments raised against the term "general rule", Spiropoulos proposed that the

(68) The Committee of Experts had used the term "*régle générale*" in its report.
(69) ILC/Yearbook/1953(I), p.131.
(70) *Ibid.*, p.128.
(71) *Ibid.*, p.131.
(72) ILC/Yearbook/1966/II, p.220.
(73) Paras.6.3., 6.4., Conclusions to Part II *infra*.

expression "unless another boundary line is justified by special circumstances" should be used instead[74]. When the issue was raised again by Lauterpacht in relation to the term "as a rule", Sandström reintroduced Spiropoulos' proposal. During the debate, François clarified that "*the purpose of inserting an escape clause was to enable arbitrators to deviate from the rule in [special] circumstances*"[75]. As Spiropoulos observed, the intention was precisely to leave to judges and arbitrators to assess what constituted special circumstances; an approach endorsed by Alfaro, who confirmed that arbitral tribunals "would have to pronounce on the existence or non-existence of such special circumstances"[76].

It is clear that the attempt to define 'special circumstances' exhaustively, as an 'exceptional clause', as *jus singulare* requiring restrictive interpretations, was rejected by the ILC[77]. Instead, the choice was to have recourse to an *indeterminate concept* that had to be interpreted *in concreto*. The intention was to leave to courts to assess, in cases where agreement could not be reached, what constituted special circumstances. As Spiropoulos explained, "only in cases where the application of the [equidistance] rule *would lead to manifest unfairness* would it have to be waived"[78]. Special circumstances was undeniably seen as a notion to be assessed *in concreto*, through a judgment of (un)reasonableness, which seems to amount more to the use of equity in its corrective role rather than to decide *ex aequo et bono*[79].

In 1954 and 1955, the ILC continued its work on the regime of the territorial sea. As regards delimitation, however, no substantive innovations were introduced. The drafting of the delimitation provisions was clearly determined by the report of the Committee of Experts and the 1953 debates that followed. By 1955, situations of oppositeness (Article 12) were still treated separately from those of delimitation in straits (Article 14)[80]. These two articles were eventually merged in Article 12 on "Delimitation of the territorial sea in straits and off other opposite coasts"[81]. All in all, the delimitation provisions included in the 1956 final draft maintained the 1953 standard based on equidistance and special circumstances[82].

The ILC debates and the commentaries to the draft articles show that equidistance was seen as a general rule to apply in delimitation. "Reasonable modifications" were deemed admissible wherever special circumstances were considered to exist. The rule was

(74) ILC/Yearbook/1953(I), p.130.
(75) *Ibid.*, emphasis added.
(76) *Ibid.*, pp.132-133.
(77) The difference is crucial in as far as the adoption of a *jus singulare* enumeration would impose a restrictive interpretation of the exceptions turning impossible any kind of analogical interpretation.
(78) ILC/Yearbook/1953(I), p.133; emphasis added.
(79) As to the facts that may be weighed in the equity-oriented assessment, cf. paras.7.2., 8.2, 8.3. *infra*.
(80) ILC/Yearbook/1954(I), pp.100-103; ILC/Yearbook/1954(II), pp.157-158; ILC/Yearbook/1955(II), p.38.
(81) ILC/Yearbook/1956(II), p.271.
(82) By proposal of the UN General Assembly, all matters concerning the law of the sea were grouped systematically in a single document (UN Doc., GA Res.899(IX), of 14 December 1954).

undoubtedly devised to be seen as "fairly elastic", and applied "very flexibly"[83]. It also became clear that such rule would only be applicable in situations where no agreement could be reached between states. The concept of special circumstances was seen as including, *inter alia*, "exceptional configurations of the coast", "the presence of islands or navigable channels", "fishing interests", and the convexity and concavity of coasts[84]. It should be noted, first, that not all islands were looked upon as special circumstances, and secondly, that low-tide elevations were *a fortiori* included in this category. Importantly, some special circumstances were seen as not bearing upon all delimitations. As François noted, questions of navigation and fishing interests should not be considered in delimiting the continental shelf'[85]. The reason is obvious. The Commission had agreed since the very beginning that the control and jurisdiction of states over the continental shelf should not affect the right of free navigation or the right of free fishing in the superjacent waters[86]. This principle was later embodied in Article 5(1) of the CS Convention.

The idea that the rule emerging from the ILC debates amounts to progressive development deserves some support. As to continental shelf delimitation this leaves little doubt, if only because it concerned a maritime zone whose regime had not crystallised by 1951. With regard to the territorial sea, however, the recourse to equidistance as the *prima facie* delimitation line, subject to adjustments in the presence of exceptional circumstances, had already been advanced in the mid-1930's. Gidel portrayed it as "*la règle de droit commun*", and saw the absence of agreement and of "*conditions physiques exceptionelles*" as the prerequisite for applying the median line as a rule of delimitation[87]. Importantly, this referred both to oppositeness and adjacency. Finally, it is notable that the idea of weighing factual circumstances *in concreto* had been resorted to in the *Grisbadarna* arbitration.

1.3.b) The Debates in the Conference

The delimitation provisions drafted by the ILC had a homogeneous structure that reflected their intertwined development. Although discussed in different Committees of the Conference, that homogeneity was essentially not broken. The two main changes that were introduced in the rule regulating the delimitation of the territorial sea are not enough to say that they brought about an alteration of the kernel of the delimitation provisions. The first change stemmed from a Norwegian proposal in the First Committee, which led to the

(83) ILC/Report/1956, p.18, 44.

(84) Respectively, ILC/Yearbook/1953(II), p.216 and p.79, 1952(I), pp.182, 190. Although concavity and convexity were mentioned in the debates on territorial sea delimitation, they are obviously applicable to the cases of continental shelf delimitation.

(85) ILC/Yearbook/1953(I), pp.127, 129, 134.

(86) ILC/Yearbook/1950(I), p.224.

(87) Gidel/1934, pp.756-757, 769-773. For a review of the standards for territorial sea delimitation alluded to by the doctrine in the early 20th century, where the median line had a central place, cf. e.g. Johnston/1988, pp.129-131.

combination in one single article of the two draft provisions on territorial sea delimitation; because "the problems dealt with in the two articles were so closely related as in some cases to be practically indistinguishable"[88]. The phraseology of the article on the delimitation of the continental shelf was discussed, but the duality of equidistance-special circumstances was eventually maintained[89].

A second alteration stemming from the Conference is the reference to "historic title" in territorial sea delimitation provisions, which again resulted from a proposal put forward by Norway. According to it, in the case of "prescriptive usage" states would be entitled to define their boundaries "in a way which is at variance with" equidistance. The *Grisbadarna* arbitration and the *Fisheries* case apparently motivated this proposal, where the juridical value of historic title was considered in the allocation of maritime areas[90]. The influence of historic titles in defining the extent of the territorial sea seemed to already be reflected in the work of the Preparatory Committee for the 1930 Conference. The commentary to the Basis of Discussion No. 16 mentioned that in defining the territorial waters it was "necessary to take into consideration [...] the existence of any *usage varying the ordinary rule*"[91]. The argument found support during this First Conference. The insertion of the expression "historic title" was justified on the grounds that situations of *longa possessio* or historic rights have "the same legal value as those acquired by an explicit agreement"[92]. The Committee eventually adopted this alteration[93]. Inasmuch as the 'juridical continental shelf' was at the time a recent concept, it is understandable that no mention of historically consolidated rights was made during the debates in the Fourth Committee[94].

It is important to stress that the Conference confirmed the previously underlined willingness of states to define normative delimitation criteria. Not agreeing with the use of equidistance in the delimitation provisions, Venezuela advanced a proposal making no reference to substantive criteria, which was rejected by strong majority[95].

There is also plentiful evidence to suggest that the Conference was not prepared to alter the relationship between equidistance and special circumstances proposed by the ILC. Yugoslavia, Portugal, Greece, and to some extent Norway and Colombia, wanted the reference to special circumstances to be deleted. These approaches were rejected by the

(88) The example advanced in support to this idea was of "a common land frontier which met the sea at the head of a deep bay". Compare ILC draft Articles 12 and 14 (ILC/Report/1956, pp.271-272); Off.Rec.-1958(III), p.188 ; TS/CZ Convention, Article 12; CS Convention, Article 6. On the distinction between oppositeness and adjacency, cf. para.1.3.c)(iv) *infra*.

(89) The article on continental shelf delimitation was approved before the debate on the delimitation of the territorial sea in the First Committee (Off.Rec.-1958(II), p.15). The almost unanimous approval of the former was used as an argument for not introducing major changes in the contents of the latter (Off.Rec.-1958(III), p.191).

(90) Off.Rec.-1958(III), p.239.

(91) AJIL./1930/24(Supp.), p.36.

(92) F.R.Germany, Off.Rec.-1958(III), p.187.

(93) Off.Rec.-1958(III), pp.190, 193.

(94) Brown/1992, p.82; Weil/1989a, p.138, footnote 103.

(95) Off.Rec.-1958(VI), pp.97, 138.

Conference[96]. Noteworthy in the debates was the straightforward assertion that, even in the presence of special circumstances, equidistance "*would still provide the best starting point for negotiations*"[97]. If anything, the Conference thus re-emphasised the use of equidistance tempered by special circumstances as the substantive delimitation rule.

The Conference debates could go no further than the Commission had already gone in relation to the notion of special circumstances. The enumerative approach did not gain support, and an unspecified reference thereto was thus kept. However, other types of special circumstances bearing on continental shelf delimitation were proposed as, for example, the existence of special mineral exploitation rights or of mineral deposits[98]. Although the recourse to special circumstances was linked to the need to ensure equitable delimitations, it is important to stress that the so-called "equitable principles" were again virtually ignored. Hence, since state practice referring to this expression was considered, and since states supported instead the use of the rules incorporated in the ILC draft articles, it must be concluded that the use of the so-called "equitable principles" was rejected. It is even more so when considering the overwhelming majorities that approved, *without any votes against*, the articles governing territorial sea and continental shelf delimitation[99]. These elements cannot be discarded when assessing state practice with a view to establish the nascence of a customary rule, if only because this practice hampers the emergence of an opposite rule[100].

Finally, it must be noted that the work of the Conference also resulted in the inclusion of a provision dealing with contiguous zone delimitation. Such an article had not been foreseen in the ILC drafting. Following a Yugoslavian proposal, the Conference added, without much debate it must be said, a third paragraph to draft Article 66, which made reference only to equidistance[101].

1.3.c) *Ratio Legis* of the Delimitation Rules

The prevalence of the traditional *jus tractuum* of states over any delimitation rule was acknowledged from the very beginning, and is reflected in the conventional provisions. Strictly speaking, however, this reference is not a part of the delimitation rule. What has to be investigated is the operativeness of the normative standards of delimitation included in the Geneva Conventions. Importantly, the interpretation of the delimitation rules, it is

(96) Off.Rec.-1958(III), pp.187, 190, 192 and 1958(VI), pp.91, 94, 130, 133, 138.

(97) Off.Rec.-1958(VI), pp.92-93, emphasis added. The notion of equidistance as a starting point for delimitation was referred to the United Kingdom delegation (Gutteridge and Kennedy), and reflects how the rule was envisaged to operate. Cf. para.1.3.a) *supra*.

(98) Off.Rec.-1958(VI), pp.91-98, in particular pp.93, 95.

(99) Off.Rec.-1958(II), pp.15, 64. The results were respectively 63 to none, with 2 abstentions, and 76 to none, with 1 abstention.

(100) Thirlway seems to be against giving any relevance in the customary law-making process to the assertions of states made in international conferences (Thirlway/1990, p.55). This is arguably correct; but only to the extent that it means that no definitive conclusions can be drawn from such statements only.

(101) Off.Rec.-1958(III), pp.91, 182, 226. During the Plenary sessions no reference seems to have been made to this provision.

submitted, should not be carried out separately. Their contents are better grasped if the evolving process of the delimitation provisions, started with the preparatory works of the ILC, is considered on the whole.

1.3.c)(i) Equidistance and Special Circumstances

The use of the term "necessary" in Article 12 of the TS/CZ Convention, as opposed to the term "justified" in Article 6 of the CS Convention, does not seem to have altered materially the relationship between equidistance and special circumstances[102]. The former term appeared in the text due to the insertion of the proviso concerning "historic title", and seems to have no more than a formal impact[103]. In any event, the recourse to equidistance was devised as a *general rule*, i.e. a *starting point* for the delimitation, to which *reasonable modifications* were to be introduced where special circumstances so warranted[104]. Indeed, the report of the Committee of Experts, and the realisation that resort to strict equidistance could be inequitable, have led the Commission to design a flexible standard. It combined a reference to equidistance, which was to be modified in face of special circumstances[105]. The main difficulty in the application of this equidistance-special circumstances rule is that no precise definition was given to the term special circumstances. Although using diverse approaches, scholars have often noted this fact[106].

What 'special circumstances' actually means is thus difficult to assert; and this is where authors disagree. The *travaux préparatoires* suggest that it is an equity-oriented concept. Exceptional configurations and concavity or convexity of coasts, the location of islands, navigational channels, fishing interests, mineral deposits or exploitation rights, are examples that were advanced[107]. It may be added that none of these examples can be seen as *always* constituting special circumstances, and that some of them have relevance for the

(102) Cf. e.g. Weil/1989a, p.138, footnote 103; Bowett/1979, p.36.

(103) It stems from the amended Norwegian proposal; cf. Off.Rec.-1958(III), pp.192-193, 239.

(104) ILC/Yearbook/1953(II), p.216; Off.Rec.-1958(VI), pp.93-96. Cf. e.g. Jayewardene/1990, p.303; Vœlckel/1979, p.707; Whiteman/1965, p.329, citing Pearcy; Shalowitz/1962(I), p.232; Gutteridge/1959, p.120; Kennedy/1958 (unpublished), at conclusions; Judge Koretsky, Dissenting Opinion, *North Sea* cases, ICJ/Report/1969, p.162. Referring to equidistance as "a clear and unambiguous guideline", cf. Tanja/1990, p.40.

(105) Viewing the equidistance-special circumstances formula as one of general rule-exception, e.g. Franck/1997, p.61 ("escape clause"); Ahnish/1993, pp.55-57; Brown/1992, p.107, Attard/1987, p.229; Dipla/1984, pp.148, 173; Rhee/1981, p.610; Bowett/1979, pp.149-150; judges Tanaka, Lachs and Sørensen, Dissenting Opinions, *North Sea* cases, ICJ/Report/1969, pp.187, 240, 255; Judge Shahabuddeen, Separate Opinion, *Jan Mayen* case, ICJ/Report/1993, p.157. *Contra* Symonides/1984, pp.41-42. Some authors argue for what seems to be a *third genus*, where equidistance and special circumstances have a non-hierarchical relationship; cf. Charney/1989, p.34; O'Connell/1989, p.705; Caflisch/1980, p.91.

(106) Oude Elferink/1994, pp.22-23; Brown/1992, pp.75-76; Jayewardene/1990, pp.304-305; Tanja/1990, p.45; O'Connell/1989, pp.673-674; McDougal/Burke/1987, pp.436-437; Symonides/1984, p.23; Dipla/1984, p.135. In relation to case law, cf. the *North Sea* cases, ICJ/Reports/1969, p.42, para.72.

(107) Shalowitz/1962(I), p.232. Although proposed by Iran during the Conference (Off.Rec.-1958(VI), pp.92, 142), the recourse to the high-water mark where the low-water mark cannot be used should not be seen as a special circumstance. What is involved here is a change of referential for computing the equidistance-line. Oude Elferink seems to accept the view that it is a type of special circumstance (Oude Elferink/1994, p.21).

delimitation of certain maritime zones only[108]. The conclusion is that special circumstances exist where, *in concreto*, their existence causes equidistance to yield a rather inequitable boundary. Since the "function [or classical role] of equity is precisely to mitigate the 'blind effect' of rules of law when their application in particular situations produce 'extraordinary, unnatural or unreasonable' results"[109], the equity-base of this concept seems undoubted.

One important point concerns the fact that no explicit limit was set to the category of circumstances to be appraised. Lauterpacht was critical of the idea of exceptions to be identified by judges on the ground that it was tantamount to giving courts the power to judge *ex aequo et bono*[110]. This criticism is somewhat striking. During the debates on the definition of island, this eminent jurist proposed the adoption of the expression "normal circumstances" to qualify the expression "permanently above high-water mark", in order to account for "exceptional cases" in which an island would be covered by water[111]. It may safely be affirmed that the term "normal circumstances" is no less indeterminate than "special circumstances".

When exceptions to a rule have to be considered, the choice between describing generally those situations and enumerating them exhaustively must always be made. Insofar as foreseeing all contingencies is sometimes impossible, in many circumstances a general definition of exceptions offers the best balance between certainty and fairness. More often than not exhaustive enumerations raise insurmountable difficulties. For one thing, they may lead to treating differently situations that, although not having been foreseen in the enumeration, are substantively equal to those included therein – thus giving rise to great unfairness. For another, their rigidity increases the likelihood of obsolescence of the regime. One would contend that the reference to special circumstances was not intended to amount to an 'exceptional clause' in the sense of *jus singulare*. For it did not convey a meaning that contradicts a fundamental principle of law, i.e. it did not bear a spirit *contra rationem juris*. Analogical interpretations were thus allowed.

In delimitation, evidence concerning the possible existence of special circumstances has to be put forward by the claiming party. How these circumstances lead to an inequitable boundary also has to be shown, in order to facilitate *in casu* the proper interpretation of the rule by the decision-making body[112]. But this is no more difficult than presenting evidence to support any other claim based on equitable considerations. It may be suggested then that

(108) The view that each island "should be considered on its merits", and that its classification as a special circumstance depended on a case-to-case assessment, for example, was prevalent. The rejection of an Italian proposal is clear indication of this approach. Also, navigation channels and fisheries were viewed as irrelevant for continental shelf delimitation (para.1.3.a) *supra*.).

(109) Jennings/1989, pp.399-400.

(110) ILC/Yearbook/1953(I), p.131.

(111) ILC/Yearboook/1954(I), p.92.

(112) In relation to this issue, cf. Ahnish/1993, p.42; Brown/1992, p.107; McDougal/Burke/1987, p.437; Bowett/1979, p.150; Judge Shahabuddeen, Separate Opinion, *Jan Mayen* case, ICJ/Report/1993, p.157.

inasmuch as special circumstances are the *justification* for departing from the equidistance-line, an *onus probandi latissimo sensu* lies on the claimant *in casu*. Equidistance emerges as a *juris tantum* presumption[113], refutable by evidence of existence of special circumstances. Notwithstanding this, adjudicating bodies are entitled to investigate the matter by their own initiative, in view of attaining a proper interpretation the rule: *jura novit curia*[114].

Insofar as the use of *strict equidistance* was qualified by modifications "justified by special circumstances", it seems to have a "residual character". This viewpoint, which is based upon the statements of the United Kingdom and The Netherlands in the Fourth Committee[115], is one possible understanding of the role of equidistance. Recourse to strict equidistance would presuppose the fulfilment of two negative conditions: the absence of agreement, and the absence of special circumstances[116]. Furthermore, this *qualification of equidistance by special circumstances* was undoubtedly intended to *avoid inequitable delimitations* in situations where the use of strict equidistance would lead thereto. This goal is explicit in references made by the ILC members to equity, which can be traced back to 1951. Questions of "unfairness", "manifest hardship", and "undue hardship" in delimitation were the teleological motivations behind the departures from equidistance considered in the form of special circumstances[117]. This is why, in Franck's words, the combined rule invites "principled and reasoned fairness discourse, *including elements of distributive justice*"[118].

1.3.c)(ii) Historic Title

Although it is beyond the scope of this study to analyse the legal regime of historic title and historic rights, the mention of historic title in the delimitation rule applicable to the territorial sea justifies further examination. Broadly speaking, a historic maritime title depends upon the existence of a *possessio longi temporis*, carried out *à titre de souverain*, to which it has to be given due notoriety, and to which the international community as a whole

(113) It might be argued, because theoretically a state might claim less than equidistance, that there is no presumption in favour of equidistance. This idea cannot be accepted. The fact that a state decides, *in concreto*, to claim less than equidistance, is irrelevant in establishing the contents of the norm. Either it amounts to recognising the existence of special circumstances (in which case the rule is in effect being applied), or it amounts to a voluntary waving of its rights (which is not limited by the content of the rule).

(114) Oude Elferink questions whether "it is actually possible for a state to prove" the existence of special circumstances, since the "drafting history of Article 6 does not give any indication of how this burden of proof can be satisfied" (Oude Elferink/1994, p.24). But this is exactly the plane in which that negotiation and adjudication will play their key role (Spiropoulos and Alfaro, ILC/Yearbook/1953(I), pp.132-133).

(115) Tanja/1990, p.40; Off.Rec.-1958(VI), pp.93-95.

(116) Judge Tanaka, Dissenting Opinion, *North Sea* cases, ICJ/Reports/1969, p.185; Jayewardene/1990, p.300.

(117) Hudson, Hsu, El-Khoury, ILC/Yearbook/1951(I), pp.287-290; Sandström, Lauterpacht, Spiropoulos, ILC/Yearbook/1953(I), pp.126, 132-133.

(118) Franck/1997, p.61, emphasis added. Similarly, Ahnish/1993, pp.44; Tanja/1990, pp.41-42, 71; Weil/1989a, p.146, 162, 170; Jennings/1989, pp.399-400; McDougal/Burke/1987, p.729; Oda/1987, p.357; Weil/1987, p.541; Dipla/1984, pp.148, 173; Rhee/1981, p.611; Caflisch/1980, pp.92, 103-104; Whiteman/1965, p.331, citing Pearcy; judges Weeramantry, Dissenting Opinion, *Jan Mayen* case, ICJ/Report/1993, p.235, Judge Oda, Dissenting Opinion, *Tunisia/Libya* case, ICJ/Report/1982, p.246, judges Morelli and Sørensen, Dissenting Opinions, and Judge Ammoun, Separate Opinion, *North Sea* cases, ICJ/Report/1969, pp.209, 256, 151. The idea that "the standard of equity was not thought by the International Law Commission [...] and played little part in its deliberations on the draft of Article 6 of the CS Convention" is difficult to understand (O'Connell/1989, p.694).

has acquiesced[119]. As derogation away from international law, namely to the principle of the freedom of the high seas, this title is then dependent upon the acquiescence of the great majority of the states. Whereas historic titles are opposable *erga omnes*, historic rights are advanced merely *inter partes*, and their scope falls short of sovereignty[120]. They are non-exclusive rights, which Blum categorises into two main types: historic rights of passage and historic fishing rights[121]. Moreover, whilst the former can only be originated by acts of state officials or persons authorised to act on behalf of the states, the latter may emerge from mere acts of private individuals[122].

The *travaux préparatoires* seem to indicate that the inclusion of the expression "historic title" by the Conference was intended to comprise historic titles and historic rights. The statement of the F.R.Germany referred to both situations of *longa possessio* and historic rights[123]. Substantively, however, the two situations have a marked distinction. A historic title signifies that no other state can potentially be entitled to exercise powers over the area to which the title is referred. Historic titles exclude the existence of any other title. In contradistinction, historic rights have a non-exclusive nature and are reconcilable with a maritime title vested in another state[124]. Arguably relevant for this debate is the *Eritrea/Yemen* arbitration. The Tribunal stated that, by its very nature, the *lex pescatoria* that had been part of the immemorial way of life of the Red Sea fishermen was in no way qualified by the maritime zones specified under the LOSC. The traditional regime (which included activities other than fishing) was deemed not to be, either for its existence or for its protection, dependent on the drawing of a maritime boundary[125]. This immemorial regime remained unaffected by, and had no impact on, the maritime delimitation[126].

Despite having the notion of historic bays at its root, the concept of historic title "can apply [...] to waters other than bays, i.e., to straits, archipelagos, and *generally to all those waters which can be included in the maritime domain of a state*"[127]. Referring primarily to internal waters, the claims of historic title can undoubtedly also be put forward in relation to the territorial sea. The Court had already upheld this view in the *Fisheries*

(119) The factors to weigh in the determination of a historic title are: (i) an exercise of authority for a long period and in accordance with the maritime title that is being claimed; (ii) the notoriety and continuity of such display of authority; (iii) the reaction – or lack of it – of other states; cf. *Juridical Regime of Historic Waters, Including Historic Bays*, ILC/Yearbook/1962(I), pp.1-26 (hereinafter "JRHW"). On the question of historic titles over maritime areas, cf. also Blum/1965, pp.241-334; Sharma/1997, pp.173-182; Scovazzi/1993, pp.321-331; Jennings/1963, pp.23-28; Johnson/1955, pp.215-225; Off.Rec.-1958(I), pp.21-27.

(120) Blum/1965, p.311.

(121) *Ibid.*, p.315 (for the whole analysis, pp.311-334). The question of sedentary fisheries, and its impact on the regime of the high seas and the continental shelf, was looked into by the ILC with particular attention during the *travaux préparatoires* of the Geneva Conventions. Cf. the Special Rapporteur's conclusions (ILC/Yearbook/1951(II), pp. 94-99).

(122) The activities of the Swedish fishermen in the Grisbadarna Banks are a good example (para.2.2. *infra*).

(123) Off.Rec.-1958(III), p.187.

(124) This possibility is clearly admitted by Article 51(1) of the LOSC, where it is prescribed that the state exercising sovereignty over archipelagic waters "shall recognise traditional fishing rights" of other states.

(125) Eritrea/Yemen-II, paras.109-110.

(126) For an analysis of this regime, cf. Antunes/2001, pp.301-316, 339.

(127) JRHW, ILC/Yearbook/1962(I), p.6, emphasis added.

case[128]. The inclusion of a proviso concerning historic title in the delimitation rule for the territorial sea is no more than the recognition of this fact.

Notably, in theoretical terms, historic title seems to allow states to claim sovereignty over areas that lie beyond the limits of what would be in principle their maximum territorial sea entitlement. The existence of such sovereignty would only depend upon the proof of existence of the historic title[129]. With the advent of the LOSC, however, the territorial sea entitlement was extended up to 12 M; and the existence of a historic title beyond that limit became very unlikely. With regard other maritime areas – as the EEZ or the continental shelf, the existence of a historic title is difficult to conceive in practice. Inasmuch as the juridical validity of any claims would have to be assessed in the light of the general theory of historic title (notably *longa possessio*), their existence becomes highly improbable. These are relatively recent maritime claims[130]; a sufficiently long possession over those areas is at least problematical, and the requisite of acquiescence or recognition by the international community as a whole could not yet have been met. Moreover, historic titles are primarily related to the exercise of full sovereignty.

Where referring alternatively to "historic title or other special circumstances", the textual element of the delimitation rule seems to indicate that historic title is just another type of special circumstances, which may or may not justify a departure from equidistance. This view cannot be supported. Because the overlapping of potential entitlements is a *conditio sine qua non* for the delimitation[131], and because historic titles are exclusive in nature, it may be affirmed that the existence of a historic title precludes any delimitation of the area pertaining thereto. Furthermore, if historic title has a juridical relevance equivalent to that of an "explicit agreement", then formally the equidistance-special circumstances rule should not be applied[132]. Indeed, "full recognition" must be given to historic titles. As Gidel puts it, the delimitation rules are not to be applied to historic waters[133]. As acknowledged in the 1958 Conference, historic titles allow states *"to go further in delimiting its territorial sea from that of neighbouring states than the median line would allow"*[134].

(128) ICJ/Reports/1951, pp.130-139.
(129) Blum/1965, pp.295-296.
(130) Weil/1989a, p.138 (fn.103).
(131) Para.4.3. *infra*.
(132) The equidistance-special circumstances rule was intended to apply in the absence of an agreement. The expression "in a way which is at variance with this provision" was used exactly to reflect an almost free definition of a boundary-line entailed by the existence of historic title (Off.Rec.-1958(III), p.239). Supporting this view, cf. Tanja/1990, p.44, fn.128. Weil makes the same distinction implicitly (Weil/1989a, p.138, fn.103). Some authors, although considering historic title as a special circumstance, conclude that they "must be given full recognition" (Ahnish/1993, pp.46-47; Jayewardene/1990, pp.274-277). The existence of "historical special circumstances" has also been suggested (Brown/1992, p.82). But the distinction between these two concepts is not always made (O'Connell/1989, pp.673-679, 713-714; Dipla/1984, p.135; Caflisch/1980, p.77; cf. also, Ceylon, Off.Rec.-1958(III), p.191).
(133) Gidel/1934, p.774.
(134) F.R.Germany, Off.Rec.-1958(III), p.187.

A situation of acquiescence, and/or recognition, of a certain boundary-line is similar to that of a historic title. Historic titles emerge in effect from acquiescence or recognition. The difference is that in the cases of historic titles, these titles refer to a certain 'maritime area' the precise limits of which are yet to be established. Where a dividing line has been acquiesced to, or recognised, the boundary is agreed, and delimitation is no longer required.

Unlike historic title, historic rights are no more than possible special circumstances. Whatever their weight in the delimitation, it can only be decided on a case-to-case basis. Because the exercise of these non-exclusive rights is not incompatible with the sovereign title of another state, sovereignty/jurisdiction over the area in question may be disputed. And delimitation may be required to establish the dividing lines between the states involved. Departures from equidistance have to be justified by a situation of manifest unreasonableness or hardship *in casu*. In this light, the references made to "navigable channels"[135] and "fishing interests" during the ILC works, as types of special circumstances not related to the coastlines of states, seem to be explained. It is essential to distinguish between historic title and historic rights (that only amount to special circumstances). Treating both equally would downgrade the true juridical nature of a historic title.

1.3.c)(iii) Delimitation of the Contiguous Zone

The delimitation provision concerning the contiguous zone resulted from the work of the Conference. For reasons not totally clear, this provision refers only to equidistance, and not to special circumstances (or historic title for that matter)[136]. Notwithstanding this, one would argue that this provision should be the object of a corrective interpretation, so that it is applied in a way similar to that of the equidistance-special circumstances rule. Indeed, some arguments appear to support the view that the absence of reference to special circumstances was not intended. First, the Committee of Experts explicitly stated that the boundaries of the zones contiguous to the territorial sea should be drawn on the same basis as the boundary for the territorial sea[137]. Secondly, in the Conference states overwhelmingly expressed the intention to keep a similar structure for all delimitation provisions[138]. Thirdly, Yugoslavia made proposals in relation to the continental shelf and the territorial sea similar to that of the contiguous zone, and they were rejected by the Conference. In short, this provision should perhaps be seen as having substantively the same contents as those concerning the territorial sea and the continental shelf.

(135) These interests may be linked to rights of passage and access to ports. On the concept of thalweg, cf. para.5.3.b) *infra*.
(136) TS/CZ Convention, Article 24(3).
(137) ILC/Yearbook/1953(II), p.79.
(138) Cf. e.g. Turkey, Ceylon and Italy Off.Rec.-1958(III), pp.190-191. For the voting majorities, Off.Rec.-1958(II), pp.15, 64.

1.3.c)(iv) Oppositeness and Adjacency in Continental Shelf Delimitation

The article concerning continental shelf delimitation kept the distinction between situations of oppositeness and of adjacency, following *verbatim* the Committee of Experts' report[139]. Neither the report of the Committee of Experts, nor the *travaux prèparatoires*, present clear-cut evidence that the two provisions were meant to have a different content. It is likely that, during the Conference, the two paragraphs were not combined simply because the delimitation provisions on the territorial sea and those concerning the continental shelf, were drafted by different Committees, the latter being decided before the former[140]. The view that this distinction consists of an improper use of terms has indeed been advanced[141]. But it might also be the case that the distinction was kept because it was meant to bear a different legal-technical meaning[142]. Whatever the truth, there is little doubt that these two provisions were intended to cover all possible situations, being therefore exhaustive. There was no question of lacunae in this respect.

1.3.c)(v) The 'Procedural Element'

All three delimitation provisions incorporated in the 1958 Conventions have one further element in common. They all prescribe that the substantive criteria set down thereby apply only in the absence of an agreement. Indeed, if there was any aspect of delimitation that the ILC was able to identify in state practice – with particular emphasis on the Truman Proclamation – as raising little or no controversy, it was the necessarily bilateral nature of the delimitation. In fact, in the *travaux prèparatoires*, the members of the ILC soon concluded that it was the only guidance on this matter provided by state practice[143].

More important than anything else is to enquire what is the requirement underlying the mention of "agreement". One would argue that is a reference to a *procedural element*. Understanding it as setting down a strict stipulation to negotiate, and to reach agreement, seems to overstep the perspective of the ILC and the intention of the states present in the 1958 Conference. Beneath the said reference was, in reality, merely acknowledgement of the necessarily consensual nature of maritime boundaries. Agreement appeared as a reflection of the need to obtain the *mutual consent* of the parties involved[144].

(139) ILC/Yearbook/1953(II), p.79.
(140) Para.1.3.b) *supra*.
(141) Francalanci/1989, p.83.
(142) Paras.5.2.a)(i), 5.2.e) *infra*.
(143) ILC/Yearbook/1950(I), p.233; ILC/Yearbook/1950(II), pp.49-51; ILC/Yearbook/1951(I), pp.285-294. Para.1.2.b)(i) *supra*.
(144) For further elaboration on this issue, cf. para.3.6. *infra*.

Chapter 2

RELEVANT CASE LAW PRE-1982

2.1. The Selected Case Law

Understanding the debates held during the Third Conference requires an analysis of previous jurisprudence. Alongside the 1958 Conventions, case law forms the background for interpreting the 1982 delimitation rules. Of the cases examined, one was decided long before the ILC work that preceded the First Conference: the *Grisbadarna* arbitration. Its impact on delimitation law has to be evaluated in this light. The *Anglo/French* arbitration and the *North Sea* cases, which were resolved in the inter-conventional period, have a more direct and relevant impact upon the debates and controversies that took place in the Third Conference, particularly in regard to continental shelf and EEZ delimitation.

Other cases decided before 1982 could have been examined. However, because their importance for understanding the background of the delimitation provisions of the LOSC is negligible, they are not formally examined at this stage. The *Beagle Channel* arbitration deals primarily with the attribution of sovereignty over land territory. The issue of territorial sea delimitation raised therein involves the application of specific treaty provisions governing the situation between the two states involved. Thus it is not a typical maritime delimitation case. In the *Aegean Sea* case, as the ICJ considered that the requirements for establishing its jurisdiction had not been met, it passed no judgment on the merits. Finally, insofar as the *Dubai/Sharjah* arbitration and the *Tunisia/Libya* case were both decided not long before the end of the Third Conference, they are unlikely to have had any bearing on the debates or the draft texts.

State practice is another important element of interpretation of the delimitation rules, and is usually referred to in case law. References thereto will be made whenever required, especially as a basis for comparison with jurisprudence. Essentially, this chapter continues to focus on providing elements of interpretation of the substantive delimitation standards embedded in LOSC provisions. Emphasis is put on the international law-making process as a *continuum*, in which state practice and case law both play a central role. The juxtaposition between jurisprudence on delimitation and the 1958 delimitation rules, previously addressed, will thus come up naturally.

2.2. The Grisbadarna Arbitration

2.2.a) Overview: The Dispute and the Award

The 1909 *Grisbadarna* arbitration, decided by the Permanent Court of Arbitration, relates to a dispute between Sweden and Norway. Regarding a territorial sea boundary (in the vicinity of fishing grounds known as the Grisbadarna Banks), it may be looked at as the first adjudication on maritime delimitation. It concerned a 1661 treaty, which in principle had fixed the boundary between the states mentioned. In an attempt to overcome their disagreement in the interpretation of this treaty, the two states appointed a Joint Commission. Its task was to define the precise course of the boundary as fixed in the treaty. An agreement as to where the line ran landward of point XVIII was eventually reached. The dispute concerned, therefore, the course of the boundary seawards of that point up to the territorial sea limit (which at the time was 4 M for the two states). The Tribunal was first asked to decide whether the 1661 treaty had fixed the boundary wholly or in part, and where the line should be traced. Should the boundary be viewed as not having been delimited (to any extent), the *compromis* empowered the Tribunal to fix its course in accordance with "the circumstances of fact and the principles of international law"[145].

Sweden claimed that westward of point XVIII the boundary had not been completely defined, and in part had not been fixed at all. The Norwegian argument was that, even if the boundary had not been completely defined, since the eastward segment of the line followed the median line, the same principle should apply throughout the boundary. Sweden rejected this claim. Nevertheless, in regard to points XVIII and XIX the two claims coincided. As far as point XX was concerned, the only divergence was related to the choice of basepoints on the Norwegian side. Only westward of this point did the two claims differ substantially. In essence, whereas Norway contended that the boundary should run south of the Grisbadarna Banks, Sweden argued for a line traced to the north of these banks.

The Award rendered by the Tribunal has two key points of departure. On the one hand, it is an Award that involves the interpretation of a boundary treaty. On the other hand, in accordance with the principle of intertemporal law, the Award was decided on the basis of the principles of law in force in the 17th century. The Tribunal concluded that it had not been demonstrated that the boundary fixed by the 1661 treaty was based on the median line rule. Concluding also that the treaty did not fix the whole of the boundary, it stressed that, even if the inner sector of the boundary was based on the median line, this would not necessarily mean that the same rule would apply to the outer sector.

(145) AJIL/1910/4, pp.226-227. For an illustration of this case, see Figure 1.

With regard to the precise course of the boundary, the Tribunal noted that both parties agreed on the location of point XIX. As to the further delimitation up to point XX, the conclusion was that a "division along the median line" had in practice been accepted by both states as the rule stemming from the 1661 treaty. Considering that it could be concluded "with sufficient certainty" that Heiefluer reefs, which Norway claimed should be used on its side as the basepoints to determine point XX, had not yet emerged from the water at the time of the 1661 treaty, the Tribunal upheld the Swedish contention and used Hejeknub rock instead. Notably, in this sector, the boundary is not (in strict technical terms) a median line, because not all of its points are equidistant from the nearest basepoints. Along the boundary-line, only points XVIII, XIX and XX are at an equal distance from the selected basepoints. Such a line is merely 'broadly based' on equidistance[146].

Faced with delimitation *proprio sensu* in the outer sector, the Tribunal turned to the applicable normative standards. The median line rule was deemed as not finding "sufficient support in *the law of nations in force in the seventeenth century*". The *thalweg* rule was also rejected, on the grounds that it had not been demonstrated that this rule had been followed in the present case. To the Tribunal, "*much more in accord with the ideas of the seventeenth century*" was the idea that the delimitation should be effected by a perpendicular to the general direction of the coast of which the maritime territory constituted an appurtenance[147].

The effective presence of Sweden in the Grisbadarna region was central for the decision. Incidentally, the Tribunal observed that lobster fishing had been carried out in these banks "for a much longer time, to a much larger extent, and by much larger fishers by the subjects of Sweden than by the subjects of Norway". It further stressed that Sweden had performed various acts related to fishing that denoted its conviction as to its rights over the Grisbadarna Banks[148] – and against which Norway never objected. Similar acts performed by Norway were deemed less relevant – for they had taken place after the Swedish acts, had not spread over a sufficiently long period, and could not be compared in terms of expenses[149]. The fact that fishing was of greater importance to the inhabitants of Koster (Sweden) than to those of Hvaler (Norway) was viewed as strengthening the previous points. Relying on the principle *quieta non movere*[150], the Tribunal thus concluded that the *status quo* should not be disturbed by the delimitation. The agreement between the parties in

(146) This line appears to be a sort of pseudo-equidistance; cf. para.5.2.e) *infra*.

(147) AJIL/1910/4, p.232, emphasis added.

(148) These acts included the installation and maintenance of a light-boat, the placing of beacons, and the measurement of the sea, and were deemed to involve "considering expense", and to demonstrate that Sweden acted not just in the exercise of her right, but was in fact performing its duty.

(149) These acts (seen as less relevant than those of Sweden) comprised the placing of a bellbuoy, and some measurements of the sea.

(150) The Tribunal referred to it as "a settled principle of the law of nations" according to which "a state of things which actually exists and has existed for a long time should be changed as little as possible" (AJIL/1910/4, p.233).

relation to "the great unsuitability of tracing the boundary across important banks"[151] allowed the Tribunal to approach the allocation of the fishing grounds in an 'all-or-nothing fashion', and to draw the boundary in such a way as to leave the whole of the Grisbadarna Banks to Sweden.

Having due account of the *de jure* and *de facto* circumstances, as well as the advice of an expert, the Tribunal concluded that the general direction of the coast was "about 20 degrees westward from due north" (i.e. true azimuths 160°-340°), and that the perpendicular thereto would "run toward the west to about 20 degrees to the south" (i.e. true azimuths 070°-250°). To avoid cutting across the Grisbadarna Banks (while leaving Skjøttegrunde Bank to the north) the boundary-line was fixed as running "from point XX westward to 19 degrees south" (i.e. true azimuths 071°-251°).

2.2.b) Critical Analysis

An analysis of the *Grisbadarna* arbitration has to consider two aspects previously stressed. The fact that the delimitation of the outer sector of the boundary was founded on international law as in force in the 17th century cannot be dismissed lightly. It must be duly considered when referring to the normativity resorted to by the Tribunal. Furthermore, it must be noted that the inner sector of the boundary was defined through an interpretation of the treaty provisions, which took into account the posterior practice of the two states.

Anderson draws interesting parallels between this decision and recent developments of delimitation law[152]. In his view, the ILC's conclusions[153] (subsequent to the advice of the Committee of Experts) as to the vagueness of the perpendicular method for the purposes of law did not stand the test of time. Contending that the same criticism might be directed against the equidistance-special circumstances rule, he notes the similitude with the *North Sea* cases, in regard to the conclusion that equidistance was not a rule of law. He also draws a parallel between the expression "just and lawful determination of the boundary" utilised by the Tribunal, and the expression "equitable solution" used in Articles 74(1) and 83(1) of the LOSC. Observing that perpendiculars to the coast have been used in state practice, in litigation and in jurisprudence, he suggests that the method of perpendicular stood the test of time and should be retained as potentially usable.

Whilst not disagreeing with the conclusion that the method of perpendiculars to the coast might be of extreme utility in delimitation, attention must be devoted to other

(151) *Ibid.*, pp.233-235.
(152) Anderson/1996, pp.158-164.
(153) ILC/Yearbook/1953(II), p.78, and commentary to draft Article 14, ILC/Yearbook/1956(II), p.272.

propositions. A perpendicular to the general direction of the coast is simply one possible simplification of equidistance; and as such, it allows a high degree of subjectivity. There is also the question of the scientific knowledge in the 17th century. Computing accurately a strict equidistant line was probably impossible at the time[154]. As to the juridical status of equidistance in international law, the comparison with the *North Sea* cases must be seen *cum grano salis*. In the *Grisbadarna* arbitration, "all evidence presented on the relevant 'principles of international law' that had evolved between 1661 and 1909 was discarded, and the opportunity to consolidate the norms rejected"[155]. Extrapolating therefrom to the law of the 20th century is thus far from being an easy step. Further, with respect to the *North Sea* cases, the rule under scrutiny should have been the equidistance-special circumstances rule, not strict equidistance[156]. Another issue is the reference to a "just and lawful determination of the boundary". The term "just" was used not so much in the sense of "equitable" or "fair", but as meaning "well grounded", "justified", and "legitimate". This interpretation is supported by the original French version of the Award, which refers to "*une détermination légitime et justifiée de la frontière*"[157]. The aim apparently was to stress that the solution devised (the use of a perpendicular to the coast) was a reasoned decision, founded on law.

For contemporary delimitation law, the most notable feature of this Award is the way in which the Swedish and Norwegian activities in the Grisbadarna area were weighed-up in the delimitation process. The approach adopted, in which the provenance, the nature, the relevance and the timing of certain acts were balanced-up in relative terms, resembles the adjudication of a sovereign title[158]. Indeed, this arbitration already led authors to the conclusion that, in regard to sovereignty over sea areas, the "actual exploitation of the resources of the disputed area is probably the most decisive consideration"[159].

Weighing-up the evidence, the Tribunal concluded that assigning the Grisbadarna Banks to Sweden [was] "supported by all of several circumstances of fact"[160]. The fact that the Tribunal referred not only to private fishing activities, but also considered the sovereign acts of Sweden in the area must be emphasised. Arguably, this adjudication is perhaps more about the existence of a historic title over the Grisbadarna region rather than a question of historic fishing rights. In effect, this approach provides a good example of how the proviso

(154) Paras.5.2.a), 5.2.e) *infra*.
(155) Johnston/1988, p.127.
(156) Para.2.3.c) *infra*, and Conclusions to Part I.
(157) RIAA /XI, p.160.
(158) Sharma/1997, pp.196-197.
(159) Munkman/1972, p.101 (referring to the *Grisbadarna*, *North Atlantic Coast Fisheries*, *Gulf of Fonseca* and *Fisheries* cases).
(160) AJIL/1910/4, p.233.

on historic title in the rule for territorial sea delimitation might be interpreted. What the Tribunal did, arguably, was to recognise the Swedish title over the Grisbadarna shoals[161].

To what extent the outcome was shaped by the agreement between the parties as to not cutting across important banks is difficult to assert. The terms of the Award are unclear as to the relevance attributed thereto in the reasoning. It is particularly so in the light of the fact that the Tribunal emphasised the principle of *quieta non movere* as the decisive legal argument for attributing the Grisbadarna Banks to Sweden. The elements weighed-up in the process include not only aspects related to historic rights – the fishing activities, but also aspects which are true displays of state authority – the activities performed by Sweden in the Grisbadarna Banks *à titre de souverain.*

2.3. The North Sea Continental Shelf Cases

2.3.a) Overview of the Judgment

2.3.a)(i) The Dispute

The *North Sea Continental Shelf* cases involved disputes of the Federal Republic of Germany (hereinafter "Germany") with both The Netherlands and Denmark as regards their continental shelf delimitation. The geographical setting is illustrated in Figure 2. In simple terms, it may be said that the German North Sea coastline forms a *corner* lying adjacent to, and between, the Dutch and Danish coasts. A partial delimitation of the continental shelf, based on equidistance, had already been effected through negotiations[162]. An agreement respecting the further course of the boundaries, however, could not be reached. In the meantime, another agreement between Denmark and The Netherlands, defining a boundary on the basis of strict equidistance – and imposing a trijunction point on Germany – led to a dispute as to the location of the boundaries between these three states[163]. The International Court of Justice was then requested to declare "what principles and rules of international law [were] applicable to the delimitation"[164]. It is noteworthy that the Court was not, however, asked to define or draw the boundary-line[165]. Although the parties were during the course of the proceedings very discreet as to the economic motivations underlying this dispute, it seems clear that the access to oil and gas was one key point in question[166].

(161) As to giving full precedence to historic titles in maritime delimitation, cf. paras.1.3.c)(ii) *supra*, 3.4. *infra*.
(162) Appendix 2, B23-B24. The boundaries extended 25 M and 30 M from the end of the territorial sea boundary.
(163) Appendix 2, B20.
(164) Special Agreements between Germany and both The Netherlands and Denmark; cf. ICJ/Pleadings/1968(1), pp.6, 8.
(165) For a summary of the claims of both parties, cf. ICJ/Reports/1969, pp.9-22.
(166) Lang/1970, pp.9-11.

Germany based its case primarily on the so-called *principle of just and equitable share*: each state would be apportioned a just and equitable share of the continental shelf, "in proportion to the length of coastlines". It also argued that the *equidistance method* and the rule of Article 6(2) of the CS Convention had not become a rule of customary law. Subsidiarily, it alleged that even if the rule of Article 6(2) would be applicable, "special circumstances within the meaning of that rule would render the *equidistant method* inapplicable. The 'cut-off' effect resulting *in casu* therefrom would originate an inequitable solution, for it would not attain "a just and equitable apportionment of the continental shelf between the states concerned". Notably, the German case attempted to treat equidistance separately, downgrading it to a mere method, while elevating to principle concepts like "just and equitable share" and "sectoral division"[167].

The Netherlands and Denmark both claimed that the delimitation should be effected according to the "principles and rules of international law expressed in Article 6(2)"; and that Germany had "unilaterally assumed the obligations of the Convention". The argument that practice post-1958 had elevated Article 6 to "generally recognised rules of international law applicable to delimitation of continental shelf boundaries", although not explicitly presented in the Submissions, is implicitly made. Equidistance was in the view of the two states "inherent" in the continental shelf concept. Consequently, since agreement had not been reached, and no special circumstances existed *in casu*, the boundary should follow the equidistance-line. Subsidiarily, these states argued that, should Article 6(2) be seen as inapplicable, the delimitation should be effected in a way that would "leave to each party every point of the continental shelf [lying] nearer to its coast than to the coast of the other party". *Appurtenance* – they contended – equated to *proximity*[168].

2.3.a)(ii) <u>The Reasoning</u>

The Court did not uphold the German pretension to a just and equitable share of the continental shelf. In its view, delimitation was not a "*de novo*" apportionment of seabed areas to littoral states. Due to the *ipso facto* and *ab initio* character of the continental shelf, it was stated, delimitation was to be seen instead as a "process of [...] drawing a boundary line between areas which *already appertain*" to the states involved[169]. Turning next to the alleged acceptance by Germany of the conventional regime, the Court endorsed a restrictive view of estoppel where the elements of *reliance* and *detriment* assumed a fundamental part.

(167) German Memorial and Reply, ICJ/Pleadings/1968(1), pp.30-36, 80-84, 391-395, 425-432, and pp.91, 435.
(168) Danish and Dutch Memorials and Common Rejoinder, ICJ/Pleadings/1968(1), pp.163-164, 190-198, 318-320, 343-351, 477-479, 491-521, and pp.221, 375, 537.
(169) ICJ/Reports/1969, pp.22-24, paras.18-20; emphasis added.

Thus, considering that Germany had not "accepted the regime of Article 6(2) in a manner binding upon itself", it rejected the Dutch and Danish claims[170].

The first conclusion as regards the applicable normative standards was that natural prolongation and absolute proximity were irreconcilable. In the Court's view, this was due to the fact that delimitations based on strict equidistance would sometimes attribute to one state an area that would encroach upon the natural extension of the land territory of another state. What appertained to a state could be closer to the territory of another state[171]. It should be observed that, to prove its point, the Court resorted to the example of the Norwegian Trough. However, since it is impossible to make any division based on natural prolongation or on any other geological or geomorphologic elements in the disputed area of the North Sea, this argument is flawed. This is to be highlighted because it was by recourse to the notion of natural prolongation that the Court dismissed the Dutch and Danish claims, and concluded that equidistance was not inherent in the continental shelf concept. Secondly, the Court analysed the emergence of the notion of continental shelf in international law. Giving great significance to the Truman Proclamation, it concluded that this instrument confirmed the non-obligatory nature of equidistance. For the Court, the historical beliefs had remained that no single method would be satisfactory in all circumstances, and that delimitation should be effected by agreement on the basis of equitable principles[172]. Thirdly, as to Article 6, the Court rejected the idea that it embodied a rule of customary law. In its opinion, that rule had been proposed by the ILC "at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary law". The fact that reservations had been permitted thereto was deemed to be confirmation of this view. As a conventional rule, it was concluded, Article 6 could not be binding upon Germany. Looking then at the requirements of formation of customary law, the Court considered state practice had been quantitatively and qualitatively insufficient to generate customary law. Hence, it deemed unnecessary to determine whether or not the configuration of the German coast constituted a special circumstance[173].

The arguments of both parties failed to impress the Court. Hence, the Court then went on to articulate the grounds on which it considered that delimitation should be hinged. In its view, the "*opinio juris* in the matter" was, "from the beginning", that "delimitation [should] be object of agreement between the states concerned, and that such agreement [should] be arrived at in accordance with equitable principles". Pointing out that it was not

(170) *Ibid.*, pp.26-28, paras.27-33.
(171) *Ibid.*, pp.30-33, paras.39-46.
(172) *Ibid.*, pp.33-37, paras.47-56.
(173) *Ibid.*, pp.38-47, paras.60-82.

"a question of applying equity as a matter of abstract justice", it named the pivotal aspects in delimitation: meaningful negotiations, relevant circumstances, equitable principles, natural prolongation and non-encroachment[174].

Referring to the role of the "rule of equity", the Court affirmed that there could be no question of an *ex aequo et bono* decision. Equity did not imply "equality"; and it could not lead to "totally refashioning geography". For the Court, the problem was that, due to "the effects of an incidental *special feature*" – coastal concavity, equidistance resulted in an "unacceptable" enjoyment of "considerably different" rights by states having coastlines "comparable in length". Therefore, seeking a goal – an equitable solution, rather than a method, was seen as translating the required impact of equity[175].

Related to this point was the issue of the facts relevant for delimitation. The Court found that they could not be exhaustively identified; for their existence and relative weight was variable and dependent on the circumstances of each situation. As relevant *in casu* the Court indicated "geological aspects", such as natural prolongation and appurtenance, the "geographical configuration of the coastline" as an expression of the principle that the land dominates the sea, the "unity of deposits" of natural resources, and a "reasonable degree of proportionality" between the length of coastlines and the areas of shelf appertaining to each state. For the Court, if these factors were considered, "the choice and application of the *appropriate technical methods* [was] a matter for the parties"[176].

2.3.a)(iii) A Brief Initial Comment

The *dispositif* of the Judgment summarises the Court's findings. It reaffirms that equidistance is not obligatory, and that there is no single method obligatory in delimitation. It further asserts the need to effect delimitations by agreement, in conformity with equitable principles, considering all relevant circumstances; and it concludes by noting that each state is entitled to the continental shelf constituting the natural prolongation of its land territory, subject to the non-encroachment upon other states' shelves. Among the factors to weigh-up in delimitation, the Court identified the general configuration of coastlines, the presence of any special features, the physical and geological structure of the shelf, natural resources, and a reasonable degree of proportionality[177].

The Court's conclusion that the use of strict equidistance *in casu* would lead to an inequitable boundary is incontestable. The relevance given to equity is thus understandable.

(174) *Ibid.*, pp.47-48, paras.83-85.
(175) *Ibid.*, pp.49-51, paras.88-91; emphasis added.
(176) *Ibid.*, pp.51-53, paras.92-99; emphasis added.
(177) *Ibid.*, pp.54-55, para.101.

Furthermore, looking at the boundary agreed *a posteriori* between the states, it seems indisputable that this Judgment contributed to attain an equitable boundary, arguably with its share of pragmatism. However, the legal reasoning supporting a judicial decision is as important as the decision itself, because the "essential purpose of adjudication is to resolve disputes by reference to law", and "judgments which are inadequately reasoned [...] are defective"[178]. Well-reasoned decisions promote the 'acceptability' of the rule of law in international affairs; and "the more a decision is supported by a process of reasoned progression, the more impartial and judicial it appears"[179]. With all respect for the Court, the reasoning appears to be the Achilles heel of this Judgment. The analyses of three issues, namely the assessment of customary law, the conflict between equidistance and natural prolongation, and the normative standards of delimitation identified to by the Court, seek to demonstrate this assertion.

2.3.b) The Assessment of Customary Law

2.3.b)(i) Summary of State Practice Post-1958

With the exception of Germany, the states in the North and Baltic Seas had agreed to delimit their continental shelf boundaries consonant with the conventional rules, despite of the fact that not all were parties to the CS Convention[180]. Germany applied equidistance to delimit part of its continental shelf boundaries with Denmark and the Netherlands, but it declared that it did not accept its use in the further course of the boundaries[181]. Importantly, most post-1958 agreements on continental shelf delimitation reflected some recourse to equidistance (e.g. Denmark/United Kingdom, Norway/Sweden, Norway/United Kingdom, Denmark/Norway, Netherlands/United Kingdom, Bahrain/Saudi Arabia)[182]. Relevant in this respect was equally the joint declaration by the USSR, the German Democratic Republic and Poland, concerning the delimitation of their continental shelf boundaries in the Baltic Sea[183]. Unilateral acts, including those of states non-parties to the CS Convention, also revealed a general support to the Article 6 rule (or equidistance)[184]. Significantly,

(178) Merrils/1998, p.308.
(179) Shaw/1998, p.34 (pp.31-38).
(180) Appendix 2, B20-B22, B27-B31.
(181) Appendix 2, B23-B24.
(182) Appendix 2, B18-B33. The three exceptions, being approximately perpendiculars to the general direction of the coast, might be seen as simplified equidistances. One is the Senegal/Portugal (Guinea-Bissau) boundary. The second is the Bahrain/Saudi Arabia boundary. Germany argued in relation to this boundary that it did not follow equidistance. But it did not argue that it did not comply with Article 6 rule (ICJ/Pleadings/1968(1), p.438). The third is the 1965 Finland/USSR agreement, which Germany argued that it did "not follow the equidistance-line", where it forms a lateral boundary (ICJ/Pleadings/1968(1), p.439). However, this line stemmed from a former peace treaty. As to the 1957 Norway/USSR agreement, although defining a line in an atypical manner, it seems to resort to a "selective utilisation of the equidistance principle" (LS/17/1970, p.5).
(183) Appendix 2, B34.
(184) Appendix 2, B1-B17.

Germany's 1964 declaration made no reference to equitable principles – it simply proclaimed that delimitation would be subject to agreement. The only post-1958 unilateral act that made reference to equitable principles is a Philippine proclamation of 1968. Another argument in favour of the preponderance of the Geneva Convention criterion is given by the agreement between Iran and Saudi Arabia. Having made references to equity and equitable principles in unilateral acts prior to 1958, these states delimited their continental shelf boundary in 1965 on the basis of equidistance. This approach was kept in the 1968 agreement, which was induced by equity-related concerns[185]. Again, equitable principles appeared normatively associated with the use of equidistance[186]. It must also be stressed that the recourse to equidistance in state practice had led some scholars to change their views on the subject[187]. Finally, it must be mentioned that the term "special circumstances" had already started to acquire a more palpable content. The presence of oil fields and the effect of islands on the equidistance-line had already been considered in state practice as 'justifications' for adjusting strict equidistance[188].

2.3.b)(ii) The Court's Approach

Having set the stage with a brief description of state practice, it is now necessary to appraise the Court's reasoning in regard to the existence of customary law. The German contention was based on the idea that continental shelf delimitation was governed by a principle of just and equitable share[189]. As to state practice referring to equitable principles, however, Germany only indicated in support to its contention unilateral practice that *dated exclusively to the pre-1958 period*[190]. No reference to equitable principles was identified in bilateral state practice, most probably because state practice addressed considerations of equity through adjustments of the starting equidistance-line. In contradistinction, Denmark and The Netherlands argued that Article 6 had acquired a customary nature. To prove the existence of a general and settled post-1958 state practice, these states presented examples of unilateral acts and bilateral agreements concerning maritime delimitation in general, and continental shelf in particular[191]. Germany rejected the argument on several grounds. For one thing, it contended that the examples presented referred only to cases of oppositeness.

(185) Pietrowski, Jr., IMB/Report 7-7, pp.1519-1524.
(186) Para.1.2.a) *supra*.
(187) Young/1965, p.516; Young/1951, p.237.
(188) Cf. the Bahrain/Saudi Arabia, Iran/Saudi Arabia, and Italy/Yugoslavia agreements (Appendix 2, B19, B25-B26).
(189) Memorial, ICJ/Pleadings/1968(1), pp.30-33.
(190) German Memorial (ICJ/Pleadings/1968(1), p.31); cf. para.1.2.a) *supra*.
(191) Counter-Memorials and Common Rejoinder, ICJ/Pleadings/1968(1), pp.190-198, 343-351, 477-503.

For another, it argued that these examples either did not apply equidistance or applied derivations from equidistance[192].

The Court's reasoning deserves attention. Reviewing the history of the continental shelf, and the work of the ILC, it concluded that "the Geneva Convention did not embody or crystallise any pre-existing or emergent rule of customary law". Noting the primacy of agreements, the controversies as to the meaning of special circumstances, and the fact that reservations to Article 6 were allowed, it deemed that this provision was 'limited' in its "norm-creating character" [193]. This assertion is, to say the least, highly controversial. As any conventional or customary rule, the rule embodied in Article 6 must necessarily bear a normative nature. Otherwise it could not be a legal rule. What is so different about Article 6 that led the Court to consider that it had no "norm-creating character", whilst recognising that Article 1 had become customary law, is by no means clear. Undoubtedly, the Court's views may be challenged[194]. Besides this, it seems clear in the statements of ILC members, and in the comments of states made during the *travaux prèparatoires*, that the delimitation rules were derived from legal principles. The references to agreement and to special circumstances are perfectly understandable if seen in light of the historical background of the norm. They should have been seen as mere interpretative issues concerning Article 6[195]. They did not affect its normativity.

In respect of the possibility to enter into reservations, the conclusions of the Court are truly unexpected. The number of reservations was noticeably small when compared with the number of interested states; and not one of these reservations opposed in general terms equidistance. Venezuela and France claimed the existence of special circumstances in certain stretches of their coasts. Yugoslavia asserted that it would not recognise any special circumstances. Instead of weakening Article 6, these reservations did in effect reinforce it. They all referred to its interpretation, and not to its non-validity. Importantly, the idea that customary norms must have a universal nature and do not allow reservations is contradicted clearly by the regional practice of states[196]. All in all, nothing seemed to impede the rule in Article 6 from acquiring a customary nature under international legal standards[197].

---

(192) Reply, ICJ/Pleadings/1968(1), pp.404-416, 437-440.

(193) ICJ/Reports/1969, pp.33-42, paras.47-69.

(194) Jennings/1981, pp.64-65; Marek/1979, p.58. By 1951, it was not just the delimitation criteria that had to be developed; the very definition of continental shelf remained unclear (para.1.2.b(i) *supra*; ILC/Yearbook/1951(II), pp.101-102). Article 6 might indeed have been a proposal *de lege ferenda*; but no acceptable reason was given to justify why it could not become *lege lata*.

(195) Paras.1.2., 1.3. *supra*. As to the reference to agreement, cf. e.g. Fitzmaurice (ILC/Yearbook/1956(I), p.152).

(196) Lang/1970, p.98.

(197) Judges Koretski, Lachs, Sørensen, Dissenting Opinions, *North Sea* cases, ICJ/Reports/1969, pp.164-165, 224-226, 253-254. See the reservations of France, Iran, Venezuela, Yugoslavia, ICJ/Pleadings/1968(1), pp.230-233. The way in which the Court limited the existence of reservations to conventional law, while apparently denying that possibility in relation to customary law is also notable (ICJ/Reports/1969, pp.39-42, paras.63-69).

In the course of its reasoning, the Court declared that customary rules could only surface from a "settled practice", "both extensive and virtually uniform", evincing an *opinio juris*, i.e. the "belief that [such] practice [was] rendered obligatory by the existence of a rule of law requiring it"[198]. As far as Article 6 was concerned, it concluded "that state practice [had] been insufficient" for it to have become a rule of customary law[199].

The reasoning substantiating this conclusion is somewhat unconvincing. First, the Court was too stringent in relation to the fulfilment of the requisites for the formation of customary law[200]. It departed from its views in the *Fisheries* case, in which the unilateral practice of Norway, and the "general toleration of the international community", led to the acceptance of a conduct that had been rejected by the majority of states in the 1930 Conference[201]. Secondly, its 'objectivist' and 'anti-voluntarist' analysis in this case departs from the PCIJ's findings in the *Lotus* case[202]. Thirdly, while states attempted to demonstrate the existence of customary law by reference to state practice, scholarship and municipal law, the Court examined only state practice – and even that in a superficial manner[203]. Fourthly, it is also surprising the way in which the Court discarded unilateral declarations of states non-parties to the CS Convention (e.g. Belgium and Iraq). Inasmuch as unilateral acts do not reflect a trade-off between two opposing positions, their evidentiary value in relation to the existence of an *opinio juris* is greater than that of bilateral acts[204]. Thus, "[i]n view of the complexity of [the custom-forming] process, and the differing motivations possible at its various stages, it is surely over-exacting to require proof that every state having applied a given rule did so because it was conscious of an obligation to do so"; indeed "the general practice of states should be recognised as *prima facie* evidence that it is accepted as law"[205]. It seems fair to assume that a widespread "consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by [clear] evidence of non-normative intent"[206].

Compelling arguments may be advanced to submit that a settled practice emerged, as to the recourse to the equidistance-special circumstances rule. First, the Court discarded

(198) ICJ/Reports/1969, pp.44-45, paras.74, 77. According to the working definition of the ILA, "a rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future". Cf. ILA, Final Report of the Committee on the Formation of Customary (General) International Law, p.8.
(199) ICJ/Reports/1969, pp.44-46, paras.75-81.
(200) Brownlie/1998b, p.21; Marek/1979, p.59; Lang/1970, pp.118-121.
(201) ICJ/Reports/1951, pp.138-139; Waldock/1951, p.114.
(202) WCR(II), p.35.
(203) Marek/1979, p.64.
(204) Judge Morelli, Dissenting Opinion, ICJ/Reports/1969, pp.202-203.
(205) Judge Lachs, Dissenting Opinion, ICJ/Reports/1969, p.232. As to the formation of customary law, the ILA considers that "it is not always, and probably not even usually, *necessary* to prove the existence of any sort of subjective element in addition to the objective element" – cf. Final Report of the Committee on the Formation of Customary (General) International Law, p.31.
(206) Kirgis/1987, p.149.

fundamental aspects of the *travaux préparatoires* and the First Conference. The fact that most states had shown a clear intention to have a substantive criterion for continental shelf delimitation was not even mentioned in the Judgment. Nor was allusion made to the overwhelming majorities by which the delimitation rules were approved or, even more significantly, to the rejection of the proposals to modify it[207]. Secondly, post-1958 state practice evinced almost unanimous support to the equidistance-special circumstances rule[208]. If any *settled, extensive* and *virtually uniform* state practice existed at the time, it could only be a practice that supported the application thereof. Thirdly, the conclusion that in most cases bilateral state practice had dealt with delimitations between opposite states, and that these situations were sufficiently distinct from those of adjacency not to constitute a precedent is questionable[209]. This assertion is geographically inaccurate. For instance, long segments of the United Kingdom/Netherlands and Denmark/Norway boundaries refer more to situations of adjacency, rather than of oppositeness[210]. Fourthly, it must be observed that, paradoxically, after discarding some agreements as precedents of the use of the Article 6 rule, the Court resorted to them afterwards as evidence of the relevance of the "unity of deposits" as delimitation factor[211].

Brown argues that, at the time, Article 6 "had attained the status of international customary law"[212]. Less categorically, Tanja nevertheless notes that "*some obvious trends in state practice*" were ignored[213]. Indeed, it might be suggested that it would have been less controversial to conclude that Article 6 had acquired a customary nature. Notwithstanding this, since the identification of customary law forms a difficult and complex assessment, always bearing a certain degree of 'subjectivity', the Court's conclusion could be accepted. The problem was that the rejection of Article 6 led to another type of difficulties. Having 'created' a vacuum in the legal system, the Court "faced a risk to declare *non liquet*"[214]. Undoubtedly, that "was perfectly possible in theory"; but the Court seems to have been "guided by a presumption against the existence of gaps in the law"[215]. One would argue that it was to overcome the possibility of declaring *non-liquet* that it proclaimed equitable principles as part of customary law. And this is where the Court appears to contradict its own reasoning. In fact, to discard the customary nature of equidistance, the Court affirmed, in relation to state practice, that

(207) Paras.1.2., 1.3.b) *supra*.
(208) Appendix 2, Table B.
(209) ICJ/Reports/1969, p.46, para.79.
(210) See Figure 2.
(211) ICJ/Reports/1969, pp.52-53, para.97.
(212) Brown/1992, p.74.
(213) Tanja/1990, p.119, emphasis added.
(214) Rossi/1993, p.224; Thirlway/1989, p.78; Jennings/1989, p.400; Degan/1987, p.108.
(215) Thirlway/1989, pp.77-78.

> over a half of the states concerned [...] were or shortly became parties to the Geneva Convention, and were therefore presumably [...] acting actually or potentially in the application of the Convention. *From their action no inference could legitimately be drawn as to the existence of a rule of customary international law* in favour of the equidistance principle. As regards those states [...] which were not, and have not become parties to the Convention, *the basis of their action can only be problematical and remain speculative.*[216]

As shown here, the Court considered that no conclusions could be drawn as to the psychological element of *all state practice*. On what basis did it then conclude that there was an *opinio juris* in international law requiring the application of the so-called equitable principles? This is an unsolvable enigma – a true paradox.

In the case of the Article 6 rule, its dismissal resulted from the conclusion that there was no evidence that states viewed its application as mandatory. Apparently, the existing practice allowed no conclusion for one of two reasons: states parties to the CS Convention were presumably acting in conformity therewith; and the practice of states non-parties to the CS Convention was deemed to be problematical and to have to remain speculative. The problem in the Court's reasoning is that it did not examine equitable principles on the same basis. No settled, extensive and virtually uniform state practice using equitable principles in continental shelf delimitation was ever identified. Unsurprisingly, a survey undertaken by this author reveals that, by 1969, state practice supporting equitable principles was scarce, if at all existent[217]. How then could an *opinio juris* have surfaced? This is the striking question to which the Judgment provides no answer.

All in all, the conclusion that the *opinio juris* was that delimitation had to "be arrived at in accordance with equitable principles" appears not only as paradoxical, but also as juridically incoherent. Without a general state practice, and a high degree of certainty as to the *opinio juris* thereby conveyed, the existence of a rule of customary law with contents 'opposite' to that of the Article 6 rule could not have been ascertained.

It has been contended that the principles and rules of international law considered applicable by the Court "must presumably be taken to be entailed in the concept of the continental shelf and of the rights over it established by customary law on the basis of practice beginning from the 1945 Truman Proclamation"[218]. This explanation does not stand close examination. First, the ILC debates show that until 1958 customary law incorporated no clear concept of continental shelf; let alone of its delimitation standards[219]. And it is even clearer that equitable principles could not have become custom between 1958 and 1969; for

(216) ICJ/Reports/1969, pp.44-45, para.76, emphasis added.
(217) Para.3.3.b)(iv) and Conclusions to Part I *infra*. For a summary of pre-1969 state practice, cf. Appendix 2, Tables A and B.
(218) Thirlway/1990, p.61.
(219) Para.1.2.b)(i) *supra*.

Article 6 rule was then dominant in state practice. Secondly, the unilateral acts referring to equitable principles were, when compared to the number of states potentially interested, negligible in number – and most pre-dated 1958. Thirdly, the proposition that equitable principles were antithetical to equidistance is unconvincing[220]. Fourthly, unilateral acts of states supporting equitable principles were considered during the ILC's debates; and states expressed in their comments to the draft articles, and during the First Conference, their unwillingness to support this type of 'vague' criteria[221]. Fifthly, the adherence of a significant group of states, whose interests were especially affected, to the Article 6 rule would at the very least have prevented the nascence of an opposite settled practice. This suggestion is further strengthened by the support given to this rule in the First Conference. It is difficult to conceive that states would overwhelmingly vote in favour of a conventional rule that would oppose existing customary law. Sixthly, no example of bilateral agreements making use of the so-called equitable principles as interpreted by the Court existed at the time. Finally, having concluded that no inference could be drawn as to the psychological element of the practice of states non-parties to the CS Convention, the Court could not have considered equitable principles as customary law. If the practice of states non-parties to that convention could not be interpreted in terms of *opinio juris*, it is hardly conceivable how equitable principles could have been seen as customary in nature.

The concern of the Court with equity cannot be criticised. In effect, the steps taken then to bring equity into the heart of international law must be praised[222]. Moreover, the relevance of equity in maritime delimitation did become evident during the ILC debates and the First Conference. But an equity-oriented interpretation of Article 6 would have sufficed to address these concerns. There was no need for 'attacking' the combined formula. For the sake of argument, one might even accept the conclusion that Article 6 was not part of customary law. What is rejected is the assertion that, in customary law, delimitation was to be effected in accordance with equitable principles. Either the practice of states non-parties to the CS Convention was relevant, and their support to the rule of Article 6 (added to that of states parties to the CS Convention) would have hampered the emergence of a consistent and settled practice opposing thereto; or that practice was "problematic" and had to "remain speculative", and no *opinio juris* could have been identified[223].

The suggestion that the Court "misidentified the source of equitable principles", for it should have made reference to the general principles of international law instead, is

(220) Para 1.2.a) *supra*; Conclusions to Part I *infra*.

(221) Cf. ILC/Yearbook/1951(II), pp.50, 93; paras.1.2.c), 1.3.b) *supra*.

(222) On the principle of equity in maritime delimitation, cf. para.6.4.b) *infra*.

(223) As to the threshold of "extensiveness" and "representativeness" of state practice, and the subjective element of custom, cf. ILA, Final Report of the Committee on the Formation of Customary (General) International Law, pp.20-42.

striking[224]. Incontestably, the Court had either to show that the mandatory use of equitable principles stemmed from a settled, extensive and virtually uniform state practice, or that equitable principles were general principles of law applicable to delimitation[225]. As it was, no acceptable reasoning was provided. Why equitable principles were regarded as the applicable law remained somewhat of a 'mystery'. Perhaps this is why the Judgment has been deemed to amount to an *ex aequo et bono* decision rendered in *excès de pouvoir*[226], and to be "by any standards, a remarkable exercise in law-making"[227].

2.3.c) Equidistance-Special Circumstances *versus* Natural Prolongation

The way in which the Court delved into Article 6 equally raises some difficulties. Why it refused to examine the combined equidistance-special circumstances rule, and why it instead focused on strict equidistance, is not understandable. Not even when the Counsel for the Dutch and Danish Governments affirmed that it was pausing to, "for the *hundredth time*, [...] say that it [was] *the equidistance-special circumstances rule, not the equidistance method*, which [was] before" it[228], did the Court alter its approach. The non-existence of agreement within the majority of the Court, as to the interpretation of the combined rule, was deemed to be the explanation for the Court not looking into it[229]. This is a striking proposition. Surely, the "unresolved controversies as to the exact meaning and scope" of special circumstances[230] cannot be an argument for not interpreting *a rule that was being argued by one of the parties as being applicable.* Other terms used by the Court were no less indeterminate. For example, the indeterminacy of the term "special circumstances" is no different than that of the expression "reasonable degree of proportionality". Further, it is difficult to understand how it could be concluded that the rule incorporated in Article 6 had not become a part of customary law, *without even interpreting it.*

It is not being denied that the concepts of continental shelf and natural prolongation are deeply intertwined[231]. That only fortuitously would an equidistance-line coincide with the natural prolongation of a state is obvious – but also irrelevant. These are not sufficiently

(224) Rossi/1993, pp.224-227. This view finds support in the arguments that Germany put forward during the oral hearings (cf. e.g. Oda, ICJ/Pleadings/1968(2), p.62). Brownlie affirms that this Judgment "does not purport to reflect pre-existing principles or a pattern of state practice" (Brownlie/1998b, p.29).

(225) Cf. Degan/1987, p.114.

(226) Jennings/1989, p.401; Friedmann/1970, p.236. Arriving at the same conclusion by arguing that proportionality had never been used in delimitation law, cf. Tanja/1990, p.75.

(227) Brownlie/1998b, p.30.

(228) Waldock, ICJ/Pleadings/1968(2), p.245.

(229) Oude Elferink/1994, p.53.

(230) ICJ/Reports/1969, p.43.

(231) The Truman Proclamation referred to the continental shelf as an "extension of the land mass of the coastal nation [...] naturally appurtenant to it". This same idea is conveyed in the CS Convention by the expression "adjacent to the coast" (Article 1); cf. Judge Bustamante y Rivero, Separate Opinion, *North Sea* cases, ICJ/Reports/1969, p.59.

strong reasons for discarding equidistance, and concluding that proximity could not be used as a standard for delimiting the continental shelf[232]. More importantly, these reasons are not justification for not interpreting the rule of Article 6 properly.

From the outset, it is crucial to note that the distinction between equidistance as a juridical concept and as a geometric method was never made; and this is essential. The *equidistance method* involves technical problems concerning the definition of a certain line whose points are equidistant from defined basepoints[233]. Article 6 of the CS Convention (as well all provisions incorporating the combined rule), although an expression of this method, incorporates another notion embodied in equidistance: it translates the idea that 'closer proximity' to coasts should be taken as the starting point for delimitation. However, this is explicitly qualified by equity, under the veil of 'special circumstances'. Properly speaking, when qualified by special circumstances, equidistance and "absolute proximity" cannot be seen as synonymous[234]. Failing to make this distinction, the Court fatally downgraded a valid juridical concept[235], and blighted all its reasoning from the beginning. There is "no good reason why the 'principle' of equidistance, or the 'notion' of proximity should not be a 'fundamental or inherent rule' of law when the whole armoury of equity exists to qualify, or even inhibit, its application in certain kinds of cases where it would produce injustice"[236]. For it is equitable to assume that, *prima facie*, the dividing line lies as far from one state as from the other. Natural prolongation is insufficient to deny a 'legal notion of equidistance' a role in continental shelf delimitation. Clearly, the conclusion is that the Court *had to isolate equidistance from special circumstances and downgrade it to a mere method.* If it had not done so, and had allowed the effectively equitable character of Article 6 to surface, *it could not have discarded its application* on the basis of natural prolongation[237]. Consequently, it would have been 'forced' to accept the use of equidistance as the starting point for the delimitation.

(232) ICJ/Reports/1969, pp.29-33, paras.37-46, in particular. Arguing that equidistance was rejected due to its incompatibility with the notion of natural prolongation, cf. Highet/1993, p.167; Rossi/1993, p.234; Nelson/1990, p.847; Weil/1989a, p.23; Jennings/1969b, pp.823-825; *contra* cf. Thirlway/1993, pp.19-20.

(233) ICJ/Reports/1969, pp.24-29, paras.21-36. Cf. para.5.2.a) *infra*.

(234) ICJ/Reports/1969, pp.30-32, paras.40-43. Cf. Waldock, ICJ/Pleadings/1968(2), p.247. Grisel states that for cases of adjacency Article 6 is "based on a sole idea, namely, that of proximity", although considering that "natural prolongation" and "equitable apportionment" on the basis of the length of coastlines should be considered for purposes of delimitation (Grisel/1970, p.579).

(235) Para.6.3.d) *infra*. Brown affirms that in Article 6 "the principle of equidistance was adopted both as denoting the abstract concept of equidistance and as a legal principle" (Brown/1992, p.84). Cf. also Ahnish/1993, pp.58-59; Weil/1989a, pp.144-145; Jennings/1989, pp.398-399.

(236) Jennings/1989, pp.399-400.

(237) This prevented the Court from accepting the German argument in respect of the relationship between equidistance and special circumstances, according to which there seems to be no hierarchy in between equidistance and special circumstances (Jaenicke, ICJ/Pleadings/1968(2), pp.43-52); and led it to discard also the German proposal for applying equidistance in relation to different baselines – the façade of the coasts (Jaenicke and Oda, ICJ/Pleadings/1968(2), pp.47, 62-63).

On another level, using a geology-oriented delimitation standard is questionable[238]. Geologically, the North Sea seabed forms one single shelf. Identifying on geo-scientific grounds which part of the seabed is an extension of which (politically defined) territory would be impossible. A perfectly valid geography-standard (equidistance) was therefore replaced by an unsuitable geology-standard (natural prolongation). Moreover, "the concept of natural prolongation belongs to the problem of the seaward extension of the continental shelf, not to its delimitation as between opposite or adjacent states"[239]. Indeed, the lack of differentiation between criterion of entitlement (natural prolongation) and standard of delimitation (equidistance) was the root of various misunderstandings in this Judgment[240].

Equally debatable are the conclusions of the Court in respect of the differences between paragraphs 1 and 2 of Article 6 of the CS Convention, as well as their relationship with natural prolongation. The analysis of the Court in relation to the legal contents of the two provisions does not cover all relevant arguments, and is therefore unconvincing. To affirm that in oppositeness "a median line divides equally [...] areas that can be regarded as being the natural prolongation of the territory of each" state, and that in adjacency "a lateral equidistance-line often leaves to one of the states concerned areas that are a natural prolongation of the territory of the other"[241] would call for a demonstration that the Court did not – could not – provide. Geo-scientifically, natural prolongation has no relationship with equidistance in terms of the distinction between adjacency and oppositeness.

Strikingly, the Court presents arguments against its own reasoning when referring to the Norwegian Trough, and affirming that the areas beyond it, up to the equidistance-line with the United Kingdom, were not ("in any physical sense") natural prolongation of the Norwegian territory[242]. This is incorrect. Scientific studies and statements of both states had already ascertained that the Norwegian (legal and geological) shelf extended beyond the Norwegian Trough[243]. Let it be assumed, for the sake of argument, that the United Kingdom and Norway had not delimited their continental shelf boundary by agreement. If the notion of natural prolongation were applied as understood by the Court, an 'equitable delimitation' would mean giving the United Kingdom *all areas from its coasts up to the Norwegian*

(238) Highet/1993, p.171; Rossi/1993, pp.234-235; Brown/1992, pp.96-103; Johnston/1988, p.139. What physically constitutes a continental shelf depends on assessments concerning *inter alia* geology (particularly sediments), plate tectonics, geomorphology, geophysics, bathimetry, geomagnetism, and gravimetry. The unsuitability of natural prolongation as a delimitation standard was noted in subsequent adjudications, starting in the *Anglo/French* arbitration (paras.2.3.b)(ii), 4.3.a) *infra*).

(239) Brown/1992, p.58; cf. also Johnston/1988, p.139.

(240) Paras.6.3.b), 6.3.d) *infra*.

(241) ICJ/Reports/1969, pp.37-38, paras.57-59. As already said, only by mere coincidence would any equidistance-line coincide with natural prolongation, either in oppositeness or in adjacency.

(242) Referring to the Norwegian Trough and natural prolongation, ICJ/Reports/1969, pp14-15, 32-33, paras.4, 44-45.

(243) UNESCO Secretariat – *Scientific Considerations Relating to the Continental Shelf*, Off.Rec.-1958(I), pp.39-46, at pp.43-44; statements of the British and Norwegian delegations to the First Conference, Off.Rec.-1958(VI), pp.41, 48 respectively. Concurring, cf. e.g. Goldie/1973, p.257. For an illustration of the location of the Norwegian Trough, see Figure 89.

Trough. More accurately, perhaps there would be no need for delimitation; for the areas to which the two states would be entitled would not overlap.

To Thirlway, such a criticism is "only valid on the assumption that the 'natural prolongation' refers only to geophysical facts". He argues that this would be "a misreading of the Judgment", because the use of the adjective "natural" was not intended as a reference "to 'nature', in the sense of the geographical and [...] geological facts". Allegedly, "natural" would be an "idea of the geographical pattern of the relevant region as suggesting that a particular area of continental shelf 'ought' to belong to a particular coast". It would thus be "a question of deciding what looks, on the map, like a 'natural' prolongation of the land territory, rather than any more profound (in any sense) study of the area"[244].

This approach must be strongly rejected. The idea of 'natural' conveyed by the Truman Proclamation undoubtedly referred to 'facts of nature'[245]. The continental shelf was viewed therein as "an extension of the land mass of the coastal nation [...] *naturally appurtenant* to it", the resources of which "frequently form a *seaward extension of a pool or deposit lying within the territory*". Inasmuch as the Court based all its reasoning on the assertion that the Truman Proclamation "must be considered as having propounded the rules of law in this field", it cannot be seen how it is logically possible to consider in this context 'natural' as not implying 'nature'. More importantly, if natural prolongation did not correspond to that of the Truman Proclamation, the Court should have explained what was meant by it, and why such a 'novel' notion was part of international law.

More importantly, "what looks, on the map, like a 'natural' prolongation" had never been used in state practice as a standard for delimitation, and could therefore not be a part of customary law. In addition, this kind of subjectivity (which would potentially amount to the possibility of deciding *ex aequo et bono*) was rejected by states in their comments to the 1951 ILC draft articles[246]. Unsurprisingly, this idea of natural prolongation as an "invention of the legal mind" has been severely criticised[247]. Furthermore, an analysis based on the visual impression caused by charts or maps bear an overlooked (but significant) danger. Judges are laypersons insofar as cartography is concerned; and since manipulating maps to convey a certain impression of the reality is far from difficult to cartographic experts, such an approach is normatively untenable. One underlying truth about cartographic information must be borne in mind: "*if not harnessed by knowledge* [...] *the power of maps can get out*

(244) Thirlway/1993, pp.18-24.

(245) Brownlie/1998a, pp.226-227; Wallace/1992, pp.12-13; Brown/1992, pp.56-60; Attard/1987, pp.133-134; Jennings/1969b, pp.821-825; Judge Bustamante y Rivero, Separate Opinion, *North Sea* cases, ICJ/Reports/1969, pp.58-62.

(246) For the 1951 ILC draft articles, and the correspondent comments by states, cf. paras.1.2.b)(i), 1.2.c) *supra*. The "large degree" of subjectivity of this expression is not denied by Thirlway, who considers that "the essential doctrine of the 1969 Judgment, that of the application of equitable principles, is of the same nature".

(247) Jennings/1989, pp.403-406.

of control"[248]. Cartographic materials never present neutral information, and never are a 'portrayal of the truth'. Perception, manipulation and biases are always present.

2.3.d) Normative Standards of Delimitation

The *North Sea* Judgment may also be criticised from another angle. The Court was required to decide which were the *principles and rules of international law* applicable to the delimitation between the three states. Principles and rules of law convey always some normative guidance. It can be asked, however, whether the Court truly enunciated material standards for delimitation; and if the answer is in the affirmative, whether such normative standards are after all different from those contained in Article 6.

Elaborating further on what was meant by effecting a delimitation in accordance with equitable principles, the Court assured that this "was not a question of applying equity simply as a matter of abstract justice". It affirmed, that such a rule rested "on a broader basis", namely that "decisions must by definition be just" and "in that sense equitable". Finally, it asserted that since "it is precisely a rule of law that calls for the application of equitable principles", this would not amount to decide *ex aequo et bono*[249]. This is as far as the Court went as to the normativity of delimitation law. References to proportionality, to cut-off effects and to the unity of deposits are not normative in nature. They are matters of fact (coastal lengths comparison, coastal geography, and location of natural resources), to be appraised in the light of the normative standards.

Ultimately, the idea that the Court decided the case "along the lines prescribed by the conventional combined rule", using as basic normative standard 'legal-equidistance', is striking. Apparently, equitable considerations seem to warrant mere modifications of the starting (equidistance) line[250]. The mention of "*abating the effects* of an incidental special feature" (concavity of the coast) reflects this approach. If the Court mentions *abating the effects*, it is undoubtedly referring to the *cut-off effect* that occurs by *applying equidistance* to the case, which should somehow *be reduced.* Furthermore, the *dispositif* equates clearly 'special circumstances' to equity; which signifies that a similar argument could have been made on the basis of Article 6[251]. Had the Court been willing to examine it, the justification

(248) Monmonier/1996, pp.184-186, emphasis added. This author shows in simple terms how variables of maps (e.g., projection, scale, colours, symbology, selection and density of information, optical principles) can be manipulated, and conjugated, to attain a certain visual impression that departs from reality. Also Wood/1992; Keates/1982, pp.107, 138-144.

(249) ICJ/Reports/1969, pp.47-49, paras.85-88.

(250) Tanja/1990, p.73. Cf. ICJ/Reports/1969, pp.36-38, 50-51, paras.53-59, 89-91.

(251) The Court was fully aware of the teleological nature of the caption 'special circumstances': to provide equitable relief from strict equidistance (ICJ/Reports/1969, p.37, para.55). While voting with the majority of the Court, Judge Ammoun advocated the idea that the inequitableness of the application of strict equidistance could have been avoided by applying Article 6 rule, and considering the German coastline as a special circumstance (Separate Opinion, ICJ/Reports/1969, pp.149-151).

for departing from strict equidistance would have been easily found.[252]. The references made by the ILC to problematic geographical settings (to which specific consideration had to be given) included "coastal configuration", "concavity" and "convexity"[253].

While denying so, the Court indeed seems to have furthered the interpretation of the combined formula of Article 6. First, it confirmed that equidistance could *in some instances* yield inequitable results, and it declared the *cut-off effect* as one of the possible inequitable repercussions demanding adjustment. Secondly, it noted that special circumstances could not be exhaustively enumerated, and emphasised the need to consider "the relative weight to be accorded" to each circumstance *in concreto*[254]. Thirdly, it identified proportionality as means to assess the inequity of cut-off effects caused by equidistance[255]. In this respect, it is notable that the reference to a "reasonable degree of proportionality" entails only the ruling out of situations of *unreasonable lack of proportionality*. Finally, the "known or readily ascertainable" natural resources (and the "unity of deposits") were also confirmed as factors to be considered for purposes of the determination of the course of the boundary[256].

This 'non-acknowledged recourse' to Article 6 emerges fairly obviously from other parts of the Court's reasoning, especially when affirming that the equitable principles only operate to delimit the *overlapping area*, i.e. the "disputed marginal or fringe area"[257]. This area therefore had to be determined. Since equidistance had been dismissed, such areas had then to be defined necessarily through the concept of natural prolongation. The problem, however, is that the North Sea is geologically one single shelf. Unless natural prolongation is defined in terms of 'what looks on a map' (which was already rejected), it would not be possible to make any practical use of this concept to determine the marginal area. Hence, the notion of *marginal* (or *fringe*) area to be divided in accordance with equitable principles was defined by reference to an equidistance-line[258]. Or to put it differently, equidistance was in reality central to the whole argument. The Court simply declared that, taking into

(252) Considering that the idea of having equidistance as the basis from which to derive equitable boundaries was from the very beginning in the mind of those who first addressed the issue of continental shelf delimitation, this conclusion is unsurprising; cf. the reference to Boggs's writings (para.1.2.a) *supra*).

(253) Hsu, ILC/Yearbook/1951(I), p.288; Alfaro, ILC/Yearbook/1952(I), pp.182, 190. Even if not autonomously mentioned, concavity and convexity could be included in the concept of "exceptional configurations of the coast" (ILC/Yearbook/1953(II), p.216); cf. e.g. Grisel/1970, pp.582-583. Disagreeing with the idea of seeing the German coastline as a special circumstance, cf. e.g. Friedmann/1970, pp.239-240; Judges Tanaka, Lachs and Sørensen, Dissenting Opinions, ICJ/Reports/1969, pp.186-187, 240-241, 254-257. Amongst those that criticised the Court's lack of "close investigation" of the *travaux préparatoires* of the First Conference, the ILC discussions, and state practice, cf. e.g. Tanja/1990, pp.70-71; Ahnish/1993, pp.60-63.

(254) ICJ/Reports/1969, p.51, para.93.

(255) Tanja takes the view that by resorting to proportionality (which "had never been referred to in delimitation law") the Court rendered an *ex aequo et bono* decision (Tanja/1990, p.75). If the Court applied proportionality as an equitable principle, and if equitable principles were not part of international customary law (as one would argue), then the Court appears to have rendered an *ex aequo et bono* decision. Speaking of a "legislative role", cf. Lauterpacht/1991, p.127.

(256) Para.2.3.b)(ii) *supra*.

(257) ICJ/Reports/1969, pp.23, 50, 53, paras.20, 89, 99.

(258) Jennings/1989, pp.403-405. Cf. para.6.3.d)(ii) *infra*.

account certain factors, Germany should be attributed more than it would get if delimitation would be effected on the basis of strict equidistance.

Corroboration of this view may be found in the way in which the actual boundaries were defined in the agreements that later effectively applied the decision. Considering that "one German demand had to be met – its continental shelf had to border on the British one", the starting equidistance-lines "were gradually shifted in such a manner that Denmark and the Netherlands both gave up areas of more or less the same size, but as little as possible until the German delegation declared itself satisfied"[259]. To overcome the cut-off effect, Germany claimed a corridor up to the equidistance-line with the United Kingdom. Proportionality was then used as criterion to determine the area of that corridor. The precise position of known natural resources also seems to have played a part therein. Existing oil fields under Danish exploitation, for instance, influenced some of the precise 'shifts' in the course of the Danish/German boundary[260].

Had the Court been asked to define the boundary-line, and had it not resorted to equidistance as a starting point (as the states did afterwards), on what grounds would it have justified the precise course of the line? One can only speculate. Nevertheless, it can be safely affirmed that the answer is far from being easy to devise. As shown, natural prolongation was of no help as a delimitation standard. In addition, the requirement of attaining an agreement is a formal one; and "it is difficult to see how [state] practice could support an *opinio juris* that agreement was a matter of obligation"[261]. Finally, by simply asserting that agreement was to be reached in accordance with equitable principles, taking account of certain factors, the Court gave virtually no normative guidance. As mere factual circumstances, these factors do not amount to principles or rules of law, the identification of which the states had asked[262].

A quick glance over the notion of equitable principles is enough to conclude that a mere reference thereto falls short of actually providing workable normativity[263]. The Court presented them as "actual rules of law" founded on "very general precepts of justice and good faith". They were said to prescribe an obligation to enter "into negotiation with a view to arriving at an agreement" on the basis of equitable principles, taking into account all

(259) Langeraar/1998 (unpublished). Franck confirms this suggestion (Franck/1995, p.36).

(260) Anderson, IMB/Reports 9-8, 9-11, 9-18, pp.1802-1805, 1836-1839, 2498-2499; Smith/1982, pp.7-8. Anderson considers that this boundary has a "pragmatic" nature. The Court seems not to have intended to consider the location of oil-fields as factors relevant to delimitation. Thirlway takes this view, when affirming that "on a classical approach based on the *North Sea* decision, the presence of wells would be irrelevant" (Thirlway/1993, p.15).

(261) Thirlway/1989, p.78. Supporting this view, cf. paras.3.6.c), 6.1.b)(i)(ii) *infra*.

(262) Jennings/1989, p.407. Arguably, the Court would have not been able to show that equitable principles had any normative content different from that of the principle of equity; cf. para.6.4.b)(iv), Conclusions to Part II *infra*.

(263) Considering that they provided little guidance, e.g. Rossi/1993, p.223; Lauterpacht/1991, p.127; Grisel/1970, p.592.

circumstances, while complying with the principle of natural prolongation[264]. The various confusions in this statement appear to be obvious. Good faith constitutes not only a basis for equitable principles, but for all the law. Equally, justice is, side-by-side with certainty, one of the integral aims of law, and again not only of equitable principles. Then, stating that equitable principles require the use of equitable principles in delimitation is, to say the very least, tautological. The exegesis of this part of the Judgment unveils in effect a totally sterile intellectual game[265]. What are the normative contents of equitable principles, or how they operate, is simply not explained. Since the same comment was made from early on in relation to the Truman Proclamation[266], this comes as no surprise.

The argument so far suggests that, insofar as equitable principles only emerged as delimitation criteria with this decision, the Court was bound to clarify their contents. This, however, has not been done. Asserting that agreement must be achieved in accordance with equitable principles conveys no more than the obvious idea that a reasonable accord, acceptable to all parties, must be sought. Configuration of coasts, proportionality, natural resources, and geological features, are mere facts, whose appraisal was suggested in this case. Consequently, equitable principles appear to be whatever considerations states wish to weigh-up with a view to reaching agreement. Since the only limit imposed on states as to the methods and factors used in the determination of a boundary is *jus cogens*[267], this is again stating the obvious. The problem is that this shows no clear normative content. If this is the rule upon which delimitations by adjudication are hinged, then courts are entitled to decide *ex aequo et bono*; for they would have a freedom of choice as to the methods to use and factors to weigh-up that would equate to that of states. Besides having been explicitly rejected by state practice, this was also explicitly excluded by the Court[268].

All things considered, this Judgment has two different facets. On the one hand, it asserts the obvious by stating that, in negotiation, states may agree to use any methods and to ponder any factors that they consider adequate. On the other, it surfaces as an unclear statement as to which normative standards are binding upon courts in the adjudication of maritime boundaries, thus leaving many doubts as to the what differences (if any) exist under international law between their competencies in adjudication and the powers of states in negotiation. It is therefore with hesitation that conclusions are drawn in relation thereto. First, the fact that the Court was asked to declare what rules and principles of international

(264) ICJ/Reports/1979, pp.47-48, para.85.
(265) Marek/1979, p.71.
(266) Vallat/1946, p. 336.
(267) ICJ/Reports/1969, pp.47, 51-52, paras.84, 92-94. As to the limits of states in negotiation, cf. para.6.1.b)(ii) *infra*.
(268) This is the reason why the ILC was mandated by states to look for suitable delimitation criteria was to provide courts and tribunals with normative decision-making standards (para.1.2.c) *supra*).

law were applicable *in the course of negotiations*, and not to define a boundary-line between the three states, seems to have had a profound impact on the approach adopted[269]. Secondly, it was the combined "cut-off effect" of the Dutch and Danish coasts that gave Germany the opportunity to impress the Court with cartographic material stressing its disadvantageous position[270]. Had The Netherlands and Denmark not tried to delimit their boundaries with Germany simultaneously, the outcome of the Judgment might have been quite different[271]. What is clear today, is that the development of maritime delimitation law was disturbed unnecessarily, much as a result of conceptual misunderstandings. Perfectly justified concerns with equity were not enough reason to discard equidistance. Other, more 'subliminal' elements seem thus to have conditioned this Judgment[272].

2.4. The Anglo/French Arbitration

2.4.a) Overview

2.4.a)(i) The Dispute

In July 1975, after four years of unsuccessful negotiations, the United Kingdom and France agreed to resort to arbitration to resolve the dispute concerning the delimitation of their continental shelves. By the Arbitration Agreement, the Tribunal was asked to decide the course of the boundary (boundaries) of the continental shelf westward of the 30 minutes west of the Greenwich Meridian, as far as the 1,000-metre isobath[273]. The delimitation area encompasses the central and western parts of the English Channel (*Manche*) and its (south-western) Atlantic approaches (Figure 79).

To this effect, the Tribunal was asked to apply "the rules of international law applicable in the matter as between the Parties". This was the first point of disagreement between the two states[274]. Whereas France argued that the delimitation should be carried out by reference to customary law, as stated by the ICJ in the 1969 *North Sea* cases, the United Kingdom argued that the 1958 CS Convention should be applied. France contended that the fact that it had entered reservations to Article 6 of this convention was paramount. Either the whole convention, or at least Article 6, would thus not apply to the dispute. In the

(269) This is why in the *Anglo/French* arbitration the Tribunal was also asked to draw the line (Anderson/1999b (unpublished)).

(270) For examples of how Germany utilised visual perception to its advantage, see Figures 45-46.

(271) It is noteworthy in this respect that, in the *Anglo/French* arbitration, the Tribunal asserted that the boundary between the two parties depended in no way "*on any nice calculations of proportionality* based on conjectures as to the course of the prospective boundary between the United Kingdom and the Republic of Ireland". It viewed such problem as being "manifestly outside [its] competence". Cf. RIAA/18, pp.26-27, paras.27-28, emphasis added.

(272) Conclusions to Part I *infra*.

(273) RIAA/18, pp.5-7.

(274) For a summary of the positions of each state, cf. RIAA/18, pp.9-17.

United Kingdom's view however, the French reservations (to which it had objected) did not preclude the application of the conventional regime.

To the United Kingdom, because no proof had been presented in terms of existence of special circumstances, the delimitation consisted of a straightforward application of the equidistance principle based upon all basepoints on each side. Consequently, in the Channel Islands vicinity, the boundary would deviate from the mainland-to-mainland equidistance, turning southwards to encircle these islands. It further contended that, even if customary law would be applied, the boundary would run along this equidistance-line, which arguably would leave each state a continental shelf area that abided by the notions of natural prolongation and non-encroachment. Subsidiarily, it argued that if any geological discontinuity existed, defining different limits for the natural prolongation of each state, it would follow along the Hurd Deep Fault (situated south of the equidistance-line).

The French contention as regards delimitation was slightly more complex. Claiming the existence of special circumstances in the *Baie de Grandville*, it argued that the Channel Islands should only be attributed an enclave of 6 M. Similarly, the Atlantic area, westwards of a line joining the Scilly Islands and *l'île d'Ouessant*, was also seen as requiring a special approach. There, the equidistance-line should allegedly be drawn from *lignes de lissage* reflecting the general direction of the Channel coasts of the two states. As to the rest of *la Manche*, France accepted the use of the equidistance-line (although rejecting the use of Eddystone Rock as a basepoint).

2.4.a)(ii) <u>The Award</u>

The Award refers to the 'arbitration area' as the limit of the 'spatial competence' of the Tribunal. After consultation with both parties as to the extent of the powers conferred on it, the Tribunal concluded also that it was not empowered to effect the delimitation of the boundary between the Channel Islands and the coasts of Normandy and Brittany. France was of the view that the mandate given by the "Arbitration Agreement" to the Tribunal merely comprised the seabed and subsoil beyond the 12 M of the (French) territorial sea[275]. As to the 'arbitration area', moreover, the Tribunal found that it was not open to it to decide on the position of a (potential) trijunction point with the Republic of Ireland. It observed in this respect that the Award would only be binding upon the parties to the case[276]. The question concerning the rules and principles of international law in force between the two states was then examined. Article 6 was deemed applicable to the delimitation in general,

(275) The dispute in this area also involved fishing issues with roots dating back to the 1839 Fishery Convention.
(276) RIAA/18, p.24-27, paras.20-28.

only being excluded to the extent of the French reservations. The Channel Islands region was therefore seen as an area where customary law would be applicable[277].

In light of the circumstances of the case, the distinction between conventional and customary law was deemed insignificant. Customary law was seen as leading "to much the same result as the provisions of Article 6". And the equidistance-special circumstances rule and customary rules were viewed as having the same object: the delimitation of continental shelf boundaries according to equitable principles. For the Tribunal, the former only gave "a particular expression to a general norm that, failing agreement, the boundary between states abutting on the same continental shelf is to be determined on equitable principles"; and the latter were "a relevant and even essential means of both interpreting and completing the provisions of Article 6". In this context, the Tribunal emphasised, there was no question of attributing just and equitable shares; and it was clear that the natural prolongation of one state could not encroach on the natural prolongation of another state[278]. As to Article 6, the Tribunal concluded that its two paragraphs articulated the same combined rule, that this provision was "to be understood as dealing comprehensively with the delimitation of the continental shelf, and that all situations, in principle, fall under" one of its paragraphs[279]. Before turning to the delimitation *in concreto*, the Tribunal dismissed the relevancy of the Hurd Deep Fault. Noting the "essential geological continuity" of the area, it held the view that this feature was not "capable of exercising a material influence in the determination of the boundary"[280].

As a first step towards the required equitable solution, the Tribunal 'homologated' the agreement reached between the parties concerning the use of equidistance as the basis for delimitation[281], exception made to the Atlantic and the Channel Islands regions. In spite of this agreement, there was still an outstanding issue: France did not agree with the use of Eddystone Rock as a basepoint. The Tribunal deemed it unnecessary to pronounce itself on the "precise legal status" of this feature. Considering that France had previously acquiesced to its use as basepoint for defining the United Kingdom's fishery limits, it concluded that Eddystone Rock was to be taken into account[282].

Examining the Channel Islands region, the Tribunal started by observing how the two states had put their claims on a double basis, i.e. both considering that they should be

(277) *Ibid.*, pp.28-48, paras.29-75.
(278) *Ibid.*, pp.44-49, paras.65-79.
(279) *Ibid.*, pp.44-45, 55-56, paras.68, 94.
(280) *Ibid.*, pp.59-61, paras.104-109.
(281) *Ibid.*, pp.61-65, paras.111-120. Quéneudec considers that this part of the boundary is not really work of the Tribunal; but adds that to the extent that the Tribunal effected the control and registration of what had been agreed between the parties, it in fact homologated the agreement conferring to it "*la force obligatoire d'une décision du Tribunal*" (Quéneudec/1979, p.86).
(282) RIAA/18, pp.65-74, paras.121-144.

upheld under either conventional or customary law. For the Tribunal, this confirmed "that the different ways in which the requirements of 'equitable principles' or the effects of 'special circumstances' are put reflect differences of approach and terminology rather than of substance"[283]. One point became central to the delimitation: with the exception of the Channel Islands, the situation was one of oppositeness between two states "having almost equal coastlines". In respect of these islands, attention was drawn to three points: their detached location – on the "wrong side" of the equidistance-line; their close proximity to the French coast; and the fact that the geographical context allowed almost no scope for redressing inequities. Regarding the effects of the Channel Islands as a "radical distortion of the boundary creative of inequity", the Tribunal concluded that to attain a "more equitable balance" a two-fold solution was needed. A mainland-to-mainland equidistance-line was drawn as the primary boundary between the two states; and the Channel Islands were only attributed a 12-mile enclave (Figure 3)[284].

Turning to the Atlantic region, the Tribunal identified one "pertinent dissimilarity between the two coasts". Whereas *l'île d'Ouessant* lay westwards of the Brest peninsula at a maximum distance of roughly 14 M, the Scilly Isles extended up to 31 M westwards of Land's End. The resulting southwards shifting of the course of the equidistance-line was deemed to lead to an inequitable disproportion "in the areas of continental shelf accruing to" each state. The location of the Scilly Isles was thus viewed as a "special circumstance", to which only a half-effect was to be given. The actual boundary defined by the Tribunal is a line bisecting the angle formed by two equidistance-lines: one calculated between Ushant and the Scilly Isles; the other calculated between Ushant and Land's End (Figure 3)[285].

2.4.b) Some Points of Contrast with the *North Sea* Cases

A comparative approach between this Award and the 1969 Judgment is justified on two grounds: the former is the jurisprudential milestone on which the ICJ relied 15-odd years later to complete the 'overturn' of the jurisprudence that it had started with the latter; this approach offers a better basis for understanding the developments in delimitation law.

2.4.b)(i) A Different Task

The task assigned to the courts in the two instances had a different scope. Whereas in the 1969 cases the ICJ was asked to declare what principles and rules of international law

(283) *Ibid.*, p.75, para.148.
(284) *Ibid.*, pp.93-96, paras.196-203.
(285) *Ibid.*, pp.109-118; emphasis added.

were applicable to the delimitation, in this instance the Tribunal was also asked to define the actual course of the continental shelf boundary. The different challenges posed by the need to define the course of the line led to further dispute, regarding its technical definition. For reasons of brevity, but without prejudice of brief mentions at a later stage[286], this issue will not be analysed in-depth in this study.

2.4.b)(ii) The Clarification of Certain Issues

Whilst correcting some misconceptions that arose in the 1969 Judgment, this Award has furthered the understanding of maritime delimitation law. At one level, while admitting that some pronouncements of the ICJ had "a general character", the Tribunal noted that not all of them could be seen as a general statement of law, and should therefore not be extrapolated lightly. This is clear in the assessment concerning the use of equidistance in situations of adjacency[287], as well as in the assertions dealing with the role of natural prolongation and of proportionality, which are now examined.

Drawing attention to the fact that it is precisely *where the territories of two or more states abut on a single continuous area of continental shelf* that problems of delimitation arise, the Tribunal stated that natural prolongation was not a generally suitable criterion for delimitation. The 'dogma' of a geology-oriented concept of natural prolongation, with absolute character, was dismissed when the Tribunal affirmed that this notion could also "*be subject to qualifications in particular situations*". Its effects were deemed to depend on "the particular geographical and other circumstances", and on "any relevant considerations of law and equity"[288]. This approach is important in cases like the English Channel, where the shelf is geo-scientifically the prolongation of all territories that abut upon it; so much so that France was allocated continental shelf areas north of the Channel Islands, up to the equidistance-line between the mainland coasts[289]. This approach comes as confirmation that natural prolongation was to be viewed as geological-oriented notion. *In casu*, however, its role was negligible. The Award asserts clearly that only in very exceptional circumstances would natural prolongation bear on continental shelf delimitation[290]. With this approach, natural prolongation arguably started to be "seen as referring [primarily] to geographical circumstances rather than geological factors"[291].

(286) Paras.4.2.b)(ii), 5.1.c), 5.3.a) *infra*.
(287) For an analysis of this issue, cf. para.2.4.c)(ii) *infra*.
(288) Vicuña contends that the influence of this principle "was considerably down-toned" also in view of the emergence of the concept of EEZ in international law (Vicuña/1988, p.122).
(289) RIAA/18, p.49, 91-92, paras.79, 191-194; emphasis added.
(290) Brown/1992, pp.99-103. Cf. also Tanja/1990, p.173; Attard/1987, p.232; Bowett/1979, p.206; Quéneudec/1979, p.76.
(291) Bowett/1979, p.221. Later, the *Dubai/Sharjah* arbitration evaluated natural prolongation very similarly (ILR/91/1993, pp.675-677); cf. Vicuña/1988, p.122. Considering the existence of two meanings for the concept of natural prolongation, cf.

In relation to proportionality, the Tribunal did not deny that it was "inherent in the notion of delimitation in accordance with equitable principles". It did however, confine its scope by noting that it is not for application in all cases, and it should not be considered as a source of title to continental shelf. Proportionality, stated the Tribunal, should be seen as a factor to be taken into account in appreciating the equitable or inequitable character of a delimitation, and in particular for *determining the reasonable or unreasonable effects of particular geographical features or configurations upon the course of an equidistance-line boundary*. "[I]t is disproportion rather than any general principle of proportionality which is the relevant [...] factor", it added[292]. Conceding to proportionality only a secondary part in delimitation[293], this approach conceptualises its function within the equidistance-special circumstances rule, as a means to detecting unreasonable distorting effects caused in certain contexts by specific geographical features[294].

2.4.b)(iii) The Contribution to International Law

This Award's contribution for the development of delimitation law is significant in relation to two key aspects. First, it restates the relevancy of state practice as a factor of the international law-making process. Secondly, it demonstrates that the correct interpretation of Article 6 of the CS Convention is perfectly compatible with the requirements of equity.

State practice was 'devalued' in the *North Sea* Judgment in order to 'complete' the rejection of equidistance in maritime delimitation. This was fully reversed by this Award. The enclaving solution in the Channel Islands was considered on the basis of precedents of semi-enclaving solutions found in state practice, concerning situations where small islands lay "on the right side of or close to the median line". By analogy, the fact that the Channel Islands lay "on the wrong side" of the equidistance-line, and were "wholly detached geographically from the United Kingdom" led the Tribunal to accept the French proposal of enclaving the Channel Islands[295]. In the Atlantic region, the half-effect solution was also inspired by state practice – having the Tribunal referred to the examples of "delimitations in which only partial effect [had] been given to offshore islands situated outside the territorial

Evans/1989, pp.99-118. Dipla seems to support the perspective that natural prolongation is "what looks on a chart" (Dipla/1984, p.183), thus close to Thirlway's proposition (Thirlway/1993, p.24); cf. paras.2.3.c) *supra*); also para.8.2.g) *infra*.

(292) RIAA/18, pp.57-58, 115, paras.98-101, 246; emphasis added.

(293) Tanja asks if this was not "a friendly way of indicating that the ICJ had exceeded its competence in 1969" when elevating proportionality to a delimitation principle (Tanja/1990, p.169). Evans considers that the Court "misconstrued the role given to proportionality in the *North Sea* cases", because proportionality "is not a 'criterion for application' at all", but concedes that the use of proportionality in this arbitration was "in full accord with that of the Court in the *North Sea* cases" in that it was used "to assess the application of equitable principles" (Evans/1989, pp.225-226).

(294) Brown/1992, pp.110-112; Weil/1989a, pp.237-238; Jagota/1985, p.146; Dipla/1984, pp.184-185; Quéneudec/1979, p.76; Zoller/1977, pp.383, 406. To Jaenicke, "it would have been inappropriate" to use proportionality in the Atlantic region owing to "the uncertainty of the lateral and seaward limits of the area to be tested" (Jaenicke/1986, pp.62-63).

(295) RIAA/18, p.94, para.199.

sea of the mainland"[296]. No explicit indication was given, however, as to which state practice had been examined in either instance.

More importantly, state practice provided arguments to uphold the view that the choice of the delimitation method is neither absolutely free, nor merely equity-oriented. In the Channel Islands, the solution is in some measure still equidistance-related; it comprises a "primary boundary" based on strict equidistance from the mainland coasts. The enclaving line was utilised to accommodate the equity concerns by reflecting the local geographical eccentricities[297]. The most significant pronouncements came perhaps with the delimitation in the Atlantic region. State practice was deemed to reflect how departures from strict equidistance were to be justified. Stating that it was not empowered with "*carte blanche to employ any method that it chooses*", the Tribunal also added that, besides remedying unreasonable distorting effects, the method utilised ought to have a "*relation to the coasts of the parties actually abutting on the continental shelf of that region*". Particular emphasis was placed on the idea that fact that, in similar circumstances, state practice showed some preference for *using a "modification or a variant of the equidistance principle rather than to have recourse to a wholly different criterion of delimitation*". Ultimately, the Tribunal held the view that equitable delimitations should – as done in state practice – rely on, and favour, solutions grounded on the appropriate adjustments to the strict equidistance-line, instead of rejecting it *in toto*[298].

2.4.c) Article 6 of the CS Convention

2.4.c)(i) Interpretation

This was the first instance in which Article 6 of the CS Convention was interpreted. As it was also the first time that an international court was called upon to, *proprio sensu*, delimit a continental shelf boundary, this Award inevitably had to have an impact on the development of maritime delimitation law. In addition, since in the *North Sea* Judgment the ICJ failed to give Article 6 dispositive effects, while declining to interpret it, the reasoning of this Award acquired even more relevance.

The relationship between equidistance and special circumstances had already been approached from diverse angles. Different interpretations had for example been proposed in the individual opinions attached to the *North Sea* Judgment. In their Dissenting Opinions, Judges Tanaka, Lachs and Sørensen considered special circumstances as a *stricto sensu*

(296) *Ibid.*, p.117, para.251.
(297) *Ibid.*, pp.94-95, paras.199-202. Cf. Brownlie/1983, p.61. Cf. also para.5.3.a) *infra*.
(298) RIAA/18, p.114-117, paras.245-251; emphasis added.

exception to a rule, thus requiring a *strictissimae interpretationis*[299]. Holding a different view, Judge Morelli regarded special circumstances as an autonomous "exception-rule" to be interpreted separately from the equidistance rule[300]. Diversely, to Judge Ammoun, special circumstances were an element of a rule that combined equidistance and special circumstances towards an equitable result[301].

The interpretation of Article 6 followed in this decision seems to be very close to the last of these interpretations. To start with, the Tribunal affirmed that Article 6 embodied a single combined equidistance-special circumstances rule. Further, it regarded this rule as giving "particular expression to a general norm that, failing agreement, the boundary between states abutting on the same continental shelf is to be determined on equitable principles". Consequently, it reached the conclusion that both this rule and the rule of customary law had the same object[302].

The conclusion that Article 6 did not differ in content from customary law was seemingly unanticipated. This approach was in fact severely criticised on the grounds that this provision's drafting history does not provide any support for an extensive interpretation of the notion of special circumstances. According to this view, only exceptional geographic situations should be considered[303]. In this respect, O'Connell affirms that, in the Channel Islands region, "the Court came perilously close to doing what it had theoretically repudiated, [i.e.,] refashioning nature"[304]. Notwithstanding this criticism, the Tribunal's approach found support in part of the scholarly writings[305]. There is clearly a duality of opinions in this regard.

One ought to ask, therefore, to what extent were these two standpoints influenced by the fact that certain elements of this Award admittedly favoured the French case[306]. In principle, this should not be taken into account in juridical analyses. For this reason, it is firmly believed that the Tribunal's approach to Article 6 must be examined in two separate phases: one, its interpretation *in abstrato*; another, its application *in concreto*.

---

(299) ICJ/Reports/1969, pp.187, 240, 257, respectively.
(300) *Ibid.*, p.209.
(301) *Ibid.*, pp.149-151.
(302) RIAA/18, pp.44-48, paras.68, 70, 75.
(303) Brown/1992, p.104; O'Connell/1989, pp.697-698, 708 (this author considers that each paragraph of Article 6 contains a different rule); Attard/1987, p.233; Bowett/1979, p.201. Weil regrets that the rule of Article 6 was deprived "of all particularity vis-à-vis customary law" (i.e. equitable principles), and argues that Article 6 should have been adopted as reflecting the contents of customary law (Weil/1989a, p.147). Dipla, although supporting the Court's approach, observes that the notion of special circumstances was clearly enlarged, and that this notion is in Article 6 subordinated to the equidistance method – but it does not explain what is exactly the nature of such subordination (Dipla/1984, pp.183-184).
(304) O'Connell/1989, p.725.
(305) Supporting, or not criticising, this view, cf. Ahnish/1993, pp.65-69; Lauterpacht/1991, pp.128-130; Caflisch/1991, p.459; Tanja/1990, p.166; Jagota/1985, p.146; Symonides/1984, p.42; Quéneudec/1979, pp.72-75; Zoller/1977, pp.372-377.
(306) Quéneudec/1979, p.102; Zoller/1977, p.407.

The nascence of the notion of "special circumstances" was unarguably intended to prevent inequitable delimitations[307]. Despite its uncertainty, the reality is that the ILC was unable to agree on another, more explicit term. Establishing more accurately the latitude to concede to judges in maritime delimitation proved to be impossible. After considering the proposal for specifying the special circumstances, the ILC concluded that the draft rule should leave the assessment of the scope of this term to judges. The examples mentioned in the comments to the draft article were mere examples[308]. In their assessment, judges would have to consider *any situations* of "undue hardship" or "manifest unfairness"[309]. During the 1958 Conference, the essence of the views expressed in the *travaux préparatoires* did not change[310]. Article 6 was therefore intended to allow judges to categorise as special circumstances any facts that would cause strict equidistance to yield a manifestly unjust course of the boundary (thus justifying adjustments thereto).

The Tribunal's interpretation of Article 6 is reconcilable with these premises. The equality between customary and conventional rules concerned only the obligation to reach an equitable delimitation. As observed, both approaches had to consider "geographical and other circumstances"[311]. The similarity existed because arguing on the basis of equitable principles or of special circumstances reflected "differences of approach and terminology rather than of substance"[312]. Further, when asserting that an equitable delimitation did not imply equality of shares[313], the Tribunal indeed highlighted that the purpose of delimitation is avoiding an inequitable result, rather than promoting a division on an equal basis. To this extent, the suggestion that Article 6 and customary rules have similar contents is *de jure* perfectly acceptable; so much so that the proposition that Article 6 was intended to ensure that delimitations would not result in unfair boundaries finds support in the ILC's work and in the scholarly writings[314].

Notwithstanding this, the assertion that the object of Article 6 is a delimitation of the boundary in accordance with equitable principles must be seen with caution[315]. Indeed, this appears to have alternative interpretations. It might be read as meaning that the norm contained in Article 6 was deemed to convey the view of the ICJ in the *North Sea* cases as regards maritime delimitation. When read in context, however, the reverse idea is equally

(307) Paras.1.2.b)(i), 1.3.a), 1.3.c)(i) *supra*.
(308) ILC/Yearbook/1956(II), p.300; the cases of "exceptional configurations of the coast", "the presence of islands or of navigable channels" where mentioned. Other examples, such as the existence of special mineral exploitation rights or of mineral deposits, were mentioned during the debates of the First Conference (Off.Rec./1958(VI), pp.91-98, in particular pp.93, 95).
(309) ILC/Yearbook/1953(I), pp.131-133.
(310) Paras.1.3.b), 1.3.c)(i) *supra*.
(311) RIAA/18, pp.45-46, paras.69-70.
(312) *Ibid.*, p.75, para.148.
(313) *Ibid.*, pp.48-49, para.78.
(314) *Ibid.*, p.45, para.70. Cf. para.1.3.c)(i) *supra*.
(315) *Ibid.*, pp.45-48, paras.70, 75.

possible. It can also mean, similarly to what Judge Ammoun suggested, that delimitation in accordance with equitable principles equates to the proper interpretation and application of the combined equidistance-special circumstances rule. Insofar as this approach was averred 15-odd years later, in the *Jan Mayen* case, this proposition must be accepted; for "the Court used this linkage to justify exporting the equidistance method into customary law"[316].

In casu, this was consonant with what was affirmed as to the actual determination of the boundaries. The Tribunal stated not only that the existence of special circumstances did not give it *carte blanche* to employ any method that it chose, but also that state practice utilised special circumstances as justification for adjusting equidistance, which it preferred to discarding equidistance altogether[317]. It was this that led it to utilise equidistance as the starting point for the delimitation, in both the Channel Islands and the Atlantic region[318].

This view is reinforced by the conviction that such interpretation envisaged a more settled development of delimitation law. The Tribunal was careful enough not to contradict the 1969 decision, but it did not endorse its contents in terms of delimitation standards[319]. Aware of the 'rupture' between conventional and customary law created by that Judgment, the Tribunal sought a 'reconciling interpretation'. The antithetical positions assumed in the Third Conference, which resulted in a formula that attempted to conjugate equitable principles, equidistance and "all relevant circumstances"[320], was also weighed-up by the Tribunal[321]. The assertion that the *Revised Single Negotiating Text* (RSNT) did "not appear to visualise the solution of cases like the present one on principles materially different from those applicable under the 1958 Convention or under general international law" appears to support this idea[322]. This view, whereby international law-making process is portrayed as a *continuum*, brought about a re-evaluation of state practice. If this proposition is accepted, the Tribunal's interpretation of Article 6, besides being acceptable *de jure*, is to be seen as an attempt to bring together state practice, customary law and conventional law, and to bridge the 'gap' created in 1969[323].

(316) Evans/1999, p.160.
(317) RIAA/18, pp.114, 116, paras.245, 249.
(318) Near the Channel Islands, the equidistance-line between the mainland coasts was viewed as the "primary boundary".
(319) It should not be forgotten that two of the arbitrators were also judges of the ICJ. The intention of not contradicting the 1969 decision is clearly present in the way in which the Court dealt with the concepts of natural prolongation and proportionality.
(320) Articles 62(1) and 71(1) of the Revised Single Negotiating Text (RSNT), Off.Rec.-1973/82(V), pp.164-165; Articles 74(1) and 83(1) of the Informal Composite Negotiating Text (ICNT), Off.Rec.-1973/82(VIII), pp.16-17.
(321) Anderson/1999 (unpublished).
(322) RIAA/18, pp.37, 56-57, paras.48, 96. This point was made in order to answer France's argument that general customary law had undergone material changes that rendered obsolete the 1958 Conventions. Cf. Brown/1992, pp.102-103; Quéneudec/1979, pp.70-72; Symmons/1979, pp.182-183; Colson/1978, pp.102-103, 111.
(323) Colson/1978, p.111.

2.4.c)(ii) Conventional and Customary Law

The conclusions of the previous paragraph are however not enough to clarify some aspects of the reasoning in relation to the relationship between Article 6 and customary law. State practice and the work in the Third Conference could have been analysed in greater depth. Having concluded that state practice showed, first, that the choice of method was not totally free, and secondly, there was some preference for modifying equidistance rather than discarding it *in toto*, it was advisable to assert what conclusions, if any, should be drawn as to the existence of an *opinio juris* supporting Article 6[324]. The conclusion that this provision and customary law both envisaged an equitable delimitation required further elaboration. Whether state practice formed a settled practice showing that equidistance was legally the starting point for delimitation was one essential question. The fact that the findings of the *North Sea* Judgment as regards customary law had been far from unanimous, amongst both judges and scholars, was enough for attempting an answer thereto.

Associated with this, is another aspect that deserves attention. By 1976, the Third Conference had already agreed that natural prolongation would only have relevance, as root of title to the continental shelf, in relation to areas beyond 200 M. Such an idea was clearly reflected in the draft articles[325]. Consequently, the main argument upon which the rejection of equidistance in the *North Sea* cases had been supported – i.e. that natural prolongation and proximity were irreconcilable – had disappeared[326]. Distance to the coast, i.e. *proximity*, had prevailed over natural prolongation as entitlement criterion. The consensus in the Third Conference deserved a closer examination because it was supported by state practice [327]. Its impact on delimitation law is recognised in the Award only implicitly, with the emphasis

(324) On the conclusions of the Tribunal, cf. para.2.4.a)(ii) *supra*.

(325) Cf. RSNT (Article 64) and ICNT (Article 76), at Off.Rec.-1973/82(V), p.164 and Off.Rec.-1973/82(VIII), p.16. The key question that remained unresolved was the definition of the outer limit of the continental margin, that is, the precise way in which geological features would entitle states to claim a continental shelf beyond 200 M (Nordquist/1993, pp.841-856, in particular p.854). However, it must be noted that, taking no account of these developments, the ICJ reaffirmed in 1978 the doctrine of the 1969 Judgment. In the *Aegean Sea* case, it stated that natural prolongation was "a criterion for determining the extent of a coastal state's entitlement to continental shelf as against other states" (ICJ/Reports/1978, p.37, para.86). Undoubtedly, the ICJ had previously affirmed in the *Fisheries Jurisdiction* cases, as regards the works in the Third Conference, that judgments could not be rendered "*sub specie legis ferendae*, or anticipate the law before the legislator has laid it down" (ICJ/Reports/1974, pp.24-25, para.53). But this assertion was made in a totally different context. First, the Icelandic claims concerned fisheries jurisdiction, and not continental shelf rights. Secondly, whereas in that case the issue in discussion implied *an extension* of coastal states' jurisdiction, in respect of the continental shelf the Third Conference intended *to limit* claims based on the exploitability criterion. Finally, while in 1974 the Third Conference was in its initial stage, by 1977 some major issues had already been settled with wide support from states. Besides all this, the ICJ did not affirm that customary law in 1974 did not allow the exercise of fisheries jurisdiction beyond 12 M. It simply concluded that the exclusive fishing rights claimed by Iceland were "not opposable" to the United Kingdom (ICJ/Reports/1974, pp.35-36, para.79). Apparently the Court "deliberately evaded the question" as to "whether Iceland's claims [were] in accordance with international law" (Declaration of Judge Ignacio-Pinto, ICJ/Reports/1974, p.37). This view is apparently supported by judges Forster, Bengzon, DeAréchaga, Nagendra Singh and Ruda, in their joint Separate Opinion, when asserting that they voted favourably only inasmuch as the Judgment did "not declare [...] that such an extension [of jurisdiction was] without foundation in international law and invalid *erga omnes*" (ICJ/Reports/1974, p.46).

(326) Paras.2.3.a)(ii), 2.3.c) *supra*.

(327) On the relevance to customary law of deliberations and consensus in plenipotentiary conferences, cf. Danilenko/1993, p.283; DeAréchaga/1978, p.14; D'Amato/1971, pp.164-165.

put on the *geographical configuration of coastlines* rather than on natural prolongation[328]. However, the Tribunal failed to analyse the effects of the concatenation between state practice and those developments in the Third Conference.

Avoiding potential contradictions with the 1969 Judgment was clearly one major concern of this Award. This is patent in the way in which the Tribunal sought to reconcile another aspect of the interpretation of Article 6. In the *North Sea* cases, the ICJ considered that the two paragraphs of this article were materially different, and did not encompass all situations of continental shelf delimitation. Equally, it attempted to distinguish the effects of natural prolongation and equidistance in the attribution of continental shelf on the basis of the distinction oppositeness-adjacency[329]. Without openly criticising the *North Sea* cases, the Tribunal adopted a different view. Considering that no inference to the contrary could be derived from state practice or from the *travaux préparatoires*, it affirmed that the two paragraphs incorporated the same rule, and that no *casus omissus* existed. All situations would "fall under either paragraph 1 or paragraph 2" of Article 6. The association with natural prolongation was rejected, implicitly, by asserting that oppositeness and adjacency were characterised exclusively by the geographical relationship between coasts. This was said to find support in the work of the Third Conference, insofar as no material distinction between these situations was made in the RSNT draft provisions[330]. Hence, it is argued that, although equidistance was treated as a normative standard – not as a mere method[331], the juridical status of the combined rule remained unclear. Whether the Article 6 rule had acquired a customary nature was a carefully avoided issue, particularly as to the use of equidistance as the starting point for delimitation. It was asserted, on the basis of state practice, that the existence of special circumstances did not warrant *per se* the full dismissal of equidistance. Why it was so however, remained unexplained[332].

Reluctant to contradict the *North Sea* cases, the Tribunal avoided the conclusion that an *opinio juris* had emerged from the actual use of the Article 6 rule in state practice. The contents thereof, of customary law, and of the LOSC draft articles, were not compared *in abstrato*. What was said was that in "*cases like the present one*" all three formulae would "*lead to much the same result*"[333]. The fact that the repercussions of asserting that Article 6 and customary law envisaged both an equitable delimitation were not fully determined is

(328) This was deemed to be "a salutary development" of the delimitation law (Bowett/1979, p.221); cf. also Dipla/1984, p.183.
(329) ICJ/Reports/1969, pp.36-38, 46, paras.54, 57-59, 79.
(330) RIAA/18, p.53-56, 97-103, 110-111, paras.89-95, 206-218, 237-238. However, it must be noted that the Tribunal seemed to consider that the terms "median" and "equidistant" were not exactly equivalent, and should apply to situations of oppositeness and adjacency respectively (RIAA/18, p.56, fn.12). Cf. para.1.3.c)(iii) *supra*; Brown/1992, pp.112-115; Tanja/1990, p.165; Dipla/1984, p.180; Bowett/1979, pp.210-212; Quéneudec/1979, pp.95-97; Zoller/1977, pp.381-382, 399-401.
(331) RIAA/18, pp.44-45, paras.68, 70.
(332) As argued later, that this seems to equate to the use of state practice as *opinio aequitatis*; cf. paras.7.1., 7.4.c) *infra*).
(333) RIAA/18, pp.43-44, 56-57, paras.65, 96; emphasis added. Cf. Brown/1992, p.104.

explicable perhaps as judicial restraint[334]. Owing to the controversy raised by the *North Sea* Judgment, and the debates in the Third Conference, one would nevertheless suggest that a less restrained approach would have been justified.

2.4.c)(iii) Special Circumstances, Geography and Equity

As stated above, the application of Article 6 *in concreto* must be seen separately from its interpretation *in abstrato*. Asserting that the combined rule contained in Article 6 amounted to seek an equitable solution is hardly debatable. What is perhaps questionable is the way in which this provision was applied *in casu*.

Incidentally, it must be stressed that the underlying interpretation of the Tribunal appears to have in mind a very practical problem: the need to *define the precise course of the boundary*. This crucial point offers further explanation as to why Article 6 was viewed as having the same object of customary law. Only Article 6 could equip the Tribunal with a practical standard. Although equitable principles appeared as 'customary law', they offered no guidance. States overwhelmingly utilised the Article 6 rule. For the Tribunal, it became clear that the 'discovery' of the boundary-line had to be grounded on an adjustment of the equidistance-line. Clearly, equitable principles remained somewhat of a 'mystery'. Should account be taken of the way in which after the *North Sea* Judgment the states concerned conducted themselves to agree on a boundary-line[335], the proposition above holds true.

Criticism of the interpretation of the concept of special circumstances adopted in the Award stems only from the actual solutions reached. Before addressing this point, it must be remembered that the cautious statements made by the ILC in relation to that notion reflected the difficulties of foreseeing all possible situations. An exhaustive enumeration of special circumstances was not given because it was thought that case-to-case assessments were inescapable. The idea that no *onus probandi stricto sensu* lay on the state claiming the existence of special circumstances was in this light adequate[336]. Under the principle *jura novit curia*, provided that the facts are brought before the court, judges are empowered to gauge which circumstances are "special", i.e. which facts result in inequity[337]. The dictum that "geographical and other circumstances" had to be balanced to achieve an equitable delimitation is therefore accepted without difficulty[338]. Equally, that the function of equity is to abate inequitable effects of distorting geographical features is uncontroversial[339].

(334) Analysing judicial caution in the light of the development of international law, of which the scope of the decision is one aspect, cf. Lauterpacht/1958, pp.75-152 (in particular pp.75-84).
(335) Para.2.3.d) *supra*.
(336) RIAA/18, pp.44-45, para.68.
(337) Dipla/1984, pp.172-173. On the existence of a burden of proof in relation to special circumstances, cf. para.1.3.c)(i) *supra*.
(338) RIAA/18, pp.45, 57, 112, paras.70, 97, 239.
(339) *Ibid.*, p.117, para.251.

What must be realised, however, is that not all circumstances creative of inequity can be brought into the delimitation process[340]. Although the Tribunal endeavoured to look for guidance in state practice, the practical outcome is not totally satisfactory. The steps are clear; but the justification is not. The criticism of Bowett, stating that "the Court could have rendered more assistance by giving some actual citations of state practice, at least in those cases where it is by no means obvious what practice the Court has in mind", is perfectly understandable. As he notes, the "reference to semi-enclaves" does not present justification for the "complete enclave solution"; and it is questionable to assume that the attribution of partial-effect to islands reflects what the states had considered until then to be an equitable delimitation[341]. This author cites the 1971 Italy/Tunisia agreement as a possible precedent considered in terms of semi-enclaving islands close to the equidistance-line; and the 1965 agreement between Iran/Saudi Arabia seems to be the precedent from which the idea of half-effect equidistance-lines stemmed. Here, the island of Kharg (lying at roughly 17 M off the coast of Iran) was only given half-effect in determining the equidistant boundary. However, the 1965 agreement was not ratified, being the line altered by an agreement of 1968, which taking into account the discovery of petroleum structures in the area envisaged a more equitable solution. The resulting boundary-line zigzags across the said half-effect equidistance-line[342].

The 'distortive' effect produced by the Channel Islands and the Scilly Isles on the equidistance-line seemed sufficient to classify them as special circumstances, creative of inequity. But the reasoning of the Tribunal as to the modification of the equidistance-line is somewhat unclear. First, since no enclaving examples existed in state practice, the solution found for the Channel Islands had to be carefully reasoned. What factors justified the mere attribution of what was (for practical purposes) a territorial sea belt is a question that should have been elaborated further. It is especially so because, at that time, the consensus in the Third Conference was that all states were in principle entitled to 12 M of territorial sea. As it stood, it appeared that the Channel Islands were attributed no continental shelf area[343].

(340) Para.7.2. *infra.*

(341) Bowett/1979, pp.228-229. Rosenne criticises this solution because "the notion of giving half-effect to geographical features does not appear in [...] the Convention on the Continental Shelf of 1958" (Rosenne/1988, p.97).

(342) Pietrowski, Jr, IMB/Report 7-7, pp.1519-1524. On the influence of the Iran/Saudi Arabia agreement, cf. also Dipla/1984, p.181. Other examples of treating islands as circumstances allowing the departure from equidistance may also have influenced the Tribunal. The 1968 Italy/Yugoslavia agreement is one example in which some islands located close to the equidistance-line from the mainland coasts were given a reduced effect similar to 12-mile semi-enclaves. In the 1969 Qatar-Abu Dhabi agreement, Dayinah Island was allocated only a 3-mile belt. In the 1973 Canada/Denmark (Greenland) agreement, partial or no-effect was given to some islands. On these agreements, cf. Appendix 2, B25-B26, D12, D45, D57.

(343) RSNT, Articles 2 and 128(3), Off.Rec.-1973/82(V), pp.154, 172; ICNT, Articles 3 and 121(3), Off.Rec.-1973/82(VIII), pp.6, 21. Whether by 1977 the 12 M territorial sea was customary law is a question that should have been addressed. Another question concerned the idea that only islands that "could not sustain human habitation or economic life" would not be entitled to at least some continental shelf. In scholarship, Brown argues that the delimitation had to be equitable in relation to the United Kingdom

A second point concerns the use of half-effect (and not another partial-effect) to adjust the equidistance in the Atlantic region, and the fact that the actual application of that technique was again severe for the United Kingdom. Even admitting that the effect of the Scillies had to be mitigated, the way in which the half-effect was applied is not equitable. To have a parity of treatment, it is preferable to use a bisector-line computed in relation to the angle formed between the equidistance-line from the mainland coasts, and an equidistance-line between the Scillies and Ushant. All insular features off the mainland coasts would thus be treated equally. The resulting line runs between the awarded line and the equidistance-line giving full-effect to the Scillies (Figure 3)[344]. The abatement would be predicated on the mainland coasts' relative location and, importantly, it would not give Ushant full-effect while attributing only half-effect to the Scillies. The fact that Tribunal's solution produces a line close to the midway-line between the two claims is perhaps more than just coincidence.

The most relevant contribution of this Award is the idea that even if equidistance leads to inequity, that does not justify dismissing it without further reasoning. Seeking reasonable adjustments thereto is an indispensable step, consecrated by state practice[345]. The notion of "primary boundary" in the Channel Islands region and the use of half-effect equidistance-lines in the Atlantic region are exemplificative of this approach. These examples reflect the prevalence that must be given to geographical circumstances, and set constraints to the role of equity. Important is also the idea that 'geographical special circumstances' are those that cause inequitable shifts on the equidistance-line. Which are the "other circumstances", and how to assess their 'special status', is a question that should have been subsequently answered. Surely, there are limits to the "other" considerations that courts may balance for attaining equitable delimitations. Admitting otherwise would entail ascribing to judges an *ex aequo et bono* competence. Indeed, if this Award has a weakness, it is precisely the failure to identify the limits to weighable circumstances[346].

References, for instance, to the broad notions of "navigation defence and security interests", even complemented by the assurance that they could not 'negative' conclusions derived from the geographical, political and legal circumstances, illustrate the confusion thereby maintained[347]. The Truman Proclamation, which the ICJ considered as the juridical source of the whole doctrine of continental shelf, clearly stated that continental shelf claims

(Brown/1992, pp.119-120). Lauterpacht questions why the enclave was 12 miles, and "not 6, nor 18 or more" (Lauterpacht/1991, p.129). Raising similar difficulties, cf. Dipla/1984, p.185.

(344) Although applying the half-effect method differently, Bowett suggests a similar solution (Bowett/1979, pp.231-240).

(345) RIAA/18, pp.114-117, paras.245-250.

(346) Judicial restraint seems to explain this approach (para.2.4.c)(ii) *supra*). One would suggest that, in view of the development of international law, the Tribunal could have had a more elaborative approach.

(347) RIAA/18, pp.90, para.188.

were related only to the "exercise of *jurisdiction over the natural resources* of the subsoil and seabed". It was affirmed therein, that "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation" *would not be affected in any way*. The idea that navigation interests were irrelevant for purposes of continental shelf delimitation was also mentioned during the ILC debates[348]. Whatever the weight, in continental shelf delimitation, the assessment of navigation and security factors is indeed open to question[349]. Equally, the political status of islands, their demography and economic life, are considerations that only arguably can be taken into account[350]. All in all, what had been a crucial question in the *North Sea* cases – the identification of the relevant non-geographic factors in continental shelf delimitation – thus remained unanswered.

(348) François, ILC/Yearbook/1953(I), p.129.

(349) Arguing that the continental shelf regime does not include defence-related and navigation-related rights, cf. O'Connell/1989, pp.467-503 (p.488, in particular); Andrassy/1979, pp.49-53; Anand/1976, pp.31-75, 81-99; Auguste/1960, pp.29-103 (and pp.243-343, for the practice of states in Latin America).

(350) These factors were used mainly for the delimitation in the Channel Islands region; but they were also mentioned in relation to the Atlantic region; cf. RIAA/18, pp.88-89, 93, 116, paras.184, 186, 197, 248.

Chapter 3

MARITIME DELIMITATION IN THE LOSC

3.1. Introduction

The key steps in the evolving process of maritime delimitation law pre-LOSC were described in the two previous chapters. In the LOSC, Articles 15, 74(1) and 83(1) are the provisions that govern the delimitation of the territorial sea, the EEZ and the continental shelf respectively. Their drafting history, in particular that of Articles 74(1) and 83(1), have already been thoroughly reviewed and discussed. Describing exhaustively the evolution of these provisions, and the debates within the Third Conference, is not the purpose of this chapter. Insofar as these provisions have been interpreted by scholarship in discrepant ways, further examination of the questions raised thereby is however required. Thus, references will have to be made to specific aspects of the drafting history.

During the Third Conference, the topic of delimitation was deeply intertwined with the topic of entitlement of islands to maritime zones. This fact had become obvious since the opening statements in 1974. As the Irish representative put it, "all states were greatly interested in the question of islands and rocks, their precise definition *and their effect on delimitation*"[351]. Other states – Greece, Tunisia, Turkey, and Cyprus – also made reference to the relationship between the two issues[352]. Ultimately, however, the LOSC delimitation provisions made no distinction between continental and insular territories. No autonomous references to islands will therefore be made in this chapter.

At this stage, it is worthwhile mentioning several features of the LOSC that contrast with the background presented in the two previous chapters. The comprehensive nature of the Convention is, in terms of international law of the sea, an important contextual reference for the interpretation of its provisions. Its quasi-universal acceptance is another element that will probably confer upon the conventional regime (as a whole) a greater degree of stability. In relation specifically to the provisions on maritime delimitation, it was noted at the outset that, even when they are not applied as conventional law *qua tale*, they have provided the legal framework for effecting delimitation involving states that are not parties to the LOSC (e.g. in the *Eritrea/Yemen* arbitration, and in the *Qatar/Bahrain* case)[353]. It is indeed

(351) Off.Rec.-1973/82(I), p.159, emphasis added.
(352) *Ibid.*, pp.129, 153, 168-169, 175.
(353) Cf. General Introduction *supra*.

unlikely that the conventional delimitation formulae will change in the years to come, or that they will be overturned by customary law. On the contrary, inasmuch as no reservations are allowed to the conventional provisions[354], the emergence of customary rules stemming from, and consonant with, the LOSC is likely to occur[355]. Customary law conforming to the LOSC will be the rule rather than the exception. This also means that courts will now have the possibility of elaborating on, and refining, the interpretation of those rules in a steadier context – as to maritime delimitation, if only because the LOSC brought a higher degree of certainty to the spatial definition of maritime jurisdiction. Hesitations relating to the breadth of maritime zones were to a great extent resolved; and the criteria of entitlement to these zones were more accurately defined.

3.2. Brief Notes on Treaty Interpretation

Most analyses have put great emphasis on the drafting history of the conventional provisions on delimitation. Without discounting the relevance of this element, it is possible nonetheless to indicate other elements that are equally (if not more) important. For instance, it has to be understood that the quasi-legislative and quasi-universal character of the LOSC will indelibly bear upon the interpretation of its provisions. The meaning conveyed by each provision is embedded in a certain phraseology whose interpretation has to follow the tenets of juridical hermeneutics. Before turning to the actual examination of the delimitation rules, some essential aspects of treaty interpretation should therefore be considered.

There are three main theories in treaty interpretation[356]. The search for the intention of the parties characterises the subjective school. The objectivists assert that the fundamental aim is to determine the meaning of the text. The teleological approach stresses the need to look into the object and purpose of the treaty. The rules of interpretation incorporated in the 1969 Vienna Convention on the Law of the Treaties (hereinafter "VCLT") contain elements of the three schools of thought[357]. It is nevertheless clear that the objectivist standpoint was favoured. This is confirmed by the ILC comments on the draft articles: "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties"[358]. The text is therefore the primary expression of the *common will of the parties* – a standpoint which the Court has

(354) LOSC, Article 309. Analysing the question of 'disguised reservations', cf. Nelson/2001.
(355) Cf. Danilenko/1993, pp.156-162; Schachter/1985, p.98; Virally/1985, p.184; DeAréchaga/1979, p.14; D'Amato/1971, pp.162-166; Baxter/1971.
(356) Cf. Aust/2000, pp.184-202; Nguyen/Daillier/Pellet/1999, pp.250-263; Jennings/Watts/1997, pp.1266-1284; Shaw/1997, p.656; Bernhardt/1995, pp.1419-1420; Sinclair/1984, pp.114-115; McNair/1961, pp.364-382.
(357) Articles 31 and 32.
(358) ILC/Yearbook/1966(II), p.220.

deemed to be customary international law[359]. On account of their very general nature, however, these rules of interpretation cannot be seen as more than a set of guidelines. The relative weight to be attributed to each theory, when interpreting treaty provisions, thus can only be established *in concreto*.

In the specific case of the delimitation provisions embodied in the LOSC, several arguments seem to reinforce the adoption of an objectivist interpretation, focusing primarily on the textual element. First, subjectivist interpretations are undoubtedly more appropriate to bilateral treaties, and occasionally to multilateral treaties with a very small number of parties. The *common intention of all parties* is in such instances determined more easily. It is difficult, perhaps impossible sometimes, to determine a *common intention* in provisions of quasi-universal treaties[360]. As to the delimitation provisions of the LOSC, since most states had in mind a small number of delimitations (the factual details of which are virtually unchangeable and somewhat unique), the difficulties in establishing an intention *common to all states* is even greater. Surely, all states would try (and indeed tried throughout the Third Conference) to safeguard their own positions in potential or actual disputes.

Secondly, it must be considered that the Third Conference was based on a consensus process – a *package-deal approach* – in which the substantive discussion often took place off the record. Unofficial documents were recurrently used in the negotiations, thus raising further difficulties; for the official documents do not give a comprehensive account of the debate on most issues. Only a few of the Third Conference documents may really "be regarded as *travaux préparatoires* in the traditional sense" (used in Article 32 of the VCLT)[361]. Since the *travaux préparatoires* are the key evidence of the intention of the parties, in the present case this intention is harder to elucidate.

Thirdly, the interpretation of any provisions ought to be made in light of the wide context in which they are integrated, and of the subsequent state practice in relation to the treaty[362]. State practice, contemporary and subsequent to the treaty, normally provides sound guidance as to what constituted the intention of the parties. However, inasmuch as the proof of acceptance by all (or a significant majority of the) parties is required for state practice to be relevant in interpretation[363], in the case of a quasi-universal treaty this element is of little or no use. It is even more so when the matter at hand is typically

(359) Cf. *Libya/Chad* case, ICJ/Reports/1994, pp.21-22, para.41; *Qatar/Bahrain* case, Judgment on Jurisdiction and Admissibility, ICJ/Reports/1995, p.18, para.33.

(360) McNair/1961, pp.412, 423.

(361) Allott/1983, pp.6-7.

(362) VCLT, Article 31(2)(3). The context includes the text, preamble and annexes, and any *agreement between all parties* made in connection with the conclusion of the treaty, or any instrument made by one or more parties and accepted by the others as related to the treaty.

(363) This results from the actual text of Article 31 of the VCLT. Even before this convention was signed, this view already seemed to have been followed by jurisprudence and scholarship (cf. McNair/1961, pp.424-431; Fitzmaurice/1957, p.223).

bilateral, as in maritime delimitation, which is why a cautious approach is required in this respect.

Finally, it must be remembered that the LOSC constitutes, in a way, a true 'legal system' of its own. The organised structure of principles, institutions, rules, and procedures, supported by a basically coherent set of interactions between these elements, is a systematic reference of interpretation that must not be overlooked. Thus, the conventional regime as a whole appears as a sort of *lex specialis*. Interpretations of a rule based on the systematic element, therefore, are likely to be preferable to interpretations of the same rule outside its systematic context. Moreover, account should be taken of the normativity provided by the principles that shape the LOSC.

All in all, interpretations essentially based on objective elements should prevail. In terms of the context, the principle of integration, which conveys the notion that treaties are to be interpreted as a whole, must be given due consideration. An *actualist interpretation* should also be preferred to a historical one. As the ICJ stated already, "an international instrument has to be interpreted and applied within *the framework of the entire legal system prevailing at the time of the interpretation*"[364]. Law has to reflect the evolution of the society from which it stems. In 'deciphering' the meaning embedded in the textual element of the delimitation provisions, attention thus must be drawn to interpretative aspects other than the drafting history, namely the context provided by the LOSC and the systematic element of interpretation. Only then it becomes possible to grasp their true *ratio legis*.

3.3. EEZ and Continental Shelf

3.3.a) Drafting History

Contrasting with what happened in relation to the territorial sea, the provisions on EEZ and continental shelf delimitation stem from difficult negotiations, which dealt with three issues of a different nature: the normative standards to apply in the delimitation; the interim arrangements to adopt, pending a final delimitation; and the procedural regime of dispute-settlement. This analysis will address only the first of these problems.

The controversy surrounding the delimitation formulae is reflected in the common drafting history of Articles 74(1) and 83(1)[365]. The intention to have recourse to identical

(364) *Namibia AO*, ICJ/Reports/1971, p.31, emphasis added. Similarly, cf. the *Aegean Sea* Case, ICJ/Reports/1978, p.34.

(365) For an account of the draft history of these provisions, cf. Nordquist/1993, pp.796-816, 948-985; Oude Elferink/1994, pp.27-37, 113-130; Ahnish/1993, pp.72-76; Brown/1992, pp.313-360; Caflisch/1991, pp.477-486; Tanja/1990, pp.81-116; Jayewardene/1990, pp.308-316; Jagota/1985, pp.219-271; Dipla/1984, pp.213-231; Symonides/1984, pp.25-46; Caflisch/1983, pp.92-96; Judge Oda, Dissenting Opinion, *Tunisia/Libya* case, ICJ/Reports/1982, pp.234-262, and Separate Opinion, *Jan Mayen* case, ICJ/Reports/1993, pp.106-109.

wording in these provisions was manifested by some states at very early stages[366]. Inasmuch as both the EEZ and the continental shelf are primarily resource-related areas, the idea of negotiating them jointly is understandable. Initially, however, the formulae included in the "Main Trends" document were not the same for the two zones[367]. One reason seems to explain this fact: whilst the delimitation of the continental shelf had already been examined in the 1958 Conference, and by international jurisprudence, the delimitation of the EEZ was being addressed for the first time.

The negotiation of these provisions soon revealed the existence of two opposing groups of interests: the "Equidistance Group" and the "Equitable Principles Group". The former argued for the combined equidistance-special circumstances rule, whereas the latter favoured the idea of delimitation in accordance with equitable principles[368]. The first attempt to reconcile the 1958 rule and the *North Sea* Judgment appears in the Informal Single Negotiating Text (ISNT, 1975). Articles 61(1) and 70(1) replicated the relevant part of the *dispositif* of that decision, adding a reference to equidistance[369]. This formula was kept in the Revised Single Negotiating Text (RSNT, 1976) and in the Informal Composite Negotiating Text (ICNT, 1977). It provided that delimitation should

> 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.[370]

Neither group was however willing to accept this wording. The delimitation issue was eventually considered as one of the unresolved hard-core issues, and was referred to Negotiating Group 7 (NG7)[371]. The group negotiations started in 1978, and were predicated on proposals put forward by each of the delimitation groups. The "Equidistance Group" considered that the delimitation should employ

> as a general principle, the median or equidistance-line, taking into account any special circumstances where this is justified.[372]

Differently, the final proposal of the "Equitable Principles Group" suggested that delimitation should be effected

> in accordance with equitable principles, taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution.[373]

(366) Cf. 1974 proposals presented by The Netherlands, Kenya-Tunisia, and France, Off.Rec.-1973/82(III), pp.190-191, 205, 237.
(367) Provisions 82(CS) and 116(EEZ), Off.Rec.-1973/82(III), pp.119-120, 126; cf. Platzöder/Documents(III), pp.293-294, 312-313, and pp.330-331, 351-352, 375-376. In the case of the EEZ, reference was made to "delineation" instead of delimitation.
(368) On the "Group System" in the Third Conference, cf. Nordquist/1985, pp.68-86; the states included in each "Delimitation Group", 24 in the "Equidistance Group" and 29 in the "Equitable Principles Group", are identified at pp.78-79.
(369) Off.Rec.-1973/82(IV), pp.162-163.
(370) Articles 62(1) and 71(1), Off.Rec.-1973/82(V), pp.164-165; Articles 74(1) and 83(1), Off.Rec.-1973/82(VIII), pp.16-17.
(371) Document A/Conf.62/62 (13 April 1978), Off.Rec.-1973/82(X), pp.7-8.
(372) Document NG7/2 (20 April 1978), Platzöder/Documents(IX), pp.392-393.
(373) Documents NG7/4 (21 April 1978) and NG7/10 (1 May 1978), Platzöder/Documents(IX), pp.397, 402.

The proposals helped somewhat to tame the waters. Unsurprisingly, the necessarily consensual nature of delimitation was undisputed. It became also clear that the difficulties were centred on the operative criteria to apply in the absence of an agreement: either the "equidistance-special circumstances rule", or the recourse to "equitable principles". In the proposal of the "Equidistance Group", equidistance was attributed the status of a "general principle". This idea followed the notion of a "general rule" that had been mentioned during the ILC debates, and argued for the advantages of adopting such terminology. Although referring to equidistance as a "principle", this proposal kept the balance between objectivity (equidistance) and 'subjectivity' (special circumstances) struck in 1958[374]. By contrast, the proposal put forward by the "Equitable Principles Group" argued that equidistance was a mere method. The striking feature thereof is that it did not present any objective standard for determining the course of the boundary. All standards included therein are 'subjective' (equitable principles, relevant circumstances); and it confers unbound discretion through the explicit reference to "any method". The ambiguity conveyed by these terms is clearly not counterbalanced by any measure of objectivity. Following clearly in the footsteps of the *North Sea* Judgment, this formula may be criticised on exactly the same grounds[375].

The negotiations in NG7 were characterised by a series of proposals that, for one reason or another, were not accepted[376]. In March 1980, the Report of the Chairman of NG7 advanced another proposal for the delimitation articles, which again attempted to combine equidistance and equitable principles[377]. Although with caution, the "Equidistance Group" reacted positively. The "Equitable Principles Group", on the contrary, rejected it "even as a basis of negotiation"[378]. Notwithstanding this objection, the proposal was incorporated in the second revision of the ICNT (1980). Subsequently, the states of the "Equitable Principles Group" addressed a letter to the President of the Conference formally rejecting the text[379].

Further negotiations did not succeed in bringing together the views of the two sides. Insofar as it would be possible to pair many states (one from each group) with ongoing or potential maritime delimitation disputes, the uncompromising stance of both groups is unsurprising[380]. By 1981, after meetings with the two states representing the delimitation groups (Spain and Ireland), the President of the Conference put forward a new proposal[381].

(374) Paras.1.3.a), 1.3.c)(i) *supra*, 3.4. *infra*.
(375) Paras.2.3.b), 2.3.c), 2.3.d) *supra*.
(376) Cf. e.g. Documents NG7/6 (24 April 1978), NG7/9 (27 April 1978), NG7/28 (28 March 1979), NG7/29-Rev.1 (5 April 1979), NG7/35 (10 April 1979), Platzöder/Documents(IX), pp.399, 401, 448, 451, 455.
(377) Off.Rec.-1973/82(XIII), pp.77-78.
(378) Statements by Spain (Equidistance Group), and by Ireland (Equitable Principles Group), Off.Rec.-1973/82(XIII), pp.13-15.
(379) Off.Rec.-1973/82(XIV), p.8.
(380) Cf. Anderson/1999 (unpublished); Manner/1984, pp.630-631. Consider e.g. Turkey and Greece, Morocco and Spain, Libya and Malta, Senegal and Guinea-Bissau, Ireland and the United Kingdom.
(381) Document A/Conf.62/WP.11 (27 August 1981), Platzöder/Documents(IX), p.474.

The text made reference neither to equitable principles, nor to equidistance. This formula was eventually accepted by Ireland and Spain on behalf of both delimitation groups[382], and incorporated without changes as Articles 74(1) and 83(1) of the LOSC[383].

3.3.b) The Interpretation of Articles 74(1) and 83(1)

3.3.b)(i) Common Intention of the Parties

Notwithstanding what was said before as to the theories of treaty interpretation, the reality is that the drafting history of Articles 74(1) and 83(1) is crucial to interpreting them, although formally only the intention common to all the signatories and/or parties should be taken as relevant.

The compromising nature of the text of Articles 74(1) and 83(1) of the LOSC leads to one indisputable idea: none of the views of the delimitation groups prevailed in full. As the Chairman of NG7 noted early on in the process, if agreement were to be reached, a "neutral formula between divergent opinions" had to be found[384]. He expressed also the view that a more concise formulation (i.e. not mentioning any operative criteria) would certainly gather wider support more easily[385]. The formula then advanced, stated that delimitation should "be effected by agreement in accordance with international law". It differed from the final version basically in relation to the reference to "achieve an equitable solution". Taking into account that only the intention of all negotiating states is relevant, two inferences are possible. First, the two groups agreed that the result of the delimitation ought not to be inequitable. Secondly, the adopted wording purposely prescribes neither the use of equidistance, nor the use of equitable principles, as means of delimitation. Any attempt to go further would be unsuccessful. The records make clear that, amongst the states that took the floor at the session in which the proposal was presented to the Conference, the majority wanted more time to study the proposal – some of them viewed its adoption as a premature decision[386]. One state at least, expressed its open dissension against its contents[387].

At that time, the President of the Conference requested the states "*to avoid making any interpretative statements*"[388]. How a common intention on the means of delimitation can be determined without such statements is a striking question, which has however a

(382) Off.Rec.-1973/82(XV), pp.39-40.
(383) Draft Convention, Off.Rec.-1973/82(XV), pp.187, 189.
(384) Document NG7/9 (27 April 1978), Platzöder/Documents(IX), p.401. Adede describes the attempts initially made at neutral formulae (Adede/1979, pp.240-244).
(385) Document A/Conf.62/L.47 (24 March 1980), Off.Rec.-1973/82(XIII), p.77.
(386) Off.Rec.-1973/82(XV), pp.40-41 (United States, China, United Arab Emirates, Portugal, Venezuela, Qatar, Peru, Oman, Kuwait, Egypt, Bahrain, Israel).
(387) Off.Rec.-1973/82(XV), p.41 (German Democratic Republic).
(388) *Ibid.*, p.41, emphasis added.

simple answer: it is not. Fortunately, in the 1982 session, some states made references to the text of Articles 74(1) and 83(1) in their statements, stressing two key ideas. First, they showed that the agreed text constituted perhaps the only compromise possible under the circumstances[389]. Indeed, references to "equitable principles" and to "equidistance" were dropped as a result of a trade-off[390]. Secondly, those statements demonstrated that states from both delimitation groups believed that their position could be subsumed in the wording adopted[391]. Above all, that phraseology stemmed from the conviction that it had become impossible to arrive at another (more dense) formula without giving rise to objections by either group of states[392]. Significantly, the formula adopted was vague enough not to prejudice the actual interests of any state involved in a potential or actual maritime delimitation dispute[393].

The idea that the need to compromise forced states to accept one formula that had minimal substantive content is paramount. Spain, which headed the "Equidistance Group", noted that *the balance attained was a compromise that protected Spanish interests although not precisely through the desired regulations*[394]. Its counterpart in the "Equitable Principles Group", Ireland, confirmed similarly that only *by abandoning efforts to express the relevant law substantively* had the stalemate been broken[395]. This interpretation was supported in the *Tunisia/Libya* Judgment, when the Court stated "any indication of a specific criterion which could give guidance to the interested states in their effort to achieve an equitable solution *ha[d] been excluded*"[396]. As an unequivocal statement of the Tribunal in the *Eritrea/Yemen* arbitration recognises,

> there has to be room for differences of opinion about the interpretation of [Articles 74(1) and 83(1)] which, in a last minute endeavour at the [Third Conference] to get agreement on a very controversial matter, *were consciously designed to decide as little as possible.*[397]

All things considered, one conclusion may be drawn. It is hard to assert, with any degree of certainty, which was the common intention of the parties in regard to the means of delimitation. When attempting to interpret Articles 74(1) and 83(1), this conclusion must be taken in due account. From the whole negotiation process what it is fair to infer is that the

(389) Off.Rec.-1973/82(XVI), pp.47, 51-52, 55, 58-59, 62-63, 69, 73, 79, 82, 84; Off.Rec.-1973/82(XVII), pp.24, 71, 77, 90, 105, 119; in chronological order, Guyana, Finland, Sweden, Denmark, Kenya, Spain(1), Cape Verde, Algeria, Chile, Senegal, Barbados, Cyprus(1), Bahamas(1), Ireland, Cyprus(2), Turkey, Spain(2), Bahamas(2).

(390) Evans/1999, p.157; Bedjaoui/1990, p.371; Manner/1984, p.633.

(391) Supporting equitable principles or principles of equity in general: Algeria (Off.Rec.-1973/82(XVI), p.63), Ireland, Turkey, and Venezuela (Off.Rec.-1973/82(XVII), pp.24, 76-77, 119). Supporting equidistance: United Arab Emirates, Cyprus, Colombia, Spain, and Bahamas (Off.Rec.-1973/82(XVII), pp.50, 71, 82, 90, 105).

(392) Judge Evensen, Dissenting Opinion, *Tunisia/Libya* case, ICJ/Reports/1982, p.281, para.4.

(393) Oxman/1982, pp.14-15.

(394) Off.Rec.-1973/82(XVII), p.90.

(395) *Ibid.*, p.24.

(396) ICJ/Reports/1982, p.49, para.50.

(397) Eritrea/Yemen-II, para.116.

delimitation formula constitutes a compromise that embodies only what was common to both perspectives: the need to avoid inequitable solutions. The compromise stemmed from sensitive trade-off concessions, whereby the balance was struck. Neither equidistance, nor equitable principles were collectively endorsed in the Third Conference. The wording of Articles 74(1) and 83(1) amounts to a *phraseology that allows interpretations reconcilable with the two divergent intentions*[398]. It does not reflect a *mens legislatoris*; which is why one should concentrate on delving into its objective content, the *mens legis*.

3.3.b)(ii) The Text and the Context

In broad terms, Articles 74(1) and 83(1) contain three main structural parts, which prescribe that delimitation is to be effected: (I) "by agreement", (II) "on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice", (III) "in order to achieve an equitable solution". These parts of the textual element raise three outstanding issues that must be examined independently, as absolutely decisive for the interpretation. One ought to enquire, first, what constitutes the precise extent of the requirement to delimit boundaries by agreement. Under this provision, are states 'forced' to negotiate, even if they consider it not being in their interest to do so? This question concerns the 'procedural element', and will be addressed later[399]. Secondly, it must be asked on which normative basis is delimitation to be effected, according to these provisions. The following analysis will centre on this question. How is the equitableness of the solution to be assessed is the third question, which will be examined only in subsequent parts of this study[400].

As the rules in question are part of an international treaty, the text of the relevant provisions, and indeed the context in which they were drafted, necessarily forms the basis of analysis. The textual element thus will be the *starting point* for the interpretation, which considering the abovementioned difficulties as to the elucidation of the intention of parties on the basis of the *travaux prèparatoires*, acquires greater relevance in this case. However, the ordinary meaning of the words must be moulded by the surrounding context. *Lex non est textus sed contextus*. Owing to the principle of integration, besides the wider context provided by general international law, attention must be drawn to other LOSC provisions.

(398) Cf. e.g. Oude Elferink/1994, p.31; Ahnish/1993, pp.74-76; Brown/1992, pp.236-239, 345; Caflisch/1991, pp.480-481; Tanja/1990, pp.108-116; Evans/1989, p.31; Oda/1987, p.357; Attard/1987, p.224; Jagota/1985, pp.245, 264-270; Vukas/1985, pp.166-167; Manner/1984, p.640; Allott/1983, pp.21-24; Judge Oda, Dissenting Opinion, *Tunisia/Libya* case, ICJ/Reports/1982, p.246, and Separate Opinion, *Jan Mayen* case, ICJ/Reports/1993, pp.107-108.

(399) Para.3.6. *infra*.

(400) Para.6.4., Conclusions to Part II; also paras.7.2., 7.3., 7.4. *infra*.

3.3.b)(iii) Normativity and Equitable Solution

As far as normativity is concerned, the formula of Articles 74(1) and 83(1) has been criticised by scholars as vague, vacuous, indeterminate, virtually meaningless and bearing a regrettable degree of juridical uncertainty[401]. Oxman believes it does not "purport to lay down a normative rule to be applied in the absence of an agreement". He affirms, moreover, that it "says nothing of significance while, worse still, trying to give a contrary impression by introducing *unnecessary language* and *avoiding recognised terminology* associated with jurisprudence and scholarship"[402]. In juridical terms, the drawbacks are in fact considerable. The failure to lay down true normative standards is hardly understandable[403]. Nonetheless, this reveals an impact of realism on international law, namely the need felt during the Third Conference to find a compromise that would gather support from the vast majority of states. To the jurist is left the task of interpreting the rules as they are presented.

Apparently, the said articles establish that delimitation agreements shall "achieve an equitable solution". If taken literally on its own, this expression would open the door to any reasoning that would lead to equitableness, allowing for wide discretionary powers. Some limits have been introduced by prescribing that the solution must be founded on "the basis of international law". The meaning of the reference to Article 38 of the Statute of the ICJ is however not totally clear. It was suggested by Manner, who chaired NG7, that this reference to Article 38 of the Statute was intended "to indicate that international law, as a basis of delimitation agreements, [did] not differ from the law applied by the Hague Court"[404]. That might have been indeed the intention of the "Equitable Principles Group"[405]. Other factors must however be pondered. Because the reference to Article 38 of the Statute and the requirement of attaining an equitable result were a last minute twist that was not discussed in detail at the Conference[406], no common intention is likely to have emerged. Importantly, it is hardly believable that the intention was to effect a *renvoi* to the law as applied by the ICJ. First, the inclusion of a reference to "international law" was 'demanded' by the group that claimed an obligatory application of equidistance as the starting point, thus opposing the views of the ICJ in 1969[407]. Secondly, jurisprudence was far from settled. Whereas the 1969 cases dismissed equidistance *in toto*, the 1977 arbitration attributed it, *de facto* and

(401) Cf. e.g. Evans/1999, p.156; Charney/1994, p.227; Brown/1992, p.48; Caflisch/1991, p.480; Queneudec/1989, p.419; Johnston/Saunders/1988, p.4; Allott/1983, p.22; Caflisch/1983, p.98; Judge Oda, Dissenting Opinion, *Tunisia/Libya* case, ICJ/Reports/1982, p.246, para.143.

(402) Oxman/1982, pp.14-15, emphasis added.

(403) The need for substantive delimitation rules was behind the solution devised in the 1958 Conventions. As stressed, there was the danger that states would be unwilling to resort to adjudication in the absence of such rules (Lauterpacht, ILC/Yearbook/1952(I), p.184; ILC/Yearbook/1953(II), pp.241-269).

(404) Manner/1984, p.639.

(405) Cf. e.g. the statements of Algeria and Ireland, Off.Rec.-1973/82(XVI), p.63, Off.Rec.-1973/82(XVII), p.24.

(406) Judge Evensen, Dissenting Opinion, *Tunisia/Libya* case, ICJ/Reports/1982, p.281, para.4.

(407) Symonides/1984, p.31. Cf. the statements by Spain and Denmark, both from the "Equidistance Group", supporting openly the first proposal where the reference to "international law" appeared (Off.Rec.-1973/82(XIII), pp.13, 18, 77-78).

de jure, a primary role. Thirdly, insofar as no delimitation of the EEZ had ever been carried out, that view would (at that time) lead to the conclusion that the delimitation standards for the EEZ remained undefined[408]. *Quod est absurdum.*

Once again, it must be observed that not too much emphasis should be put on the intention of the parties when interpreting these provisions. A more objective interpretation should be favoured instead. Unlike domestic legal systems, international law does not have a constitution whereby the sources of law are identified. Nor would that be possible with its 'horizontal nature'. The enumeration of Article 38 of the Statute of the ICJ has been widely accepted "as the most authoritative statement as to the sources of international law"[409]. This suggests that it is more appropriate to view the aforementioned reference as entailing a juridical limitation concerning the operative-criteria through which the equitable solution is to be sought, and the legal foundation on which it rests. Besides leading to a non-inequitable result, delimitation must be predicated on operative-standards set by international law. The contents of these criteria however, are not explained[410]. No doubt, it may be argued that "[w]hat the Convention [did was] to set the parameters of the delimitation *process*"[411].

This conclusion gives rise to problematic questions. It has to be asked whether, in negotiation, states parties to the LOSC are bound by normative standards. This possibility appears to be upheld by the famous *dictum* of the *North Sea* Judgment: "delimitation is to be effected by agreement *in accordance with equitable principles, and taking account of all relevant circumstances*"[412]. Taken literally, this statement would imply a limitation of the contractual freedom of states, and of the scope of the traditional *jus tractuum*. This seems unreasonable. Strictly speaking, when shaping the content of an agreement, states are only bound by imperative rules of international law, i.e. *jus cogens*. Neither have states to abide by any parameters regarding the delimitation process, nor are they bound to take account of specific circumstances, should they not want to do so[413].

More importantly, even if an agreement interferes with or infringes upon the rights of a third state, the rule *pacta tertiis nec nocere nec prodesse possunt* becomes applicable; the conventional provisions are unopposable to it. This protection of third states' rights means that states do not necessarily have to weigh interests of third parties when shaping the content of bilateral delimitation agreements. States are free to choose the *circumstances*

(408) As recognised by Nordquist, during the Third Conference, "the question of [EEZ] delimitation had to be approached *de novo*" (Nordquist/1993, p.801).

(409) Shaw/1997, p.55. This provision was drafted for the PCIJ. The view more commonly held by the doctrine seems to be that, nowadays, the enumeration of sources of Article 38 of the Statute is incomplete (cf. Nguyen/Daillier/Pellet/1999, pp.112-114; Allott/1983, p.22). The reference to "civilised nations", for instance, has become obsolete and meaningless.

(410) Judge Oda, Dissenting Opinion, ICJ/Reports/1982, p.246, para.144.

(411) Allott/1983, p.23.

(412) ICJ/Reports/1969, p.53, para.101(C)(1), emphasis added.

(413) On the freedom of states in determining the contents of agreements and the nature of the solution that is incorporated therein, cf. para.6.1.b)(ii) *infra*.

(political, strategic, defence, geographical, juridical, environmental, economic, etc.) and the *methods* to consider, *irrespective of their legal relevance*, just as they are free to determine the way in which to weigh the circumstances and to apply the methods. The 'give and take' character of negotiations entitles them thereto. One cannot overstress that, in 1969, when the Court affirmed that states should consider "all the relevant circumstances", it did so because it also considered that delimitation was to be effected by agreement. States might, however, not want to lift the veil in regard to the considerations that led to a certain line. This explains why the contents of customary law are so debatable, and bilateral state practice cannot be taken, in definite terms, as evincing an *opinio juris*.

Whether a delimitation agreement must necessarily contain an 'equitable solution' is a different problem. It leads us to ask how the equitable character of a maritime boundary is to be assessed. Only one answer is possible: all boundaries established by a valid agreement must be assumed to be equitable. Furthermore, there are reasons to deny a state the right to require the review of an agreement on the grounds that it did not achieve an equitable solution. The rule of *pacta sunt servanda*, as well as the doctrine of finality and stability of boundaries (also applicable to maritime boundaries), rule out this possibility[414]. Actually, in the *Guinea-Bissau/Senegal* arbitration, the Tribunal affirmed that Articles 74(1) and 83(1) did not encompass the authorisation to review the equitableness of boundary agreements[415]. A validly agreed boundary may be *manifestly inequitable* to one of the states, because "as far as states are concerned, [maritime delimitation law] is no more than suppletive", i.e. it may "be derogated from" by *common consent*[416] – which is the sole paramount aspect.

Although Articles 74(1) and 83(1) refer to agreement, seemingly representing states as the addressees of the rule, the reference to international law is in fact intended to limit the powers of courts. States are neither bound to apply whatever standards international law prescribes, nor under the obligation to reach an equitable solution (if only because there are no objective parameters on the basis of which to evaluate its equitableness). The explicit reference to Article 38 of the Statute reinforces the idea that the addressees of the obligation to apply international law are the courts. What discretion is conferred on courts under these provisions is thus a cardinal question.

The proposition that Articles 74(1) and 83(1) give judges the freedom to choose any delimitation formulae, method or principle "that is likely to lead to an equitable solution"

(414) Making the same argument, cf. Jennings/1989, p.402. On the relevance of the doctrine of finality and stability of boundaries, cf. Marston/1994; Kaikobad/1983. References to this doctrine may be found in jurisprudence; cf. *Guinea-Bissau/Senegal* arbitration, ILR/83/1990, pp.36-37, para.64; *Aegean Sea* case, ICJ/Reports/1978, pp.36-37, para.85; *Temple* case, ICJ/Reports/1962, p.34.

(415) ILR/83/1990, pp.42-43, para.79.

(416) Weil/1989a, p.8; and Tanja/1990, p.306. Cf. para.6.1.b)(i) *infra*.

has already been advanced[417]. This would amount to place states and courts in much the same position, which is, to say the least, controversial. Discerning any difference between such unlimited freedom, and the power to decide *ex aequo et bono*, would become in all fairness very difficult, if not impossible. This suggestion holds true in the light of the textual element. As according to Article 38 of the Statute, *ex aequo et bono* decisions can only be rendered if states explicitly agree thereto, the reference to international law and to the said Article 38 appears exactly to set limits to a court's freedom.

With regard to the common intention of the parties, it must be recalled that during the preparatory work of the Geneva Conventions states rejected explicitly, and strongly, the possibility of *ex aequo et bono* delimitations[418]. The need to establish normative criteria of delimitation was at the time emphatically supported. Conferring on courts a wide margin of discretion, in relation to the methods to apply and the circumstances to weigh, would entail a departure from this perspective. Such an interpretation would hold true only if predicated on an unequivocal common intention of states. The records of the Third Conference point in the opposite direction. The debates were centred precisely on the choice of substantive standards to adopt, and showed a clear cleavage between the two delimitation groups.

A final and decisive argument to dismiss the idea that Articles 74(1) and 83(1) give courts the power to decide primarily on the basis of equity can be found in the systematic element of interpretation. When referring to the attribution of rights and jurisdiction in the EEZ, in cases not regulated by the LOSC, Article 59 establishes that any conflicts "should be resolved *on the basis of equity* and *in the light of all relevant circumstances*". No doubt whatsoever is left as to the freedom to choose any considerations deemed relevant in the light of pure equity. This systematic argument finds further support in Articles 69(1) and 70(1). These provisions refer to the participation of landlocked and disadvantaged states in the surplus of EEZ resources, "on *an equitable basis*, [...] *taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this Article and of Articles 61 and 62*". Here, equity is still the basis of decision, account taken of specified circumstances. If the same type of decision-making criterion was intended for maritime delimitation, why did states not resort to the same or similar phraseology? There is only one answer. No such freedom was ever intended. *Legis quo volet dixit, quod non volet tacet.*

All in all, it is clear that Articles 74(1) and 83(1) distinguish between the result and the means. The obligation laid down in the LOSC is one of result: inequitable solutions must be avoided. The means whereby these non-inequitable solutions are to be attained are

(417) Manner/1984, p.641.
(418) Para.1.2.c) *supra*.

specified only indirectly, through the expression "*on the basis* of international law". Courts are thus bound to seek in international law the normative basis upon which delimitations are to be effected. The circumstances and methods to be considered in maritime delimitation, in the search for non-inequitable solutions, are strictly those *allowed*, and more importantly, those *required by international law*.

3.3.b)(iv) The Standards of Delimitation in International Law

The enumeration of sources of law in Article 38 of the Statute of the ICJ refers to "international conventions", "international custom" and "general principles of law". Judicial decisions and learned writings are indicated as subsidiary means to determine the contents of international law. Although the *de facto* law-making nature of some judicial decisions cannot be denied[419], the benefits of such a practice remain undemonstrated. Despite recent changes, which gave international organisations an important role, the law-making powers in international law remain ultimately with the states. The exercise of similar powers by courts may import the risk of unbalancing the horizontal nature of the international legal order. Even when fostered by courts, proposals *de lege ferenda* should not be imposed on states[420]. Furthermore, there is no rule of *stare decisis et non quieta movere* in international law. For these reasons, case law will not be regarded here as a source of law, but rather as an auxiliary means of interpretation and crystallisation of its contents.

Among the important points that may be raised as to Articles 74(1) and 83(1), two seem to require specific attention. One, in terms of treaty law, the Geneva Conventions still have to be taken into account. It is important to establish whether there is any role for the delimitation provisions incorporated therein. Two, the assertion that customary law requires delimitation to be effected in accordance with equitable principles taking account of all relevant circumstances must be scrutinised in-depth.

The entry into force of the LOSC gives rise to questions regarding the application of successive treaties. The non-existence of a clause of general supersession in relation to the Geneva Conventions leaves room to doubt. Stating that the LOSC prevails, as between states parties, over the 1958 Conventions falls short of what would be desirable[421]. It means that the 1958 Conventions do not cease to have effect automatically. Whether they apply to a case then depends on the situation *in concreto*. The prevalence of the LOSC regime, when contradicting with the 1958 regime, is unquestioned. But if the two regimes are compatible, there seems to be no reason for not applying the Geneva Conventions[422].

(419) Cf. Brownlie/1998b, pp.28-32; Quintana/1997, pp.369-380; Charney/1994, p.228; Weil/1989a, pp.7-8.
(420) *Fisheries Jurisdiction* cases, ICJ/Reports/1974, pp.24-25, para.53.
(421) LOSC, Article 311(1); and VCLT, Articles 30 and 59. Cf. Nordquist/1989, pp.242-243.
(422) Fleischer/1999, p.352.

In continental shelf delimitations involving states parties to the Geneva Convention, when at least one of them did not ratify the LOSC, Article 6 of the CS Convention remains thus applicable. If both states are parties to the LOSC, the delimitation is to be effected in accordance with Article 83(1). Notwithstanding this, since this provision refers solely to the result to be attained (an equitable solution) and does not establish an obligation of means, it should be asked whether Article 6 (the equidistance-special circumstances rule) may be applied between the parties to the LOSC which are also parties to the 1958 Convention.

The question must be raised because whereas Article 83(1) of the LOSC provides no answer as to the means of delimitation (referring only to the result), Article 6 refers to the equidistance-special circumstances rule. Since the notion of special circumstances was inset as an 'escape clause' aimed at avoiding inequity, the obligation of result contained in Article 83(1) would be met. In effect, its drafting history substantiates the idea that the use of the equidistance-special circumstances rule is allowed[423]. As Fleischer states, "Articles 74 and 83 of the LOS Convention retain, and indeed reiterate, the applicability of the Geneva Convention as between the states parties"[424].

Should it be deemed to exist, customary law becomes applicable to continental shelf delimitations involving states non-parties to the 1958 Convention, and to EEZ delimitations. In fact, the suggestion that the contents of Articles 74(1) and 83(1) do not depart from those of customary law has been put forward in jurisprudence and scholarship[425]. If it were so, insofar as the 'equitable principles' are allegedly the substantive standard of delimitation in customary law for over thirty years[426], it should presumably be easy to find an extensive, settled and virtually uniform state practice, evincing an *opinio juris*.

An attempt made by the author to survey state practice in continental shelf and EEZ delimitation showed however that no such general practice exists[427]. Some of the findings are striking. Of some 300 cases of both unilateral and bilateral state practice considered, roughly one in five mention no operative-standard. References to equitable principles can be found in only some 10% of the occurrences, and one third of these references pre-date 1958. Notably, in the post-1969 practice, clearly less than one in ten acts refer to equitable principles. If restricted to the post-1982 practice, this ratio drops dramatically to less than one in twenty-five instances. Contrasting clearly, the explicit endorsement of equidistance

(423) Courts have interpreted Article 83(1) of the LOSC and Article 6 of the CS Convention as having similar contents. On this issue, cf. (para.6.4.b)(iii)(iv), Conclusions to Part II *infra*). On the fairness and balanced nature of Article 6, cf. paras.1.3.c)(i) *supra*, 3.4. *infra*. As to the three possible interpretations of this rule, cf. para.2.4.c)(i) *supra*.

(424) Fleischer/1999, p.526.

(425) Cf. *Jan Mayen* case, ICJ/Reports/1993, p.59, para.48; *Guinea/Guinea-Bissau* arbitration, ILM/25/1986, p.289, para.88; *Libya/Malta* case, ICJ/Reports/1985, pp.30-31, paras.28-29; *Gulf of Maine* case, ICJ/Reports/1984, pp.294-295, paras.95-100; Oude Elferink/1999, p.462; Kwiatkowska/1997, p.102; Jagota/1985, p.270; Symonides/1984, p.37; Manner/1984, p.639.

(426) The equitable principles doctrine is understood as rejecting the equidistance-line as the starting point for delimitations, and as allowing the consideration of any circumstances that may contribute to an equitable result.

(427) Cf. Appendix 2. For a brief assessment, cf. also Antunes/2000c, pp.183-184.

occurs in almost 50% of cases. When taking account of the bilateral agreements in which equidistance was *de facto* resorted to in some form or another, this figure rises impressively to two thirds of all state practice[428]. In this light, it is difficult to conclude that there is any settled, extensive and virtually uniform state practice supporting the use of equitable principles. This conclusion is probably not so surprising. In the early 1950's, the opinion appeared to be that customary law provided no standards for continental shelf delimitation. Evidence for this can be found in the Report on the "Rights to Sea-Bed and Its Subsoil", presented in the 1950 Forty-Fourth Conference of the ILA, which stated:

> Criteria for the division of the sea-bed (and subsoil) of a continental shelf shared by two or more coastal states *should be developed*, taking into account factors such as the configuration of the coastlines, the economic value of proven deposits of minerals, etc.[429]

The idea that no normative standards existed was corroborated in the 1950 meetings of the ILC[430]. Thus, it is not easily understandable how it could be concluded that a general practice bearing an *opinio juris* supporting the use of equitable principles emerged between 1950 and 1969, precisely the period when the equidistance-special circumstances rule was introduced in international law, and gained support amongst states. The aforementioned survey shows that, in that period, the use of equidistance was explicitly supported by state practice in some 70% of the cases, and implicitly in a number of other cases. Consequently, in legal terms, the elevation of equitable principles to customary law is incomprehensible.

In EEZ delimitation, the use of equitable principles is even less understandable. The historical development of this maritime zone makes scarce reference to equitable principles. Two thirds of the unilateral practice refers to equidistance as the *prima facie* boundary-line for EEZ and fisheries zones, in the absence of agreement. To the extent that unilateral state practice is not determined by any kind of trade-off, but conveys instead the unconditioned view of states, this practice cannot be discarded lightly, especially when the states involved are either parties or signatories to the LOSC. Another argument helps to brush aside the application of the so-called equitable principles doctrine in EEZ delimitation. The reasoning of the ICJ in the *North Sea* cases, when rejecting equidistance, started from the premise that the idea of proximity (related to equidistance) was not reconcilable with the concept of natural prolongation. The problem here is that *natural prolongation is completely unrelated with the notion of EEZ.* It was precisely the non-existence of natural prolongation in certain oceanic areas that gave rise to the creation of this maritime zone[431].

(428) An explanation for this wide use of some form of equidistance is attempted later – cf. para.6.3.d), Conclusion of Part II *infra*.
(429) ILA, Report of the Forty-Fourth Conference, p.135, emphasis added. Reference was made thereto during the ILC work.
(430) ILC/Yearbook/1950(I), pp.232-234. Cf. also para.1.2.b)(i) *supra*.
(431) Considering that no customary law on EEZ delimitation exists, cf. e.g. Caflisch/1991, p.481; Dipla/1984, pp.224-225.

For the equitable principles doctrine, equidistance is not mandatory. State practice should therefore clearly reflect this point. The truth is, however, that there have been a large number of states continuously arguing in favour of the mandatory nature of equidistance. The position assumed by the "Equidistance Group" in the Third Conference is utter and conclusive evidence of an uncompromising and significant endorsement of equidistance as a normative standard, obligatory in some measure. Inasmuch as the potential emergence of a customary rule from a certain practice is always hampered by the "strong adherence" of a group of states to an opposing practice[432], serious doubts are cast on the idea that equitable principles are part of customary law. Indeed, there is clear evidence of a "strong adherence" of an appreciable number of states to the obligatory use of equidistance as the starting point of delimitation. Consequently, because the first prerequisite – an extensive, settled and virtually uniform practice – is not fulfilled, the equitable principles doctrine cannot be seen as customary law. For similar reasons, the use of strict equidistance cannot be seen as mandatory, as far as the final boundary-line is concerned.

The conclusion to be drawn as to the 'means of delimitation', in light of the relevant state practice, is that no customary rule exists. First, the application of equitable principles in continental shelf delimitation was never acquiesced to by those states that supported equidistance – which rejected it continuously. Secondly, no customary law regarding EEZ delimitation could have arisen before the 1970's; and the practice thereafter shows clear preference for the use of equidistance. Therefore, the suggestion that Articles 74(1) and 83(1) embody the rule of 'delimitation in accordance with equitable principles' is undoubtedly owed "more to wishful thinking than well found treaty interpretation"[433]. The use of equitable principles (which entails the complete rejection of the mandatory nature of equidistance) has never been supported by a general practice, evincing an *opinio juris*[434].

3.4. Territorial Sea: Crystallisation of a Balanced Rule

The drafting history of Article 15 of the LOSC is not very complex, and raised little controversy. Although four different formulae were considered initially, Formula A (which was materially identical to Article 12 of the 1958 Convention) was eventually favoured[435]. An analysis of the documents of Negotiating Group 7 (NG7) shows that this matter was not

(432) *Nuclear Weapons* AO, ICJ/Reports/1996(I), p.255, para.73.
(433) Brown/1992, p.360.
(434) Concluding for the absence of any *opinio juris*, cf. Charney/1993, p.xlii. Cf. also O'Connell/1989, p.731.
(435) Cf. Nordquist/1993, pp.132-143; Ahnish/1993, pp.47-50; Jayewardene/1990, pp.277-280; Vukas/1985, pp.149-153; Symonides/1984, pp.21-24. Informal Working Papers No.1, No.1/Rev.1, No.1/Rev.2(Reissued), in Platzöder/Documents(III), pp.208-209, 215-216, 232-233, 250-251. The proposals were consolidated in the "Main Trends Working Paper", of the Second Committee, Off.Rec.-1973/82(III), pp.107-142, at p.111.

debated extensively[436]. This is explainable on various grounds. Strong objections[437] were raised against Formula C (mentioning equitable principles), for being inadequate, subjective and ambiguous. Objections of this nature were not raised against Formula A. Further, the potential distorting effect of certain features when using equidistance is negligible in the vicinity of the coast, and this was explicitly noted in the *North Sea* cases[438]. In addition, the notion of special circumstances provides enough room to overcome any inequities resulting from the use of strict equidistance[439]. On another level, taking into account the breadth of the territorial sea, the number of states concerned with the practical impact of this provision was small[440]. Finally, it has to be considered that, unlike the continental shelf, the territorial sea delimitation remained "unaffected by the theoretical and judicial controversies"[441].

Inasmuch as the delimitation formula adopted in the LOSC remained substantively unchanged in relation to the 1958 rule, all considerations made above in relation to the latter are thus applicable to the former[442]. This means that when agreement cannot be reached, equidistance is the line beyond which, *prima facie*, states cannot exercise their sovereignty. Equidistance is the starting line for the delimitation[443]. Reasonable modifications thereto are allowed where special circumstances are deemed to exist.

The Convention does not regulate comprehensively the questions regarding historic titles and historic rights over oceanic areas. The Second Committee referred to this issue superficially in the territorial sea draft provisions of the 'Main Trends' working paper[444]. These references no longer appeared in the RSNT of 1976[445]. Ultimately, historic bays and traditional fishing rights were the only references in this respect[446]. This matter continues therefore to be governed by the rules and principles of general international law[447]. Clearly, the comments made above with regard to historic title in the context of the 1958 rule remain valid[448]. A historic title might determine the inapplicability of the delimitation rule to the whole or part of the disputed area. In addition, the contradistinction between historic title and historic rights still has to be considered. It might happen that a historic legal regime is

(436) Doc.A/Conf.62/62, Off.Rec.-1973/82(X), pp.7-8; cf. Platzöder/Documents(IX), pp.474.
(437) Off.Rec.-1973/82(II), p.119; *ibid.*(III), p.111.
(438) Cf. ICJ/Reports/1969, pp.19, 38, paras.8, 59; Caflisch/1991, p.442; Vukas/1985, p.150; Symonides/1984, p.23.
(439) Off.Rec.-1973/82(II), p.119.
(440) Symonides/1984, pp.22-23.
(441) Weil/1989a, p.138.
(442) Cf. e.g. Oude Elferink/1994, p.37; Nordquist/1993, p.136; Ahnish/1993, p.48; Caflisch/1991, pp.439-440; O'Connell/1989, p.677; Johnston/1988, p.164; Kapoor/Kerr/1986, p.72; Jagota/1985, p.249; Vukas/1985, p.152-153; Symonides/1984, p.22.
(443) The definition of the equidistance-line can give rise to various problems of a technical nature, which appear as another level of potential disagreement. The identification of basepoints and/or baselines from which the equidistance-line is to be computed can become a difficult hurdle to jump in the delimitation process (e.g. the use of low-tide elevations, the use of straight baselines, the agreement in relation to the tidal datum to be used in the determination of the normal baseline, etc.). Cf. para.5.2.b) *infra*.
(444) Provisions 2, 3, and 17, Off.Rec.-1973/82(III), pp.109-110. Cf. proposal by the Philippines, Off.Rec.-1973/82(III), p.202.
(445) Off.Rec.-1973/82(V), pp.154-156.
(446) LOSC, Articles 10(6) and 51(1). The optional clause included in the dispute-settlement mechanism – Article 298(1)(a)(i), makes also reference to "historic bays or titles".
(447) LOSC, Preamble.
(448) Para.1.3.c)(ii) *supra*.

spatially superimposed as a separate 'layer of normativity'. The traditional *lex pescatoria* existing in the Red Sea between Eritrea and Yemen offers an example of this situation. The Tribunal affirmed that such a regime did "not depend, either for its existence or for its protection, upon the drawing of an international boundary", and that "the drawing of the maritime boundary [was not] conditioned by the findings [...] of such regime"[449].

Some scholars have argued that Article 15, despite its text, prescribes that territorial sea delimitation is to be effected in accordance with equitable principles[450]. This conclusion appears to be flawed on conceptual grounds. Stating that equity is embedded in Article 15 (insofar as an inequitable result should be avoided) is quite different from affirming that it prescribes delimitations in accordance with equitable principles. The delimitation result is one thing; the means used to undertake the delimitation is a totally different thing. The *dictum* in the *Anglo/French* arbitration, from which this idea stems, concerned continental shelf delimitation and, importantly, can be read in two different ways. Within the context of other considerations in the Award, this *dictum* can be interpreted as stating that the delimitation in accordance with equitable principles simply amounts to the proper application of the equidistance-special circumstances rule[451]. This suggestion finds support is jurisprudence. In the *Eritrea/Yemen* arbitration, the Tribunal concluded that the use of equidistance was equitable because no reason founded on historic title or special circumstances justified a departure therefrom[452]. In this respect, the *Qatar/Bahrain* case is even more conclusive. Apparently, the equidistance-special circumstances rule – applicable in particular to territorial sea delimitations, was distinguished from the equitable principles doctrine – applicable to the delimitation of the other maritime zones. In practice, however, it all came down to applying the equidistance-special circumstances rule. Turning the wheel full circle, the Court explained how the delimitation rule of the territorial sea operated by referring to the *Jan Mayen* case – a continental shelf and fisheries zones delimitation (which *de facto* consists of an application of the equidistance-special circumstances rule)[453].

Absolutely decisive in terms of concluding that the equitable principles doctrine is not subsumed in Article 15 is an argument of treaty interpretation. The use of the equitable principles formula in the provision on territorial sea delimitation was suggested at various stages of the Third Conference, as an alternative to the equidistance-special circumstances formula[454]. Its non-acceptance demonstrates that such a doctrine was rejected.

(449) Eritrea/Yemen-II, para.110.
(450) Cf. Oude Elferink/1994, p.27; Kwiatkwoska/1989, pp.184-185.
(451) Paras.2.4.c)(i) *supra*, 6.4.b)(iii) *infra*.
(452) Eritrea/Yemen-II, para.159.
(453) Qatar/Bahrain-Merits, paras.217, 231.
(454) Cf. Platzöder/Documents(III), pp.208-209, 215-216, 232-233, 250-251; Off.Rec.-1973/82(III), pp.107-142, at p.111; Proposal by The Netherlands, Off.Rec.-1973/82(III), pp.190-191; Proposal by Morocco, Platzöder/Documents(IX), pp.394-395; Statements of Argentina and Venezuela, Off.Rec.-1973/82(XIII), pp.17, 20.

All things considered, one would argue that Article 15 of the LOSC incorporates the same rule as Article 12 of the TS/CZ Convention, and indeed crystallises it. Resulting from years of work by lawyers, geographers and politicians, this rule offers a balance between an objective element that promotes certainty (equidistance), and an element of flexibility that promotes justice *in casu* (special circumstances). Focusing on the means of delimitation, it nonetheless ensures that unreasonableness is avoided[455]; so much so that it is on the basis thereof that courts actually delimit maritime boundaries today. Insofar as the equitable principles doctrine rejects equidistance as the mandatory starting point for delimitation, it is barely possible to argue that such a doctrine is incorporated in Article 15.

3.5. Contiguous Zone: The Non-Existence of a Delimitation Rule

The "Main Trends" working paper contained a provision regulating contiguous zone delimitation. It transcribed Article 24(3) of the TS/CZ Convention[456]. Neither in the ISNT (1975)[457] and in subsequent draft texts, nor in the LOSC, was this provision incorporated. Apparently three reasons justify this[458]. First, states seem to have shown some reluctance to further complicate the already difficult negotiations on delimitation. Secondly, the idea that a provision for delimitation of the contiguous zone was somewhat dispensable, because that boundary would simply follow the EEZ boundary, had acquired some support. Thirdly, some states were convinced that the nature of the jurisdictional powers exercised in the contiguous zone was reconcilable with the notion of overlapping jurisdictions[459].

Various reasons lead us to argue, however, that the lack of a delimitation provision for the contiguous zone may potentially give rise to problems. Since not all states claim an EEZ (and might claim a fisheries zone instead), in some cases there will be no boundary to apply to the contiguous zone. On another level, the exclusive nature of some powers related to the contiguous zone impedes their concurrent exercise. This is the case of Article 303(2), on the finding and protection of archaeological and historical objects. Conceptually, this is clear in the fact that the contiguous zone is no longer part of the high seas (as happened in the 1958 Convention). Finally, concurrent exercise of jurisdiction is likely to raise problems at the level of enforcement of law, where the laws and regulations of the states concerned

(455) On the normative principles underlying this rule, cf. paras.6.3., 6.4, and Conclusions to Part II *infra*.
(456) Provision 49, Off.Rec.-1973/82(III), p.115; *ibid.*(II), p.121.
(457) Off.Rec.-1973/82(VI), p.157.
(458) Cf. Nordquist/1993, pp.273-274; Caflisch/1991, pp.443-445; Vukas/1985, pp.156-162.
(459) Advanced during the First Conference by some delegations (Off.Rec.-1958(III), p.199), this idea assumed that the contiguous zone was part of the high seas.

differ (e.g. immigration, customs, drug smuggling). It is thus necessary to know how the delimitation between adjoining contiguous zones is effected, if required[460].

If two states are parties to the TS/CZ Convention, and at least one of them has not ratified the LOSC, Article 24(3) of the TS/CZ Convention is applicable. Here, one would maintain that a proper corrective interpretation is required[461]. The situation is unclear when both states are parties to the LOSC, and to the TS/CZ Convention. One ought to consider whether the absence of a rule for contiguous zone delimitation means that Article 24(3) is still applicable. As aforesaid, the LOSC does not have a clause of general supersession in relation to Geneva Conventions[462]. The term "prevail" used in the wording of Article 311(1) provides no clear-cut answer to cases such as this[463]. For instance, Cyprus has suggested that there is a presumption in favour of the said Article 24(3)[464]. Prescribing the use of strict equidistance, this article apparently leaves no room for considerations of equity. Such an approach is however contrary to one key idea present at all stages of the Third Conference: the non-inequitable nature of maritime boundaries.

State practice on contiguous zone delimitation is virtually negligible, which means that no customary law emerged. In this context, the suggestion that Article 24(3) should be subject to a corrective interpretation acquires greater relevance. A similar outcome would arise from recourse by analogy to Article 15 of the LOSC[465]. Whatever the interpretative path actually followed, the point is that the use of the equidistance-special circumstances rule to delimitations of contiguous zones finds support on various grounds. Substantively, the protective and preventive jurisdiction that characterises this maritime zone is similar to some sovereign powers exercised in the territorial sea. No doubt, these powers are in nature different from those of the EEZ. This view is reinforced, systematically, by the inclusion of the regimes of the territorial sea and the contiguous zone in the same Part of the LOSC, as had happened also in 1958. Furthermore, the historical evolution of the contiguous zone is clearly related with the territorial sea, and not with the EEZ[466].

The analogy that allegedly allows the application of the delimitation provisions of the EEZ to contiguous zone delimitations seems rather superficial[467]. The argument behind the idea that it is "probably more justified" that delimitations between EEZ and contiguous zone are effected by recourse to Article 74(1) is suggestive[468]. It is difficult, however, to

(460) According to Vukas, the Netherlands was the only state that denied explicitly the usefulness of a delimitation provision for the contiguous zone (Vukas/1985, pp.156-158).
(461) Para.1.3.c)(iii) *supra*.
(462) Para.3.3.b)(iv) *supra*.
(463) The regime of the VCLT – Articles 30 and 59 – is not applicable. Article 311 of the LOSC is *lex specialis* in relation thereto.
(464) Off.Rec.-1973/82(XVII), p.71.
(465) Caflisch/1991, p.445.
(466) O'Connell/1989, pp.1034-1061.
(467) Cf. e.g. Turkey, Off.Rec.-1973/82(XVII), p.77.
(468) Symonides/1984, p.25.

escape the conclusion that the considerations that might be relevant for contiguous zone delimitation are not only not necessarily relevant for the EEZ[469], but also more likely to be substantively linked to those relevant for territorial sea delimitation. Furthermore, since Article 74(1) refers only to an equitable solution, and since Article 15 embodies a rule able to yield such a solution, the recourse to the equidistance-special circumstances rule is, in the absence of a contradiction, systematically and analogically the preferable approach.

The case of "rocks which cannot sustain human habitation or economic life of their own" provides a decisive argument in favour of this conclusion. Under the LOSC, these insular features "shall have no EEZ or continental shelf"[470]. Through reasoning *a contrario* (because this is the exceptional case in which the rule concerning the maritime entitlement of islands is excluded) it may be concluded that states are entitled to claim contiguous zones around 'rocks'[471]. In such a situation, where there will be no EEZ at all, it becomes difficult to argue for the application of Article 74(1). There is therefore much reason to believe that the analogical application of Article 15 is the correct interpretation. The uniformity of regime achieved thereby – the rule applicable to any contiguous zone delimitation would always be the same – strengthens such an option[472].

3.6. The 'Procedural Element' of Delimitation Rules

3.6.a) Introductory Remarks

At the final stage of this chapter, it is necessary to dwell, however briefly, on one specific issue: the 'procedural element' of delimitation rules. All delimitation provisions of the LOSC, as well as those of the Geneva Conventions, make reference to "agreement". What is the meaning of this reference? Should it be understood that states are required to negotiate, and to reach agreement? How does this reference interrelate with the question of dispute-settlement in international law in general, and in the law of the sea in particular?

It must be noted that the aim is neither to discuss dispute-settlement in international law, nor to examine the specific mechanisms that the LOSC contains in this respect. They are both taken here as givens. Notwithstanding this, mention must be made of the cardinal tenet of general international law, which has been uncompromisingly accepted by states: disputes are to be settled through peaceful means (e.g. negotiation, conciliation, arbitration,

(469) Caflisch/1983, pp.56-57.
(470) LOSC, Article 121(3).
(471) Cf. Kolb/1994, p.908.
(472) The use of Article 74(1) where there is an EEZ, and Article 15 by analogy in those cases of insular features which fall under the category of rocks defined in Article 121(3), seems to be another solution (Quadros/Otero/Gouveia/1999 (unpublished), pp.28-29, 42, 66, 68).

judicial settlement)[473]. An important right, indeed the counterbalance of the said obligation, has simultaneously been conferred upon states: they "enjoy complete freedom to choose the appropriate means of settling disputes", because the political and ideological divisions between states have been a hindrance "to reach agreement on the creation of universally accepted devices"[474]. States might waive this freedom of choice by means of a conventional obligation, and accept to refer a dispute, or certain disputes, to specific dispute-settlement mechanisms[475]. Nevertheless, they "are not obliged to resolve their differences at all"; all procedural means are "operative only upon the consent of the particular states"[476].

3.6.b) Agreements in Maritime Delimitation

The resolution of maritime boundary disputes does not appear to have any intrinsic specificity requiring an exemption from the dispute-settlement regime established in general international law, or in the law of the sea. Unless it is clear that states have explicitly agreed to waive their *freedom of choice of means, the presumption must surely be against the existence of any obligation to resort to a specific means of dispute-settlement.* As stated by the ICJ, "[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court"[477]. In effect, "in the absence of a specific obligation to negotiate a state is entitled to suggest that another procedure should be used"[478]. The paramount question is thus whether under the LOSC, or the 1958 Conventions, the freedom of states is in any way conditioned.

That consent is supreme in maritime delimitation; i.e. it is unanimously uncontested that states cannot impose boundaries on other states by unilateral declaration[479]. Whether under the LOSC's delimitation provisions states are bound by an obligation to enter into negotiations to resolve disputes concerning maritime boundaries, is a different question. To be meaningful, such an obligation to reach agreement through negotiations would have to amount to attribute to state A the right to demand from state B the initiation of negotiations.

(473) UN Charter, Articles 2(3), 33(1). Cf. also Resolution 2625 (XXV) of the United Nations, General Assembly, of 24 October 1970, Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.

(474) Cassese/1991, pp.213-214. Should states fail to resolve a dispute likely to endanger international peace and security, they should refer it to the Security Council; cf. UN Charter, Article 37(1). Nevertheless, especially in fields related to human rights this situation seems to be undergoing dramatic changes.

(475) Nguyen/Daillier/Pellet/1999, pp.788-789.

(476) Shaw/1997, p.718. Cf. also Brownlie/1998, p.703. The choice of means of dispute resolution in international law has already been portrayed as an "international dilemma"; see Evans (ed.)/1998

(477) *Cameroon/Nigeria* case, Judgment on Preliminary Objections, ICJ/Reports/1998, p.303, para.56.

(478) Merrills/1998, p.26.

(479) Cf. *Guinea/Guinea-Bissau* arbitration, ILM/25/1986, p.291, para.94; *Gulf of Maine* case, ICJ/Reports/1984, p.292, para.87; *Tunisia/Libya* case, ICJ/Reports/1982, pp.66-67, para.87; also, Anderson/1998c, p.118; Lucchini/Vœlckel/1996, pp.82-83; Oude Elferink/1994, p.32; Thirlway/1993, p.38; Nordquist/1993, pp.813-814, 982; Bardonnet/1989, p.3; Kwiatkowska/1989, pp.194-195; Weil/1989a, p.107; Attard/1987, p.227; Dipla/1984, p.221; Symonides/1984, p.35.

Or at the very least, negotiations would have to emerge as a *conditio* for having recourse to adjudication. Anything short of this makes such an obligation meaningless, if only because state B could almost indefinitely stall the commencement of the negotiations.

It has been suggested that the concatenation of the "principle of agreement" with the "basic duty of international co-operation" means that states are under the obligation to enter into meaningful negotiations in good faith in order to reach an agreement on delimitation[480]. This assertion gives rise to two issues: one concerns the understanding of meaningful negotiations; the other regards the obligation to enter into negotiation.

No argument will be made against the idea that, (according to the principle of good faith) if states decide to negotiate, they must do so in meaningful terms. This means usually that states must be prepared to modify their initial positions on delimitation[481]. But that does not have to happen necessarily. The *trade-off approach* actually followed in negotiations may involve concessions that are unrelated with the determination of the boundary *proprio sensu*. States might negotiate in good faith without considering changes to their position in relation to the boundary-line, as long as other forms of 'compensation' (paying *reasonable regard to the legal rights of the other state*[482]) are considered. Such an approach is visible in certain examples of state practice[483].

How to understand the so-called obligation to enter into negotiations, and to arrive at an agreement, is a more delicate issue. The idea that one state may unilaterally 'force' another state to negotiate – against its will – is striking. The decision as to *when to enter in negotiations* (and of course *when and if to conclude an agreement*) has depended hitherto totally on states' discretion. Denying such discretionary power would bring about a major departure from the ancient *jus tractuum*. Because it is hardly plausible that the freedom of states to decide, according to their interests, when to negotiate, could be overridden by a yet ill-defined duty of cooperation, this problem must be investigated in further detail.

3.6.c) Is There an Obligation to Negotiate?

Going back to the early ILC debates on continental shelf delimitation, it is possible to show that, historically, no such obligation was intended. During the 1951 debates, Scelle and Spiropoulos asserted that it "had never been implied that states should reach agreement as to the delimitation of their respective parts of the continental shelf unless they found it

(480) Kwiatkowska/1988, pp.140-143. Also, Symonides/1984, pp.35-36; *North Sea* cases, ICJ/Reports/1969, p.48, para.85(a); *Tunisia/Libya* case, ICJ/Reports/1982, pp.66-67, para.87; *Gulf of Maine* case, ICJ/Reports(1984, pp.292, 299, paras.87, 112.
(481) *North Sea* cases, ICJ/Reports/1969, p.48, para.85/a; Kwiatkowska/1988, p.141.
(482) *Fisheries Jurisdiction* case, ICJ/Reports/1974, p.33, para.78.
(483) Para.6.1.b)(ii) *infra*.

necessary"[484]. When, consonant with the advice of the Committee of Experts, the Special Rapporteur proposed in 1953 an amended draft Article 7 on continental shelf delimitation, no reference was made to agreement[485]. It was Pal who, affirming that "states should be given the opportunity of arriving at an amicable settlement", proposed that the expression "unless otherwise amicably determined by them" would be included in the text. In response, François stated that he "was not opposed to the inclusion" of such words, but "*considered them to be superfluous*". As he put it quite correctly, "when two parties agreed not to follow the prescribed rules and arrived at a settlement which did not conflict with the interests of a third-party, no objection could be raised"[486]. However, since the delimitation articles stipulated the use of equidistance in mandatory terms, it was decided to keep the reference to agreement to make clear that the contractual freedom of states would not be overridden. Thus, the *travaux préparatoires* are unsupportive of an obligation to negotiate.

Other arguments support this view decisively. The textual element does not impose any obligation to reach agreement by negotiation. Reaching agreement, for instance, by an adjudicating process, is still an option. Literally, for an obligation to negotiate to exist, states would resort to a wording similar to that of Article 41 of the 1978 Vienna Convention on Succession of States in Respect to Treaties (hereinafter "VCSSRT"), which refers to 'a process of negotiation'. Had such an obligation been intended, the text would certainly have made it undisputed – for it would be a departure from general international law.

No element (literal, contextual, or the *travaux préparatoires*) was found to support the existence of such an obligation in maritime delimitation. States continue to be free to choose the procedural means to delimit their boundaries. The reference to agreement in Articles 74 and 83 means simply that if states want their maritime boundaries precisely and definitively fixed, they must abide by the principle of consent, which can be expressed in more than one way. No *stricto sensu* obligation to negotiate exists.

The doctrine of stability and finality of boundaries lends further weight to this idea. At any moment in time, a state may be transitionally in a critically weak political position. If that state could be 'forced' to enter into negotiations at that precise moment, its position would be dramatic. Since boundaries are presumably permanent in character, what was a transitional weakness would have a lasting impact upon the spatial sphere of jurisdiction of that state. Such possibility is certainly everything but equitable. The changeable nature of

(484) ILC/Yearbook/1951(I), p.293. It is noteworthy in this respect that, in the *North Sea* cases, the ICJ recognised that the land boundaries of a state (which relate to the exercise of full sovereignty) do not necessarily have to be delimited, "and often in various places and for long periods they are not" (ICJ/Reports/1969, p.33, para.46). *A fortiori*, no reason exists for imposing on states an obligation to delimit their EEZ or continental shelf boundaries (which relate to mere sovereign rights and jurisdiction). They may thus remain indeterminate for an indefinite period of time.

(485) ILC/Yearbook/1953(I), p.106.

(486) *Ibid.*, pp.125-126. Sandström supported this view.

the law – as for example in the case of the entitlement criterion – is another example of how *timing* is so crucial. Negotiating in the immediate aftermath of the *North Sea* cases, Australia arrived in 1972 at an agreement with Indonesia[487] – which relied on natural prolongation – that would most probably not be possible less than fifteen years later. This can be inferred clearly from the ICJ's assertion in the *Libya/Malta* case, as to the relevance of geological and geomorphological elements in maritime delimitation[488]. Bearing in mind the paradoxical relationship between the stability and finality inherent in boundaries, and the 'snapshot' character of delimitation, the only reasonable conclusion is therefore that the decision as regards *whether and when to negotiate* (*or to conclude an agreement*) must still be left to the discretion of states. As Anderson puts it, "the duty to negotiate over maritime boundaries still leaves decisions about timing in the hands of the two sides"[489]. No doubt, this is a corollary of the fundamental horizontal nature of the international legal system.

3.6.d) Is the Justiciability of Maritime Boundary Disputes Conditioned?

The obligation to negotiate is also related to the recourse to judicial bodies, either to the ICJ through the use of declarations made under the optional clause of Article 36(2) of its Statute, or to the ICJ, the ITLOS or an arbitral tribunal under Part XV of the LOSC. If existent, such an obligation would prevent states from resorting to these means without previously entering into negotiations over their maritime boundaries.

In the *Libya/Malta* case, reasoning under the umbrella of the equitable principles doctrine, the Court stated that there was a duty of the parties to first seek delimitation by agreement[490]. How is this to be understood in relation to the LOSC provisions? It was not until the *Cameroon/Nigeria* case that this issue was analysed[491]. In its seventh preliminary objection, Nigeria stated that, as far as maritime delimitation was concerned, there was no legal dispute. One of its arguments was that there had not been "sufficient action by the parties, on a footing of equality, to effect of a delimitation *by agreement on the basis of international law*"[492]. The need to negotiate before having recourse to adjudication was, to Nigeria, a requirement prescribed by general international law, also present in Articles 74 and 83 of the LOSC.

The Court's answer has left little room for doubt. Noting that it had "been seized on the basis of declarations made under Article 36, paragraph 2, of the Statute, which

(487) Appendix 2, D4.
(488) ICJ/Reports/1985, p.35, para.39.
(489) Anderson/1998c, p.118. Oxman/1993, p.39; Bowett/1993, p.132.
(490) ICJ/Reports/1985, p.39, para.46.
(491) Antunes/2000c, pp.164-165.
(492) Preliminary Objections of Nigeria, para.7.33(2), emphasis added.

declarations *do not contain any condition relating to prior negotiations to be conducted within a reasonable period of time*", the Court rejected Nigeria's objection[493]. Apparently, to seek first an agreement is no longer (if it ever was) a prerequisite. Regardless of whether the Court changed its views, it is clear that even if there is a conventional obligation to negotiate, that obligation is irrelevant for purposes of establishing jurisdiction under the optional clause. As the compulsory dispute-settlement system incorporated in the LOSC does not in any way impair "the right of any States Parties to agree at any time to settle a dispute between them [...] by *any peaceful means of their own choice*", this approach is irreproachable even between states parties to the LOSC[494].

That exhausting prior negotiations is not a condition of admissibility of applications under the optional clause, and that the existence of a dispute is the sole operative criterion, has been affirmed since the *Aegean Sea* case[495]. In the recent *Cameroon/Nigeria* case, this view was maintained[496]. As perceptively noted by Judge Higgins in her Separate Opinion, entirely different from establishing whether negotiations are a prerequisite for resorting to adjudication, is enquiring whether a dispute exists at all in situations where negotiations have yet not been held[497]. A dispute exists only when two states are aware of each other's claims, and positively and reciprocally oppose them, which in most cases – although not always – occurs in the follow-up of negotiations. But as restated in the *Tunisia/Libya* case, "the manifestation of the existence of [a] dispute in a specific manner, as for instance by diplomatic negotiations, is not required"[498].

How is the situation to be viewed under Part XV of the LOSC? Must negotiations be exhausted before resorting to the means set down in Article 287? One would argue that the answer should be given in the negative. Articles 74 and 83 bear primarily a negative prescription: maritime boundaries may not be determined unilaterally. This is a reflection of the principle of consent, and should be interpreted as nothing more. First, in general terms states are clearly unwilling to condition their freedom to negotiate. Secondly, the textual element of these provisions is unclear as to the existence of an obligation. Thirdly, evidence in the *travaux préparatoires* of the ILC, and in the work of the Third Conference, is against the existence of such an obligation. Fourthly, such an interpretation would benefit primarily the state unwilling to negotiate. Because it would impede the other state from resorting to adjudication without delay, and because it would place on this state the *onus probandi* as to

(493) Judgment on Preliminary Objections, ICJ/Report/1998, pp.321-322, paras.108-111, emphasis added.
(494) LOSC, Article 280. Cf. also Article 33(1) of the Charter, to which Article 279 of the LOSC makes reference.
(495) ICJ/Reports/1978, pp. 12-14, paras.27-31.
(496) Judgment on Preliminary Objections, ICJ/Report/1998, pp.302-303, para.56.
(497) *Ibid.*, pp.345-349.
(498) Reference to the *Chorzów Factory* case in the Judgment on Application for Revision and Interpretation; cf. ICJ/Reports/1985, pp.217-218, para.46.

the unwillingness to enter into negotiation, it would provide the former state with a highly effective 'stalling instrument'.

Realistically, no state will resort to adjudication without attempting (to some extent) to resolve the dispute by negotiation. Whether, and the extent to which, negotiations must be held is a matter of judgment for states. One would argue that they have a wide freedom in this regard, and that in principle nothing precludes a state from immediately seeking the determination of its boundaries by adjudication. It is so equally because an obligation to negotiate has "a very limited scope, amounting to little more than the need to negotiate rather than pursue non-peaceful means, and to negotiate in order to define the precise point at issue"[499].

All in all, the requirement of agreement in Articles 15, 74(1) and 83(1) is no more than the rejection of the possibility to effect delimitations unilaterally. It is significant that agreements are required even when recourse is had to adjudication. The implementation of judicial decisions depends thereon; and importantly, in these agreements, states continue to be virtually free to shape the contents thereof. They are even entitled to depart from any court's decision[500].

(499) Collier/Lowe/2000, p.22.
(500) Anderson/1998c, p.120. This seems to have happened in the *North Sea* cases

CONCLUSIONS TO PART I

A summary of the key ideas conveyed by the previous chapters is worthwhile. To begin, it is crucial to realise that the history of maritime delimitation has always revolved around the tension between geography and law, within which equity assumed a central role. The interdisciplinary nature of this dialectic, reflected from the outset in the work of the ILC, and the participation of the Committee of Experts, has created several difficulties – the resolution of which has not always been approached from the most productive angle. Notably, technical and juridical issues were often not clearly differentiated.

The *equidistance-special circumstances rule* embodied in the Geneva Conventions was the result of years of debate whereby juridical arguments, technical issues, and the views of states were considered in a balanced process. Lawyers, technical experts and politicians all had input, creating a rule that expresses "the effort to balance determinacy with concern for justice", and that invites "principled and reasoned fairness discourse"[501]. State practice prior to 1958 and the views expressed during the *travaux préparatoires* (including both the statements by the government of states) leave no doubt that at the time this formula amounted to progressive development of law, rather than codification of existent law. Important to understanding these provisions is the idea that they were derived from principles of law, which the ILC was explicitly invited by states to develop in order to provide them with some certainty as to the regime of delimitation[502]. It must be duly stressed that states compelled the ILC to abandon any idea of *ex aequo et bono* resolution of boundary disputes. Any approach to discussion of delimitation law must reflect this point. The majority of states were unwilling to leave to courts a wide margin of discretion.

The dismissal of the equidistance-special circumstances rule in the *North Sea* cases was certainly hasty, and unnecessarily upset the whole evolution of maritime delimitation law. Knowing that judges are all too aware that their decisions contribute, often decisively, to shaping the development of the law, the reasoning of this case must also be viewed from a policy-making, or matter of principle, perspective. The ICJ was thus certainly conscious of the relevance of its imprimatur to the international law-making process[503]. The

(501) Franck/1997, p.61; Franck/1995, p.34.

(502) Paras.1.2.b)(ii), 1.2.c) supra.

(503) The decisive role of the ICJ in the identification, crystallisation, and sometimes progressive development of international law could already clearly be seen in many judgments (cf. Shaw/1997, pp.86-87; Thirlway/1990, pp.127-133, Waldock/1951). Cf. the

emergence of the New International Economic Order (NIEO) was already deemed to be one of the reasons that led the Court to attribute to equity an *over-particular role* in the outcome of these cases[504]. Without disagreeing, it ought to be added that if equity was the sole concern, then the Court could have simply resorted to an equity-oriented interpretation of Article 6 of the CS Convention. *Interpretatio aequior sumenda est.* This would have given it all the room it required to aver the need to arrive at a non-inequitable boundary[505]. One would suggest that the impact of the concept of NIEO lies not just on the emphasis put on equity, but also on the rejection of equidistance at all cost. Having confirmed the customary nature of Article 1 of the CS Convention[506], the Court subscribed to the exploitability criterion as a basis of entitlement to the continental shelf. An endorsement of equidistance would have brought about major difficulties.

The concatenation of this entitlement criterion with the use of equidistance in delimitation would result in a situation that was illustrated in sketch-maps used by Germany in its pleadings, showing the whole North Atlantic Ocean divided on the basis of strict equidistance. They cannot have failed to impress the Court unfavourably to equidistance. States like Canada, Denmark (Greenland), Iceland, Ireland, Portugal and the United Kingdom would claim vast areas of ocean floor and subsoil, while inequitably constraining the maritime claims of other interested states[507]. Significantly, Ambassador Pardo's speech in the United Nations had been given just before the oral pleadings took place, little more than one year before the Judgment was rendered. Had equidistance been endorsed to any extent, the idea of a common heritage of mankind would have had little opportunity to crystallize. The dismissal of equidistance *in toto*, leaving equity as the sole deciding criterion, should be understood in this light.

The fact that the Court did not even attempt to interpret the rule contained in Article 6, the combined equidistance-special circumstances rule, lends further weight to this view. Had the Court applied it, it could later be argued that it had homologated equidistance in some measure. The combined rule incorporated in Article 6 of the CS Convention seems thus to have been no more than a 'collateral casualty' of the process of ordering the oceans.

Attempts to bring together the contents of treaty and customary law do not seem to have fully succeeded. The approach of the *Anglo/French* arbitration, though irreproachable,

Reparations case (ICJ/Reports/1949), the *Genocide* case (ICJ/Reports/1951), the *Nottebohm* case (ICJ/Reports/1955), the *Certain Expenses* case (ICJ/Reports/1962), the *Temple* case (ICJ/Reports/1962), and the *Fisheries* case (ICJ/Reports/1951).

(504) Cf. Rossi/1993, pp.126, 173, 195-200, 202-203, 218; Quéneudec/1979, p.74; Friedmann/1969, pp.239-240.

(505) Judge Ammoun, Separate Opinion, *North Sea* cases, ICJ/Reports/1969, pp.149-151, paras.52-53. Concurring with this view, Anderson suggests that it "would have produced the same broad result" (Anderson/2001, p.6).

(506) ICJ/Reports/1969, pp.39-40, para.63.

(507) German Memorial, ICJ/Pleadings/1968(1), pp.62-67. As Lang emphasises, this was one of the most spectacular sketch-maps brought before the Court (Lang/1970, p.21). It must be remembered that, by then, it was thought that the wealth existent in the deep seabed (in particular the polymetallic manganese nodules) would become a key factor in some aspects of world economy.

is far from clear (probably because of the attempt not to contradict the 1969 Judgment), and the *travaux préparatoires* of the LOSC illustrate the difficulties in reconciling the two perspectives. As to the role of equidistance in delimitation, the assertion that Article 6 and customary law had the same object (the delimitation of boundaries by equitable principles) may be interpreted in two opposite ways[508]. Despite their understandable objectives, by blurring its contents these attempts at reconciliation damaged even further, at least in the years that followed, the combined equidistance-special circumstances rule.

The decisive impact of jurisprudence in the evolution of maritime delimitation law before the LOSC has to be recognised. Although not expressed in very precise terms, the averring of the role of proportionality as a standard for identifying inequities is undoubtedly an outstanding legacy of the *North Sea* cases. No less important is the inheritance of the *Anglo/French* arbitration, which recognised that under state practice, whenever equidistance would lead to an inequitable result, boundary-lines should be sought through adjustments thereof[509]. Hasty or unjustified dismissals of equidistance were then rejected.

The contribution of case law, however, was not always positive. The approach of the *North Sea* cases, in certain issues, lacks systematisation and legal articulation. Resorting to natural prolongation as a delimitation standard, instead of seeing it as root of entitlement, is scarcely understandable. Further, parts of the Judgment – which appear to be more *obiter dicta* than *ratio decidendi* – were extrapolated without due caution, becoming the reasoning in other cases. Not surprisingly, this Judgment – already referred to as "admittedly not one of the best products of the Hague Court"[510], or as suffering "from an excess of deductive reasoning from vague premises" – has not gained widespread support for its doctrine[511].

Common to both the 1969 and the 1977 decisions (although clearly less marked in the latter), is the flawed idea that equity allows courts to weigh whatever circumstances they deem relevant. If the relevance and weight of delimitation factors were definable only on a case-to-case basis by courts in order to justify a specific outcome, and were not limited by law, then courts would be empowered to decide *ex aequo et bono*. That was explicitly rejected in both decisions, and in state practice.

The LOSC was hailed, by jurisprudence and by many authors, as the victory of the *equitable principles doctrine*. It has to be said, however, that the so-called customary rule of delimitation has only a spurious existence. For it lacks the tangibility of real-life facts, namely its *de facto* and *de jure* application outside the courts. State practice has never given

(508) Paras.2.4.c)(i), 3.4. *supra*, 6.4.b)(iii) *infra*.
(509) Para.6.4.b)(iii) *infra*.
(510) Arangio-Ruiz/1987, p.44.
(511) Brown/1992, p.83.

it the necessary general support. In addition, proper treaty interpretation shows that the equitable principles doctrine was not adopted in any of the LOSC delimitation provisions. Had this been the case, why would some states of the "Equitable Principles Group" vote against the LOSC, while attempting to formulate reservations to the delimitation articles?[512] This is a striking question, especially when considering that no state of the "Equidistance Group" voted against the Convention or tried to formulate reservations to the delimitation articles. Actually, as would be proven by subsequent jurisprudence, the recourse to distance as the main operative-criterion of maritime entitlement was a sign that equidistance had not been discarded at all.

The delimitation provisions of the LOSC must be seen as the result of three decades of developments in international law. As conventional law, perhaps it is intellectually appropriate to distinguish between Article 15 and Articles 74(1) and 83(1). The former incorporates the formula "equidistance-special circumstances", the acceptance of which raised little controversy during the Third Conference, and which crystallised in customary law and conventional law alike. According thereto, equidistance is the mandatory starting line for delimitation in the absence of an agreement, which amounts to a *juris tantum* presumption in favour of equidistance, rebuttable only by special circumstances[513]. As to Articles 74(1) and 83(1), their historical evolution leads to the conclusion that – in substantive terms – it appears preferable to interpret them as simply setting an *obligation of result*: the boundary must be non-inequitable. Other substantive criteria, of an operative nature, are set down only indirectly, through a *renvoi* to international law. No *obligation of means* was directly set[514]. It is noteworthy that proposals stating that recourse could be had to "any methods" of delimitation were explicitly rejected in the Third Conference. Any attempt to interpret Articles 74(1) and 83(1) as conferring upon courts the power to decide by reference to "any methods" finds here an insurmountable obstacle. Finally, it is important to stress that the differences between Articles 74(1) and 83(1) and Article 15 do not necessarily mean that their practical application differs significantly[515].

An attempted survey of state practice concerning continental shelf, EEZ and fisheries zone delimitation showed that no settled, extensive and virtually uniform practice

(512) Cf. the positions adopted by Turkey and by Venezuela over this matter; Off.Rec.-1973/82(XVI), pp.132-134, 223 (Document A/Conf.62/L.108), 226 (Document A/Conf.62/L.120); Off.Rec.-1973/82(XVII), pp.76-77, 119. The long statement of the Turkish representative, emphasising the equitable principles doctrine, only seems to demonstrate that the intention of the parties was not to adopt such doctrine, and that Turkey was reserving its position as to the interpretation of those articles.

(513) The notion of special circumstances should not include historic titles. Equidistance is not applicable in situations where a historic title exists, not because it is a special circumstance, but rather because the existence of a historic title means that no delimitation is necessary, rendering thus the delimitation rule inapplicable.

(514) As will be argued, *stricto sensu*, neither of these obligations is germane to negotiations between states. They are binding solely upon courts and tribunals (or equivalent third-party decision-making bodies).

(515) Conclusions to Part II, and General Conclusions *infra*.

has emerged favouring the so-called 'equitable principles' doctrine. Nor does state practice explain what are its contents. Clearly, the few references to equitable principles are far from implying the rejection of equidistance as the starting point of delimitation.

The United States of America, the state which referred first to equitable principles, in its 1945 declaration regarding rights over the adjacent seabed and subsoil, and which kept that reference in its 1983 proclamation concerning the EEZ[516], has used equidistance in the vast majority of delimitations[517]. Highly reputable American writers have endorsed such an association from the beginning. Boggs affirmed, back in 1951, that the "most reasonable and just line would be one laid down on the *median line* principle", and added that this method "would provide the *equitable principles* for accord between the United States and a neighbour which are referred to in" the Truman proclamation[518]. Shalowitz also stressed the equitable nature of the recourse to the median line principle in maritime delimitation[519]. The only exceptions to the resort to equidistance in boundaries involving the United States are the boundary with Canada in the Gulf of Maine, decided by a Chamber of the ICJ, and the boundary with Russia in the Bering Sea[520], where the line results to a great extent from the interpretation of a previous treaty. Equidistance was resorted to even in the delimitation of the continental shelf beyond 200 M, with Mexico, where the entitlements that overlap are not based on the distance criterion[521]. This lends outstanding support to the idea that the expression "equitable principles" was always associated with equidistance[522].

Interestingly, one of the states at the centre of the "Equitable Principles Group", Ireland, used the expression "equitable equidistant line" to refer to the criterion to delimit its exclusive fisheries zone. Intrinsic in this expression seems to be the idea of equidistance as the *prima facie* delimitation line. Another interesting case is that of the United Arab Emirates. Having started by referring to equitable principles as the delimitation criterion for the continental shelf in the late 1940's[523], these same states used equidistance in their 1980 declaration concerning the exclusive economic zone[524]. The preference for equidistance, due to its "clear and equitable" character, was re-affirmed at the end of the Third Conference[525]. Other state practice combines references to equity or equitable solution with equidistance in some form, either implicitly or explicitly (e.g. Australia, Belgium, Bulgaria,

(516) Appendix 2, E45.
(517) For the treaties involving the USA in which equidistance was used, cf. Appendix 2, D18, D53, D61-D62, D64, F46, F62-F64.
(518) Boggs/1951, p.262.
(519) Shalowitz/1962(I), p.232.
(520) Appendix 2, F65.
(521) Appendix 2, F64.
(522) Para.1.2.a) *supra*.
(523) In 1949, the states that constitute the United Arab Emirates were British protectorates.
(524) Appendix 2, A1-A2, A4, A9, A11-A12, C57.
(525) Off.Rec.-1973/82(XVI), p.28.

Cuba, France, Haiti, Indonesia, Jamaica, Malaysia, Morocco, Seychelles, Tanzania, Turkey, and the United Kingdom)[526].

At the fulcrum of the interpretation of the conventional provisions on continental shelf and EEZ delimitation is one distinction: it is one thing to speak of the *means* on the basis of which the delimitation is effected; and it is another to refer to the *result* reached in the delimitation. Account taken of all elements, it is suggested that the LOSC provides one explicit normative parameter: the result must be non-inequitable. Articles 74(1) and 83(1) lay down "the aim of any delimitation process [and reflect] the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones"[527]. Indeed, both groups of states had converging views in this respect. Doubts subsist, however, on how to attain such result. In particular as regards the existence of obligatory means of delimitation. It is in this respect that the two groups disagreed. That the LOSC, while omitting references to specific standards, effects a *renvoi* to international law in general, seems doubtless[528]. However, it may be contended, as Charney does while stressing the "normative and theoretical uncertainties in this area", that there is no customary law on this matter, and "that no normative principle of international law has developed that would mandate the specific location of any boundary line"[529]. This would turn the said *renvoi* into a somewhat hollow statement. The answer to this problem may be postponed for the time being. Further investigation will provide an answer[530].

(526) Appendix 2, C26, C34, D8, D20, D42-D43, D46, D58, D60, D64-D66, E3, E19, E21, E33, F4-F6, F12, F14, F19, F21, F27, F31-F32, F44, F47, F53, F55, F58.
(527) *Jan Mayen* case, ICJ/Reports/1993, p.59, para.48.
(528) Arangio-Ruiz/1987, p.46.
(529) Charney/1993, p.xlii.
(530) Paras.6.2.c), 6.3., 6.4., Conclusions to Part II *infra*.

II

CORE ISSUES:
CONCEPT, METHODS AND NORMATIVITY

INTRODUCTION TO PART II

The conclusions reached in Part I raise many questions in respect of delimitation law. Serious doubts are cast upon the argument that customary law prescribes the recourse to 'equitable principles' in continental shelf and EEZ delimitation. No general practice can be found that to support its key propositions: one, that the mandatory use of equidistance is rejected – even as a starting point for the delimitation; two, that courts are empowered to choose whatever methods are deemed appropriate, and to weigh whatever circumstances they deem to be relevant. Equally doubtful is the suggestion that the 'equitable principles' doctrine were incorporated in the provisions on delimitation of the LOSC.

That international law prescribes that inequitable delimitations ought to be avoided is unquestionable. This proposition is part of customary law, and is indeed incorporated in the LOSC. However, this *obligation of result* means little in terms of the normative means to be utilised in delimitation. One would argue that there is no *consensus generalis*, and thus no customary rule on the means whereby continental shelf and the EEZ delimitations are to be effected. Without identifying a general and settled practice, and the corresponding *opinio juris*, the existence of a customary rule cannot be asserted – unless the whole understanding of this source of law is changed. Difficulties of this type, inherent in the identification of customary law, have led some authors to question the very existence of customary law, primarily due to legitimacy concerns in a multicultural and heterogeneous world[1]. Whether customary international law is indeed in its twilight, and whether multilateral treaties (of which the LOSC is a cardinal example) should be favoured, is a matter of debate. What is certain is that weakening the concept of custom by adopting the less than sound approach which led to considering the so-called 'equitable principles' as part of customary law is unlikely to promote the international legal order. With it, clarity and predictability, as well as equity for that matter, are far from being furthered.

(1) Referring to the twilight of customary law, cf. Kelly/2000.

Part II attempts to set down some conceptualising tenets of maritime delimitation, ultimately seeking to overcome uncertainties related to the normative standards applicable to delimitation. These conceptual tenets underlie the application of the provisions of the LOSC on delimitation, and form the cornerstones of the political-legal determination and technical definition of maritime boundaries. In Chapter 4, this study delves into the concept of delimitation, and its evolution in case law and doctrine. It is suggested therein that the notion of overlapping of entitlements is the object-matter of maritime delimitation, around which the whole problem revolves. The idea that there is a certain degree of precedence between different maritime entitlements, and the impact of this idea on the delimitation process, also deserves particular attention. Chapter 5 offers an overview of the methods of delimitation and the line-defining techniques more commonly used. The technical character of these concepts, and their relevance in the delimitation process, are examined. One crucial point is made in this part: most methods applied in maritime delimitation are technically equidistance-related. Finally, Chapter 6 deals with the issue of normativity. It considers at an introductory level aspects of the delimitation process, and aspects of the concept of normativity in international law. Its core consists of an analysis of the two principles of international law that arguably form the normative framework whereby maritime delimitation is governed. Understanding what makes equidistance a normative standard, and how equity interplays therewith in the delimitation process, are critical questions to which an answer is sought.

Chapter 4
THE CONCEPT OF MARITIME DELIMITATION

4.1. The Need for Conceptualisation

Despite the numerous studies, attention has seldom been drawn to the conceptual aspects of maritime delimitation. Apparently, this stems from the fact that emphasis has been put, perhaps too much, on the uniqueness of each case. Such an approach is clearly illustrated in a *dictum* of the ICJ in the *Tunisia/Libya* case. The Court affirmed that "each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances"; and concluded that, for this reason "no attempt should be made [...] to overconceptualise the application of the principles and rules relating to the continental shelf"[2].

That the application of rules of law to a certain situation must always take account of the factual circumstances is unquestionable. But it is hardly possible to overconceptualise legal principles and rules, which are necessarily characterised by 'abstraction' and (*prima facie*) by 'generality'. Otherwise how could normativity exist? Conceptualisation is exactly the operation through which, whilst understanding the *ratio decidendi* of legal decisions, general and abstract principles and rules may be identified. These principles and rules are what allow extrapolation from one case to another. Extrapolation without conceptualisation has therefore little (if any) juridical support. If the uniqueness of each case is the paramount determinant, it is difficult (if not impossible) to rely on a previous decision to assess another case – which is again unique. There is good reason to believe that overemphasising the uniqueness of each case, while under-conceptualising the maritime delimitation problem, has contributed to the emergence of some misunderstandings. The best example is the way in which equidistance has been handled. The difficulty in grasping its inherent normative content stems from the lack of distinction between different conceptual aspects of maritime delimitation. Equidistance embodies not only a geometrical principle, but also a juridical rationale. Its role must thus be understood at two different levels[3].

Maritime boundary delimitation has multiple facets. Its interdisciplinary nature, and the distinct impact thereof on the different stages of the delimitation process, must be

(2) ICJ/Reports/1982, p.92, para.132.
(3) On the normative content of equidistance, cf. para.6.3.d) *infra*.

properly grasped. Nevertheless, the two basic questions to be answered remain those that were asked by DeLapradelle a long time ago[4]: Where does the boundary-line run? By which juridical and technical procedures is this line to be fixed? Whilst attempting to shed light on conceptual aspects, this chapter endeavours to provide a coherent framework for analysing maritime boundary-making. The propositions made, whilst forming the premises for further investigation, have two-fold relevance: they form the background against which the actual delimitation practice must be construed; to some extent, they amount to an interpretative element of the normative standards.

4.2. Delimitation: A Two-Phase Operation

4.2.a) Delimitation: Political-Legal Determination and Technical Definition

First and foremost, it must be clarified that, conceptually, the notion of *delimitation* encompasses two different phases: one is the *determination* of the boundary; the other is the *definition* thereof. The *determination* of the boundary consists of the choice of the location of the boundary-line. Referring to land-boundary delimitation, Jones speaks of this phase as "a *compromise between geographical suitability and political necessity*", amounting to "*science and art*". As to the *definition* of the boundary-line, he sees it as "a purely technical process that *should*, and *can*, be carried out *with scientific exactitude*"[5]. This distinction is conceptually important because it emphasises the key moment of the delimitation process: the decision on the locus of the boundary. On land, the distinction between these phases is clear, in particular because delimitation is usually followed by an operation of demarcation. In maritime delimitation, the distinction might in practice be difficult. For conceptualising purposes however, it should not be forgotten. A number of misconceptions and problems might arise if it is not made. Hence, methodologically, it appears appropriate to clarify the scope of these two phases, their relevance, and how they interact with the political, legal and technical aspects of maritime delimitation.

The *determination* of a boundary's course has a hybrid nature, where politics, law and technicalities are intertwined. As a decision-making process however, one should focus primarily of the political-legal pendulum. The determination of the boundary is in essence a political matter if stemming from negotiation. When resulting from adjudication, it becomes mainly a juridical issue. Technicalities have in this phase a less relevant, supporting role. Broadly speaking, the boundary determination may be seen as a weighing-up process that

(4) DeLapradelle/1928, p.17.
(5) Jones/1945, p.57, emphasis added.

involves either political and legal considerations (in negotiation), or strictly legal considerations (in adjudication)[6].

The *definition* of the boundary-line, by contrast, is a purely technical matter[7]. During the phase of determination, the process results in a decision that, though determining the location of the boundary, does not define its course in a technically precise manner. For example, a court may adjudge that the delimitation line between two states will be an equidistance-line, attributing full-effect to some basepoints but only partial-effect to others. The precise course of the line, defined by turning points, the coordinates of which are anchored on a specific geodetic datum, is a matter to be dealt with in the phase of definition. Another example: states may agree that the boundary will be a line following an organised series of parallels and meridians. Establishing the precise coordinates of the parallels and meridians, and their geodetic reference, belongs to the definition phase. This stage, whereby the line determined during the previous phase is expressed in exact technical terms, should be governed entirely by technical tenets.

4.2.b) Case Law

4.2.b)(i) *North Sea Continental Shelf* Cases

In the *North Sea* cases, decided in 1969, the ICJ was asked to declare which principles and rules of law would be applicable to the maritime delimitation between the parties[8]. Because the states involved decided that the boundary-line was to be established by negotiation, it may be said that the scope of the competence of the Court was confined to a part of the phase of determination. Its competence was restricted to elaborate on the legal framework by which the delimitation had to abide, without actually deciding on the location of the line *in concreto*. Since the Court was not empowered to choose the boundary-line, the technical considerations involved were scarce.

4.2.b)(ii) *Anglo/French* Arbitration

The situation was quite different in the *Anglo/French* arbitration, where the Court of Arbitration was requested to decide upon the actual course of the boundary[9]. In the 1977 decision, unfortunately for negative reasons, the technical aspects played a prominent role. Not satisfied with the technical definition of the line effected by the expert of the tribunal,

(6) For an analysis of this process, cf. Chapter 7 *infra*.

(7) Seeing the fixing *proprio sensu* of the dividing-line as an operation more technical in nature, see Lucchini/Vœlckel/1996, p.9. For an overview of some of the technicalities involved in this phase, and of the methods and line-defining techniques that can be used in the definition of the boundary-line, cf. Chapter 5 *infra*.

(8) ICJ/Reports/1969, p.14, para.2.

(9) RIAA/18, p.17-18, para.1.

the United Kingdom filed an application to re-institute the proceedings with a view to obtaining an interpretation of the meaning and scope of the decision rendered. Its application stated that *the techniques and methods employed by the technical expert to trace boundary-lines gave rise to certain technical problems involving contradictions between segments of those lines and the intentions of the Court set out in the body of the Award.* Basically, the view of the United Kingdom was that the line *defined* by the technical expert did not comply with the boundary *determined* by the Court. Insofar as the technical definition of the line in the Atlantic region was in contradiction with the ordinary meaning of the technical terms used in the reasoning, this view should have prevailed. In any event, what must be noted here are the distinctions drawn by the United Kingdom between: (a) the *determination* of the course of the line, (b) its *definition*, and (c) its depiction on a chart for purposes simply of *visual illustration*[10].

4.2.b)(iii) *Dubai/Sharjah* Arbitration

In the *Dubai/Sharjah* arbitration, the technicalities involved were approached in a correct manner. Issues such as scale and accuracy of charts, the merely illustrative character of charts, the nature of straight lines, and the geodetic datum were properly addressed in the 1981 Award. They were dealt with in such a way that the determination of the boundary (in accordance with the juridical reasoning), and the technical definition of the line, are clearly separated – the latter being consonant with the former[11].

4.2.b)(iv) *Tunisia/Libya* Case

In the *Tunisia/Libya* case, the Court was requested to determine which principles and rules of international law applied to the delimitation of the continental shelf areas appertaining to the states involved. But this time it was also asked "to specify precisely the practical way in which the aforesaid principles and rules" applied *in casu* "so as to *enable the experts of the two countries to delimit those areas without any difficulties*". According to the Special Agreement, the two states would subsequently meet in order "to determine the line of delimitation". Should an agreement not be reached within three months, the states would be entitled to address the Court to obtain the necessary "explanations and clarifications"[12]. The separation between the two phases of delimitation is patent in the way in which the Court was requested to adjudicate.

(10) RIAA/18, pp.304-306, paras.48-51, emphasis added.
(11) ILR/91/1993, pp.677-678.
(12) ICJ/Reports/1982, pp.21-22, para.2, emphasis added.

In rendering its 1982 Judgment, the Court discarded the use of equidistance, and found itself in a rather difficult position as to the determination of the boundary's course. Without scrutinising the decision here from a juridical standpoint, it is crucial to note that some of the technical appraisals of the Court are questionable[13]. Why was the most westerly point in the Gulf of Gabes relevant? This point has no impact either on the general direction of the coast, or on the coastal relationship between the two states. Why was the parallel of its latitude decisive for the turning point of the boundary? The relevance of a parallel of latitude (which is simply an element of the chart-lattice, with no significance whatsoever at the level of geographical context) for the delimitation amounts to an "*optical illusion*"[14]. To use Alexander's words, it results from *cartohypnosis*[15]. As aforesaid, this effect might occur if the 'power of maps' is not harnessed by the knowledge of proficient experts[16]. When the *North Sea* cases were analysed, one important question was asked: On what grounds would the Court have justified the course of the boundary if it had been required to determine it, and had refused to resort to equidistance as the starting point?[17] The *Tunisia/Libya* case answered this question. The ICJ's reliance on 'chart-features' with no juridical relevance for the delimitation illustrates the shortcomings of its conceptual approach at that time.

4.2.b)(v) <u>*Gulf of Maine* Case</u>

Fully aware of these previous difficulties, Canada and the United States included in the Special Agreement that preceded the *Gulf of Maine* case some specific provisions on technical issues. The Chamber was requested, first, to "describe the course of the boundary in terms of geodetic lines, connecting geographic coordinates of points". In addition, it was also asked, "for illustrative purposes only, to depict the course of the boundary" on specific hydrographic charts. To provide assistance to the Chamber in discharging its functions the parties equally asked that a jointly nominated technical expert would be appointed. In fact, perhaps it should be said that the parties agreed on the nomination, and the Chamber had no choice but to abide by this agreement[18]. Since then, whenever the course of the boundary was to be established by adjudication, technical experts have been appointed to assist courts in technical matters[19].

(13) Since no satisfactory explanation was given to discard equidistance (the fact that the parties did not argue on the basis thereof is not enough to render it inapplicable, if that were required by law – cf. para.8.4.e)(ii) *infra*), the Judgment seems to be more an *ex aequo et bono* decision, than a decision based on law (para.6.4.b)(ii) *infra*).

(14) Judge Oda, Dissenting Opinion, ICJ/Reports/1982, p.268, emphasis added.

(15) Alexander/1986, p.74.

(16) Para.2.3.c) *supra*.

(17) Para.2.3.d) *supra*.

(18) ICJ/Reports/1984, p.253, Article II of the Special Agreement; see also Article IV.

(19) *Guinea/Guinea-Bissau* arbitration, ILM/25/1986, p.257 (Article 9 of the *compromis*), p.261, para.15; *Guinea-Bissau/Senegal* arbitration, ILR/83/1990, p.11 (Article 9 of the *compromis*), p.14, para.14; *Canada/France* arbitration, ILM/31/1992, p.1152 (Article 2(3) of the *compromis*), p.1155, para.31; *Eritrea/Yemen* arbitration, Article 2(3)(b) of the *compromis*, Eritrea/Yemen-II, para.5.

4.2.b)(vi) _Jan Mayen_ Case

The *Jan Mayen* case is another instance in which the question of technical definition of the boundary-line deserves attention. In the oral pleadings, Denmark requested the Court to draw the line of delimitation, if its first submission – to adjudge that the boundary was the 200-mile limit from Greenland – would not be upheld. By contrast, Norway asked the Court to render a judgment "declaratory as to the bases of the delimitation", leaving "the precise articulation (or demarcation) of the alignment to negotiation between the parties". Norway agreed "that the Court ha[d] jurisdiction and power to answer the legal question as to the rules and principles governing a delimitation". But it argued that, since the parties had neither negotiated, nor articulated, the scope of the task, the Court "should exercise judicial restraint by stopping short of indicating the details of the specific delimitation itself". Affirming that giving "only a broad indication of the manner in which the definition of the delimitation line should be fixed" would "not be a complete discharge of its duty to determine the dispute", the Court decided to "define the line in such a way that any questions which might still remain would be *matters strictly relating to hydrographic technicalities* which the parties, with the help of their experts, can certainly resolve"[20].

The distinct phases of delimitation are clear in these citations. One point however, makes the decision peculiar. The Court not only dealt with various technical issues (e.g. geodetic datum, nature of the straight lines joining the turning points), but it also carried out other technical computations relevant for the *determination* phase (e.g. calculation of 'equal areas' and of distances between points). This however, was done without any expert being formally appointed[21]. Although no significant problems arose here, such an approach should perhaps be discouraged – owing to the risks that it entails[22].

4.2.c) State Practice

The existence of a purely technical phase of definition of the boundary, as opposed to a political-legal determination thereof, is patent in various examples of state practice. The arbitration agreements that led to the *Canada/France* and *Eritrea/Yemen* arbitrations, which are for all purposes state practice, illustrate clearly the distinction between determination

(20) ICJ/Reports/1993, pp.42-44, 77-81, paras.9-10, 88-93, emphasis added. Cf. also Norwegian Counter-Memorial (para.704) and Rejoinder (para.658); Verbatim Records, CR93/9, CR93/11, Public Sittings, 11, 27 January 1993. Whether the boundary should have been delimited (since there was a clear disagreement between parties in this respect) is a different procedural question.

(21) In reality, the Court seems to have the support of technical experts, who nevertheless are not appointed as allowed under the Court's Statute and Procedural Rules (cf. paras.5.1.a), 5.1.c) *infra*).

(22) ICJ/Reports/1993, pp.80-81, paras.92-93. For instance, the Court referred to a division of Zone 1 into two parts of equal area. However, rough calculations by the author show that Norway was favoured in the division of Zone 1 in some 45 sq.km, in relation to the Danish area. Whether such a level of approximation was intended, or any other for that matter, is unclear.

and definition of the boundary-line. In these arbitral *compromis*, after referring to the legal regime on which the delimitation was to be founded, states requested the Tribunal to define the course of the boundary "in a technically precise manner"[23].

As to agreements that effect the delimitation of maritime boundaries, the practice of states such as India, Indonesia, Thailand, Sri Lanka, Malaysia, Maldives, Burma (Myanmar) and Vietnam provide good examples of the said distinction. In virtually every delimitation agreement, there is a provision stating that the actual location of the boundary points at sea, and of the lines connecting them, shall be technically defined by mutual agreement between the hydrographic experts or the competent authorities of the two Governments. Whilst the determination of the boundary is made by diplomatic negotiations, and its description made in the agreement, the technical definition of the boundary-line is left to a later stage[24].

4.2.d) Technical Support to Maritime Delimitation

The distinction between a political-legal phase, and a technical phase, may lead to think that the function of technical experts in maritime delimitation is restricted to the latter. That is not the case. No doubt, the definition of the boundary involves exclusively technical matters. However, the reverse is not true. Technical aspects are not confined to the phase of definition. The determination of the boundary requires in all cases some degree of technical support, especially in assessing the geographical setting and in appraising the impact of the weight given to certain considerations.

Negotiators and judges embark initially on a 'wide perspective approach'. The first goal is to become cognisant of the geographical framework, and to identify which 'main variables' influence the delimitation. Cartographic information – the understanding of which requires technical expertise – is central to this analysis of the delimitation setting. Decision-makers indeed rely from the outset on technical assessments, which interweave in the political-legal determination of the boundary's course. The initial assessments made, the delimitation process enters into an intermediate stage in which decision-makers require a higher level of technical support. Provisional lines are then drawn on maps; and they are 'iteratively' refined in the light of the weight given to 'delimitation factors'. The subsequent number of iterations (i.e. adjustments of the line), is dependent upon the complexity of the delimitation setting. At this juncture, agreement on a number of technical points might have become necessary. It may also become necessary to calculate maritime areas, coastal lengths, and distances, in order to grasp objectively how a certain line effects the division of

(23) ILM/31/1992, p.1152, para.1, Article 2(2); Eritrea/Yemen Arbitration Agreement, Article 2(3)(a).
(24) Appendix 2, D11, D31-D41, F56.

the area germane to the delimitation. This is perhaps why Jones refers to the determination of a boundary as being both science and art, where geographic suitability must be reconciled with political-legal necessity. Such 'tentative approach' may seem improper to resolve a fundamental political-legal issue; but it seems to be how the determination of a boundary-line is actually attained. Technical aspects acquire even greater relevance as the delimitation process approaches its conclusion. The boundary determined in broad terms, it becomes necessary to refine its precise course. Potentially, disagreement on technicalities may constitute the only pending issue. Advice of technical experts thus becomes crucial at this point. When the course of the boundary is finally determined, it is necessary to define the line with scientific exactitude. That is when one enters the phase of definition. Legal and political arguments are no longer relevant.

Decision-makers should be fully aware of the difficulties that might arise if the determination of the line does not consider certain technical aspects. Without recourse to technical experts, these difficulties are likely to increase. For example, if a boundary is determined merely as 'the straight line perpendicular to the geodesic that joins points A and B', and the term 'straight line' is used as meaning a geodesic, the definition of the line is technically impossible. A perpendicular to a geodesic can never be another geodesic (with the exception of specific situations, highly unlikely to occur). Further, the 'perpendicularity' can only be computed in relation to one point on the geodesic (which must be indicated), and can only refer to the azimuth of the perpendicular line in that point.

Two pivotal ideas thus are worth emphasising. The definition of the boundary-line, which is a purely technical exercise, is conceptually distinct from the determination thereof. Regardless of the procedural means to which recourse is had, the definition of the line is to be undertaken in accordance with the *leges artis*, and should be carried out by technical experts. This definition emerges as the 'technical translation' of the determination made by the political-legal decision-makers. Notwithstanding this, technical aspects are relevant – although in different measures – not only for the definition of the boundary-line, but also for the determination thereof.

4.2.e) Legal Significance: Compliance of the Definition with the Determination

What is the legal significance of the distinction between these two phases is another fundamental question. Tanja accepts the distinction between a political-legal phase and a technical phase. Importantly, he has clarified that there is a technical side in delimitation, which is distinct from, and operates within, the political-legal framework[25]. Quite correctly,

(25) Tanja/1990, pp.xvii-xviii, 292. Concurring, cf. Lucchini/Vœlckel/1996, p.9; Vœlckel/1979, p.707; Boggs/1940, p.32.

his approach emphasises the primacy of the political-legal phase. Some points of his conceptualisation must nevertheless be viewed with caution. When speaking of "several legal aspects", Tanja seems to consider that all aspects of delimitation exist on the same level: the legal level. First, this approach is not totally accurate. Secondly, it reflects the fact he analyses the delimitation process from the adjudicative standpoint. The technical phase of delimitation is neither a "legal aspect", nor restricted to "the use of delimitation methods". Various technical issues must be dealt with independently of the "delimitation methods", under strict technical tenets (e.g. computation of areas, computation formulae, cartographic projections, geodetic datums, notion of straight line). Further, the "procedural aspects" are relevant only for the *determination* phase; the *definition* phase is independent thereof. On another level, Tanja's distinction between the "identification" of the applicable law, and its "implementation" *in casu*, creates perhaps an unnecessary separation between two issues belonging to the *determination* phase; if only because the interpretation of the law entails the subsumption of the facts into the normative premise. Also, the identification of the applicable law does not necessarily have to take place in negotiation, in which case the delimitation process might be fundamentally a politics-oriented process.

Conceptually, the key conclusion is that the *definition* of the line must abide by the determination of the political-legal decision-maker. It is a 'technical translation' that must defer to a political-legal decision[26]. The line might have been attained by negotiation (where political factors may be considered), by adjudication (where only legal considerations may be weighed), or by non-judicial third-party settlement (where the factors to be weighed depend on the specific agreement on which it is based). The way in which the line is technically defined however, remains unaltered. As a purely technical operation, it should be left to experts only.

Finally, it must be observed that, in practice, it may be difficult, or simply not possible, to differentiate the two phases of delimitation. Because technicalities are involved in both the determination and definition phases, in most instances, the determination of the boundary leads simultaneously to a certain level of technical definition. In addition, on the 'temporal axis' the two phases might overlap. The phase of definition might begin before the phase of determination is completed. The reality is that, in many agreements and judgments (or awards) which only present the final outcome of the delimitation, the two phases appear so deeply interwoven that it is not possible to distinguish between them.

(26) Tanja uses the terms "delineation" and "demarcation" to refer to the technical phase of delimitation. However, this terminology seems inadequate (Tanja/1990, p.xvii). Delineation refers to the unilateral establishment of maritime limits, and demarcation to the setting-up of conspicuous marks on the ground. Maling uses the term *demarcation* to refer "to the technology, observing and measuring techniques and data processing involved in the establishment of the boundaries [comprising] mathematical concepts in geodesy and hydrographic surveying" (Maling/1989, p.525).

In the *Gulf of Maine* case and in *Canada/France* arbitration, a technical report appears attached to the Judgment and the Award, respectively[27]. The technical definition of the boundary-line is thus easily grasped. Reading the technical report moreover, it is understood that, although the technical definition of the line is presented separately, the two phases overlapped. The *Guinea-Bissau/Senegal* arbitration is a different situation. Due to the reasoning adopted, the Tribunal thought it was not "expedient to append a map showing the course of the line". No technical report was annexed to the award, and the work of the technical expert appears to have been less relevant[28]. An intermediate instance is the *Eritrea/Yemen* arbitration. Although no report is provided, the assessments of the technical expert are patent. They become clear when the Award 'translates' the legal reasoning into a boundary-line (under the title "The Boundary Line Determined by the Tribunal"), and when it defines the course of the line in the *dispositif.* The references made throughout to tidal datums, geodetic lines, geodetic datum, and the illustrative use of charts, appear as a token of the expert's work[29].

In the 1999 agreement between the United Kingdom and Denmark (Farøe Islands), the phases of determination and of definition are hardly discernible. Articles 1 and 3 state succinctly that the boundary is constituted by a series of geodetic lines joining the points described in schedules appended to the text, in the specified order. The appended list of geodetically referenced coordinates of points, being part of the definition of the line, is directly referred to in the determination thereof. In the 1997 agreement between the United States and Niue, it is easier to differentiate between the two phases. The preamble shows that the two states agreed that the location of the boundary should be based on equidistance (phase of determination). Article III states that the boundary is constituted by geodesics connecting certain turning points defined by coordinates, the geodetic datum of which is indicated in Article II (phase of definition)[30].

4.3. Object-Matter of Delimitation: The Overlapping of Entitlements

4.3.a) Early Developments in Case Law

In the *North Sea* cases, the ICJ considered that "the process of delimitation [was] essentially one of drawing a boundary line between areas which already appertain[ed] to one or other of the states affected". This approach was conditioned clearly by the notion of

(27) ICJ/Reports/1984, pp.347-352; ILM/31/1992, pp.1178-1180.
(28) ILR/83/1990, p.47, para.87. Apparently, the technical definition of the boundary was not effected.
(29) Eritrea/Yemen-II, paras.134-135, 161-162, 169.
(30) For references on these two agreements, cf. Appendix 2, F46, F60.

natural prolongation inherent in the coeval "concept of continental shelf entitlement"[31]. At a first glance moreover, this seemed to convey the idea that delimitation had a declarative nature, and that the continental shelf boundaries had a natural character. No reference was made to overlapping of entitlements. Actually, in the *dispositif*, the Court considered the possibility of overlapping areas continuing to exist *after delimitation had been effected*; which should be divided "in agreed proportions or, failing agreement, equally"[32]. Such an approach illustrates the conceptual weaknesses, and the confusion between delimitation and legal entitlement, that affected the 1969 Judgment.

Courts gradually abandoned this declarative, 'nature-oriented' perspective. In the *Anglo/French* arbitration, although still speaking of areas that already appertained to states, the Tribunal departed somewhat from that view. It affirmed that "the very fact that in international law the continental shelf is a juridical concept means that its scope and the conditions for its application are not determined exclusively by the physical facts of geography but also by legal rules"[33]. Later, in the *Tunisia/Libya* case, the ICJ referred to the definition of continental shelf embodied in Article 1 of the CS Convention, and emphasised "the lack of identity between the legal concept of the continental shelf and the physical phenomenon known to geographers by that name". It further clarified that, in 1969, it had "not regard[ed] an equitable delimitation and a determination of the limits of natural prolongation as synonymous"[34]. The complete dismissal of the 'nature-oriented' perspective of maritime boundaries occurred in the *Libya/Malta* case. The Court held that "there [was] no reason to ascribe any role to geological or geophysical factors within [the 200-mile jurisdiction] either in verifying the legal title of the states concerned or in proceeding to a delimitation as between their claims"[35]. The cases decided thereafter simply make no reference to natural prolongation as object-matter of maritime delimitation.

Another reason contributed to the abandonment of the idea that the oceanic areas to be divided were part of the natural prolongation of the land territory, and had always been in the appurtenance of coastal states: the emergence of the notion of the EEZ. In relation to the water column, "one is concerned with an element that is featureless and mobile, and upon which boundary lines can only be notional"[36]. Hence, it is not possible to discern "any genuine, sure and stable 'natural boundaries' in so fluctuating an environment as the waters of the ocean, their flora and fauna"[37]. The same difficulty emerges if one attempts to apply

(31) ICJ Reports 1969, p.23, para.20.
(32) ICJ/Reports/1969, p.54, para.101.(C)(2).
(33) RIAA/18, pp.49, 91, paras.78, 191.
(34) ICJ/Reports/1982, pp.46-47, paras.42-44.
(35) ICJ/Reports/1985, p.35, para.39.
(36) O'Connell (1982) p.635.
(37) ICJ Reports 1984, p.277, para.54. This statement was made in relation to the delimitation of fisheries zones, but is similarly valid for the EEZ.

the theory of natural boundaries, for instance, to territorial sea delimitation. This maritime zone also comprises the column of water, and has its historical origins not in any physical or natural geo-feature, but mainly in aspects of sovereignty and security of the coastal state.

4.3.b) Overlapping of Entitlements and Overlapping of Claims

Maritime entitlement hinges today primarily on the omni-directional projection of the coastline on the basis of the distance criterion. With this criterion, it became clear that delimitation is not the mere declaration of the maritime areas already appertaining to states. Behind the idea of natural prolongation as the object-matter of delimitation advanced in the *North Sea* Judgment underlay indeed a misconception. The question of determination of the maritime entitlement was not distinguished from the delimitation of maritime boundaries. Delimitation appeared to be seen as the determination of the entitlement of states on the basis of natural prolongation, rather than a division of the area of overlapping entitlements. Because natural prolongation was the criterion of entitlement, initially it became difficult to understand how there could be an overlapping of entitlements; i.e. how it could be legally conceived that the natural prolongation of two states overlapped.

The emergence of the distance criterion as the basis of maritime entitlement helped in clarifying the distinction between entitlement and delimitation, and to realise that maritime boundaries have no pre-existing natural character. It became clear that boundaries are set up through delimitation. As regards entitlement, what international law establishes, and already did at the time of the *North Sea* cases, is the extent of the maritime areas that *prima facie* appertain to states, as a corollary of the sovereign title over their territory. Only where two (or more) states demonstrate that they are equally entitled to a certain oceanic area – i.e. where their entitlements overlap – might delimitation be required. Entitlement and delimitation are thus clearly distinct concepts.

With respect to this, it is noteworthy that the idea of overlapping of entitlements has existed in French teachings at least since the 1930s, as illustrated by Gidel's reference to a "*chevauchement des mers territoriales*" in straits[38]. It is therefore somewhat surprising that in jurisprudence the idea of 'area of overlapping potential entitlement' emerged only in the *Jan Mayen* case. The Court observed then that the fact that Norway had restricted its claim to the median line did not mean that Jan Mayen had "any less entitlement to 200 M of continental shelf and fishery zone than the coast of Greenland". It affirmed moreover, that "maritime boundary claims have the particular feature that there is an area of overlapping entitlements, in the sense of overlap between the areas which each state would be able to

(38) Gidel/1934, p.746.

claim had it not been for the presence of the other state". It is within this area, initially 'appertaining' to more than one state, that delimitation is to be effected.

Why the Court decided, *in casu*, to found the reasoning on the area of overlapping of claims, instead of making reference to the area of overlapping of entitlements, is hardly understandable[39]. This means that the entitlement of Jan Mayen beyond the median line was *de facto* irrelevant[40]. Given that the access to natural resources was analysed by reference to the area of overlapping claims[41], this view is regrettable. Imagine that another important fishing ground was located close to and westwards of the equidistance-line (i.e. closer to Greenland). If only those resources that lay within the area of overlapping claims were considered, Denmark would be attributed the fishing ground west of the equidistance-line, and an equitable access to the fishing ground eastwards thereof. That would be anything but equitable. If the area of overlapping of entitlements would be used instead, this conceptual issue would not emerge. All resources within the area of overlapping entitlements would be taken into account. The existence of fishing grounds to the west of equidistance would be weighed-up against the existence of fishing grounds to east thereof.

In adjudication, attributing relevance to the area of overlapping claims – which is merely the result of 'litigation strategy', while denying relevance to the area of overlapping entitlements – the juridical notion *par excellence*, is striking. It is especially so because it 'rewards' the political maximisation of claims in detriment of restrictive approaches based on entitlements[42]. If true, such an approach would lend support to the 'realist idea' that "it may serve the interest of a party to claim the maximum to which it is conceivably entitled", for they should expect a decision embodying "a compromise of some sorts"[43]. One would suggest that this criticism ought to be taken seriously by judges[44].

In the *Jan Mayen* case, the "principle of non-encroachment" (used in the *North Sea* cases) was seen as being based on the notion of overlapping of entitlements[45]. This confirms the idea that natural prolongation was then the object-matter of delimitation. The problem is that because the continental shelf was an area *already appertaining* to each state (which merely required declaration), it was difficult to conceive how an overlap of entitlements could exist. Thus, the only way of *determining where the boundaries lay* was to resort to the so-called principle of non-encroachment. Delimitation did not have a constitutive nature,

(39) ICJ/Reports/1993, pp.47, 64, 70, 78-82, paras.18-19, 59, 72, 89-94.
(40) Figure 80 illustrates the areas of overlapping claims and of overlapping entitlements. Cf. also para.4.3.d)(ii) *infra*.
(41) ICJ/Reports/1993, p.70, para.72.
(42) Judge Oda, Separate Opinion, *Jan Mayen* case, ICJ/Reports/1993, p.101, paras.44-46; Judge Schwebel, Separate Opinion, *ibid.*, pp.126-127; Weil/1996, p.141; Charney/1994, p.243; Churchill/1994, p.26; Politakis/1994, pp.22-24. Oude Elferink states that the area of overlapping claims has to be divided, which is a "basic tenet of delimitation law" (OudeElferink/2001, p.180). Noting that in the *Eritrea/Yemen* arbitration no recourse was had to the overlapping of claims, see Antunes/2001, p.327.
(43) Robinson/Colson/Rashkow/1985, p.591.
(44) Para.6.1.b)(iii) *infra*.
(45) ICJ/Reports/1993, p.64, para.59.

but a declarative one. This 'renewed version' of non-encroachment, which in 1969 had a subjective content, becomes now objectively related to the potential maritime entitlement. Also in this regard, the *Jan Mayen* case was a major turning point. As noted by Thirlway[46], this new approach departs from the perspective adopted in the *Libya/Malta* case, where the entitlement of Malta *in abstrato* was not considered for the purpose of the delimitation[47]. However, this departure of the Court from its previous view is not at all negative. Inasmuch as the new approach in the *Jan Mayen* case is indubitably a better conceptualisation of maritime delimitation, which can contribute to increased predictability in the adjudicating process, it should be strongly supported.

The conceptual coherence of this 'new' approach may be confirmed by a look into the 1969 cases. At that time, the continental shelf entitlement stemmed from the notion of natural prolongation; its outer limits were to be referenced to the depth criterion and the exploitability criterion. Because of the geomorphologic characteristics of the North Sea basin, this meant that *each state* bordering the North Sea would be legally entitled, in the absence of all other states, to the whole of the North Sea continental shelf[48]. Put differently, the whole of the North Sea was an 'area of overlapping potential entitlements'. In a way, all areas appertained *ab initio* to all states. This overlapping of entitlements made delimitation necessary – and entailed the *ex novo* establishment of maritime boundaries.

Relating the reasoning in the *Jan Mayen* case with one of the German arguments in the *North Sea* cases, Thirlway asserts that "[i]t is difficult to escape the conclusion that reasoning of this kind rests on an unstated rule that each of the states concerned should have a 'just and equitable share' of the available continental shelf, in the proportion to the length of its coastline or sea-frontage"[49]. This however, is not exactly true. Thirlway's conclusion assumes, without submitting evidence to support it, that proportionality is the paramount standard in delimitation; which is certainly not the case. Indeed, in most (if not all) cases, the area of overlapping of entitlements will be in some way divided. Such a division is however not a matter of proportionality alone. Moreover, to the extent that it is utilised, proportionality is not a pure mathematical appraisal. Having said this, it will be recognised later that, in relation to one point, Thirlway is right to name the German theory in the *North Sea* cases as example of the Court's new approach[50].

The conceptualisation behind the *Jan Mayen* case, which presents the overlapping of entitlements as the object-matter of maritime delimitation, is a major step forward in the

(46) Thirlway/1993, p.18.
(47) ICJ/Reports/1985, pp.51-52, para.72.
(48) As said, the Norwegian Trough is not an interruption of the North Sea continental shelf (cf. para.2.3.c) *supra*).
(49) Thirlway/1993, p.18.
(50) Para.4.3.d)(i) *infra*.

theorisation of maritime delimitation. This approach was re-averred in the *Eritrea/Yemen* arbitration and in the *Qatar/Bahrain* case[51]. With these three cases considered, it appears that the scope of application of the delimitation rules is today defined in jurisprudence by recourse to the notion of overlapping of entitlements.

The claims put forward by states in disputes over maritime boundaries reflect their views on maritime entitlement. Disputant states almost always advance delimitation claims that positioned between the equidistance and the maximum potential entitlement. Claims which fall short of the equidistance-line, or that extend beyond the maximum entitlement are extremely rare, if at all existent. The *Jan Mayen* case is an instance in which the claims advanced are the two extremes. Whilst Denmark claimed the maximum entitlement based on Greenland, Norway restricted its claim from Jan Mayen to the equidistance-line *vis-à-vis* Greenland[52]. Delimitation claims that extend beyond the line of maximum potential entitlement are in principle legally untenable. Claims based on historic title are, perhaps, the only exception to this proposition. Theoretically, nothing seems to prevent a state from claiming, on the basis of a historic title, areas beyond its maximum entitlement. If the existence of this title is proven, the delimitation has to be effected in such a way as to leave to the state concerned the whole of the area to which the historic title is referred. These extended claims based on historic title are very uncommon. As aforesaid, a historic title is to be distinguished from historic rights[53]. The latter involve the enjoyment of less than sovereign powers; and in delimitation it amounts to no more than a consideration to be weighed-up amongst others.

4.3.c) Title, Entitlement and Delimitation

Some *dicta* of the ICJ seem to indicate that an analogy existed between land and maritime boundaries, in respect of their delimitation. In the *Aegean Sea* case, for instance, the Court asserted that "[w]hether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same"[54]. A similar analogy was drawn by the Chamber in the *Gulf of Maine* case when considering that "a delimitation, whether of a maritime boundary or of a land boundary, is a legal-political operation"[55]. Following a thought-provoking approach, Weil suggests in this respect that in 1969 the Court attempted to transpose to maritime delimitation the primary tenet of land delimitation: over the same

(51) Eritrea/Yemen-II, paras.128, 154-163; Qatar/Bahrain-Merits, paras.172-180, 202, 215. It is noteworthy that, when Qatar filed its Application in the Registry of the ICJ (8 July 1991), neither Qatar, nor Bahrain, had yet claimed a 12 M territorial sea. Still, the Court from considered the 12 M territorial sea for purposes of defining the overlapping of entitlements.
(52) ICJ/Reports/1993, pp.42-44, paras.9-10.
(53) Para.1.3.c)(ii) *supra*.
(54) ICJ/Reports/1978, pp.36-37, para.85.
(55) ICJ/Reports/1984, p.277, para.56.

space it is not possible to conceive of the existence of more than one title, and delimitation consists of searching for its possessor[56]. Pointing out various conceptual and operative differences between the delimitation of land and maritime boundaries, this author brings to light difficulties that stem, it is argued, from the distinction between 'title to territory' and 'entitlement to maritime areas', and the intertwined relation of the latter with 'maritime delimitation'. These are key issues in the conceptualisation of maritime delimitation[57].

The question of title over land territory concerns, primarily and in most cases, the exercise of full sovereignty – and must be assessed in the light of the modes of acquisition of title to territory, *inter alia*, historical consolidation, discovery and occupation, conquest and subjugation, cession, prescription and accretion[58]. Further, the maintenance of such a title through adequate displays of state authority (*effectivités*) is crucial. Often if not always, the determination of title over a certain territory is a relative issue. It consists of a process of identification of the 'better title' among the competing claims; and it depends on the place, the time, and the existence (or not) of human settlements[59]. This type of assessment should not be seen as delimitation *proprio sensu*. It does not directly address the determination and definition of dividing-lines separating different spheres of sovereignty or jurisdiction. No doubt, it might indirectly lead to the establishment of boundaries. But the search for the possessor of the title appears to be in fact a matter of 'allocation' of territory.

Besides this point, there are other substantive differences to consider, between title to territory and entitlement to maritime areas. First, it is the sovereign title over a land territory that generates the maritime entitlement[60]. Secondly, if the existence of a juridically valid title over a certain (land or maritime) territory is established, that implies the exclusion of any other title over the same territory[61]. Maritime entitlement, by contrast, stems from rules that legally empower states to exercise sovereignty, certain kinds of sovereign rights and jurisdiction. Initially, the precise extent of the entitlement of one state has a conditioned character (a 'potential' character). That entitlement might be opposed by an equally valid entitlement (encompassing the whole or part of the area) vested in another state.

Before proceeding further, a pause is required to make a clarification. In spite of the fact that it became common to refer to *potential maritime entitlements*, one ought to realise

(56) Weil/1989b, p.1022.

(57) Here, it is considered, first, that the concept of *condominium* does not entail more than one title, but refers to one title held conjointly; and secondly, that 'relative title' is a notion by reference to which territory is attributed within adjudicative processes (reflecting the idea of 'better title'), which similarly does not mean that two titles exist simultaneously.

(58) Sharma/1997; Jennings/Watts/1997, pp.677-716; Jennings/1967. For arguments that the regimes governing the delimitation of land boundaries and maritime boundaries differ, cf. Judge Bedjaoui, Dissenting Opinion, *Guinea-Bissau/Senegal* arbitration, ILR/83/1990, p.65. For a justification as to why the principle of stability and finality of boundaries applies also to maritime boundaries, cf. Marston/1994, pp.152-159.

(59) Antunes/1999, pp.371-376.

(60) Para.6.3.c) *infra*.

(61) It might happen that there is no title over that parcel of territory – i.e. it concerns *terra nullius*.

that, where there are two competing maritime entitlements, each entitlement has an actual existence under international law. It is not potential. This is why it is perhaps preferable to refer to *sub conditione* entitlements, to describe the fact that each entitlement might have to be truncated owing to the possible existence of an equally valid, opposing entitlement.

Further attention must be drawn to another point. Whereas sovereign title over land or maritime territory is an *all-or-nothing question*, a maritime entitlement – if overlapping spatially with other valid entitlements – must undergo a process whereby its extension *in concreto* is decided. The expression "all-or-nothing" is utilised because title over a given territory, once established under international law, excludes any other title over the same territory. Either one state holds the title; or it does not. In a different way, the existence of a valid maritime entitlement does not entail the exclusion of other entitlements. Entitlements might overlap. The precise spatial limits of the maritime legal-sphere of states can only be established *in concreto*, through delimitation.

Although 'title' and 'entitlement' are sometimes viewed as interchangeable terms, they must be read in context. In the maritime context they might convey a subtle distinction. A historic title over a sea area indicates the existence of a 'sovereign title', which is in a certain sense 'absolute', as opposed to the 'potential' nature of the 'maritime entitlement'. Speaking of overlapping of 'titles' reveals in some measure a contradiction in terms; no sovereign title may exist in an area where another sovereign title already exists. Legally, as noted before, a historic title must be attributed full precedence in delimitation, and cannot be deemed to be a mere relevant circumstance[62].

What might happen, incidentally, is that the same sovereign title is jointly held – in *condominium* – by two or more states. This was explicitly acknowledged both in the *Gulf of Fonseca* and in the *El Salvador/Honduras* cases. In these decisions, El Salvador, Honduras and Nicaragua were deemed to jointly hold a sovereign title over the Gulf of Fonseca[63]. When compared with the entitlement to territorial sea, which also involves the exercise of sovereignty, there is one important difference; where there is an overlapping of territorial sea entitlements, the spatial area in which each state may exercise sovereignty remains undefined. In a *condominium*, all the states involved are entitled (taking into account all restrictions inherent to this juridical notion) to exercise sovereignty over the area to which the title is referred. The *condominium* in the Gulf of Fonseca comprises all waters beyond the 3-mile limit, over which the Chamber considered each of the three states had historically exercised exclusive sovereignty.

(62) Para.1.3.c)(ii) *supra*.
(63) AJIL/1917/11, pp.693-694; ICJ/Reports/1992, pp.580-606, 616-617, paras.369-414, 431(1).

How maritime entitlement is established in international law has a crucial impact on delimitation. As stated in the *Aegean Sea* case, "[a]ny disputed delimitation of a boundary entails some determination of entitlement to the areas to be delimited"[64]. This view was endorsed in the *Libya/Malta* case, where the Court affirmed that the "legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to it"[65]. This explains why the question of entitlement of islands to maritime areas was so intertwined with the topic of delimitation during the Third Conference[66].

In the *Jan Mayen* case, Denmark argued that "[f]rom the fact that a maritime delimitation situation cannot arise unless there are two coasts under different titles, generating overlapping claims, one cannot infer that such title governs the delimitation"[67]. This assertion is conceptually somewhat inaccurate for two reasons. One, although it is the overlapping of claims that creates the dispute, delimitation is only required where there is an overlapping of entitlements. If an overlapping of claims exists because, hypothetically, one of the states has put forward a claim that extends beyond the spatial limits set out in international law, delimitation is not legally required. The non-existence of an overlapping of legally valid entitlements renders the overlapping of claims irrelevant. Two, title does to some extent govern delimitation. Only a valid sovereign title over a land territory with a coast generates a maritime entitlement, which might overlap with another entitlement, thus creating the need for delimitation.

In the footsteps of Gidel's ideas, Weil has further elaborated on the object-matter of maritime delimitation. To him, where "the maritime projections of two states meet and overlap, each of them must inevitably forego the full enjoyment of the maritime jurisdiction it could have claimed had it not had the geographical misfortune to find its appropriation in conflict with that of its neighbour". That "is exactly what maritime delimitation is all about". Distinguishing between 'title' (i.e. 'entitlement', in the terminology of this study) and 'delimitation', he nevertheless notes that "[d]elimitation cannot be understood without title, which lies at its very heart"[68]. Delimitation stems from entitlement; it is founded on it. Clearly intertwined, these two concepts remain nevertheless distinct. Closely following this view, Lucchini and Vœlckel consider the *titre juridique* (juridical entitlement) a basic indispensable condition to maritime delimitation. As they observe, it is where (owing to the 'geographical vicinity' between states) an overlapping between two entitlements emerges that delimitation is required[69]. Analogously, Evans notes that "[t]he *sine qua non* of a

(64) ICJ/Reports/1978, p.36, para.84.
(65) ICJ/Reports/1985, p.30, 34, paras.27, 34.
(66) Paras.3.1. *supra*.
(67) Verbatim Records, CR93/1, Public Sitting, 11 January 1993.
(68) Weil/1989a, p.3, 48-49; also, Dissenting Opinion, *Canada/France* arbitration, ILM/31/1992, p.1198, paras.10-12.
(69) Lucchini/Vœlckel/1996, pp.12-14.

delimitation is the basic and often unarticulated premise that there must be an area over which each party to a dispute claims sole jurisdiction"[70].

This relationship between "legal title to a maritime zone and delimitation" is also emphasised by Tanja, who considers "quite natural" the conclusion reached by the Court in 1969, as "the process of delimitation [being] essentially one of drawing a boundary line between areas which already appertain to one or other of the states affected"[71]. He argues that, since in terms of legal entitlement the distance criterion "gained force" and is now embodied in the LOSC, "the legal concept of maritime delimitation has changed". Thus, delimitation is no longer "concerned with the determination of legal-political boundaries of areas which 'already, in principle', appertain to coastal states", but consists rather of "the determination of a maritime boundary in a situation where two (or more) states are confronted with overlapping titles"[72].

One ought to ask, however, whether the *concept of maritime delimitation* has indeed changed. The answer must be in the negative. Maritime delimitation has always consisted of establishing lines separating the maritime areas in which adjoining (adjacent or opposite) coastal states exercise sovereignty or jurisdiction. The determination of such dividing lines has always been necessary where overlapping potential entitlements exist, and states want to exercise their rights separately. What changed was the *criterion on which the entitlement to maritime areas is based.* By 1969, the continental shelf entitlement was defined by reference to an *inherent right* to the *natural prolongation* of the land territory based on two criteria: *depth* and *exploitability.* The vagueness of this entitlement definition obfuscated the concept of delimitation. Determining an area of overlapping of potential entitlements was virtually impossible, because the exploitability criterion impeded a proper determination of the extension of each of the entitlements involved. In the geographical setting of the *North Sea* cases, not even the depth criterion could provide that determination. With the distance criterion, it became possible to precisely define the limits of the overlapping area. Hence, it is not the concept of maritime delimitation that has changed. Notably, in the *Jan Mayen* case, the ICJ stated that the concept of overlapping of entitlements was subsumed in the notion of non-encroachment advanced in 1969[73].

A few key ideas may now be lined up. Maritime entitlement appears in international law as a corollary of the sovereignty exercised over land territory. The area of entitlement is defined through an omni-directional projection of the coastline onto the sea. Importantly, this is no novel idea. As Weil reminds us: the idea that "[t]he land dominates the sea and

(70) Evans/1989, p.64.
(71) ICJ/Reports/1969, p.23, para.20.
(72) Tanja/1990, pp.xv-xvi.
(73) ICJ/Reports/1993, p.64, para.59.

does so in all directions [...] stretches back into the beginnings of the law of the sea"[74]. Further, there are different maritime entitlements. The rights to be exercised depend on the type of entitlement, which appears characterised both spatially (primarily by reference to distance from the coast) and *rationae materiae*. Where the nearest basepoints of two states are at a distance of less than twice the maximum potential entitlement[75], an overlapping of entitlements emerges. Delimitation is then required, to determine *in concreto* the limits of the jurisdictional spheres of the states involved.

4.3.d) The Inexorable 'Amputation' of Potential Entitlements

4.3.d)(i) Overlapping of Entitlements: A Situation of Concurrence of Rights

How should the concept of delimitation be comprehended from a legal-theoretical standpoint? Let the notion of 'potential maximum entitlement' be considered first[76]. It may be described as the oceanic area that, according to international law, a state could claim for purposes of exercising sovereignty, sovereign rights or jurisdiction, should the presence of all other states be disregarded. Maritime entitlements – it is worth emphasising once more – have an actual existence. The adjective 'potential' usually associated therewith must be understood *cum grano salis*. The entitlement is seen as 'potential' only to the extent that it is subject to the absence of competing entitlements. However, each of the states involved can actually exercise the jurisdiction that corresponds to the entitlement at issue, over the area of overlapping entitlements, even before the delimitation is effected.

The German thesis in the *North Sea* cases grasped this point correctly[77]. The ideas of *indivisum* and *apportionment* upon which it was founded explain, together, the concept of delimitation as division of the area of overlapping entitlements. No state is empowered by international law to determine unilaterally how the area of overlapping is to be divided (*indivisum*). Each state should be attributed a share of that area (*apportionment*). The issue in relation to which the German theory fails is the *apportioning criterion*; or put differently, the normative delimitation standards. According thereto, states are entitled to a *just and equitable share* of the *indivisum*. The problem is that legally maritime delimitation cannot be presented as a question of distributive justice. For that is not what is required by the applicable normative standards.

(74) Weil/1989, p.63. His criticism in relation to the *Canada/France* arbitration, which seemed to suggest that coasts might project in some cases only frontally, i.e. perpendicularly to its general direction, must be endorsed. Dissenting Opinion, ILM/31/1992, pp.1199-1202, paras.9-14 (see the Award, *ibid.*, p.1171, para.73). On the principle of maritime zoning, cf. para.6.3. *infra*.

(75) This is the typical situation. In some cases, entitlements to continental shelf beyond 200 M might be in question. Then, the definition of the area of overlapping entitlements cannot be made by means of distance from the coast.

(76) The maximum entitlement of states depends upon the maritime space in question: 12 M for the territorial sea, 24 M for the contiguous zone; 200 M for the EEZ and continental shelf (except for the cases of an extended continental shelf). The question of entitlement may give rise to certain problems in the delimitation of continental shelf areas beyond 200 M; cf. para.8.4.b) *infra*.

(77) ICJ/Pleadings/1968(I), pp.30, 391, 425.

The overlapping of entitlements, one would argue, is a situation of *concurrence of rights*. In other words, the states involved concurrently hold legal positions with the same scope (maritime entitlement), the object of which is (at least partially) the same: the area of overlapping entitlements. The aim of delimitation is to resolve this situation of concurrence of juridical positions (which is why it should be seen as constitutive in nature) by reference to the normative standards prescribed by international law. In broad general terms, there are two juridical positions that 'collide', causing a 'conflict' between rights of the same type. Hence, it becomes necessary to reconcile their existence in light of the principles in force in the legal order.

This standpoint was taken by Portugal in the *East Timor* case, when it referred to the existence of a "*concurrence ou concours de droits (potentiels)*" and to a "*concours de droits ou de prétensions sur les espaces maritimes*"[78]. Learned writings have also advanced this proposition[79], which underlies Weil's reference – in the *Canada/France* arbitration – to the equally valid rights (entitlements) of the states involved[80].

Conceiving the problem in this way leads to the conclusion that while delimitation is not effected, each and any of the states involved might actually exercise their jurisdiction over the whole or part of the area of overlapping. This is illustrated by state practice. The boundary-line agreed by Denmark and Germany in the follow-up of the *North Sea* cases was devised to take also into account the location of the Danish oil fields the exploitation of which had started before the delimitation[81]. Such an exercise of jurisdiction might in effect give rise to disputes that may no longer be merely juridical. In the *Nicaragua/Honduras* case, Nicaragua noted that the disagreement as to the location of the maritime boundary "has brought about *repeated confrontations and mutual capture of vessels of both nations in and around the general border area*"[82].

Thus, some states might and do indeed exercise jurisdiction over the area of overlap before the delimitation is effected. The *ratio legis* of, and the need for, Articles 74(3) and 83(3) of the LOSC, is explicable perhaps in this light. They prescribe that, pending a final delimitation, states shall seek to enter into provisional practical arrangements, which are without prejudice to the delimitation. One ought to ask, therefore, whether the unilateral exercise of jurisdiction over areas of overlapping of entitlement is lawful. No doubt, states are under the obligation to take a course of action that ensures that the boundary dispute is not aggravated – which means necessarily, to avoid any course of action that prejudices the

(78) Memorial, p.201, para.7.10.c), Conclusion, p.236, para.3, respectively. The Court made no pronouncement in relation thereto.
(79) Teles/1998 (unpublished), paras.13-20; Lucchini/Vœlckel/1996, p14 ("*titres concurrents*").
(80) Dissenting Opinion, *Canada/France* arbitration, ILM/31/1992, pp.1198, 1203, paras.5, 19.
(81) Para.2.3.d) *supra*.
(82) Application, para.4, emphasis added.

other state[83]. In relation to the specific case of exploitation of resources, an "obligation of mutual restraint" has already been identified: "states are obliged to refrain from unilateral action when it risks depriving other states of the gains they might realise by exercising their sovereign right of exploitation"[84].

4.3.d)(ii) Maritime Delimitation: 'Amputation' of Entitlements of the Same Type

Maritime delimitation has a practical impact on the political level that is crucial to its understanding: it determines the extent to which each state must relinquish its maximum potential maritime entitlement in order to avoid the difficulties that would stem from the maintenance of the *indivisum* (the area of overlapping of maritime entitlements). Hence, it is appropriate to speak of a *maximisation process*, whereby the concurrent jurisdictions of states are maximised in the light of the relevant factual circumstances. Subsumed in this conception is inherently the notion of 'mutual compression of entitlements'. Inexorably, this entails the '*amputation*' of the entitlements that overlap[85]. This is the paramount conceptual axiom of maritime delimitation: politically, what lies at its very heart is an '*amputation*' *of maritime entitlements* – not *apportionment of areas* [86].

This was clearly recognised by both parties in the *Canada/France* arbitration[87]. The reasoning of the *Jan Mayen* Judgment however, has a different focus. Although referring to the overlapping of entitlements, the Court resorted to the overlapping of claims to effect the delimitation. That the *overlapping of claims* is "of obvious relevance to any case involving opposed maritime boundaries" is hardly debatable. Why that area became the reference in the determination of how much each entitlement was to be 'amputated' is however not totally clear in the reasoning. Apparently, both the Danish and the Norwegian claim-lines were deemed to be inequitable *in casu*, leading the Court to conclude that the boundary had to fall within the area defined by the claim-lines[88]. But no straightforward statement is advanced in this respect; and perhaps there should have been one. It has been suggested that

(83) By an Order of 15 March 1996, on Provisional Measures in the *Cameroon/Nigeria* case, the ICJ asserted that the parties were under the duty not to carry out any actions that could aggravate the dispute. That the conduct of states must sometimes be understood as the result of an intention not to aggravate disputes, which is without prejudice of a final boundary settlement, was stressed in the *Jan Mayen* case (ICJ/Reports/1993, p.54, para.35). In the *Guinea-Bissau/Senegal* arbitration, referring to the fact that Guinea-Bissau had "abstained from any activity in the disputed area pending the outcome of the dispute", Judge Bedjaoui considered it as "irreproachable" (Dissenting Opinion, ILR/83/1990, p.83).

(84) Ong/1999, p.198. Although Ong had in mind the exploitation of petroleum resources, analogically, the same approach seems to be valid for resources of the water column.

(85) Terms other than "amputation" could have been used here (e.g. truncation, curtailment). The use of the term "amputation" is justified because it conveys the idea of a "painful process" whereby the states involved are denied areas that each "could hope to appropriate if it faced the oceans on its own" (Weil/1989a, p.5); cf. also Weil/1989b, p.1023). In the *Anglo/French* arbitration, reference was made to the term "curtailment" (RIAA/18, p.92, para.195). Tanja refers to "restriction" (Tanja/1991, p.xvi).

(86) The situation of concurrence of rights is kept, at least to some extent, in the case of joint zones. Either there is no 'amputation' of entitlements in the joint area, or the said 'amputation' is 'smaller' (insofar as it does not exclude completely the entitlement that is 'amputated' – e.g. the state continues to obtain revenues, although it might have no intervention in the exercise of activities in the area). It is because of this fact that joint zones might be preferable choices in certain, highly disputed cases.

(87) ILM/31/1992, p.1169, para.67.

(88) ICJ/Reports/1993, pp.64, 68-70, paras.59, 68-71.

the area of overlapping claims must always be divided between the claimants. This view cannot be accepted. Inferring from the *Jan Mayen* case that there is a rule of international law requiring the division of the area of overlapping claims in every case is certainly to overstep the Court's line of reasoning. Such an approach would mean that either the Court dismissed the entitlement of Jan Mayen beyond the equidistance-line *in limine*, or Norway relinquished that entitlement when advancing its claim. Neither seems admissible. What is clear is that maybe the Court should have explained its approach in detail, with a view to avoiding the criticism that maritime delimitation by adjudication is no more than a 'subjective exercise of sharing-out the area of overlapping claims'[89].

For conceptual purposes, the idea that the area of overlapping of claims does not necessarily have to be shared-out between the claimants is paramount. The partition of such an area only has to take place where required by law. *In abstrato*, delimitation does not require such a division. Hypothetically, it is possible to conceive a scenario in which the boundary-line stemming from the application of delimitation law would coincide with one of the claim-lines. If only for this reason, the possibility of having to attribute the whole of the area of overlapping claims to one disputant must be admitted. Indeed, the sharing-out of the overlapping of claims is consequence of the delimitation, not vice versa[90].

No doubt, the areas of overlapping claims and of overlapping entitlements are both crucial for delimitation. The former will be virtually shared-out in every instance between the disputants. But that is not required. The only legal requirement is that the boundary-line falls spatially within the overlapping of claims[91]. *Non ultra petita.*

Maritime delimitation has one key tenet. Insofar as it presupposes the existence of an overlapping of entitlements, it entails the 'amputation' of the potential entitlement of at least one of the states involved[92]. Typically, the entitlements of the states involved are both 'amputated'. In cases where the entitlements that overlap are not of the same type, however, this might not be the case. As will be argued, if the continental shelf and EEZ entitlement of one state overlaps with the territorial sea entitlement of another, the latter will in principle not be 'amputated', and will be given full precedence[93]. Only overlapping of entitlements of the same type should be considered. Asking why continental shelf and EEZ entitlements do not affect the territorial sea entitlements is thus a crucial conceptual point.

(89) Joint Separate Opinion, Judges Ruda, Bedjaoui and DeAréchaga, *Libya/Malta* case, ICJ/Reports/1985, p.90, para.37.
(90) ICJ/Reports/1993, p.67, para.64. This was restated recently in the *Qatar/Bahrain* case (Qatar/Bahrain-Merits, para.234).
(91) Merrils/2000, p.896; Kaikobad/1999, pp.209-302.
(92) Luccini/Vœlckel/1996, pp.12-14; Thirlway/1993, pp.39-40; Tanja/1990, p.xvi; Weil/1989a, p.3; Weil/1989b, p.1023.
(93) This proposition was already advanced elsewhere; cf. Antunes/2001, pp.327-328.

4.3.d)(iii) Precedence between Different Entitlements: Case Law and State Practice

The following examples of case law and state practice, in which continental shelf and EEZ entitlements did not affect territorial sea entitlements, provide a starting point for delving into the issue of precedence between entitlements. In the *Dubai/Sharjah* arbitration, which concerned the delimitation of a continental shelf boundary, the entitlement of the island of Abu Musa (Sharjah) to a territorial sea belt was fully recognised. The Tribunal stated that such entitlement could only be restricted if a territorial sea boundary would be in question[94]. Analogously, in the *Anglo/French* arbitration, a cardinal argument for attributing the Channel Islands a 12-mile enclave (and not less) was to allow in the future the full extension of their territorial sea[95]. The case of Alcatraz island, in the *Guinea/Guinea-Bissau* arbitration, is another instance in which the Court guaranteed the 12-mile territorial sea[96]. An approach along the same lines was adopted in the *Eritrea/Yemen* arbitration. The Tribunal recognised fully the territorial sea entitlement of all insular features, proceeding to their 'amputation' only where other competing territorial sea entitlements existed. That is why for purposes of determination of the middle stretch of the boundary-line it determined the area of overlapping territorial sea entitlements. Outside that area, in the area of overlapping of EEZ and continental shelf entitlements, the Tribunal discounted the effect of some mid-sea islands. Due attention was nonetheless paid to the fact that giving no-effect to the Yemeni northern mid-sea islands would not affect their 12-mile territorial sea[97].

Examples of state practice are consonant with case law. The semi-enclave solution adopted in the Italy/Yugoslavia and Italy/Tunisia agreements seeks to avoid encroaching on the territorial sea of certain small islands[98]. The Sharjah/Umm al Qaywayn agreement offers a similar solution. The continental shelf boundary was described as a line of bearing that, in principle, would encroach upon the territorial sea of Abu Musa island[99]. Because Umm al Qaywayn explicitly acknowledged the entitlement of Abu Musa to a territorial sea, that boundary was deflected around the belt of territorial sea of Abu Musa.

4.3.d)(iv) Precedence between Different Entitlements: Rationale

Having shown that there is a trend according to which continental shelf and EEZ entitlements and territorial sea entitlements are not weighed on equal footing, one has now to attempt to understand the underlying rationale. Especially, it must be enquired whether it

(94) ILR/91/1993, p.674.
(95) RIAA/18, pp.89-90, para.187.
(96) ILM/25/1986, p.298, para.111.
(97) Eritrea/Yemen-II, paras.119, 124-128, 154-163. The Tribunal had already stated, referring to the mid-sea islands, that "some weight is to be or may be accorded to [them], *certainly in respect of their territorial waters*" (para.83).
(98) Appendix 2, B26, D45.
(99) Appendix 2, B33.

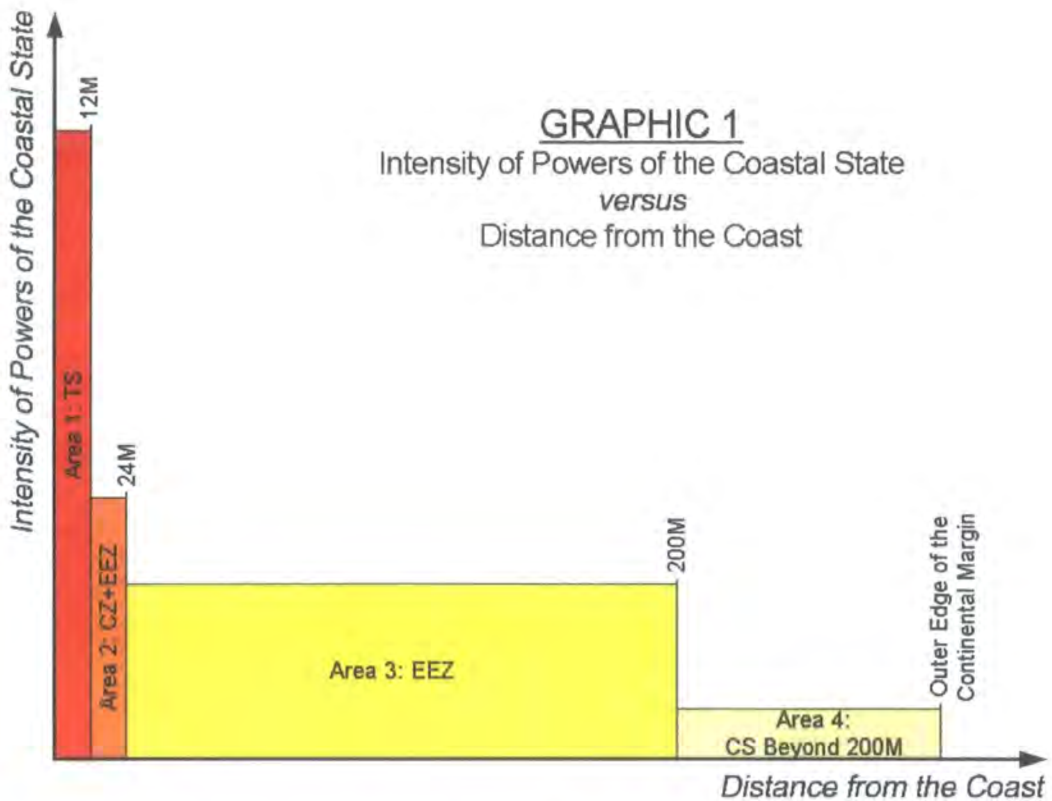
is possible to speak, in general, of a precedence between different types of entitlements. In this respect, the fact that the territorial sea regime allows coastal states to exercise sovereign powers that, *ratione materiae*, are much wider and stronger than those allowed by the regimes of the EEZ, the continental shelf or the contiguous zone must be highlighted. That is why full precedence has been given to the former. Conceptually, this is again explainable by reference to the theory of concurrence of rights: when two rights of a different nature collide, the 'superior' right prevails. The 'superiority' of a territorial sea entitlement over a contiguous zone, EEZ or continental shelf entitlement has to do with the fact that, having account of the rights that are conferred upon coastal states, the former is valued as being of greater significance for states. Further, since delimitation might be effected differently in each maritime zone, the relevance of this conceptual issue must not be underestimated.

Whether other situations of overlapping of entitlements of different type exist, in which precedence has to be given to one of them, is less clear. It is indubitable that the legal rights and the powers of states over maritime areas are less intense and less comprehensive as the distance from the coast increases. In contradistinction, there is a strengthening of the rights and interests of the international community. This reveals a balancing-up between exclusiveness and inclusiveness at sea, in which the relative weight of each set of interests is valued differently by reference to distance to the coast[100].

Starting from the coast, it is possible to identify four areas where such balancing-up is different (see Graphic 1 below). The first is the territorial sea. From 12 to 24 M, there is a second area where the regime of the contiguous zone, the EEZ, and the continental shelf subsist together. In the third area, from 24 to 200 M, only the EEZ and the continental shelf exist. The fourth is constituted by the continental shelf beyond 200 M. As between the territorial sea entitlement and other maritime entitlements, it was suggested that precedence should be given to the former. Similarly, it must be investigated whether the entitlement up to 24 M has precedence over the entitlement up to 200 M, and whether the latter should prevail over the entitlement over continental shelf areas beyond 200 M.

It may be argued that, since in the three areas identified beyond 12 M coastal states are entitled only to exercise powers that amount to less than sovereignty, the difference between them is not one of substance. The suggestion that the contiguous zone powers may be reconcilable with the idea of overlapping jurisdictions, for instance, may also be used as an argument to support the idea of a non-existence of material distinction between Areas 2 and 3. However, the fact remains that the rights exercisable by coastal states differ in each of the three areas beyond the territorial sea.

(100) Para.6.3.c)(i) *infra*.



The distinction between Areas 2 and 3 may be seen in three of the LOSC provisions. The jurisdictional powers conferred on coastal states by Article 33(1) are seldom, if ever, concurrently exercisable with EEZ and continental shelf jurisdiction of another state. Concurring jurisdictions are even less conceivable under Article 303(2). If no precedence would exist – i.e. if an Area 2 entitlement could be truncated by an Area 3 entitlement, then there would be some 'squandered' jurisdiction. An area over which a state A could exercise powers referent to Area 2 would be downgraded to Area 3, because under international law a state B would not be in a position to exercise the same powers. The decisive argument stems from Article 121. This provision equates islands to land territory, and prescribes that *prima facie* islands are entitled to all four maritime zones (paragraph 2). The exception is "rocks which cannot sustain human habitation or economic life of their own". They are not entitled to EEZ and/or continental shelf (paragraph 3). As an exception to a general rule of entitlement, and due to the wording, such restriction ought to be interpreted restrictively. Thus, "rocks" do generate entitlements to a contiguous zone[101]. This reinforces the idea that, in terms of maritime entitlements, an entitlement to Area 2 has greater relevance for coastal states than an entitlement to Area 3.

A similar line of analysis may be followed in relation to Areas 3 and 4. The powers conferred upon states by the existence of the entitlement to Area 3 are stronger than those

(101) Para.3.5. *supra*.

derived from the entitlement to Area 4. For instance, within 200 M states may exercise certain powers and jurisdiction not only over the seabed and subsoil, but also over the superjacent column of water. Further, in terms of protection of the marine environment, the powers exercisable by coastal states under certain circumstances include the possibility of detention of vessels[102]. It might be suggested that these difficulties could be overcome by adopting different boundaries for the water and for the seabed and subsoil. However, this is a solution that unavoidably leads to practical difficulties of administration of the boundary. Even if only the seabed and subsoil are considered, there are still differences that cannot be discarded lightly. The delineation of the limits of Area 3 falls totally within the sphere of discretion of states. In contrast, limits beyond 200 M depend on a 'technical homologation' by the CLCS[103]. Their final and binding nature is subject thereto, i.e. the precise extent of an overlapping of entitlements cannot be established without it. Finally, there is an obligation imposed on states to make payments or contributions in kind in respect of exploitation of mineral resources in Area 4[104]. All these aspects appear to support the suggestion that there is some legal difference between the entitlements to Areas 3 and 4[105].

One would submit, in conclusion, the there is a very strong presumption in favour of giving precedence to Area 1 entitlements over entitlements to Areas 2, 3 and 4. Territorial sea entitlements should in principle not be 'amputated' by effect of an overlapping with a different entitlement. The difference in powers exercisable by states is perhaps more of quantity, rather than of quality, when it comes to precedence between Areas 2, 3 and 4. Thus the answer is less straightforward. One would suggest, nevertheless, that there is a *juris tantum* presumption in favour of the entitlements to Areas 2 and 3 over the entitlements to Areas 3 and 4, respectively. The distinction between these cases lies upon the strength of the presumption. The 'amputation' of 12 M territorial sea entitlements by effect of a different entitlement should only take place in exceptional circumstances[106]. In relation to the other cases, the presumption operates similarly (although with less strength). Unless rebutted objectively, the 'amputation' of entitlements to Areas 2 and 3 by effect of entitlements to Areas 3 and 4, respectively, should also not occur.

To some extent, this rationale lies behind the solution found in the *Canada/France* arbitration (Figure 10). The entitlement of the French islands to a 12 M belt was considered as a given. Then, the Tribunal considered that, in the western sector, France should be attributed an additional 12 M, beyond the territorial sea. The "encroachment to certain

(102) Cf. LOSC, Article 220(6).
(103) Cf. LOSC, Article 76(8), which refers to Annex II.
(104) Cf. LOSC, Article 82.
(105) Lilje-Jensen and Thamsborg concur with this view (Lilje-Jensen/Thamsborg/1995, p.643).
(106) Possible examples could be the Aegean Sea and the Torres Strait (between Papua New Guinea and Australia).

Canadian seaward projections" caused by this approach was deemed to be non-inequitable and reasonable. An *explicit reference* to the jurisdictional powers over the contiguous zone was then made to justify this extension of the French jurisdiction up to 24 M, which prevailed over the Canadian entitlement beyond 24 M. The Tribunal noted that, to the east, the proximity to the Canadian coast, creating an overlapping of entitlements of the same type, ought to be viewed differently. Preserving the entitlement of both states to a territorial sea, full precedence was given there to the Canadian entitlement up to 24 M *vis-à-vis* the equivalent French entitlement. Why the Tribunal made no finding, and did not aver the precedence of the Canadian entitlement up to 200 M *vis-à-vis* the French entitlement beyond 200 M is unclear. Even if the entitlement beyond 200 M would exist, apparently no objective reasons supports *in casu* the attribution to France of areas beyond 200 M, which would encroach upon the Canadian entitlement up to 200 M[107].

The proposition that there is a level of precedence between different entitlements is grounded in another idea. Today, as ever, the law of the sea revolves around a tension between exclusiveness (i.e. the exclusive interests of coastal states) and inclusiveness (i.e. the interests common to all states). As the distance to the coast increases, the importance of exclusivity declines; and that of inclusivity increases[108]. The underlying rationale is simple: the closer to the coast, the stronger are the exclusive rights and interests of coastal states[109]. If there would be no level of precedence between entitlements, this rationale would simply be brushed aside, without satisfactory justification. More comprehensive rights and interests of a state A (stemming from closer proximity) would not be protected to any extent *vis-à-vis* competing, less comprehensive – thus less relevant – rights and interests of a state B.

There is no question of hard and fast rules concerning precedence of entitlements. But discarding the proposition altogether raises significant conceptual problems; and loses sight of reality. No doubt, this is without prejudice of reaching equilibrium between the states involved, as mandate by international law[110]. That, however, does not preclude the existence of a *juris tantum* presumption.

(107) ILM/31/1992, pp.1169-1173, paras.66-82. On the entitlements beyond 200 M, cf. para.8.4.b) *infra*.
(108) McDougal/Burke/1987, pp.56-63. Cf. paras.6.3.b), 6.3.c) *infra*.
(109) It is worthwhile stressing that the precedence between different entitlements ought to be read, and understood, in conjunction with the question of emergence of 'grey areas', examined below (para.8.4.d) infra).
(110) On how the equilibrium is to be achieved, cf. Conclusions to Part II *infra*.

Chapter 5

METHODS AND LINE-DEFINING TECHNIQUES

5.1. Introductory Notes

5.1.a) The Need for Technical Expertise

The technical-scientific nature of the process of *definition* of the boundary-line has already been noted[111]. What must equally be noted is the fact that amongst the serious errors that might occur in delimitation are the mistakes due to the "*lack of knowledge of the many pitfalls in boundary definition*"[112]. Since the aim of boundary definition is to express the technical parameters of a line previously determined, proper technical expertise should be available. This is reinforced by the fact that in the maritime context the selection of the boundary site can hardly be isolated from the technical issues concerning the methods and line-defining techniques involved. In effect, because many of the relevant considerations are perceptible only by means of cartographic information (e.g. coastal configuration, coastal lengths, general direction of the coast, navigation channels insular features, and fishing banks), technical expertise is fundamental[113].

The *prima facie ad eternum* nature of boundaries turns the boundary definition into a key issue. States are fully aware of its implications on the technical level. Negotiating teams set up to resolve maritime boundary disputes include (in the overwhelming majority of cases) experts in geography, hydrography and cartography. A correct technical definition of the boundary is required with a view to prevent future disputes in regard to its location. After an agreement is reached, the course of the boundary has to be technically described in the treaty so that no interpretative doubts are left. That is the task for the technical experts of the two parties, who are expected to provide an unequivocal definition of the line[114].

Boundaries delimited through adjudication have no lesser requirements. Courts should thus not underestimate the technicalities that might emerge in the definition of maritime boundaries. As the full understanding of cartographic information, and the impact of certain technically-related decisions, might not be easily perceived by laypersons, judges

(111) Para.4.2.a) *supra.*
(112) Jones/1945, p.57, emphasis added.
(113) Para.4.2.d) *supra.*
(114) Carleton/Schofield/2000.

should avoid technical appraisals of their own without expert advice[115]. Otherwise, they face the risk of adjudging inequitably without even realising that possibility. Notwithstanding this, it must be stressed that judges should also 'avoid looking for shelter' in purely legal arguments when technical matters are under scrutiny, and appear as determinant for the outcome of the case. All in all, one can but subscribe to the idea that having recourse to impartial technical expertise in international adjudication is a valid approach, invariably worth adopting[116].

The recourse to scientific or technical expertise is explicitly dealt with in the LOSC and, by consequence, in the procedural rules of the International Tribunal for the Law of the Sea (ITLOS). Article 289 of the LOSC prescribes that a court exercising jurisdiction under the dispute-settlement mechanism of the Convention may, "at the request of any party or *proprio motu*", select "no fewer than two scientific or technical experts" to sit with it but without the right to vote. Courts whose jurisdiction is established through the LOSC system of dispute-settlement should consider appointing impartial experts whenever its decision requires technical assessments, as in maritime delimitation. As for ITLOS, Article 15(3) of its Rules establishes that the experts "shall be independent and enjoy the highest reputation for fairness, competence and integrity". No doubt, similar approaches may be adopted before the ICJ. Under Article 30(2) of the ICJ Statute (and Articles 9 and 21(2) of the Procedural Rules), the Court may (either *proprio motu* or on request) decide to appoint assessors to sit with it without the right to vote. The same might happen in arbitration. For example, the *compromis* between Eritrea and Yemen empowered the Tribunal to resort to "experts of its choice after notice to the Parties", whilst stating that such experts should perform "their functions impartially and conscientiously"[117]. Equally, in the *Gulf of Maine* case, the parties demanded that a technical expert would assist the Chamber.

As Anderson suggests, "[b]oundary disputes are best tackled with the assistance of expert hydrographers or geographers or geodesists"[118]. Clearly, having recourse to procedural mechanisms of the aforementioned type would not only improve the evaluation of evidence and proof of facts (especially arguments made by the parties on the basis of cartographic information), but would also help in bridging the gap between the legal and the technical assessments in maritime delimitation. It should also be emphasised that the intervention of experts in the proceedings is suggested with a view to bringing in an

(115) Weil stresses the difficulties of jurists in mastering technicalities (Weil/1984, p.359). If an image is worth more than a thousand words, then judges will certainly be influenced by how maps look. However, without proper preparation and advice, most judges are probably unable to fully understand many technical issues involved in cartography.

(116) White/1996, p.540.

(117) Agreement of 3 October 1996.

(118) Anderson/1998b, p.81.

impartial view on scientific and technical matters. Since cartography is never neutral (maps and charts are indeed manipulated with a specific aim, and the parties' experts should not be expected to present cartographic information in a neutral way), such an intervention may acquire great relevance and become decisive in the 'search for the technical truth'.

The 'choice of method' is indubitably not a technical question. Nevertheless, the political-legal decision-maker ought to consider the technicalities involved[119]. This is what justifies the presence of technical experts in meetings of courts, tribunals, or conciliation commissions. It might not be enough to bring in experts after the decision is made. Many of the assessments concerning the choice of line rely on cartographic information and related data. What the present chapter attempts to do is to introduce the basic notions involved in the application of delimitation methods and line-defining techniques. An attempt was made to present technical issues from a perspective accessible to non-technical experts, that is, avoiding unnecessary technical detail. Its purpose is to draw attention to conceptual aspects and technical difficulties that may arise, and not to minutely describe the application of each method or technique. No discussion will be held on technicalities such as geodetic datums, tidal datums, chart projections, or the nature of straight lines. These are some of the issues that for reasons of brevity had to be left out.

5.1.b) Methods and Line-Defining Techniques

Before entering into the description of each delimitation method and line-defining technique, it is worth setting down the conceptual framework that moulds the following description. A few notions adopted in this study depart perhaps from what has been the accepted understanding. They are therefore crucial for grasping the ideas herein submitted. One point concerns the distinction between *determination* and *definition* of boundaries; the delimitation methods and line-defining techniques operate as such mainly within the stage of boundary definition. In the phase of determination, the support-role that they have in the decision-making process is typically illustrative, rather than technical. Marginal situations might arise, however, in which the decision will depend on technically exact assessments. This explains why the two roles should not be strictly compartmentalised[120].

The second point to make relates to the distinction between delimitation method and line-defining technique. A *delimitation method* is understood as an ordered assemblage of technical procedures and operations necessary to construct and define the course of a maritime boundary accurately, in accordance with the determination of the political or legal

(119) On question of choice of method, cf. Conclusion to Part II, and paras.7.1., 7.4. *infra*.
(120) Paras.4.2.a), 4.2.d) *supra*.

decision-maker. It has two marking features: it is a systematic procedure; and results in a line characterised by technical certainty[121]. *Line-defining technique* is a term devised here to encompass two types of procedure that fall short of being methods: *ad hoc* (a-systematic) approaches used to define lines; and technical procedures that cannot autonomously result in a line, although usable in the determination or definition thereof.

The following analysis contains a brief description of both delimitation methods and line-defining techniques. It seeks to give a brief overview of technical aspects that must be considered when applying them. Incidentally, it is also intended to provide the basis for distinguishing between technical procedures and delimitation rules.

The two-fold categorisation of technical procedures has academic purposes only. Notwithstanding this, because 'closer proximity' is paramount in maritime delimitation[122], it is important to itemise separately procedures that stem from the notion of *equal-distance* (equidistance and its variants), and procedures that have no relationship therewith (e.g. enclaving, 'corridor solution', coastal length comparison)[123]. This distinction is significant from another, more practical standpoint. Equidistance-related lines have been utilised in the vast majority of delimitations. This distinction is justified on a third ground: the rationale underlying all equidistance-related methods is the same – equal-distance. They result in different types of line only because coastal geography is assessed, or interpreted, differently in each case.

Finally, it must be noted that the techniques described are basic types. Delimitations are effected more often than not through a combination and/or variants of these methods and techniques. Since in negotiation states are entitled to resort, on a consensual basis, to any *ad hoc* solutions they deem appropriate, the techniques that could be devised are in fact virtually numberless. This presentation provides merely an overview of those methods and line-defining techniques more commonly used. Historically, others were considered, as for instance, the prolongation of the land boundary, or the prolongation of the territorial sea boundary (in continental shelf delimitation).

(121) Roubertou/1996, pp.132-133.

(122) For the arguments supporting this suggestion, cf. paras.6.3.b), 6.3.d) *infra*.

(123) The United Nations proposes a division of delimitation methods that includes: equidistance, perpendicularity, meridians and parallels, enclaving, parallel lines (corridor), and other means of achieving a delimitation line (United Nations/2000, pp.47-63). Analysing state practice, Nascimento/1999, pp.69-151, groups agreements under four methods: equidistance, simplified and modified equidistance, mixed lines (equidistance tempered by another type of line), and other lines (meridians and parallels, parallel lines, perpendiculars). Legault/Hankey/1993, pp.206-217, divide methods in two main groups: "Equidistance Methods" and "Other Methods". Although the basic cataloguing is similar to that used in this study, the contents of each category are different. For instance, "parallels and meridians" and "parallel lines" are presented as methods, whereas here they are dealt with under the caption "*Ad Hoc* Approaches". Equally, "perpendiculars" are catalogued under "Other Methods", whereas here it is deemed to be a variant of equidistance. Willis/1993, pp.66-73, referring to "An Inventory of Methods", refers to five categories: equidistance and its variants, perpendiculars, parallels and meridians, corridor effect, and effect of islands. The methods enumerated by the Chamber in the *Gulf of Maine* case comprise lateral equidistance-line, median line, perpendiculars, prolongation of the land boundary, and prolongation of the territorial sea boundary (ICJ/Reports/1984, p.313, para.159).

5.1.c) Technicalities and Law

That the technical definition of the line must always comply with the terms set out in the determination phase was already affirmed. Delimitation methods (and line-defining techniques) are means for defining the boundary-line, not means for determining it. Their application has no constitutive nature. The boundary definition must accurately translate, in geographical terms, the decision of the determination phase. The former must not depart from the latter. For this reason, the 'conversion' of the qualitative evaluation of facts (carried out in the determination phase) into a boundary-line is the fulcrum of maritime delimitation. This 'conversion' however, gives rise to numerous difficulties, especially in adjudication (in which case the line must stem from normative standards)[124]. For the normativity at issue might not be apt to specify the location of any boundary-line[125]. Despite the shortcomings, it is however unquestionable that the technical implementation of the determination of the boundary ought not to transgress the reasoning of the adjudicative decision.

For instance, the United Kingdom reopened the proceedings in the *Anglo/French* arbitration exactly because, rightly one would argue, it considered that the way in which the method had been applied departed from the reasoning of the Tribunal. Indeed, the Award describes the "half-effect method" as consisting of the definition of a bisecting-line between two lines defined through the "equidistance method"[126]. This is confirmed in the report of the technical expert, which refers to the equidistance method. The technical misapplication thereof *in concreto* should thus not have been accepted. When it argued that the boundary defined by the technical expert was "an equitable variant of the equidistance principle"[127], the Tribunal misconceived the non-constitutive, technical nature of delimitation methods. The same may be said about the proposition that this resulted from "the *margin of the lack of precision inherent in the notion of equity*"[128].

Not distinguishing between technical methods and legal principles is indubitably misconception. No doubt, "a *rule of delimitation* cannot be a *method of delimitation* at the same time"[129]. Rules (and principles) belong to the realm of political-legal determination of the boundary. Methods are part of the technical definition thereof, and should follow technical tenets. Whereas the determination of the boundary is a political-legal issue, its

(124) Para.7.1.a) *infra*.
(125) Charney/1993, p.xlii.
(126) RIAA/18, p.117-118, paras.251-253.
(127) Award on interpretation, RIAA/18, p.328, para.110.
(128) Proposition advanced by France, Award on interpretation, RIAA/18, p.302, para.42, emphasis added.
(129) Tanja/1990, p. xvii, emphasis added.

definition through the adequate procedures is a technical matter. Unless explicitly qualified in some way during the determination stage, the application of any method should be made in accordance with the *leges artis*.

5.2. Equidistance and Equidistance-Related Methods

5.2.a) Method of Equidistance

5.2.a)(i) A Proper Historical-Technical Background

The concept of equidistance[130], and its utilisation in maritime delimitation, must be understood in the light of the ILC work, and of the proposals advanced by the Committee of Experts. However, as far as technical points are concerned, the report of this Committee to the ILC is somewhat unhelpful. It does not completely clarify the terminology used in the draft articles. A paper prepared by Kennedy (a member of the Committee), and distributed during the 1958 Conference by the delegation of the United Kingdom, is a crucial source of information in this regard. It sheds light on the distinct terms used in the two paragraphs of Article 6 of the CS Convention – *median line* and *principle of equidistance*, used also in the ILC draft Articles 12 and 14, applicable to territorial sea delimitation.

A first point to make is that the Committee of Experts noted clearly that it had made an effort to discover formulae applicable to the territorial sea delimitation, and which could at the same time serve in continental shelf delimitation. And this observation covered both situations of adjacency and oppositeness. This indicates that, unless there are reasons to conclude otherwise, the formula used for territorial sea delimitation should be viewed as similar to those used in continental shelf delimitation – at least as far as technicalities are concerned. As to legal implications, it is unlikely that such an experienced panel of experts would fall into the trap of attempting to make definitive pronouncements in that regard.

The second point to make concerns the exceptions to the proposed methods. The Committee noted that, in the case of opposite coasts, there could be special reasons (e.g. interests of navigation and fisheries) that would justify departing from the median line. As to adjacent coasts, it stated that in certain instances the proposed method would not lead to equitable solutions – which should then be sought by negotiation. For both cases, thus, the use of the methods proposed was subject to one condition: the reasonableness of the line. Notably, no distinction was made between adjacency and oppositeness as to the likelihood of existence of justification for departing from the '*prima facie* method'[131].

(130) The normative aspects embedded in equidistance will be dealt with at a later stage (para.6.3.d) *infra*).
(131) On the conclusions of the Committee of Experts, cf. ILC/Yearbook/1953(II), p.79.

The third key idea concerns the distinction between "median line" and "principle of equidistance". Neither the report, nor the ILC debates clarify it. As said, the explanation is perhaps given in Kennedy's paper. Referring to the case of opposite coasts, he defines "median line" as "a line every point of which is equidistant from the nearest points on the baselines from which the breadths of the territorial sea of the two states are measured"[132]. This definition is used in Article 6(1) of the CS Convention and Articles 12(1) and 24(3) of the TS/CZ Convention. When addressing the case of adjacent coasts, Kennedy refers not to one, but three possible methods: (A) adaptation of the median line principle; (B) method of equidistances offshore; (C) method based on equidistance from the boundary[133].

The first method amounts to the computation of a median line from two adjacent coasts (Figures 48 and 49). As to the second, it "consists primarily of drawing at varying distances offshore a series of limits along the coasts of the adjacent states by the *arcs of circles* method", followed by the determination of the points of intersection "of the most seaward arcs centred on" each state. The resulting line is formed by the "consecutive points of intersection of the limits at the different distances offshore [which] are then joined by a series of straight lines". It has "the various *dog-legs* [that] have different directions and lengths from the true and precise median line". Insofar as such line runs fairly close to the true median line, and does not escape the effect of controlling basepoints (e.g. islands, promontories) located near the terminus of the land boundary, this method is "somewhat of an approximation to the median line principle" (Figure 55)[134]. The last method "is based on joining by straight lines a series of points, each equidistant from points on the coast which are themselves equidistant from the position where the land boundary meets the coast". This method appears to be what Roubertou denominates *pseudo-equidistance*[135]. It results in a line that is usually very different from the two previous lines (Figure 56).

The proposition that Kennedy's paper reflects the Committee's views finds further support in Boggs' writings. In 1951, he had already referred to the 'median line principle' and to the 'method of equidistances offshore'. He argued that in cases of cartographically ill-defined coastlines, the use of other 'methodological interpretations' of the principle of equidistance would be acceptable[136]. Shalowitz also reinforces the suggestions above. Noting that equidistance "is embodied in the median-line concept", he nevertheless takes the view that the "distinction between an equidistant line and a median-line seems valid from a geometrical point of view, for a true median line presupposes a line that is in the

(132) Kennedy/1958 (unpublished), para.I.
(133) *Ibid.*, para.II(A)(B)(C); from which are taken all citations in the following paragraph.
(134) Boggs/1951, p.262. Cf. also Christensen/1998.
(135) Para.5.2.e) *infra*.
(136) Boggs/1951, p.262. He was also a member of the Committee of Experts.

middle". Referring to the "application of the *principle of equidistance* from the nearest points on the baseline from which the breadth of the territorial sea of each country is measured", he adds that theoretically "a boundary line through the territorial sea between two adjacent states, *while an equidistant line*, is not a true median line"[137]. In other words, whereas a median line is an equidistance-line, not all equidistance-lines are median lines. Finally, on the interpretation of Article 6 of the CS Convention, he notes that it embodies "*in substance the same principles for delimiting the boundary between two states through the continental shelf as was adopted for the territorial sea*"[138].

Whether the term "principle of equidistance" was meant to refer to a "median line", or to another understanding of equidistance, or all of them, is unclear. Further, the records of the First Conference provide no evidence in this respect. One would suggest that the technical distinction initially embodied in the two terms aforementioned was not transposed to the 1958 Conventions. The ILC, the Committee of Experts, and the First Conference, all seem to have agreed on one point. The normative standards applicable to delimitation were envisaged for both the territorial sea and the continental shelf. This is *prima facie* evidence that the delimitation rules were meant to be the same. The fact that the two draft-provisions on territorial sea delimitation were merged, whereas those concerning the continental shelf were not, without further evidence, is insufficient to overturn that idea. As suggested, this might have happened simply because different Conference Committees were involved[139].

5.2.a)(ii) Contents and Technical Aspects

Whatever the correct perspective historically, today the distinction between *median line* and *equidistance* is formal. These two terms are used interchangeably to convey the same meaning: a line every point of which is equidistant from the nearest basepoints on two coasts. This view has prevailed in scholarship, which considers that both lines "result from the application of the same geometric method"[140]. Therefore, they are taken as synonymous here. Indeed, it has been suggested that this distinction amounts to an improper use of terms, caused by a misconception[141]. The difference in Article 6 of the CS Convention was already considered as bearing no juridical relevance, and deemed to be "fictitious" and "inadequate" as "juridico-technical terminology"[142]. In any event, since technically what is

(137) Shalowitz/1962(I), pp.230-231, emphasis added.
(138) *Ibid.*, p.253, emphasis added.
(139) Para.1.3.c)(iv) *supra*.
(140) Kapoor/Kerr/1986, p.73. Cf. also, IHO/TALOS-Manual, pp.106-108; IHO/Dictionary, pp.79, 145 (n.1648, 3171); Guy/2000, pp.186-187; Carleton/1999, para.6.17; Roubertou/1996, p.375; Beazley/1994, pp.7-8; Hodgson/Cooper/1976, pp.361-364; Vœlckel/1979, pp.702-703; Whiteman/1965, pp.332-333.
(141) Francalanci/1989, p.83.
(142) Judge Sørensen, Dissenting Opinion, *North Sea* cases, ICJ/Report/1969, p.252. Jayewardene/1990, pp.294-295; Tanja/1990, p.33; Weil/1989a, p.247. Not making distinction in the treatment of the two situations, thus agreeing implicitly, cf. Ahnish/1993,

in question is a line formed by *equidistant points*, the term "equidistance" is used in this study to refer to both oppositeness and adjacency (Figures 48 to 54).

Behind the use of this method is the rationale *closer proximity*. With it, each state is allocated all points at sea that are closer to its coasts than to the coast of another state. The sole remark that should be made in relation to the recourse to equidistance in cases of adjacency concerns the link between the maritime and the land boundaries. The stretch of equidistance in the vicinity of the terminal point of the land boundary may be composed by a rather complex sequence of short segments, depending on the coastlines' features. For this reason, the graphical definition of the line, which is started on a point at sea and constructed landwards, is usually stopped at a certain point, which is then joined to the terminus of the land boundary by one segment. Even when appropriate software is used, simplifications might be needed, due to the large number of turning points in the vicinity of the coast.

With this said, attention should now be focused on the technical aspects involved in the definition of lines through this method. The first point to make concerns the distinction between Euclidean geometry and geodetic computations. In plane Euclidean geometry, the definition of equidistance is easy to interpret. It is the perpendicular bisector of the line connecting any two points. When a point and a line are considered, it becomes a parabola with the focus on that point. Thus, it would be somewhat simple to graphically determine an equidistance-line on a chart. On an ellipsoid however, things are much more complex[143]. The use of charts might lead to material errors, as occurred in the *Anglo/French* arbitration; Mercator charts are unsuitable to construct strict equidistance-lines on the basis of plane geometry[144]. To compute these lines geodetically, it is preferable to resort to appropriate computer software, thereby circumventing the problems raised by map projections[145].

Notwithstanding this, it must be added that on an adequate Lambert conformal or Transverse Mercator projections, equidistance-lines can be constructed according to plane geometry principles. On these charts, straight lines may be taken for all practical purposes as geodesics[146]. Because the accuracy of the solution obtained depends more on the chart scale than on the inaccuracies involved in graphical computations, the error involved in the assumption made becomes in many instances negligible.

To understand the application of this method, a few other notions must be refined. In the computation of an equidistance-line, the normal baseline is in practice reduced to a

pp.52-57; Dipla/1984, pp.143-148. *Contra*, cf. O'Connell/1989, pp.684-685. Francalanci sees *equidistance* as the product of a graphical or analytical construction, and *median line* as the final product of a negotiation (Francalanci/1989, p.83).

(143) IHO/TALOS-Manual, p.106.

(144) For information on chart projections (attributes, simplifications, distortions in the Mercator projection), cf. Appendix 3.

(145) The formulae (or construction rules) involved in the computation of an equidistance-line belong to the world of geodesy, and need not be examined in a study such as this, in which technical issues need to be dealt with only on a conceptual level.

(146) For an illustration of the difference between using a Mercator chart or a Lambert conformal chart, cf. Appendix 3.

sequence of *relevant basepoints*. The line may be represented by a series of discrete points. Just as most points on a baseline are irrelevant for delineating an outer limit, the basepoints used for computing an equidistance-line are only a few. The line every point of which (on an ellipsoidal surface) is equidistant from the nearest points on the baselines of two states is usually known as *strict equidistance*. This line consists of a number of segments that join certain points – known as *turning points*. These points are equidistant from triplets of basepoints (two on the baseline of one state and one on the baseline of the other). The main advantage in resorting to equidistance is that, in principle, it is always possible to establish the line that is equidistant from the coasts of any two states[147].

As is easily understood, the definition of the normal baseline becomes the primary concern. The equidistance is only defined if the basepoints from which the line is computed are identified. It does not suffice to establish a boundary as the equidistance between the coasts of two states. A *strict equidistance*, which accounts for all relevant points on the low-water line of the states involved, is the line underlying the reference to "equidistance" in international law. Legal coastlines (from which equidistance-lines are to be computed) might change as a result of natural phenomena (e.g. erosion, accretion, or silting), and of artificial works (e.g. harbour constructions, reclamation).

The key point, technically, is that an equidistance boundary is defined only if there is an indication of either the basepoints from which the line is computed, or the turning points of the resulting line. Otherwise, doubts might emerge as to the line in question.

Another question to deal with is that of the scale of the charts on which the normal baseline is marked, and the accuracy provided thereby. One further question involves the tidal datum to which each of the baselines of the two states is referred[148]. The geodetic datum (ellipsoid and origin) upon which the coordinates of the relevant basepoints are anchored is one further point to address[149]. The geodetic formulae used in the computation of the line must also be considered. If charts are being used for constructing the line graphically, the projection upon which the charts are based (and the associated distortion) is an aspect to be taken into account. Finally, the understanding of the concept of straight line might bear on the definition of an equidistance-line. Even when straight baselines are used

(147) There are theoretical situations in which it might be impossible to compute an equidistance-line (Roubertou/1996, p.378).

(148) On the tidal datum issue, cf. Antunes/2000b.

(149) When charts are used for delimitation, which implies the recourse to graphical methods, it is necessary to confirm whether they are all based on the same datum. If charts have different datums, coordinates of basepoints must be converted to the datum of the chart used for the delimitation. Even when applying analytical methods, because the coordinates of the basepoints are often obtained from charts, this conversion between datums is necessary. Computing equidistance-lines without having coordinates on both sides expressed in the same datum is technically incorrect. The following example may illustrate this point. Although the legislation of Equatorial Guinea and of São Tomé and Príncipe (cf. Appendix 2, E8, E35) refer both to an equidistance-line as the boundary between them, the coordinates of the points of such line do not coincide. That is most likely caused by cartography based on different geodetic datums.

in part or the whole of the coast, most of the aforementioned aspects still have to be addressed. Geodetic datums, computation formulae, projection and scale of charts, and the concept of a straight line will often continue to be inescapable issues. These are the main issues that surround the application of the method of equidistance. Because states have resorted to this method very often, examples of its use are quite easy to find[150].

One particular case of the equidistance method is the situation in which the coasts of three states abut on the same oceanic area. The application of the equidistance method leads, then, to the identification of a point that is equidistant from the baselines of the three states (Figure 50), usually known as *trijunction point* (or *tri-point*). The case of the Gulf of Guinea is an example of a geographical context where several trijunction points have to be determined (Figure 37). There are a few examples of determination of trijunction points in state practice: e.g. the agreements between India, Maldives and Sri Lanka (Figure 28), between Poland, Sweden and the Soviet Union, and between India, Myanmar (Burma) and Thailand[151]. It might also happen that bilateral agreements (or unilateral claims to maritime zones) extend the boundary (or claim-line) up to the trijunction point with another state (or to its close vicinity)[152].

The decision to resort to equidistance, or to another method, is indubitably a rather different question, which must be considered on different grounds, that is, in political-legal terms. The method of equidistance, whose application raises the technical issues addressed above very briefly, is distinct from the legal notion of equidistance. Importantly, the latter concerns the legal-normative aspects relating to the entitlement of states to maritime areas, and the limits that are prescribed by international law, in relative terms, to the spatial sphere of jurisdiction of states. Understanding why maritime boundaries are delimited by reference to equidistance is not an issue that falls within the scope of the *equidistance method*, but of a *legal notion* whose content is the rationale embedded in equidistance.

5.2.b) Simplified and Modified Equidistance

Derivative forms of the equidistance method have been used often in maritime delimitation. The possible 'variants' thereof are indeed innumerable. Notwithstanding this, it is possible to identify basic types of variant-methods. A first group includes methods that may be named *modified equidistance* and *simplified equidistance*. Legault and Hankey present modified equidistances as lines "composed of segments connecting points whose

(150) Cf. Appendix 2, B20-B24, B27-B31, D3, D7, D11, D14, D18, D21-D24, D26, D28, D31-D38, D51-D55, D61-D64, F12, F14, F21, F27, F31-F33, F37-F38, F46, F52-F53, F58, F62-F64.

(151) *Ibid.*, D35, F50, F38.

(152) *Ibid.*, B19-B20, B26, C47(EEZ), D14, D16, D45, D61, E8, E35.

position is not strictly equidistant from the territorial sea baselines because certain features [...] have not been used or have been given reduced effect". In distinguishing them from simplified equidistance-lines, they add that these lines involve usually "a greater departure from strict equidistance than does a simplified equidistance-line", and that "whereas a simplified line typically involves an *equal exchange of areas*, a modified equidistance-line generally involves *the allocation of maritime space to one party at the expense of the other*"[153]. These ideas may be used as a starting point for further elaboration.

First, strictly speaking, it must be noted that the term *modified equidistance* does not refer to a method per se. It refers to a line that may be arrived at by various methods and/or *ad hoc* approaches. In effect, all methods examined below – in particular those that are variants of equidistance – may result in *modified equidistances*. This category includes any lines derived from or constructed on the basis of equidistance – but in which the use of equidistance was tempered with another rationale. The intent is to allocate to one state areas that would be attributed to another state should strict equidistance would be used. Thus, it benefits the former at the expense of the latter. That is why this line departs from strict equidistance more than a simplified equidistance. How close the line follows equidistance depends exclusively on how equidistance and the other rationale are relatively weighed. This however, is not a technical issue. It is a political-legal decision.

Technically speaking, the distinction between *modified equidistance* and *simplified equidistance* is perhaps more one of degree than one of substance. The issues to address are no different, since strict equidistance is the starting point in both cases. The distinction exists only in terms of objective to achieve. A *simplified equidistance* aims at 'a simpler line'. Differently, a *modified equidistance* seeks to alter the area-attribution that result from strict equidistance. In the former, the goal is ultimately to simplify the administration of the boundary (e.g. resource management, enforcement of laws), while maintaining equidistance as the key criterion. The new line deviates "so little [from strict equidistance] that the resulting area gained or lost by the states is essentially unmeasurable"[154]. This is achieved usually by reducing the number of turning points – although the new turning points do not necessarily have to be located over the strict equidistance-line. In modified equidistances, it is possible to speak of a weighing-up of two criteria, one of which is equidistance.

Either of these lines requires the previous computation of a strict equidistance-line. Thus, they both involve all technical aspects pertinent thereto. The question of the geodetic datum to which the geographical coordinates are to be anchored is particularly important.

(153) Legault/Hankey/1993, p.208, emphasis added.
(154) IHO/TALOS-Manual, p.109.

Furthermore, whereas the segments that join the turning points of a strict equidistance-line are geodesics, in simplified or modified equidistances the equivalent segments can be either geodesics or loxodromes. What is important is that the intention of the decision-maker (whether negotiators or judges) be made clear. In the absence of any explicit determination, because the new line is to be derived from a strict equidistance-line, it is argued that there should be a *juris tantum* presumption in favour of geodesics. But if the line is drawn on Mercator charts, and no disclaimer exists as to the binding nature of these charts, that presumption should be reversed, and become in favour of loxodromes.

As a final note, it should be observed that these methodologies share a common aim: *both preserve the objectivity inherent in equidistance.* Differentiating aspects, notably the extent to which each of them retains that 'objectivity', and the diverse goals underlying their use, are not enough to break this common ground. Whether a line is a simplified equidistance or a modified equidistance is far less important than the fact that both are variants of equidistance.

5.2.c) Adjustment of Baselines and Partial-Effect Adjustments

The method of 'adjustment of baselines' consists in effect of the application of the equidistance method. Instead of using all possible basepoints however, the computation of the equidistance-line is based on selected points and/or lines. This amounts to an adjustment of the normal baseline through a certain rationale. For example, some basepoints might be excluded; or straight baselines might be defined (accepted) for purposes of computing the equidistance-line. Similar to the adjustment of baselines is the *partial-effect* technique – in which notional basepoints are created for purposes of applying the equidistance method[155]. Baseline and partial-effect adjustments are both conceived on the political-legal level with a view to attain a certain objective. It is crucial to understand that the outcome often is a true equidistant-boundary (from the basepoints or baselines that were selected). Hence, the technical aspects to address will be the same as in the case of the equidistance method. The result might be either a simplified equidistance, or a modified equidistance, depending on the intention underlying, and the extent of, the adjustment of the normal baseline.

An example of baseline adjustment, in which certain basepoints were disregarded, concerns the uninhabited islet of Filfla, which the ICJ did not consider when calculating the provisional median line between Malta and Libya[156]. In the *Eritrea/Yemen* arbitration, the

(155) The exclusion of certain basepoints may be seen as a particular application of the partial-effect technique, in which the effect attributed to a basepoint is null.
(156) ICJ/Reports/1985, p.48, para.64.

Yemeni northern mid-sea islands were attributed no-effect[157]. More recently, in the *Qatar/Bahrain* Judgment, the ICJ asserted that Fasht al Jarim, an insular feature off the northern Bahraini coast, should have no-effect in determining the boundary in the northern sector[158].

Various examples of basepoint selection may be found in state practice. One is the 1991 Belgium/United Kingdom agreement, in regard to the role of low-tide elevations and harbour works[159]. Another kind of adjustment appears in the 1994 Cuba/Jamaica agreement, where it was agreed to compute the equidistance boundary from points on the normal baseline (on the Jamaican side) and on straight baselines (on the Cuban side)[160]. In other cases, such as in the agreement between the Dominican Republic and the United Kingdom (Turks and Caicos Islands), straight baselines were disregarded in the computation of the equidistance-line[161]. Finally, it is possible to construct straight baselines specifically for the computation of an equidistance-line, as done in the 1977 Cuba/United States agreement[162].

Partial-effect adjustment is sometimes referred to as a delimitation method. From a technical viewpoint however, perhaps that is not strictly correct. Inasmuch as the course of a boundary cannot be defined without combining the notion of partial-effect with a true method, perhaps this should be seen as a *line-defining technique*. When combined with the equidistance method, partial-effect appears as a variant of equidistance. Its rationale lies on the reduction of the impact of certain coastline features in weighing-up of the geographical context, as reflected in the *coastline configuration*[163]. This explains why the technique is particularly apt to be applied in combination with the equidistance method. In this case, the technique does not differ much from an adjustment of baselines. As Beazley explains, traditionally, its use requires the definition of 'notional basepoints', the location of which depends on the weight attributed to the geographical feature and on its location in relation to the full-effect baseline[164]. The basic ways in which this technique works in combination with equidistance are illustrated in Figures 72 to 74, which portray cases of half-effect lines in oppositeness and adjacency, and a particular case of angle-bisecting.

The partial-effect technique has been resorted to primarily where the presence of islands and low-tide elevations raises difficulties in the determination of the boundary. Essentially, it seeks to alter the impact of basepoints on the determination of the boundary.

(157) Eritrea/Yemen-II, para.148.
(158) Qatar/Bahrain-Merits, para.248.
(159) Appendix 2, F6.
(160) *Ibid.*, F14.
(161) *Ibid.*, F20.
(162) *Ibid.*, D61.
(163) On the question of representativeness of basepoints, cf. paras.8.2.b), 8.2.c) *infra*.
(164) Beazley/1979.

The first instance in which the half-effect technique was applied appears to have been the 1965 Iran/Saudi Arabia agreement (subsequently altered by a 1968 agreement); the island of Kharg was given only a half-effect in the determination of the equidistance-line between two opposite coasts[165]. In case law, equidistance and partial-effect adjustments were used for the first time in the *Anglo/French* arbitration[166]. In the Atlantic region, the Scilly Isles were attributed only half-effect, which was implemented through the use of a bisector between two equidistance-lines. The *Tunisia/Libya* case, in which half-effect was attributed to the Kerkennah islands in the definition of the direction of the coast northwards of the Gulf of Gabes, offers a different example of partial-effect adjustment of baselines through bisectors (Figure 5). The bisector was directly unconcerned with the boundary course; it related to the general direction of the coast[167]. Related to the displacement of a "median line" between flattened coasts, the half-effect given to Seal Island in the *Gulf of Maine* case is again a variation of the equidistance/partial-effect combination (Figure 6)[168]. Although the half-effect lines are the most common, other partial-effects may be applied (e.g. three-quarters, one-third)[169]. As exemplified in the *Qatar/Bahrain* case with the Qit'at Jaradah and Fasht al Azm insular features, moreover, such a partial-effect might be derived from practical considerations as to the course of the boundary, and not be quantitatively defined (Figure 13)[170].

A few points concerning the use of this technique must be taken into account when applying it. The decision as to the "amount of effect" to be given to a certain feature falls within the scope of the determination of the boundary, being thus a political-legal decision. Its application allows *in concreto* wide room for manoeuvre, whatever the relative location of coasts. The cardinal point here is simple: there is no such thing as a true partial-effect lines[171]. The use of partial-effect depends on how the necessary adjustment of the line is defined; for it may be devised in a number of different ways. With the advent of computer technology, technical experts can easily generate lines representing different understandings of the partial-effect technique – some of which have not yet been used by courts.

The work of the technical expert, one would suggest, should be guided by two key thoughts: to provide the optional interpretations of partial-effect (in support of the phase of determination) when and if that is required by the decision-makers; and to produce an accurate definition of the line, in accordance with the decision-makers' reasoning. If charts

(165) Appendix 2, B24.
(166) RIAA/18, pp.117-118, paras.251, 254.
(167) ICJ/Reports/1982, pp.89-90, 94, paras.129, 133.C(3).
(168) ICJ/Reports/1984, pp.333-337, paras.214-223, pp.349-350. Apparently *contra*, Legaul/Hankey/1993, p.209.
(169) Cf. Appendix 2, F5-F6, F54.
(170) Qatar/Bahrain-Merits, paras.218-219.
(171) Beazley/1979, p.159.

are used, the characteristics of the map projections must be duly considered. When applied in conjunction with equidistance, a half-effect line remains still an equidistance-line, with the difference that it is computed from certain notional basepoints. What the partial-effect technique does is to displace, veer or curve the equidistant line, which is why substantively it is merely a line-adjusting technique. Finally, one ought to understand that partial-effect lines do not necessarily divide the area between full-effect and no-effect lines in parts equivalent to the effect adopted (as shown e.g. in Figure 72).

5.2.d) *"Méthodes de Lissage"*

The term *méthodes de lissage*[172] refers to 'methods based on the assumption that coasts are flat-lines'. It presupposes the notion of "*lignes de lissage*", which may be loosely translated as 'flattening-lines'. For purposes of application of this method, states' coastlines are represented by lines that have no indentations or protuberances whatsoever. Coastal geography is simplified to the highest degree possible. The *méthodes de lissage* comprise three sub-types: perpendiculars, bisectors, and radial-lines[173]. Insofar as they all amount to the computation of an equidistance-line from 'flattened-coasts', they are in fact simplified variants of the equidistance method.

5.2.d)(i) Perpendicular-Lines

Clearly associated with the concept of '*ligne de lissage*' is the notion of "general direction of the coast", and perpendiculars thereto. At the dawn of maritime delimitation, the scientific-technological means made the graphical computation of an equidistance-line a rather complex operation. The use of simplifications of the coastline should perhaps be understood in this light[174]. For example, representing the direction of the coast as a straight line meant that an equidistance-line was a perpendicular thereto. Given the technological advancements, by the time of the debates in the ILC, the situation had changed somewhat. In the 1953 report to the ILC, the Committee of Experts emphasised some of the technical shortcomings surrounding the use of this approach. As stated therein, the definition of the "general direction of the coast" with any degree of objectivity and certainty might become impossible in certain instances. The decision might involve rather arbitrary assessments, as those concerning the *scale of the chart* and the *extension of the coastline* to be

(172) On this expression, cf. Roubertou/1996, p.382.

(173) For an illustration of these methods, see Figure 60.

(174) The dictum in the *Grisbadarna* arbitration, as regards the fact that at the time of the delimitation treaty under scrutiny (1661) international law required the use of perpendiculars to the general direction of the coast, has to be understood in this light.

considered[175]. Because charts remain the basic reference for determining the general direction of the coast, the remarks of the Committee of Experts are as valid today as they were then. Nonetheless, there are a few other complementary and updating technical notes worth putting forward.

Visual perception of the sinuosities of the coast is the basis for the operation of 'flattening the coastline'. Resorting to *lignes de lissage* thus entails the use of cartographic material. Besides the scale, the chart projection might also become important. On Mercator charts, loxodromes appear as straight lines and, because they are lines that follow a constant azimuth, they are particularly suitable to convey the notion of *direction*. Because geodesics are not lines of constant azimuth, they are not as suitable. Nevertheless, as they may be approximated to straight lines on Lambert conformal and Transverse Mercator charts, this should not be seen as an absolute proposition. The azimuth variation along a geodesic (over short distances) is small. And *coastal direction* is a notion fluid enough to be susceptible of representation through a straight line on a chart based on these projections (as occurred in the *Gulf of Maine* case).

There are various examples of maritime boundaries delimited by perpendiculars to a straight line (general direction of the coast, macro-geographical orientation of the coast, closing line). The agreements Argentina/Uruguay, Brazil/Uruguay, and Estonia/Latvia, are examples of state practice resorting to this approach[176]. The outer stretch of the boundary delimited in the Estonia/Latvia agreement seems to be defined as a geodesic perpendicular to another geodesic at its mid-point. The *Grisbadarna* arbitration, the *Gulf of Maine* case, and the *Guinea/Guinea-Bissau* arbitration can be named as examples of recourse to this method in adjudication[177].

That a perpendicular to the coastal direction is substantively an equidistance-line is unquestionable since Gidel made this point in 1934[178]. Referring to 'perpendiculars' as a method distinct of equidistance is misleading, for it amounts to true misconception[179]. When the baseline is simplified to the point of becoming a straight line, the perpendicular thereto is an equidistance-line. No doubt, this presupposes that one is working in plane geometry. On an ellipsoid, reconciling *perpendicularity* with *equidistance* raises various difficulties. Perpendiculars to straight lines on Mercator charts are loxodromes (i.e. non-equidistant lines). In ellipsoidal geometry, only in the cases in which the perpendicular coincides with a meridian (i.e. a line that is simultaneously a loxodrome and a geodesic) can perpendiculars

(175) ILC/Yearbook/1953(II), p.78. For an illustration of some difficulties involved at this level, see Figures 75, 84.
(176) Appendix 2, D1, D10, F23. For the first two agreements, see Figures 17, 22.
(177) See Figures 1, 6, 7.
(178) Gidel/1934, pp.767-769.
(179) Presenting it as a different method, cf. e.g. Legault/Hankey/1993, pp.213-214.

be equidistance-lines. It must be remembered that, in general, a perpendicular to a geodesic is not a geodesic; thus not an equidistance-line. With a certain error involved, straight lines on Lambert conformal or Transverse Mercator charts may be approximated to geodesics, and perpendiculars thereto may approximated to an equidistance-line[180].

5.2.d)(ii) Bisector-Lines

The second of the *méthodes de lissage* is the bisector-line. Consider the general direction of the coasts of two states, represented by straight lines. The *bisector of the angle* formed by these lines might be adopted as the boundary. From the outset, it must be noted that this method is the general method of which the method of perpendiculars is a particular case. A perpendicular is the bisector of an angle of 180 degrees (whose vertex is the point where the land boundary meets the line representing the general direction of the coast).

In principle, a bisector-line is an equidistance-line from the 'flattened coasts'. But this holds true only if the line starts from the vertex of the angle to be bisected (i.e. the point of intersection between the straight lines)[181]. Attention is drawn to this point because there are various instances in jurisprudence in which bisectors and perpendiculars were utilised in a different way. That is the case, for instance, of the first segment of the boundary adjudged by the Chamber in the *Gulf of Maine* case. The boundary-line follows the azimuth of the bisector of the angle formed by the general direction of the coasts of Nova Scotia (Canada) and Maine (United States). However, the segment does not start at the terminus of the land boundary, but from a point agreed between Canada and the USA. Technically, it is as if the relevant façades were 'displaced' to intersect at that point. In the *Guinea/Guinea-Bissau arbitration*, similarly, the perpendicular to the general direction of the coast was adopted only for the outer stretch of the boundary, starting from a point offshore defined by the Tribunal. These cases illustrate clearly that bisectors and perpendiculars do not necessarily have to start from the terminus of the land boundary. Whilst there are no conceptual reasons against this approach, its impact on area-attribution must be fully understood.

The technical issues involved in the use of this method are further illustrated by the first sector of the boundary in the *Gulf of Maine* case. The point of intersection between the 'flattened-coasts' did not coincide with the starting point of the boundary. This meant that the 'flattened-coasts' had to be offset, which immediately raised a problem: a line parallel to a geodesic is not another geodesic[182]. On an ellipsoid, transposing geodesics by means of an

(180) Caution is required in this respect, for this idea is not free from difficulties. Importantly, since geodesics are not bearing-lines, the perpendicular only has an azimuth difference of 90 degrees from the straight line at their point of intersection.
(181) On this point, cf. e.g. Judge Oda, *Libya/Malta* case, Dissenting Opinion, ICJ/Reports/1985, p.166.
(182) A parallel to a loxodrome is also not another loxodrome, which happens only if the first loxodrome is an East/West line.

offset, to pass on a defined point, is technically problematic. Thus, the technical expert opted for computing a bisector of 'notional perpendiculars' to the 'flattened-coasts' passing at the starting point "A". This line was constructed on a Universal Transverse Mercator grid, all lines being approximately geodesics[183]. On another level, it is also important to note that, on the contrary of what the Chamber seemed to imply, the resulting bisector did not effect exactly an equal division of the area between the coastal façades[184].

The difficulties concerning 'plane geometry *versus* equidistance' remain the same here. The bisector of the angle formed by two straight lines is an equidistance-line in plane geometry only. The loxodrome that bisects the angle formed by two other loxodromes is however not a strict equidistance-line. When Lambert conformal or Transverse Mercator charts are used, the bisector between two 'flattened-coasts' may be taken as a geodesic, and thus approximated to an equidistance-line. Strictly speaking, however, the line is neither an equidistance-line, nor a loxodrome.

The recourse to this method is driven often by practical reasons. In the 1960's, the United Kingdom proposed to the rulers of five of the Emirates that form today the United Arab Emirates that their continental shelf boundaries be delimited by bisectors of the angles formed by the general direction of the coast at the land boundary terminus. Of all states, only Sharjah and Umm al Qaywayn accepted these lines. Behind this approach was apparently the inaccuracy of the baseline data contained in the cartography available. For this reason, the computation of accurate equidistance-lines was not possible[185].

5.2.d)(iii) Radial-Lines of a Circumference

No substantive reason impairs the simplification of a convex or concave coastline, by turning it into an arc of circumference. The "general direction" of this *ligne de lissage* should be seen in wider terms, as "general orientation" of the coast. The 'flattened-coast' is then an arc of circumference. The radial-line of this arc of circumference may be taken as the boundary. In plane geometry, the radial-line is a perpendicular to the 'circular baseline'; thus an equidistance-line from the 'flattened-coast'. On an ellipsoidal surface, because the definition of a circumference may not be simple, caution is required. Resorting to Lambert conformal or Transverse Mercator projections may help resolving the problem of constructing graphically a true equidistance, which will nonetheless involve some degree of error. If constructed on Mercator charts, the radial-line raises the same questions as any

(183) ICJ/Reports/1984, p.333-337, paras.213-223; Technical Report, pp.347-350.
(184) On this issue, cf. Judge Oda, Dissenting Opinion, *Libya/Malta* case, ICJ/Reports/1985, p.166.
(185) Pietrowski/1993, IMB/Report 7-10, pp.1551-1552.

other straight line. It is interesting to note that the radial-line method seems to underlie the sector partition proposed by Germany during the *North Sea* cases (Figure 61)[186].

5.2.d)(iv) Appraisal and Rationale

As illustrated in Figure 60, the boundary-line resulting from the use of *méthodes de lissage* is always a straight line: (a) a perpendicular to another straight line, (b) a bisector of an angle between two straight lines, (c) a radial-line of an arc of circumference. Although conceived mainly for cases of adjacency, such an approach can be applied also to situations of oppositeness, especially in the form of bisector-line (d). Furthermore, these approaches might be combined with a view to portray changes in the direction of the coast and to reflect them upon the course of the boundary (as illustrated by the *Gulf of Maine* case). These equidistance-variants are particularly useful if, for purposes of simplification, emphasis is put on the façade of coasts (and not on the coastline proper)[187].

This approach may be useful also in cases of delimitations between adjacent states where the terminus of the land boundary is situated on the 'vertex' of a very pronounced headland. The Honduras/Nicaragua boundary, at the mouth of *Rio Coco* (the delimitation of which is *sub judice*) is a good example (Figure 15). The recourse to equidistance becomes problematic because there is a danger that the boundary be solely defined by one basepoint on each side, and that minor changes in these basepoints have a dramatic impact on the course of the boundary. Between Honduras and Nicaragua, the problem is particularly acute due to silting and erosion. The river stream is the main variable in the dynamics of these processes, and causes major alterations in the coastal configuration at the river mouth (with islands appearing, disappearing, or changing shape)[188]. The difficulty might be overcome if the issue is analysed as a problem between two general directions of the coast that intersect at one point, the boundary being the bisector between them (Figure 78).

In short, the merit of the *méthodes de lissage* is to simplify boundary delimitation, turning it into a straightforward geometric problem. Substantively, this approach is no more than a variant of the equidistance method. In cases in which the line does not start from the intersection of the two façades, the line is still equidistant, but from the 'displaced-façades'. Its rationale is primarily to avoid the 'control' of prominent basepoints over the course of the boundary, while simplifying certain computations. These methods may also be viewed as adjustments of baselines, which if the coast is assumed as a series of discrete points, can

(186) ICJ/Pleadings/1968(1), p.85.
(187) Paras.8.2.a), 8.2.d) *infra*.
(188) For an overview of the changes that the coastal area at the mouth of Rio Coco has undergone in the past 200 years or more, cf. Sandner/Ratter/1991, pp.290-293.

be flattened through the use of mathematical tools (numerical methods). Their application however, always entails a certain degree of subjectivity. More likely to lead to a modified equidistance, this method might equally lead to a simplified equidistance (if the coast is simple or slightly undulated). But its simplicity is merely apparent. First, the method is not suitable to certain geographical scenarios. Secondly, it entails the use of charts, which means that the lines derived from it carry all the conceptual difficulties inherent in the resort to charts (particularly small-scale Mercator charts). Unless harnessed on a proper understanding of the principles, and of the results thereof, this method might lead to unwanted and inequitable area-attributions.

5.2.e) Pseudo-Equidistance

The term '*pseudo-équidistance*' is used by Roubertou to refer to a method broadly based on equidistance, which corresponds to the third method applicable to adjacent coasts in Kennedy's paper[189]. Its application is illustrated in Figures 58 and 59. First, basepoints along the coasts of the two states are selected. One constraint is imposed to this selection: the number of points must be the same on both coastlines. The second step involves one of two different operations, depending on whether it is a case of oppositeness or of adjacency. In the former, it is necessary to compute the midpoints of the straight lines joining two basepoints (one on each coast). The selected basepoints are either located "face-to-face" along both coasts, or disposed obliquely, forming a zigzag line. In cases of adjacency, what is required is the determination of points equidistant from 'equivalent basepoints' on each side of the land boundary terminus. The third step consists of joining sequentially the points previously computed, thereby creating a continuous line constituted by straight segments.

Whilst the turning points of the resulting line are equidistant from the basepoints selected on the two coasts, the points on the boundary-line will almost never be equidistant to the nearest basepoints. They are equidistant only *lato sensu*, thus pseudo-equidistance. Its main advantage is that, whilst taking some objective account of the coastlines, the method mitigates disproportionate effects of certain prominent basepoints, over the computation of the equidistance-line. Each point is utilised only once.

Once again, the emphasis is put on basepoint selection. This brings subjectivity into play, inexorably. Selecting the basepoints equally spaced along the coastlines provides some degree of objectivity, but the distance between points would still remain a subjective assessment. In any event, the basepoints' selection is the controlling variable in the use of

(189) Roubertou/1996, pp.381-382. Para.5.2.a)(i) *supra*, method (C).

this method. Inasmuch as it requires measurements of distance, it raises questions similar to those of the equidistance method. Small-scale Mercator charts should be judiciously used when measuring distances. Matters relating to baseline definition must also be addressed. And the concept of straight line becomes necessarily an issue when the segments joining the turning points are defined.

Understanding how pseudo-equidistance-lines relate to strict equidistance helps in its effective application. Imagine the theoretical case of adjacent states whose coasts form one continuous straight line (Figure 53). In this diagrammatic instance, pseudo-equidistance coincides with strict equidistance; which also happens with oppositeness (Figure 51). What this shows is that for simple coastlines this method is useful because pseudo-equidistance and strict equidistance will not depart to a great extent. Furthermore, as the number of selected basepoints is increased, the two lines are approximated. Depending thus on how the line is derived, so will pseudo-equidistance be a simplified or a modified equidistance. But this method has some drawbacks. In certain situations, such as that of Figure 57, the application of this method leads to very unsatisfactory results.

The inner sector of the boundary adjudged in the *Grisbadarna* arbitration resembles the application of the pseudo-equidistance method – rather than the equidistance method. Although points XVIII to XX are equidistant from the basepoints from which they were derived, the line joining them is not strictly equidistant from those basepoints (Figure 1). Lines joining midpoints between selected basepoints was a method used in the 1958 Saudi Arabia/Bahrain boundary – although not in exactly the same terms (Figure 21).

5.2.f) Equiratio Method

Devised by Langeraar, former Dutch Hydrographer, the equiratio method is another method related to equidistance[190]. An *equiratio-line* between two states may be defined as a line every point of which is at a distance from the nearest basepoint of one of the states that bears a constant ratio to its distance from the nearest basepoint of the other state. In other words, at every boundary point, the ratio between the distances from the nearest basepoints on either side is constant. Geometrically, equidistance is merely a particular case thereof, in which the constant ratio is 1.0. In other words, the equiratio method is the generalisation of the geometric-mathematical principle underlying the equidistance method. Consider now a 0.90 equiratio-line between states A and B, favouring state B. All points on the line are at distances from the nearest basepoint of state A that are 90% of the distance from the nearest

(190) Langeraar/1986a; Langeraar/1986b; Langeraar/1986c; IHO/TALOS-Manual, p.111.

basepoint of state B. What this means is that while the boundary-line is still computed by reference to distance to the coast, it becomes possible for the decision-maker to attribute a different weight to the basepoints of the two states.

Some diagrammatic examples illustrate the type of lines that are obtained with the application of the equiratio method. Figures 62 and 63 provide examples of equiratio-lines between opposite and adjacent states, and illustrate the displacement thereof in relation to strict equidistance. Because the coasts are straight lines, the equiratio-lines also appear as straight lines. Depicted in Figure 64 are equiratio-lines drawn between two states with flat-coasts, but one of which has an offshore island. Figure 66 illustrates a situation where the territorial sea boundary is based on equidistance, and a 0.90 equiratio-line is used as the EEZ and continental shelf boundary. These examples however, are mere diagrams. Figures 67 and 68 illustrate more realistically the application of the equiratio method.

Graphical constructions of equiratio-lines pose exactly the same technical problems as equidistance-lines. For they flow from distance measurements. Account has to be taken namely of the difficulties concerning baseline definition, the need for a geodetic datum on which to anchor coordinates, and the notion of straight line. The distinction between plane and ellipsoidal geometry will not be an issue because charts cannot be easily used in the application of this method. The graphical construction of equiratio-lines is so complex, and time-consuming, that it is rendered virtually unfeasible (in particular because the resulting lines are curved lines, whose construction on charts is rather difficult and impractical).

Hitherto this method was not used in actual delimitations[191], perhaps because of its complexity. But adequate computer software may delineate equiratio-lines as easily as it delineates equidistance-lines[192]. Even if the equiratio-lines are deemed mathematically too complex to be adopted as boundaries, the use of this method should not be simply brushed aside. Some of its features might be helpful. For example, it is possible to derive composite lines. Nothing prevents the computation of turning points on the basis of a certain 'distance ratio', and joining them subsequently with segments of straight lines (either loxodromes or geodesics). One has only to be aware that such joining lines will not retain the distance ratio of the turning points. Equally, the 'distance ratio' does not necessarily have to be the same for the whole line. Different stretches of the boundary might be based on different ratios, as shown in Figure 65. The inner segment is an equidistance-line; the outer segment is a 0.95 equiratio-line favouring state A – thus attenuating the effect of island B1 seawards.

(191) Suggesting the use of this method in the delimitations in the Aegean Sea, cf. Kozyris/1997, pp.45-46, 53 and Kozyris/1998, pp.372-373, 388.

(192) The software *Caris LOTS* (Universal Systems, Ltd) is equipped to compute, and draw on-screen, this type of lines.

Finally, attention must be drawn to the key notion underlying the equiratio method: 'distance ratio'. It is paramount to understand that, through this notion, basepoints may be valued differently; i.e. relevant basepoints may be attributed different weights for purposes of the determination of the course of the line. As will be demonstrated[193], nothing hinders the recourse to the notion of 'distance ratio' (even if the boundary is such that this value varies continuously along the line) to express adjustments based on equity.

5.3. Other Methods and Line-Defining Techniques

5.3.a) Enclaving

The method of *enclaving* has been used in certain maritime delimitations. Although not conceptually related to equidistance, *enclaving* is however inextricably linked thereto. Its application occurs in parallel with equidistance. The concept of 'enclave' is defined in relation to the equidistance-line. Typically, the method applies where islands are located either in the vicinity of the equidistance-line between mainland coasts, or on the 'wrong side' thereof. It consists of defining a boundary (or a stretch thereof) on the basis of distance to the normal baseline of islands involved. Where islands lie on the 'wrong side' of the equidistance-line, the resulting line tends to be an enclave – the area attributed to the islands lies entirely within the maritime zone of another state. In cases of semi-enclaves, the area attributed to the islands forms a 'bulge' in the equidistance-line. Both cases are diagrammatically illustrated in Figure 77.

When combined with equidistance, it leads to discarding the basepoints of the islands to be enclaved. They are taken into account only to generate the belt of maritime space around the islands. As far as equidistance is concerned, this is another type of adjustment of baselines. The enclaving method generates stretches of the boundary that are independent from equidistance. Because it consists also of measuring distances from basepoints along the normal baseline, similar technical issues are raised. The definition of the basepoints on the basis of which the line is to be computed is the key point; and it involves assessments concerning the scale in which the coastline is depicted, the tidal datum used, and the accuracy of the surveys upon which the cartographic information is based. The boundary-line is a complex curve, described as a belt-line around certain points. The geographical coordinates of the basepoints upon which such a belt-line is hinged must be anchored to a geodetic datum. To depict the boundary on a chart, it is necessary to compute

(193) Conclusions to Part II *infra*.

its course through geodetic formulae. Because the distances involved are relatively short (e.g. 3, 12, 13, 24 M), large-scale charts may be used in the graphical construction of the line. When Mercator charts are used, the construction of the line should take into account the inherent distortions. Using charts always entails less accuracy and discrepancies in relation to the line obtained by geodetic computation.

States have resorted to semi-enclaves in a number of occasions as, for instance, in the Italy/Yugoslavia, the Iran/Saudi Arabia, the Italy/Tunisia, and the Qatar/U.A.E. (Abu Dhabi) agreements[194]. Perhaps the only example where a full enclave was resorted to is the Australia/Papua New Guinea agreement[195]. In case law, the enclaving method was utilised in the *Anglo/French* and in the *Sharjah/Dubai* arbitrations, in the form of full enclave and semi-enclave respectively[196]. Whether the solution devised in the *Canada/France* arbitration is an example of an enclave is open to debate. The reality is that the maritime area awarded to the French islands of St. Pierre and Miquelon falls entirely within waters under Canadian jurisdiction (Figure 10).

The *Anglo/French* arbitration is illustrative of the difficulties that may arise from the use of this method. In its Application instituting the 1978 proceedings, the United Kingdom argued the 12-mile belt-line around the Channel Islands had not been drawn by reference to the basepoints required by the Court. Except for minor differences related to the geodetic datum, France accepted the United Kingdom's contention as regards the basepoints used. The Court of Arbitration confirmed the existence of a contradiction between the reasoning and the *dispositif.* Viewing it as a "material error", it then rectified the boundary described in the *dispositif*[197].

5.3.b) Navigable Channel (*Thalweg*)

The concept of *thalweg* belongs to river law. Literally, the term means 'downway'. It refers to the course followed by vessels navigating downstream[198]. Where an international boundary on a navigable river is defined by an equidistance-line computed from the nearest points on the banks, it might result in a line that denies access to the navigation channel to one of the states. Customary law has sanctioned the *thalweg* (understood as the mid-line of the main navigation channel), as the delimitation criterion for these situations (should no

(194) Appendix 2, B25-B26, D45, D57. On the first three of these agreements, see Figures 18, 19, 25.
(195) Appendix 2, D6.
(196) RIAA/18, pp.94-95, paras.199-202; ILR/91/1993, pp.672-678.
(197) RIAA/18, pp.296-300, 330, paras.31-37, 114(4).
(198) Cf. Bouchez/1963, pp.790-796; Lauterpacht/1960, pp.216-226; Hyde/1912, pp.901-906. The United States Supreme Court's decisions are helpful to understand the notion of *thalweg* in river boundary delimitation. Cf. Texas/Louisiana (410 US 702); New Jersey/Delaware (291 US 361); Minnesota/Wisconsin (252 US 273); Louisiana/Mississippi (202 US 1); Iowa/Illinois (147 US 1, 202 US 59); Nebraska/Iowa (143 US 359).

treaty, or otherwise agreed line, be in place). Its rationale is one of equality. The navigation interests of the two riparian states are the key consideration to weigh.

More often than not, the middle of the main navigation channel corresponds to "the line of maximum depth along a river or lake" (usually also the line of strongest current), which is the technical definition usually advanced for the *thalweg*[199]. The line of deepest soundings might however not coincide with the main navigable channel (which must be assessed, as to geomorphologic data, in terms of depth, width, and river-bed profile). It is an overall balance of considerations that allows conclusions as to route of the safest channel. In the *Botswana/Namibia* case, while establishing the location of the *thalweg*, the Court viewed as relevant criteria depth, width, flow of water, visibility, bed profile configuration and navigability. It concluded, moreover, that although the "terms '*thalweg*' and 'centre of the channel' are interchangeable, the former reflects more accurately the common intention to exploit navigation than does the latter"[200].

The rationale behind the *thalweg* may be transposed to any coastal "navigable channels"[201]. Navigation interests, in the form of access to harbours and ports, might have to be considered in the delimitation of maritime boundaries in terms analogous to those of the *thalweg* in rivers. Since waters are shallower near the coast, thus making safe navigation more difficult, it is easy to understand why navigable channels have great importance in the territorial sea. Its relevance is even greater if one links this factor with the legal constraints imposed on third states as regards navigation in this maritime zone. In the *Beagle Channel* and the *Guinea/Guinea-Bissau* arbitrations, for instance, the navigation interests of the states involved were taken into account in the determination of the course of the boundary[202]. To what extent they may be weighed-up in the delimitation process is an issue to be addressed later[203].

The definition of the mid-line of the navigable channel may involve various technical considerations, the assessment of which depends on the circumstances of the case. Information concerning the course followed by the navigation in the area is the most important. Hydrographic surveys may also be needed to analyse the depth contours, and the width of navigation channels. Geological and oceanographic information may also be required, especially in cases where the channel is likely to shift by erosion or silting processes, as well as due to the impact of artificial (harbour) works. When the boundary is

(199) IHO/TALOS-Manual, p.113; IHO/Dictionary, p.241 (n.5288). See also Gidel/1934, pp.752-753.
(200) *Botswana/Namibia* case, paras.32-42, 88-89. In this case, the Court noted that the parties had agreed that the "*thalweg* was formed by the line of deepest soundings". For an illustration comparing the north and south channels in this case, see Figure 85.
(201) Because strictly speaking the *thalweg* exists only in rivers, the use of the term "navigable channel" is more appropriate in the context of the law of the sea.
(202) ILM/25/1986, pp.295, 298, 301, paras.106, 111(a), 121; ILR/52/1979, p.185, para.110, Annex IV, pp.262-263.
(203) Paras.7.2., 8.3.c) *infra*.

to be based on the location of the navigation channel, its potential future shifting must be considered. Otherwise, the boundary might become meaningless in the light of its primary purpose. These specific issues must be addressed prior to, and are fundamental for, the determination of the course of the boundary. Afterwards, it is necessary to define the course of the boundary, namely as regards the geographical coordinates of the turning points, their geodetic reference, and the type of lines used.

5.3.c) Coastal Length Comparison (Proportionality)

The terminology *coastal length comparison* has been used to refer to a methodology based on coastline length measurements, area calculations, and successive approximation processes[204]. Some calculations involved therein, however, underlie also the *juridical notion of proportionality*[205]. The distinction between them, one would suggest, is similar to the one that exists between the equidistance method and the legal notion of equidistance[206]. Whereas the former relates to technical issues, the latter bears a distinct normative content. How relevant proportionality is for purposes of determination of the boundary is a question to address at a later stage[207]. For now, one will concentrate on the technical aspects involved in coastal length comparison. To start with, it should be noted that its application requires the previous ascertainment of the *relevant coastline* of the states involved and of the *relevant area* to be divided. Although part of the determination phase, this decision relies often on technical expertise. The first step is to measure the length of the coastline of the states involved with a view to compare them through the definition of a ratio. The second is to compute the relevant area for purposes of delimitation. And the third is to divide this area according to the coastal length ratio defined in the first step.

Coastal length measurement and the computation of areas raise various technical issues[208]. Unless computer technology is available, if the length of the coast is measured considering all sinuosities and indentations represented on a chart, in practical terms that can only be done with the help of a curvometer. Regardless of the means utilised (charts or computers), the scale of cartographic information becomes pivotal[209]. Measurements made on the basis of cartographic information at a scale of 1:10,000 can differ substantially from those based on information available at a scale of 1:1,000,000. Perhaps surprising to some,

(204) IHO/TALOS-Manual, p.111.

(205) Weil notes that the theory behind proportionality "is sometimes pushed further" to argue that "the extent of the maritime rights accruing to each state should be more or less in the same ratio as the length of the maritime fronts" (Weil/1989a, p.75).

(206) Paras.5.2.a) *supra*, 6.3.d) *infra*.

(207) Para.8.2.e) *infra*; cf. also para.2.3.d) *supra*.

(208) In the *Jan Mayen* case, the relevant coastline of Greenland was restricted to the area between the two most extreme points that controlled the course of the equidistance-line. Although based on a technical appraisal, this decision is not technical, but legal.

(209) Anderson/1987. In map-making, scale in intimately related to the generalisation and simplification of the coastline.

the fact is that, theoretically, by 'zooming in' (i.e. varying the fractal dimension on the basis of which measurements are made) the length of the coastline may be increased indefinitely. That is why – as Roubertou notes – to speak of length of the coastline, without indicating the scale to which it is referred, simply does not make sense[210].

Furthermore, the coastline may be measured without accounting for all sinuosities and indentations, that is, by simplifying the coastline. Straight closing lines may be used across the entrances of bays, the mouths of rivers, and of all minor indentations in general. A higher degree of generalisation is to depict the coast as a sequence of segments (straight lines) joining certain basepoints, the selection of which depends on the accuracy required and the regularity of the coast. The ultimate level of generalisation is to represent the coast by a single straight line. Illustrating three different cases, Figure 76 gives an idea of how large the difference between each measurement can be. Naturally, the notion of straight line and the projection of the charts (if they are used) are also issues to be addressed.

As to area calculations, the key moment is the definition of the relevant area by decision-makers. Technical experts have little to say about it, except to provide an accurate value for such area. What may be said is that computing areas on charts, especially without taking account of their inherent distortions, may lead to different results than using proper geodesic formulae referred to an ellipsoidal surface. Also, when the notion of straight line is used in the definition of the relevant area and of the boundary, the computed areas may differ to some extent if the concept is understood as a geodesic or as a loxodrome.

Noteworthy is the fact that, in adjacency, the definition of the relevant coastline and of the relevant area is somewhat more complex and subjective than in oppositeness. The overlapping of entitlements will always extend over some hundred miles, in the close proximity of both states' coasts. Additionally, the number of basepoints relevant for that overlapping is unclear. The overlapping of entitlement shown in Figure 53 is determined by only two basepoints: those that are positioned on each side of the land boundary terminus, in its infinitesimal vicinity. What constitutes the relevant coast (if seen by reference to the overlapping of entitlements) is therefore unclear.

Given its technical-mathematical nature, one might feel compelled to view coastal length comparison as an objective exercise. Nothing could be more misleading. The degree of objectivity that it seemingly bears *in abstrato* is easily overturned by the assessments concerning the coastline and the area relevant for the delimitation. The understanding of the delimitation problem may actually be manipulated by these assessments. Equally worth emphasising is the fact that coastal length comparison does not provide a course for the

(210) Roubertou/1996, p.366.

boundary. The number of possible solutions is literally infinite. Therefore, *it cannot be seen as a delimitation method.* What this technique allows is the determination of "how much" a certain line needs to be adjusted in order to divide the relevant area according a computed ratio. Substantively, however, this assessment is part of the phase of determination of the boundary. The role of the technical experts is to ensure that decision-makers have a clear geographical picture as regards the alternatives for coastline measurements, the basepoints relevant for the entitlement and for the computation of the equidistance-line, and the area of overlapping of entitlements and of overlapping of claims.

5.3.d) *Ad Hoc* Approaches

5.3.d)(i) Basic Notion

Boundaries agreed by states might sometimes reflect specific circumstances *in casu*, thus appearing as *ad hoc* solutions. The fact that the rationale behind them is not obvious does not mean necessarily that they do not result from a systematic methodology. That might indeed be the case. But it might also be that the states involved opted for obfuscating deliberately the method used in the determination of the boundary. With the considerations weighed remaining unknown, the agreement is less susceptible of criticism. It wins political approval more easily. States may equally intend to simplify their boundaries, in order to facilitate law enforcement. Another explanation is that the boundary course be designed to compensate cut-off effects in specific contexts.

At first glance, nothing hampers the recourse to *ad hoc* approaches in adjudication, on exactly the same grounds. The technical questions that they might raise are the same either in negotiation or in adjudication. Whether courts are legally entitled to resort to these lines is a different question, which does not regard a technical analysis[211].

In general terms, it might be said that *ad hoc* lines appear as a response to specific considerations, such as concerns of equity, economic interests, the simplification of the boundary, or strategic goals. Whatever considerations are weighed, one thing is common to *ad hoc* solutions: they tend to be simple lines, often defined by recourse to loxodromes. The use of parallels and meridians is but one particular case. From these solutions one excludes, naturally, those boundaries that stem from the application of other methodologies, namely perpendiculars and bisectors resulting from the use of *méthodes de lissage.*

The first technical concern to be addressed is the concept of straight line, which has to be defined in the treaty, or in the judicial or arbitral decision. The geodetic reference and

(211) Para.7.4., Conclusion to Part III *infra*.

the geographical coordinates of the points defining each segment of the line are also pivotal for an accurate definition of boundary. Depending on how the lines were arrived at, other technical issues might have to be addressed.

Despite the fact that generalisations from *ad hoc* solutions can hardly ever be made, as to the methodology used, these solutions might provide an objective starting point for analysing geographically analogous situations. For example, as will be illustrated by the examples below, it might be argued that the 'corridor solution' is applicable where one state is 'walled' on both sides by the territory of another state, and using equidistance would give rise to a cut-off. Equally, it must be observed that, in numerous instances, *ad hoc* solutions do not depart significantly from equidistance (although the relationship with equidistance cannot be easily established). A typical case is that of recourse to parallels or meridians that follow closely perpendiculars to the general direction of the coast.

5.3.d)(ii) Parallels, Meridians, and Other Straight Lines

The course of the boundaries devised in the 1988 Anglo/Irish agreement, which run through a "stepped" succession of parallels and meridians, seems an *ad hoc* solution that nonetheless has behind it a certain (equidistance-related) rationale. Equidistance, strict and modified, and bisectors of coastal fronts have influenced the basic course of the lines, which were also adapted to fit in the 'block systems' of concessions of both parties.

Making explicit reference to the equidistance principle, the 1976 Colombia/Panama agreement resorts to parallels and meridians, both in the Pacific Ocean (a parallel) and in the Caribbean Sea (a "stepped" succession of parallels and meridians), to define the course of the boundary. This is an example of an *ad hoc* solution in which equidistance was clearly the starting point. The 1984 Argentina/Chile agreement defines the boundary on the basis of a succession of loxodromes, including two arcs of meridian and one arc of parallel[212]. Strategic goals, previously awarded boundaries and economic interests are among the factors that were weighed in the determination of the boundary. An example of boundary simplification, involving a trade-off of areas on both sides of the equidistance-line, is the 1976 Spain/Portugal agreement. In the north, the boundary is a parallel; and in the south, it is a meridian. Equity-related adjustments seem to have played a significant role in three agreements in which parallels were used: 1976 Kenya/Tanzania, in the outer stretch; 1976 Mauritania/Morocco; and 1988 Mozambique/Tanzania[213], in the outer stretch.

(212) Figure 26.
(213) Figure 24.

In 1952, Peru, Chile and Ecuador made the Santiago Declaration in which they used parallels to delimit their boundaries in the western coast of South America. At that time however, these states were attempting to assert their maritime claims in international law, and the normative standards of delimitation remained unclear, if at all existent[214]. One could only speculate as regards the specific considerations behind the utilisation of this line. The adherence of Colombia in 1979 to this declaration was preceded by an agreement with Ecuador which, conforming to the regional framework, had also recourse to a parallel as boundary-line[215].

The boundary determined by the Court in the *Jan Mayen* case is also an example of an *ad hoc* line, adjusting the provisional equidistance. The course of the line was influenced by a combination of two factors: the disproportionality of coastal lengths, and the need to allow equitable access to the capelin resources by both sides. This is again a line devised in an *ad hoc* manner to respond to a specific context. The recourse to geodesics to connect the turning points, though a perfectly legitimate choice, remains unexplained. But it should be noted that nothing prevented the Court from resorting to loxodromes as an interpretation of 'straight line'.

5.3.d)(iii) 'Corridor-Solutions'

The 'corridor-solutions' devised in the certain delimitations are usually based upon two loxodromes (not necessarily parallel). What characterises the settings in which this solution was used is that the land territory of one state has a projection onto the sea on each side the land territory of the other. This approach was utilised in the following agreements: 1975 Senegal/Gambia, 1984 France/Monaco, and 1987 Dominica/France (Guadeloupe and Martinique), in the eastern sector[216]. From a legal perspective, and despite being based also on a 'corridor-solution', the *Canada/France* arbitration (around St. Pierre and Miquelon) shows one important difference in relation to the others. Whereas in the former, the corridor was devised as means to favour the 'surrounded state', in the latter such a solution sought to favour the 'surrounding state'. To this extent, this solution seems closer related to the 1978 Venezuela/Netherlands (Antilles) agreement, in which the sidelines are also pushed from equidistance towards the 'surrounded state'[217].

The solution devised by Germany, Denmark and the Netherlands in the aftermath of the *North Sea* cases (1971) is also somewhat of a 'corridor-solution'. The chief difference is

(214) Through its permanent mission in the UN, Peru has stated in January 2001 that it does not recognise the parallel as being the maritime boundary with Chile. On the non-existence of normative delimitations standards at that time, cf. para.1.2.a) *supra*.
(215) DeAréchaga/1993, pp.285-286.
(216) Appendix 2, D27, F19, F34.
(217) Para.7.4.c) *infra*.

that these agreements involved three states, unlike the typical 'corridor solution', which involves only two states. However, because of the way in which the cases developed and in which the boundaries were delimited in the aftermath, it might be contended that, as to delimitation with Germany, Denmark and the Netherlands acted much as if they were only one state. The sequence of loxodromes that forms the 'complex corridor' results from the specific geographical and legal circumstances *in casu*. It is owed to the need to consider previous oil concessions and to the fact that the 'corridor' was 'opened' by gradually shifting the equidistance-lines on both sides of Germany[218].

(218) Para.2.3.d) *supra*.

Chapter 6

NORMATIVITY IN MARITIME DELIMITATION

6.1. The Delimitation Process: Choice of Procedural Means

6.1.a) Preliminary Notes

Maritime delimitation is a complex, long-lasting and sensitive political-diplomatic process. As it concerns a line dividing maritime spaces under jurisdiction of different states, where their maritime entitlements overlap, it always has an international facet. Rights and interests of more than one state are inexorably involved. Importantly, maritime boundaries cannot be determined unilaterally. Competing outlooks on the balance to be struck as to, *inter alia*, political, economic, security, and historical considerations, require a compromise. States unavoidably have to relinquish partially their potential entitlements; i.e. they must be prepared to accept an 'amputation' thereof. Insofar as each state is certain to attempt to minimise its 'losses', this 'amputation' is likely to produce political tension.

How complex the settlement process becomes depends very much on the diplomatic relations between the states involved. It is trite to note that states with 'friendly' relations are likely to reach agreement more easily. Notwithstanding this, there can be idiosyncratic reasons that make negotiations difficult. Highly sensitive issues of internal politics may jeopardise the chances of an agreement if there is no solution apt to win approval internally. Equally, the position a state *vis-à-vis* a third neighbouring state may condition that state's position during negotiations. For states with 'strained' relations there are further hurdles. Indeed, an agreed settlement may be impossible. When the difficulties in reconciling rights are such that states become unable to agree on a boundary, the dispute may necessitate referral to a third-party settlement – adjudication (or less often conciliation).

6.1.b) Negotiation *versus* Adjudication: Outstanding Considerations

6.1.b)(i) Operative Distinction between Negotiation and Adjudication

Maritime boundaries exist in the realm of international politics – delimiting them is primarily a political act. Not surprisingly, among the mechanisms of dispute-settlement available to states, diplomatic negotiation is the most frequently used. It is the simplest and the traditional procedure, and it is successful more often than not. Negotiation leaves the solution entirely to the states involved – which have maximum of control over the outcome.

"[W]hether the dispute is one that falls to be resolved within the framework of existing law or is one of such novelty or proportions that a specifically legislative effort is called for", it is "best settled by negotiation and agreement"[219]. Maritime delimitation is no exception. In effect, statistically, adjudication is subsidiary – although qualitatively no less important[220].

Negotiation and adjudication are complementary. They both bear an expression of consent by the states for the purpose of settling a dispute[221]. Where the former is unsuccessful in providing the 'tools' to reach agreement, the latter might succeed. As noted in the *Gulf of Maine* case, adjudication is an alternative (*un succédané*) to direct settlement between the parties[222]. Significantly, the choice of procedural means, i.e. the decision as to whether to proceed through negotiation, or through litigation, is not preclusive. States may continue to seek settlement through negotiation, even when litigation is underway[223].

Bearing in mind that the choice of dispute-settlement means is not conditioned by the reference to agreement in Articles 74(1) and 83(1)[224], to which extent is the distinction between negotiation and adjudication relevant for the delimitation process?

The answer to this question is intertwined with the debate on normative standards. Germane to the phase of boundary determination, these standards play a *de facto* role in almost all delimitations, regardless of the procedural means utilised. Claims advanced by states during negotiations are virtually always founded on international law, even if peculiar interpretations thereof are adopted. What must be understood however, is the fact that, *de jure*, recourse to normative standards is compulsory in adjudication only. In negotiation, states are completely free to depart therefrom by mutual consent. As Weil notes, "although it binds the international judge or arbitrator, the law of maritime delimitation, as far as states are concerned, is no more than suppletive"[225]. It is simply *jus dispositivum*[226]. Hence, it is possible to speak of two types of delimitations: those concluded by negotiation; and those effected by recourse to third-party adjudication. "The theory that all maritime delimitations, whether negotiated or third-party, are identical [...] has had disastrous consequences. It is one example of judicial construction it is to be hoped will disappear"[227]. The corollaries of this distinction must thus be more closely examined.

(219) Lauterpacht/1991, p.6.
(220) Roughly, only one in ten maritime boundaries are delimited by recourse to adjudication.
(221) Conciliation may be described as a blend between negotiation (because it is not legally binding on states, it allows solutions not strictly speaking based on law) and adjudication (because it leads to a decision by an impartial third-party).
(222) ICJ/Reports/1984, p.266, para.22.
(223) Cf. Merrills/1998, pp.17-22; Anderson/1998c, pp.119-121; Bowett/1997, pp.1-4; Cassese/1991, pp.200-202.
(224) Cf. paras.3.6.c), 3.6.d) *supra*.
(225) Weil/1989a, p.8.
(226) Mendelson/2002. Cf. also e.g. Charney/1993, pp.xxix, xlii; Willis/1993, p.65; Thirlway/1993, p.46; Oxman/1993, pp.39-40; Brown/1992, p.343; Caflisch/1991, p.484; Cahier/1989, p.414; Weil/1989a, p.113; Dipla/1984, p.221; Allott/1983, p.24.
(227) Weil/1989a, p.114.

6.1.b)(ii) Normativity in Negotiated Agreements

The fashioning of delimitation agreements, by recourse to whatever considerations they deem relevant, is always a prerogative of states. Negotiations have an "element of give and take" which is crucial for their success[228]. Maritime boundaries may even be determined on the basis of a *quid pro quo.* States' discretion is limited only by *jus cogens*[229], which includes no norms specific to delimitation[230]. States are free to shape boundary-lines at their will, and the majority of delimitation treaties do not explain how the line was determined (as this is not required). Indeed, states might adopt a policy of "deliberate obfuscation"[231], evading explanations as to the concessions made. In short, the law "can almost entirely be disregarded in negotiated settlements"[232]. Negotiations have "no impartial machinery for resolving disputed questions of fact", and states are virtually free to put "forward extreme claims, especially where its bargaining power is very strong"[233]. This is the scope of the contractual freedom inherent in the *jus tractuum* of states[234].

The Australia/Papua New Guinea and the Argentina/Chile agreements are merely examples where such a trade-off approach stands out[235]. Such a trade-off approach is even clearer in a statement of the Australian Minister of Foreign Affairs, Alexander Downer, on the negotiations between Australia and East Timor over the Timor Sea area[236]:

> The extent to which East Timor itself is able to get the royalties, or a share of the royalties, the size of its share, plays into the overall size of the Australian aid programme. So there are a lot of issues tied up together here.

In summary, "[w]hile the Court and arbitration tribunals are required to apply the law, coastal states have a greater latitude when fashioning voluntary agreements"[237]. There is thus a first corollary of the distinction between negotiation and adjudication. The relevance of negotiated agreements, for the purpose of identifying and/or interpreting

(228) Merrills/1998, p.15.

(229) Some authors affirm that agreements cannot infringe upon the rights of thirds states (cf. Charney/1999, p.873; Tanja/1990, p.xvii.) Because the *pacta tertiis* rule protects the rights of third states from obligations created by bilateral agreements, however, this requirement of not infringing on third states' rights seems unnecessary. Claims against third states cannot be underpinned on bilateral boundary treaties. Any curtailment of entitlements continues to require the consent of the third state. For an analysis of the *pacta tertiis* rule, cf. Chinkin/1993, pp.25-144.

(230) Bardonnet/1989, p.3. For instance, as Charney notes, "the use of an Article 121(3) rock in an agreement to delimit the maritime boundary between state is not violative of international law because Article 121(3) is not *jus cogens*" (Charney1999, p.873).

(231) Anderson/2000 (unpublished).

(232) Collier/Lowe/2000, pp.7, 24.

(233) Malanczuk/1997, p.275.

(234) Cf. Collier/Lowe/2000, pp.20-24; Evans/1999, p.158; Marston/1994, pp.155-156; Oxman/1993, p.10-12; Weil/1989a, pp.110-113; Dipla/1984, p.221; Judge Oda, Separate Opinion, *Jan Mayen* case, ICJ/Reports/1993, pp.108-109, paras.67-68. Apparently, distinguishing between EEZ and continental shelf delimitation, cf. Churchill/Lowe/1999, pp.191, 195.

(235) Appendix 2, D6, F2. Pointing out that maritime boundaries may be delimited in treaties that include aspects that are extraneous to delimitation *stricto sensu*, cf. Anderson/1999 (unpublished).

(236) Reuters, 9 October 2000.

(237) Charney/1994, p.228.

customary law, should not be taken for granted – just as it is not taken for granted in other areas. Observing that "agreed delimitations may have been dictated by legally irrelevant considerations", Thirlway concludes that this fact "complicates the quest for customary rules of maritime delimitation enshrined in state practice" and "weakens the force of the act as evidence of an *opinio juris*"[238]. Hence, "courts have been reluctant to find any evidence of generally applicable norms in state practice, and they have been unimpressed by statistical surveys demonstrating the preponderance of any particular method"[239].

With this said, care must be taken not to fall in the trap of viewing agreements as meaningless for the international law-making process. The underlying idea is that "[w]hile it is difficult to imagine adjudication without law, law without adjudication is actually the normal situation in international affairs"[240]. Claims advanced by states are virtually always marked by the expression of an understanding of international law. While not necessarily determined by normative standards, agreements often incorporate a compromise between opposing views on normativity. To this extent, they are likely to encapsulate the common ground between them. A large number of negotiated treaties providing solutions that result from similar (if not identical) approaches should not – and cannot – be dismissed lightly.

Since it was concluded that Articles 74(1) and 83(1) only prescribe an obligation of result[241], how can that obligation be reconciled with the aforementioned contractual freedom of states? Once more, the suggestion that states are under the obligation to seek an equitable result must be seen *cum grano salis*[242]. As Judge Gros observes, agreements often include "concessions which are not motivated by reliance on international law"; states may (and do) negotiate boundaries that suit them "without going into the question of whether the result is equitable"[243]. Treaties validly signed and ratified must be deemed to incorporate equitable solutions[244]. It is hard to "see how any compromise arrangement could be made on a basis which was not equitable"[245], because it would "be very odd if [states would succeed] in agreeing a solution which they did not consider equitable"[246].

(238) Thirlway/1993, p.40.

(239) Willis (1993) p. 65. Cf. also Mendelson/2002; Brownlie/1998b, p.163; Weil/1993, p.123; Charney/1993, p.xlii; Tanja/1990, p.307; Weil/1989a, p.113. In case law, see e.g. *Libya/Malta* case, ICJ/Reports/1985, pp.37-38, paras.43-44.

(240) Merrills/1998, p.292.

(241) Para.3.3.b)(iv) and Conclusions to Part I *supra*.

(242) *Libya/Malta* case, ICJ/Reports/1985, p.39, para.46. Cf. para.3.6.d) *supra*.

(243) *Gulf of Maine* case, Dissenting Opinion, ICJ/Reports/1984, p.370, para.16.

(244) As François stated during the ILC work, "when two parties agreed not to follow the prescribed rules and arrived at a settlement [...] no objection could be raised" (ILC/Yearbook/1953(I), pp.125-126). The idea that states would agree on inequitable solutions could only arise in situations where the validity of the treaty would be questionable. Cf. VCLT, Articles 48 (Error), 49 (Fraud), 50 (Corruption), 51-52 (Coercion; involving the use of illegal force or threat thereof).

(245) Amado, ILC/Yearbook/1951(I), p.293.

(246) Churchill/Lowe/1999, pp.191. Cf. Lucchini/Vœlckel/1996, p.93; Caflisch/1991, p. 484; Thirlway/1990, p.58; Jennings/1989, pp.401-403; Calatayud/1989, p.82; Weil/1989a, p.111; Johnston/1988, p.244; Vukas/1985, p.172; Dipla/1984, p.221.

States are free to agree on any boundary, "even if what they achieve is seen [by others] as an inequitable result". International law on maritime delimitation is "imperative only inasmuch as it regulates a field that is of particular concern for the international society, [and it] is not concerned with inequitable delimitations of maritime boundaries as long as they are the result of free consent from the states involved"[247]. Analyses of bilateral state practice, thus, "must presume that the agreement in question was fair and equitable"[248], for the states involved see them as equitable[249]. Importantly, and precisely because of this presumption[250], *when an objective trend is found in the type of solutions devised in treaties, it ought to be taken as a matter of reference for discerning the normative standards applied to engender equitable solutions*. Naturally, since states are free to weigh non-legal factors, conclusions should not be drawn lightly. Notwithstanding this however, if recourse is had to a certain 'type-solution' by a significant majority of states, it becomes difficult to deny that there is some, *prima facie* normative content in such a 'type-solution'.

6.1.b)(iii) Adjudication: *Realjurisprudenz* or Judicial Reasoning?

Whenever disputing states freely decide to resort to adjudication, unless otherwise agreed, the expected outcome is a decision reasoned on the basis of law. Were it not for this expectation, they probably would not have been ready to accept the binding decision in the first place. The belief that adjudication offers the possibility of settling disputes on the basis of law is central in international affairs; it is precisely this belief that sanctions adjudication as a means for dispute-settlement. Blemishing it in any way is hardly likely to encourage states to resort thereto – for they are perfectly aware of the fact that when resorting to adjudication they 'lose control' over the outcome. What makes it acceptable is that the worse case scenario within the 'probable outcomes' (which are assessed in the light of the law by reference to which the case will be adjudged) appears to be 'bearable'[251].

Notwithstanding this position of principle, the reality is that, as Schachter observes, "strict positivism is a chimerical goal" in adjudication. Experienced judges, he adds, "will seek not optimal solutions, but those that are seen to do least harm to contending principles

(247) Cahier/1989, p.414.
(248) Jagota/1985, p.121.
(249) Lucchini/Vœlckel/1996, p.175.
(250) As this presumption refers to maritime delimitation treaties, the overwhelming majority of which are very recent, the issue of 'unequal treaties' does not emerge. Whether the specific solution incorporated in a treaty is objectively equitable might be debated if political pressure is exercised by one state over the other. Although it might be argued that its equitableness can still be assessed against a wider political picture, it must be recognised that such agreements do not reflect the application of normative standards on maritime delimitation. Thus, no inferences should be made therefrom.
(251) Jennings suggests that it is not the outcome that must be predictable, but the relevant considerations and the reasoning process (Jennings/1981, pp.59-60). On dispute-settlement by adjudication, cf. Lowe/Collier/2000, pp.5-10; Nguyen/Daillier/Pellet/1999, pp.827-830; Merrills/1998, pp.292-296; Shaw/1998, pp.31-38; Brownlie/1998b, pp.110-117; Shaw/1997, pp.739-742, 749-751, 762-764; Jennings/1997, pp.40-41; Bowett/1997, pp.5-12, 18-19; Lucchini/Vœlckel/1996, pp.192-193.

and interests" – which inexorably implies an act of choice regarding the harmonisation of these competing approaches. Although ultimately presenting "their conclusions in a way that obscures the act of choice and stresses the 'objective' character of the decision", they will "look behind the legal abstractions to the underlying interests and attitudes that may be affected by the potential decisions". According to him, "judicial wisdom" might not be "to exhaust fully the processes of judicial reasoning in every case or to express principles in their full generality" – individualisation "will often be the better way for an international court to cope with the inevitable choices it must make"[252]. Describing the reality of the 'backstage of courts', *realjurisprudenz* has nonetheless to be confined to some normative canons[253]. That judges may be seen as *de facto* 'creators of law' needs scarcely be noted. If there is a field of international law in which the judges' choices have played an outstanding part in creating law, it is delimitation law. Vast jurisprudence, starting with the *North Sea* cases has elaborated extensively on the contents thereof (despite some hesitant steps).

One would argue, however, that it is time to reconsider this *de facto* law-making process. The approach endorsed by several eminent authors is touchstone[254]. Judges should bear in mind that their office is *jus dicere* (to interpret the law), and not *jus dare* (to make the law). From here stems the authority of courts. Despite its inadequacies, Article 38(1) of the Statute of the ICJ should remain the reference-point for identifying the formal sources of international law. Concretisation of legal notions *in casu*, which occurs within the sphere of discretion of courts, should not amount to law-making. Further, the distinction between *ratio decidendi* and incidental *obiter dicta* should not be overlooked[255]. This finely-drawn distinction, typical of precedent-systems, was perhaps not contemplated in the Rules of the Court[256]. However, it has to be recognised that in giving their 'fullest decisions' courts do elaborate on incidental issues, and make general pronouncements on the state of the law[257]. Extrapolations therefore require a prior sieving process, to ensure that the legal reasoning of cases is neither misinterpreted, nor overstated. Recourse to 'precedents' as a source of law must be judicious and cautious, if only because the undeniable existence of *realjurisprudenz* entails a risk of perpetuating non-normative solutions.

Where the line between *realjurisprudenz* and normative decision-making is to be drawn is of course not easy to determine. The former should be compressed to the absolute

(252) Schachter/1991, pp.43-46.

(253) In an appraisal of the *East Timor* Judgment, Galvão Teles speaks of *realjurisprudenz*, when suggesting that "[t]imes are of pure *Realpolitik*, and *Realpolitik* brought *Realjurisprudenz*"; cf. Teles/1995, p.31; also Teles/2001 p.625. In an analysis to the same Judgment, Lowe has referred to a "businesslike judgment" (Lowe/1995, p.486).

(254) Shaw/1998, pp.31-38; Jennings/1997, pp.39-44; Jennings/1996, pp.8-12; Jennings/1981, pp.73-76.

(255) As to the acceptance of this distinction, cf. Esser/1961, p.114 (pp.237, 248-249); Radbruch, cited in Engish/1988, pp.364-366.

(256) Rosenne/1961, p.427. It must be noted that analyses of jurisprudence in civil law systems also resort to similar distinctions.

(257) Judge Lachs, cited in Sturgess/Chubb/1988, p.90.

minimum. Opportunities must not be given to the more cynical to observe that in maritime delimitation the line chosen by the court "represents a splitting of the difference between what each party has claimed should be the boundary"[258]. In the *Tunisia/Libya* case, Judge Gros affirmed that the decision was meant to "divide the areas said to be in dispute", and was reached through a compromise "between the claims of the parties and the opinions held within the Court"[259]. From a similar perspective, Judge Oda suggested that the decision was based on a "split of the difference" between the parties' positions approach[260].

The dangers of basing maritime delimitation on the area of overlapping claims have already been mentioned above[261]. Indubitably, such an approach gives states every reason to exaggerate their claims, in order to maximise their 'slice of the cake'. Courts must be careful not to reward such behaviour. States might also want to consider minimising this danger by resorting to 'winner-takes-all' approaches[262]. Courts' powers may be restricted by resort to 'swing arbitration'. Here, the decision becomes a choice between the parties' claims. No intermediate solution can be adopted. In the *Taba* arbitration, for example, the Tribunal was "not authorised to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel"[263].

'Swing arbitration', besides ensuring that maritime delimitation does not become a question of sharing claimed areas, offers some advantages. Owing to the risk of losing to a more reasonable claim, the parties will tend to assess their own claims objectively, rather than simply maximising them. With it, the claims are brought closer, facilitating the resolution of the dispute (perhaps even through negotiation). In addition, because the parties are less likely to be surprised by an 'unreasonable' opposing claim, justice in the argumentation process is furthered.

In summary, maritime delimitation law is adjudication-oriented. It not only provides the *foundations* for, but it also imposes the *limits* to, the discretion of courts. Affirming that courts have an absolute freedom of choice of methods, or that they may weigh whatever facts they deem relevant, would equate adjudication to *ex aequo et bono* decision-making.

(258) Churchill/Lowe/1999, pp.190-191.

(259) Dissenting Opinion, ICJ/Reports/1982, pp.152-153.

(260) Dissenting Opinion, *ibid.*, p.270.

(261) Para.4..3.b) *supra*.

(262) This can be achieved through the special agreement or arbitral *compromis*.

(263) RIAA/20, p.12, Annex to the *Compromis*, para.5. As to the restrictions imposed on the Tribunal by the parties, and in particular its relation with the "preponderance of evidence", cf. pp.45-46, paras.176-177. Insofar as, in judicial settlements, courts are bound to decide according to law (e.g. in the case of the ICJ, by reference to what is stated in Article 38 of its Statute), recourse to this type of clause might not have the desired effect. The Court to whom the issue is referred might conclude that neither claim finds support in the applicable law. Notwithstanding this, in the *Minquiers and Ecrehos* case, for example, the Court was asked to determine whether the sovereignty belonged to the United Kingdom or to the French Republic (ICJ/Reports/1953, p.49). The parties thus explicitly excluded the status of *res nullius* as well as that of *condominium* (ICJ/Reports/1953, p.52). The Court was given only two possibilities: to decide that title was vested in the United Kingdom, or that it was vested in France.

Courts and states are not in parallel positions. In adjudication, the methods to apply and factors to weigh are those required under international law[264]. What the Court literally affirmed in the *North Sea* cases was that "there is no legal limit to the considerations *which states may take account of* for the purpose of making sure that they apply equitable procedures"[265]. As recognised in the *Jan Mayen* case, this was referred to negotiation, and not to adjudication[266]. Regrettably, this assertion was extrapolated too lightly to interpret the powers of courts. No matter how wide the scope of the discretion attributed to judges, it is always conditioned. To utilise the Court's words in the *Libya/Malta* case on the scope of relevant circumstances, in delimitation, "only those [circumstances] that are pertinent to the institution" in question "will qualify for inclusion"[267]. Whatever choices judges make, they must justify them under sound juridical parameters. Notably, it is important to explain why other possible choices were dismissed in favour of the solution adopted. Failure to do so amounts to moving out of the realm of legal decisions into the realm of arbitrary decisions.

6.2. The Dogmatics of Normativity and Maritime Delimitation

6.2.a) Key Aspects

When searching for normativity, examining the essential elements of its theoretical basis is almost inevitable, even if entering into a detailed level of philosophical analysis is to be avoided. Despite whatever refinements one finds appropriate to make, the Kelsenian dichotomy between *Sein* ("is") and *Sollen* ("ought") remains the starkest foundation of the concept of normativity. Facts are entities of the world of *Sein*, whereas normativity exists in the world of *Sollen*. To put it simply, facts are something that "is", which means that they may be the object of empirical recognition based on the observation of natural and social realities. Normativity, in contrast, appears as 'guiding-ideals', or 'reference parameters'[268]. Typically, it amounts to general 'ought' prescriptions – deontic statements that can only be completely unveiled by means of legal reasoning and hermeneutics. Being elements of an on-going debate concerning legal philosophy, these aspects serve to highlight two points: to recall that factual circumstances ought not to be confused with normative prescriptions; and to pave the way for delving into the contents of normative standards.

(264) Para.7.1. *infra*.
(265) ICJ/Reports/1969, p.51, para.93, emphasis added.
(266) ICJ/Reports/1993, p.63, para.57.
(267) ICJ/Reports/1985, p.40, para.48.
(268) In more precise terms, normativity may give rise to different legal positions such as 'duty', 'right', 'power' and 'permission'. Cf. Kelsen/1970, in particular pp.4-23. MacCormick/1999, pp.122-133; VonWright/1998; Guastini/1998; Raz/1980, in particular pp.44-69, 121-167; Ehrenzweig/1977, pp.29-38.

At this juncture it is worthwhile examining the 'equitable principles' enumerated by the Court in the *Libya/Malta* case: (i) non-refashioning of geography; (ii) non-encroachment on the natural prolongation of another state; (iii) due respect to all relevant circumstances; (iv) equity does not necessarily imply equality; (v) rejection of distributive justice[269]. The contrast is striking when comparing these with the 'equitable criteria' named by the Chamber in the *Gulf of Maine* case, namely: (i) the land dominates the sea; (ii) the equal division, in the absence of special circumstances, of the area of overlapping entitlements; (iii) non-encroachment upon the areas of another state; (iv) prevention of any cut-off of projections of the coast; (v) drawing due consequences from any inequalities in the extent of coasts into the delimitation area[270]. First, a different *nomen juris* was used to refer to what are apparently equal entities (criteria in 1984, principles in 1985). Secondly, the fact that two cases decided less than a year apart present only one standard in common must be stressed. Thirdly, even this common standard is expressed differently. Whereas the concept of non-encroachment was viewed in 1984 in terms of proximity to the coast, in 1985 it was related to relevant circumstances. The (somewhat) paradoxical content of the notions of proximity and of relevant circumstances, as stemming from the 1969 Judgment, seems to confer on the two ideas of non-encroachment a striking quasi-contradictory meaning.

The difference between the standards named in each case is not irrelevant. Although expressed formally in 'ought' terms, these 'principles' or 'criteria' seem to have emerged by influence of the factual elements *in concreto*. It is otherwise difficult to determine why different principles would be enumerated. Insofar as their formulation takes into account the facts *in casu*, these so-called principles have a blurred normative domain. Indeed, perhaps they are not truly normative principles, but expressions of normativity *in casu*. The problem is that deontic statements should be expressible independently from factuality. Normativity *qua tale* is neither descriptive, nor dependent on descriptions of facts. It is prescriptive. Typically a normative sentence, "A is allowed to do W", is a proposition not circumscribed by facts. It is not re-definable by reference thereto, or as a function thereof. Thus, whatever the normativity in maritime delimitation, it must surface as 'ought' prescriptions.

6.2.b) Legal Systems: Principles and Rules

Legal systems are often described as bodies of rules that govern the legally relevant relations between the subjects of a community. Accepting this definition depends much on how the concept of *rule* is perceived. To confine the normativity of legal systems – on

(269) ICJ/Reports/1985, pp.39-40, para.46.
(270) ICJ/Reports/1984, pp.312-313, para.157.

which legal discourse is founded – to one type of *normative standard* is too reductive. There are diverse levels of normative density[271]. It is to explain this differentiated nature of normative standards that reference is made to the concept of *principle*. In broad terms, it may be said that "principles operate at a higher level of generality than rules"[272], the latter having therefore a higher normative density. Embodying a specific determinacy, rules provide specific legal consequences for given situations (defined in their *facti species*). Principles bear broader guiding-normative parameters, have no *facti species*, and lie at the structuring base of legal systems. They may be viewed as 'constitutive elements' of legal systems[273]. Applying primarily to situations left uncovered by rules *stricto sensu*, principles appear then as the 'starting point' for reaching case-decisions[274].

A corollary of this distinction is that, unlike rules, which are (or at least tend to be) "applicable in an all-or-nothing fashion", principles "should be construed in the context of [...] other principles"[275]. Since rules always incorporate an 'if-clause' (*facti species*), the 'collision' between two rules necessarily entails the 'invalidity' (inappropriateness for application *in casu*[276]) of one of them. In contrast, 'collisions' between principles never lead to question the 'validity' of any of them[277]. Principles always admit exceptions, do not apply in terms of exclusion of other principles, and might (and are indeed likely to) contradict other principles. Their guiding-normative nature entails an interwoven reciprocal restriction with other principles; their implementation depends on a 'normative consolidation' through denser standards[278]. They "function quite differently from rules"[279]. Unlike the latter, they contain no specific binding-instruction, susceptible of immediate application *in casu*[280]. Due to their broad normative guidance, principles provide legal

(271) Esser/1961, p.120-123. When speaking of normative standards, the term "normative density" may be seen as referring to its degree of refinement, as to the solution conveyed and the means to arrive thereto.

(272) ILA, Final Report of the Committee on the Formation of Customary (General) International Law, p.11.

(273) Canaris/1996, pp.76-88. Referring to principles as 'governing ideas', cf. Shaw/1997, pp.77-78.

(274) Esser/1961, pp.27(fn.59), 88, 120, 236, 252.

(275) Dworkin/1977, p.24. The expression "tend to be" is a 'safeguard' from MacCormick's arguments against Dworkin's metaphor of principles having a dimension of weight. He argues that Dworkin does not explain the recourse to rules in arguments from analogy, and that no clear line can be drawn between arguments from principle and from analogy. Because hard cases are, in his view, decided on the basis of the interaction of arguments from principle and consequentialist arguments, Dworkin's metaphor would be unhelpful and misleading if taken too seriously (MacCormick/1978, pp.152-194, 231-258). Nevertheless, MacCormick accepts that "[a]nalogies only make sense if there are reasons of principle underlying them" (p.186); which perhaps makes the two views reconcilable. Arguments from analogy seem indeed to be more a variant of arguments from principle, than a mode of application of rules. Analogies build on the principles that underlie the rule to be applied.

(276) Günther distinguishes between 'validity' and 'appropriateness for application' (cited in Habermas/1996, pp.217-218). On the distinction between collisions of principles and of rules, cf. Alexi/2000, pp.295-298. He argues that a "conflict between two rules can only be solved by either introducing an exception clause into one of the two rules or declaring at least one of them invalid".

(277) Canaris states that to speak of contradiction of principles does not reflect the fact that an opposition between principles is simultaneously overcome and kept through the compromise that is reached (Canaris/1996, p.206). Arguing that rules like principles apply through a weighing-process, cf. e.g. Peczenik/1999, p179; Utz/1992, pp.39-43.

(278) Canaris/1996, pp.88-99, 204-206.

(279) Kratochwil/1989, p.237.

(280) Esser/1961, pp.65-66. He notes also that, as far as the position of the judge is concerned, the continental notion of "norm" is slightly different than the Anglo-American notion of "rule", and that the difference between principle and rule bears in continental law a much wider reach than in Anglo-American law.

systems with a higher degree of 'openness', allowing their application and conformation to unforeseeable concrete events.

Collisions between principles are frequent and indeed inevitable, and occur because the constitution of a *corpus juris* is based on different fundamental normative ideas[281]. For instance, Resolution 2625(XXV) of the General Assembly of the United Nations approved a Declaration proclaiming a number of "principles of international law relating to friendly relations and cooperation among states". Some of these principles have a clear conflicting nature, which is why paragraph 2 states that "each principle should be construed in the context of the other principles".

Alexy very persuasively argues that principles are to be optimised in *relative terms.* As ideal precepts, he says, they "demand more than what is really possible". If a collision between principles occurs, that collision is to be resolved by mutual conformation, in the light of the circumstances *in concreto.* What principles require is "*to realise something to the highest degree possible relative to the factual and legal possibilities*" *in casu.* To him, a process of weighing and balancing is thus necessary in order to move "from the ideal *prima facie* ought to the real and definite ought"[282]. Having different impacts upon each case, principles are ever-present entities in legal systems, which emerge dressed as "variable legal standards"[283]. In short, they "are normative propositions of such high level of generality that they can as a rule not be applied without the addition of further normative premises and are usually subject to limitation on account of other principles"[284].

Because a principle demands more than is realisable *in concreto,* its scope might overlap with that of other principles. This is what the term 'collision' is meant to convey. Owing to this fact, the normative prescription of a principle in a certain situation cannot be fixed *a priori.* It is variable. Referring to the question of 'colliding normative standards' in German constitutional law, Larenz describes a method for resolving these collisions of principles, which consists of weighing juridical values *in concreto*[285]. This is a substantive juridical canon that defines the methodological thread of judicial implementation of normativity. It leads to the development of the law when there is no explicit rule *stricto sensu.* Along the same lines Alexi argues that the relative optimisation of principles is best attained by the 'maxim of proportionality', operating at three levels: appropriateness,

(281) Engish/1988, p.318.
(282) Alexi/1999, p.39, emphasis added.
(283) Hart/1997, pp.124-136, 263-268. Despite all the discordance between Hart's and Dworkin's approaches, one would argue that they both endorse the idea of spheres of normativity in which the applicable standards are not always specific enough for a strict 'subsumptive model' to be utilised.
(284) Alexy/1989, p.260.
(285) Larenz/1989, pp.490-502.

necessity, and proportionality *stricto sensu.*[286]. *Appropriateness* (i.e. the adequacy of the restriction imposed on each principle) and *necessity* (i.e. the magnitude of the restriction) "stem from the obligation of a realisation as great as possible relative to the actual possibilities". *Proportionality stricto sensu* (i.e. the balance of subjective positions) "stems from the obligation of a realisation as far as possible relative to the legal possibilities, that is, relative most of all to the countervailing principles"[287].

Whilst rules "enclose a definite ought" (i.e. a "definitive command"), principles "enclose an ideal [*prima facie*] ought" (i.e. an "optimisation command")[288]. Applied to predetermined class-cases, rules set down a concrete legal consequence. Principles are legal parameters whose legal consequence lies dependent on the specificities of each case; their application requires further normative elaboration. Nevertheless, both "claim to be deontologically valid; i.e., they have an obligatory character"[289]. Independently of situational assessments, principles offer normative guidance. Conflicting principles, most importantly, can be applied jointly to decide a certain situation. Recourse to a principle does not exclude the simultaneous application of another principle. The normativity *in casu* stems from the relative optimisation of both principles. In contrast, rules tend to be either applicable, or not applicable. If they are applied, there is a specific juridical consequence derived from it, which determines the non-application of rules with contradicting solutions[290]. Noteworthy also is the fact that rules are manifestations of principles, often appearing as the integration of two or more principles.

Irrespective of establishing whether the differentiation between rules and principles is, or is not, a matter of degree[291], such a distinction is important for purposes of intellectual discipline. Its impact on legal reasoning is pivotal. A 'definite ought' leaves little room for elaboration. In contradistinction, an 'ideal ought' is the 'playground' of legal reasoning *par excellence.* Principles interact by relations of precedence, in an intertwined lattice-work specifiable only *in casu.* In some circumstances, one principle has precedence over another.

(286) The reference to "proportionality *stricto sensu*" must not be confused with "proportionality" as means of assessing the equity of a particular delimitation-line through comparison of coastal lengths and area-attribution (cf. para.8.2.e) *infra*).

(287) Alexi/2000, pp.297-298.

(288) Alexi/2000, p.295; Alexi/1999, pp.38-39.

(289) Habermas/1996, p.208. He notes, furthermore, that the "distinction between these types of norms must not be confused with that between norms and policies. Neither rules nor principles have a teleological structure."

(290) Because principles can be applied jointly to the same case, the distinction principles-rules has to be made. In a coherent system, there ought to be no rules (*stricto sensu*) that, applying to the same situation, prescribe contradictory legal consequences. The question of collision between a rule and a principle is more complex. Here, because the rule does not have the 'malleable nature' of principles, the rule is no longer applicable. What might happen is that the solution for the specific conflict be found in the optimisation between the conflicting principle and the principle (or principles) that underlie the rule that was dismissed. We tend here to depart from Hart's view on this matter (Hart/1997, pp.259-263).

(291) In the *Gulf of Maine* case, the Chamber affirmed that the terms "rules" and "principles" amounted to "no more than the use of a dual expression *to convey one and the same idea*". But it also admitted that the term "principles" might be justified when referring to rules of "more general and more fundamental character" (ICJ/Reports/1984, p.288, para.79). Hart sees also the

If circumstances change, such precedence might be reshaped and/or reversed. Notably, the relation of precedence never entails the complete dismissal of either principle.

Two final points must be made. First, it must be acknowledged that there is no such thing as the 'correct' philosophy of law. However, to advance tangible propositions on the conceptualisation of any field of law, it is necessary to pre-define the legal-philosophical foundations of the argument to be made. The considerations above thus have a functional purpose. Secondly, it must equally be acknowledged that all legal systems strike a balance between *justice*, understood as the need to consider the circumstances of concrete cases (often unanticipatable), and *certainty*, as means for transmitting social standards of behaviour to the subjects of law. These are two needs that must necessarily be reconciled. They are the 'supreme principles' of Law[292], and their paradoxical relationship is in effect inherent in the existence of any *corpus juris*.

6.2.c) Normativity in Maritime Delimitation

6.2.c)(i) Brief Appraisal

The premises set, it is now necessary to demonstrate their relevance in the search for the normativity applicable to maritime delimitation. Naturally, Article 38(1) of the Statute of the ICJ becomes crucial; for it remains – despite all criticism – the most authoritative reference-point for identifying normativity in international law[293]. The order by which the sources of law are enumerated therein is the order by which they should be considered in adjudging a case. It is "*un ordre successif «de prise en consideration»*", which takes into account the fact that the existence of conventional and customary rules is easier to establish, and the fact that their content is much denser, thus 'less random' ("*moins aléatoire*")[294]. The resort to general principles of law is therefore subject to the non-existence of conventional and customary rules[295]. More than anything else, the mention of general principles was in effect meant to avoid lacunae of normativity, thereby evading the issue of *non-liquet*[296].

distinction as a matter of degree (Hart/1997, p.262). Colliard considers that principles, rules and norms, being all normative expressions, are synonymous terms (Colliard/1987, p.92).

(292) Besides these two fundamental principles, Engish refers to a third principle: "practical opportunity" (Engish/1988, p.319). Canaris refers to justice, equity and certainty as the highest juridical values (Canaris/1996, p.61).

(293) Danilenko/1993, pp.30-42. Cf. also Nguyen/Daillier/Pellet/1999, pp.111-116; Brownlie/1998a, pp.1-4; Jennings/Watts/1997, pp.23-25; Shaw/1997, pp.54-56; Malanczuk/1997, pp.35-36; Greig/1976, pp.6-7. Looking specifically into the sources of the law of the sea, cf. Churchill/Lowe/1999, pp.5-27; Caminos/Marotta-Rangel/1991, pp.29-42.

(294) Nguyen/Daillier/Pellet/1999, pp. 346-347. Esser argues that Article 38 of the Statute incorporates a ranking order, and not simply an enumeration (Esser/1961, p.46).

(295) An initial reference in Article 38 to a strict hierarchical application of the sources of law was subsequently discarded, although it still seems to apply in some measure as regards subparagraph d) (cf. Rossi/1993, pp.93-99).

(296) Cf. Churchill/Lowe/1999, p.12; Shaw/1998, p.37; Shaw/1997, p.78; Malanczuk/1997, p.50; Jennings/Watts/1997, p.40; Greig/1976, p.31; Esser/1961, p.56.

An analysis on the normativity applicable to maritime delimitation must thus start by a sequential examination of the normative standards set down, first, in conventional law, and secondly, in customary law. For this analysis, an important distinction has to be made between territorial sea delimitation, and the delimitation of the maritime zones beyond it. In territorial sea delimitation, the use of the equidistance-special circumstances rule is prescribed in both conventional law and customary law. The LOSC provision is virtually identical to that of the TS/CZ Convention. During the Third Conference, almost no voices were heard against the use of the equidistance-special circumstances rule[297]. Further, international jurisprudence has not challenged its customary nature. In the *Qatar/Bahrain* case, the ICJ has in fact averred the customary character of Article 15 of the LOSC[298].

The situation is different when it comes to the delimitation of other maritime zones. Here, because the 1982 and 1958 provisions on delimitation differ, the understanding of Article 311(1)(2) of the LOSC is paramount to interpreting the succession of conventional provisions. One would suggest that, as long as compatible with the LOSC, provisions of the 1958 Conventions may apply *inter partes*. With respect to the succession of conventional provisions, there are three situations to consider. First, as to contiguous zone delimitation, it should be observed that the 1958 provision has no corresponding provision in the LOSC. Secondly, as regards continental shelf delimitation, whereas Article 6 of the CS Convention prescribes the use of the equidistance-special circumstances rule, Article 83(1) of the LOSC only refers to achieving an equitable solution[299]. Thirdly, since the EEZ did not exist in 1958, no provision on delimitation preceded Article 74(1) of the LOSC.

The reasons that explain why the equidistance-special circumstances formula was adopted for territorial sea delimitation, but not for the delimitation of the maritime zones beyond it, are three-fold. First, as Hsu pointed out during the preparatory work of the ILC, in territorial waters, the dividing line would be relatively less important than in the case of the continental shelf; for whereas the former were a narrow belt, the latter sometimes had a considerable extent[300]. Ironically, he was not thinking of the problems posed by equidistant boundaries, but of those posed by the prolongation of the territorial sea boundary[301]. When, in 1969, the Court noted that any distortions in the course of strict equidistance-lines caused by coastal features are in the territorial sea very slight, it was transposing this view[302].

(297) Para.3.4. *supra*.
(298) Qatar/Bahrain-Merits, para.176.
(299) As mentioned, between the parties to the CS Convention, Article 6 might be applied, because its content does not contradict the obligation of result of Article 83(1); cf. para.3.3b)(iii)(iv) and Conclusions to Part I *supra*.
(300) ILC/Yearbook/1951(I), p.288.
(301) For an illustration of a similar type of situation – prolongation of the land boundary, see Figure 47.
(302) ICJ/Reports/1969, pp.19, 38, paras.8, 59.

Secondly, inasmuch as the number of cases in which territorial sea delimitation is required between opposite states is smaller than the number of cases of continental shelf and EEZ delimitation, the number of potential disputes is also smaller. Thirdly, one ought to take into account the fact that the territorial sea allows the exercise of sovereign powers by states in the vicinity of the coast. *Inter alia*, this means that 'closer proximity' is a paramount factor (owing to the need to ensure that security is not compromised by rights exercised opposite the coast, in the immediate vicinity thereof[303]).

Jurisprudence, as well as some scholarship, has suggested that under customary law the delimitation of the maritime zones beyond the territorial sea is to be effected by recourse to equitable principles. As shown, however, this proposition does not appear to be founded on any general practice of states[304]. This creates a problem. Approaches of this sort have led to questions concerning the very existence of customary international law. For example, Kelly argues, *inter alia*, that customary law lacks legitimacy as a lawmaking process, for it allows a manipulation of international law that favours some states to the prejudice of others[305]. Without necessarily endorsing the idea that customary law has reached its twilight, it ought to be recognised that this idea has been fuelled by the realisation that, in important instances, the existence of rules of customary law has been established without the requirements of a settled, extensive and uniform practice, conjugated with an *opinio juris*, being properly met[306]. Maritime delimitation concerning continental shelf and EEZ appears to be one of those cases. Taking into account actual practice, one can but consider that the "supposition that the [equitable] principles emerged from practice is a pure fiction"[307]. The rules qualified as customary in various instances were determined without due regard to state practice, which has effectively been left aside. They are doubtless judge-made law[308].

What gives rise to concern is not so much that delimitation law on continental shelf and the EEZ is judge-made law, but the fact that the way in which it was devised appears to have placed in the hands of courts (at least until recently) what amounts to an extremely wide discretionary power. While virtually dismissing state practice, courts have claimed the power to weigh whatever circumstances they deem relevant, and to choose whatever

(303) Para.8.3.b) *infra*.
(304) Conclusions to Part I *supra*.
(305) Kelly/2000.
(306) Danilenko suggests that "[t]he effective operation of custom as a source of international law obviously requires further clarification and systematisation of normative criteria for the formation of customary rules" (Danilenko/1993, pp.128-129).
(307) Jennings/1981, p.68.
(308) In the field of maritime delimitation, Jennings was the first to use the expression "judge-made law" (Jennings/1981, p.68). Other authors have used it more recently; cf. Brownlie/1998, p.28; Quintana/1997, p.373; Schachter/1991, p.58; Bedjaoui/1990, p.387; Weil/1989a, pp.6-8; Weil/1987, p.550.

methods they consider appropriate. Besides not reflecting the views expressed by a large number of states in this respect, this approach is hardly likely to further the rule of law in international affairs. It places scant emphasis on certainty. For the rule of law to prevail, consideration must be given to "certainty as to what the rules are, [and] predictability as to the legal consequences of conduct"[309]. By not "sufficiently defining [equitable principles] or giving them an identifiable objective content", courts have sought "to reach transactional solutions on a case-by-case basis"[310]. The problem is that normativity is left at its lowest[311], because the "basis of transaction lies in opportunity, rather than in equity and in law"[312].

In addition, recent case law has resorted to the equidistance-special circumstances rule, while asserting that it equated to the application of equitable principles. With this approach, doubts were cast on the interpretation of the delimitation rule applicable to the territorial sea, leading some authors to suggest that it also amounted to the application of equitable principles.

A number of questions concerning normativity in maritime delimitation thus need to be answered. What are the contents of the equidistance-special circumstances rule? How precisely does it operate? Since it has been argued that, for the continental shelf and the EEZ, conventional law and customary law only prescribe an obligation of result, what are the normative means whereby the delimitation is to be effected? In other words, taking into account the *renvoi* effected by Articles 74(1) and 83(1) of the LOSC, and the fact that it has been argued that no customary rules on the means of delimitation have emerged, by which substantive operative-standards are equitable solutions to be reached? Insofar as the LOSC contains no rule on contiguous zone delimitation, and insofar as no customary law in exists, how are contiguous zone boundaries to be delimited? From a conceptual standpoint, is it possible to justify the proposition that the equidistance-special circumstances rule equates to applying equitable principles, and/or vice-versa?

The answers to all of these questions, one would argue, stem from two principles of international law: the principle of maritime zoning, and the principle of equity. Besides being the normative standards that apply to delimitation in the absence of conventional and customary rules, they explain the balance that was struck through the equidistance-special circumstances rule, and how the so-called 'equitable principles' should be viewed. This is unsurprising if it is realised that the understanding of legal systems – as well as of fields of law, which are sub-structures thereof – is best furthered when the principles underlying

(309) Watts/2000, p.7.
(310) Abi-Saab/1996, pp.11-12.
(311) Weil/1989a, p.161.
(312) Degan/1987, p.137.

them are properly grasped. These standards bear a level of normativity central to, *inter alia*, the interpretation of rules, the filling of lacunae, and the shaping of indeterminate concepts. More important for maritime delimitation, once these principles are properly understood 'transactional approaches' (typically a-normative) will be no longer required. It is to these two principles that govern maritime delimitation that we must now turn.

6.2.c)(ii) General Principles of Law and Principles of International Law

The difficulties and dangers underlying attempts to resort to general principles of law cannot be underestimated, as is shown by the debates in the Advisory Committee of Jurists[313]. Whether both principles of international and municipal law are comprised by this notion is not irrelevant, especially when the existence of universal international law is being questioned[314]. Article 38(1)(c) indeed does not amount to "a blank cheque to go delving among selected municipal law"[315] in an attempt to identify (spurious) 'universal principles'. 'Recognition' and 'validation' of general principles of law is thus problematic. Notwithstanding this, a case can be made for the existence of principles predicated "*dans la conscience juridique mondiale*"[316]. They are "the principles which are in force between all independent nations"[317], and which have a (quasi-)unanimous acceptance.

Equity is amongst the general principles of law[318]. In maritime delimitation, the first relevant references to *equity*, *fairness* and *justice* date back to the early 1950s, to the work of the ILC[319]. How these references are to be seen might be debated. It will be argued later that what the Court had in mind in the *North Sea* cases[320], when it referred to "general precepts of justice and good faith", was the *principle of equity*. The reference to equitable principles was merely an ill-founded attempt to avoid the debate concerning the existence of a *tertium genus* of normativity in international law, in which the Advisory Committee of Jurists had already been embroiled. As will be submitted, it is the 'principle of equity', rather than 'equitable principles', that has shaped the history of maritime delimitation law, from the early stages of the *travaux préparatoires* of the 1958 Conventions up to the *obligation of result* incorporated in Articles 74(1) and 83(1) of the LOSC.

(313) On the notion of general principles of law, cf. Nguyen/Daillier/Pellet/1999, pp. 344-350; Jennings/Watts/1997, pp.36-40; Shaw/1997, pp.77-86; Malanczuk/1997, pp.48-50; Danilenko/1993, pp.173-189.
(314) Green/1985.
(315) Jennings/1981, pp.71-73.
(316) Verdross, AIDI/1932, p.322.
(317) *Lotus* case, WCR/1932, p.34.
(318) As to why it should be seen as a general principle of law, cf. para.6.4. *infra*.
(319) Para.1.2.b)(i) *supra*. Although the principle of equity bears on all delimitations, the facts that determine its operation differ slightly in territorial sea delimitation and in continental shelf and EEZ delimitation (cf. para.8.1., General Conclusions *infra*).
(320) ICJ/Reports/1969, pp.47-48, para.85.

Distinct from general principles of law are principles of international law (which are not specifically mentioned in Article 38). Here, one ought to reconsider for a moment the philosophical construction of law. A *corpus juris* entails the existence of cohesion between, and coherence amongst, the normative prescriptions that form it. Once again this draws attention to the legal-philosophical distinction between rules and principles. Although both being normative in character, rules and principles relate to each other in the same way as 'particularisation' relates to 'universalisation'. Within the realm of normativity, rules are elements of particularisation of a 'centrifugal nature'. By regulating class-situations through a 'definite ought', these elements move along the periphery of the system. In contrast, principles have a 'centripetal nature'. Because they bear an 'ideal ought', they remain at the centre of the system, providing it with cohesion, coherence, and structuring equilibrium.

Principles of international law are normative standards that surface from analyses of the totality of the rules in force in the international legal system. They are usually deducible from the legal spirit embedded in customary and conventional rules in force. It has already been suggested that they have a customary nature[321]. With the advent of multilateral treaties, it can be suggested with equal force that they may have also a conventional nature, especially if related to a field regulated by a quasi-legislative instrument. What states agree on quasi-universal instruments may often be enough to create new principles of law. This dualism is nevertheless too strict to describe the nature of principles that bear the spirit of customary and conventional rules, either when they have similar contents, or when they are complementary to each other. From this perspective, principles of international law appear in fact to be part of the *tertium genus* of normativity, side-by-side with general principles of law[322] (both being 'variable legal standards' that embody 'ideal oughts').

One would argue that there is a principle of international law – naturally embodying legal contents endorsed by states on a universal (or quasi-universal) basis – that is central to maritime delimitation: the *principle of maritime zoning*. With a content often encapsulated in the maxim "the land dominates the sea", this is the normative standard that explains the delimitation rule incorporated in all 1958 Conventions, which conferred on the legal notion underlying 'equidistance' such a paramount role.

In short, one would argue that international law incorporates a plane of normativity (that of 'principles of law') which, providing a framework for conceptualising maritime delimitation law, explains its developing stages and the contents of the few existing rules. State practice and jurisprudence, it is suggested, have implicitly made use of two principles:

(321) Nguyen/Daillier/Pellet/1999, p.345.

(322) The principles of international law are implicit in Article 38(1)(c) of the Statute of the ICJ; cf. Brownlie/1998a, pp.18-19.

the *principle of equity* and the *principle of maritime zoning*. These are arguably the principles from which the ILC, mandated by states, developed the equidistance-special circumstances rule. Proper intellectual understanding of delimitation leads us to analyse the latter first. This however, does not imply any abstract supremacy thereof over the former.

6.3. The Principle of Maritime Zoning

6.3.a) Maritime Jurisdiction

6.3.a)(i) Basic Concept

Faced with the need to explain how the *principle of maritime zoning* bears on the conceptualisation of maritime delimitation, one must start by introducing the concept that lies at its very heart: maritime jurisdiction. Jurisdiction amounts to "the power of the state to affect people, property and circumstances", consisting of "an exercise of authority [...] by means of legislative action or by executive action or by judicial action"[323]. Accordingly, maritime jurisdiction may be defined "as the exercise, in conformity with international law, of legislative, executive and judicial functions over the sea and over persons and things on or under the sea"[324]. It is important to note however, that maritime jurisdiction "has an uncertain scope and content because legal philosophy has not yet been able to disengage satisfactorily the exhibition of power from abstract sovereignty"[325].

6.3.a)(ii) Ambit of Interest for This Study

That jurisdiction, being a corollary of sovereignty over land territory, is essentially a territory-oriented concept seems indisputable. Besides *territory*, however, jurisdiction may be founded on other 'principles' (also known as 'bases'), notably: the *nationality* principle; the *universal* principle; the *protective* principle; and the *passive personality* principle. Taking account of the distinct powers involved, *legislative* jurisdiction, *judicial* jurisdiction, and *enforcement* jurisdiction must be differentiated. Bearing in mind these categorisations, another point should be added: enforcement jurisdiction is exclusively territorial.

The prominence of the *principle of the freedom of the seas* kept states at bay as to the exercise of maritime jurisdiction of a 'territorial' type. Jurisdiction was exercised mainly on the basis of the flag. Primarily because the main benefits to states (navigation and fishing) were seen as 'sharable', this *status quo* subsisted for a long time. Only in the fairly

(323) Shaw/1997, p.452. Cf. Jennings/Watts/1997, p.456; Malanczuk/1997, p.109; Schachter/1991, pp.253-254; Greig/1976, p.210.
(324) Marston/1989, p.316.
(325) O'Connell/1982, p.734.

recent past, as a result of the process of appropriation of vast oceanic areas by states, did maritime jurisdiction emerge 'dressed territorially'[326]. Indeed, the eagerness in acquiring control over oceanic areas was for a time such that many thought about the possibility of a gold-rush to ocean resources. A balance was eventually struck between the conflicting interests of states (coastal and non-coastal, technologically developed or not), in a division of the oceans in areas under national jurisdiction and areas beyond national jurisdiction. Looking over the LOSC Preamble, the existence of such balance becomes instinctively clear[327]. For the purpose of this study, only the operation of the *territorial* principle in maritime jurisdiction is in question. Only that part of the exercise of authority by coastal states over certain oceanic zones will be investigated. In other words, one will delve into what might be named in a certain sense the 'maritime territory' of coastal states, or to use more common terminology, the zones under national jurisdiction.

6.3.b) Maritime Zoning: the Spatial Allocation of Maritime Jurisdiction

6.3.b)(i) Introductory Remarks

The Roman notion of *dominium maris* is one the oldest forms of claim to authority over sea areas. It is perhaps the first instance in which a political entity sought to establish its control over certain coastal waters, which *in concreto* were primarily for purposes of fisheries (*locatio piscatus*)[328]. With Grotius, apparently, the distinction between *dominium* and *imperium* was related to the distinction between territorial and personal jurisdiction. Noteworthy in this regard is the *exclusive nature* of the former[329]. This concept of *dominium* seems to underlie, and to be the ancestor of, an idea of *maritime zoning*, i.e. the allocation of maritime jurisdiction to coastal states on the basis of the territorial principle.

Intrinsic to Grotius' distinction between *dominium* and *imperium* was an embryonic idea of 'ocean zoning'[330]. Whereas *dominium* (implying necessarily *imperium*) existed in relation to coastal waters only (*mare particulare*), *imperium* considered autonomously was related to the high seas (*mare universale*)[331]. To some degree, the authority of states over the ocean was already in the 17th century dependent upon 'spatial circumscription'. That boundary-making (*lato sensu*) is "the delimitative aspect of the spatial allocation of

(326) The Truman Proclamation and its impact in international affairs, the dramatic technological developments post-World War II, and the attempt by states to control the access to ocean resources exploitation are key factors of the changes undergone.
(327) Cf. Guedes/1998, pp.15-75; Jennings/Watts/1997, pp.720-726; Brown/1994(I), pp.5-21; DeMarffy/1991; Schachter/1991, pp.274-296; Galssner/1990, pp.1-34; McDougal/Burke/1987, pp.1-56; Anand/1983 (chapters 4-6); O'Connell/1982, p.733-746.
(328) Guedes/1998, pp.16-17; Brandão/1971, p.36.
(329) O'Connell/1982, p.16.
(330) Johnston/1988, pp.248-250.
(331) O'Connell/1982, pp.17-18.

authority" is to be understood in this light[332]. Latent in the concepts of *regime* and *zone*, the spatial allocation of authority is indeed the cornerstone of the contemporary law of the sea. Paramount to a proper understanding of maritime zoning is equally the idea that claims of states over sea areas "may be categorised in terms of [1] inclusiveness or exclusiveness of use demanded, [2] the degree of comprehensiveness of authority asserted, and [3] the geographical area in which such use and the authority are demanded"[333]. These are the three 'vectors' whereby maritime zoning must be explained.

Until recently, the *res communis* nature of the oceans led authors to conceptualise the exercise of maritime jurisdiction *vis-à-vis* the principle of the freedom of the oceans. The former appeared as a qualitative (substantive) and quantitative (spatial) limitation to the latter[334]. The tide has turned with the LOSC. Both the "High Seas" and the "Area"[335], the areas of *inclusiveness*, are defined spatially in residual terms. What the LOSC offers is, *inter alia*, the framework within which the allocation of maritime authority is effectuated. Indeed, "[t]he division of the sea into various zones [...] has meant that there are varying scales of competence of coastal states and shipping states over things, persons and events at sea"[336]. Spatial limits are set to *areas of exclusiveness* and to *areas of inclusiveness*, i.e. areas under national jurisdiction, as opposed to areas beyond national jurisdiction. Each geographical area under national jurisdiction has a different degree of authority conferred on the state, which stems from different balances struck between exclusivity and inclusivity. In short, today the international law of the sea incorporates a principle of maritime zoning, whereby maritime jurisdiction is allocated to states on a 'territorial' basis.

6.3.b)(ii) The Paramountcy of Proximity in Maritime Zoning

Bearing the above in mind, the grounds must be determined on which maritime jurisdiction – in its facet of *dominium* bearing an exclusive and territorial nature[337] – has been allocated to states under international law. In question, here, are the criteria on which the maritime entitlements of states are based. More important than simply stating that the LOSC is strong evidence that 'the land dominates the sea' through *proximity* (adjacency) – something easily realisable by its endorsement of the distance criterion – is to show that proximity has been linked to forms of maritime zoning throughout the history of the law of

(332) Johnston/1988, pp.42-44. By framing the issue in this way, maritime zones appear as central to, and a condition for the application of, the law of the sea (Treves/1990, p.61).
(333) McDougal/Burke/1987, p.29 (also pp.56-57).
(334) Bouchez/1964, p.6.
(335) LOSC, Articles 1.1.(1), 86.
(336) O'Connell/1982, p.733.
(337) The term *dominium* is intended to express the territorial character, and the exclusive-effect, of the powers exercised by coastal states over adjacent maritime zones – it conveys no endorsement of it as expression of the juridical nature of any maritime zone.

the sea[338]. Prior to this however, attention must be drawn to the notion of proximity, which is to be seen in relative terms (i.e. closely related to technological development), and which has allowed an increasing ability to effectively control maritime spaces further offshore[339].

One of the first doctrines of maritime zoning, which led certain maritime spaces to be equated to *terra firma*, was the doctrine of *inter fauces terrae*, which developed into the notion of juridical bay. Since centuries ago, states have claimed authority over secluded waters located 'within the jaws of the land'. The proximity of these waters to the shores soon made it possible to exercise 'sovereign authority' over them. This is the highest degree of authority, which corresponds to the highest degree of proximity between land and sea.

Archipelagic waters, to the extent that they consist of waters circumscribed by the perimeter of a group of mid-ocean islands, bear an analogous notion of closeness. The waters in question are 'surrounded' by land territory. However, because the land territory is not 'continuous', and because the degree of closeness is less, the ties between land and sea are weakened. That is why these waters may perhaps be analogised instead to those in the vicinity of 'complex coasts', in the sense endorsed in the 1951 *Fisheries* case. Whatever the perspective, there is little doubt that jurisdiction over archipelagic waters is based also on an idea of proximity.

In respect of jurisdiction over the belt of littoral waters, from the 15th to the 17th centuries scholarship alluded to various criteria. Amongst them were *distance from the coast*, *sailing distance*, *range of vision* (*line-of-sight*, *land-kenning*, *vue*), and *canon-shot*. Each criterion usually reflected a regional practice. By the 18th century, states used different criteria still, largely as a result of the historical development. Eventually, *distance* prevailed, and became the sole criterion for defining the extent of territorial waters. Since this was a more precise criterion, all other criteria converged thereto through various translations into distance. Once more, it is important to highlight that maritime zoning was justified through criteria all of which conveyed a notion of proximity to the land. Claims to specific types of jurisdiction (customs, policing, security, sanitation, neutrality) beyond the territorial sea were put forward by states since the 18th century, subsequently leading to the emergence of the concept of contiguous zone. They also were almost invariably based on distance from the coast (or on criteria that later converged thereto).

The claims to jurisdiction over fisheries beyond the territorial sea, the predecessors of the exclusive fisheries zones of the 20th century, date back to the late 17th and early 18th

(338) This survey is based on the following references: Guedes/1998, pp.17-28; Rocha/1996, pp.23-103; Brown/1992, pp.9-13; Westerman/1987, pp.32-74; O'Connell/1982, pp.124-169, 233-258, 338-370, 439-581, 733-746; Fulton/1976, pp.537-740; Brandão/1971, pp.35-55; Hurst/1924; Hurst/1923.

(339) The notions of nearness and remoteness depend on the (technological) means available to travel the distance in question.

century. The location of fishing-grounds and movements of stocks were certainly central to these claims, as especially was the seabed morphology for trawling (which was, and still is, carried out in areas of flat seabed, usually in depths of under 200 metres)[340]. Still, the most common criteria upon which these claims were based were the canon-shot rule and distance from the coast. Something similar occurred with the EEZ. Underlying the 200-mile limit advanced by the Latin American states[341] is the *up-welling phenomenon* off the west coast of South America (which leads to the appearance of fishing resources), whose effects (although decreasing with distance) extend up to approximately 200 M from the coast.

Continental shelf zoning is the only case in relation to which the role of proximity is not exclusive. The Truman proclamation referred to the continental shelf as "an extension of", and "naturally appurtenant to", the landmass of the state, being "contiguous" thereto. This concept of contiguity is undoubtedly a reference to proximity and it is because of this duality that no outer limit for this type of maritime zone was advanced therein. The allusion to "modern technological progress" amounted, as happened in the CS Convention some years later, to the criterion for establishing such a limit. Continental shelf zoning was thus based on a duality of criteria – proximity and natural appurtenance – the precise content of which however, was conditioned by the available technology.

The consecration of 'distance to the coast', in the LOSC, as the criterion upon which maritime entitlement is founded (therefore defining the geographical area of authority) can hardly be seen as surprising[342]. It amounts to sanctioning proximity as the basis of maritime zoning, and merely reflects the role thereof throughout the history of the law of the sea. Recourse to geo-scientific criteria for establishing continental shelf jurisdiction is not sufficient to diminish the relevance of proximity[343]. No doubt, when speaking of maritime zoning beyond 200 M, attention must focus mainly on geomorphological and geological aspects. But these geo-scientific criteria bear a notion of 'geological proximity' (*lato sensu*).

(340) Fulton, examining the relationship between the geographical limits of the 200-metre bathymetric and the three-mile limit, argues for the inadequacy of the latter as regards fishing jurisdiction (Fulton/1976, pp.737-740).

(341) These claims (diverse and complex in nature) were a reaction to claims to continental shelf rights, and were advanced by states that have very narrow geological continental shelves. They were based on distance for a combination of two reasons. The motivating factor was to guarantee the exclusive access to fishing resources; and because the column of water where these resources exist is featureless, the limits for this zone could only be established by recourse to distance. Furthermore, this criterion created certainty, and was independent of local considerations, which made it exportable to other cases, thus facilitating the emergence of an extended practice. The reference to sovereignty was perhaps owed to the fact that international law had, until then, placed serious restrictions upon the exercise of jurisdictional powers related to fisheries beyond territorial waters. Dressing such claims as extended claims to sovereignty reinforced their relevance.

(342) LOSC, Articles 3, 33(2), 57, 76(1). All provisions defining the spatial limits of maritime zones resort to distance. In the case of the continental shelf, such reference is coupled to a geo-scientific criterion (based on geology and geomorphology).

(343) The conceptual consequences of the consecration of the distance criterion as basis for continental shelf entitlement do not seem to have all been accounted for by the Third Conference. The proposition that the 200-mile continental shelf entitlement might continue to be an *ab initio* and *ipso facto* right is perplexing. Yet that seems to be the conceptual perspective consecrated in Article 77(3).

One would argue that such a notion is not antonym to 'geographic proximity' (distance). Rather, it expresses closeness in a different manner.

Why proximity has been preponderant as the basis of maritime zoning is explicable in light of power-politics, power being understood (in the words of Byers) as the ability "to control or significantly influence how actors – in this case states – behave". States "in *geographic proximity* to the area in which [some] rule is to be applied will usually be in a more powerful position than states which are more distant", for "the ability to project power derived from some sources, especially military capabilities, is at least partly dependent on *geographic proximity*"[344]. The relevance of enforcement of a claim for establishing such a claim, by the exercise of power if need be, scarcely needs underlining. The emergence of the canon-shot rule as a foundation of territorial sea zoning is the *paradigmatic and literal illustration* of how geographic proximity and power have interwoven.

As one delves into the scope of authority bestowed upon states in international law, further weight is lent to the argument that proximity is the paramount notion in attribution of maritime jurisdiction. Proximity means power. That is why along a scale of 'distance from the coast' maritime jurisdiction appears as a diminuendo. Moving further offshore, the degree of comprehensiveness of the authority of states dwindles as a result of the different balances that are struck between *exclusiveness* and *inclusiveness*. While the relevance of the former decreases, that of the latter increases. It is this changing-balance between exclusive interests and inclusive interests that lies at the root of the precedence of entitlements in maritime delimitation[345].

The use of distance as an expression of the notion of proximity is intimately related to a chief aim of legal systems: certainty[346]. It reflects "a widespread desire for uniformity and certainty", which having "the virtue of simplicity [...] is widely, if not universally, expected to result in stability"[347]. This need for certainty is also expressed in the criterion of 'geological proximity'. This explains the degree of technical-scientific detail with which the limit of continental shelf jurisdiction beyond 200 M was conventionally set down, and reinforced by the technical-scientific refinement brought on by the *Guidelines* of the CLCS.

The principle of maritime zoning is, therefore, the fundamental normative criterion that allows states to claim, and appropriate, maritime zones of various kinds. From it stems the maritime entitlement of coastal states, generated on the basis of proximity between land and sea. Its existence is noticeable in treaty law and state practice, and has been explicitly

(344) Byers/1999, pp.5, 60, emphasis added.
(345) Para.4.3.d)(iii)(iv) *supra*, in particular Graphic 1.
(346) Para.6.2.b) *supra*.
(347) Johnston/1988, p.239.

endorsed by jurisprudence. Essentially, this principle expresses the 'territorialisation' of maritime zones[348], a phenomenon that resulted from the need to enforce exclusiveness.

6.3.c) Maritime Zoning *versus* Maritime Delimitation

6.3.c)(i) Maritime Entitlement and Overlapping of Entitlements

Examining the relationship between maritime zoning and maritime delimitation, one would argue that it must be understood in light of the notions of maritime entitlement and of overlapping of entitlements, respectively. International law confers upon states the right to claim and exercise jurisdiction over a certain maritime area, the limits of which are defined (primarily) through distance to the coast. Unlike title, which revolves around a right to possess a certain land or maritime area, the notion of *maritime entitlement* consists of a *prima facie* right to exercise jurisdiction over a sea area, and does not presuppose absolute exclusiveness. A maritime entitlement is concretised as exclusive jurisdiction in one of two situations: (i) where there are no competing entitlements; (ii) in the presence of competing, overlapping entitlements, once the concurrence of rights is resolved through delimitation. The adjectival term 'potential' that has been used to express the *sub conditione* character of 'maritime entitlements' is to be understood in this light[349].

Whereas maritime zoning concerns the relationship of *exclusiveness–inclusiveness*, maritime delimitation is concerned with two opposing positions of *exclusiveness*, i.e. an *overlapping of two potential positions of exclusiveness*. In the former, exclusive interests of one state conflict with inclusive interests of the community of states. The latter, involving at least two states, represents the clash between sets of exclusive interests. For this clash to be legally relevant, each competing position has to conform to the standards established under international law, bringing into play the notion of overlapping of entitlements. Maritime delimitation amounts to the allocation of authority in the area of overlapping *prima facie* jurisdictions – which is effected by the resolution of the existing concurrence of rights. Entailing the 'amputation' of the maritime entitlements of both claimants, it determines how the area of overlap is to be divided for purposes of exercise of authority (or less likely, to which state authority over the whole area of overlap is allocated).

6.3.c)(ii) Overview of Case Law: The Pre-LOSC Period

The expression 'the land dominates the sea' encapsulates the substantive core of the principle of maritime zoning. For all practical purposes, the two concepts should be viewed

(348) Arguably, this phenomenon of 'territorialisation' has also extended to maritime boundaries; cf. para.8.4.c)(i) *infra*.
(349) On the notions of maritime entitlement and overlapping of entitlements, cf. para.4.3. *supra*.

as synonymous. Two fundamental reasons justify the preferential use of the latter *nomen juris*. First, it avoids potential confusions related to meanings previously attributed to the former notion in jurisprudence and scholarship. Secondly, 'principle of maritime zoning' is a terminology that conveys more accurately the contents of the 'ideal ought' described here, thus making its comprehension easier. Irrespective of terminological quarrels, a survey of selected case law is necessary to shed light on the contents of the principle of maritime zoning, as well as on the distinction between maritime zoning and maritime delimitation.

Although not using a specific denomination, in the *Grisbadarna* arbitration the Tribunal stated that the principle "in accordance with which the maritime territory is an essential appurtenance of land territory" was a fundamental principle "of the law of the nations, both ancient and modern"[350]. Worthy of emphasis is the idea that entitlement over sea areas is derived from sovereign title over land territory. This seems an ever-present notion in international law, consolidated historically. The same idea was confirmed in the 1951 *Fisheries* case. Alluding to a "close dependence of the territorial sea upon the land domain", the Court re-stated that "[i]t is the land which confers upon the coastal state a right to the waters off its coasts". A more relevant contribution was the reference to different degrees of 'closeness' between sea areas and land territory, "the more or less close relationship" between them, which justified a different treatment under the law. This idea lies at the root of the differentiated regimes of maritime zones[351].

In the *North Sea* cases, the Court reaffirmed that a coastal state is entitled to continental shelf areas "by virtue of its sovereignty over the land". Its most important contribution was to clarify that the principle that the land dominates the sea refers to all maritime zones under coastal states' jurisdiction. With this said, it must be observed that other aspects of the Court's approach are debatable, as is for instance the lack of distinction between criteria of entitlement and standards of delimitation. The failure to identify this crucial distinction became obvious when dealing with the "test of appurtenance". *Proximity* and *closer proximity* were treated as equivalent, and *natural prolongation* used as a standard of delimitation. The drawbacks of these cases result from this misconception. Whereas *natural prolongation* and *proximity* are related to maritime entitlement, *closer proximity* belongs to the realm of delimitation. Had this distinction been made, the idea that proximity also lay at the root of the continental shelf entitlement would have been easily accepted[352].

(350) AJIL/1910/4, p.231.
(351) ICJ/Reports/1951, p.133.
(352) ICJ/Reports/1969, pp.23, 30-32, 52, paras.19, 39-43, 96.

The conceptual core of the principle of maritime zoning is once again restated in the *Aegean Sea* case, which emphasised that "legally a coastal state's rights over the continental shelf are both appurtenant to and directly derived from the state's territory abutting on that continental shelf". Although it dealt with entitlement and delimitation as being two parts of one single issue, when mentioning disputes "regarding entitlement to and delimitation of areas of the continental shelf" the Court acknowledged for the first time the existence of a conceptual distinction between the two notions[353].

In line with previous case law, the *Beagle Channel* arbitration re-avers the idea that "an attribution of territory must *ipso facto* carry with it the waters appurtenant to the territory attributed". Noteworthy about this decision is the fact that the Tribunal labelled this principle "an overriding *general principle of law*". This approach to the principle of maritime zoning lends further weight to its role in maritime delimitation. Inasmuch as the dividing-line in the channel waters was designed to also effect a "division of the small islands lying in it", such a line seems to be a maritime boundary as much as a line of allocation. That explains perhaps the subsequent reference that was made to "mixed factors of appurtenance"[354].

6.3.c)(iii) Overview of Case Law: The Post-LOSC Period

By taking into account the draft-LOSC, the *Tunisia/Libya* Judgment bears the first indications of the 'new winds' brought by the Third Conference. The Court then referred to the "*geographical correlation between the coast and submerged areas off the coast*". Most importantly, it clarified that "in connection with the concept of natural prolongation, the coast [...] is the decisive factor for title to submarine areas". The developments of the LOSC apparently compelled the Court to shift the emphasis towards *the coast of the state.* Another conceptual contribution of this case was that it confirmed the distinction between the *legal status of submerged areas* and the *delimitation of those areas*[355].

In the *Gulf of Maine* case, the influence of the LOSC criteria in the attribution of maritime jurisdiction became even clearer. The Chamber acknowledged that geographic proximity can in most cases "be credited with the ability to express, *perhaps better than that of natural prolongation*, the link between a state's sovereignty and its sovereign rights to adjacent submerged land". In addition, it stated that it also "express[ed] correctly the link between the state's territorial sovereignty and its sovereign rights over water covering such

(353) ICJ/Reports/1978, p.37, para.86.
(354) ILR/52/1979, pp.184-185, paras.107-110.
(355) ICJ/Reports/1982, p.61, paras.73-74, emphasis added.

submerged land". The relationship between proximity and maritime zoning had inexorably surfaced. Less well-conceptualised appear to be other ideas. It is a misconception on several grounds to see the principle that 'the land dominates the sea' as one of various equitable criteria to apply in delimitation[356]. The principle of maritime zoning is neither a mere criterion, nor one of various 'legal entities'. Nor is it equitable in the sense of being a token of justice. Quite on the contrary, it embodies a rationale of certainty.

Often underrated, the *Libya/Malta* Judgment is undoubtedly a landmark case, as far as conceptualisation is concerned. First, the distinct, although complementary, relationship between entitlement to maritime zones and maritime delimitation was properly presented. Thus, the misconception that tainted the 1969 Judgment (i.e. the confusion between criteria of entitlement and standards of delimitation) was once and for all resolved in this case. Secondly, admitting that distance from the coast was common to both EEZ and continental shelf entitlements, the Court acknowledged that this element had to be attributed "greater importance". Thus the paramountcy of proximity in allocation of maritime zones was fully endorsed. Thirdly, it was recognised that the concepts of natural prolongation and distance are "not opposed but complementary", and that the latter had not superseded the former[357].

In this light, the *Canada/France* arbitration is perhaps questionable. The explanation that was given as to why the coast of the French islands projected onto the sea in only one direction is unconvincing. Apparently implying that certain maritime entitlements might be limited in direction when facing competing entitlements, this decision seems difficult to justify legally. Conceptually much stronger are the *Jan Mayen* case, the *Eritrea/Yemen* arbitration and the *Qatar/Bahrain* case. Interpreting adequately the principle of maritime zoning, they all approach delimitation on the basis of the notion of overlap of entitlements (defined through distance from the coast). In the *Qatar/Bahrain* case, while restating that maritime rights stem from coastal states' sovereignty over the land (*the land dominates the sea*), the ICJ noted that, for establishing maritime jurisdiction, all points on the low-water line of continental or insular land features under the sovereignty of a state should be taken into consideration[358]. This is the ultimate stage of the paramountcy of distance. It should be stressed, however, that because of the distinction between maritime zoning and maritime

(356) ICJ/Reports/1984, pp.296, 312-313, paras.102,157.

(357) ICJ/Reports/1985, pp.29-34, paras.27-34. The use of the term "complementary" was criticised by Judge Oda, who affirmed that the two criteria are in effect "alternative" (Dissenting Opinion, ICJ/Reports/1985, p.157). Undoubtedly, the two definitions given in Article 76 are alternative. Nevertheless, to the extent that they complement each other in the definition of the legal continental shelf, one would argue that they should be seen as "complementary". Lucchini and Vœlckel, while referring to the *North Sea* and *Libya/Malta* Judgments, speak of a spectacular evolution of the conceptual understanding of the entitlement to continental shelf areas (Lucchini/Vœlckel/1996, p.204).

(358) Qatar/Bahrain-Merits, paras.180-185.

delimitation, the fact that all basepoints are relevant for defining the extension of maritime zones does not entail that all basepoints are to be considered in maritime delimitation.

6.3.d) Equidistance ('Closer Proximity') as a Legal Concept

6.3.d)(i) Recent Trend in Case Law

Before addressing the issues underlying the legal notion of equidistance ('closer proximity'), a clarification is necessary. The equidistance method belongs to the world of technicalities, and was examined above[359]. The scrutiny of equidistance below has nothing to do with how this line is defined geographically, but rather with the political-legal division of areas of exclusiveness on the basis of the 'closer proximity' criterion. As such it belongs to the world of politics and international law.

That equidistance (usually portrayed as a mere method), or 'closer proximity', is not part of customary law is perhaps the most repeated statement in jurisprudence on maritime delimitation – at least until 1992[360]. The *Jan Mayen* case appears to have brought a shift of approach in adjudication of maritime boundaries, and to mark the beginning of a new era. Equidistance was definitively consolidated as the provisional delimitation line. The Court stated that "it is in accord with precedents to begin with the median line as a provisional line" for the delimitation[361]. This provisional recourse to equidistance was re-affirmed in the *Eritrea/Yemen* arbitration (which nonetheless also considered the fact that both disputants explicitly endorsed it)[362]. In the *Qatar/Bahrain* case, the Court sanctioned the *Jan Mayen* Judgment; and re-averred the proposition that an equidistance-line was appropriate as the starting point for delimitation (despite also stating that it did not "have the benefit of a presumption in its favour")[363]. Attention should thus be devoted to one chief thought. To no avail did courts attempt to sideline equidistance from the delimitation process in their earlier decisions. Eventually, although without explicitly recognising its obligatory nature, they were compelled (by the very nature of things as will be shown) to have recourse thereto as the starting point of delimitation.

The similar recourse to equidistance in the delimitation of the territorial sea and of the jurisdictional zones beyond it, in the *Eritrea/Yemen* arbitration and the *Qatar/Bahrain* case, must be highlighted. This demonstrates how correct Weil was when forecasting that

(359) Para.5.2. *supra*. Also making a distinction between the method and the normative standard, cf. Jennings/1989, pp.398-399.

(360) *North Sea* cases, ICJ/Reports/1969, pp.30-38, 54, paras.39-59, 101(A); *Anglo/French* arbitration, RIAA/18, pp.45, 50-51, paras.70, 82-85; *Tunisia/Libya* case, ICJ/Reports/1982, pp.79-80, paras.110-111; *Gulf of Maine* case, ICJ/Reports/1984, pp.296-298, 315, paras.102-107, 162; Guinea/Guinea-Bissau arbitration, ILM/25/1986, p.294, para.102; *Libya/Malta* case, ICJ/Reports/1985, pp.37-38, 55-56, paras.43-44, 77; *Canada/France* arbitration, ILM/31/1992, p.1163, para.38.

(361) Jan Mayen case, ICJ/Reports/1993, pp.61-62, paras.51-53.

(362) Eritrea/Yemen-II, paras.131-132.

(363) Qatar/Bahrain-Merits, paras.227-233.

the lost unity of delimitation law seemed "to be reconstituting itself around the rules of customary law developed by the Court rather than on the rule of equidistance/special circumstances, so much so that it would appear to be the legal regime for the delimitation of the territorial sea which is losing its particularity and becoming merged in the legal regime appertaining to the delimitation of the continental shelf and the EEZ"[364]. As if to confirm this idea, when delimiting the territorial sea boundary between Qatar and Bahrain, the Court cited the *Jan Mayen* Judgment (which was concerned with continental shelf and fisheries zone delimitation) to explain how the provisional equidistance-line was to be adjusted to obtain an equitable result[365].

On the effect of the distinction between adjacency and oppositeness, and its impact on the recourse to equidistance, from the outset must be remembered the words of the Committee of Experts that advised the ILC. They noted that situations could be anticipated in which departing from equidistance would be necessary in order to accommodate other interests[366]. Most importantly, this caveat encompassed (although expressed in different terms) both cases of adjacency and of oppositeness. No reference whatever was made as regards the likelihood of their occurrence in either case. Case law appears to have evolved greatly also with respect to this issue. The *North Sea* Judgment placed great emphasis upon this distinction[367], which was kept in various subsequent decisions. However, if it is taken into account that the views of the Committee of Experts related to *strict equidistance*, it becomes easy to realise that the emphasis placed on this distinction was not only artificial, but also technically and legally unjustified[368].

In terms of potential inequitable outcomes, the difference between oppositeness and adjacency is less relevant than has often been stated in jurisprudence. The examples of the *Libya/Malta* and the *Jan Mayen* cases, and the *Eritrea/Yemen* arbitration, all illustrate how recourse to strict equidistance might result in inequitable boundaries in situations of oppositeness[369]. These instances, in which adjustments were made to strict equidistance, are enough to demonstrate how recourse to strict equidistance in delimitations between opposite coasts is as likely to yield an inequitable boundary as in delimitations between adjacent coasts. The 'discovery' of equitable boundaries may indeed be approached similarly in both oppositeness and adjacency. Such a demonstration, which had already been made in the *Anglo/French* and *Dubai/Sharjah* arbitrations, came again with the *Qatar/Bahrain* case.

(364) Weil/1989a, p.141.
(365) Qatar/Bahrain-Merits, para.217. Reaching a similar conclusion, cf. Anderson/2001, p.8.
(366) Para.5.2.a)(i) *supra*.
(367) ICJ/Reports/1969, pp.18-19, 36-38, paras.6-8, 54-59.
(368) Antunes/2001, pp.333-337.
(369) ICJ/Reports/1985, p.46-53, 57, paras.60-73, 79; ICJ/Reports/1993, pp.59-77, paras.49-86; Eritrea/Yemen-II, paras.131-168.

The delimitation in the northern sector, between coasts that are adjacent, was effected on the same basis as the delimitation in the southern sector (between opposite coasts), just as in the cases aforementioned. Equidistance was used as the starting line, followed by the adjustments necessary to enable an equitable boundary[370].

The insistence that equidistance is non-obligatory is striking. Should this be as clear-cut as courts have affirmed, it would hardly need to be repeated. Behind these statements indubitably lies the awareness of the disharmony between the bulk of state practice and jurisprudence. The downgrading of equidistance to a mere method was no more than a stratagem to avoid facing directly the legal content embedded in equidistance. The persistent reference to equitable principles as part of customary law (without ever showing the relevant state practice) appears to have been but a way of conferring on courts a margin of discretion that was never intended by states (as shown since the preparatory work of the 1958 Conventions). Notwithstanding this, what matters is to identify the reasons that 'forced' courts to eventually follow an approach to maritime delimitation in line with that adopted by states in negotiation.

6.3.d)(ii) A Corollary Emanating from the Principle of Maritime Zoning

Hitherto, courts have lacked the ingenuity to depart from what is an untenable position as to delimitation law: affirming that equidistance (as means of allocating maritime zones on the basis of 'closer proximity') has no legal content, being simply a method which benefits of no preference amongst others. Insofar as this would amount to admitting that they were in error, such position is scarcely surprising. On this matter, however, Weil is right when saying that rejecting the intrinsic juridical relevance of equidistance amounts to a hangover from the past, which will pass sooner rather than later[371]. The failure to recognise that equidistance is a 'natural law', inherent in maritime delimitation by virtue of the principle of maritime zoning, serves no purpose. Indeed, it has a negative bearing on the refinement of delimitation law. Fortunately, taking account of recent case law, it appears that such a leap might not be too far away.

Given the fact that this proposition challenges case law, as well as most scholarship, the burden of proving it is certainly accepted. The first reason for contending that recourse to equidistance in maritime delimitation is immanent to maritime zoning concerns legal logics, and systematic coherence. Conceptually, three important relationships (bearing the exact same analogy) lie at the nucleus of this argument. Maritime zoning relates to maritime

(370) Qatar/Bahrain-Merits, paras.169-170, 176-223, 230-249. For an illustration of the Qatar/Bahrain case, see Figure 13.
(371) Weil/1989a, p.81.

delimitation in the same way in which entitlement and distance relate to the overlapping of entitlements and equidistance, respectively (Table 1).

TABLE 1
Maritime Zoning and Maritime Delimitation: Analogical Relationships

MARITIME ZONING	⟺	MARITIME DELIMITATION
ENTITLEMENT	⟺	OVERLAPPING OF ENTITLEMENTS
DISTANCE (PROXIMITY)	⟺	EQUIDISTANCE (CLOSER PROXIMITY)

The Court has acknowledged in the *Libya/Malta* case that the legal entitlement of states to maritime areas off their coasts "cannot be other than pertinent" to the delimitation of these areas[372]. This reflects the first of the aforementioned relationships. Subsequently, in the *Jan Mayen* and the *Qatar/Bahrain* cases, and in the *Eritrea/Yemen* arbitration, the notion of overlapping of entitlements was used as the fulcrum of the delimitation. Of crucial importance is the example set by the *Jan Mayen* case in relation to the determination of the relevant length of coastlines for purposes of proportionality assessments, which referenced it to the basepoints relevant for the computation of the equidistance (which are potentially the same for defining the limits of the maritime entitlement)[373]. The validity of the second correlation was therefore asserted.

Currently, the step missing in a comprehensive conceptualisation of maritime delimitation is to aver, *de jure*, the mandatory resort to equidistance in the delimitation process (which is the recent *de facto* approach of courts). This is virtually inexorable. *Maritime zoning* exists only insofar as states possess a coastal front, which is the basis of *maritime entitlement.* A certain point at sea falls under state jurisdiction because of the 'control' exercised over it by a point on the coast – the nearest point on the coast. Where a 'sea-point' falls simultaneously within the 'control' of the points situated on coasts of different states, that 'sea-point' is part of an area of overlapping entitlements. Since maritime entitlement is based on distance, then, in principle, 'coastal-points' situated nearer to the 'sea-point' in question exercise a 'stronger control'. The exclusiveness imposed by the nearest point is, *prima facie*, stronger than the exclusiveness that results from other

(372) ICJ/Reports/1985, p.30, 34, paras.27, 34.
(373) ICJ/Reports/1993, pp.47-48, 65, paras.20-21, 61. The same basepoints were utilised as reference to define the limits of the relevant area.

points. Whether the nearest point is sufficiently nearer to exclude completely the control of other points, or whether the strength of the control exercised by the nearer 'coastal-points' of state A are to be weighed-up differently than that of the nearer 'coastal-points' of state B, are different questions, the answer to which does not alter the 'ideal ought' of the principle.

The second ground for the contention that equidistance emanates from maritime zoning relates to the issue of precedence between different entitlements. That proximity means power is axiomatic. It explains why state authority decreases the further one moves offshore. This decrease of intensity of state power amounts also to a weakening of the maritime entitlement. Stemming from this, the idea of precedence of entitlements is cardinal to unravelling the role of 'closer proximity' in maritime delimitation. When an EEZ or continental shelf entitlement faces an entitlement to territorial sea, the latter prevails. This is merely a particular translation of a wider rationale. The idea that, in general, when any two competing entitlements collide, 'closer proximity' provides an 'instinctive' assessment as to the relative strength of those competing entitlements as regards each point at sea is far too compelling to be ignored. 'Closer proximity' appears – naturally – as the criterion to determine the relative prevalence between competing entitlements.

The third argument in support of equidistance would be decisive on its own. Equidistance is the only criterion that reflects the basis on which the maritime entitlement is generated (distance); it provides uniformity and certainty in the determination of the course of the boundary to the same degree as distance does in relation to maritime entitlement; and it tends to allocate maritime areas in a just fashion.

Of these propositions, only the last has been questioned. Jurisprudence and some scholarship have argued that, because in certain cases equidistance yields inequitable boundaries, and because the aim of any delimitation is to seek an equitable solution, the application of equidistance is rendered non-mandatory. This argument must be refuted. To begin with, one is unaware of any principle of law capable of yielding a just outcome in every case. Paradoxically, even equity might become inequitable. If applied as the single, exclusive criterion of dispute resolution in every case, equity would create such a level of uncertainty in social relations that it would result in injustice on many occasions. Added to this, a crucial point has been missed by those who argue against equidistance. Their case is centred on the results yielded by equidistance in specific geographical contexts. Analyses *in concreto* however, are conditioned by different perceptions of the case. If an objectifying stance is adopted, by looking at equidistance from a theoretical perspective, the conclusions are rather different[374]. As a final argument, one ought to return to the ideas of certainty and

(374) Para.6.3.d)(iv) *infra*.

uniformity that lie behind the adoption of distance as an entitlement criterion. Equidistance also stems from the principle of maritime zoning because it provides the same certainty and uniformity. In effect, were it not for equidistance, one would be left with no objective starting point; so much so that Jennings argues that in the *North Sea* cases equidistance was the reference-line underlying the Court's idea of "a disputed marginal or fringe area". As he notes, any idea of "marginal" or "fringe" must be related to a potential boundary, which could only be the equidistance-line[375]. All other lines lack reasonableness and certainty. More than the logical starting point in delimitation, equidistance is the only reasonable starting point, the 'natural line' for first approaching delimitations[376].

6.3.d)(iii) Equidistance as the Reference Point for the Third State Issue

That equidistance is the only logical and reasonable starting point for delimitation is reinforced by the fact that, when more than two states are involved, it is the only valid reference-notion on the basis of which to address the issue. One example of case law that confers significant weight on this proposition is the *Cameroon/Nigeria* case. The Court used equidistance to justify why questions brought before it did not concern third states. It stated that the rights and interests thereof were not at issue in the dispute over the maritime boundary from point G landwards because the geographical location of point G was "*clearly closer to the Nigerian/Cameroonian mainland than is the location of the tripoint Cameroon-Nigeria-Equatorial Guinea to the mainland*"[377]. The "tripoint" in question, upon which the reasoning was founded, is an *equidistant trijunction point*[378].

A similar approach was followed in the *Eritrea/Yemen* arbitration. The first point of the boundary, albeit north of the limit mentioned in Saudi Arabia's letter to the Tribunal, is positioned some 20 M southeast of the estimated equidistant trijunction point[379]. The assertion that this location was positioned "well short" of areas that could be claimed by a third state was proven right by the subsequent Saudi Arabia/Yemen agreement[380]. The seaward-most point of the maritime boundary is located roughly 30 M northeast of the equidistant trijunction point, or some 36 M north-northeast of the endpoint of the boundary awarded. The southern endpoint of the boundary was dealt with in a similar manner, the difference being that Djibouti did not make its views known to the Tribunal.

(375) Jennings/1989, pp.403-405. Cf. para.2.3.d) *supra*.

(376) Areas closer to the equidistance-line are more easily transferable to the state on the other side of the line, than other areas.

(377) Preliminary Objections, ICJ/Reports/1998, pp.323-324, para.115. See Figure 14.

(378) Antunes/2001, pp.336-337; Antunes/2000c, p.189. On the third state issue, cf. paras.8.2.f), 9.3.b) *infra*.

(379) This equidistant trijunction point was computed by giving full-effect to the Jabal al-Tayr island. The boundary endpoint is some 16 M south of the intersection between a Saudi Arabia/Yemen strict equidistance-line, and the northerly prolongation of the boundary-line, i.e. of the equidistance-line between the Eritrean and the Yemeni mainland coasts.

(380) Appendix 2, F51. See Figure 41.

Since it is possible to find in state practice a relevant number of cases confirming the recourse to equidistant trijunction points for the purpose of delimiting boundaries while preserving the rights and interests of third states[381], the approach adopted in these two cases acquires greater significance. *Prima facie*, as long as the boundary adjudged stops clearly short of the equidistant trijunction point with a third state, there can be no question of infringing upon its rights and interests. No doubt, when boundaries between the parties and third states are already defined, it is possible for courts to set the terminal points of the line much closer to areas which fall under the third state's jurisdiction. In the *Qatar/Bahrain* case, the northern terminus lies less than 1 M southwards of the loxodrome referred to in Iran/Bahrain and Iran/Qatar agreements[382]; and the southern terminus lies some 2.5 M from the end-point the boundary agreed between Saudi Arabia and Bahrain (less than 1 M from the prolongation thereof further southeastwards)[383].

Taking this same argument one step further, Equatorial Guinea's Application for permission to intervene suggested to the Court that the boundary should not be extended "across the median line". This contention should be examined in light of the fact that the Cameroonian claim-line extended well beyond equidistance[384]. Should such a boundary be adjudged, Equatorial Guinea argued, its rights and interests would be *de facto* prejudiced (for concessionaires would most probably ignore its "protests and proceed to explore and exploit resources to [its] legal and economic detriment"). In its view, its ability to negotiate its boundaries with Cameroon and Nigeria on the basis of equidistance would also be impaired[385]. As yet, unfortunately, it is not possible to have the benefit of the Court's decision in the *Cameroon/Nigeria* case as to the impact of Equatorial Guinea's intervention on the delimitation. Notwithstanding this, it is improbable that the maritime boundary delimited by the Court will extend beyond the equidistance-line[386].

6.3.d)(iv) The Equitable Normative Content of Equidistance

Having argued that the resort to equidistance is mandatory in maritime delimitation, it is necessary to elaborate on its normative content. Although the perspective adopted in

(381) For some clear examples of this practice, cf. Appendix 2, D2, D13, D16-D17, D20, D38, D43, D52, D58, D61, F4, F14, F21, F31, F32, F61.

(382) Appendix 2, D8, D43.

(383) See Figure 13. It is noticeable that all three agreements are either based on equidistance or on variations thereof.

(384) For an illustration of the claim-line, see Figure 14. Cameroon's claim-line was described during the oral hearings; see ICJ, Public Sitting of 3 March 1998, Verbatim Record CR/98/02, para.35; cf. also Antunes/2000c, p.176. As to the geographical framework in the Gulf of Guinea, see Figures 37-38.

(385) Equatorial Guinea added also that Cameroon had never "once hinted that it did not accept the median line as the maritime boundary between itself and Equatorial Guinea", and had "never protested" the activities authorised by Equatorial Guinea "on its side of the median line [...] including the issuance of oil concessions and the active exploitation of continental shelf resources'.

(386) Referring to possible solutions for this case, cf. Antunes/2000c, p.181.

this study appears to be irreconcilable with the perspective adopted by courts, perhaps this is in appearance only. It is irrefutable that international law has never prescribed, either at conventional level or at customary level, that maritime boundaries shall follow strict equidistance-lines. To this extent, case law raises no difficulty. Yet, this does not signify that equidistance is not a normative standard. Indeed, not only is equidistance a normative standard, but it is also an equitable one.

Recourse to equidistance immediately prompts one key question: Equal distance from what? This is where all problems spring. What causes equidistance to yield inequitable results is not its rationale; but the definition of 'relevant coastline' adopted in international law. If the relevant coasts were defined differently, the outcome of a delimitation effected on the basis of equidistance would also be different. Proof that, as a substantive criterion of area-allocation, 'closer proximity' is *in abstrato* irreproachable appears in the diagrammatic examples of Figures 51 and 53 (in which the coasts of the two states are straight lines that somewhat mirror each other). Whether between opposite coasts, or between adjacent coasts, equidistance effectuates an equal division of the overlapping of entitlements. When applied to actual geographical circumstances, equidistance tends to result in equality of division (Figures 52 and 54). Noteworthy is the situation in the latter, a case of adjacency in which Headland A1 (a conspicuous point situated near the terminus of the land boundary) appears as the controlling basepoint of the equidistant boundary. Even in such a difficult scenario, and notwithstanding the need for adjustments, the division of the area of overlapping entitlements through equidistance leads to 'reasonable equality'. Insofar as equality means equity, equidistance is intrinsically an equitable criterion. Most importantly, it is the only normative standard that, simultaneously, offers certainty in the definition of the course of the line, and tends to effect just area-attributions.

This study submits that equidistance (i.e. 'closer proximity') is a legal principle – a sub-principle of the principle of maritime zoning. Necessarily, the distinction between rules and principles bears on this proposition. Insofar as it is not a rule *stricto sensu*, equidistance does not operate in an all-or-nothing fashion. It amounts to a starting point for reaching concrete solutions – and it is to be construed *in casu* in the light of other principles. The extent to which it governs specific situations is thus variable, and must be assessed on a case-by-case basis. If equidistance collides with another legal principle (e.g. equity), both principles must be realised to the highest degree possible relative to the factual and legal circumstances *in casu*, through a mutual maximisation. In short, the 'ideal ought' embedded in equidistance is an ever-present standard in maritime delimitation, though the specific solution derived from it is determinable only *in concreto*. International law thus prescribes a

provisional recourse to strict equidistance, qualified by adjustments imposed *in casu*, both in adjacency and in oppositeness.

It must be remembered that the introduction of equidistance, although undoubtedly due to the intervention of the Committee of Experts, was implicitly advanced in debates that took place before 1953, and was related to considerations of equity. Attempting to objectify the division of maritime zones, Sandström observed that, under Swedish private law, the principle applied was that "where the waters extending in front of two properties had to be partitioned or divided, each owner took possession of the waters *situated nearest to its own territory*". In the same debate, Spiropoulos suggested that, between states with opposite coasts, "*half the continental shelf* should belong to each of the two states, in the absence of other division arrived at by mutual consent"[387]. Underlying each of these proposals are the two vectors of the rationale of equidistance: proximity and division on an equal basis. Without a doubt, these views help explain why the recourse to equidistance was eventually accepted by the ILC without major discord.

State practice has reflected this view since the early stages of maritime delimitation, as illustrated by the Iran/Saudi Arabia and Italy/Yugoslavia agreements[388]. Despite what the Court affirmed in the *North Sea* cases, the reality was that the Netherlands, Germany and Denmark went on to delimit a boundary by gradually adjusting the equidistance-lines on both sides[389]. The fact that the vast majority of agreements dealing with continental shelf and EEZ delimitation have recourse to equidistance, often mitigated to accommodate the equities *in casu*, can be neither overlooked, nor overstressed[390]. Importantly, the preference of states for this type of approach was soon acknowledged. In the *Anglo/French* arbitration, the Tribunal noted that "in a large proportion of the delimitations known to it" states opted for having recourse to "some modification or variant of the equidistance principle"[391]. This approach was central to the Award. Less perceptive, subsequent developments however, brought an unnecessary degree of uncertainty to maritime delimitation.

In the *Jan Mayen* case, jurisprudence definitively recognised this approach. Wisely echoing the approach of the *Anglo/French* arbitration, the Court took the first step towards restoring the legal role of equidistance in delimitation, which was subscribed to in the *Eritrea/Yemen* arbitration and in the *Qatar/Bahrain* case (in which no distinction was made between adjacency and oppositeness as regards the use of equidistance)[392]. The recourse to

(387) ILC/Yearbook/1951(I), p.286, emphasis added.
(388) Appendix 2, B25-B26.
(389) Para.2.3.d) *supra*.
(390) Cf. Appendix 2. For a short summary of the results of the survey of state practice, cf. Conclusions to Part I *supra*.
(391) RIAA/18, p.116, para.249; cf. para.2.4.c)(i) *supra*.
(392) Para.6.4.d)(iii) *supra*.

equidistance in delimitations of areas beyond 200 M from the coast, as happens in the USA/Mexico and Australia/France agreements[393], deserves further attention. Despite of the fact that the overlapping entitlements are based on natural prolongation, 'closer proximity' still emerges as the basis for an equitable division.

To adequately grasp equidistance, one ought to differentiate between the rationale embedded therein and the effects that result from the definition of baselines adopted in international law. Irrespective of the adopted basepoints, the rationale of equidistance – which the *Jan Mayen* case refers to as equitable in character[394] – remains unaltered. The adjustments to equidistance, if and where necessary, operate primary through manipulation of baselines (or basepoints). Two important conceptual points should be identified in this respect. The first concerns the methods of delimitation. Common to all methods identified as equidistance-related is the fact that they all apply the same rationale. Where they differ is in the way the coastline is interpreted, or the relevant basepoints weighed[395]. The second point concerns the law-making process. If it is considered that the lines defined by these methods embody the same rationale, then the conclusion must be that the overwhelming majority of state practice resorts in some measure to the rationale of equidistance.

The fact that the application of equidistance as a delimitation principle has been anticipated during the *travaux préparatoires* of the 1958 Conventions is striking; although the specific circumstances in which equidistance was to be departed from were not comprehensively foreseen. The commentary to the 1956 Draft stated that because "special circumstances would probably necessitate *frequent departures from the mathematical median line*" the rule was meant to be "fairly flexible". The median line thus surfaced as the "*basis for delimitation*" (Article 12). Analogous comments appear in relation to Article 14, in which it is stated that "the rule should be very flexibly applied", and to Article 72, where reference is made to "exceptional configurations of the coast" and to "the presence of islands or of navigable channels" as circumstances that would "arise fairly often", and that would require a "fairly elastic" application of the rule[396].

In summary, it is contended that the utilisation of equidistance as the 'starting point' of delimitation – a provisional line – stems from the very notion of maritime zoning being a

(393) Appendix 2, D2, F64. In the Australia/France agreement, the boundaries run only partially beyond 200 M.

(394) ICJ/Reports/1993, p.67, para.65.

(395) Para.5.2. *supra*. This idea has been underlined more than once by Judge Oda. In the *Tunisia/Libya* case, he affirmed that "[p]erhaps the true solution to the problem relating to the method of equidistance is that account should be always taken of various elements and factors when determining the baselines from which the equidistance-line is to be plotted" (Dissenting Opinion, ICJ/Reports/1982, p.262, para.168). The approach he proposes in his Separate Opinion in the *Qatar/Bahrain* case (which follows his views as counsel in the *North Sea* cases) is an example of the application of equidistance as a rationale, but in which the relevant coast is interpreted in terms of façades (cf. para.40, and note that this obviously does not encompass his enclave-approach around the Hawar Islands).

(396) ILC/Yearbook/1956(II), pp.271-272, 300, emphasis added.

principle of law. The existence of a 'principle of equidistance' is rejected only in case law, and even then only formally. More often than not there is a "shadow of an equidistance-line even in those cases where the courts have expressly renounced the use" of equidistance[397]. State practice has emphatically endorsed this corollary of the principle of maritime zoning. The recourse to equidistance as the starting point of delimitation adjusted where and if necessary was consecrated by states. This practice is derived from the crystallisation of the principle of maritime zoning. Normatively, what equidistance prescribes is that points at sea positioned in the area of overlapping maritime entitlements which are closer to state A than to state B ought *prima facie* to be subject to the sovereignty or jurisdiction of state A. Which points are closer to each coast is a question that depends on how the delimitation factors are balanced *in casu*. This however, is a different issue.

6.4. The Principle of Equity in Maritime Delimitation

6.4.a) Key Thoughts on the Concept of Equity

6.4.a)(i) An 'Indefinable' Concept

From the outset, it must be conceded that no comprehensive conceptual analysis of 'equity' in international law is being sought. The present section, modestly, attempts to undertake a functional appraisal of the concept of equity, i.e. an appraisal oriented towards unravelling the conceptual position of equity in maritime delimitation law. Critical to this investigation is to establish whether or not equity is a normative standard, and if so, what are its contents. How the paradoxical coexistence of justice and certainty in legal systems intertwines in this problem is a paramount issue. Shedding light on what equity means as far as the discretion conferred on courts is concerned, is also an important goal.

Had one to choose an idea to characterise the concept of equity in international law, that idea would come from Schachter's initial statement on the diverse manifestations of equity: "No concept of international law resists precise definition more than the notion of equity"[398]. Equity is indeed an 'indefinable' concept. Since it is fastened to individual and social ethics and morals, every 'juridical mind' has its own 'subjective' perception of equity. Notably, it varies in time. Developments in human-social philosophy are bound to bear upon the notion of equity at a given moment. Equity, as a legal concept, also varies in space[399]. Different legal upbringings lead to different conceptions of equity. Whereas

(397) Willis/1986, p.51.

(398) Schachter/1991, p.55.

(399) Nader and Starr conclude that "equity is not universal, but is dependent on time, place, and the restraints set against the 'naked power' which the dominant members of a society might use" (Nader/Starr/1973, p.136).

Anglo-American jurists probably see it as an everyday part of law[400], their continental counterparts probably tend to associate it with non-normative *ex aequo et bono* decisions[401], while Chinese jurists probably view it by reference to Confucianism[402]. The heterogeneity of the community to which the international legal system is applicable therefore gives rise to idiosyncratic concerns. As a concept, equity is certainly more prone to poetic evocation than to legal-scientific precision[403].

Clearly, equity is more easily comprehended through its practical manifestations[404], than through textbook definitions. Notwithstanding this, to proceed further, it is appropriate to seek a *functional definition*, without prejudice to refinements to be introduced as the investigation develops. Such a definition ought to be sufficiently broad to incorporate different perceptions of equity, in order to avoid the problems posed by its understanding in different legal contexts. The definition advanced in the *Norwegian Shipowners' Claims* arbitration, which referred to "general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state", appears a sound choice[405]. For the time being, therefore, equity will be portrayed as a broad notion of justice, which cuts across all legal orders.

6.4.a)(ii) Legal Systems, Normativity and Equity

The description of equity as a 'sense of justice' spreading through all legal systems bears a misleading simplicity. Nothing is straightforward in the interplay of equity, legal systems and normativity. In fact, these three notions form a dialectic, the understanding of which is a prerequisite to the recourse to equity. Legal systems were described above as bodies of rules (*lato sensu*) providing standards that regulate the conduct of subjects of law (the members of a community, which at the international level are primarily states). Here, the paradoxical nature of certainty and justice, the supreme principles of Law immanent to all legal orders, is also to be emphasised.

The paradox between justice and certainty not only reflects the disharmony between individual justice and predictability (and clarity of law), but also concerns the prevalence of

(400) Megarry/Baker/1973, pp.5-6. The integration of equity in law is not free from hurdles; "the long history of the administration of equitable relief in a separate court has left an impression on the legal mind that is hard to overcome, and has created an obstacle to the complete integration of the principles of equity into the main body of the common law" (Newman/1973a, p.20).

(401) Commenting upon the position of equity in continental systems, Brutau states that equity "is a juridical phenomenon which, paradoxically, does not find a place in the system of law in force" (Brutau/1973, p.84).

(402) Tsao/1973.

(403) Weil/1996, p.121.

(404) For example: *pacta sunt servanda, rebus sic stantibus,* good faith, estoppel/preclusion, prohibition of abuse of rights, *exceptio non adimpleti contractus*, limitation of property rights, equitable relief, denial of relief to the unscrupulous, equality of treatment, distributive justice, the maxims of equity in Anglo-American law (equality is equity, he who comes into equity must come with clean hands, he who seeks equity must do equity), the maxim of proportionality *lato sensu*, protection of reasonable expectations, unjust enrichment.

(405) AJIL/17/1923, p.384; cf. also the *Cayuga Indians* arbitration, AJIL/20/1926, p.585-586.

positive law. Juridical certainty demands the application of positive law, *even when the latter is unjust.* Only in circumstances where the injustice of positive law reaches the point at which, in the light of such injustice, the certainty guaranteed by positive law becomes irrelevant, will the unjust positive law surrender to justice[406], and consequently to equity. "The injustice of a law is not, in general, a sufficient reason for not adhering to it"; non-compliance is dependent "on the extent to which laws [...] are unjust"[407]. As Alexy concludes, following Radbruch's reference to an "unbearable degree" of injustice, only "extreme injustice is no law"[408]. To summarise it through Akehurst's words, "although it is desirable that rules of law should be *just*, it is perhaps even more desirable that they should be *certain, clear and predictable*"[409].

Those, like Newman, who delved into the concept of equity, have acknowledged the impact of this issue. As he observes, the "conflict between the goals of certainty and of individual justice has created an ambivalent attitude of the law toward equity, to which the law is attracted by reason of the identity of equity in the general sense with justice, but which the law rejects because of the law's concern for certainty". This explains why, both in common law and in civil law, there are "wide enclaves of law in which the principles of equity are not applied even in cases in which they are relevant"[410].

By presenting the analysis of equity in this fashion, the issue is transposed to the quintessence of legal thought: the appraisal of the validity of positive law as an expression of the social consciousness as to how the *polis* is to be regulated. The social 'sense of justice' thus becomes the moral threshold for assessing the validity of certainty as a social-legal aim. This 'cut-off', scrutinising function of justice is in fact essential to the understanding of equity.

Law being an element of social organisation, it is scarcely surprising that it seeks certainty, and in doing so, that it has recourse to generalisation and abstraction. Law could not exist were it "not possible to communicate general standards of conduct, which multitudes of [subjects] could understand, without further direction, as requiring from them certain conduct when the occasion arose". Naturally, law is expressed "*predominantly, but by no means exclusively*, [by reference] to *classes* of [subjects], and to *classes* of acts, things and circumstances"[411], i.e. through rules *stricto sensu.* Equally, the law appears

(406) Radbruch, cited in Engish/1988, p.320.
(407) Rawls/1999, pp.308-309.
(408) Alexy/1999, p.33.
(409) Akehurst/1976, p.809, emphasis added.
(410) Newman/1973a, pp.17-18.
(411) Hart/1997, p.124, emphasis added.

a priori, and corresponds to an idea of order and certainty; and even if inspired in justice, it will never be in a position to completely realise it[412].

Normative prescriptions, as expressions of law, are inexorably general and abstract. What varies is the degree of generalisation and abstraction. Rules provide specific solutions to defined class-events. Principles, potentially applicable to all situations, offer a general guidance for the solution. Pure equity, by giving prominence to *particular facts of specific situations*, shapes solutions on a case-to-case basis. Pure (absolute) equity is antithetical to pure (absolute) normativity. They are the two extremes of the same scale. If it is true that normativity cannot prescind from a degree of particularisation to be applied, it is no less true that equity cannot become a decision-making standard without acquiring a level of generalisation. For this reason, Sohn sees equity as falling "along a *continuum* with respect to departure from the rule of law"[413]. The permutations between subjects, and acts, things and circumstances, cannot be comprehensively foreseen. Solutions devised in general terms and applied to concrete situations, by overlooking actual elements thereof, will eventually cause unjust results. When the level of injustice becomes clearly unreasonable, one must contemplate relief, which entails departure from pure normative solutions.

In short, within legal systems (all of which seek certainty and justice), equity is to justice what normativity is to certainty: the means to reach an end. As Radbruch writes, justice considers the particular case from the standpoint of the general norm. Equity seeks to discover the very norm of the particular case, to transform it also into a general norm; which is why it is part of the normative realm[414].

6.4.a)(iii) Justice *In Casu* and 'Normative Equity'

Jus dare, as a function attributed to the legislature, is in principle separated from *jus dicere*, a function conferred on the judiciary. Theoretically, the former precedes the latter. It rests on courts to apply the law as made. Only after establishing what is the applicable law is a court in a position to establish what result its application *in concreto* produces. What matters, as Newman states, is the fact that "[e]quity is for judges to administer, not for legislators to decree by statute". The goal is individual justice. Because such a goal "cannot be spelled out in the statute, it must be reached by judicial decision"[415]. As explained by Reuter, it is the relationship between equity and the judge that constitutes the central

(412) Decencière-Ferrandière, AIDI/1934, p.272.
(413) Sohn/1984, p.307.
(414) Radbruch/1934, p.49.
(415) Newman/1973b, p.626. Referring to a "moral mission of the judge", cf. Delbez, cited in Chemellier-Gendreau/1991, pp.277-278, and Degan/1970, p.19. On the role of courts in applying equity, cf. also DeVisscher/1972, p.vi. When analysing the

problem[416]. The question of respect for equity by the legislator evades the jurist. Where from the judge's perspective the strictly legal solution is inequitable, the question is whether the hardship can be attenuated. The problem becomes particularly acute where no grounds for relief are found in positive law[417].

How judges apply the Law thus becomes central to this problem[418]. Elaborating on this issue, Esser distinguishes two stages[419]: the *finding* of the decision; and the *reasoning* of this decision (which seeks to demonstrate the compatibility of the decision with positive law). Judges appear in his view to find first the most adequate decision according to their understanding of the Law and the facts *in casu*. The reasoning appears more often than not subsequently, as a function of control which might lead the judge to abandon a decision, if it is insusceptible of legal support. Owing to the scope conferred on judges in interpreting the law and in filling lacunae, however, that hardly ever happens.

Reaching a decision and justifying it thus falls largely within judicial discretion, which as regards the international dispute-settlement machinery raises a crucial dilemma: the existence of a true 'world society'. This is a key point because "the preunderstanding of the judge is shaped by the shared topoi of an ethical tradition"[420]. Whereas the law is an element of social organisation, notes Rosenne, at the domestic level it is possible to identify "a strong societal relationship between those who make the law, those for whom it is made, and those who administer the law". Society has an integrated conception of justice. But "[n]o international tribunal has yet attained such a degree of integration of its judges in to the international society"[421]. The notion of justice in international law is heterogeneous. And because jurisdiction is established by consent only, there is the danger that claims based on equity advanced by states might not always be susceptible of scrutiny by courts[422].

At this juncture, it is worth pausing momentarily to return to the idea that all agreements must be deemed to bear an equitable solution[423]. Forging a compromise requires states to agree upon a common notion of what is acceptable, which is why agreements may provide parameters for objectifying the contents not only of normative standards, but also of the notion of equity.

issue of "the nature of the bodies applying equity", Lauterpacht looks into all types of third-party settlement processes, i.e. arbitration, judicial settlement, conciliation and mediation (Lauterpacht/1991, pp.118-119).

(416) Reuter/1980, p.166.

(417) Lapidoth/1987, p.163; Degan/1970, p.25.

(418) Paras.6.1.b)(iii) *supra*, 7.3., 7.4. *infra*.

(419) Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Pre-Comprehension and Method Selection in Law-Finding), cited in Larenz/1989, p.165. Considering a similar distinction, cf. Anderson/1996a.

(420) Habermas/1996, p.200.

(421) Rosenne/1988, p.89.

(422) Akehurst/1976, p.811. Cf. also Rosenne/1988, p.91; Lapidoth/1987, p.165.

(423) Para.6.1.b)(ii) *supra*. This approach must be taken cautiously insofar as political balances reached through agreement do not always match strictly legal assessments – the former might weigh-up extra-legal considerations.

Turning to adjudication, the question that is prompted concerns the basis on which, and extent to which, courts may have recourse to equity, bearing in mind that decisions must be founded strictly on Law. It was argued that equity is a general principle of law[424]. To common law jurists, this idea is unlikely to raise major difficulties[425]. Continental jurists, on the contrary, might tend to disagree therewith[426]. In civil law traditions, the normative standards precede the case. The reasoning flows 'downwards'. Equity appears as "*justice individualisée*" ("*justice adaptée à l'espèce*")[427], but referenced to a rule of law. Due to the integration of equity in the law, departures from the rule are set also in law. Hence, although courts weigh the specificities of each, it becomes difficult to view equity as a source of law[428]. Since in common law systems normativity is identified mainly from case-solutions, through reasoning 'upwards', viewing equity as creative of normativity becomes easier[429].

In truth, knowing whether equity is a source of law, and if it is, whether it is a formal source, a secondary source, a material source, a general principle, or customary law is, as Akehurst states, "purely a verbal question"; for "whichever the way the question is answered, it is an undeniable fact that international tribunals often apply equity"[430]. Further, the increasing recourse to equity-related notions in treaty law shows that the 'legislator' recognises and promotes the role of equity in international law[431].

Equity may be included amongst the sources of law because it may be expressed in normative forms, characterised by generality and abstraction. The focus is thus 'normative equity', what Weil denominates '*règle d'équité*' (or '*équité juridique*'). As he incisively notes, this norm is not the only norm marked by a margin of indeterminacy and uncertainty that leaves to courts room for discretion. The sole difference is that the general and abstract standards that emerge from equity acquire their shape through the resolution of cases, bit by

(424) Whether equity is a source of law is a question that might have different approaches. Undoubtedly part of the *corpus juris*, equity is sometimes portrayed as a source of law. But if 'source of law' is seen as the *fait social* or the institution that creates positive law, than equity might not be a source of law. This seems to be the view followed by Esser, who sees in Article 38(1)(c) of the Statute permission for the Court to create positive norms of international law (Esser/1961, pp.169-179).

(425) Cf. Shaw/1997, p.82; Janis/1995, pp.109-110; Rossi/1993, p.250; Akehurst/1976, p.814. Brownlie considers that in strict terms "equity cannot be a source of law" – although included in Article 38(1)(c) of the ICJ Statute (Brownlie/1998a, pp.25-26). Malanczuk states that "it is doubtful whether equity forms a source of international law today" (Malanczuk/1997, p.55). Jennings and Watts, although not including equity in the general principles, present it as "material source of law" (Jennings/Watts/1997, pp.43-44). Shearer excludes equity from the "material 'sources' of international law"; cf. Shearer/1994, pp.29-31.

(426) Cf. Nguyen/Daillier/Pellet/1999, p.354; Baptista/1998, p.72; Moncada/1996, pp.324-325; Pereira/Quadros/1993, p.275; DeVisscher/1972, p.7 ; Degan/1970, pp.17, 40. Considering equity a formal source of law under Article 38 of the ICJ Statute, Cunha and Pereira do not view it as a general principle of law – which raises difficulties in understanding under which sub-paragraph of paragraph 1 of the said article it should be included (Cunha/Pereira/2000, pp.305-312).

(427) DeVisscher/1972, p.3.

(428) In civil law systems, the legislator protects justice *in casu* by infusing the code-norms with 'indeterminate concepts' and 'general clauses', which are concepts very wide in scope that often leave in the hands of judges discretion to mould case-decisions to his/her sense of justice, account taken of the whole system and of previous decisions.

(429) The idea that common law jurists "tend to reason *upwards*" from the facts of cases, whereas continental jurists "tend to reason downwards from abstract principles", is advanced by Lord Goff (Lord Goff/1997, p.753).

(430) Akehurst/1976, p.808. Agreeing, Weil considers that this debate is "*largement semantique*" (Weil/1996, p.126). Esser argues that principles become part of positive law when incorporated, *inter alia*, through an act of jurisprudence (Esser/1961, p.169).

(431) Cf. Chemillier-Gendreau/1991, pp.274-275 ; Bardonnet/1981, pp.39-41.

bit, slowly diminishing the discretion of courts, while increasing predictability and juridical certainty[432]. Labelled 'general equity' by Jeanneau, it "is distinguished from individual equity", and it penetrates into the *corpus juris* "under the characteristics of a veritable norm". "A simple inspiration for a concrete solution in the first case", it "becomes in the second a formal source of law"; it will eventually "engrave itself in a more abstract formula expressed in terms general enough to attain universal scope" and to reach directly "the level of positive law"[433].

6.4.a)(iv) Functions and Bounds of 'Normative Equity'

As aforesaid, courts are central to the practical operation of equity. Not surprisingly, equity was at the heart of the debate that took place during the preparation and drafting of Article 38 of the Statute of the PCIJ. The process behind its wording was already examined thoroughly[434]. No re-examination is necessary. Nevertheless, insofar as some points may be helpful for grasping the functions of equity, reference thereto is desirable. Equity is inherent in the 'sane application of Law'[435]. Hence, it is unthinkable that it becomes applicable only when the parties agree thereto, as happens under Article 38(2). It is therefore fair to suggest that the provision on *ex aequo et bono* had in mind exclusively the power to decide on the basis of that equity which has "no direct connection to rules of law"[436], i.e. pure equity[437]. The role of equity within Law – as a principle of application of conventional and customary law, and as part of the general principles of law (all of which reflect precepts of justice) – seems to have remained unaffected by that provision[438].

Equity is incorporated not only in paragraph 2 of Article 38 of the Statute of the ICJ – its non-normative facet, but also in paragraph 1(c) – its normative facet[439]. Further, it does exist outside the said Article 38, as general guidance in the application of law. *Interpretatio aequior sumenda est.* This widespread presence, interacting with questions of competence of courts to legislate, and of *non liquet*, explains much of the discussion that surrounds equity. What must be stressed is that the presence of equity provides the courts of all legal systems with a margin of discretion that gives them a *de facto* quasi-legislative power. Even in civil law systems, a number of notions (e.g. good faith, proportionality, abuse of right)

(432) Weil/1996, p.124, 127, 143.
(433) Jeanneau/1973, pp.232-233.
(434) Cf. Rossi/1993, pp.87-118; Cheng/1993, pp.1-Miyoshi/1993, pp.23-25; VanDijk/1991, pp.3-13; Habicht/1935, pp.17-22; Judge Weeramantry, Separate Opinion, *Jan Mayen* case, ICJ/Reports/1993, pp.227-230.
(435) AIDI/1937, p.271; expression translated literally from French.
(436) VanDijk/1991, p.13.
(437) Rossi/1993, p.114; cf. also Cheng/1993, p.20. Insofar as *ex aequo et bono* decisions may disregard the normative framework, and rely solely on the notion of justice of the decision-maker, it may be seen as potentially based on "pure equity".
(438) VanDijk/1991, p.11.
(439) For a summary of scholarship on the distinction between two types of equity, cf. Munkman/1973, p.16.

depend chiefly on assessments of courts *in casu*, based on equity. Equity is thus integrated in the law. Since international law has undeveloped areas, of which maritime delimitation law was an example, the fact that courts had a more relevant participation in developing the law raises no difficulties[440]. The same happens if and when new communal aspirations have to be given attention. Equity then emerges as an expression of the 'open texture' of international law, seeking to accommodate, and to respond to, these situations. Normatively less dense than domestic law, with a structure oriented to 'problem-resolution', international law offers to principles such as equity a larger field of operation[441].

Subsumed in this debate are two conceptually significant distinctions. The first concerns the traditional three-fold categorisation of the functions (objectives) of equity, set by reference to positive law: *infra legem* (to mitigate unjust results of the law), *praeter legem* (to complement the law by filling its lacunae), and *contra legem* (to disregard the law exceptionally, in order to reach a just solution). DeVisscher criticised this categorisation on the grounds that it did not contribute to elucidate the problem, that it had not been followed in practice, and that due to its abstract rigidity it was not adaptable to the subtleties of moulding rules of law to the particularities of each case[442]. From an operative perspective, because it is difficult to draw strict lines between each of these functions of equity *in casu*, this point must be accepted. Notwithstanding this, such a tripartite categorisation remains relevant for purposes of intellectual discipline[443], and was endorsed by the Court[444]. The second distinction relates to the decision-making powers of the ICJ. Article 38 differentiates between decisions based on law and *ex aequo et bono* decisions. Underlying this distinction are two diverse types of juridical reasoning: one confined to the bounds of Law; another where recourse to 'non-normative equity' is allowed. 'Normative equity' was developed in international law by resort to this distinction[445]. The *North Sea* Judgment is perhaps the landmark of 'normative equity'[446]; for it was here that its thread was set down. The Court

(440) When compared to the pace of technological and sociological evolution (e.g. nuclear science, space exploration, environmental protection, continental shelf delimitation in 1945, the war crimes at Nuremberg), the law-making process in international law is remarkably slow – whether concerning customary law or conventional law (though the latter is much faster). This means that often, when an international court is asked to adjudge on a certain issue, it will be faced with unclear normative standards and a low degree of normative density. The pronouncements in the *Nuclear Weapons* AO illustrate this idea very well (ICJ/Reports/1996(I), p.226).

(441) Esser/1961, p.50.

(442) DeVisscher/1972, p.12. Similarly, Munkman/1972, pp.14-15.

(443) Cf. e.g. Moncada/1996, pp.325-328; Janis/1995, p.109-110; Pereira/Quadros/1993, p.275; Chemillier-Gendreau/1991, p.272; VanDijk/1991, pp.20-21; Schachter/1991, pp.57-58; Singh/1989, p.181; Lapidoth/1987, pp.172-174; Sohn/1984, pp.306-307; Akehurst/1976, pp.801-807; Degan/1970, pp.25-35.

(444) This happened for the first time in the *Burkina-Faso/Mali* case, ICJ/Reports/1986, pp.567-568, para.28.

(445) Cf. Weil/1996, pp.126-129; Franck/1997, pp.54-56; Franck/1995, pp.29-31; Miyoshi/1993, pp.14-16; Thirlway/1989, pp.50-51; Degan/1987, pp.119-131.

(446) In the *Rann of Kutch* arbitration, the Tribunal endorsed the idea that "equity forms part of international law", and affirmed that the parties were "free to present and develop their cases with reliance on principles of equity", but did not refer to the contents thereof (ILR/50/1976, p.18). The Individual Opinion of Judge Hudson, in the *River Meuse* case, is often referred to as being the landmark in the resort to equity in international law. However, because strictly speaking it is not part of the *ratio decidendi* of the

then referred to a "rule of equity" calling for the application of equitable considerations, and which raised no question "of any decision *ex aequo et bono*". Described as founded on "very general precepts of justice and good faith", the said rule was deemed not to amount to the application of "equity as a matter of abstract justice", but to ensure that "a reasonable result is arrived at"[447].

Imparting momentum to the resort to 'normative equity' in case law, this approach was re-averred in many instances thereafter[448]. In the mid-1980s, Jennings expressed his belief that what appeared "at first sight to be a jumble of different and disparate elements" could "be arranged into a pattern which ha[d] some pretensions to simplicity, clarity and even elegance"[449]. A decade later, Weil concluded that following a non-linear development, based on an iterative process of "trial and error", the Court had finally managed to accord to equity a crucial – yet circumscribed – place in the international legal order, by endowing it with a stable and predictable content, a prerequisite of any juridical norm[450]. As if to concur with the proposition that 'normative equity' has currently a stable and undisputed place in international law, recent jurisprudence in maritime delimitation has not felt the need to restate the aforesaid distinction[451].

The two aforesaid distinctions, although related, should perhaps not be joined into one single categorisation, for they stem from diverse distinction-criteria. Decisions *ex aequo et bono* "may in fact belong to any of the [...] three alternatives: *infra legem*, *praeter legem*, or *contra legem*"[452]. Equity *infra legem* and *ex aequo et bono* decisions are reconcilable to

case, and because it seems to reflect an understanding of equity typical of Anglo-American law, not necessarily followed by other systems (cf. Degan/1970, p.17), its weight in terms of development of 'normative equity' does not seem as decisive as the *North Sea* Judgment.

(447) ICJ/Reports/1969, pp.47-50, paras.85, 88, 90. Unquestionable in terms of the contents of equity, the views of the Court raise nevertheless difficulties when presenting this "rule" as customary law, and not as a general principle of law (cf. paras.2.3.b)(ii), 6.2.c)(ii) *supra*, 6.4.b)(iv) *infra*).

(448) *Fisheries Jurisdiction* cases, ICJ/Reports/1974, pp.34, 202, paras.78, 69; *Anglo/French* arbitration, RIAA/18, p.114, para.245; *Tunisia/Libya* case, ICJ/Reports/1982, p.60, para.71; *Gulf of Maine* case, ICJ/Reports/1984, p.278, para.59; *Guinea/Guinea-Bissau* arbitration, ILM/25/1986, p.289, para.88 ; *Libya/Malta* case, ICJ/Reports/1985, pp.38-39, para.45; *Burkina-Faso/Mali* case, ICJ/Reports/1986, pp.567, 633, paras.28, 149; *El Salvador/Honduras* case, ICJ/Reports/1992, p.514, para.262.

(449) Jennings/1986, p.38.

(450) Weil/1996, pp.123, 144.

(451) In the *Jan Mayen* and *Qatar/Bahrain* cases, as well as in the *Eritrea/Yemen* arbitration, no reference was made to the distinction between 'normative equity' and *ex aequo et bono* equity. References thereto were nonetheless made in a number of individual opinions in the *Jan Mayen* and *Qatar/Bahrain* cases (judges Schwebel, Shahabuddeen, Weeramantry, Separate Opinions, ICJ/Reports/1993, pp.127-128, 192-197, 226-230; Judge Bernárdez, Dissenting Opinion, *Qatar/Bahrain* case, paras.5-6; judges Bedjaoui, Ranjeva, and Koroma, Joint Dissenting Opinion, *Qatar/Bahrain* case, paras.8-9).

(452) Lapidoth/1987, p.172. Perhaps conceptually less accurate, a categorisation that includes the three traditional functions of equity and *ex aequo et bono* might be helpful if, as Sohn does, one views equity in the perspective of "a continuum with respect to departure from the rule of law" (Sohn/1984, p.307). He sees equity *contra legem* as "the use of equity in derogation of the law where an exception from the law is needed, given the circumstances, in order to achieve an equitable and just result", and *ex aequo et bono* decisions as "designed to find a solution for the individual case" and "not of necessity guided by the general principles of law". Weiss also distinguishes between the equity *contra legem* ("an exception to the normal application of a rule of international law" on moral grounds) and *ex aequo et bono* decisions – whereby individual cases are decided "in a way that may disregard existing law" (Weiss/1989, pp.34-35). Cheng presents also a four-type distinction which (besides equity *infra legem* and *praeter legem*) considers *ex aequo et bono* decisions – i.e. disregarding the law "for the sake of expediency", and "absolute equity" – i.e. disregarding "merely the letter of the law, and not its spirit" (Cheng/1955, pp.202-211). In his Separate Opinion in

the extent that an "*ex aequo et bono* decision will be contrary to a settlement based on law in force [only] in so far as the latter is inequitable"[453]. On the other hand, equity *contra legem* does not necessarily stem from *ex aequo et bono* decisions. The particularities *in casu* might justify, under the law, an exception from positive law on equitable grounds. This is something of a *jus singulare*, a ruling that (whilst confirming positive law) concludes that if the 'legislator' had foreseen the circumstances, the applicable rule would have provided for it. Judicial discretion amounts here to an exercise of *de facto* quasi-legislative powers. These two categorizations thus differ in that *ex aequo et bono* decisions do "not have to be at all related to judicial considerations"[454]. It "could well be made without the need of specifically legal training or skill". By contrast, "a decision according to equity as part of the law should mean the application to the case of the principles and rules of equity for the proper identification of which a legal training is essential"[455].

6.4.a)(v) Reasonableness as the Scope of 'Normative Equity'

To shed light on the scope of 'normative equity', one must at a preliminary level refer to the question of the relevance to be attributed to equity within the international legal order. In the *River Meuse* case, Judge Hudson affirmed that a "sharp division between law and equity, such as prevails in the administration of justice in some states, should find no place in international jurisprudence"[456]. Certain legal systems have in effect reduced the immediate-role of equity to a minimum. The 'openness' thereof to justice is referred to various 'indeterminate concepts' and 'general clauses'. As the determination *in concreto* of these concepts and clauses forms part of the interpretation of norms, and confers on courts a level of discretion similar to that of equity, one might speak of 'mediated-equity'. Since international law has a normative density smaller than municipal law, the discretion with which courts are endowed is correspondently wider. Should a strict codified-positivistic approach be followed, the flexibility of the system would become minimal (if at all existent in certain cases). This means that, conceptually, equity becomes pivotal to the application of international law, for it is one of the means (if not often the only one) that can 'guide' the judge within his/her sphere of discretion. As Lauterpacht observes, equity "introduces into

the *Jan Mayen* case, Judge Weeramantry considers five "categories of equity": *ex aequo et bono* ("depending purely on the tribunal's sense of justice"), absolute ("a disregard of the letter for the spirit of the law"), *praeter legem*, *infra legem*, and *contra legem* (ICJ/Reports/1993, pp.226-234).

(453) Habicht/1935, p.22. Conversely, it might be said that where decisions taken in accordance with the law lead to equitable solutions, the two notions coexist.

(454) Lapidoth/1987, p.172; Virally/1987, p.525. However, an *ex aequo et bono* decision does not equate to arbitrariness, because it requires the weighing of objective considerations (cf. Lapidoth/1987, p.172; Degan/1987, p.119).

(455) Jennings/1986, p.30.

(456) Individual Opinion, WCR(IV), p.232.

the system a degree of flexibility [that] enables the judge or arbitrator more easily to perform a constructive role in the application of the law"[457].

While delving into the scope of 'normative equity', it is of major importance to seek reference-points. From the outset, it should be noted that the objective is not to give a definition of the expression, but to clarify the scope of the recourse to equity within the law. Ultimately, the goal is to understand how the principle of equity operates. As suggested, equity and normativity in their purest state are antithetical, and become two extremes of one scale. What needs to be discerned is the dialectic between *jus aequum* and *jus strictum*, and its realisation *in casu.*

Latent in the recourse to equity has been, notably, the core idea of reasonableness. In the *North Sea* cases, the Court stressed that one was not dealing with abstract justice, but with the need to ensure that "a *reasonable result*" was arrived at[458]. The same guiding-idea emerged in the *Barcelona Traction* case, where the Court considered that "in the field of diplomatic protection as in all fields of international law, it is necessary that *the law be applied reasonably*"[459]. That relief on equitable grounds is associated above all with the notion of reasonableness is however a truism requiring further explication, the essence of which relates to the question of judicial reasoning.

In the *Fisheries Jurisdiction* cases, the Court observed that applying equity "is not a matter of simply finding an equitable solution, but *an equitable solution derived from the applicable law*"[460]. What amount to a solution based on law and equity is therefore the question to answer. Interwoven here are some issues previously introduced, namely the distinction between rules and principles (their different operation), the conflict between normativity and equity, and the judicial function of *finding* and *reasoning* a decision. Unless the judge is directed to decide the case *ex aequo et bono*, the exercise that he/she faces is, as Kratochwil observes, one that amounts to a "going back and forth between 'facts' and norms". The corollary is that 'justice' becomes

> not so much an attribute of the formal principles contained in positive law as it is the result of *reasonable and principled use of norms* in making practical judgments about factual situations. Viewed from this angle, [one] can understand why 'Law' and 'Justice' stand in a certain relationship of tension, as it is *only through the authoritative decision of a court that it can be established what is fair and reasonable in a particular case.*[461]

(457) Lauterpacht/1991, p.117.
(458) ICJ/Reports/1969, p.50, para.90, emphasis added.
(459) ICJ/Reports/1970, p.49, para.93, emphasis added.
(460) ICJ/Reports/1974, pp.34, 202, paras.78, 69, emphasis added.
(461) Kratochwil/1989, p.240, emphasis added. On the relationship equity-reasonableness, see also Esser/1961, pp.86-87.

Both the Court's dicta and Kratochwil's words refer to the notion of reasonableness in two distinct aspects: in the use of *means*, and in the *result* to be attained. From the conflict between 'social certainty' and 'individual justice', in which by virtue of its identification with the notion of 'general principles of justice' equity is entangled, stem the requirements of reasonable application of the law, and of reasonableness of the result *in concreto*. 'Normative equity' appears to have thus a functional nature: it bridges the gap between normativity (law *strictissimo sensu*) and equity (justice), through reasonableness, in a way that confers upon 'law' greater 'justice'. As Bardonnet states, equity corresponds to common sense; it is a standard of reasonableness that seeks balance and equilibrium between the rights and obligations of disputant parties[462].

As a legal principle, equity is insusceptible of immediate application to the case. Its content can only be established by relative optimisation, account taken of all factual and legal possibilities *in casu*, with a view to translate its 'ideal *prima facie* ought' into an actual and 'definite ought'[463]. Perhaps in an attempt to objectify equity, Reuter argued that the problem of equity might be posed in three very different directions, which correspond to the search for a solution of *equivalence*, a solution of *proportionality*, or a solution of *finality*[464]. This approach has the merit of identifying elements whereby equity becomes translatable: the balance between the parties, the quantifying parameters of such a balance, and the teleological subordination to justice. One would suggest that reasonableness might provide another path towards objectifying 'normative equity'. The question to answer is how to express reasonableness of means and of result, in the light of a normative framework where two principles are integrated. It will be submitted that the best approach is to resort to the 'maxim of proportionality'.

Suffice it to say that the association between equity and reasonableness appears to have crystallised indelibly in international affairs, particularly in the "allocation of scarce resources among states"[465]. For instance, the 1987 report of the World Commission on Environment and Development refers to the use of transboundary natural resources "in a reasonable and equitable manner"[466]. The 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, similarly, refers to the use of transboundary waters "in a reasonable and equitable way"[467]. This approach is followed equally in the 1997 Convention on Non-Navigational Uses of International Watercourses,

(462) Bardonnet/1981, pp.41-43.
(463) Para.6.2.b) *supra*.
(464) Reuter/1980, pp.169-184.
(465) The relevance of equity in resource allocation is emphasised by Franck (Franck/1997, pp.56-79; Franck/1995, pp.31-47).
(466) Annex 1, Article 9.
(467) Article 2(2)(c).

when speaking of use, development and protection of watercourses "in an equitable and reasonable manner"[468]. The Second Report of the ILA Committee on Water Resources Law (2000) presents equity and reasonableness as forming part of a principle: the principle of reasonable and equitable utilisation of resources[469].

One last point to address concerns the 'dangers of equity', and judicial discretion. It goes without saying that when more than one interpretation of a legal norm is possible the more equitable interpretation should be preferred[470]. But this simply amounts to identifying the lowest level of reflection of equity. From here to the point at which equity demands a total departure from normativity lie innumerable 'greys' of the equity-normativity blend. It is within this spectrum of possibilities that the 'dangers of equity' come into play[471]: danger of arbitrary exceptions to legal rules; danger of subjectivity in choices and in appraisals of decision-factors; danger that the parties are not treated on a foot of equality due to the lack of predictability in the decision-making process. As will be shown, reasonableness achieved through the 'maxim of proportionality' tackles this issue[472]. Not only does it allow courts to justify the '*discovery of solutions*' through *proper judicial argumentation*, but it ensures also that both parties plead on a *predictable basis*[473].

6.4.b) 'Normative Equity' in Maritime Delimitation

6.4.b)(i) First Period (1945-1969)

The key purpose of the 1945 Truman Proclamation on the continental shelf was to ensure that the mineral resources of the seabed and subsoil would benefit the coastal state, *in casu* the United States. Because there were no precedents in international law on this matter, the whole declaration was drafted on the basis of a notion of fairness, and the policy encapsulated in a (general and abstract) normative formula. The "exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf" was attributed *in abstrato* to "the contiguous nation", and the solution justified as being "reasonable and just" on a number of grounds[474]. Of course, being aware of the fact that neighbouring states could advance similar claims, the United States had to tackle the issue of delimitation. Again, because no precedents existed, it did so by recourse to the same idea of fairness –

(468) Articles 5 and 6.
(469) Articles 8, 10, 12 , 58(5), and 60. Cf. also Part II, and Articles 3, 4, 6, 7, and 51(1).
(470) Cf. Weil/1996, p.125; Bedjaoui/1990, p.384.
(471) Akehurst/1976, pp.808-812.
(472) Conclusions to Part II; cf. also para.6.2.b) *supra*.
(473) As to what is exactly the meaning of the requirement of predictability, cf. para.7.1. *infra*.
(474) The expression "reasonable and just" was used by Boggs, when referring to the recourse to the "median line principle" in maritime delimitation (Boggs/1951, p.262). This reinforces the suggestion that the use of equidistance in the USA's practice was related to the notion of equitable principles; cf. para.1.2.a), Conclusions to Part I *supra*.

thus the reference to equitable principles[475]. Indeed, it is the absence of a legal regime on these issues that explains the recourse to the notion of equity. This illustrates how the recourse to equity becomes inexorable whenever there is insufficient normative density. Equally noteworthy in this instrument is the association of reasonableness and justness.

The non-existence of, and the need to develop, criteria for the delimitation of overlapping continental shelves was noted during the early 1950s ILC meetings[476]. Since then, it has become clear that a major concern was to guarantee that the delimitation did not yield an inequitable boundary. For example, Hsu referred to the potential "unfairness" of prolonging the territorial sea boundary to delimit the continental shelf, and suggested that the ILC should consider a partition of the continental shelf "on an equitable basis"[477]. Expressing similar concerns, Hudson stated that the prolongation of the land boundary "might result in unfairness of delimitation", and El-Khoury suggested that states ought to settle "their differences equitably"[478].

As argued, the equidistance-special circumstances formula results from the blend between these two thoughts – the idea of equal division of sea areas based on proximity (equidistance), and the need to ensure the non-inequitableness of the boundary (special circumstances) – of which the members of the Commission were mindful from the very beginning. This dual approach, based on equidistance as a principle subject to exceptions founded on equity, was followed by the Committee of Experts (which proposed the recourse to equidistance whilst noting the existence of cases potentially requiring departure from it), and was subsequently supported by the Commission. Endorsing equidistance as the general rule, Sandström asked whether "rules should not be laid down for such special cases where the application of the *normal rule* would lead to *manifest hardship*"[479]. The same idea is present in Lauterpacht's proposal to define exceptions to equidistance by reference to the existence of "undue hardship"[480], or in Spiropoulos' waiver of equidistance when it "would lead to manifest unfairness"[481]. Pal's idea that the "only *equitable starting point* for dividing the continental shelf [...] was the median line" was apparently widely accepted[482]. The debate thus focused on how to express the provisional nature of equidistance in the text. The expression "as a general rule" was proposed, but eventually the Commission opted

(475) Brown/1992, p.57. Amado argued that the expression equitable principles in the Truman Proclamation meant simply that the parties had to reach a mutually acceptable agreement (cf. Amado, ILC/Yearbook/1951(I), p.293); cf. also Judge Koretsky, *North Sea* cases, Dissenting Opinion, ICJ/Reports/1969, p.167.

(476) Para.1.2.b) *supra*. Cf. ILC/Yearbook/1950(I), pp.232-234.

(477) ILC/Yearbook/1951(I), pp.286, 288, 290.

(478) *Ibid.*, pp.287, 289.

(479) ILC/Yearbook/1953(I), p.126.

(480) *Ibid.*, pp.131-132.

(481) *Ibid.*, p.133.

(482) *Ibid.*, p.127, emphasis added.

for defining the situations that required an exemption from strict equidistance as 'special circumstances' – as had been suggested by Spiropoulos[483].

The process that preceded the Geneva Conventions also amounts to the elaboration *in abstrato* of the role of equity in delimitation. Lauterpacht has noted in this regard that the Committee of Experts, the ILC, and the First Conference "did not elaborate on what they meant by inequitable"[484]. One would suggest that this happened because, as said, equity is not to be decreed by 'statute', but to be administered by courts. What characterises this first period is exactly the fact that the role of equity was developed without any contribution by courts[485]. But from 1958 to the *North Sea* Judgment, the content of the equidistance-special circumstances rule was developed by state practice, which began elaborating on how equity was to be applied to mitigate unreasonable effects produced by strict equidistance in specific cases[486]. Of all 34 examples of state practice in this period, some 88% resorted to the equidistance-special circumstances formula.

6.4.b)(ii) Second Period (1969-1993)

The second period in the development of the recourse to equity in maritime delimitation stretches from the *North Sea* cases to the *Jan Mayen* case (this case being part of the third period). The work of courts was at the core of the developments that took place, although not always marked by fluency and continuity of thought. As had happened in the previous period, it was the need to avoid inequitable solutions that became paramount. But because decisions of courts have to be reasoned, an extra level of difficulty emerged: the need to explain, and to confine, the discretion conferred on courts by equity.

The *North Sea* cases and the *Anglo/French* arbitration were examined previously. The concerns in the 1969 Judgment with the need to avoid inequitable boundaries were not only justified, but perfectly in line with the debates in the ILC. What is unclear is why the Court deemed it necessary to discard the equidistance-special circumstances formula (as a means of delimitation), and to replace it with an undefined notion of "equitable principles". It is particularly so when the latter is presented as part of customary law without showing any state practice upon which to hinge it. The reason behind this approach is clear: since equity was being applied as a result of a *renvoi* from a rule of positive law, the Court could thereby avoid the delicate debate surrounding the general principles of law. The problem

(483) *Ibid.*, pp.124-134, at p.130 in particular.
(484) Lauterpacht/1991, p.125.
(485) The point comes across clearly when realising the concerns that involved the drafting of the provision, especially as regards the discretion that would be conferred upon courts (ILC/Yearbook/1953(I), pp.130-134).
(486) This is shown by the Tribunal in the *Anglo/French* arbitration (cf. paras.2.4.b), 2.4.c)(iii) *supra*).

however, is that the notion of special circumstances had been devised explicitly to effect the *renvoi* to equity – which takes us back to the initial, unanswered question. Why was the combined formula not applied? The only rational explanation is that the Court sought to avoid giving equidistance any endorsement in the process of ordering the ocean space.

The 1977 award demonstrated, through recourse to examples imported from state practice, how the equidistance-special circumstances rule operated. More importantly, it showed that state practice did not view equity as an autonomous means of delimitation, but rather as a tool to mould strict equidistance to the circumstances of each case. By equating the conventional formula to the application of equitable principles, the Tribunal attempted (unsuccessfully) to reconcile the 1969 Judgment with conventional law. Although the freedom of choice of courts as to the means of delimitation was toned down (by stating that courts did not have *carte blanche* in the choice of methods[487]), it was insufficient to prevent courts from claiming later further discretion, on the basis of equity.

The 1981 *Dubai/Sharjah* Award adopts a similar conception of law, and also resorts to the equidistance-special circumstances formula to reach an equitable result between adjacent states. Analogously, the need to achieve an equitable result was viewed as a matter of "remedying distortions" caused by certain coastal features on the equidistance-line, which would amount to "inequitable deflections". The Tribunal supported the restrictive view of the 1977 Award as to natural prolongation and proportionality, the references to which in the 1969 Judgment it considered as *dicta* (thus not part of the *ratio decidendi*)[488].

The process that led to the provisions on maritime delimitation incorporated in the LOSC was analysed above. The equidistance-special circumstances formula was kept as the means whereby territorial sea delimitations were to be effected. As regards the EEZ and the continental shelf, the compromise that was found prescribes that an equitable solution is to be achieved. No reference to an obligation of means is made, however, appearing instead a *renvoi* to international law. The role of equity in maritime delimitation was confined, strictly speaking, to the result.

Perhaps because of the question posed by the parties[489], the *Tunisia/Libya* Judgment presents the role of equity in maritime delimitation in a different fashion. With the greatest respect, however, we must side with those who disagreed with the approach adopted in the Judgment[490]. Considering the approach adopted in the 1977 arbitration, claiming that the

(487) RIAA/18, p.114, para.245.
(488) ILR/91/1993, pp.662-678. Unfortunately, this award was not made public immediately.
(489) The parties asked the Court to determine which principles and rules of international law were applicable to the delimitation and, in rendering its decision, to have account of three factors: equitable principles, the relevant circumstances which characterise the area; the new accepted trends in the Third Conference (Article 1 of the Special Agreement, ICJ/Reports/1982, p.21, para.2).
(490) Dissenting Opinions of Judges Gros, Oda and Evensen, ICJ/Reports/1982, pp.147-156, 253-260, 290-299.

equitableness of the result justified a wide freedom of choice of means would require sound reasoning; which the Court did not provide. To state that a principle "cannot be interpreted in the abstract", that it is "subordinate" to a goal, and that it acquires the quality 'equitable' "by reference to the equitableness of the result" that it attains *in concreto* is conceptually odd[491]. Principles embody precisely abstract 'ideal-oughts' – which are neither subordinate to a goal, nor determined by factual circumstances or by the results achieved thereby. Most importantly, subjecting the resort to (supposedly) normative prescriptions to their ability to attain a certain result – that seen by the majority of judges as equitable – appears to amount to the exercise of an *ex aequo et bono* power.

This 'boundless equity' stems, perhaps to a great extent, from the way in which the Court devised the recourse to equity in 1969. At the time, the idea that the freedom to weigh-up whatever circumstances were deemed relevant was vested in states only, and that courts had no similar power, was not properly emphasised[492]. Insofar as the recourse to equity was seen as stemming from a *renvoi* effected by customary law, the misinterpretation was enhanced. The limits imposed on equity as a result of its interaction with other normative prescriptions of the *corpus juris* became blurred, appearing as if one were allowed legally to apply equity in absolute terms. Had equity been presented as a general principle of law, perhaps no such problem would have arisen. The other reason that appears to explain this 'boundless equity' concerns the content of the provisions on delimitation included in the draft-LOSC – which mentioning the need to achieve an equitable result. However, they also prescribe that the delimitation is to be effected "on the basis of international law", which means that there are legal limits imposed on equity. The reasoning in the *Tunisia/Libya* Judgment seems to have forgotten these limits.

The *Gulf of Maine* Judgment states that international law prescribes only, in general terms, the application of undefined "equitable criteria", which are determinable essentially in the light of the geographical setting of the area[493]. The change from 'principles' to 'criteria' is not devoid of meaning, for the latter "are not themselves rules of law"[494]. To the Chamber, whereas 'principle' appears to be a term connoted clearly with normativity (being thus general and abstract), the term 'criteria' surfaces as related with assessments of fact (viewed as unique for each case). In this respect, Degan suggests that the "main merit of this Judgment [...] was that it introduced an order between different categories of genuine 'principles and rules' of international law [...] and of the application of 'equitable criteria'

(491) ICJ/Reports/1982, p.59, para.70.
(492) As will be seen, this was made in 1985, in the *Libya/Malta* case.
(493) ICJ/Reports/1984, p.278, para.59.
(494) *Ibid.*, p.313, para.158.

and use of 'practical methods' capable of ensuring an equitable result'"[495]. The notion of "*unicum*" emerges as the justification for falling back on a notion of equity that allows wide room for discretion[496]. The problem is that this approach, as that of the *Tunisia/Libya* case, completely obscures the thin line that separates decisions which apply equity as part of the Law and *ex aequo et bono* decisions. A similar view, also referring to the idea of *unicum*, was adopted in the 1985 *Guinea/Guinea-Bissau* arbitration[497].

The *Libya/Malta* case, despite bearing a transitional flavour, is a landmark decision. While apparently not departing dramatically from the views on equity laid down in previous decisions, it has indeed 'rebuilt' the notion of equity on more solid grounds. Equidistance emerges as a provisional delimitation line[498], to be adjusted on the basis of equitable considerations related to the specificities of the case (in particular, here, proportionality)[499]. The most important aspect of the Judgment, however, is the way in which equity is confined to certain bounds, in order to increase the level of predictability of considerations to weigh. The Court's *dicta* are so relevant that it is worthwhile quoting in full passages regarding the limits of equity[500]:

> [T]he justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application. [...] [A]lthough there may be no legal limit to the considerations which states may take account of, this can hardly be true for a Court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion.

The Court had finally acknowledged the dangers of the approach that it had adopted until then. In a few lines, it addressed all key issues concerning the scope of equity as part of Law. First, it stressed that, being part of Law the recourse to equity should display consistency and some degree of predictability, and be of general application – which is the basis of the certainty borne by normative prescriptions. Secondly, it complemented the 1969 Judgment by emphasising that the considerations that courts are entitled to weigh, although not limited by any "closed list", do not encompass all those that states may consider in negotiations. Finally, it offered what is perhaps the most relevant contribution of this

(495) Degan/1987, p.122.
(496) ICJ/Reports/1984, p.290, para.81 (French version).
(497) ILM/25/1986, pp.289-290, paras.87-90.
(498) Commenting on the fact that the Court's "apologetic" approach in this regard, Evans observes quite rightly that "it is difficult to see what other 'starting-point' could have served its purposes so well" (Evans/1999, p.159).
(499) ICJ/Reports/1985, pp.37-38, 44-56, paras.43, 57-78.
(500) *Ibid.*, pp.39-40, paras.45, 48.

Judgment when it established a substantive criterion on the basis of which such considerations are to be identified: only those factors legally pertinent to the institution in question may be considered. Perhaps for these reasons, Bedjaoui has affirmed that with this decision the Court conferred on equity "a normative, security-inducing, predictable dimension, general in its application"[501].

The 1992 *Canada/France* arbitration appears to be a step backwards in terms of the incorporation of equity within Law. Again, it presents an understanding of equity based on assessments of a somewhat subjective nature where proportionality becomes pivotal. To that Tribunal, the "underlying premise of [the] fundamental norm [of maritime delimitation] is the emphasis on equity and the rejection of any obligatory method"[502] (i.e. equidistance is not given any particular role). This is somewhat of a return to the application of equity as seen in the *Tunisia/Libya* case. How to explain this approach is debatable. But there are some facts that deserve attention: one is the constitution of the tribunal; the other is the majority that voted in favour of the decision. One would suggest that the views of Judge DeAréchaga (president of the Tribunal), which are well known, determined the outcome and shaped the whole reasoning. He had already considered in the Tunisia/Libya case that "the application of equity in maritime delimitation is not a mechanism designed to correct or mitigate the inequitable effects of a strict rule of law based on equidistance"[503], and that "the judicial application of equitable principles means that a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant 'factual matrix' of that case"[504]. Focusing exclusively on facts, and leaving aside constraints derived from the legal framework, he favours interpretations of equity conferring upon courts the widest room for discretion. The other element that might shed some light on the decision is the fact that the judges chosen by the parties voted both against the decision, while considering that delimitation law had not been applied[505]. This fact suggests that perhaps the award was a pragmatic compromise reached between the other three judges.

6.4.b)(iii) Third Period (1993 to Date)

The *Jan Mayen* case, re-averring essential aspects of the *Anglo/French* arbitration and the *Libya/Malta* case[506], marks the beginning of the third period. It reinstated the equidistance-special circumstances formula at the heart of maritime delimitation. Indeed, it

(501) Bedjaoui/2000, p.23.
(502) ILM/31/1992, p.1163, para.38.
(503) DeAréchaga/1987, p.238.
(504) Separate Opinion, *Tunisia/Libya* case, ICJ/Reports/1982, p.106.
(505) ILM/31/1992, pp.1181-1196 (Judge Gotlieb), 1197-1219 (Judge Weil).
(506) ICJ/Reports/1993, pp.58-64, paras.46-58.

might be argued that it incorporates a "renunciation of the earlier cases"[507]. The Court acknowledged that – as to the *result* of delimitation (to attain an "equitable solution") – Articles 74 and 83 reflect customary law[508]. As regards the *means*, while quoting the 1977 award, it recognised that state practice sought solutions "in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation"[509]. Naturally, the Court found itself "called upon to examine every particular factor of the case which might suggest an adjustment or shifting of the median line provisionally drawn"[510]. Noteworthy is equally the conclusion that there is a trend "towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this *if only because they both are intended to enable the achievement of an equitable result*"[511].

Nevertheless, the most notable contribution of the Court in relation to the notion of equity is embedded in the conclusion that – as affirmed in the *Anglo/French* arbitration – "the different ways in which the requirements of 'equitable principles' or the effects of 'special circumstances' are put reflect differences of approach and terminology rather than of substance"[512]. In relation to the choice of circumstances weighable under the notion of equity, and the limits imposed on such choice in order to ensure consistency and a degree of predictability, the Court followed the views advanced in the *Libya/Malta* case[513].

By framing the resort to equity as a notion 'corrective of equidistance', the Court completed the full circle of delimitation law. With respect to the means to 'choose a line', it took delimitation law back to the views adopted by the ILC, thus shaking off the "excessive scruples" in relation to the recourse to equidistance[514]. It demonstrated that although the LOSC provisions (which reflect customary law) speak of "equitable solution", what is envisaged is to avoid inequitable boundaries[515]. The function of equity is less to positively ensure an equitable solution than it is to avoid an inequitable solution[516]. As previously argued, had the aim been to positively seek equitable solutions, the means conventionally

(507) Evans/1999, p.161. He also states that this Judgment can "be seen as a rejection of the directions [the Court] was appearing to take in [...] earlier cases" (Evans/1999, p.154).
(508) ICJ/Reports/1993, p.59, para.48, *in fine*.
(509) *Ibid.*, p.61, para.51. Interestingly, in the same sentence equidistance seems to be viewed as "method" and "criterion".
(510) *Ibid.*, p.62, para.54. Apparently, the Court assumed that the dictum of the 1977 arbitration, as regards the relationship between equidistance-special circumstances and equitable principles, meant that equidistance is the starting point of the delimitation also under customary law (cf. para.2.4.c)(i) *supra*). Evans refers to an export of equidistance into customary law (Evans/1999, p.160).
(511) ICJ/Reports/1993, p.62, para.56, emphasis added. Judge Schwebel observes that special circumstances cannot be equated to relevant circumstances (Separate Opinion, ICJ/Reports/1993, p.121).
(512) ICJ/Reports/1993, p.63, para.56.
(513) *Ibid.*, pp.63-64, paras.57-58.
(514) Thirlway/1994, p.83.
(515) The example of "proportionality" is again paradigmatic. As was stressed, again by citing the 1977 award, "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor" (ICJ/Reports/1993, p.67, para.66).
(516) Weil/1996, p.139. Cf. also Judge Schwebel, Separate Opinion, *Gulf of Maine* case, ICJ/Reports/1984, p.353.

consecrated thereto would have been "equity" (as happens in Articles 59, 69(1) and 70(1) of the LOSC), and not "international law" (as stated in Articles 74 and 83). The Court's approach lends support to the idea that the boundary is to be attained through the mitigation of any unreasonable effects derived from the application of strict equidistance, whose unreasonableness is to be assessed *in concreto*. Similarly, it leaves no doubt that, in adjudication, the relevant factors are substantively limited by the regime of the zone in question (although they cannot be enumerated exhaustively)[517].

These views were endorsed in the *Eritrea/Yemen* arbitration, and reaffirmed in the *Qatar/Bahrain* case. Recourse was had again to the equidistance-special circumstances formula as means of delimitation. The idea of non-inequitableness of the boundary is again presented under the guise of "reasonableness" and "non-disproportion"[518]. Importantly, in the *Qatar/Bahrain* case, no distinction was made between adjacency (the northern sector) and oppositeness (the southern sector) as to the use of equidistance as starting point for the delimitation – which is undoubtedly a welcomed and much needed development[519].

After much controversy, the balance between certainty (normativity) and justice (equity) in maritime delimitation law finally seems to have been struck. Unsurprisingly, this was achieved through recourse to the equidistance-special circumstances formula, which as Franck has stated is a rule that exemplifies "the effort to balance determinacy with concern for justice"[520]. Importantly, it brings together state practice, conventional law and case law. Noteworthy is also the fact that it confers upon courts the task that had been envisaged by the ILC members: the identification of the circumstances which, in the light of equity, justify departure from strict equidistance, in order to provide relief from undue hardship. Today, the administration of equity by courts seems to finally evolve within the juridical framework provided for international law.

6.4.b)(iv) A Requiem for the Term "Equitable Principles"

That equity is inherent in maritime delimitation is doubtless. What has raised doubts is the way in which it operates, and whether or not it is a normative standard. Interrelated here are equally terminological issues. For instance, are "equitable principles" synonymous

(517) On the question of the choice of factors, cf. para.7.1.b) *infra*.

(518) Eritrea/Yemen-II, paras.116-119, 130-131, 142, 150, 159-160, 165, 168; Qatar/Bahrain-Merits, paras.218-219, 229-232, 244-249.

(519) In a commentary to the second award of the Eritrea/Yemen arbitration, the author has already suggested that "the distinction between situations of oppositeness and adjacency is of artificial, and not understandable in both juridical and technical terms", and that "courts should not distinguish between them". Then, it was equally argued that "equidistance is, in both situations, the most equitable, and predictable, starting point that may be used", and that there seemed to be no reason for not applying the equidistance-special circumstances formula to both situations in exactly the same terms (cf. Antunes/2001, pp.335-336; although published only after the *Qatar/Bahrain* Judgment, the article was written earlier).

(520) Franck/1997, p.61.

with equity, or should they be understood differently? Is there a "principle of equity", and if so, how does it relate to "equitable principles"? In attempting to answer these questions, it is submitted that, in its normative facet, "equity" is a general principle of law, and that "equitable principles" stem from it, and are mere expressions of normativity *in casu*. Their existence as normative standards is indeed spurious[521].

The primary distinction to be made is that between '*obligation of result*' and '*obligation of means*'. An obligation of result (achieving an equitable solution) does not entail an obligation of means – whereby equity is applied with exclusion of other standards in the determination of the boundary[522]. The *Jan Mayen* Judgment seems to suggest that customary law and conventional law cover only the former. If this is true, then the Court has changed the complexion of delimitation law. First, it allows equitable principles to be equated to the equidistance-special circumstances rule (as proposed in the *Anglo/French* arbitration). Case law thus converges towards state practice, leading to a higher level of crystallisation of delimitation law. Secondly, as a result, because the combined formula must be subject to a teleological element – to attain a non-inequitable boundary, "relevant circumstances" become subsumed in the notion of "special circumstances" – and are to be interpreted in the context of the combined formula. Equity emerges therefore as having a corrective role, referenced to equidistance. And it goes without saying that ultimately, this approach amounts to aver the substantive emptiness of the term "equitable principles".

The disuse of the term 'equitable principles' in case law[523], instead of being reason for concern, should be welcomed. For it is likely to bring some clarity into what have been for a long time muddy waters. As noted by Judge Bedjaoui, the truth is that the Court has never provided a clear definition of what it meant thereby. As he also acknowledges, the (re)discovery of the expression 'equitable principles' is historically related to equidistance, to which the former was to serve as counterweight ("*servir de contrepoids*")[524]. If this was the true motivation, then courts overlooked in a number of instances that to counterbalance equidistance the only thing necessary was a statement averring the teleological element embodied in the notion of special circumstances.

What has never been demonstrated is the existence of an extensive, settled and virtually uniform state practice supporting the recourse to equitable principles as means of

(521) Paras.6.2.a), 6.2.c)(ii) *supra*, Conclusions to Part II *infra*.

(522) Judge Bedjaoui advanced this view in his Dissenting Opinion in the *Guinea-Bissau/Senegal* arbitration (ILR/83/1990, p.91).

(523) In the *Eritrea/Yemen* arbitration, this term was used to refer to the Yemeni case (which saw it as the basis for the adjustment of equidistance), in the context of citations concerning proportionality that referred to the 1969 Judgment (Eritrea/Yemen-II, paras.19, 39, 165). The references in the Qatar/Bahrain concern a quotation of a letter dated 1946, and a statement of the Court as to the close relationship with the equidistance-special circumstances formula (Qatar/Bahrain-Merits, paras.61, 231).

(524) Bedjaoui/1990, p.370.

delimitation[525]. Nor has it been shown that equitable principles are normative standards (principles of law or rules *stricto sensu* the application of which as standards is mandatory in every case), or that they have a meaning other than that of the principle of equity. Besides being essentially judge-made ("*essentiellement prétorien*" in the words of Judge Bedjaoui), equitable principles bear a normativity that is derived from the fact that the principle of equity is inherent in the 'fundamental norm' of delimitation[526].

The reference in the *North Sea* Judgment to "very general precepts of justice and good faith", as the foundation of equitable principles[527], cannot be seen as other than a reference to "general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state", which was taken here as the definition of equity[528]. The whole problem, one would submit, revolved around the need to confine the scope of equity to its normative facet. Because the debate concerning general principles of law would introduce more difficulties in an already difficult Judgment, the Court presented "equitable principles" as customary law to circumvent the issue. This expression was part of an artifice that, while allowing the recourse to equity within Article 38(1) the Statute of the Court, evaded the debate on the existence of a *tertium genus* of normativity[529].

The conceptual problem however, is that equity is a filigree of expressions of justice that cannot be captured by a rule of law *stricto sensu* (which applies to class-events and provides specific solutions). This is why the customary rule identified by the Court incorporated a permission to apply equity, which because of the Truman Proclamation was dressed as equitable principles. The consequence of this *renvoi* was that the scope of equity seemed to have no bounds, because it appeared that it was the law itself that allowed its unlimited application with a view to generate an equitable solution. Had 'normative equity' been presented as a general principle of law, and the limits on the resort to equity would perhaps have become clearer.

What are then the contents of the principle of equity? And how does it operate in maritime delimitation? As "general principles of justice" which cut across all legal orders, it is contended, equity equates to reasonableness. It stipulates that both the interpretation and application of normative standards, and the result thereof, must be reasonable in the light of the factual circumstances of each case[530]. What is reasonable, however, can be determined only *in concreto*. To courts, this means that they are endowed with a power of discretion the

(525) Para.3.3.b)(iv), Conclusions to Part I *supra*.
(526) Bedjaoui/1990, p.387.
(527) ICJ/Reports/1969, pp.47-48, para.85.
(528) Para.6.4.a)(i) *supra*.
(529) Para.2.3.b)(ii) *supra*.
(530) Para.6.4.a)(v) *supra*.

exercise of which must take place in the context of the whole *corpus juris* and be justified through judicial reasoning. Suffice it to say that important steps taken by courts in delimitation are simply justified by equating (in)equitableness with (un)reasonableness or (dis)proportionality[531]. As states virtually have unlimited discretion in exercising, as well as disposing of, their rights[532], what is required in negotiation is that decisions be attained by consent of all states whose interests are involved[533]. Either way, reasonableness cannot be defined in positive law; it requires a decision *in concreto*[534].

Being a principle, equity is never to be applied in absolute terms. As mentioned, because what principles require is "to realise something to the highest degree possible relative to the factual and legal possibilities" *in casu*, "they are to be optimised in relative terms"[535]. It is through a process of balancing-up factual and legal circumstances, that the 'ideal *prima facie* ought' of principles is converted into a 'definite ought'. Consider the principles of equity and of stability and finality of boundaries. The rule whereby boundary treaties are excluded from the *tabula rasa* rule (which applies to newly independent states in terms of treaty succession) expresses the prevalence of the latter principle – regardless of whether the solution embodied therein is equitable[536]. The rule excluding boundary treaties from the regime of the *rebus sic stantibus* clause is a similar example[537]. As observed in the *Guinea-Bissau/Senegal* arbitration, "there does not exist at present in positive international law any customary norm or any general principle of law that would authorise states which have concluded a valid treaty concerning maritime delimitation, or their successors, to verify or review its equitable character"[538]. These examples express the balance struck in international law between the principle of stability and finality of boundaries and the principle of equity. However, in delimitation *proprio sensu* – which presupposes that no boundary has yet been established, the weight of equity has to be assessed under a different legal light.

(531) Cf. e.g. *North Sea* cases, ICJ/Reports/1969, pp.24-25, 50, 52-53, paras24, 90, 97-98; *Anglo/French* arbitration, RIAA/18, pp.57-58, 93-95, 113-115, paras.99-101, 196-201, 242-246; *Tunisia/Libya* case, ICJ/Reports/1982, pp.60, 88, paras.72, 127; *Gulf of Maine* case, ICJ/Reports/1984, pp.301, 313, 323, 327-328, 335, paras.115, 158, 185, 196, 220; Libya/Malta case, pp.44, 49, 51-52, paras.56, 66, 72-73; *Canada/France* arbitration, ILM/XXI/1992, pp.1169-1170, paras.68-69; *Jan Mayen* case, ICJ/Reports/1993, pp.65-69, paras.61-69; Eritrea/Yemen-II, paras.116-119, 130-131, 142, 150, 159-160, 165, 168; Qatar/Bahrain-Merits, paras.218-219, 229-232, 244-249.

(532) Para.6.1.b)(ii) *supra*.

(533) For instance, Article 17 of the 1997 Convention on Non-Navigational Uses of International Watercourses refers, in the framework of the equitable and reasonable utilisation and development of the watercourse, to "negotiations with a view to *arriving at an equitable resolution* of the situation", and states that "negotiations shall be conducted on the basis that each State must in good faith *pay reasonable regard to the rights and legitimate interests of the other State*" (emphasis added).

(534) Para.6.4.a)(iii) *supra*.

(535) Para.6.2.b) *supra*.

(536) VCSSRT, Article 11. Cf. *Guinea-Bissau/Senegal* arbitration, ILR/83/1990, pp.35-37, paras.61-65. But this is not free from difficulties; as Judge Bedjaoui stressed in his Dissenting Opinion, the *uti possidetis* principle might lead to an unjust solution (ILR/83/1990, pp.56-85, p.62 in particular).

(537) VCLT, Article 62(2)(a); see the *Aegean Sea* case, ICJ/Reports/1978, p.37, para.85.

(538) ILR/83/1990, p.43, para.79.

Until the 1950s, maritime delimitation law was virtually non-existent, even in relation to the territorial sea. Why the principle of equity became paramount must be seen by reference to two thoughts. The normative density of maritime delimitation law was until the 1950s minimal. Adding to this, the delimitation of jurisdictional zones concerned primarily the partitioning of and access to natural resources. This meant that the normative standards for delimitation had to be developed progressively, in a way that had to leave room for accommodating unforeseeable cases, and that would effect a fair division of the natural resources. Equity turned into an inescapable standard. 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.

To summarise, it is the principle of equity, rather than the undefined notion of equitable principles, that forms part of the normative framework of maritime delimitation. Its expression in this field of law might be translated in the following deontic statement. Considering those factors which, *in casu* and according to the substantive legal regime of the maritime zones to be delimited, might have an impact on the rights and interests of the states involved in the area of overlapping entitlements, the maritime boundary delimited between two states ought not to be unreasonable (i.e. manifest hardship is to be avoided). Three points are stressed here. Equity is a negative condition, rather than a positive one. Its role in the delimitation process is to ensure that the balance of rights and interests attained for the overlapping of entitlements is 'not grossly unreasonable'. The factors by reference to which such a balance is achieved, although stemming from the factual circumstances *in concreto*, must be selected through the legal regime of the maritime zones to be delimited.

CONCLUSIONS TO PART II

The conceptualisation proposed here is founded on the deconstruction of maritime delimitation into three central issues: the concept of maritime delimitation, the technical methodologies utilised to define a boundary-line, and the applicable normative standards. Far from independent of each other, these issues are constituted by intertwined elements, which only when taken as a coherent whole allow a proper understanding of the subject. The deconstruction having served its purpose – a separate analysis of each issue, one must begin to reconstruct the delimitation problem as an organised set of ideas on the basis of which the quest for actual boundary-lines is to be undertaken.

According to the argument of Chapter 4, maritime delimitation is an operation that encompasses the political-legal determination, and the technical definition, of a maritime boundary. Naturally, it is presupposed that the boundary has not yet been determined *de jure*, either formally, or tacitly. Central maritime delimitation is an overlapping of at least two legally valid maritime entitlements. The object of the 'juridical positions' of the states involved is wholly or partially coincident, thus consubstantiating a concurrence of rights. Only when this concurrence of rights is resolved through delimitation does the exercise of exclusive jurisdictional powers become possible. The question is therefore one of spatial allocation of authority within a disputed area, which entails the 'amputation' of at least one of the overlapping maritime entitlements.

In this light, we are exhorted to delve into two focal points. What are the normative standards by which the determination of the boundary is governed? Which technical means and parameters are involved in this decision, and in the implementation thereof?

Intertwined in the answer to the first question is one prior distinction concerning the procedural means utilised in delimitation. For states involved in the negotiation of maritime boundaries all that is required is that the solution be achieved by mutual consent. There are virtually no limits to their consensual choices. Courts asked to delimit maritime boundaries are however in a different situation. Regardless of the level of normative density with which they are faced (which is recognisably low in delimitation law, and which in consequence results in a wide margin of discretion for courts), their decisions must be reasoned on the basis of international law. Adjudicated boundaries ought to be reached through analyses that must be objective, account taken of the applicable normative standards. In other words,

binding on courts, delimitation law is merely suppletive to states. Notwithstanding this distinction the reality is that states involved in negotiation do consider delimitation law for purposes of preparing and justifying their claims. For this reason, the following conclusions are relevant for both courts and states.

With respect to normativity in maritime delimitation, the picture is problematic. Its description requires that distinction be made between what is the result to achieve, and the means whereby the result is to be sought. That conventional law and customary law both require that an equitable solution be achieved – or more precisely, that inequitable solutions be avoided – is undoubted. This applies to all maritime zones, the territorial sea included. It is true that the delimitation provisions of the LOSC, for the territorial sea, and for the EEZ and continental shelf, do not have the same wording. But they do share a common element: the delimitation must result in a non-inequitable boundary[539].

As to an obligation of means, the question is posed differently for the territorial sea and for the maritime zones beyond it. The resort to the equidistance-special circumstances rule in territorial sea delimitation has raised no controversy. Consecrated in conventional law, this formula has been deemed to reflect customary law. In EEZ and continental shelf delimitation, while conventional law provides no guidance, the proposition that 'equitable principles' are part of customary law faces too many conceptual difficulties to be accepted. The rejection of the legal content of equidistance, and the argument that under a rule of law prescribing the use of equity courts have a freedom of choice of relevant circumstances and applicable methods, find no support in state practice. States have overwhelmingly upheld approaches based on equidistance, adjusted where necessary to accommodate the equities *in concreto*. After the *Jan Mayen* case, which consolidated the views of the *Anglo/French* arbitration, case law has converged with state practice. Today, the delimitation of maritime boundaries is founded on the equidistance-special circumstances formula. Suggesting that this results from the fact that this formula equates to 'equitable principles', is unpersuasive. Further, it only manages to muddle the understanding thereof.

Given the systematic and historical elements, as well as state practice and recent jurisprudence, another approach is conceptually preferable. This study has argued that the normative standards of maritime delimitation are two principles of law: the principle of maritime zoning and the principle of equity[540]. It is from the 'normative portmanteau' formed by the two 'ideal oughts' incorporated therein that the non-inequitable solution must

(539) In the ILC preparatory work, it became clear that one of the key concerns of delimitation, whether it regarded the territorial sea or the continental shelf, should be to avoid inequitable solutions. The inclusion of navigation and fishing interests amongst the possible special circumstances in territorial sea delimitation is the best token of the need to avoid inequitable solutions.

(540) Antunes/2001, pp.343-344; Antunes/2000c, pp.188-189. The idea that the ILC, or at least some of its members, sought to derive rules from existing legal principles has already been mentioned (cf. paras.1.2.b)(ii), 1.2.c) *supra*).

stem. Despite not being explicitly mentioned, these two principles are reflected in the LOSC. For instance, the principle of equity is patent in the reference to an equitable solution. In respect of the relevance of the principle of maritime zoning, it suffices to say that it would be odd to accept that the delimitation of maritime states could be effected without considering the very basis on which rest the rights of states over the maritime zones to be delimited.

Why the approach adopted here is preferable, and how precisely the two principles interact in shaping the legal framework of maritime delimitation, are questions that require further elaboration. The first point to emphasise is that state practice should be weighed in conceptualising the law (even if not reflecting the normative content of an *opinio juris*, as a quasi-normative *opinio aequitatis*)[541]. It would be too simplistic to literally dismiss an overwhelming number of agreements that endorse equidistance on the ground that equidistance is merely a method, and hence legally valueless. The equidistance method concerns computations (and related issues) necessary to technically define a line running at equal distance from certain pre-established or selected basepoints. Beneath the denomination 'equidistance' also lies a corollary legal principle. The principle of maritime zoning represents the legal counterpoint between 'exclusiveness' and 'inclusiveness'. In the legal order of the ocean, it operates area-attributions primarily on the basis of 'distance from the coast'. Maritime delimitation amounts to ordering maritime spaces as between the areas of 'exclusiveness' belonging to (at least) two states. Dressed as 'closer proximity', distance becomes in this context the 'natural' legal criterion for *prima facie* area-attribution.

This brings us to the second point. From a conceptual standpoint, the mandatory use of equidistance as the starting point for delimitation is the only logical conclusion. First, if states are entitled to exclude the community of states from enjoying certain rights in areas defined by reference to distance to their coasts, then in principle they are also entitled to exclude other states individually on the basis of 'closer proximity'. Secondly, delimitation consists of the determination of a line that will effect the division of an object-area over which (at least) two states hold concurrent rights. To suggest that the concurrence of rights might be resolved (maritime delimitation) without somehow weighing-up the foundation of the rights concurrently held (maritime entitlements) is untenable.

The third ground of justification demands a more extensive elaboration, as it covers two fundamental questions: why is there no hard and fast rule determining the course of the boundary; and related thereto, how is the discretion conferred on courts to be understood. Because the normativity is embedded in two legal principles, maritime delimitation must be

(541) For further elaboration on this point, cf. para.7.1. *infra*.

effected on the basis of an argument of principle. Legal argumentation and discourse thus have to bear in mind that the application of a principle is not exclusive of another principle. When principles collide, the normativity of the system stems from their mutual influence. The two principles must be construed in the light of each other, through a relative weighing-up whereby relationships of precedence emerge *in casu*. Each principle has to be materialised to the highest degree possible relative to the factual and legal possibilities. In other words, normativity stems from (potentially) colliding principles, the integration of which moulds the outcome. 'Closer proximity' and equity therefore, must be reciprocally optimised[542].

The fact that two principles are at issue means that achieving an equitable solution – the objective of all delimitations – is not an exercise in equity. In the *Tunisia/Libya* case, dissenting voices were heard precisely because equity was arguably applied without regard for any proper contextual (legal) confinement. At the time, it was noted that

> [t]here is a profound gulf between an equitable solution which is found upon the rules of law applicable to the relevant fact accurately and fully taken into account, and an equitable solution which is founded upon subjective and sometimes divided assessments of the facts, regardless of the law of delimitation. The equity considerations to be applied must be placed in some legal context. If applied in a legal void as entirely self-sufficient, equity may easily change the character of a decision from being a decision under Article 38, paragraph 1 of the Statute to becoming an *ex aequo et bono* decision.[543]

Recourse to 'normative equity' as envisaged in this study is not simply a question of arriving at "a decision shaped by and adjusted to the relevant 'factual matrix' of each case"[544]. In the transposition from the 'ideal ought' of the principle of equity to the 'definite ought' applicable *in concreto*, account must be taken of the 'legal matrix'. This amounts to factoring the principle of maritime zoning into the legal equation of maritime delimitation. The *dictum* in the *Libya/Malta* Judgment[545], as regards the need to obtain predictability and consistency by considering the legal regime of the maritime zone to be delimited, lends support to this view. Despite difficulties surrounding equity, seeking a non-inequitable boundary is not an exercise in unrestrained 'subjectivity'. Judicial decision-making allows only the subjectivity inherent in the 'back and forth journey between facts and normativity'. As Kratochwil says, 'justice' is less an intrinsic attribute of formal principles, and more "the result of *reasonable and principled use of norms* in making practical judgments about

(542) Para.6.2.b) *supra*. On how this is to be implemented in practice, cf. paras.7.3., 7.4. *infra*.
(543) Judge Gros, Dissenting Opinion, ICJ/Reports/1982, p.153; Judge Evensen, Dissenting Opinion, ICJ/Reports/1982, p.294.
(544) DeArèchaga/1987, p.232. Cf. also Judge DeArèchaga, Separate Opinion, *Tunisia/Libya* case, ICJ/Reports/1982, p.106.
(545) ICJ/Reports/1985, pp.39-40, paras.45, 48.

factual situations"[546]. Not surprisingly, reasonableness of means and reasonableness of result – as expressions of equity – are concepts not unknown to the Court[547].

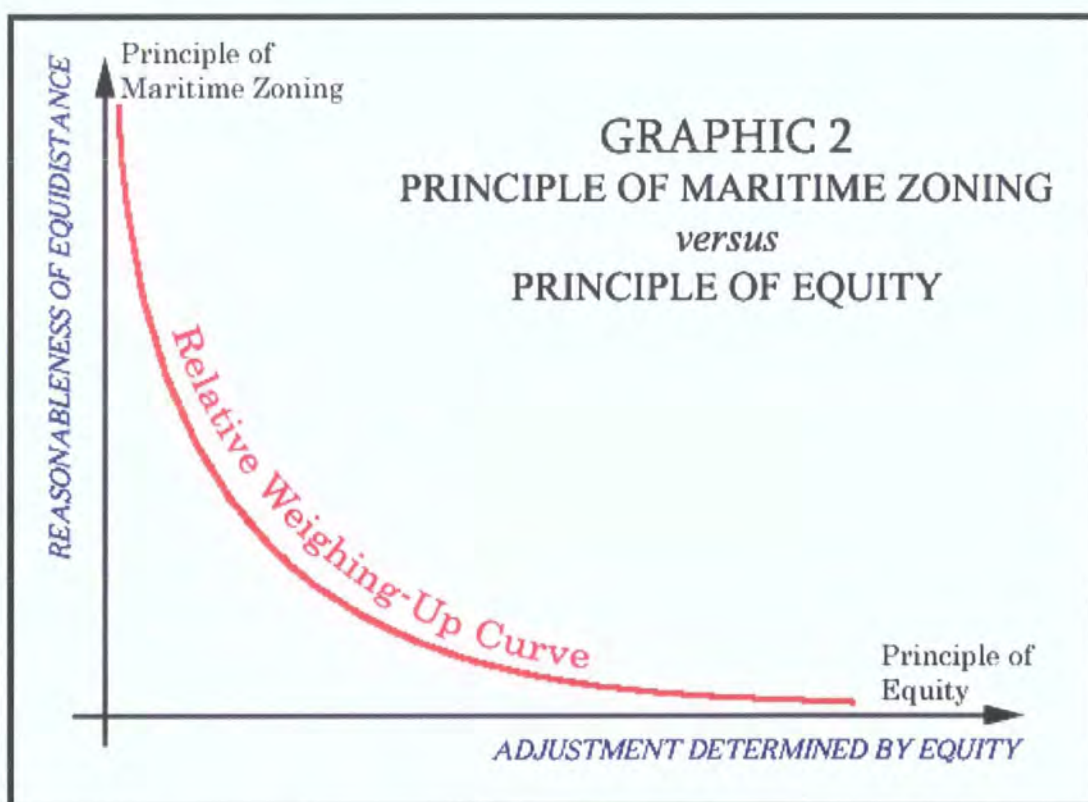
The wide berth given to 'subjectivity' in maritime delimitation is derived *inter alia* from the fact that the means of delimitation are not set down in any rule. The normativity stems from principles – standards with a variable scope. When 'closer proximity' leads to a reasonable solution, it is because the factual circumstances *in casu* do not cause the two principles to collide. Conversely, when the equidistant boundary is deemed inequitable, this means that the two principles collide. The two principles must then undergo a process of optimisation, which as said consists of a juridical appraisal referenced to both the 'legal matrix' and the 'factual matrix'. In the 'harmonisation' of concurrent rights inherent in this process, recourse should be had to the 'maxim of proportionality', and particularly its three sub-parameters: adequacy, necessity, and proportionality *stricto sensu*[548]. The outcome must be adequate to resolve the concurrence of rights, entail to each concurrent position only the restrictions necessary to reach the balance, and reflect an *equilibrium* in which the legally relevant facts are weighed-up in proportionate fashion. A non-inequitable solution results from the optimisation of principles thus effectuated[549].

Here, it is worth noting that the question of concurrent rights has been dealt with in Portuguese private law since the 19th century. The 1867 Civil Code (*Código de Seabra*) contained unparalleled norms in this respect[550]. Article 14 stated: "Whomever exercising its own right seeks benefits shall, in case of conflict and in absence of a special provision, cede to whomever seeks to avoid damages." And Article 15 added: "In the case of concurrence of equal rights or rights of the same kind, those concerned *shall cede reciprocally as necessary for both rights to be effective, without larger detriment to one party than to the other.*" Under the Portuguese Civil Code currently in force, the solution remains largely the same. Paragraph 1 of Article 335 states: "Where there is a collision of equal rights or rights of the same kind, those entitled *shall cede to the extent necessary for all rights to be equally effective, without larger detriment to either party.*" Paragraph 2 adds: "If the rights in question are unequal or of a different kind, that which is deemed superior shall prevail."

These provisions have the merit of explaining how concurrence of legal rights is to be resolved. Although not explicitly mentioning the 'maxim of proportionality', they have enshrined its core ideas. First, a distinction is made between equal rights and rights of a different kind, thus raising the question of *appropriateness* (which lies at the heart of the

(546) Kratochwil/1989, p.240.
(547) Cf. paras.6.4.a)(v), 6.4.b)(iv) *supra*.
(548) Larenz/1989, Chapter V.3., pp.490-502.
(549) On the relevant factors, and the problem of optimisation, cf. paras.7.2.,7.3., 7.4. *infra*.
(550) Resorting to these provisions for describing conceptually maritime delimitation, cf. Teles/1998 (unpublished), paras.16-17.

concept of precedence between different entitlements)[551]. Secondly, it refers to 'reciprocal cession' between the rights involved, which seeks to preserve the existence of each right. This mutual conformation is limited by *necessity* in that unnecessary restrictions will not be imposed on either party; and it underlies the notion of maximisation of principles, equating to a minimisation of the 'amputation' of each entitlement[552]. Thirdly, the balance between the detriment caused to either party entails one consideration: there must be a *proportionate balance* between the parties' positions; such an *equilibrium* is best described as a matter of avoiding detriment (negative element) rather as a matter of redistributing benefits (positive element). Arguments of equity demand restraint and caution, especially in international law where they encompass only the (small) common ground between all systems. The reference to avoiding detriment reflects this requirement. The obligation of result (avoiding inequity) and the perception that proportionality amounts to avoiding disproportion are examples of its reflection in delimitation law.



The proposition so far advanced may be better understood through the sliding-scale illustrated in Graphic 2 above. The optimisation of principles amounts to the 'discovery' of the 'case-norm' whereby the delimitation is decided. This 'case-norm' corresponds to a specific point on a 'relative weighing-up curve' oriented along two axes – one representing

(551) Para.4.3.d)(iii)(iv) *supra*.
(552) Para.4.3.d)(ii) *supra*.

the principle of maritime zoning, the other representing the principle of equity. Should equidistance yield a reasonable boundary-line, the role played *in concreto* by the principle of equity is minor. By contrast, if the equidistance-line is unreasonable, while the principle of maritime zoning becomes less dominant, the principle of equity becomes predominant. Because equidistance frequently results in boundary-lines that require little adjustment to become reasonable, most cases will fall in the left-mid part of the scale. Conceptually, this approach offers an explanation for two points that have been debated at length. First, the equidistance-special circumstances rule is an expression of two principles of international law; and must be interpreted in their light[553]. Secondly, to the extent that these principles are reconcilable, the legal argument between those who supported equidistance and those who supported equity has indeed been "based on a false antithesis"[554].

From a practical perspective, this signifies that each maritime entitlement may be restricted only to the extent appropriate and necessary to reach a non-inequitable solution. As the means to reach justice, equity cannot go beyond what justice quintessentially requires: that extreme injustice be avoided[555]. In ideal scenarios, the 'amputation' of the entitlements is minimised equally for both sides, throughout the overlapping entitlements, when it is carried out by equidistance. This explains the *prima facie* equitable nature of equidistance[556]. Only where an *equilibrium* between the positions of the parties cannot be reached through this line may courts depart therefrom. Even then, such a departure from equidistance is restricted to the extent needed to arrive at a non-inequitable (reasonable) balance, i.e. to avoid a clear detriment to either party.

The exact course of the boundary depends upon the 'definite ought' that stems from the harmonisation of these two principles. This can only be determined *in concreto*, hence explaining why there is no rigid, generally applicable formula to this effect. Nevertheless, it is incorrect to suggest that courts have a freedom of choice of line. Owing to the principle of maritime zoning, courts are bound to utilise an equidistance-line as the starting point for the decision. International law does not ascribe courts a *carte blanche* to depart therefrom. This by no means tantamount to affirming that adjudicated boundaries cannot be other than equidistance-lines. Boundary-lines can be, for example, modified versions of equidistance, variants thereof, bearing lines, parallels or meridians, 'corridor lines', or even lines based

(553) The fact that this rule was designed from its inception to "partake of some elasticity", and to confer prevalence upon the "major principle of equidistance", "subject to reasonable modifications necessitated by the special circumstances of the case" (cf. ILC/Yearbook/1953(II), p.216), corroborates this standpoint. Indeed, it reflects the normative balance that the ILC sought to strike between geography and justice (cf. para.1.2.c) supra).

(554) Jennings/Watts/1997, p.780.

(555) Para.6.4.a)(ii) *supra*.

(556) Para.6.3.d)(iv) *supra*.

on enclaving methodologies. The proviso however, is that such lines stem from a legal reasoning based on the adjustment of a mandatory, provisional equidistance-line[557].

For reasons perhaps related with the reluctance of courts in 'back-stepping' from previous positions, this view has not yet been explicitly averred. It ought nonetheless to be said that the ICJ seems to have implicitly (or subliminally) endorsed it. In the *Jan Mayen* case, it stated that analysing the delimitation problem from the point of view of equitable principles or on the basis of the equidistance-special circumstances formula reflected "differences of approach and terminology rather than of substance"[558]. In the *Qatar/Bahrain* case, this view was complemented with the assertion that resort to the equidistance-special circumstances rule was the "most logical and widely practised approach"[559].

Regardless of terminological quarrels, the conclusion appears to be clear. Just as the recourse to equidistance as criterion of division of zones of exclusive maritime jurisdiction is subject to the principle of equity, so is the latter (which concerns the choice of facts to weigh, how to weigh them, and how to reflect this in the course of the boundary) subject to the principle of maritime zoning.

In his Dissenting Opinion in the *Canada/France* arbitration, Weil advanced an idea that is arguably the best proposal yet to sum up the content of delimitation law. The guiding thread is the reasonableness [equity] of the distance of the boundary from each coastline [maritime zoning][560]. In the *Qatar/Bahrain* case, the Court expressed a similar view when it did not attribute full-effect to Fasht al Azm (an insular feature) because it "would place the boundary *disproportionately close* [equity] to Qatar's mainland coast [maritime zoning]"[561]. That *reasonable distance* depends on the circumstances *in casu* is obvious. Less obvious, but equally important, is the idea that *reasonable distance* depends upon the *equilibrium* between the rights and interests of each state on each point at sea, a question intertwined with the regime of maritime zones[562].

Why it was previously argued that the 'criteria' and 'principles' enumerated in the *Gulf of Maine* and *Libya/Malta* cases are no more than expressions of normativity *in casu* may now be clarified[563]. Those standards are in effect expressions of the optimisation between the principle of maritime zoning and the principle of equity. In most cases, they

(557) Which adjustments are required, what line is to be chosen, are questions that can only be answered by factoring the 'factual matrix' into the delimitation equation. This issue, which has regard to the 'content of equity', stems from absolute and relative assessments of factual evidence. Cf. Chapters 7 and 8 *infra*.

(558) *Jan Mayen* case, ICJ/Reports/1993, p.63, para.56 *in fine*, citing the *Anglo/French* arbitration, RIAA/18, p.75, para.148.

(559) Qatar/Bahrain-Merits, para.176. Similarly, Eritrea/Yemen-II, para.132.

(560) ILM/31/1992, p.1209.

(561) Qatar/Bahrain-Merits, para.218, emphasis added.

(562) Para.7.2.c) *infra*.

(563) ICJ/Reports/1985, pp.39-40, para.46; ICJ/Reports/1984, pp.312-313, para.157. Cf. para.6.2.a) *supra*.

articulate both principles (e.g. drawing due consequences from any inequalities in the extent of coasts into the delimitation area; equity does not necessarily imply equality; the equal division of the overlapping of entitlements, in the absence of special circumstances). In others, they express only the normativity of one of them (e.g. the land dominates the sea; due consideration to all relevant circumstances). They surface therefore as different points on the sliding-scale indicated above in Graphic 2.

The 'principle' of non-refashioning of geography must also be considered in this context. The 1969 Judgment, when referring to abating the effects of coastal configuration on equidistance, stated that there was no question of "completely refashioning nature". The adverbial term 'completely' means that the Court intentionally left the door open to a certain refashioning, on the basis of equity[564]. Only a complete refashioning of nature was ruled out[565]. The pivotal question is to understand the meaning of "refashioning nature", and its relation with coastal configuration. What the Court had in mind was surely not the possibility of physical changes of the coast. Underlying this reference can only lie the idea of a change at the level of the legal consequences of coastal configuration. Implicitly, the Court was referring to an equitable abatement of the effect of the principle of maritime zoning – the essence of which is (at least today) coastal configuration, and its projection onto the sea on the basis of distance[566].

The analysis undertaken in Chapter 5 on the 'methods of delimitation', by reaching the conclusion that the variants of the equidistance method account for the overwhelming majority of the delimitation solutions, evince further the dual 'equidistance-equity' ground on which delimitation is hinged. These variants appear as different means whereby 'closer proximity' is harmonised with 'reasonableness of the boundary'. The Separate Opinion of Judge Oda in the *Qatar/Bahrain* case may be utilised to illustrate this point. While resorting to coastal façades to determine the boundary-line he deems best suited, he affirms that the "Court's task is to indicate one line from among the many lines that *may reasonably be proposed*". In his perspective, "there is not necessarily a sole and definitive boundary line that alone meets the requirements of an equitable solution and the consideration of equity does not necessarily lead to the determination of one particular or definitive line"[567]. There are, therefore, a number of methods based on variants of equidistance that might be utilised to reach an equitable line. Even combinations of variants seem usable (e.g. to flatten the coast, and to subsequently weigh the coastal stretches differently). What courts do not seem

(564) ICJ/Reports/1969, pp.50-51, para.91.

(565) Bedjaoui/1990, pp.386-387.

(566) Para.6.3.a), 6.3.b) *supra*. As to why replacing the low-water line by a simpler line, for purposes of computing an equidistance, might be reasonable and non-inequitable, cf. para.8.2.d) *infra*.

(567) Separate Opinion, paras.26-27, 41, emphasis added.

entitled to do is to have recourse to technical definitions of boundary-lines which do not result from adjustments of equidistance; for they are not an expression of the balance required by international law[568].

Turning for a moment to the argument that, as a normative standard, equidistance should be discarded *in toto* (arguably because it yields inequitable solutions in some cases), it must be explained why it should not be accepted. The problem in maritime delimitation is not about the rationale of equidistance ('closer proximity'). It concerns the definition of 'relevant coast' in international law. What must be asked is "which basepoints are legally representative of the coastline for purposes of delimitation?" That explains why so many equidistance-related methods have emerged. All variants thereof[569] seek to determine a line by reference to the notion of 'closer proximity'. The corrections concern the evaluation of the coastal configuration and/or the relative weight of basepoints. The *Qatar/Bahrain* case and the *Eritrea/Yemen* arbitration provide examples of adjudicated boundaries which resort to equidistance and discount the effect of certain potential basepoints. The boundaries are modified equidistances, arrived at through basepoint selection.

Bearing in mind these thoughts on the relationship between 'closer proximity' and equity, one would argue that the refinement of delimitation law should focus primarily on objectifying the impact of relevant facts. This would shed light on what reasonableness actually means. Undoubtedly, case-by-case appraisals are inescapable. It is nevertheless possible to analyse adjudicated boundaries (as well as negotiated boundaries for that matter) more objectively. The goal is to identify elements that might be helpful to 'typify' delimitation cases, in order to justify analogical solutions in other cases. This is where technical tools and assessments may become valuable; especially since most delimitation methods are derived from equidistance.

The *Jan Mayen* case provides a useful example. The modification of equidistance, though attained by 'displacement' of the strict equidistance-line, may be expressed as an adjustment at the level of basepoints. Through an adaptation of the equiratio method it is possible to determine, at every point along the boundary, the 'distance ratio' in relation to basepoints on either coast[570]. For instance, point "A" is strictly equidistant from the two coasts. It is based on a 'distance ratio' 1:1, which equates to say that an equal 'weight' was

(568) This position of principle is without prejudice of the possibility of demonstrating, for instance, that a parallel of latitude may be taken as a variant of an equidistance-related boundary, i.e. a simplified form thereof. In such cases, however, the line is still predicated on an 'equidistance-equity' reasoning. The mere fact that the resulting-line is also a line that could have been derived from an *ad hoc* method becomes an irrelevant coincidence. For instance, the fact that the UK/Ireland continental shelf boundary is formed by parallel and meridian segments does not hide the relevance that equidistance actually had in reaching that solution.

(569) Simplified or modified equidistance, adjustment of baselines, partial-effect, *méthodes de lissage* (perpendiculars, bisectors and radial-lines), pseudo-equidistance, and equiratio.

(570) Para.5.2.f) *supra*.

given to the nearest basepoints on each coast. Differently, the 'distance ratio' at points "O", "N" and "M" (defined Greenland:Jan Mayen) is approximately 1:0.75, 1:0.55 and 1:0.66 respectively[571]. If only these four points were considered, the average 'distance ratio' would be roughly 1:0.71. In other words, the distance from the boundary-line to the nearest Jan Mayen's basepoints would be, on average, about 71% of the corresponding distance to the nearest Greenland's basepoints. By increasing the number of points analysed, a more representative figure may be obtained. The greater the number of computations along the line, the more accurate and representative will be the average 'distance ratio'. With adequate software, these calculations can be easily carried out. Sampling ten points spaced evenly along the line, one arrives at an average 'distance ratio' of 1:0.68 (Greenland:Jan Mayen). The average distance from the boundary to the nearest Jan Mayen's basepoints is thus approximately 68% of the equivalent distance to the nearest Greenland's basepoints.

A complementary assessment may be undertaken concerning division of the area of overlapping entitlements[572]. The boundary determined by the Court attributed to Jan Mayen approximately 27% of the area of overlapping entitlements, and to Greenland the remaining 73%. The area allocated to Greenland is thus approximately 2.7 times larger than that allocated to Jan Mayen.

The delimitation in the *Jan Mayen* case may thus be summarised as follows. State "A" has a coastal length roughly 9 times longer than that of state "B". It is necessary to allow an equitable access to fishing grounds situated in the vicinity of the equidistance-line, nearer to state "B". The boundary is located in a way that its points lie at a distance from the basepoints of state "B" that is on average approximately 68% of the distance to the basepoints of state "A". This line allocates to state "A" a portion of the area of overlapping entitlements that is some 2.7 times larger than that allocated to state "B".

The equiratio method offers the advantages of equidistance (it is unambiguous, applicable in all geographical circumstances and results in a line that may be constructed easily and accurately). But it is also "able to meet the greatest possible varieties of notions regarding equity"[573]. The paramount contribution of this method, it is suggested, is the notion of 'distance ratio'. Recourse to it in maritime delimitation has an impact on two levels. First, it allows adjustments to equidistance on the basis of distance from the coast, while presenting them in a quantified format. Secondly, it facilitates the translation of any line into an 'objectifying language', referred to coastal configuration, regardless of factual

(571) Figure 82 shows how the 'distance ratio' is to be computed, giving as examples points "A" and "N". The distances indicated are only approximate geodetic distances (for the precise coordinates of the basepoints utilised are unknown).
(572) On the use of the area of overlapping entitlements as reference for maritime delimitation, cf. paras.4.3. *supra*, 8.2.e) *infra*.
(573) Langeraar/1986a, p.393.

circumstances, or of how facts are weighed. Langeraar has compared various maritime boundaries with equiratio-lines. *Inter alia*, he shows that the boundaries negotiated in the aftermath of the *North Sea* cases run close to the 0.90 equiratio-line, favouring Germany (ratio of 1:0.90, Netherlands/Denmark:Germany)[574]. In the *Tunisia/Libya* case, the boundary runs also not far from a 0.90 equiratio-line favouring Libya. And the *Libya/Malta* boundary lies (on average) near the 0.68 equiratio-line to the advantage of Libya (Figures 69 to 71)[575].

Interesting parallels may be drawn between, on the one hand, the *Libya/Malta* and the *Jan Mayen* cases and, on the other hand, the *North Sea* and the *Tunisia/Libya* cases[576]. The former are delimitations between opposite states, in which there is a large disparity of coastal lengths. No doubt, the *Libya/Malta* case is a continental shelf delimitation, whereas the *Jan Mayen* case dealt with both continental shelf and fisheries zones. For this reason, the facts to weigh were not the same in both cases (as happens e.g. with the access to capelin resources in the latter). It nonetheless seems reasonable to say that the disparity of coastal lengths between the disputants was the pivotal fact. The ratio is 8:1 between Libya and Malta, and some 9:1 between Greenland (Denmark) and Jan Mayen (Norway)[577]. Significantly, in both cases the adjudicated boundaries lie at a distance from the state with the shorter coastal length that is, on average, approximately 68% of the distance from the state with the longer coastal length[578]. What was deemed to be an equitable displacement of the provisional equidistance shows, when translated in terms of average 'distance ratio', a remarkable degree of consistency.

This consistency is all the more remarkable when considering that it may also be found in the *North Sea* and *Tunisia/Libya* cases, despite the fact that in the former the boundaries were negotiated, whereas the latter concerns an adjudicated line. Both cases are situations of adjacency where a shift in the coastal direction 'pushes' the equidistance towards one of the states. The peculiarity of the *North Sea* cases stems from the fact that the shift in the coastal direction extends through all three coasts involved, resulting in the equidistance being 'pushed' towards Germany from both sides. Common between these two cases is also the non-existence of a large disparity of coastal lengths[579]. It is noteworthy,

(574) The Danish/German boundary has an average 'distance ratio' of a little less than 0.90 (some 0.88), whereas the Dutch/German boundary has an average 'distance ratio' of a little more than 0.90 (some 0.91).

(575) Langeraar/1986b, pp.11-12, 17.

(576) These cases are significant because they provide two examples of oppositeness and two of adjacency, because within each pair the cases bear resemblances that allow a degree of generalisation, and because they all had the imprimatur of the Court.

(577) ICJ/Reports/1985, p.50, para.68; ICJ/Reports/1993, p.65, para.61.

(578) In this computation, the uninhabited Maltese island of Filfla was not discounted. If the island is not taken into account, the average 'distance ratio' will be close to 70%, which is not a dramatically different result.

(579) ICJ/Reports/1969, p.51, para.91; ICJ/Reports/1982, p.91, para.131. The coastal length ratio varies depending on how the coastal lengths are measured. In terms of coastal façade, that ratio is less than 2:1.

again, that all three boundaries run close to and through a 0.90 equiratio-line, favouring the state disadvantaged by the concave coast. The equitableness of the boundary appears once more to be translatable by the average 'distance ratio' of the line.

The conclusions of this part may be summarised by a number of capital points. Maritime delimitation is a sensitive political process in which courts sometimes intervene. When intervening, there is a delicate line they must tread. That is why their decisions tend to include some statements that make them at least partly acceptable to the losers. They often seem designed to carry as little pain for the loser as possible, to try to avoid making courts unpopular with any part of the international community[580]. Viewing the maritime delimitation as a process that entails the 'amputation' of potential entitlements (where they overlap) makes this approach even more justifiable. However, the fact that "the authority to seek an equitable solution by the application of a law whose principles remain largely undefined affords [courts] an exceptional measure of judicial discretion"[581] does not make matters easier. Courts should thus continue their effort to remain clear of arbitrariness. For the rule of law to flourish, that is a prerequisite. Attempts to place equity within the bounds of law, which led to the emergence of 'normative equity', are commendable. Further steps in harmonising the generalising nature of normativity with the individualising nature of equity are nevertheless required, notably in endeavouring to objectify equity.

Heretical as it may sound, the equidistance-special circumstances rule remains the sole operative formula devised for maritime delimitation. Courts have eventually realised that they had to equate the contents of the so-called 'equitable principles' to the said rule if they were to determine the course of maritime boundaries. This rule integrates the two key principles of international law in this matter: maritime zoning and equity.

Where circumstances *in concreto* cause them to collide, a harmonisation process has to be undertaken. This consists of maximising each of the principles. The concurrent rights (maritime entitlements) of states must be balanced, in a reasonable fashion, with a view to minimise the losses of each state. The course of a non-inequitable boundary, it is submitted, is a line every point of which lies at a distance from the basepoints on either side that, account taken of the 'factual and legal matrices', is reasonable. This corresponds to the required optimisation of both the principles of maritime zoning and of equity, to the greatest degree possible, by reference to the legal and factual possibilities *in concreto*, from which stems the 'case-norm'. Unique to an extent, the 'case-norm' has a true normative foundation. It flows from a conjugation of principles that evolves within a margin of

(580) These views had in mind the outcome of the 1974 *Nuclear Tests* case (Sturgess/Chubb/1988, p.215). This approach is adopted in virtually all decisions of international courts.
(581) Judge Schwebel, Separate Opinion, *Jan Mayen* case, ICJ/Reports/1993, p.128.

discretion – sometimes described as an "interstitial law-making power"[582] – intentionally conferred upon the 'judiciary' by the 'legislator'.

One would also argue that the notion of average 'distance ratio' is crucial for objectifying "reasonableness". The expression of maritime boundaries by recourse to the average 'distance ratio' presents three significant advantages. First, boundary-lines are referenced to the coasts of the states involved, in a quantifiable form related to distance. While reflecting the basis of maritime zoning, this approach allows an assessment of the overall equitability of the delimitation, which under international law is paramount. The delimited boundary may to that effect be objectively compared with other boundary-lines, regardless of whether they were negotiated or adjudicated. Secondly, despite allowing objective (quantified) assessment, the average 'distance ratio' is nevertheless an extremely flexible notion. The same 'distance ratio' figure corresponds to an unlimited number of potential lines. Since maritime delimitation might ultimately consist of an attempt to reconcile different interests (security, navigation, geographical considerations, access to natural resources, etc.), through adjustments of the starting (provisional) equidistance-line, this flexibility cannot be underestimated. One is endowed with a tool that is simultaneously objective and flexible. Thirdly, it is noteworthy that no coastal features need be discarded. All basepoints are weighed in the computation of the different 'distance ratios'. How to justify discarding a specific basepoint, for example, might no longer be an issue[583].

With this exercise, which necessarily involves a resort to technical expertise, it is by no means suggested that judicial decision-making should become a 'blind' quantifying appraisal. It has already been conceded that devising a precise formula for determining the course of a boundary-line is virtually an impossible task. Just as courts have endorsed assessments of proportionality as expressions of equity, however, nothing seems to restrict the recourse by courts (as well as by states for that matter) to other objective assessments in the refinement of the quest for non-inequitable boundaries. If all negotiated and adjudicated boundaries are studied on the basis of 'distance ratio' assessments, it will be possible to generate a database that will provide a pivotal reference for grasping the idea of reasonableness in maritime delimitation, thus becoming the bedrock for deriving analogies. Regretfully, the scope of such an undertaking makes its inclusion here impracticable.

Finally, it ought to be recognised that the calculation of the average 'distance ratio' does not resolve the problem of determination of the precise course of the boundary. The

(582) Hart/1994, p.259; similarly, cf. MacCormick/1978, pp.187-188.

(583) A different issue, which ought not to be confused with attributing less than full-effect to an insular feature, is to consider that such an insular feature does not generate an entitlement to continental shelf and exclusive economic zone (under Article 121(3) of the LOSC). And if it does not generate such an entitlement, consequently, it should not be consider for the delimitation. This is the question that might be raised, for instance, in relation to the island of Filfla, above mentioned.

computation of a 'distance ratio' presupposes in principle the existence of a line. However, because there are innumerable lines with the same average 'distance ratio', on its own this concept is insufficient to determine the course of a boundary. It operates in a fashion similar to that of proportionality – it offers objective guidance as to how much an equidistance-line is to be adjusted. The decision-maker is presented with a reference in terms of a relational value to be verified, as to what has been deemed equitable in prior cases. The *Libya/Malta* and *Jan Mayen* cases illustrate once more the point in question. The boundary was reached, in the former, through an equal displacement of the provisional equidistance. As a result, the values of 'distance ratio' vary very little along the boundary (between roughly 1:0.66 and 1:0.72). In contradistinction, the adjustments in the latter were sectoral, owing much to the need to allow access to the area of capelin resources from either side. The 'distance ratio' values have greater variation (between roughly 1:0.48 and 1:1). Ultimately, however, the two boundaries have a similar average 'distance ratio'.

The design of the boundary course is thus to be derived from the equidistance-line, adjusted in accordance with the relevant facts. What is a non-inequitable average 'distance ratio' is consequently still dependent on the weighing-up of these factors. That is a different issue however, an answer to which will be attempted in Part III.

III

DENOUEMENT

INTRODUCTION TO PART III

A conceptual framework of maritime delimitation in which the normative aspect is formed by legal principles may well be juridically seen as a step backwards. With this, the contents of delimitation law appear to be less dense, thus less certain. Taking account of the practice of courts in applying the so-called 'equitable principles', one would argue that it is only so ostensibly. Much depends on the conceptualisation of how courts are to deal with decisions within their sphere of discretion, which is the key issue in this part. Ultimately, maritime delimitation seeks to determine the course of a line. How that operation is to be undertaken within the conceptualising parameters set before, in particular its normative framework, is the basic question. To answer it, a number of other more specific questions must necessarily be answered. Which facts therefore are relevant in maritime delimitation? How is their relevance to be appraised legally? By what means are they translated into adjustments of the provisional equidistance-line?

In Chapter 7, an attempt is made to rationalise the delimitation process, at the heart of which is the determination of the boundary-line. Attention is drawn therein to three main issues. First, a proposal is made for 'typification' of the facts to *which* relevance is to be given in maritime delimitation. Looking into the notion of *unicum*, and the choice of factors in adjudicative processes, it proceeds to address the interrelation between the 'legal matrix' and the 'factual matrix'. Secondly, it focuses on *how* the pertinent factors are to be gauged in terms of impact on the choice of line – the 'weighing-up process'. The argument is made that the existence of a sphere of discretion of courts in this respect is inexorable. The final section seeks to examine the *modus operandi* of delimitation factors. Having concluded that there is an area of 'subjectivity' inherent in this type of decision-process, a proposal for the recourse to *multicriteria decision-making* as the basis for reasoning on the choice of line is put forward. For purposes of illustration, recourse is then had to the *Jan Mayen* case, which having been already studied at length facilitates the understanding of the argument.

The following chapter (Chapter 8) seeks to examine the elements germane for the 'weighing-up process', central to the quest for a boundary-line. A distinction is made, from

the outset, between what is named the "delimitation factors" and the facts relevant for the delimitation, the former being legal assessments and not mere facts. Based on the argument made in the previous chapter as to the 'typification' of relevant facts, the elements of the 'factual matrix' appear divided in two groups: facts related to the basis of entitlement, and facts related to the regime of exclusiveness. A third group of elements, of a hybrid nature, deserve separate attention. It is denominated "complementary delimitation elements".

The final chapter (Chapter 9) is a 'test-case', i.e. a case study on a delimitation that is yet to be effected: the delimitation between Australia and East Timor. It delves into the factors that would be considered should the delimitation be effected on a strictly legal basis by a court of law. Ultimately, its aim is to test the conceptualisation proposed hereinbefore. Insofar as this delimitation is still to be effected, the assessments made in this study are not influenced by a previous decision. They are thus subject to future confirmation or rejection.

In broad strokes, this final part seeks to complete, and most importantly to tie in, the aspects of the conceptualisation put forward. It offers a conceptualising viewpoint on how the 'weighing-up' of relevant facts might be understood in the search for a boundary-line. In the process, it advances a proposal on the rationalisation of the reasoning of courts when deciding within their sphere of discretion. Notwithstanding this, it is argued that the fact that the analysis is primarily orientated to adjudicative processes will raise no difficulties when transposing it to negotiation processes.

Chapter 7

DELIMITATION PROCESS:
A PROPOSAL FOR RATIONALISATION

7.1. Determination of a Line: The Key Issue

The tangible outcome of maritime delimitation is a line. Not surprisingly, therefore, the determination of the boundary-line becomes a true quest, whether the decision-making is political (negotiation) or legal (adjudication)[1]. Nevertheless, negotiators enjoy a freedom that judges do not possess. Legal decision-making is particularly problematic because every step amounts to a partial-decision that has to be reasoned. This is why "the choice of means or methods for translating the relevant geographical and other circumstances into a precise line" has been described as "the most difficult issue in the law of maritime boundaries"[2]. The crux is the identification of "the connection between the relevant circumstances and the resultant delimitation line"[3] – for the choice of boundary-line often has "had all the mystery of a conjuror producing a white rabbit out of a hat"[4].

Negotiation and adjudication differ primarily in this respect. Political decisions are based on a counterbalancing of opposing viewpoints. In contradistinction, the weighing-up of relevant facts, and their translation into a boundary-line, depends, "in various degrees, on the qualitative and therefore intuitive assessment of the judge"[5], who ought to balance objectively and impartially opposing perspectives. Although conceptually diverse, these two types of decision-making are inextricably linked. They constitute the 'ebb-flow sequence' upon which the international law-making process rests. The starting point of diplomatic negotiations is international law, of which judicial decisions are one of the most formal expressions. Courts, conversely, often delineate decisions on the basis of state practice. The examples found therein illustrate the genre of solutions that the community of subjects finds acceptable. States are hardly ever concerned with the impact of the outcome of boundary negotiations in the formation of international norms. Notwithstanding this, because states

(1) In adjudication, the maritime boundary is delimited on legal grounds. The acceptance of a court's jurisdiction however, is still a political decision of states.
(2) Legault/Hankey/1993, p.206.
(3) Evans/1989, p.90.
(4) Churchill/1994, p.26.
(5) Weil/1989, p.285.

are all motivated by similar – but dissociated – narrow political and national self-interests, their practice is preponderant in the progressive crystallisation of normative standards[6]. The significant patterns that have emerged from bilateral treaty-making provide empirical data that is crucial for maritime boundary-making[7]. Subject to this distinction between political and legal decision-making, one would argue that the discretion ascribed to judges must be exercised also by reference to state practice (especially if no relevant case law exists)[8].

The body of bilateral state practice forms indeed an aggregate of wisdom as to what are reasonable boundary-lines in the perspective of states. In the *Libya/Malta* case, Judge *ad hoc* Valticos used the term *opinio aequitatis* to describe its relevance. To him, solutions embodied in bilateral agreements do not express an *opinio juris*. However, since they were reached "in the light of the legal background", they are *opinio aequitatis*; they reflect what states deemed to be equitable[9]. Resembling the view of the Tribunal in the *Anglo/French* arbitration, this view is developed further by Mendelson, who affirms that the "recurring patterns" in state practice provide maritime boundary agreements with a "quasi-normative effect". As he notes, the opinion of states on "what is an equitable solution to a particular type of boundary problem can be gleaned, with all due caution, from a consistent tendency to reach similar solutions in similar geographical situations"[10].

The choice of line as analysed here is adjudication-oriented. It aims at explaining how maritime delimitation law, applied to the facts *in casu*, results into a certain line. The virtually unlimited power of states in shaping the negotiation process turns any attempt to describe it into a fruitless exercise. In negotiation, states "may be guided principally, in some measure, or not at all by legal principles and legally relevant factors a court might examine, and by a host of other factors a tribunal might well ignore such as relative power and wealth, the state of their relations, security and foreign policy objectives, convenience, and concessions unrelated to the boundary or even to maritime jurisdiction as such"[11]. But if the political decision-making process is perceived as an adaptation of legal decision-making to the political scenario *in concreto*, the latter might be seen as the 'basic process', which might be applied *mutatis mutandis* to the former.

There is nevertheless another distinction to consider. In negotiation, the tension between justice and certainty is defused by the consensual nature of the solution attained.

(6) Bravender-Coyle/1988, p.173.
(7) Johnston/1988, p.xiii.
(8) Evans accepts that the "broader practical impact [of state practice] will ultimately depend upon the willingness of international tribunals to draw upon this body of material in a reasoned fashion", and that hitherto "the ICJ seems to have been relatively unswayed by the evidence of state practice that has been placed before it" (Evans/1999, p.155).
(9) Separate Opinion, ICJ/Reports/1985, p.108.
(10) Mendelson/2002. Endorsing this view, cf. Anderson/2001, pp.9-11.
(11) Oxman/1993, p.11. Cf. also para.6.1.b)(ii) *supra*.

By contrast, courts are faced with the issue of predictability and justness of the outcome of the adjudicating process. That is essential for the confidence in third-party settlement. For states, apart from (and often more important than) being just and equitable, decisions have to be reasonably predictable. What must be predictable, however, is not the outcome of litigation, "but the range of considerations used for a decision and the procedures for their application"[12]. The boundary-line often is less important than the reasoning supporting the choice of factors considered for purposes of boundary determination, and the weighing-up process whereby they are translated into that line. Inasmuch as this is typically the sphere in which the principle of equity operates, one faces the danger of arbitrary or 'subjective' decision-making. Predictability and arbitrariness appear as somewhat of opposite sides of the same coin. Two questions thus are pivotal to predictability in delimitation. *Which* facts are weighable? *How* to weigh them?

7.2. Choice of Factors: 'Factual Matrix' and 'Legal Matrix'

7.2.a) The Notion of *Unicum*

The notion of *unicum*, and its relevance for maritime delimitation, was for a time clearly overemphasised. In the *Tunisia/Libya* case, the Court held that continental shelf delimitations "should be considered and judged on its own merits, having regard to its peculiar circumstances", and that the application of principles and rules should not be overconceptualised[13]. The underlying argument seemed to be that each case was so different from others that the generalisation inherent in legal analogies was virtually non-inexistent. For the Court, the reasoning (and the outcome) had to be correspondently unique. The term "*unicum*" was used in the *Gulf of Maine* case and *Guinea/Guinea-Bissau* arbitration to translate this idea[14]. Understandable perhaps in the light of the conception of the role of equity in delimitation characteristic of the early 1980s[15], this is a notion that ought not to be overemphasised today. No doubt, the facts of each case are in some measure unique. This however, does not hamper the establishment of parallels and a global understanding of the issue[16]. Suggesting otherwise would be arguably a misperception. Regardless of the legal field in question, each case always is to some extent unique. Uniqueness however, is not antonym of 'typification' – which is the level at which normativity operates.

(12) Jennings/1986, p.38. Agreeing with this view, cf. Alexy/1989, p.293.
(13) ICJ/Reports/1982, p.92, para.132 *in fine*.
(14) ICJ/Reports/1984, p. 290, para. 81 (French version); ILM/25/1986, p. 290, para. 89.
(15) Para.6.4.b)(ii) *supra*.
(16) Lucchini/Vœlckel/1996, p.93.

Most importantly, achieving a non-inequitable solution is not dependent on a notion of *unicum*. All cases may be 'typified' to some degree, which is why generalisation and the derivation of legal analogies are possible. Regardless of whether delimitations are reached by adjudication or by negotiation, the emphasis must be placed on identifying 'elements of generalisation' that may lead to 'typification'. They form the bedrock of normative thought, the key for achieving a truly equitable solution. As stated in the *Libya/Malta* case, "[w]hile every case of maritime delimitation is different in its circumstances from the next, only a clear body of [normative standards] can permit such circumstances to be properly weighed, and the objective of an equitable result [...] to be attained"[17].

In short, the notion of *unicum* stems from the 'factual matrix'[18], and determines the scope of operation of the principle of equity; or in other words, the content of equity *in concreto*. The relevance of factual circumstances has nonetheless to be determined within the bounds of legal thought, whose foundation is primarily 'typification'. The comparison of average 'distance ratio' between boundaries, for instance, is objectively meaningful only where relevant analogies can be drawn between the facts of the cases under appraisal.

7.2.b) Delimitation Factors: Preliminary Approach

A problem of a special nature, related with the *unicum*, regards the identification (choice) of considerations to weigh in the maritime delimitation process. The first point is concerned with terminology. Henceforth reference will be made to the term 'delimitation factors'[19], in lieu of the more common expressions 'special circumstances' or 'relevant circumstances'[20]. First, whereas special circumstances and relevant circumstances are terms related with the equidistance-special circumstances formula and the equitable principles doctrine respectively, 'delimitation factors' is a neutral term. Secondly, insofar as both relevant circumstances and special circumstances "are intended to enable the achievement of an equitable result"[21], the two were fused (at least up to a point). 'Delimitation factors' is a term intended to encompass the fusion of these notions. With it, the distinction between

(17) ICJ/Reports/1985, p.55, para.76.

(18) The term "matrix" is used in this study in one of two slightly different meanings. First, as in the present case, the term is used to refer to a specific set of interrelated elements (e.g. the facts that characterise a case). The second meaning is usually utilised in mathematics. Matrix means a rectangular array of information, i.e. information presented in a lattice (in rows and columns). It is in a sense similar to the latter that the term "decision-matrix" is to be understood (cf. para.7.4.c) *infra*).

(19) At this stage, the terms "fact" and "factor" are being used interchangeably, to refer to those elements that form the 'factual matrix'. It will be suggested later that "delimitation factors" are effectively judgments concerning facts, not the facts themselves (cf. paras.7.3.c), 7.4.b), 7.4.c) *infra*).

(20) Courts have resorted fairly often to the term "factor" to refer to the considerations to be weighed during the delimitation process. Cf. *Anglo/French* arbitration, RIAA/18, p.58, para.101; *Beagle Channel* arbitration, ILR/52/1979, p.185, para.110; *Jan Mayen* case, ICJ/Reports/1993, p.62, para.54; *Eritrea/Yemen* arbitration, Eritrea/Yemen-II, paras.6, 130 in particular; *Qatar/Bahrain* case, Qatar/Bahrain-Merits, para.229.

(21) *Jan Mayen* case, ICJ/Reports/1993, p.62, para.56. In the *North Sea* cases, 'special circumstances' were viewed as an exception introduced by the ILC in pursuance of the need to effect delimitation on equitable principles (ICJ/Reports/1969, p.37, para.55).

the two previous terms is no longer an issue[22]. Thirdly, 'delimitation factors' is a term that evinces the existence of an equation – a legal equation – whose 'factors' depend on the interaction between the 'legal matrix' and the 'factual matrix'. This idea is paramount to the conceptualisation attempted in this study.

From an historical perspective, it is worth observing that, in the 1950s, one of the fundamental contributions of the ILC was to ascertain that special consideration might have to be given to certain specific facts, in order to avoid inequitableness. Of equal importance was the idea that such facts, deemed decisive for a non-inequitable outcome, could not be enumerated exhaustively; hence the use of the expression 'special circumstances'[23]. This is a two-tiered axiom that has remained valid to this day. Around it revolves the debate concerning the choice of factors (i.e. factual elements) relevant for the delimitation, which has had a decisive impact on the development of delimitation law.

In the *North Sea* cases, the parties requested the Court to indicate the principles and rules of international law applicable to the continental shelf delimitation between them. The delimitation was to be subsequently effected by agreement pursuant to the Court's decision. The finding that "there is no legal limit to the considerations which states may take account of" in delimitation must be understood in a specific light: the boundary was to be *negotiated between the parties*[24]. This idea was emphasised in the *Anglo/French* arbitration. Noting that in the 1969 cases "the parties had retained the actual delimitation of the boundary in their own hands for further negotiation", the Tribunal reaffirmed that, in adjudication, the considerations to be weighed are those that lie "not outside but within the rules of law"[25].

This sound approach seems to have been somewhat overlooked in the *Tunisia/Libya* case (and in the *Gulf of Maine* case and *Guinea/Guinea-Bissau* arbitration). Recourse to 'free equity' (based on facts whose relevance was to be defined by courts), founded on the notion of *unicum*, was preferred. It was the *Libya/Malta* Judgment that reversed the trend. It was stated then that, although the list of weighable considerations is not closed, only those pertinent to the delimitation of the zone in question are eligible[26]. Decisions rendered in breach of this tenet, it is argued, amount to *excès de pouvoir*. Courts and states operate in different spheres[27]. Courts *per se* are not empowered to choose 'any considerations' they see fit. Unless otherwise agreed between the parties, their competence comprises a choice

(22) For example, in his Separate Opinion in the *Jan Mayen* case, Judge Schwebel considered that 'special circumstances' could not be equated to 'relevant circumstances' (ICJ/Reports/1993, p.121). Evans has argued that whereas 'special circumstances' have an ameliorative aspect, 'relevant circumstances' have an indicative aspect (Evans/1989, p.83).

(23) Paras.1.2.b), 1.3.a), 1.3.c)(i) *supra*.

(24) ICJ/Reports/1969, pp.13, 50, paras.2, 93.

(25) RIAA/18, p.114, para.245.

(26) Para.6.4.b)(ii) *supra*.

(27) Paras.6.1.b), 7.1. *supra*.

among 'legally relevant considerations'. Recent adjudications have consistently followed this view, although some 'fine-tuning' remains necessary. There is thus an obvious question to be answered. How to 'typify' the delimitation factors?

The analyses of this issue in scholarship reflect an empirical basis[28], which is a token of the difficulties that surround it. Despite these difficulties, Evans' work offers a highly detailed point of departure. Some of his thoughts may be summarised as follows. He considers that "the categories of relevant circumstances are not closed", and that there is no "definitive list" thereof. More importantly, stressing the inadequacy of the limitations attempted on the 'open-endedness' of the heads of relevant circumstances, he concludes that it is not possible to circumscribe relevant circumstances in general terms, and that the types of circumstances have grown continuously. Unsurprisingly, therefore, he contends that it would be "misplaced criticism" to object that this approach "does not help determine what is to be a relevant circumstance". His initial viewpoint was that relevant circumstances had two central functions: to "ameliorate the strict application of a chosen method" ('special circumstances'), and to "indicate what that method is to be" ('relevant circumstances'). After the *Jan Mayen* case, he has accepted that special or relevant circumstances were both repositioned as "modifiers rather than generators of the method of delimitation". In respect of the relationship between the relevant circumstances and maritime entitlement, he contends that "[i]t is mistaken to assume that factors which cannot [display a connection with the regime of the maritime zone in question] are automatically excluded from consideration". To him, the "basis of title does not exclude factors simply because there is no correlation between factor and title"[29].

That there is no closed categorisation or definitive list of considerations that might be weighed in maritime delimitation is an established tenet. As already argued, analogical interpretations are possible when determining what constitutes a special circumstance[30]. Equally unobjectionable is the assertion that the basis of title does not preclude the recourse to factors unrelated therewith. Other aspects of Evans's views, however, are less persuasive. From a conceptual standpoint, it is perhaps more appropriate to enquire whether there is a general material criterion by reference to which delimitation factors can be identified. It will be submitted that the answer should be in the affirmative. Those considerations may at the very least be described negatively. There is a further point that deserves to be noted. No doubt, the basis of title is not exclusive of facts with no correlation therewith. What must be

(28) Cf. United Nations/2000, pp.25-46; Lucchini/Vœlckel/1996, pp.158-176; Charney/Alexander/1993, Global Analyses (I–VII); Evans/1991; Evans/1989, Part II; Calatayud/1989, pp.94-132.
(29) These ideas were compiled from Evans/1999, pp.162-174; Evans/1991; Evans/1989 (in particular pp.78-94).
(30) Para.1.3.c)(i) *supra*.

said, however, is that this is not tantamount to asserting that the regime of maritime zones does not circumscribe the considerations to be weighed. Finally, on the basis of the concept of normativity explained above, it may be argued that in strict terms courts are not entitled to choose 'any' method on the basis of the weighing-up of relevant circumstances. The line must be sought through adjustments of the starting equidistance-line, being the delimitation factors the legal basis on which that adjustment is justified.

7.2.c) Delimitation Factors: A Basis for Objective 'Typification'

'Typification', it should be made clear, operates at different levels. If all categories of factors could be identified explicitly, and their contents described exhaustively, one would reach the highest level of 'typification'. Should it be workable, this would probably be preferable. In maritime delimitation, however, this is a chimerical target. International law has consecrated one of the lowest levels of 'typification'. No enumeration of weighable factors is provided; let alone an exhaustive description of their contents. It consists mainly of a negative circumscription of delimitation factors. To restate the Court's words, the key idea is that, although the list of factors is not closed, "only those that are pertinent to the institution [in question] as it developed within the law [...] will qualify for inclusion"[31].

These points may be taken further by referring to the work of the ILC. It sheds light on how to interpret this statement of the Court. In 1953, replying to Sandström, François clarified that "navigation and fishing rights" (to which the Committee of Experts had made reference) were not to be considered in continental shelf delimitation[32]. The argument is that, since the continental shelf regime ascribes no navigation or fishing rights to states, these aspects of exclusiveness are irrelevant for its delimitation[33]. They are not pertinent to the institution of the continental shelf.

In the *Eritrea/Yemen* arbitration, the 'choice-of-law clause' referred to a decision that would take account of the opinion formed by the Tribunal on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and *any other pertinent factor*[34]. The question to ask is: Which are the "other pertinent factors"? The Tribunal found that they included "various factors that are generally recognised as being relevant to the process of delimitation such as proportionality, non-encroachment, the presence of islands, and *any other factors that might affect the equities of the particular situation*"[35].

(31) *Libya/Malta* case, ICJ/Reports/1985, p.40, para.48.
(32) 204th Meeting, ILC/Yearbook/1953(I), pp.126-129, paras.14, 35, 55. Cf. also paras.8.3.a), 8.3.c) *infra*.
(33) CS Convention, Articles 3 and 5(1); LOSC, Article 78.
(34) Arbitration Agreement, 3 October 1996, Article 2(3); Agreement on Principles, 21 May 1996, Article 3(2).
(35) Eritrea/Yemen-II, para.130, emphasis added.

This immediately raises another question. If the factors that could have been weighed are 'any' factors that bear on the 'equities' of the case, does that mean that the Tribunal felt that it was empowered to decide *ex aequo et bono*? We think not. As Reisman states, "[i]t is unlikely that the parties were signalling an interest in a distributive justice award *ex aequo et bono*" – more likely, that reference acted as an "insurance against a restrictive reading of LOS Convention Articles 15, 74 and 83"[36]. The pronoun "other" suggests clearly that some "pertinent factors" had already been included elsewhere, certainly in the reference to the LOSC. The expression "pertinent factor" is uncommon. It suggests that it was taken from and utilised in consonance with the dictum of the *Libya/Malta* Judgment. Presumably, therefore, "pertinent factors" were seen as relevant factors embodied in either the LOSC, or general international law, or both.

The idea advanced here is that the 'legal matrix' of the maritime zone substantively restricts the range of factors which courts are entitled to weigh. To identify the weighable considerations, the 'factual matrix' must be sieved through the 'legal matrix'. Only those factors somehow subsumable in the zonal regime are eligible. Although negative, there is after all a general identification of the delimitation factors.

Speaking of a limit imposed by the zonal regime does not mean, however, that only the basis of entitlement is to be considered. Maritime delimitation amounts to the division of areas of exclusiveness between neighbouring states[37]. It is logical that such a division be based on the basis of maritime entitlement. But it is also logical that the legal rights and interests embodied in the zonal regime of exclusiveness be taken into account. Viewing maritime delimitation as a mere exercise of 'drawing lines', isolated from the true issues in question – the exercise of exclusive rights and interests – entails an abstract perception of this operation that, one would argue, can only lead to further difficulties.

Maritime zoning provides the balance between exclusiveness and inclusiveness in the public order of the oceans. Setting the legal position of coastal states regarding adjacent oceanic areas *vis-à-vis* all other states, the notion of maritime zoning defines spatially the areas of exclusiveness (*ratione loci*), and elects the aspects of 'ocean utilisation' whereby the differentiation is effected (*ratione materiae*). It establishes which rights and interests of coastal states are exclusive, i.e. non-exercisable by other states. *Maritime delimitation* has as its object an area where potential exclusive rights of states overlap. The link between maritime zoning and maritime delimitation is to be viewed in this light. Whereas maritime zoning seeks to determine the reciprocal limits of exclusiveness and inclusiveness, maritime

(36) Reisman/2000, p.728.
(37) Para.6.3.c)(i), Conclusions to Part II *supra*.

delimitation seeks to determine the reciprocal limits of two areas of exclusiveness. It is because maritime zoning results in the emergence of areas of potential exclusiveness that maritime delimitation is required. Hence, account can – and should – be taken of elements relating to either the basis of entitlement (maritime zoning *ratione loci*), or the rights and interests attributed to coastal states (maritime zoning *ratione materiae*)[38]. Ultimately, this is no more than a second step in the attribution of exclusive maritime rights. The concurrence of exclusive rights and interests of neighbouring states over nearby sea areas is resolved through the spatial variable of the equation of the public order of the oceans.

Finally, it is noteworthy that although emphasis is put on the limitations imposed on judges as regards the choice of factors, there is a positive requirement set down by the 'legal matrix' that cannot be overlooked. Courts are legally required to examine *all considerations* relevant for the institution in question. There are two corollaries to this. First, courts cannot discard relevant considerations without justifying that decision. They might be attributed 'zero-weight' in a specific delimitation. That must mean, however, that such considerations were duly balanced-up, and that giving them 'zero-weight' results from a reasoned decision concerning its impact on the delimitation *in concreto*. Secondly, because of the principle *jura novit curia*, courts are entitled to weigh *proprio motu* considerations that are not relied on by the parties explicitly (as long as the relevant evidence is brought to the process by the parties). Only one condition has to be met: both parties should be given the opportunity of arguing their views on the consideration in question.

From an overall perspective, the 'growing nature' of delimitation factors is in fact unsurprising. The ILC debates show that the content of special circumstances was to be determined by courts when disputes arose. Notwithstanding this, the idea that there is no guidance as to what factors are relevant should be rejected[39]. A limit, which stems from the 'legal matrix', is imposed on the range of eligible considerations. Factors are rendered pertinent by a body of legal principles and rules[40]. Either it is considered that it is the legal system that determines the relevance of factors, and that courts are bound thereby, or this issue will be left entirely for courts to decide (in which case it would amount to an *ex aequo et bono* power). The inescapable conclusion is that delimitation factors are relevant by effect of international law. For the judge, the freedom of choice of factors is rather more limited than occasionally affirmed. Not all parts of the 'factual matrix' are legally relevant. Facts unrelated to the basis of entitlement, or irrelevant for the exercise of exclusive rights

(38) Recognising this, Evans speaks of "a connection with the *object* of the regime" (Evans/1989, p.93).
(39) Evans observes that there is no real guide for establishing which factors are relevant (Evans/1991, p.33).
(40) Reisman/2000, pp.727-728.

and interests ought not to be considered. To use Judge Ranjeva's words, relevant facts are those "facts which affect the rights of states over their maritime spaces as recognised in positive law, either in their entirety or in the exercise of the powers relating thereto"[41].

7.3. The 'Weighing-Up Process'

7.3.a) A Legal Multiple-Factor Analysis

Having delved conceptually into the question of *which* factors are weighable in delimitation, it becomes now necessary to enquiry *how* these factors are to be weighed. In a concise yet accurate description of the problem, Charney suggests that delimitation consists of "multiple-factor analysis"[42]. Maritime delimitation, regardless of whether it is effected by negotiation or by adjudication, may indeed be described as a process in which multifarious factors have to be analysed. As argued, however, when it refers to negotiation, the freedom of states renders fruitless any attempt to describe the 'bargaining process' in detail. States might opt for following an approach similar to that of courts; but again, that depends on mutual consent. Little more can in fact be said about the process, other than that it will in principle follow the basic canons of diplomatic negotiation.

From a conceptual standpoint, delimitation by adjudication is clearly different. The process that is conducive to the boundary-line – the 'weighing-up process' – ought to amount to an organised sequence of steps whereby relevant factors are translated into a line. As a process, it is subject to the canons of juridical reasoning and argumentation. Choices made in the quest for a non-inequitable boundary must be justified on legal grounds, even when they stem from the exercise of the margin of judicial discretion with which courts are endowed. The problem is that "no convincing demonstration of *how* the factors identified as relevant contribute to the equitable nature of the result"[43] has yet been given. Questions must thus be asked. Is this a failure attributable to courts? Or is there something in the delimitation process that places such a demonstration beyond the bounds of possibility?

Looking into the 'weighing-up process' from the perspective of courts, this section attempts to unravel some of its 'mystique'. Modest in its goal, it falls short of seeking to conceptualise and comprehensively explain the practice of courts. It attempts nevertheless to demystify certain debated issues, to draw parallelisms with decision-making outside the realm of law, and to put forward suggestions as to how the process might be conceived.

(41) Declaration, *Jan Mayen* case, ICJ/Reports/1993, p.88.
(42) Charney/1982, p.157.
(43) Evans/1999, pp.174-175.

Ultimately, it endeavours to bring some objectivity to a process where the interveners are often deemed to have overused 'subjective' assessments.

7.3.b) Deciding in an Extra-Legal Context: 'Multicriteria Decision-Making'

The theory of decision-making (in which emphasis is put more often than not on analysis by quantitative methodologies) is a vast subject. Reference thereto in this study should be seen in the light of one caveat. The following analysis does not seek to theorise any of its aspects. It has a specific functional purpose: to attempt to bridge the gap between the appraisals of the relevant delimitation factors and the choice of boundary-line. Through a basic conceptual appraisal of some of its aspects, light might be shed on how judicial discourse may be organised to deal with the question of how delimitation factors contribute to the determination of the boundary course. The following paragraphs advance key notions that will be returned to when discussing the weighing-up of factors.

Decision-making has been broadly defined as consisting of "generating, evaluating, and selecting among a set of *relevant choices*, where the choices *involve some uncertainty* or risk"[44]. Broadly speaking, it aims at facilitating decisions concerning complex problems. A number of procedures are designed to deconstruct the problem into sub-problems, which being smaller become easier to handle and to analyse. These are subsequently concatenated to reach a decision based on the whole. Naturally, decision-making is applicable only where there are multiple choices involved[45]. Decision-making techniques (particularly those based on numerical appraisals) have been proficiently applied in various fields (e.g. economics, business, public administration, psychology, education, sociology, geography, politics, and military). The normative foundation of judicial decision-making renders them less useful in the realm of *Law*. Difficulties tend to mount when attention is drawn to the ethical-moral values subsumed in legal prescriptions. Nevertheless, some elements of the theory of decision-making might be crucial for conceptualising judicial decision-making in maritime delimitation. For instance, it is possible to rationalise to a greater degree the choices faced by judges. In terms of the intellectual process through which judges go before arriving at a line, perhaps some parallelisms might be drawn with 'multicriteria decision-making'[46]. All in all, what is important is to construct a model designed to clarify and support reasoned legal choices.

(44) Medin and Ross, *Cognitive Psychology*, cited in Anderson/1996a, p.54, emphasis added.

(45) Cf. Malczewski/1999, pp.137-138; Zeleny/1982, pp.74-75; Starr/Zeleny/1977b, p.25.

(46) On multicriteria decision-making, cf. e.g. Malczewski/1999, pp.81-273; Yoon/Hwang/1995; Goodwin/Wright/1991, pp.7-36; Nutt/1990, pp.467-504; Zeleny/1982; Starr/Zeleny/1977a; Bell/Keeney/Raiffa/1977; Keeney/Raiffa/1976, pp.219-353. The term "criteria" encompasses usually attributes, objectives and goals (Zeleny/1982, p.17).

Let an example be considered. Suppose that a departmental official is given the task of buying, within a sound budgeting, the 'most efficient car' for a senior governmental official. The parameters that define the 'car efficiency' must be set down (e.g. mechanical reliability, comfort, speed, safety, technical assistance, fuel consumption, incorporated extras, etc.). Each attribute will have its own assessment scale. The weight of each attribute has then to be established according to government policy and the specific needs of the car user. Next comes the budgeting issue. Are there limits to the amount to be spent? Should the payment be in full or phased? In each decision, the attributes are virtually innumerable, and cannot be indicated outside a concrete context. What attributes to consider, how to describe them, and how to weigh them, is ultimately dependent on the decision-maker.

Decisions such as this are part of day-to-day life, both at the professional and the personal level. One of the oldest descriptions of 'multicriteria decision-making' dates back over 200 years. It appears in a letter written in 1772 by Benjamin Franklin to Joseph Priestly. The description involves no mathematics. It appears presented in conceptual terms (which is why it serves our purpose better), reading as follows:

> When those difficult cases occur, they are difficult, chiefly because while we have them under consideration, all the reasons pro and con are *not present to the mind at the same time*; but sometimes one set present themselves, and at other times another, the first being out of sight. Hence *the various purposes or informations that alternatively prevail*, and the uncertainty that perplexes us. To get over this, my way is to divide half a sheet of paper by a line into two columns; writing over the one Pro, and over the other Con. Then, during three or four days consideration, I put down under the different heads short hints of the different motives, that at different times occur to me, for or against the measure. When I have thus got them all *together in one view*, I endeavour to estimate their respective weights; and where I find two, one on each side, that seem equal, I strike them both out. If I find a reason pro equal to some two reasons con, I strike out the three. If I judge some two reasons con, equal to three reasons pro, I strike out the five; and thus proceeding I find at length *where the balance lies*; and if, after a day or two of farther consideration, nothing new that is of importance occurs on either side, I come to a determination accordingly. And, *though the weight of the reasons cannot be taken with the precision of algebraic quantities*, yet when each thus considered, separately and comparatively, and the whole lies before me, *I think I can judge better*, and am less liable to make a rash step, and in fact I have found great advantage from this kind of equation, and what *might be called moral or prudential algebra.*[47]

Decision-making from this perspective is about implementing a process (a 'model') tailored to optimise the outcome of a decision. As Franklin states, it resorts to algebraic concepts to rationalise a 'decision-equation' that seeks to determine where the balance lies.

(47) Yoon/Hwang/1995, pp.4-5; Zeleny/1982, p.13, emphasis added; partial citation in Shafir/Simonson/Tversky/1997, pp.69-70.

At its heart lies 'better judgment'; judgment reasoned through methodical relational information-processing. It does not require high-level mathematics. Decision-making is often associated with quantitative approaches because, then, factors become numbers, and decisions are based on numerical assessments. With it, communication is improved and objectified. Importantly, comparative assessments and relativisations become clearer and easier. It is simpler to affirm that, on a scale of 1 to 10, factor "A" is worth 6 and factor "B" is worth 9, than to attempt to qualitatively describe their impact on the outcome while establishing their relational position in the decision-making process. Franklin's words raise another key point: the visualisation of the diverse aspects of the problem in one common frame. By putting 'together in one view' the alternatives and information, this method furthers the perception of the question in its entirety. Also at this level, the impact of an 'image' becomes decisive in problem-solving.

Contrary to what might be thought, this type of decision-making does not exclude qualitative assessments and 'subjectivity'[48]. The 'decision model' relies on appraisals of 'relevant criteria', i.e. on assessments regarding "all those attributes, objectives and goals which have been *judged relevant in a given decision situation by a particular decision maker* (individual or group)"[49]. The construction of a 'model' is reliant on the experience, knowledge and intuition of the decision-maker. More importantly, the decision-maker must continue to act as the process 'end-filter'. Quantitative methods have flaws. They are not necessarily better than qualitative judgments. The construction of 'models' implies the suppression of aspects of the problem to be decided. It entails rejecting all those aspects that are not comprised in the 'criteria-definition'. When dealing with quantitative methods, decisions do not consist simply of homologating the solution of the 'decision-model'. 'Models' are by definition incapable of reflecting reality comprehensively. Decisions might be centred thereon; but cannot exclude further analysis.

7.3.c) From Objectivity to 'Subjectivity': An Inevitable Step

The discussion below is centred on the idea that in a decision-making process (be it legal or extra-legal), when it becomes necessary to undertake assessments whereby factors are relativised, entering a sphere of 'subjectivity' is inescapable. Intellectually, this type of decision-making *entails always the drawing of qualitative and/or quantitative comparisons, which establish relationships between facts in the light of a specific goal.* Such operations depend upon the 'subjective' understanding of the goal, the 'subjective' perception of how

(48) Cf. Larichev/1977.
(49) Zeleny/1982, p.17, emphasis added.

factors contribute to the outcome, and the 'subjective' interpretation of the restrictions imposed on the decision-maker.

At first glance, it could be thought that in the realm of *Law* no such 'subjectivity' would exist. This is an illusive impression. All legal systems retain necessarily some degree of openness (which is probably greater in international law than in any municipal system). To judicial decision-making, this is paramount. Eventually, one must resort to 'subjective assessments'. It is not 'subjectivity' in the sense of arbitrariness, but it is 'subjectivity' nonetheless. The *Law* cannot close the door completely to 'subjective' ingredients[50]. Unless a theory of law based on a strict 'subsumptive model' is adopted, judges will always have at their disposal a margin of discretion, however limited it is[51]. Judicial decision-making in maritime delimitation bears no difference. Recognising this, Weil affirms that "[e]ven at its tightest, the normative net will always leave room for judicial assessment, an unassailable bastion of discretionary power". From here he goes on to state that "[h]owever great the legal conquest of maritime delimitation, the most refined of judicial reasoning will never lead automatically to a predetermined solution and the 'gap' [...] between the legal argumentation of a judicial decision and the actual line will never be completely closed". To him, courts "will never be restricted to the passive discovery of the solution"; instead, they "will always arrive at it through active intervention"[52].

That judicial decision-making entails a degree of discretion, and that international courts have always recognised that such a discretion is not to be exercised arbitrarily, is a given in this study. Hence, more important than noting the judicial margin of discretion in maritime boundary adjudication is to realise that such discretion is not exclusive thereof. Judicial decisions in general can never be reached by subsumptive logic alone.

Since it was argued that the normativity in maritime delimitation stems from two principles, the issue of discretion deserves even greater attention. Decisions on maritime boundaries must be reasoned through arguments of principle, specifically as to the relative optimisation of principles. In addition, the contraposition between the value of 'justice' that equity seeks to ensure, and the value of 'certainty' enshrined in equidistance (as a corollary of maritime zoning), brings in further elements of debate. These values are also central to the normative pronouncements that underlie the decisions taken. Following in the footsteps

(50) Larenz/1989, pp.141-142.

(51) On the openness of legal systems, and the irremovable margin of discretion in judicial decision-making, cf. Hart/1997, pp.124-154, 250-254; Canaris/1996, pp.103-126; Larenz/1989, pp.139-203, 253-254, 353-357; Alexy/1989, pp.5-14, 287-295; Engish/1988, pp.205-255; MacCormick/1978, pp.152-194, 229-258. In this respect, it may be pointed out as a side-note that studies regarding the US Supreme Court suggest that its decision-making process might be explained co-dependently through legal and an extra-legal models (cf. George/Epstein/1992), and that there is some degree of correlation between the ideological values of the justices and their votes in the U.S. Supreme Court (cf. Segal *et al.*/1995).

(52) Weil/1989a, p.286.

of other German writers, Alexy has referred to these decisions as 'value-judgments'. These 'value-judgments' amount to "either the actual giving of preference, or the judgment that a particular alternative is a better one, or the rule of preference underlying this judgment"[53]. However tenuous, they are inescapable in the application of law. Amounting to assessments concerning facts, they rely always on a reasoning oriented to legally relevant values, which is why they are central to judicial decision-making, in terms of both *finding* the decision, and *reasoning* it[54]. Therefore, perhaps it is more productive to focus on the understanding of the normative pronouncements underlying the choices made by the decision-makers; for they are central to the balancing between justice and certainty.

Judge Bedjaoui appears to have recently lent weight to this view. He has set out to investigate the role of 'expediency' in the decisions of the ICJ. Whilst emphasising that *law is the science of security*, he goes on to argue that *legal security often must be reconciled with other values such as equitableness and reasonableness*. In his view, 'expediency' is intimately linked to discretion, forms part of the tissue of legality, and "is almost inevitably present in virtually any international legal decision, even one apparently founded on the strict application of international law"[55]. Judicial discretion is indeed inescapable. As Judge Bedjaoui argued elsewhere, it is scarcely possible to wipe out all traces of 'subjectivism' from an operation which cannot have the automatism of a machine, for the inevitable share of 'subjectivism' is not the product of the laxness of the judge, but the result of a normative choice of the 'international legislator'[56]. The notion of 'value-judgment' covers – although not exclusively – what is described by Judge Bedjaoui as decisions of international courts "dictated by expediency", "which, while remaining legal, [are] inspired by feelings of appropriateness, wisdom and prudence". As he observes, these decisions are justified, *inter alia*, by a court's desire to promote justice[57] – the value conveyed by equity.

A key contributor for the existence of 'subjectivity' in maritime delimitation is thus its normative element. Judges are not only faced with a normative framework of reference whose density is very low[58], but have also to address the problem of 'filling' the notion of

(53) Alexy/1989, p.6, fn.20. The translation of the German term *Werturteil* (in Portuguese *juízo de valor*) to English is difficult. There seems to be no term better than 'value-judgment', which was adopted by Ruth Adler and Neil MacCormick in the English translation of Alexy's work. Throughout this study, 'value-judgment' is used to mean assessments to be made by judges whenever the decision (which may nevertheless still be conceived as a negative 'value-judgment') cannot be reached by a mere subsumptive process. That 'value-judgments' are part of the legal system is demonstrated by Alexy, who asserts that "legal decision-making *ought* (*ought* from a legal point of view) to be guided by morally sound 'value-judgments' of a legally relevant kind" (Alexy/1989, pp.8-9). Great caution is undoubtedly required in this respect, for the moral-ethical topoi shared by states are not always easy to confirm. With this in mind, however, nothing seems to impair the transposition of Alexy's approach to the international legal field. For an analysis of the theory of principles and the theory of values, cf. Alexi/1993, pp.138-172.

(54) On Esser's reference to the *finding* of the decision, and the *reasoning* underpinning it, cf. para.6.4.a)(iii) *supra*.

(55) Bedjaoui/2000, p.4.

(56) Bedjaoui/1990, p.383.

(57) Bedjaoui/2000, pp.3-4.

(58) Conclusions to Part II *supra*.

equity, which is cardinal thereto. No doubt, it is the notion of equity that "can easily reveal the small areas of 'expediency' available to an international court"[59]. However, the scope for discretion also finds roots elsewhere. Normativity in maritime delimitation stems from two principles, legal standards that have a low normative density. Their application always leaves a wide room for discretion, which is even greater when, owing to their 'collision' *in concreto*, it becomes necessary to reconcile them in order to arrive at the 'case-norm'.

To meet the normative prescriptions, notably the need to arrive at a non-inequitable line, maritime delimitation turned into a process of multi-factor analysis. This fact cannot be underestimated. It means that even if a highly 'dense' and objective 'typification' of factors would be attained (which is not the case), the relativisation of factors subsequently required to determine the line would lead to the introduction of an element of 'subjectivity'. Whereas it is theoretically possible to objectify the choice of factors that are *in abstrato* weighable, it is impossible to evade the 'subjectivity' intrinsic to the relativisation of factors *in concreto*. 'Subjectivity' thus emerges as inherent in the type of decision-making involved in maritime delimitation. As it happens, the steps for identifying factors, weighing-up their relative relevance, and translating that assessment into a line remain largely undefined.

Since the 'weighing-up process' is juridical in nature, besides the normative density of the *corpus juris*, the scope of 'subjectivity' depends also on the body of practice usable as 'yardstick' against which to draw legal comparisons. Many 'value-judgments' in judicial decision-making stem from comparative analysis based on previous cases. Legal thought has a 'dual-flow': one downwards from normative generalisation to the cases to be decided; the other upwards from the individualisation of cases back to normativity[60]. The measure of 'subjectivity' depends on the normative density and the existence of 'yardsticks'; the higher the level of normative density, and the larger the body of practice, the less scope there will be for 'subjectivity'.

Low normative density, combined with virtual non-existence of a body of practice on maritime delimitation, constituted the enzyme – as it were – which catalysed the initial difficulties in case law. Added to it, in the *North Sea* cases (the first post-1958 delimitation) state practice was in practical terms deemed irrelevant, thus augmenting the difficulties. Slowly, as case law increased, and as state practice developed, these difficulties were somewhat overcome. Although the level of normative density remained basically unaltered, the growing body of practice provided further 'yardsticks' for orientating the exercise of 'subjectivity', bringing some stability to maritime boundary adjudication.

(59) Bedjaoui/2000, pp.22-24.
(60) Lord Goff/1997, p.753; Larenz/1989, pp.351-353.

It is noteworthy that although case law on maritime delimitation accounts for what is a relatively high percentage of international adjudications, it does not cover all possible settings. The suggestion that the scope of discretion ascribed to judges should be referenced to state practice finds here significant support[61]. Indeed, if due account is taken of the fact that agreements might weigh-up extra-legal factors, nothing hampers the recourse *mutatis mutandis* to state practice, as 'yardstick' for steering 'subjectivity' away from arbitrariness. This approach was followed in the *Anglo-French* arbitration. Precedents of semi-enclaves and of half-effect, and the idea of seeking solutions by modifying or varying equidistance, were obtained from state practice[62]. One would suggest that recent case law, by resorting to solutions based on equidistance, adjusted as necessary to achieve a non-inequitable line, converged to state practice, thus endorsing implicitly the same idea.

To conclude, within the limits laid down by the legal system, 'subjectivity' is an integral part of the decision-making process in maritime delimitation. The existence of a sphere of discretion, however, is not the result of the principle of equity only. No doubt, the need to consider equity contributes thereto; but there are other far-reaching motives behind it. Judicial discretion appears through the concatenation of three aspects: the low normative density of delimitation law, the fact that the decision-making process is based upon a multiple-factor analysis, and the relatively scarce body of 'yardsticks'. Because the relevant body of state practice has increased over the years, and because courts have recognised that account should be taken of state practice, one would argue that the scope of 'subjectivity' is today much less than it was two or three decades ago. Strictly speaking, therefore, more than having refined the normative standards, what previous adjudications have perhaps done is to refine the decision-making process.

7.4. *Modus Operandi* of the Delimitation Factors: The Choice of Line

7.4.a) 'Multicriteria Decision-Making' in the Legal Context: Justification

Turning now to the question of the *modus operandi* of delimitation factors *proprio sensu*, it is necessary to set down some premises. The first of these premises concerns the goal of the analysis: to contribute, however modestly, to objectify the justification discourse in the decision-making process in maritime delimitation. In this respect, the key issue is to identify the objective parameters on which the choice of boundary-line is based.

(61) Para.7.1. *supra*.
(62) RIAA/18, pp.94, 116-117, paras.199, 249, 251.

The second premise concerns discretion in judicial decision-making, and the low normative density of maritime delimitation law. As suggested, there is a 'gap' between the legal argumentation of a judicial decision and the chosen boundary-line that will never be completely closed[63]. However, is this not true in relation to other more developed fields of domestic law? The determination of the precise amount to be paid as compensation (and punitive damages), or the precise duration of a sentence of imprisonment, as well as what constitutes recklessness and foreseeability, are examples that suggest that conceptually there is not much difference. In such cases, the distinction appears to lie primarily on the fact that there are recognised 'yardsticks' with which the exercise of discretion is orientated. By contrast, in maritime delimitation, unless state practice is used (with whatever provisos) it may prove difficult to find a body of practice to be resorted to as recognised 'yardsticks'.

The approach followed here brings no substantive changes to the idea that the said 'gap' exists. One should focus, thus, on bridging it to the extent possible, by improving the reasoning upon which the finding of the 'case-norm' hinges. Even when deciding according to equity, judges can never interpret their competence as that of an *amiable compositeur.* Judicial decisions cannot become "*une opèration principale de partage, et subsidiaire de délimitation*"[64]. The boundary must stem from a systematic review of normative standards in force, account taken of the parties' claims.

Since the 'case-norm' stems from an argument of principle, through an optimisation of two principles[65], it is necessary to realise that "[t]he problem of reasoning from principles consists not so much in the justification of the principles but much more in the fact that the norm to be justified does not usually follow logically from the principles"[66]. The crux of the matter is therefore the need for a concretisation of the principles with the help of further normative statements. The number and scope of 'value-judgments' are naturally greater than in those instances in which rules *stricto sensu* determine the outcome of a case.

The third premise is related to the substantive contents of delimitation law. It is presupposed that, in adjudication, the delimitation of a maritime boundary starts from a provisional equidistance-line; adjustments thereto are subsequently introduced, if necessary to reach a non-inequitable solution. The adjustments result from, and are made by reference to, the weighing-up of delimitation factors. The optimisation of principles mentioned above must result in a line that reflects the legal and factual 'matrices'. This process concerns ultimately the choice of a boundary-line; but it is so in mediate terms only. From this point

(63) Para.7.3.c) *supra.*
(64) DeLapradelle/1928, p.143.
(65) Conclusions to Part II *supra*; cf. also para.6.2.b) *supra.*
(66) Alexy/1989, pp.243-244.

of view, it is submitted that the idea of 'choice of method' should be accepted only if qualified by the understanding that what is in question is the exercise of judicial discretion. Recourse to a 'technical method' is subject to its 'ability' to translate properly the outcome of the legal propositions advanced above, notably that equidistance is the starting-point to which adjustments are to be made if and where necessary.

A further clarification as to the scope of delimitation law concerns the maritime entitlement of states. Strictly speaking, the verification of the existence of entitlements does not form part of the delimitation process; it is a *prius* in relation thereto. Only after it is established that two states hold legal entitlements over certain maritime areas that overlap to some extent can the question of delimitation be raised[67]. The determination of entitlement is conceptually unrelated with delimitation factors. These factors are relevant only where a boundary has to be delimited, which presupposes the *actual existence* of an overlapping of entitlements. Speaking of delimitation factors that condition maritime entitlements would be a conceptual misconstruction. In some instances, however, this distinction might not be easy to draw with practical consequences; for example, the question of entitlement of islands[68].

The three premises, taken together, shape the scope of this analysis. The attempted objectification deals with the sphere of judicial discretion within the process of weighing-up delimitation factors. A number of questions must be answered in this respect. How should adjustments of the provisional equidistance be reasoned? How can 'value-judgments' be rationalised in terms of guidance for the courts, in their 'journey' through the sphere of discretion? Furthermore, what steps should be taken to arrive at the 'case-norm'? Finally, assuming that bridging totally the 'gap' between judicial reasoning and the boundary-line is impossible, is it at least possible to shorten that 'gap'?

The proposition made in this study is that, account taken of the analogies in terms of intellectual process, 'multicriteria decision-making' provides a framework to rationalise the weighing-up of delimitation factors. It must, however, be emphasised from the beginning that no attempt is being made to surrender judicial decision-making to a quantitative model. Not even in extra-legal decision-making should that be done.

A non-inequitable solution, it was argued, equates to find a line lying at a reasonable distance from the coastline of each state, which means considering both the legal and the factual 'matrices'. The process through which all relevant delimitation factors are to be weighed, involves attributing to each factor a weight that is determined by its importance in comparison with that of other relevant factors, with a view to reaching a conclusion on the

(67) Para.4.3.b) *supra*.
(68) Para.8.2.c) *infra*.

basis of the whole. The 'discovery' of the 'case-norm' (from which the boundary stems) exists therefore in the sphere of judicial discretion. For this reason, legal discourse becomes paramount. The idea offered for consideration is that, because it will bring about discourse rationalisation, the recourse to 'multicriteria decision-making' (more accurately, to aspects thereof) is likely to improve the quality of judicial reasoning.

Various reasons support this proposition. First, it seems indisputable from the given description of maritime delimitation that one is dealing with a multi-factor analysis. This analysis shows conceptual analogies with 'multicriteria decision-making', a process devised to start with a 'problem definition' and to end with a 'solution recommendation'. Secondly, as observed in Benjamin Franklin's letter, its application allows a problem deconstruction that is central to better perception of it, and thus to better judgment. Issues that could evade the decision-maker are identified and made clearer by the parameterisation implicit therein. Thirdly, through 'multicriteria decision-making' the choice of line might be summarised in a single framework whereby all delimitation factors are weighed and relativised, improving the perception of hierarchical and coordinate relations. This improves key aspects of collective decision-making. All variables of the problem may be visualised simultaneously, thus furthering the understanding of the whole[69]. Exchange of information on the relevance of delimitation factors, both in absolute and in relative terms, is facilitated, leading to clearer argumentation. Fourthly, this technique reflects a key prerequisite of the delimitation process, in that it enables the decision-maker to tailor the framework of criteria selection and weighing-up, by reference to the situation *in concreto*[70]. The precise scope of each criterion is for the decision-maker to define. No less relevant is the possibility to undertake assessments on the basis of either quantitative or qualitative scales.

Not all stages of 'multicriteria decision-making' have necessarily to be used. For instance, although it might be considered, the phase of 'sensitivity analysis' is not crucial for the approach suggested here[71]. Furthermore, any recourse to this technique should take place *mutatis mutandis*, in order to reflect the distinction between legal and extra-legal decision-making. The choice of attributes (delimitation factors), for example, is limited by the 'legal matrix', and is thus not a part of the discretion conferred upon the decision-maker. Amongst the stages whose application is being suggested are 'problem statement', 'criteria compilation and assessment', and 'decision-matrix design'. Even in relation to each of these stages, not all aspects thereof have to be considered. A decision-matrix might be designed

(69) On the role of "mental imagery" and "visualisation" in legal reasoning, cf. Aikenhead/2001 (unpublished), pp.85-99.
(70) Paras.7.3.b) *supra*, 7.4.b) *infra*.
(71) 'Sensitivity analysis' is the final step in the construction of a model, whereby the variations in response of the 'decision-model' derived from variations at the input are analysed. Unreasonable output variations can lead to alterations in the' model'.

only partially, by defining the attributes, but not the decision alternatives[72]. What the resort to multicriteria decision-making seeks to attain is to rationalise the delimitation problem, through deconstruction and diagrammatic representation, to create a framework upon which to predicate legal reasoning in general, and judicial argumentation in particular.

7.4.b) Framework for Reasoning Discourse

Having argued *why* 'multicriteria decision-making' may – and perhaps should – be used as the basis for rationalising the reasoning of courts in maritime delimitation, it is now necessary to explain *how* it might be used. The intention is not to describe and examine all possible applications of 'multicriteria decision-making'[73]. The aim is to delineate, on the basis of the conceptualising thoughts advanced hitherto, a proposal for reasoning the choice of line, by devising a framework that allows the 'gap' between the judicial reasoning and the choice of line to be reduced as much as possible.

In one of his analyses, Evans argues that it would not be "unreasonable to expect [courts] to find some flexible rule as to the approximate weight to be attached to the general categories of circumstances". This "appropriate hierarchical order between factors" would be practicable, however, "only in a classificatory system less rigid that that traditionally employed in the examination of relevant circumstances"[74]. He suggests that there is the misplaced belief that "the various factors are to be 'weighed' against one another is some fashion". To him, "not only is this not, strictly speaking, necessary, but the inability of the adjudicative bodies to do so in a fashion that convincingly relates to the line of delimitation ultimately adopted has served to distance relevant circumstances from the delimitation process". As regards the delimitation process, case law has in his view failed "to provide adequate guidance as to its operation, or to the 'weighing' of relevant circumstances". From here, he concludes that there are "fundamental misconceptions concerning the delimitation process and the nature of the role of relevant circumstances within it"[75].

What can be said of all of this? The question of identification of delimitation factors has been analysed already. It was suggested that international law provides a certain 'typification', which identifies the 'types' of factors potentially relevant[76]. The impossibility of specifying in advance the weight of each factor in a choice of line *in concreto* was also

(72) Because the objective is to create a basis for legal reasoning, and not to construct a 'decision-rule' for the delimitation, it is not necessary to go beyond the stage of 'decision-matrix design' – which is why 'sensitivity analysis' is not required.

(73) It is worthwhile noting that, although this proposal is derived from on a certain conceptualisation, the recourse to multicriteria decision-making may take place under different conceptualisations.

(74) Evans/1991, pp.28-29.

(75) *Ibid.*, pp.32-33.

(76) Para.7.2.c) *supra*. This aspect is cardinal for the differentiation between legal and extra-legal decision-making.

accepted. No other conclusion can be reached if, as argued above, delimitation is seen as consisting of the optimisation of two principles (which can be achieved *in concreto* only). Evans's criticism leads us to ask subsequently two questions. Is it possible to establish a hierarchical order between factors *in abstrato*? Can a 'convincing' link be found between the weighing-up of factors *in concreto* and the choice of line?

As to the first question, let some comparisons be drawn between extra-legal and legal decision-making. Suppose again the example of purchase of the 'most efficient car'. The first step consists of identifying *in abstrato* the factors that might become relevant. In maritime delimitation, this is already made by legal 'typification'. Then, one must establish how much each factor is relevant for the notion of 'car efficiency'. This notion is to some extent variable. It depends, for example, on technical-advisory expertise, annual budgeting, government policy, and the specific needs of the 'car user'. Hence, only by coincidence would two purchases lead at different times to the same hierarchisation of factors.

What about the hierarchisation of factors in maritime delimitation? Presumably, because the decision-maker is bound by normativity, it would not be unreasonable to expect guidance on how to hierarchise the factors upon which the decision hinges. Perhaps this is Evans's point. However, a hierarchisation *in abstrato* is hindered by conceptual difficulties. The aim of maritime delimitation (i.e. to achieve a non-inequitable boundary) is a variable notion[77]. Further, since delimitation is governed by two principles, normativity stems from their optimisation, undertaken in relation to the legal and factual possibilities *in casu*[78]. No weight can be given *in abstrato* to categories of factors. The type of normativity, and the objective to be attained, does not allow it. The *Tunisia/Libya* Judgment made the point excellently, when stating that "no rigid rules exist as to the exact weight to be attached to each element in the case", because "what is reasonable and equitable in any given case must depend on its particular circumstances"[79]. Defining the factor-weights is part of the margin of discretion of courts. The requirement is that, through their reasoning, courts offer a sound justification as to why *in casu* factors are hierarchised in a certain fashion, and not another. In reasoning from principles, the scrutiny concerns the 'value-judgments' on the basis of which the 'case-norm' is reached. The first question is thus answered.

The proposal concerning the recourse to 'multicriteria decision-making' is intended to address the second question: it seeks to create a framework for establishing a convincing link between the weighing-up of factors and the choice of line. As yet, this appears not to

(77) On the notion of equity, cf. para.6.4.a)(i) *supra*.

(78) Conclusions to Part II *supra*; cf. also para.6.2.b) *supra*.

(79) ICJ/Reports/1982, p.60, paras.71-72. On the multi-factor analysis, cf. also ILA, Second Report of the Committee on Water Resources Law, Article 4; 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, Article 6.

have been achieved. Alternative forms of structuring legal discourse and argumentation must then be sought. To begin with, it is important to emphasise that the hesitancies in the posture of courts towards delimitation factors have apparently disappeared. In the *Jan Mayen* case, the Court found that it had "to examine every particular factor of the case which might suggest an adjustment or shifting of the median line provisionally drawn"[80]. Ever since, factors have been dealt with as 'adjusters' of the provisional equidistance.

In broad terms, the delimitation process has two goals: first, to determine whether the provisional equidistance is to be adjusted, and if so, how much it should be adjusted; secondly, to justify each of the answers. The framework for reasoning discourse proposed here is based on a 'decision-matrix'[81], in which the attributes are delimitation factors.

The construction of the matrix is initiated by the identification of the elements of the 'factual matrix' that bear upon the delimitation. It is here that the question of 'typification' surfaces. The facts have to be sifted to arrive at the delimitation factors. It is important to observe that, under the conceptualisation adopted in this study, delimitation factors are not strictly speaking factual circumstances. They appear as a condition to fulfil, or an objective to attain. Although they stem from facts, they emerge in the process as 'value-judgments' forged by the decision-maker. Sieving the factual circumstances through the 'legal matrix' amounts, therefore, not only to determine *whether* they are relevant for the process, but also *how* they are relevant for it.

Let the *Jan Mayen* case be taken as example. As to the disparity of coastal lengths, the factual element is: Greenland's coast is roughly 9 times longer than Jan Mayen's coast. A possible enunciation of the delimitation factor is: *the coastal length ratio of roughly 9:1 must be reflected in an adjustment of equidistance-line towards the Jan Mayen coast*[82]. The difference is that the delimitation factor incorporates a 'value-judgment' on the legal consequence of the fact[83]. In regard to the question of the capelin resources, the delimitation factor could be described as follows: *in the southern sector, the boundary must allow an equitable access to the capelin resources by both parties*. Had the existence of ice been deemed to affect the access to the resources, it is possible that the 'value-judgment' would have to be redefined accordingly. A third decision-factor could be the conclusion that Jan Mayen should be given a *prima facie* full-effect, which could be enunciated as follows: *Jan Mayen has no 'capitis diminutio' in terms of its maritime entitlement*[84].

(80) ICJ/Reports/1993, p.62, para.54.
(81) A 'decision-matrix' may be described as a table in which both attributes and alternative choices are identified.
(82) "Coastal length ratio": the ratio between the lengths of the relevant coasts of the states involved in the delimitation.
(83) This 'value-judgment' can be refined further, to give an idea of how much the adjustment should be; cf. para.7.4.c) *infra*.
(84) Despite having held this view, the Court based its Judgment on the area of overlapping claims rather than on the area of overlapping entitlements; cf. para.4.3.b) *supra*.

Two other factors were examined in this Judgment: considerations of security, and conduct of the parties. Apparently, the Court admitted that, potentially, these factors might be relevant for continental shelf and fisheries zone delimitation. *In casu*, it concluded that in the light of the resulting boundary, the considerations of security were irrelevant, and that the conduct of the parties did not influence the course of the boundary. As a delimitation factor, the considerations of security could be enunciated as follows: *even if adjustments to equidistance are necessary, the boundary shall not run so close to the coasts of either party as to raise questions of security*. The question of conduct of the parties is a different matter. Unlike the *Tunisia/Libya* case, in which the question related to the conduct of the parties as between them, here, Denmark claimed that the conduct of Norway *vis-à-vis* a third state (Iceland) was indicative of the delimitation method. The fact that this conduct was deemed to be irrelevant means that, under the 'legal matrix', no consequence stems from it in terms of the determination of the boundary. Accordingly, this consideration could be left out of the 'decision-matrix'. However, since reasons that lead to discarding arguments advanced by the parties must be part of the judicial argumentation, the 'decision-matrix' should make reference thereto, not as a delimitation factor strictly speaking, but as an issue to be dealt with in the decision. A possible description would be: *the conduct of Norway vis-à-vis a third state (Iceland) has no influence over the determination of the boundary.*

In conclusion, the 'case-norm' emerges from the concatenation of all delimitation factors – each of which is discovered through the optimisation of the principles of maritime zoning and of equity, account being taken of the 'factual matrix'. What the 'weighing-up process' must provide is a sound justification for the end-adjustment to be applied to the provisional equidistance. Efforts thus should concentrate on structuring legal discourse and argumentation on the basis of 'multicriteria decision-making'. At the core of these efforts lies a 'decision-matrix' reflecting: (I) the identification of the facts legally relevant; (II) the relativised assessment of each relevant factor, formulated in the light of the 'legal matrix'. This approach, not totally dissimilar to that adopted by courts, has the advantage of putting together in one view all relevant factors pertaining the 'decision-matrix' (Table 5 below).

7.4.c) The Determination of the Boundary

When delving into the concept of maritime delimitation, it was argued that the division of the area of overlapping claims is not a requirement under international law. It is theoretically possible that the claimed-line advanced by one of the litigants becomes the boundary awarded by the decision. Hence, the first step of any tribunal must be to analyse the parties' claim-lines, to determine whether either of them meets the requirements laid

down by the delimitation factors[85]. Once more, the 'decision-matrix' of the *Jan Mayen* case may be used as illustrative example.

TABLE 2
'Decision-Matrix': Analysis of the Parties' Claims

DELIMITATION FACTORS	Danish Claim-Line	Norwegian Claim-Line
A. The coastal length ratio of roughly 9:1 must be reflected in an adjustment of the equidistance-line towards the Jan Mayen coast.	YES	NO
B. In the southern sector, the boundary must allow an equitable access to the capelin resources by both parties.	NO	NO
C. Jan Mayen has no *capitis diminutio* in terms of its maritime entitlement.	NO	YES
D. Even if adjustments to equidistance are necessary, the boundary shall not run so close to the coasts of either party as to raise questions of security.	YES	YES
E. The conduct of Norway vis-à-vis a third state (Iceland) has no influence over the determination of the boundary.	______	______

The delimitation factors that are verified and not-verified by each of the claim-lines are marked with "Yes" and "No", respectively[86]. It is noticeable that neither claim-line satisfied the requirement concerning the capelin resources, showing the relevance of this issue *in concreto*. Furthermore, whereas the Norwegian claim-line did not verify the need to adjust the equidistance-line as a result of the disparity between coastal lengths, the Danish claim-line did not recognise the *prima facie* full-entitlement of Jan Mayen (which *in casu* required some 'amputation' of the Danish entitlement). Perhaps these considerations should

(85) Para.4.3.d)(ii) *supra*. It might also happen that the parties agree to 'swing arbitration', in which case the tribunal will be bound to choose between the parties' claim-lines; cf. para.6.1.b)(iii) *supra*.

(86) Because the question of the conduct of the parties, as advanced by Denmark, was not considered a delimitation factor *proprio sensu* – meaning that it could not be translated in condition to fulfil or an objective to attain – the claim-lines do not have to be compared with that factor.

have underpinned the argumentation of the Court to discard both claim-lines, on the basis of their unreasonableness. Neither claim-line raised concerns as to security, meaning that, because the decision would have to award a line within the area of overlapping of claims (*non ultra petita*), this factor was irrelevant.

The approach adopted in this study does not depart dramatically from that usually followed by courts. Attention must nevertheless be devoted to two points. First, the formalisation of a 'reasoning-structure' offers a better chance to comprehensively address all relevant issues. Secondly, this approach emphasises the idea that, before 'discovering' a boundary-line, courts must first conclude that neither claim-line verifies the requirements of a non-inequitable solution, as expressed through the delimitation factors.

A pause has to be made in order to clarify one point: there can be more than one equitable boundary. All delimitations have more than one possible solution. In reality, each judge is likely to have his/her own perception of which line should be chosen. Even when judges agree on the line, the reasons that underpin their views are not necessarily coincident. This is patent not only in the different lines proposed in dissenting opinions, but also in the separate opinions of judges who either vote with the majority because the chosen line is as reasonable as a boundary which they could have been inclined to draw, or agree with the line but justify their concurring votes on diverse reasoning. In reality, delimitation is usually a choice (or a compromise) between proposed lines. The recourse to 'multicriteria decision-making' is intended to facilitate this choice (or compromise), whilst seeking to substantiate it by pointing out the reasons that make a line preferable *vis-à-vis* another.

The 'weighing-up process', in effect, amounts to the discovery of a non-inequitable boundary-line. The kernel of the proposal advanced here consists of an objectification of discourse that relies on the concatenation of two elements: the introduction of comparative appraisals with examples found in case law and state practice; the recourse to a quantitative element – the 'distance ratio'. The critical underlying assumption was already signalled: all previously delimited boundaries are deemed to be 'equitable solutions', susceptible of use as 'yardsticks' in other instances. Recurrent patterns in state practice, in particular, appear as *opinio aequitatis*, bearing a quasi-normative effect[87]. The key thought is thus to uncover previous cases that bear some analogy with the case to be decided. Case law and state practice are in essence marshalled as 'yardsticks' to analyse two aspects: the quantum of the adjustment (if any) to the equidistance-line, and the possible 'configuration' of the line. The

(87) Para.7.1. *supra* – which refers to the use of 'yardsticks' for purposes of objectifying the choice of line. There is no question of appreciating negotiated agreements in the exact same terms as case law. Notwithstanding this, a high the level of recurrence of a solution in state practice evinces a diluted influence of extra-legal factors in the cases of boundary negotiation under appraisal. In any event, state practice should be resorted primarily either to complement case law, or to supplement it.

immediate aim of the 'weighing-up process' is two-fold: first, to determine the average 'distance ratio' that corresponds to the line that runs at a *reasonable distance* from either coast; secondly, since there are virtually an infinite number of lines with the same average 'distance ratio', to choose among the possible lines which 'configuration' should be adopted for the line *in casu*. Besides these two aspects, there is a third aspect that must be assessed by courts in their 'value-judgments': the degree of relationship between the 'yardstick' and the case to decide. This aspect determines the soundness of resorting to the former to reason and decide upon the latter[88].

From a conceptual viewpoint, this approach aims at bringing further certainty into delimitation without having to abdicate of justice. Insofar as to each value of 'distance ratio' correspond virtually an infinite number of possible boundary-lines, determining the average 'distance ratio' does not amount to choose the course of the boundary. It simply provides guidance as to the 'amount of adjustment' to be applied, account taken of all delimitation factors – being the adjustment defined in relation to the coast.

Before returning to the 'weighing-up process' *proprio sensu*, there is another point to be made. The delimitation factors are 'value-judgments' that express the optimisation of the principles of maritime zoning and of equity *in concreto*. They form the basis on which hinge the adjustments to equidistance necessary to arrive at a non-inequitable line; a line which produces the *equilibrium* between the exclusive maritime rights and interests of the disputants. Hence, the delimitation factors constitute the core of the delimitation process. Subtle legal assessments must be made on the basis thereof.

Let factors A and B of the 'decision-matrix' of the *Jan Mayen* case be considered as an example. Factor A is formulated in such a way that it inevitably leads to a displacement of the provisional equidistance-line. Assessed in conjunction therewith, factor B does not necessarily require further displacement of that line towards the Jan Mayen coast. The adjustment caused by factor A might entail a partial or full verification of the condition set in factor B. Had it been appraised on its own however, factor B would inevitably require some adjustment. In any event, its impact would always be greater than in the case above. This illustrates what is meant by *attributing to each factor a weight that is determined by its importance in comparison with that of other relevant factors, with a view to reaching a conclusion on the basis of the whole.* Practically speaking, factor A influences primarily the determination of the 'distance ratio', whilst the impact of factor B might be restricted to the 'discovery' of the boundary 'configuration' (i.e. its course).

(88) The relationship might be assessed in terms of similarity of coastal geography, existence of a dominating factor (e.g. disparity of coastal lengths, convexity/concavity of coast, natural resources, position of islands), or a similar set of delimitation factors.

TABLE 3
'Decision-Matrix': 'Weighing-Up' of the Delimitation Factors

DELIMITATION FACTORS	Average 'Distance Ratio' (ADR)	'Configuration'
A. The coastal length ratio of roughly 9:1 must be reflected in an adjustment of the equidistance-line towards the Jan Mayen coast.	ADR = 0.70 Favouring Denmark (*Libya/Malta* case)	No impact.
B. In the southern sector, the boundary must allow an equitable access to the capelin resources by both parties.	Minimal impact (and only if required for the division of capelin grounds).	A line that, in the south, divides the capelin fishing grounds equitably.
C. Jan Mayen has no *capitis diminutio* in terms of its maritime entitlement.	Factor A implies already some 'amputation' of the Danish entitlement.	No impact.
D. Even if adjustments to equidistance are necessary, the boundary shall not run so close to the coasts of either party as to raise questions of security.	No impact.	No impact.
E. The conduct of Norway vis-à-vis a third state (Iceland) has no influence over the determination of the boundary.	______________	______________

The following analysis of the *Jan Mayen* case, necessarily simplified, is intended to illustrate how the 'decision-matrix' designed above could have been utilised to structure the argumentation of the Court, in order to bridge the gap between the reasoning and the line awarded. By recourse to Table 3, it is possible to summarise the impact of each delimitation factor in terms of either the overall adjustment of the provisional equidistance, or the course of the boundary. Being a delimitation between opposite states with a coastal length ratio of roughly 9:1, there was good reason to argue, considering the *Libya/Malta* case, that an average 'distance ratio' of 0.68 favouring Denmark was a reasonable first step towards an equitable adjustment[89]. As regards the capelin resources, as long as the 'configuration' of the line would guarantee to both states an equitable access thereto, no reason would justify increasing the amount of average displacement of the equidistance-line. Should the average

(89) See Figures 8, 11, 71.

'distance ratio' derived from factor A verify factor C, the practical impact of the latter in adjusting the provisional line could be seen as negligible. Factor C was relevant perhaps for purposes of reaching the conclusion that the Danish claim-line was inequitable. When relativised to the other delimitation factors, however, its impact on the determination of the adjustment was in effect non-existent[90].

The factors appraised as regards the adjustment of the provisional equidistance, conclusions would have to be drawn with respect to the boundary course. Unlike in the *Libya/Malta* case, where the whole of equidistance was displaced northwards, here the need to ensure equitable access to the capelin resources in the southern part of the boundary had to be considered. A line that would divide the capelin resources equitably would thus have to be found. The remainder of the boundary would be 'constructed' northwards so that the average 'distance ratio' would remain approximately 0.68 favouring Denmark. These are aspects that result from the delimitation factors directly. Other relevant aspects stem from propositions as to what international law requires. For example, the boundary should depart from equidistance as little as possible, and should have no unnecessary turns[91]. Once these conditions are fulfilled, it is virtually inevitable to arrive at a boundary-line very close to that awarded by the Court.

The arguments put forward by the Court in the *Jan Mayen* case were neither wrong, nor misplaced. In effect, the boundary finds clear support in international law[92]. What is suggested in this study is that this approach makes the leap from the Court's reasoning to the boundary-line much smaller. The improvement in discourse is based on the conjugation of three elements: a 'reasoning-structure' based upon 'multicriteria decision-making', the recourse to an objective assessment that has not been used before (the average 'distance ratio'), and the utilisation of 'yardsticks' found in case law and state practice (somewhat similar to the *Anglo/French* arbitration).

Without attempting to undertake similar exercises in relation to other cases[93], it might be interesting to provide further examples of how case law and state practice may be resorted to as objective 'yardsticks', with respect to either average 'distance ratio' or the 'configuration' of the boundary. The example of delimitations between adjacent states, in

(90) The expression "No impact" indicates the factors that played an irrelevant part in the determination of the boundary.

(91) On this issue, cf. Conclusions to Part II *supra*, and para.8.4.e)(i) *infra*.

(92) Fourteen judges voted favourably on the decision, and only one voted against it. This is the greatest majority in a maritime delimitation case decided by the ICJ, and evinces (despite the criticism directed against the reasoning, inside and outside the Court) a common perception of the reasonableness of the course of the boundary. In the exercise that was carried out, it was assumed (as the Court did without further explanation) that the continental shelf boundary and the fisheries zone boundary would coincide. If the question of the single maritime boundary were raised, further elaboration would be required to justify the course of the boundary (most probably, other delimitation factors would be introduced in the 'decision-matrix').

(93) The final chapter, analysing the delimitation of the continental shelf boundary between Australia and East Timor, is intended to form a "test-case", in which the propositions advanced here are applied in practice to a delimitation yet to be effected.

which the coastal concavity 'pushes' the equidistance-line towards one of the states (which has a slightly shorter coastal length), has already been mentioned above[94]. Although there are other circumstances to weigh in each case, an objective value of average 'distance ratio' appears to characterise this geographical setting. Taking account of the *Tunisia/Libya* case and the two agreements negotiated in the aftermath of the *North Sea* cases, Table 4 shows that an average 'distance ratio' of 0.90 favouring the state with the shorter coastline is an acceptable first step towards an equitable adjustment of equidistance[95].

TABLE 4
Average 'Distance Ratio' in Certain Adjacent Boundaries

BOUNDARY	COASTAL LENGTH RATIO (Façades)	AVERAGE 'DISTANCE RATIO'
Denmark / Germany	1.3 – 1.4 (approx.)	0.88 (approx.)
Netherlands / Germany	1.3 – 1.4 (approx.)	0.91 (approx.)
Tunisia / Libya	1.5 – 2.0 (approx.)	0.90 (less than)

Where there is no strict adjacency or oppositeness, as between France and Spain in the Bay of Biscay[96], the situation is somewhat different. The agreement between these two states includes a Special Joint Zone, which contributed to the final balancing of interests. Notwithstanding this, because this Zone straddles the boundary, this line may still be a reference for other delimitations in which the coastal relationship varies from adjacency (at the terminus of the land boundary) into oppositeness (near the end-point of the boundary). With an average 'distance ratio' of roughly 0.85 favouring France, the line reflects mainly the length of the French coast (ratio of 1.54 in relation to the Spanish coast)[97]. Another case in which the coastal relationship cannot be clearly defined as adjacency or oppositeness is the USA/Canada boundary in the Gulf of Maine. Although the two settings cannot be equated[98], it is interesting to note that the line awarded by the Chamber is based on an

(94) Conclusions to Part II *supra*.

(95) Figures 2, 5, 69, 70. The state with longer coastal length is indicated first in column one. The values of coastal length ratio are mere approximations, because they depend on how the measurements are carried out. In terms of average 'distance ratio', the figures smaller than 1.00 mean that the boundary lies closer to the state indicated first in column one. Because the end-point of the boundary remained undefined in the Tunisia/Libya boundary, the value of average 'distance ratio' had to be indicated in relative terms (i.e. "less than") and not as a concrete value. Considering the examples of Figure 64, these figures are unsurprising.

(96) Figure 31. Appendix 2, D25.

(97) Anderson suggests that this agreement (negotiated shortly after the *North Sea* cases) considered to some extent the seabed morphology (Anderson, IMB/Report 9-2, pp.1722-1723). *Contra*, referring to proportionality only, see Jeannel/1980, pp.37-38.

(98) The coastal relationship between France and Spain is initially adjacency, and turns towards the other extreme of the boundary into a situation of oppositeness. Between the USA and Canada, the coastal relationship is somewhat hybrid initially, it evolves into a situation of oppositeness in the middle (near the mouth of the Gulf), and it ends as a situation of almost adjacency.

average 'distance ratio' of approximately 0.98 favouring the USA[99], the state with longer coastline (ratio of 1.38 in relation to the Canadian coastline)[100].

Typical are also the delimitations between opposite states in enclosed areas (where the area of overlap comprises the whole, or great part, of the sea area), in which the coastal length ratio is less than 2.0. The solution adopted in case law (e.g. *Eritrea/Yemen* and the *Anglo/French* arbitrations, the latter in the "Channel region") and state practice (e.g. the Italy/Yugoslavia, Italy/Tunisia and Iran/Saudi Arabia agreements) is derived from a dual approach[101]: the boundary is based on an equidistance-line (average 'distance ratio' of 1.0); and insular features are treated autonomously. In territorial sea delimitation, the line is in principle an equidistance (or runs close thereto). If it concerns areas beyond the territorial sea, the boundary is based primarily on an equidistance-line from the mainland coasts. Islands positioned close to the mainland coast are equated thereto. If located in the vicinity of, or beyond, the equidistance from mainland coasts, islands are guaranteed a 12 M territorial sea. The impact of islands located in an intermediate position varies with the distance from it to the mainland, and the distance between mainland coasts[102].

To end this brief excursion through some of the 'yardsticks' existent in case law and state practice, reference will be made to the situation in which the territory of a coastal state is 'walled', by the territory of another state. Regardless of the average 'distance ratio' involved, state practice seems to favour what may be named 'corridor-solutions'. Examples of this type of approach are the Gambia/Senegal, Monaco/France, and Dominica/France (Guadeloupe and Martinique) agreements[103]. The two lateral boundaries were reached by 'opening' the equidistance-lines, and by 'pushing' them towards the 'surrounding state'. The *Canada/France* arbitration and the Venezuela/Netherlands (Antilles) agreement, while having similar sort of solution, reflect nonetheless a slightly different setting[104]. Since the islands are located in front of a continental coast (and not 'side-walled'), the coastal façade is not continuous; and the equidistance-lines were instead 'pushed' towards the 'surrounded state' (thus conveying a different *equilibrium*). Notwithstanding this, all cases suggest one type of 'yardstick'. Where two adjacent boundaries have to be delimited between the same two states, 'corridor-solutions' ensure reasonable area-attributions[105].

(99) In this calculation, *Mount Desert Rock*, a very small insular feature detached from the coast, was not considered.

(100) When compared with the division that would be operated with recourse to equidistance (if account was taken of the same basepoints), the value of 0.98 suggests that the division operated by the boundary is not substantially favourable to the USA (in terms of area-attribution).

(101) See Figures 3, 12, 18, 19, 25; cf. Appendix 2, B25-B26, D45.

(102) Para.8.2.c) *infra*.

(103) Para.5.3.d)(iii) *supra*; cf. Appendix 2, D27, F19, F34; Figures 23, 27, 39. Cf. Brunei/Malaysia continental shelf boundaries, defined by the United Kingdom in 1958, and apparently accepted subsequently by the two emerging states (Appendix 2, B15).

(104) Figure 10; Appendix 2, D65.

(105) It is noteworthy that the 'corridors' do not have to be formed by two parallel lines. They might have a 'funnel shape'.

All in all, the key issue becomes the identification of the aspects of 'typification' on the basis of which analogies can be elicited. Granted that this is not a novelty in legal theory, it nevertheless demonstrates that maritime delimitation can be seen as just another problem of the application of the law. What makes the difference is that the normative standards whose application is required are two principles of law, entailing an argument of principle that emerges as their optimisation relative to the legal and factual circumstances *in concreto*. The aim of this section was to explain, conceptually, how the determination of the boundary, consisting of such an optimisation, ought to be undertaken, account taken of one specific concern: bridging the gap between the reasoning and the line awarded. For practical reasons, no attempt has been made to offer a comprehensive assessment of all typical situations that can be found in case law and state practice, as to either average 'distance ratio', or 'configuration' of the boundary[106].

TABLE 5
'Negotiation-Matrix': Identification of Goals of States A and B

STATE A (Goals)	STATE B (Goals)	Goal Relationship
Regulating navigation in strait ZZZ, owing to environmental concerns	Regulating navigation in strait ZZZ, owing to environmental concerns	Common
	Ensuring a boundary that addresses security concerns in area YYY	Indeterminate
Create a stable environment for investment in petroleum exploitation	Create a stable environment for investment in petroleum exploitation	Common
Exclusive access to fishing resources in area XXX	Sharing the fishing resources of the area XXX	Opposite
Equidistance unacceptable because it does not guarantee exclusive access to fishing resources in area XXX	Equidistance (or equidistance-based) boundary, to safeguard position in a future delimitation with state C	Indirectly Opposite
Ensuring political approval for the boundary internally		Indeterminate

Finally, a brief reference must be made to the use of 'multicriteria decision-making' in negotiations. Just as it is applicable for structuring the reasoning in adjudication, it might be used in negotiation. States could indeed develop a complete 'decision-model'. However, this would not be viable in many instances. The time and effort needed to design a detailed

(106) Owing to the amount of groundwork that would be required, it was not even possible to calculate the average 'distance ratios' involved in all examples advanced above. Without adequate computation means – capable of accessing electronic-vector charts

'decision-model' can be as much as required to negotiate the boundary on more 'traditional' bases. More appropriate is the recourse to 'multicriteria decision-making' in terms similar to those described above for legal decision-making.

In addition, whilst helpful towards the identification and formulation of delimitation factors, matrices are useful for clarifying other aspects in the negotiating process. A matrix might be useful for taming the waters in highly complex negotiations. First, presenting delimitation under a more objective framework contributes to measuring the realisation of each party's goals. This expedites proposals and counterproposals. With it, the balance is more easily struck. Secondly, it is important in negotiation to pinpoint, among the various goals and interests of each state, those that have a conflicting nature and those that are reconcilable. Owing to confidence-building, the identification of common goals can create a momentum that may become decisive for the successful outcome of negotiations. Table 5 shows an example of how negotiation-goals might be identified and related.

and of executing specific computations on the basis of the information contained therein – the calculation of average 'distance ratios' is extremely time-consuming. For this reason, it would become incompatible with the main objective of this study.

Chapter 8

THE QUEST FOR A BOUNDARY-LINE

8.1. Elements Germane to the 'Weighing-Up Process'

Elements germane to the 'weighing-up process' are those considerations that, being weighed in the delimitation process, determine the course of the boundary. This notion comprises primarily factual elements from which stem the delimitation factors. But there are also non-factual elements to be considered. They are designated here as 'complementary delimitation elements'. The expression 'relevant circumstances' was purposely avoided. Its connotation, linked with the 'equitable principles doctrine', is perhaps unhelpful for this analysis. Similar reservations may be raised as to the notion of 'special circumstances', whose arguably narrower content seems incompatible with the approach outlined below. Notwithstanding these remarks, it is obvious that the considerations examined hereinafter overlap significantly – if not totally – with these notions.

There is no reason for undertaking an analysis that would repeat much of what has already been said as to the concepts of 'relevant circumstances' and 'special circumstances'. What is necessary is to reassess the conclusions of case law and scholarship in light of the conceptualisation adopted here. It is particularly important to identify discrepancies in viewpoints, to evaluate recent developments, and to clarify the impact of the 'factual matrix' in the optimisation of the principles of maritime zoning and of equity.

Latent in the different terminology that has been used is a different conception of maritime delimitation. Delimitation factors appear not as facts but as 'value-judgments', indispensable for the application of the normative standards laid down in international law. As such, they result from a sifting of the 'factual matrix' through the 'legal matrix', which seeks to establish which factual elements ought to be considered, and how they are to be considered. Delimitation factors surface thus as conditions to fulfil or objectives to attain. What the 'weighing-up process' considers are these factors; not the facts whose existence they presuppose.

From the standpoint of optimisation of principles, which depends on the interaction between the factual and the legal possibilities *in casu*, this means that, in different contexts, the same fact might result in different delimitation factors. What seems reasonable in EEZ delimitation might be less reasonable in territorial sea delimitation. Access to certain fishing

grounds, for instance, should be appraised differently in EEZ delimitation, or in territorial sea delimitation. Although the fact is the same, the delimitation factor that it will give rise to will almost invariably be different, in respect of both its definition and its relative weight. Such an intuitive conclusion reflects the different regimes of exclusiveness, and its impact under the proposed conceptualisation.

Directly tied up with this subject is the question of precedence between entitlements of a different type[107]. To use the same example of the fishing grounds, suppose that they are located within the territorial sea entitlement of state A; and suppose that, though outside the territorial sea entitlement, they are located within the EEZ entitlement of state B. Under the conceptualisation advanced here, in principle, these fishing grounds would not result in a delimitation factor when determining the EEZ boundary between states A and B. At best, if positioned relatively at close distance from the coast of state B, they might become a factor to be 'weighed-up' in the wider balance of interests.

Hitherto emphasis has been put primarily on the understanding of the 'legal matrix', and how it moulds the delimitation process. The following two sections seek to elaborate on the 'factual matrix'. The focus is the way in which 'typification' interweaves with the 'weighing-up process'. Categorising facts under the bipartition "juridical circumstances *versus* geographical circumstances"[108], for instance, fails to realise that all pertinent facts must be juridically relevant. Their pertinence in adjudication rests always on the normative regime of maritime zoning, by relation either to maritime entitlement, or to the regime of exclusive rights and interests. Practically speaking, thus, this analysis attempts to provide an outline of the facts that may be subsumed in the notion of *considerations related to the basis of maritime entitlement, or to the legal rights and interests embodied in the regime of exclusiveness of each zone.* Since there can be no closed list of relevant considerations, the following categorisation and fact-description should be seen as merely exemplificative.

8.2. Facts Related with the Basis of Maritime Entitlement

8.2.a) Coastline

The fundamental fact in maritime delimitation is coastal geography. Entitlements over maritime areas are always referenced to the coast. A state projects its sovereign power onto the sea, and exercises control over maritime areas, if its territory abuts on an oceanic space. This idea is neatly summed-up by Weil, when observing[109]: "In order to benefit from

(107) Paras.4.3.d)(iii)(iv) *supra.*
(108) Cf. Calatayud/1989, pp.96-132.
(109) Weil/1989a, p.53.

maritime rights it is not enough to be a state. One must also be a coastal state [...]. A coastline is an essential element in every state projection seawards."

In principle, the coastline is referenced to the low-water line[110]. All parts thereof are relevant for delineating the limits of states' maritime jurisdiction[111]. With perhaps only the exception of Article 121(3)[112], little room is left for interpretation as to what constitutes the relevant coast. The main issues concern the notion of low-water line. Unrelated to the coast *stricto sensu* is, on the other hand, the entitlement to the continental shelf beyond 200 M; which under Article 76 is to be delineated, *inter alia*, in accordance with geomorphological, geological, and geophysical data. This aspect of entitlement will be examined later.

Saying that equidistance is *de facto* and *de jure* the starting point for delimitation is tantamount to placing the coastline at the forefront of the assessments of fact to be made. In the *Qatar/Bahrain* case, the first assessment concerned the determination of "the relevant coasts of the Parties" – specifically the determination of the "location of the baselines and the pertinent basepoints which enable the equidistance-line to be measured". The Court's conclusion (on the basis of which it analysed the parties' views) was that "under the applicable rules of international law the normal baseline for measuring this breadth is the low-water line along the coast"[113]. This approach confirmed what had already been asserted in the *Eritrea/Yemen* arbitration, in which the Tribunal drew the same conclusions[114].

Especially important in the debate surrounding the determination of the relevant coastline is the question of low-tide elevations located in the area of overlapping territorial sea entitlements – an issue raised also in the *Qatar/Bahrain* case. The Court stated then that "international treaty law [was] silent on the question whether low-tide elevations can be considered to be *territory*", and that it was unaware "of a uniform and widespread state practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations". The key inference of the Court was that "there is no ground for recognising the right [...] to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims", and that "for the purposes of drawing the equidistance-line, such low-tide elevations must be disregarded"[115].

(110) LOSC, Articles 5-7, 9-10, 13, 47, 121.
(111) LOSC, Articles 3-4, 33(2), 55, 76(1).
(112) Para.8.2.c) *infra*.
(113) Qatar/Bahrain-Merits, paras.177-178, 184.
(114) Eritrea/Yemen-II, paras.133-135. Building on this idea, one would argue that technical problems related to 'normal baseline definition' might become crucial in these assessments. In the *Qatar/Bahrain* case, the Court did not examine Qatar's argument that the provisional equidistance-line should be computed by reference to the high-water line, which was arguably defined more accurately (Qatar/Reply, paras.9.44-9.49.).
(115) Qatar/Bahrain-Merits, paras.205-209. Because this is somewhat of a novel question, and because it influenced the decision of considering that Fasht ad Dibal belonged to Qatar, it is worthwhile stressing that this latter decision was taken unanimously; cf. paras.220, 252(5). Low-tide elevations are thus not territory *stricto sensu*.

All that need be added to demonstrate the relevance of the coastline in maritime delimitation is to refer to its key role in the definition of the overlapping of entitlements[116]. Its significance is two-fold. Without defining the overlapping, it would not be possible to distinguish between the different types of overlapping entitlements, which would render the idea of precedence between different entitlements inapplicable[117]. The issue is all the more significant because, as suggested above, the Court should reason in terms of division of the area of overlapping entitlements, and not of the area of overlapping claims[118].

8.2.b) 'Controlling Basepoints'

When it comes to the impact of the coastline in the delineation of the spatial limits of maritime jurisdiction, an idea must be borne in mind at all times: not all basepoints along the low-water line are relevant for this operation. The technique of 'envelope of arcs'[119] renders most points on the low-water line irrelevant. Only the basepoints whose prominence in relation to the other basepoints results in an impact on the calculation of the outer-envelope are relevant. Naturally, the number of relevant basepoints varies with the coastline shape: in relative terms, a flatter coast generates usually more relevant basepoints than an indented coast. Further, the wider the breadth of the maritime zone, the smaller is the number of relevant basepoints. More basepoints are utilised to delineate the territorial sea outer limit than to delineate the EEZ and continental shelf outer limit. For the purpose of delineating the limits of maritime zones, therefore, the state's coastline may be described by a series of discrete points along the coast.

Inasmuch as equidistance is to be computed by reference to basepoints, this issue cannot be underestimated in delimitation[120]. Analogously to the delineation of limits, in the computation of equidistance the number of relevant basepoints is variable. It varies with the geography between the coasts involved, notably the adjacency-oppositeness aspect and the distance between coasts. As a rule of thumb, it may be said that the number of relevant basepoints is larger in a clear case of oppositeness than in a clear case of adjacency, for states with similar coastal lengths (although this depends critically on the shape of the coasts in question and on the distance between states)[121].

(116) Because maritime entitlements are based primarily on distance, the overlapping of entitlements is usually defined on the basis of computations that resort to the coastline. In some exceptional cases, however, there might be areas of overlapping entitlements that are created by reference to the natural prolongation of states (cf. para.8.4.b)(i) *infra*).

(117) Paras.4.3.d)(iii)(iv) *supra*.

(118) Paras.4.3.b) *supra*.

(119) On the "envelope line", cf. Shalowitz/1962, pp.170-172; Boggs/1951, pp.246-250.

(120) There are various technical question associated with this computation, notably: the geodetic datum to which the basepoints' coordinates are referred, the recourse to graphical or technical methods in computations, the problems raised by chart projections.

(121) For two similar cases of oppositeness, the number of relevant basepoints varies with the distance between coasts.

A single basepoint (or a small number of basepoints) controlling the whole course of equidistance is a possibility less likely to be realised in oppositeness (except in certain instances involving islands), than in adjacency. In the latter, a headland near the terminus of the land boundary, or an insular feature either in a similar position or further away from the terminus but in a more salient position, are very likely to control the course of equidistance. Because they control the whole (or very long stretches) thereof, these basepoints might be named 'controlling basepoints'. Why three equidistance-based methods were initially devised for adjacency cases is perhaps explicable by reference to this fact. The "method based on equidistance from the boundary" sought to circumvent the effect of 'controlling basepoints' by spreading relevant basepoints along the coast[122].

Concealed in this debate is a question of '*representativeness*' – i.e. of determining whether the basepoints utilised to compute equidistance faithfully characterise the *coastal relationship* between the states involved (considering the relevant coast). One would submit that 'controlling basepoints' are *unrepresentative of the coastal relationship.* They might produce inequitableness in area-attribution if strict equidistance is applied (Figure 86). The *existence of 'controlling basepoints'* is an aspect that must be considered in the formulation of delimitation factors. Equidistance is to be adjusted in order to reach a non-inequitable solution – the adjustment depending on the relevant 'yardsticks'. Whatever the answer, the key point is that the disproportionate area-attribution yielded by 'controlling basepoints' breaches the requirement of *equilibrium*.

8.2.c) Islands

In maritime delimitation, probably no issue caught the attention of writers more than the 'effect of islands'[123]. One would argue, however, that most (if not all) aspects regarding this problem are in effect subsumable under the problem of 'controlling basepoints'. The key question is primarily whether basepoints on islands' are unrepresentative of the coastal relationship between the states concerned. That is what happens, for example, with islands detached notably from the 'mainland coast' in oppositeness, or with islands positioned in the vicinity of the terminus of the land boundary in adjacency[124].

(122) Para.5.2.a)(i) *supra*; Figure 56.

(123) Cf. Kozyris/1998; Lucchini/Vœlckel/1996, pp.169-173, 255-263; Estapà/1996, pp.98-102; Bowett/1993; Jayewardene/1990, pp.259-529; Weil/1989a, pp.229-235; Evans/1989, pp.133-151; Briscoe/1989; Ciciriello/1988; Attard/1987, pp. 259-264; Dipla/1984, pp.105-231; Bowett/1979, pp.139-247; Symmons/1979, pp.152-204; Karl/1977; Hodgson/1973a; Hodgson/1973b.

(124) The effect of low-tide elevations is similar. The distinction is that whereas islands' basepoints are always usable, low-tide elevations' basepoints can only be used if they lie within the territorial sea of land territory *stricto sensu*. In this debate, attention must be drawn to the comments of judge Oda in the *Qatar/Bahrain* case (cf. Separate Opinion, paras.6-9, 20-21, 40). Noting that many provisions of the LOSC concerning insular features were simply transposed from the 1958 Conventions, which had been devised for a narrower territorial sea belt, he expresses his "doubts as to whether Article 121 concerning the regime of islands of the 1982 United Nations Convention which does not refer to islets or small islands may as a whole be considered the customary international law in the age when the 12-mile territorial sea prevails" (para.7).

Bowett analyses this issue by categorising two types of setting: the first concerns cases in which islands appear as "the sole unit of entitlement"; the second relates to cases where the entitlement of islands appears "in conjunction with the entitlement of a larger territorial unit"[125]. No question is raised against putting emphasis on geography. It reflects the nature of the entitlement, and leads to a categorisation that finds support in case law and state practice. Attention has nevertheless to be paid to a conceptual point. Behind this view is an issue of 'representativeness' of the basepoints for the delimitation. Islands that appear as the "sole unit of entitlement" deserve different treatment because the 'representativeness' of their basepoints is beyond question. The *Canada/France* arbitration and the *Jan Mayen* and *Qatar/Bahrain* cases demonstrate that islands have no *capitis diminutio* as to maritime entitlement. The latter case illustrates equally the distinction between islands' basepoints which are representative of the coastal relationship, and those which are not.

Having an objective idea of the disproportion created by 'controlling basepoints' entails a comparison between strict equidistance and the equidistance-line that results if these basepoints are not considered. The notion of partial-effect (or no-effect) builds on this comparison[126]. Partial-effect seeks to avoid the effect of 'controlling basepoints' of islands, when they completely 'shadow' other basepoints on the state's coastline. Various examples may be given: the Scilly islands (U.K./France); the Kerkennah islands (Tunisia/Libya); Seal island (Canada/USA); Filfla island (Libya/Malta); the Zubayr group and Jabal al-Tayr (Eritrea/Yemen); Qit'at Jaradah (Qatar/Bahrain); Fanos, Samothrake and the Strofades group (Greece/Italy); Kharg island (Iran/Saudi Arabia).

Another approach adopted to overcome this issue is the enclaving (semi-enclaving) of islands[127]. The underlying distinction is that the basepoints on these islands are even less representative of the coastal relationship, thus producing an even greater inequitableness in area-attribution, if strict equidistance is applied. Both in adjacency and in oppositeness, the examples are clear: the Channel islands (U.K./France); Abu Musa island (Dubai/Sharjah); Alcatraz island (Guinea/Guinea-Bissau); Pelagruza and Galijula islands (Italy/former Yugoslavia); Lampedusa, Lampione, Pantelleria and Linosa islands (Italy/Tunisia). Though simplified, the same solution was used in the *Eritrea/Yemen* arbitration. Preserving the territorial sea of Zuqar and Hanish islands, the Tribunal considered it preferable to have a simpler straight line as the boundary, instead of the more complex 12-mile limit. It observed nonetheless that the line was "also very near to the putative boundary of a Yemen territorial

(125) Bowett/1993, p.132. He divides the second type of setting in three sub-categories referenced to the relative position of islands: (a) lying proximate to a mainland coast under the same sovereignty; (b) straddling a median or equidistant line between 'mainland' coasts; or (c) proximate to a mainland coast under a different sovereignty.

(126) Para.5.2.c) *supra*.

(127) Para.5.3.a) *supra*.

sea in this area, but [made] for a neater and more convenient international boundary"[128]. Bringing simplicity to the boundary, this approach may in many instances be preferable.

There is little doubt that islands (regardless of their size and position) are entitled to a full territorial sea belt, and that in principle 'amputations' of territorial sea entitlements occur only by effect of an overlapping territorial sea entitlement[129]. With respect to EEZ and continental shelf entitlements, account must be taken of Article 121(3)[130] – one of the most debated provisions of the LOSC. Conceptually, inasmuch as delimitation refers to an area of overlapping entitlements, determining whether an island generates a relevant entitlement is an issue that precedes any delimitation involving that island. For better or for worse however, this has not been the approach adopted by courts in delimitation[131].

Oude Elferink argues that, in most delimitations, "the clarification of Article 121(3) is not a matter of great urgency". To him, "[t]his is mostly explained by the contents of the rules of international law applicable to the delimitation of maritime boundaries, which allow for sufficient flexibility to achieve an equitable result without ruling on the applicability of Article 121(3)"[132]. Judicial restraint would indeed explain the 'unwillingness' of courts to address an issue whose outcome would not be strictly necessary to resolve the dispute. The problem however, is conceptual. Insofar as delimitation law applies to an overlapping of entitlements, the determination of the reach of all entitlements involved ought to precede its application. Concerning the existence of an entitlement, Article 121(3) should be interpreted and applied before delimitation law. To apply delimitation law without fully determining which entitlements are involved, and overlap, is somewhat odd.

Charney identifies the root of this difficulty. He observes first that, "[i]n theory, Article 121(3) features may also influence the location of international maritime boundaries that delimit EEZs and continental shelves generated from other features"; but concludes that "that potential will almost never be realised"[133].

Consider the *Eritrea/Yemen* arbitration, which involved features whose status under Article 121(3) could be debated. Because the distance between the mainland coasts of the two states is less than 200 M, the whole of the sea area between them consists of an area of overlapping entitlements, regardless of the islands' status. Ultimately, without analysing Article 121(3), the Tribunal virtually ignored the mid-sea islands in the delimitation of areas

(128) Eritrea/Yemen-II, para.162.
(129) Para.4.3.d)(ii) *supra*.
(130) On the entitlement of islands and Article 121(3), cf. Getnes/2001; OudeElferink/1999; Charney/1999; Karagiannis/1996; Kolb/1994; Kwiatkowska/Soons/1990; VanDyke//Morgan/Gurish/1988; Dipla/1984, pp.38-42; Symmons/1979, pp.45-53, 120-129; Van Dyke/Brooks/1979, pp. 351-392.
(131) Article 121(3) raises two different issues: one concerns the delineation of the outer limits of state jurisdiction; the other regards the delimitation of maritime boundaries between states. Only the latter is considered in this study.
(132) OudeElferink/1999b, p.12.
(133) Charney/1999, p.877 (similarly, p.875).

beyond the territorial sea[134]. In the debate surrounding Article 121(3), the decision to give no-effect to Jabal al-Tayr and the Zubayr group deserves special attention[135]. The reasoning of the Tribunal appears to hint at the recourse to the substantive criteria of the said Article 121(3) without ever committing itself to a clear assertion. The reference to the "barren and inhospitable nature" of the islands as justification for not attributing to them any effect "is perhaps as close as one may come to affirm that a particular island 'cannot sustain human habitation and economic life of their own' without really saying so"[136].

Owing to the interpretative difficulties that Article 121(3) embodies, questions have been hung on its operational nature[137]. One would argue, however, that many issues are insusceptible to 'black-white distinctions' – especially if relying on open-ended concepts. If the example of the *Eritrea/Yemen* arbitration is followed, this provision might become the basis for justifying a 'gradualist application'. Courts might use it as the basis to consider extra-geographical factors in assessing the effect of islands: less viability to sustain human habitation or economic life might be equated to less effect.

By conjugating paragraphs 2 and 3 of Article 121, questions must be raised as to the relationship between the entitlement to a contiguous zone and the delimitation of maritime areas beyond the territorial sea. It was suggested before that some precedence should *prima facie* be given to the entitlement up to 24 M, over entitlements beyond it[138]. However, this is not tantamount to asserting that a contiguous zone entitlement can be 'amputated' only by effect of a similar competing entitlement. Mostly, it depends on the (geographical) scope to redress inequities. There is at least one example in case law that supports this suggestion: the *Canada/France* arbitration[139].

In summary, one would submit that, in maritime delimitation, islands should be assessed primarily in terms of the 'representativeness' of their basepoints. For those islands that Bowett denominates "sole units of entitlement", the 'representativeness' cannot be questioned. What might be relevant then is a possible existence of disparity of coastal lengths[140]. Islands are truly 'advantaged' in terms of their capacity to generate maritime entitlements. Their 'circular shape' – so to speak – creates a radial-effect that causes them

(134) The boundary awarded was based on an equidistance-line between mainland coasts (which the Tribunal deemed to be "in accord with practice and precedent in the like situations but is also one that is already familiar to both Parties", and to be supported in some measure by the petroleum concessions), the effect of islands requiring careful consideration (Eritrea/Yemen-II, para.132). For reasons related with the simplicity of the boundary (recourse to a straight line rather than to a 12-mile limit-line), the Tribunal attributed the Zuqar and Hanish islands a little more than territorial sea; but it gave no clear explanation as to why the impact of these islands should be so restricted (paras.160-162).

(135) Eritrea/Yemen-II, paras.147-148.

(136) Antunes/2001, p.329.

(137) Karagiannis/1996, p.623.

(138) Para.4.3.d)(iv) *supra*.

(139) ILM/31/1992, pp.1169-1170, paras.68-69. On the scope to redress inequities, cf. para.8.4.a) *infra*.

(140) While examining the situation of insular features in the context of the South China Sea, Oude Elferink has concurred with this view (OudeElferink/2001, pp.180-181).

to generate areas greater than those generated by a straight coast with the same length. This does not signify that the said radial-effect prevails in delimitation. Nothing in international law supports such a proposition – and the bilateral nature of delimitation does not allow the mere extrapolation thereof. The existence of a coastal length disparity (the effect of which emerges clearly in the adjustments made to equidistance in the *Canada/France* arbitration and in the *Jan Mayen* case) might predominate in terms of area-division.

For islands belonging to a larger territorial unit, the issue is 'representativeness' of their basepoints – in the light of the geographical context. Other factors (e.g. population, economic status) should be appraised only as to very small islands. Here, Article 121(3) might become the beacon for a 'gradualist approach'. Geographical 'representativeness' can then be assessed by reference to 'distance ratio' assessments (as either average 'distance ratio', or differentiated 'distance ratio'), in the context of 'yardsticks' found in case law and state practice. Rather than being centred on the size of islands[141], the effect of islands should be assessed in terms of a correlation between coastal length and the distance of the relevant basepoints from the majority of the basepoints. What matters is that larger islands, with longer coasts, contribute more to the coastal relationship. To the greater 'representativeness' of their basepoints corresponds greater effect. Contributing less to the coastal relationship, basepoints on small islands (especially if isolated) are less representative.

Any analysis of this problem entails, almost inexorably, a reference to *Isla Aves*, an insular feature belonging to Venezuela. In terms of delimitation, this insular feature poses, simultaneously, problems of 'representativeness' and of legal status under Article 121(3)[142]. Three treaties entered into by Venezuela, with the USA, the Netherlands (Antilles) and France (Guadeloupe and Martinique), have granted it full-effect[143]. This was objected to by certain Caribbean states, resolved not to acquiesce to, or recognise, the granting of "island status" to Aves[144]. An in-depth analysis of all legal issues cannot be carried out here. Two points should be highlighted, however. First, it is true that the legal status of Aves under Article 121(3) is open to question. However, and secondly, it is also true that the relevant Venezuelan continental coastal façade abutting on the area is well over 300 M, much longer than any other façade abutting on this area of the Caribbean Sea.

(141) This does not mean that size is not considered to determine if an island is a rock under Article 121(3), to which Hodgson's classification might be useful: *rocks*, less than 0.001 square mile (sq.M) in area; *islets*, between 0.001 and 1 sq.M; *isles*, between 1 and 1,000 sq.M; *islands*, larger than 1,000 sq.M (Hodgson/1973a, p.17; Hodgson/1973b, pp.150-151). A classification attempted by the IHB (apparently not adopted) referred to *rock* as a feature 400 times larger than that of Hodgson (Kapoor/Kerr/1986, p.68).

(142) Its coastal length of less than one mile, and its location is 270 M north of *Isla Margarita* (Venezuela), but much closer to other Caribbean islands (e.g. 125 M from Dominica, 110 M from Guadaloupe, 100 M from St Kitts and Nevis).

(143) Appendix 2, D64, D65, D67.

(144) The text of the letters addressed to the Secretary-General of the United Nations by Antigua and Barbuda, St.Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines, appears in LOS Bulletin, No.35, pp.97-100. Taking account of the *de facto* limitations that the agreements might impose in the Caribbean context, these objections are understandable. Legally speaking, the objections might add little to the position of these states, which were already protected by the *pacta tertiis* rule.

To illustrate 'representativeness', in more classical terms, reference can be made to the Greece/Italy agreement, which illustrates various combinations. Corfu, Kefallinia and Zakynthos, islands with long coastlines, positioned very close to the mainland, were given full-effect; Fanos and Samothrake, islands further offshore, having shorter coasts, were given three-quarter-effect; and the Strofades, islands with even shorter coastlines, located even further offshore, were given half-effect[145]. Decisive for this idea is the argument of the Court, in the *Qatar/Bahrain* case, in relation to the effect of Fasht al Jarim. Stressing that the northern coasts of the parties were "*not markedly different* in character or *extent*" and that Fasht al Jarim was "*a remote projection* of Bahrain's coastline", the Court attributed no-effect thereto[146].

8.2.d) General Direction of the Coast and Façades

From the outset, it must be clarified that the concepts of *general direction of the coast* and *façade* do not differ substantively. The general direction of the coast is a coastal façade at a certain scale[147]. The distinction is perhaps only practical. Typically, references to the *general direction of the coast* are correlated with the determination of boundaries by recourse to perpendiculars. *Façade* appears as a more loose term in two contexts: to apply *méthodes de lissage* (whether perpendiculars or bisectors), and to measure coastal lengths. This distinguishing aspect is however not a hard and fast rule. In case law, relevant coasts have already been measured by recourse to "segments, according to their lines of general direction"[148]. In reality, a strict conceptual distinction between these two terms does not appear to be possible.

The coastal façade is not strictly speaking a fact. It is an interpretation of a fact: the coastline. In essence, a façade amounts simply to the greatest simplification of the coast, contemplating no prominent points. Consequently, the effect of 'controlling basepoints' that might exist along the coastline is circumvented. This is partly the rationale underlying the *méthodes de lissage*. Insofar as it takes account of *the whole length of what is deemed the relevant coast*, a façade bears great 'representativeness'. Coastal relationship is indeed best expressed by façades than by the low-water line along the coasts. Judge Oda, who as shown in the *Qatar/Bahrain* case has long been one of the main advocates of using coastal façades, observes in this respect:

(145) Appendix 2, D29. The total length of Greece's Ionian Sea façade is slightly less than 300M. The approximate façade of the islands' are: Corfu, 30 M; Kefallinia, 25 M; Zakynthos, 20 M; Fanos, 2 M; Samothrake, 1.5 M; Strofades islands (together), 1 M. From Zakynthos, the shortest distance to the mainland is some 9M; from the Strofades, it is 26 M.

(146) Qatar/Bahrain-Merits, paras.247-248, emphasis added.

(147) As observed by the Committee of Experts in 1953, scale is the key aspect for 'discovering' the general direction of the coast, the danger that it is subject to diverse interpretations (cf. ILC/Yearbook/1953(II), p.78). See Figures 75, 84.

(148) *Canada/France* arbitration, ILM/31/1992, p.1162, para.33. On the measurement of coastal lengths, cf. para.8.2.e) *infra*.

> Would it not be correct to interpret the equidistance/special circumstances rule to mean that the line of equidistance, from the outset, should be drawn taking into consideration the topography of the region, which is vast, as a whole. This is why I have advocated the macrogeographical approach. [...]The coastal *façade*, as I envisage it, represents a view taken of a State's coastal front with the intent of placing it in the proposed perspective in relation to the coastal front of its neighbouring States.[149]

The idea of conjugating the equidistance/special circumstances rule with recourse to coastal façades must be justified under international law. One would argue that the soundest (if not the only) manner of presenting such a normative justification is by recourse to a 'value-judgment'. As aforesaid, the existence of 'controlling basepoints' might prompt the need for a delimitation factor that takes account thereof. It is on this idea, and on the fact that *méthodes de lissage* are substantively a variant of equidistance, that the justification to resort to façades should be predicated. The principle of equity provides justification for discounting the effect of 'controlling basepoints'; and the principle of maritime zoning, offers legal support to utilise *méthodes de lissage*. This application might include, in very specific cases where the coast is concave or convex, the recourse to 'radial-lines' (which is based not on a general direction, but on a *general orientation of the coast*). In line with the argument that there should be no question of freedom of choice of method, this proposition exemplifies how the application of methods other than equidistance might be reasoned.

Weil argues that since equidistance, "by its very nature, reflects the direction of the two coasts and their changes of direction, together with the irregularities of the shoreline as a whole, any adjustment of this line [would amount] to a correction of geography". He adds, as to the potential inequity of equidistance, that "[n]ature, not equidistance, should be the target"[150]. Perhaps this is not exactly true. First and foremost, since only a few basepoints are relevant to compute an equidistance-line[151], the true direction of the coasts involved might not be translated in such computation. That equidistance is not inequitable is undoubted[152]. However, the crux is that, in that it might be computed from points unrepresentative of the coast, equidistance might not reflect the legal basis from which it stems: maritime zoning. Then, recourse to the façade or general direction (orientation) of the coast, which amounts indeed to some refashioning of geography, seems reasonable, thus equitable. Secondly, the fact that equidistance (as well as the breadth of maritime zones) is measured from the low-water line is not a natural fact. It is a legal proposition. States could have opted instead for other types of line (e.g. the mean-water line or the high-water line, or

(149) Separate Opinion, paras.38-39 (partially citing his arguments in the pleadings of the *North Sea* cases).
(150) Weil/1989a, p.225.
(151) Para.5.2.a)(ii) *supra*.
(152) Para.6.3.d)(iv) *supra*.

even some other form of coast-depiction)[153]. What happens is that nautical charts (which are *par excellence* the maps that offer worldwide information on coastal and offshore areas, and seabed relief, germane to the law of the sea), for reasons other than legal (i.e. safety of navigation), depict with reasonable accuracy the low-water line. Moreover, this is coincidentally the line that maximises the maritime claims of states.

One needs scarcely point out that the recourse to façades ought to be differentiated from using straight baselines *lato sensu*[154]. Insofar as it has been argued that equidistance must always be taken as the starting point of all delimitations, this issue must necessarily be addressed. In negotiations, there are three main possible ways to consider straight baselines. The first consists of giving full or partial weight to any straight baselines claimed by each of the states involved. Another possibility is to disregard any straight baselines, and to derive the equidistance from the normal baseline. A third option is to 'construct' straight baselines exclusively for purposes of the delimitation[155]. Notably, all options rely on a consensual approach: the states involved agree on the way in which to deal with straight baselines.

The perspective is not much different in adjudication. Unless the parties agree that the straight baselines are to be given effect (or to be otherwise utilised), tribunals are bound not to consider them. In the *Libya/Malta* case, without expressing an opinion on the validity of the Maltese straight baselines drawn around Filfla island, the Court disregarded them. In effect, it gave no-effect to Filfla island when computing equidistance[156]. Further explaining why straight baselines are irrelevant, the Tribunal that decided the *Guinea/Guinea-Bissau* stated that the problem of the baselines is not of direct concern to courts "as these lines *depend on the unilateral decision of the states* concerned and do not form part of [delimitation] dispute[s]"[157]. This view was fully endorsed in the *Eritrea/Yemen* arbitration; while assessing the relevance of the Eritrean straight baselines, the Tribunal asserted that such an issue was "hardly a matter that the Tribunal [was] called upon to decide"[158].

In summary, taking into account the bilateral nature of delimitation, since straight baselines stem from unilateral decisions of states, their use *vis-à-vis* other states depends on

(153) "Coastline" should be seen as a term distinct from "normal baseline", and not necessarily referring to the low-water line. In this respect, it should be noticed that the non-existence of reliable nautical charts for certain areas has sometimes led negotiators to resort to *land maps and surveys* (which utilise mostly the mean-water line) to identify the relevant coastline. Particularly where the incline of the shore is steep, the difference between these vertical references is negligible.

(154) Straight baselines *lato sensu* include all straight lines used to measure the breadth of maritime zones, notably baselines defined under Article 7 of the LOSC, bay-closing and river-closing baselines, and archipelagic baselines.

(155) On the use of straight baselines in state practice, cf. Sohn/1993, pp.155-160.

(156) ICJ/Reports/1985, p.48, para.64.

(157) ILM/25/1986, p.292, para.96, emphasis added.

(158) Eritrea/Yemen-II, para.142. It must be observed, however, that the Tribunal made some references to Article 7 of the LOSC. In one case, while rejecting the use of a low-tide elevation (*Negileh Rock*) for computing the equidistance, it noted that, even if a straight baseline system existed around the Dahlaks, under Article 7(4) that feature would not be usable (paras.143-145). Another reference to Article 7 came to justify the recourse to Kamaran island, and its satellite islets, as being part of the Yemeni mainland, since their location and context was such that it would be of the kind contemplated by Article 7 (paras.150-151). Reisman has noted that this provides "new guidance on what constitutes reasonable implementation of Article 7" (Reisman/2000, p.732).

their consent. This rationale appears to have underlain the Court's reasoning as regards the archipelagic status of Bahrain, in the *Qatar/Bahrain* case, when affirming that its judgment "could not be put in issue by the unilateral action of either of the parties, and in particular, by any decision of Bahrain to declare itself an archipelagic state"[159].

8.2.e) Coastal Length (and Its Role in Proportionality)

The idea that the apportionment of areas effected by delimitation has to reflect the coastal length of the states involved was first advanced by Germany, in the *North Sea* cases. In its Judgment, the Court acknowledged that "a reasonable degree of proportionality" must be factored in delimitation[160]. Ever since, to one degree or another, coastal length has been given relevance in jurisprudence (*per se* or in proportionality assessments)[161] – thus leading scholars to devote much attention to it[162]. Once more, it is of little relevance to reanalyse the issue from its inception. Building on previous analyses instead, the following excursus seeks to present an argument on how the fact *coastal length* bears on delimitation.

Even the quickest glance over scholarship reveals that three central points must be analysed. First, since there is room for 'subjectivity', resultant from the non-existence of objective criteria on coastline measurement, it is necessary to analyse how this issue is to be handled legally. Secondly, it must be established whether coastal length comparison should be utilised for purposes of an *ex post* proportionality test, and/or be weighed in the 'weighing-up process'[163]. Thirdly, it is crucial to ascertain whether coastal length may be used in all geographical settings.

Lest it be forgotten, reference must be made to the two key ideas that emerged from the analysis of the technicalities related with coastal length measurement and comparison. First, there are different ways of measuring coastal lengths (leading to different results). Secondly, in assessments concerning the division of what is deemed to be the relevant area, the definition of such an area determines the outcome thereof. Arguments based upon coastal length comparison are thus characterised by a margin of subjectivity at two levels

(159) Qatar/Bahrain-Merits, para.183.

(160) Para.2.3.a)(ii) *supra*. ICJ/Reports/1969, pp.53, 55, paras.98, 101(D)(3). Arguing that proportionality was not by then a part of delimitation law, Tanja concludes that recourse thereto amounted to *excès de pouvoir* (Tanja/1990, p.75).

(161) Cf. e.g. *Anglo/French*, RIAA/18, pp.57-58, 115, paras.98-101, 246; *Tunisia/Libya*, ICJ/Reports/1982, pp.75-76, 91, paras.103-104, 130-131; *Gulf of Maine*, ICJ/Reports/1984, pp.323, 336-337, paras.185, 222; *Libya/Malta*, ICJ/Reports/1985, pp.43-55, paras.55-59, 65-75; *Guinea/Guinea-Bissau*, ILM/25/1986, pp.292-293, 301, paras.97, 119-120; *Canada/France*, ILM/31/1992, pp.1161-1162, 1175-1176, paras.27-33, 92-93; *Jan Mayen*, ICJ/Reports/1993, pp.65-69, 79-81, paras.61-70, 92; Eritrea/Yemen-II, paras.165-168; Qatar/Bahrain-Merits, paras.241-243, 247.

(162) Cf. e.g. Yoshifumi/2001; Kozyris/1998; Kozyris/1997; Lucchini/Vœlckel/1996, pp.306-313; Estapà/1996, pp.102-106; Charney/1994, pp.241-243; Legault/Hankey/1993, pp.217-221; Weil/1989a, pp.75-79, 235-244; Evans/1989, pp.224-231; Calatayud/1989, pp.133-137, O'Connell/1989, pp.724-725; Jaenicke/1986.

(163) There is a reason for using the term "coastal length comparison", instead of using the term "proportionality". Whereas all proportionality assessments entail coastal length comparison, the reverse is not true. It is possible to compare coastal lengths, and to weigh-up in the delimitation process any existing disparities, without ever entering into proportionality assessments.

that opens the door to discourse manipulation[164]. Hardly surprisingly, in the *Eritrea/Yemen* arbitration, the Tribunal observed that proportionality had been "argued *strenuously and ingeniously* by both parties"[165].

How is coastal length comparison to be contextualised? Coastal length is germane to delimitation, not because it suits some arguments of states, but because it is a requirement of the principle of equity. Equal situations have to be treated equally, just as a differentiated treatment ought to be awarded to different situations, in the exact measure of the existing difference. Conjugated with the principle of maritime zoning, this proposition demands that, *other considerations being absent*, "a reasonable degree of proportionality" be retained between the length of the relevant coasts and the area-attribution brought about by the boundary-line. What does this mean in more practical terms?

Delimitation amounts to resolving a concurrence of rights, entailing an 'amputation' of potential areas of exclusiveness for the disputants. The requirement is that this produces no clear detriment to either party[166]. Interpreting the effect of the principle of equity in this respect, the *Anglo/French* Award clarified the statement of the Court in the *North Sea* cases by highlighting that "it is *disproportion* rather than any general principle of proportionality which is the relevant [...] factor"[167]. Without exception, this approach has been endorsed ever since. In terms of formulation of a delimitation factor, the *prima facie* corollaries are two-fold. First, in the absence of great disparity between coastal lengths, there should be no disproportion in area-attribution. Secondly, where disproportion exists, adjustments must be made to the provisional equidistance-line to avoid causing clear detriment to the party with the longer coastline. Notwithstanding the weighing-up of other factors, 'value-judgments' on coastal lengths should be formulated on these bases.

The second point to ascertain is whether coastal length should be used as an *ex post facto* test of equitableness, and/or as a consideration to be weighed-up in the determination of the boundary. Evans concludes that "[p]roportionality is chiefly relevant at the final stage of the delimitation process, as a means of assessing the equitability of the result achieved", adding that "[i]t is to be distinguished from the relevant circumstances of a disparity of coastal lengths"[168]. From this viewpoint, *coastal length* appears relevant at two stages: as a factor, during the 'weighing-up process'; as an *ex post facto* test of equity, to assess the outcome of that process. Insofar as this conclusion is in accord with case law, and because Evans was analysing relevant circumstances as proposed in jurisprudence, there is little

(164) Para.5.3.c) *supra*. See Figure 76.
(165) Eritrea/Yemen-II, para.39, emphasis added.
(166) Conclusion of Part II *supra*.
(167) RIAA/18, p.58, para.101; emphasis added.
(168) Evans/1989, p.231. Jaenicke reaches similar conclusions (Jaenicke/1986, pp.68-69).

room for dissention here. Whether this is conceptually sound is a different matter. Coastal length measurements can be undertaken in an almost infinite variety of ways. Coastal length ratios are therefore mere approximations that depend on how these measurements are effected. Similarly, the 'relevant area' is not an objectified concept. It varies with the decision-maker's viewpoint. For these reasons, whilst warning against "the uncertainties and dangers of the proportionality test in its quantitative form", Weil has voiced a paradox that amounts to the most compelling argument against the recourse to proportionality as an *ex post facto* test[169]:

> What would happen if the proportionality test indicated an unreasonable disproportion between the ratios of coastline length and those of areas? Would the judge or arbitrator then be bound, in order to arrive at a more proportionate result, to adjust the line which he states he has arrived at by other methods? A negative reply would deprive the proportionality test of all significance. An affirmative reply would be tantamount to converting proportionality into the dominant principle of delimitation. It may perhaps be said that an unfavourable test is unlikely and has never occurred, but *is not this precisely because the data on which the arithmetical test is based are in reality selected so as to confirm a predetermined result?*

One must side with Weil. Discarding the outcome of the 'weighing-up process' on the basis of an *ex post facto* proportionality test would amount to overruling the result arrived at through consideration of all other pertinent factors. This would amount arguably to unsound legal and justification discourse. By contrast, denying relevance to the said test in the face of a disproportion of area-attribution would deprive it of all significance. In this light the *ex post facto* proportionality test appears as an empty exercise. Furthermore, in the absence of objective criteria to measure coastal lengths and to define the relevant area, proportionality may be manipulated to justify numerous solutions[170] – which explain why O'Connell notes that, due to its "capricious results", proportionality is of "limited value"[171].

All in all, *coastal length* should be considered in context of the 'weighing-up process'. The coastal lengths of the states should be compared and, if and where justified, a 'value-judgment' should be formulated on the basis of such a comparison, to reflect the optimisation *in casu* of the principles of maritime zoning and of equity. Its contribution thus would be gauged in relativised terms, by reference to that of the other relevant facts.

This approach deals also with the third point that one has set out to clarify: whether or not proportionality is applicable to all geographical settings[172]. Practically speaking, the

(169) *Canada/France* arbitration, Dissenting Opinion, ILM/31/1992, p.1207, para.25, emphasis added. In addition, he questions "whether there is any real difference between a quantified proportionality test [...] and proportionality as a direct delimitation criterion". Besides this, it should be noted that Weil has considered that, either as a delimitation factor, or as an *ex post facto* test, coastal length and proportionality considerations "ought not to survive the re-examination by the courts" (Weil/1989a, p.244).

(170) Antunes/2001, p.339.

(171) O'Connell/1989, p.725.

(172) Yoshifumi suggests that, in oppositeness, "the applicability of proportionality is doubtful" (Yoshifumi/2001, pp.458-459). Evans argues that proportionality is "for use only where the circumstances permit" (Evans/1989, p.231). Jaenicke considers that

problem may be posed differently. Wherever the required measurements rely heavily on the exercise of discretion by the decision-maker, proportionality might be meaningless. It might be manipulated to justify virtually any boundary. However, if *coastal length* is seen merely as one of the facts that can generate delimitation factors – as proposed here – the difficulty is overcome. What emerges is a relativised factor, formulated in terms of its weight in the decision-making process. Further, even if in a specific case coastal length comparison is possible only on the basis of very 'subjective' assessments, that problem might be diluted in the way in which the 'value-judgment' is formulated.

Attention must now be turned, briefly, to some practical aspects of coastal length comparison, the first step of which is to measure coastal lengths. It became clear since the *North Sea* cases that what is to be measured is not the length of the low-water line, with all its sinuosities. Coast length is to be appraised as the *frontage* (constituted by straight-line segments) projecting onto the area of overlap. Although it indubitably leaves the door open to some ambiguity (as to the definition of the relevant segments), this is the correct way of assessing the link between coasts and principle of maritime zoning. Most basepoints are irrelevant for defining the outer limits of maritime zones, which is why they should also be discounted in terms of coastal length measurement. The *Canada/France* arbitration and the *Jan Mayen* case are recent illustrations of this approach in jurisprudence[173].

One aspect of the *Jan Mayen* case is critically important. The coast of Greenland defined as relevant for purposes of coastal length measurement was restricted to the stretch between the two most extreme points that contributed to the computation of equidistance[174]. From here stems one proposition: only those coastal stretches that interrelate in the division of the overlapping of entitlements are to be compared. To some extent, this is no novelty. Correctly, in the *Tunisia/Libya* case, the Court asserted that not the whole of the coast could be taken into account, and that those parts thereof that did not contribute to the overlapping of entitlements were to "be excluded from further consideration"[175]. The problems at the time emerged from the fact that equidistance was deemed not to have a normative content. If equidistance is accepted as the starting point for delimitation, the solution adopted in the Jan Mayen case is not only conceptually logical, but also inevitable.

Other questions must be addressed. How does the coastal length ratio translate into a delimitation factor? How is the adjustment to equidistance to be calculated? The references to proportionality as a factor have led to speak of "disparity of coastal lengths", meaning

the "concept of proportionality is not applicable in all geographical situations", "irrespective of whether the relevant coasts are geographically adjacent or opposite to each other" (Jaenicke/1986, pp.68-69).

(173) See Figures 10 and 11.

(174) ICJ/Reports/1993, pp.47-48, para.20.

(175) ICJ/Reports/1982, p.61, para.75.

that adjustments were required if such a disparity existed. Qualitatively, however, there is another category of situation to be considered. As shown in the *North Sea* cases, should there be no disparity of coastal length, the equidistance-line must be adjusted wherever the area-attribution effected thereby does not reflect the similarity of coastal lengths.

Under the notion of proportionality, coastal length ratio has been used as reference point to divide a *relevant area*, which is defined by courts. Conceptually, the way in which courts have approached the issue can be criticised on two grounds. First, the relevant area should not include areas that are not part of the overlapping of entitlements (e.g. *Jan Mayen* case – Figures 80 and 81). Delimitation should refer to the division of areas of concurrent potential entitlements. Secondly, the relevant area should not include areas falling under a different entitlement. Territorial sea areas should not be considered in EEZ and/or continental shelf delimitation (e.g. *Canada/France* arbitration).

In summary, if equidistance effects a disproportionate area-attribution, considering the coastal length ratio, a delimitation factor is to be incorporated in the 'decision-matrix'. The relevant area, it is suggested, should be defined so that it includes only areas belonging to the overlapping of entitlements of the same nature. It is conceptually odd to consider in a certain area-attribution, areas that under international law could not be attributed to one of the states involved in the delimitation. As to the quantification of the adjustment based on coastal length, the conceptual kernel is *manifest disproportion*. Not all disproportion entails an adjustment. The requirement of a "reasonable degree of proportionality" is tantamount only to the rejection of an unreasonable degree of disproportionality.

Seeking to objectify the notion of unreasonableness, Kozyris speaks of a '*grossness factor*', which quantifies disproportion through a ratio of ratios: the *coastal length ratio* and the *ratio between areas apportioned under equidistance*. In his view, a formula between "two-to-one and three-to-one equidistance-proportionality" emerges from case law[176]. This view appears to improve the understanding of proportionality in two ways: it demonstrates that previous delimitations can be utilised as 'yardsticks' for future cases; it introduces a concept that objectifies the notion of disproportion – the 'grossness factor'.

This concept of 'grossness factor' deals also with another issue that has been raised: Can proportionality be used in all situations? It has been contended that, between opposite states, if a disparity of coastal lengths exists, an area-apportionment based on equidistance will reflect the disparity[177]. According to this argument, usually illustrated by recourse to a geometric figure of a trapezium (Figure 88), further adjustments would be unnecessary. A median line would arguably attribute to the state with a longer coast an area ("Zone 2") that

(176) Kozyris/1998, pp.362-366, 388; Kozyris/1997, pp.35-46, 52-53.
(177) For an overview of the argument, cf. Yoshifumi/2001, pp.441-443.

is larger than that attributed to the state with the shorter coast ("Zone 1"). However, perhaps caution is required. For this to be verified, the relevant area must be defined as a trapezium (which has not happened in the *Jan Mayen* case, for example). As shown in Figure 88, the overlapping of entitlements might extend beyond the trapezium limits, and might not include all areas comprised thereby. Further, geometrically, the "trapezium mid-line" is not a strict equidistance-line. Away from the centre, an equidistance-line shifts towards the state with shorter coastline[178]. This approach, maybe valid in the context of the *Libya/Malta* case, should thus not be extrapolated lightly. It restricts coastal length comparison to adjacency situations needlessly, leaving unanswered situations such as those of Figure 88. There, if based on equidistance, the delimitation attributes to state A roughly 56% of the overlapping of entitlements, and to state B the other 44%. In terms of areas apportioned, the ratio A:B is some 1.27; the coastal length ratio A:B is some 15.70. The manifest disproportion revealed by a 'grossness factor' of 12.36 would have to be considered in the 'decision-matrix'.

What deserves attention, therefore, is whether the coastal length ratio and the ratio between the 'shares' apportioned by equidistance are grossly disproportionate. Should that be the case, an adjustment to equidistance ought to be factored into the 'decision-matrix'. Once more, the notion of average 'distance ratio' is helpful in objectifying the adjustments required, account taken of existing 'yardsticks'. Not only is it applicable to all geographical situations, but it also is compatible with the notion of 'grossness factor'. Once the coastal lengths ratio and the 'shares' of the overlapping of entitlements apportioned to each state are compared, the 'grossness factor' obtained therefrom can be examined comparatively, by reference to solution found in analogous geographical settings[179]. It is possible to establish then whether adjustments to equidistance are indeed justified, and if so, what could be a reasonable average 'distance ratio' for the adjusted line.

By way of conclusion, one would suggest that *coastal length* ought to be considered within the 'weighing-up process', on which the determination of the boundary is predicated, in exact the same terms as other facts. In this conceptualisation, the *ex post facto* test is rendered unnecessary and unjustified. The non-inequitableness of the boundary is ensured through the structured 'weighing-up' of all legally typified facts. Coastal length comparison (or proportionality) amounts to an objectification of the principle of equity, account taken of the principle of maritime zoning. It purports exclusively to avoid gross disproportion in

(178) The equidistance between the straight coasts that form the apex and the base of the trapezium follows closely the equidistance between coasts shown in Figure 88.

(179) Perhaps it is interesting to observe that, at least in relation to the *Jan Mayen* case, this study confirms Kozyris' approach to area-attribution on the basis of a formula between "two-to-one and three-to-one equidistance-proportionality". The boundary awarded gave Greenland a part of the overlapping of entitlements (within the relevant area defined by the Court) that was 2.7 times larger than the area attributed to Jan Mayen. Compared with the 9:1 coastal length ratio, this leads to a 'grossness factor' of roughly 3.37, which seems to confirm that "a total disproportion of a magnitude of at least three to one was tolerated" (Kozyris/1998, p.364; Kozyris/1997, p.38).

area-apportionment, by singling out situations of manifest inequity. Neither should it be decontextualised, nor should it be turned into an autonomous exercise. Mathematically refined attributions of maritime spaces should not be produced on the basis thereof. The proportionality test becomes unjustified because replacing an analysis that considers the whole 'factual matrix' in the light of the 'legal matrix', by an operation that would contemplate only one aspect of the 'factual matrix', is from a legal-conceptual perspective unsound. Furthermore, it would entail the risk of relying too largely on a test that might revolve around the discretionary powers of courts. Perhaps significantly, this test has had hitherto no tangible impact on delimitation.

8.2.f) Macrogeography (and Entitlements of Third States)

A macrogeographical view (which amounts to examining geography at a smaller scale) looks at the wider context in which delimitation is to be undertaken. To Evans, this affects the perception of the problem in two ways: "it might reduce the relative importance of particular factors or features"; and it "might suggest a different means of achieving the delimitation than that indicated by the immediate area"[180]. Referring to the *Libya/Malta* case to show the dangers of macrogeographical analyses, Weil notes however that by "extending the area concerned to the overall geographical context, the Court eventually recognised as a relevant circumstance coasts which were completely foreign to the two countries in the case". Due to the dangers that it entails, he thus argues that this consideration should be ejected from the list of relevant circumstances[181].

Macrogeography is a fact whose consideration bears some obvious dangers indeed, if only owing to the further discretion that it introduces in the delimitation process. The definition of the relevant delimitation area remains largely unrestricted. Circumscribing spatially the facts that might be taken into account in the delimitation, such a discretionary decision might be decisive for the outcome. Although agreeing with Weil's view that the role of macrogeography in the *Libya/Malta* case was somewhat odd, one would argue that banning macrogeographical considerations altogether would be hasty. Dismissing the wider delimitation context altogether is analogous to interpreting a legal provision isolated from its systematic element. It should not happen. At the very least, there are three planes on which macrogeography bears.

Macrogeography might provide pivotal guidance when, for instance, owing to the existence of 'controlling basepoints', the conclusion is that equidistance must be adjusted. It

(180) Evans/1989, p.131; cf. also Lucchini/Vœlckel/1996, p.239. If an illustrative example of these two ideas is required, it may easily be found in the determination of the general direction of the coast (Figure 84).
(181) Weil/1989a, p.252.

is not a question of resorting to macrogeography to discard equidistance. The question is one of adjusting the provisional equidistance due to the effect of 'controlling basepoints'; macrogeographical aspects come into play only as guidance for determining how the line should be adjusted. The 'yardstick' for the adjustment should stem again from case law and state practice. Presupposing that (on account of the 'controlling basepoints') equidistance would yield an inequitable solution in the *Guinea/Guinea-Bissau* arbitration, the decision to look "at the whole of West Africa" to predicate the boundary-line is reasonable[182]. Should an analogous situation arise, nothing should hamper the recourse to this 'yardstick' to reason the boundary course.

The second plane on which macrogeography might become relevant concerns the rights of third states[183]. Delimitation is undoubtedly a bilateral issue. But it is equally true that there are numerous instances in which third states' positions might affect the boundary in a specific delimitation. Since it looks always beyond the strict geographical scope of the bilateral boundary, the issue of third states is always a macrogeographical issue. Malta's attempt to intervene in the *Tunisia/Libya* case resulted in a boundary based on a bearing line whose end-point remained undefined. Italy's attempted intervention in the *Malta/Libya* case caused the Court to confine geographically the scope of its judgment. The presence of Saudi Arabia to the north, and of Djibouti to the south, in the *Eritrea/Yemen* arbitration, led the Tribunal to define end-points well short of areas potentially disputed by third states[184]. In the *Qatar/Bahrain* case, the Court defined two bearings along which the boundary is to run beyond its northernmost and southernmost end-points, until it meets the boundary with Iran and Saudi Arabia respectively[185].

The presence of third states cannot be neglected, although it might have variable relevance. The idea that a "delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region" should be upheld[186]. In cases such as the *Cameroon/Nigeria* case, currently *sub judice*, it is unrealistic to effect the delimitation without considering the wider context. Like in a jigsaw-puzzle, one piece (the Cameroon/Nigeria boundary) makes sense only in the context created by the other pieces (the boundaries between other states in the Gulf of Guinea)[187]. The balance of equities is so delicate here that the Court did not "rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of the third states could be

(182) ILM/25/1986, pp.297-298, paras.108-111.
(183) Paras.6.3.d)(iii) *supra*, 9.3.b) *infra*.
(184) Eritrea/Yemen-II, paras.44-46, 136, 164.
(185) Qatar/Bahrain-Merits, paras.221-222, 250 (*in fine*).
(186) *Guinea/Guinea-Bissau* arbitration, ILM/25/1986, p.291, para.93.
(187) As to the geographical scope to redress inequities, cf. para.8.4.a) *infra*.

such that [it] would be prevented from rendering it in the absence of these States"[188]. Equatorial Guinea eventually requested permission to intervene, which was eventually granted[189]. What is important to stress is that the problem is especially acute in adjudication, owing to the *de facto* imprimatur of courts' decisions (despite the fact that they have, strictly speaking, an *inter partes* effect). As Equatorial Guinea argued, "any judgment extending the boundary between Cameroon and Nigeria across the median line with Equatorial Guinea [would] be relied upon by concessionaires who would likely ignore Equatorial Guinea's protests and proceed to explore and exploit resources to [its] legal and economic detriment"[190].

Macrogeographical aspects are also relevant on a third level. It was argued that coastal length appraisals should, as far as area-attribution was concerned, bear only on the area of overlapping entitlements. In taking no account of the areas immediately adjacent to the overlapping of entitlements, an inequitable solution might be created. Compensation might have to be made in some cases to attain an overall balance of equities. The size of areas lying outside the overlapping of entitlements, and the entitlements generated by the remainder of the coasts (taking into account if necessary third states), might have to be considered. Suppose the fictional situation of Figure 87. In the delimitation between states A and B, if account were taken only of the geographical context near the boundary, this would be probably a straightforward case in which equidistance yielded an inequitable boundary. However, whereas states A and C can both extend their entitlements up to 200 M from certain stretches of their coasts, state B has its entitlement 'amputated' throughout. If equidistance were adjusted on the ground that B1 is a 'controlling basepoint', correcting it to be a perpendicular to the general direction of the coasts of states A and B, for instance, would be a perfectly reasonable solution in the absence of state C. As it is, one would argue that, because the fact that state B is disadvantaged in relation to the other two states must be considered, equidistance must either be retained as boundary, or at least be corrected less than in would otherwise be.

8.2.g) Natural Prolongation: Geology and Geomorphology

From the outset, it is necessary to clarify that the question under appraisal here is whether natural prolongation (and thus geomorphological and geological aspects) is a fact

(188) Preliminary Objections, ICJ/Reports/1998, p.324, para.116.

(189) As regards the questions of third states' rights, third-party intervention and the possible solutions to be adopted by the Court, in the *Cameroon/Nigeria* case, cf. Antunes/2000c. On intervention before the ICJ, cf. Chinkin/1993, pp.147-185.

(190) Application for Permission to Intervene, of 30 June 1999, pp.8-9. For an overview of the ways in which the third state issue has been dealt with in state practice, cf. Colson/1993, pp.61-63. But it should be noticed that, in delimitations effected by negotiation, states are in a position that is rather different from that of courts; cf. paras.6.1.b)(i)(ii) *supra*. An example of a

susceptible of influencing the legal determination of a maritime boundary. In other words, what need be enquired is whether, under the LOSC, geological and geomorphological elements must be taken into account in judicial decision-making on maritime delimitation.

The reference to natural prolongation appeared for the first time in the *North Sea* Judgment[191]. Although recourse thereto might be criticised nowadays, it must be recognised that some reasons made it understandable at the time, especially if it is considered that the distinction between entitlement criterion and delimitation criterion was unclear. The notion of continental shelf was defined as the submerged prolongation of the land territory; and its conventional definition referred to a geomorphological element: the 200-metre isobath. For this analysis, two points concerning the *North Sea* cases approach must be noted. First, 'natural boundary' (i.e. a "line between areas which already appertain to one or other of the states affected"[192]) is a concept that has no existence in international law. Secondly, of all the propositions advanced in the *North Sea* Judgment, and in its aftermath, one must be rejected *in limine*. Natural prolongation can never be seen as a question of "what looks, on the map, like a 'natural' prolongation of the land territory"[193].

What can be said about subsequent case law? The answer is simple[194]. States have attempted to ground their claims on natural prolongation to no avail (whether by resort to geological or to geomorphological aspects). These attempts stopped completely after the *Libya/Malta* Judgment. Natural prolongation was then 'checkmated' as a relevant fact in delimitations between coasts situated less than 400 M apart – the Court's conclusion is so blunt that it leaves no scope for elaboration on natural prolongation[195].

> [S]ince the development of the law enables a state to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding seabed and subsoil, there is *no reason to ascribe any role to geological or geophysical factors* within that distance either in verifying the legal title of the states concerned or *in proceeding to a delimitation as between their claims*. [... To rely on previous] jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological facts in delimitation, it finds warrant for doing so in *a*

peculiar way in which the third state issue was approached is that of the practice of Colombia in relation to Jamaica, Haiti, and the Dominican Republic (Appendix 2, D14, D16, F9 – cf. Figure 35).

(191) Paras.2.3.c), 2.3.d), 4.3.a), 4.3.b), 6.3.c)(ii) *supra*.

(192) ICJ Reports 1969, p.23, para.20. On the notion of natural boundaries, cf. General Introduction.

(193) Thirlway suggests that this was how the Court understood natural prolongation in the *North Sea* cases (Thirlway/1993, p.23).

(194) On this matter, cf. e.g. Estapà/1996, pp.108-110; Lucchini/Vœlckel/1996, pp.136-137, 213-218; Highet/1993, pp.166-183; Wallace/1992, pp.10-33; Highet/1989; Evans/1989, pp.99-118; Sharma/1989, pp.166-170; Goldie/1973.

(195) ICJ/Reports/1985, pp.35-36, paras.39-40, emphasis added. This statement is all the more remarkable because a few months before, in the *Guinea/Guinea-Bissau* arbitration, the Tribunal accepted theoretically the relevance of natural prolongation; the non-relevance *in concreto* owed to the fact that the continental shelf was viewed as being continuous (ILM/25/1986, p.300, paras.116-117). This view seems to build on the dictum of the *Tunisia/Libya* case, in which the Court stated that it was "only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the parties" (ICJ/Reports/1982, p.48, para.48).

> *regime of the title itself which used to allot those factors a place which now belongs to the past,* insofar as seabed areas less than 200 miles from the coast are concerned.

There can be no doubt about the 'devastating' effect of the LOSC as to recourse to natural prolongation as a fact relevant for maritime delimitation. The consecration of the EEZ[196], concatenated with the fact that up to 200 M from the coast the criterion upon which entitlement to the seabed and subsoil is based becomes independent of any 'natural' aspect, brought about a dramatic change. The prevalent view is that, for delimitations concerning areas within 200 M from coasts, facts related to natural prolongation "have been rendered immaterial"[197]. By framing the issue as it did, the Court seems to have left the door open as to the weighing-up of natural prolongation in delimitations encompassing continental shelf areas beyond 200 M. This is a question to be analysed at a later stage[198].

Reinforcing the unwillingness of courts to dwell upon aspects concerning natural prolongation are also reasons of practicality, such as the fact that they are unequipped to make pronouncements on matters that remain unresolved scientifically. Not long before the *Libya/Malta* Judgment, Weil suggested that natural prolongation had not been awarded any weight because of the excessive technical nature of the arguments, which led courts to devalue them in favour of more classical elements. He equally contended that international justice has not been set up to rule, with the authority accredited to *res judicata*, between contradictory scientific theories, which are moreover submitted with the precariousness of novel discoveries and ever-changing fashions[199]. Following a similar path of reasoning, in the *Libya/Malta* case, the Court rejected the idea that to reach a decision it had

> first [to] make a determination upon a disagreement between scientists of distinction as to the more probably correct interpretation of apparently incomplete data; for a criterion that depends upon such a judgment or estimate having to be made by a court [...] is clearly inapt to a general legal rule of delimitation.[200]

For states, whether to weigh-up arguments on natural prolongation is a question that falls in their contractual freedom. A survey of state practice indicates that in one case only is it beyond doubt that natural prolongation was paramount for the delimitation: the 1972 Australia/Indonesia agreement[201]. In a decision-making process based on international law, however, such an approach would perhaps find no support today. The same survey suggests

(196) Vicuña/1989, pp.188-227.

(197) Sharma/1989, p.174. Concurring, cf. Lucchini/Vœlckel/1996, p.218; Estapà/1996, p.110; Lilje-Jensen/Thamsborg/1995, p.622; Ahnish/1993, pp.88-90; Vicuña/1990, p. 617; Evans/1989, pp.117-118; Highet/1989, pp.95, 98-99; Weil/1989a, p.281; Kwiatkowska/1988, pp.149-150; Bowett/1987b, pp.23-24; Willis/1986, p.54. The question of geomorphological features associated with the notion of *thalweg* should perhaps not be examined under "natural prolongation". What matters in such cases is the functional relevance of those features in terms of the use of the suprajacent waters for navigation purposes.

(198) Para.8.4.b) *infra.*

(199) Weil/1984, pp.358-359.

(200) ICJ/Reports/1985, p.36, para.41.

(201) Highet/1993, pp.186-188. Here refers also to the 1989 so-called Timor Gap Treaty, which however is not a treaty delimiting maritime boundaries. Cf. also Prescott, IMB, Report 6-2(2), pp.1210-1212.

that other treaties gave natural prolongation a "partial recognition"[202]. That however, might be questioned. Consider the France/Spain agreement. Whereas some authors have suggested that geomorphology was considered[203], others have dismissed that idea[204]. Perhaps more significantly, in other settings involving marked geomorphological features, the absence of clear evidence of their use suggests that they were irrelevant. The delimitation between the Dominican Republic and Venezuela seems to have disregarded the 5000 metres Muertos Trough[205]. Similarly, in the India/Thailand agreement, the fact that the Andaman basin lies closer to the Indian coast than to the Thai coast seems to have not been considered; the agreed boundary was based on equidistance[206]. Although there has been occasional use of natural prolongation in state practice[207], one would submit that such practice is insufficient to weaken the ICJ's conclusion expressed in the *Libya/Malta* case.

No arguments could be found to contradict the idea that in delimitations between states whose coasts lie less than 400 M apart, courts will disregard natural prolongation. The pronouncement in the *Libya/Malta* case has been implicitly accepted in the *Jan Mayen* case. Neither the parties, nor the Court, entertained the possibility of a continental shelf entitlement beyond 200 M. Moreover, the same assumption has been made in relation to Iceland, a third-party. The Court stated that its possible claims appeared "to be *fully covered* by the 200-mile line"[208]. This appears as a strong indication that the Court accepted that, because all three states were less than 400 M apart, none could claim areas beyond 200 M. No delimitation factor was therefore to be derived from the geomorphological or geological evidence.

8.3. Facts Related with the Regime of Exclusiveness

8.3.a) Natural Resources: Petroleum and Fisheries in Particular

The quickest of glances over the historical development of both the continental shelf and the EEZ shows one very simple truth: the driving force behind them was primarily the exclusive access to natural resources. Perfectly clear in the 1945 Truman Proclamation, this

(202) Highet/1993, pp.188-190.

(203) Cf. e.g. Anderson, IMB/Report 9-2, pp.1722-1723; Evans/1989, p.115 (fn.96). The fact that subsequent negotiations (in 1979) over the water column boundary have failed, because Spain argued that the acceptance of a single maritime boundary was conditioned by the revision of the 1974 boundary (delimited as a continental shelf boundary), appears to indicate that aspects of natural prolongation played some role in this delimitation. Cf. also Calatayud/1989, pp.178-184.

(204) Cf. Weil/1989a, p.29 (fn26); Jeannel/1980, pp.37-38.

(205) Nweihed, IMB/Report 2-9, pp.583-584.

(206) Prescott, IMB/Report 6-11, p.1436.

(207) Highet/1993, pp.194-196.

(208) ICJ/Reports/1993, p.68, para.67. This assumption is unquestionable as between Iceland and Norway, which have entered into agreement to that effect. However, vis-à-vis Denmark, Iceland could perhaps claim continental shelf areas beyond the 200-mile line (for that seems possible under Article 76). The 200-mile limit seems to be operative if it is assumed that the approach adopted in the *Libya/Malta case* is legally binding.

is no less clear in the 1952 Santiago Declaration[209]. This development culminated in the LOSC, which reserves for coastal states either exclusive, or preferential, access to the natural resources off their coasts, within their legal area of entitlement[210].

Since delimitation concerns the division of an area of overlapping exclusiveness, it is odd to conceive that such an operation could be undertaken with complete disregard of the key aspect underlying the maritime zone in question. With this said, it must be stressed immediately that this does not amount to a plea for distributive justice – in the sense of balancing the relative economic position of states. International courts have rightly rejected the idea of apportioning resources on the basis of need[211]. What is in question is a division of resources that would belong to either state under international law, were it not for the presence of the other state. It might happen that the resources are not shared ultimately because that would be possible only if an unacceptable boundary would be awarded. The possibility however, must be entertained.

Most authors have acknowledged the relevance of natural resources in delimitation. Higgins, for example, argues that courts' task "of determining whose claim is well founded is only preliminary to the *real* task of allocating resources between claimants"[212]. Starting by affirming that, because "they have no role to play at the level of legal title, it is logical that considerations to do with the existence, importance, and location of natural resources cannot be regarded as relevant for the purposes of delimitation", Weil concludes, that they "cannot be ignored since it is in reality the heart of the matter"[213]. Similarly, Kwiatkowska observes that natural resources are "a leitmotif for concluding delimitation agreements", and that despite courts' "formal rejection of economic factors in their decisions, [they] do in fact take such factors into account in the delimitation process"[214].

As perceptively noted by Evans, the core point is not "*whether* the location of natural resources is a relevant circumstance but of *how* such a relevant circumstance can be given effect"[215]. Intertwined in this question are two distinct aspects: one concerns the determination of the substantive scope of the fact to be considered; the other is related to the practical manner in which this fact is to be reflected on the adjustment of the provisional equidistance.

(209) The fact that the 1952 Declaration, as well as the doctrine of the Patrimonial Sea, went further than the Truman Proclamation, and presented the claim as an extension of the territorial sea sovereignty does not invalidate the idea that the key aim was to guarantee an exclusive access to valuable natural resources. Since claims over extended fisheries jurisdictions seemed unlikely to succeed, these states strengthened their claims by dressing them as claims to extended territorial sea sovereignty.

(210) LOSC, Articles 56(1)(a), 77(1). Somewhat paradoxically, the *EEZ* does not provide an exclusive access to natural resources, placing coastal states under the obligation of sharing its surplus resources – LOSC, Article 62(2).

(211) Cf. *France/Canada* arbitration, ILM/31/1992, p.1173, para.83; *Libya/Malta* case, ICJ/Reports/1985, p.41, para.50; *Tunisia/Libya* case, ICJ/Reports/1982, pp.77-78, para.107.

(212) Higgins/1994, p.224, italic in original.

(213) Weil/1989a, pp.259, 264.

(214) Kwiatkowska/1993, pp.103, 110.

(215) Evans/1989, p.191, italic in original.

By suggesting *de lege ferenda* that "delimitation should not be divorced from the interests of the world community in promoting the economic well-being of states which have so far been economically underdeveloped or disadvantaged in terms of their access to resources"[216], Bowett confirms the approach taken by international courts as to economic considerations. At present, delimitation is not a matter of dividing resources in an equitable, distributive fashion[217]. A key distinction must nevertheless be made. *Economic factors* and *access to natural resources* have a different scope. That the relative economic strength of states is legally irrelevant for delimitation purposes is not tantamount to saying that an equitable access to natural resources is not a relevant fact. Exclusiveness and inclusiveness can be distinguished not only *ratione loci*, but also *ratione materiae*[218]. As yet, only the criterion of entitlement has been deemed a fountain of relevant considerations. However, since the principle of maritime zoning entails not just a question of division by space, but also a question of division by subject matter, there is good reason to argue, conceptually, that the substantive regime of the maritime zones must be considered. To the extent that delimitation is a division between areas of exclusiveness, it is logical that facts relevant *ratione materiae* be taken into account. Natural resources located in the area of overlapping entitlements (whether in the seabed or in the water column) are resources that would belong to either state were it not for the presence of the other state. More than being potentially inequitable, to disregard the access thereto as a relevant fact is juridically illogical.

A more complex issue is to know *how* to take account of natural resources in terms of adjustment of the provisional equidistance. The *Jan Mayen* case is the only clear instance of case law in which natural resources influenced the boundary course[219]. For this reason, it is crucial to understand that its outcome stems from a conjugation of factors. What allowed the Court to choose a line that shared the capelin resources between the parties was the disparity of coastal lengths, which required an adjustment of the provisional equidistance towards the Jan Mayen coast. Had the two coasts a similar length it would have been very difficult to justify such a dramatic adjustment simply to provide equal access to the capelin resources. Thus, the access to capelin resources influenced the *course* of the line, but had little or no impact on the *amount* of adjustment[220]. Interweaving here is the key argument advanced by courts to reject the relevance of natural resources in area-attribution. Because only *known and readily ascertainable resources* can be considered, because some resources are exhaustible, and because boundaries have a *prima facie ad eternum* nature, a division

(216) Bowett/1987a, p.62. Proposing also a wide consideration of economic factors, cf. Sharma/1989, pp.123-150.
(217) One exception might perhaps be considered: that of catastrophic repercussions for the population, as pronounced in the *Gulf of Maine* case (ICJ/Reports/1984, p.342, para.237).
(218) Para.7.2.c) *supra*.
(219) ICJ/Reports/1993, pp.70-72, paras.73-76.
(220) Para.7.4.c) *supra*, in particular Table 3.

that is reasonable today might turn to be unreasonable tomorrow[221]. New discoveries might be made. Natural resources unvalued today might acquire a significant value in the future, either due to technological advancements, or owing to scarcity of 'land resources' of the same type. In other cases, resources might be simply exhausted.

Central to this debate is therefore one question. Is it possible to divide the resources without yielding a potentially inequitable area-attribution? One would argue that, although it is feasible, the resulting boundaries might be very complex, and/or depart from examples in case law and state practice to a great extent. Let the situation be examined by resort to diagrammatic examples of oppositeness and adjacency (Figures 96 and 97). Suppose that the resource spreads equally on both sides of equidistance, in a case in which the coasts 'mirror' each other, and where equidistance yields an equal division of the overlapping of entitlements (Scenario 1)[222]. There is no reason for adjusting equidistance: both the area and the resources are divided equally. Consider this example with one alteration: the resource does not spread equally, lying slightly closer to state A (Scenario 2). Although the area is divided equally, the resource division favours state A. Notwithstanding this, perhaps no unreasonableness exists, and no adjustment is required. Equidistance operates an equal and proportionate area-attribution, and both states have some access to the resources. Consider now Scenario 3, where the whole of the resources lie within state A's area, if the boundary is equidistant. Geographically, it would be possible, in oppositeness, to provide state B with some access to the resources, whilst maintaining the equal area-attribution required by the coastal relationship (Figure 97, Scenario 4)[223]. That might not be possible in adjacency, however. To effect an equal and proportionate area-attribution, the boundary would have to zigzag back and forth, thus rendering the solution impracticable. If state B would have a significantly longer coast, and/or if state A would benefit from the effect of 'controlling basepoints' (Figure 96, Scenario 4)[224], perhaps an adjustment towards state A could then be justified. This would allow granting state B some access to the resources.

Noteworthy in respect of this problem is the Honduras/United Kingdom (Cayman Islands) agreement. Whilst effecting the delimitation on the basis of equidistance (adjusted

(221) For a summary of jurisprudence, cf. Evans/1989, pp.193-194; Bowett/1987a, pp.60-61. Bowett's argument that, in terms of petroleum resources, the situation might be taken as unchangeable seems unconvincing, if only because what were yesterday unexploitable resources (e.g. lying at seafloor depths of 3000 metres) are nowadays being exploited, which suggests that similar developments might occur in the future.

(222) Although *en passant*, it is worthwhile noting that the management of straddling resources (whatever the type) is subject to a principle of mutual cooperation. Due relevance has been given to unitisation of hydrocarbon resources since the *North Sea* cases, (ICJ/Reports/1969, pp.52-53, para.97; emphasised recently in the *Eritrea/Yemen* arbitration, paras.84-86). As to fisheries, the LOSC incorporates an explicit obligation to cooperate in the conservation of resources (e.g. Articles 63-64). Reisman notes that, in the *Eritrea/Yemen* arbitration, the approach of the Tribunal seems to entail that the body of state practice on straddling natural resources has already crystallised into customary law (Reisman/2000, p.735).

(223) Although not an equidistance-line, the "tilted" boundary still retains an average 'distance ratio' of 1:1. Should state A have a shorter coastal length (like Jan Mayen), the resource division could be attained by simply pushing the equidistance towards it.

(224) The *Jan Mayen* case is a good illustration of a similar situation, but as between opposite states.

to take into account the relevant geographical considerations), the two states have set-up a special fishing area within the Honduran EEZ, which allows for the continuation of the historic fishing rights of Cayman Islands' fishermen (Figure 42)[225]. Aside from whether this fisheries regime has an historical character, the point to note is the creative solution in terms of the dialectics 'area-attribution *versus* access to resources'. Because the area-attribution that results from encompassing the *Misteriosa* and *Rosario Banks* within the Cayman Islands' EEZ would probably entail an inequitable adjustment of the equidistance-line, the two states opted for sidelining the issue of fishing rights by creating the special area. The delimitation was then effected primarily by reference to geographical considerations.

By way of conclusion, it is suggested that the difficulties surrounding the issue of access to natural resources is owed principally to the practicalities of considering it while retaining a reasonable area-attribution. In boundary adjudication, the difficulty is that courts do not enjoy the freedom allowed to states in negotiation. Hence, it may not be as easy to reach *equilibrium* between the parties' rights and interests[226]. Insofar as it permits objective appraisals of area-attribution, whatever the boundary configuration, the notion of average 'distance ratio' allows certain flexibility. Notwithstanding the difficulties, it is postulated that access to natural resources should be considered, particularly as to continental shelf and EEZ delimitation[227]. A different approach, besides legally illogical, would ignore reality inadvisably. Their significance is such that they have already been elevated to a condition which, if not fulfilled, may lead to review a boundary treaty[228]. For account to be taken of access to natural resources there is however one prerequisite: the boundary must not yield an unreasonable area-attribution. The risks that future developments turn the line into an inequitable division must be reduced to the absolute minimum, especially taking into account that resources might have a transitory existence (e.g. hydrocarbons).

8.3.b) Defence and Security

An analysis of the relevance of facts relating to defence and security in must take account of the different regimes of exclusiveness of maritime zones. Just as it is doubtless that the relevance of natural resources is greater in continental shelf and EEZ delimitation than in territorial sea delimitation, it is also clear that defence and security play a greater

(225) Appendix 2, F61. The agreement defines spatially the area in question, and outlines a specific regime of which the following aspects deserve attention: (i) the fishing resources that may be captured are of a specific type, and cannot exceed a certain amount; (ii) only a certain number and type of vessels are allowed to fish; (ii) the catch is for local consumption only.

(226) As regards the possibility to resort to joint zones, cf. para.8.4.e)(iii) *infra*.

(227) Natural resources might be relevant in territorial sea delimitation. However, since resources are not the key concern here, the focus must be shifted – for the exclusiveness embodied in this zone entails a 'different reasonableness'. On the balance between interests concerning seabed/subsoil resources and those concerning water column resources, cf. para.8.4.c)(ii) *infra*.

(228) Note the treatment given to unitisation and development of hydrocarbon resources in the Nigeria/Equatorial Guinea agreement – cf. Appendix 2, F22, Articles 6, 7(3).

role in the latter. The historical canon-shot rule is a useful literal illustration of how much defence and security have always been at the forefront of rights and interests of states in the territorial sea. One of the first instances in which defence and security emerged as relevant for maritime zoning was the 1917 *Gulf of Fonseca* case, in which the Central American Court of Justice stated that national defence and security were essential for the Gulf's *condominium* regime[229]. Another landmark in this regard is the Truman Proclamation, which referred to "self-protection" in offshore activities in continental shelf areas.

Case law on continental shelf and EEZ delimitation, having accepted that defence and security concerns are relevant, has been somewhat unsuccessful in showing its practical impact. In the *Anglo/French* arbitration, though accepting the idea that these considerations are connected with the delimitation, the Tribunal said no more than that they evidenced the "predominant interest" of France in the southern Channel. Even this came only after affirming that their influence was not decisive, and could not negative conclusions drawn from geographical, political and legal considerations[230]. In this debate, one of the more positive contributions came from the *Guinea/Guinea-Bissau* arbitration. Emphasising that "neither the EEZ nor the continental shelf are zones of sovereignty", the Tribunal affirmed that it had ensured that each state would control the maritime territories situated opposite its coasts and in their vicinity, and that its prime objective had been to avoid that rights exercised opposite each party's coast, or in its immediate vicinity, would compromise its security[231]. In the *Libya/Malta* case, not much was added when the Court referred to nearness to the coast, while stating that security was "not unrelated to the concept of continental shelf"[232]. The *Jan Mayen* case restated this idea, although making it subject to the primacy of geographical considerations, whilst clarifying that the fundamental issue is "to avoid creating conditions of imbalance"[233]. By referring to security concerns in the ambit of the delimitation of the overlapping territorial seas, the *Eritrea/Yemen* arbitration brings further conceptual clarification to this discussion[234].

Before advancing any propositions, attention must be devoted to at least two points. Early references to defence and security concerns in maritime areas beyond the territorial sea presupposed a breadth of 3 M for the latter. Much has changed with the possibility of extending the territorial sea to 12 M, which is reinforced by a further 12 M of contiguous zone jurisdiction. What this means is that, for example, the reference made to security in the

(229) AJIL/11/1917, pp.705, 714, 716, 730.
(230) RIAA/18, p.90, para.188 (cf. also pp.80-81, paras.161-163).
(231) ILM/25/1986, p.302, para.124.
(232) ICJ/Reports/1985, p.42, para.51.
(233) ICJ/Reports/1993, p.74, para.81.
(234) Eritrea/Yemen-II, paras.157-158.

Truman Proclamation has lost some of its relevance, owing to the different context in which it has to be appraised today.

The second point concerns the substantive aims envisaged by defence and security jurisdiction. Analysing the *Eritrea/Yemen* award, Reisman has suggested that "long-range and over-the-horizon weapons have consigned Bynkershoek's 'canon-shot rule' to the museum of antiquities of international law, and *have largely depreciated the erstwhile defensive value of the broad territorial sea*"[235]. This approach is unquestionable if assumed that security considerations embrace strict military threats only. One would suggest that a number of security threats, with sources and means other than military, must be considered. Deployment of biological/chemical weapon-devices, infiltration of terrorist agents, drug trafficking, and even illegal immigration, are examples thereof. States with long coasts can only combat it through law enforcement over broader offshore areas[236]. Their importance surfaces clearly in the fact that NATO redefined its strategic concept to encompass them[237]. Indubitably, these new threats have rendered an effective control over maritime spaces in the vicinity of the coast at least as important today as it was before. As to their relevance for territorial sea delimitation, it suffices to say that states are prohibited from exercising law enforcement powers in another state's territorial sea (e.g. hot pursuit must cease when the ship pursued enters the territorial sea of another state[238]).

The above thoughts are reinforced by Oxman's conclusion that, in state practice, though security factors "have influenced some boundary arrangements beyond the territorial sea", they "are most prominent in dealing with maritime boundaries close to the coast"[239]. Hardly coincidental, such a distinction stems in fact from the different nature of the powers with which states are endowed in each maritime zone.

Defence and security exist at the heart not only of the concept of precedence of entitlements[240], but also of the paramountcy of distance in maritime zoning[241]. No doubt, states exercise stronger powers closer to their coasts. The practical corollary of this fact is that closer proximity is elevated to a central criterion for assessing the value of sea areas for defence and security purposes. By circumscribing the relevance of security to the territorial sea delimitation, in the *Eritrea/Yemen* arbitration, the Tribunal contributed to assert a key conceptual distinction. The legal effect, yet to be explicitly voiced by courts, is inescapable: the presumption in favour of equidistance in territorial sea delimitation is much stronger

(235) Reisman/2000, p.735.
(236) Their importance is such that it justifies that greater relevance be given to the contiguous zone jurisdictional powers.
(237) The Alliance's Strategic Concept, approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C., on 23rd and 24th April 1999; cf. paras.24-25.
(238) LOSC, Article111(3).
(239) Oxman/1993, p.40.
(240) Para.4.3.d)(iv) *supra*.
(241) Para.6.3.b)(ii) *supra*.

than in continental shelf and EEZ delimitations[242]. Logically, it is stronger in the division of areas up to 24 M from the coast than in the division of areas beyond it. Perhaps it is this that explains the different text of Article 15 and Articles 74 and 83 of the LOSC.

8.3.c) Navigation

Insofar as international law confers upon states no powers of exclusiveness, as far as navigation is concerned, in areas beyond the territorial sea, it is difficult to conceive that this might be a consideration in the delimitation of those areas. As regards the continental shelf, because legally it comprises only the seabed and the subsoil, the idea is indeed very odd. How one can navigate the seabed and subsoil is difficult to imagine. In relation to the EEZ, although questions related to navigation may be raised, the LOSC leaves no room for doubts: the freedom of navigation is preserved in the EEZ[243].

Why courts have been reticent in discarding the relevance of navigational issues in EEZ and continental shelf delimitation can only be speculated. As already observed, during the ILC debates, François explicitly stated that navigation would not be a consideration in continental shelf delimitation[244]. More importantly, the relevance of navigable channels had already been clearly conceptualised by Gidel in the 1930s, when asserting (as to adjacency cases) that where the waters were not navigable on both side of the equidistance-line, the adoption of the latter would lead to gross inequity in the partition of the waters between the two riparian states[245]. Inasmuch as courts are not unaware of these doctrinal ideas, it might be argued that the explanation must be found in more practical grounds. Since it soon became obvious that no closed list of relevant considerations could be made, it is possible that courts sought to avoid discarding any consideration that might later be helpful for resolving a dispute in an unforeseen context. Thus, the potential relevance of navigation in continental shelf delimitation has been accepted without ever having been utilised to justify departures from equidistance (or in any way shape the boundary).

That issues concerning navigation interests are relevant to territorial sea delimitation is doubtless. As delimitation is bilateral, these interests are usually vested in the parties. In the *Beagle Channel* arbitration, for instance, the boundary was delimited having regard *inter alia* to "navigability, and the desirability of enabling each party to so far as possible to

(242) Any adjustment to equidistance in territorial sea delimitation will come probably only from questions of 'representativeness' of basepoints. A typical example would be a situation where equidistance is pushed towards one state by effect of an isolated low-tide elevation, which is faced by a mainland basepoint on the other side. The 'representativeness' of the low-tide elevation might be questioned, if only because its relevance for defence and security purposes is less than a point on the mainland.

(243) LOSC, Articles 58(1), 87. The legal qualifications imposed on the freedom of navigation, which are primarily related with the exercise of rights of coastal states, have a minor weight when compared with the limitations existent in territorial waters.

(244) 204th Meeting, ILC/Yearbook/1953(I), pp.126-129, paras.14, 35, 55.

(245) Gidel/1934, p.771. He stated, in relation to cases of oppositeness, that the rule of the *thalweg* was valid only exceptionally (p.758). On the notion of thalweg, cf. para.5.3.b) *supra*.

navigate its own waters", notable by following the "habitually used navigable track" near Gable Island[246]. Navigability was prominent also in the *Guinea/Guinea-Bissau* arbitration, in which the initial stretch of the boundary follows the navigable channel, from the mouth of the Cajet river through *Pilots' Pass*[247].

Considering that the passage through territorial waters can only be made in terms of the right of innocent passage, there are navigation interests of the international community as a whole that might also be relevant. In the *Eritrea/Yemen* arbitration, while delimiting the territorial seas in the middle stretch of the boundary, the Tribunal emphasised the need for simplicity in the immediate vicinity of a main international shipping lane[248]. This reasoning is justified on at least two grounds. First, the parties had explicitly drawn attention to this issue when acknowledging "their responsibilities towards the international community as regards [...] the safeguard of the freedom of navigation in a particularly sensitive region of the world"[249]. Secondly, since these interests are part of the regime of inclusiveness legally protected by international law, the Tribunal must consider them, even when the central issue is a bilateral one and concerns primarily areas of exclusiveness. Importantly, this approach is not unfamiliar to state practice. The Indonesia/Singapore agreement on the territorial sea delimitation in the Strait of Singapore (which connects with the Strait of Malacca), safety of international navigation was central to the outcome. The boundary follows primarily the deep-draught tanker route[250].

To sum-up, navigation interests, vested in either party or in the international community as a whole, might be in certain contexts a cardinal consideration in territorial sea delimitation, susceptible even of determining the course of the boundary. As to continental shelf or EEZ delimitation, it is difficult to conceive a situation in which they might become directly relevant in the choice of boundary-line[251].

8.3.d) Historical Regimes

The inclusion of a heading "historical regimes" at this juncture requires further explanation. It is necessary not only to clarify what facts are encompassed thereby, but also to explain why this reference appears under the category of facts related with the regime of exclusiveness. Within this heading fall a number of facts that have a common aspect: they all have subsumed *a degree of consolidation through time*. This is the positive aspect of a

(246) ILR/52/1979, p.185, para.110.
(247) ILM/25/1986, pp.273, 298, paras.45, 111.
(248) Eritrea/Yemen-II, paras.128, 155.
(249) Arbitration Agreement of 3 October 1996, Preamble.
(250) Park, IMB/Report 5-11, pp.1049-1053.
(251) Recognising that there is no conceptual link between continental shelf and navigation interests, Evans concludes that there is little evidence that such interests had any direct impact or influence in continental shelf delimitation (Evans/1989, p.183).

category of facts which is marked by its *residual character*. Encompassed here are facts of a historical nature insusceptible of giving rise to a historic title. A *historic title* signifies that there can be no overlapping of entitlements. Delimitation cannot be at issue[252]. The issue here may concern *historic rights*. Furthermore, these historic regimes cannot amount to acquiescence or estoppel as to a specific line. Should there be a tacit agreement upon the boundary location, or should a state be barred from claiming a different boundary-line, no delimitation is to be effected[253]. The dividing-line is already in place[254].

Historic regimes are placed under the category "facts related to the regime of exclusiveness" because they refer to either exclusive rights (or their enforcement) and they have a distinguishing historical integrant. The facts comprised here have a *composite nature*. Speaking of consolidation through time signifies that 'something' is maintained virtually unaltered for a period. The key element is the perpetuation of a situation through time. The situation that is perpetuated may be, for instance, the upkeep of a navigation channel, the exploitation of fishing grounds, oil concessions, or the exercise of a certain jurisdiction up to a line. These facts have thus an obvious fluidity, which would make them indistinct from other headings were it not for the aspect 'passage of time'.

As to the relevance of these historical regimes for delimitation, it is particularly important to enquire whether they can justify adjustments to the provisional equidistance. The *modus vivendi* line referred to in the *Tunisia/Libya* case is perhaps the most known example of recourse to this type of fact in case law[255]. The line was seen as a "sort of tacit *modus vivendi*", which although resting "on the silence and lack of protest" by France, fell however "short of proving the existence of a recognised maritime boundary". Its relevance was greater, in the first sector, for it coincided with the line separating the adjoining oil concessions granted by both parties – a factor of crucial importance for the Court. Further, the line in question 'fitted' in the geographical setting to perfection: it corresponded to an approximate perpendicular to a general direction of the coast.

The possible existence of a *modus vivendi* was equally debated in the *Gulf of Maine* case, but the Chamber rejected it eventually[256]. One would argue that, besides other aspects (e.g. provenance of the "Hoffman letter"), the fundamental reason behind this rejection was

(252) Of crucial importance here is the distinction between historic title and historic rights. If what are in question are historic rights, it is possible to consider simultaneously a delimitation dispute. In contradistinction, a historic title is preclusive of the division of the areas to which the title is referred – for there can be no overlapping title. Cf. paras.1.3.c)(ii), 4.3.c) *supra*.

(253) Practically speaking, it is clear that claims based on estoppel or acquiescence must be considered within the same judicial process. However, conceptually, a distinction must be made between the judicial declaration of existence of a boundary in case of estoppel or acquiescence, from the judicial determination of the course of the boundary through the delimitation process. On acquiescence, recognition and estoppel in boundary disputes, cf. Antunes/2000a.

(254) Evans seems to include issues of estoppel and acquiescence in the delimitation process (Evans/1989, p.217). Bravender-Coyle also includes *de facto* agreements and historic title in the delimitation process (Bravender-Coyle/1988, pp.174-179, 205).

(255) ICJ/Reports/1982, pp.70-71, 83-85, 93-94, paras.93-96, 117, 120, 133.C(2).

(256) ICJ/Reports/1984, pp.303-312, paras.126-154.

the non-existence of *de facto* state activities (e.g. pattern in petroleum grants, effective law enforcement) showing the 'presence' of a line. This relationship between state activities and a definable line (as a prerequisite for attributing relevance thereto) emerges explicitly in the *Guinea/Guinea-Bissau* arbitration, when the Tribunal emphasised the existence of a "wide area of indetermination"[257]. The view taken in the *Eritrea/Yemen* arbitration confirms these ideas[258]. To strengthen its choice of a boundary-line, the Tribunal observed that the offshore petroleum contracts previously entered into by Yemen, and by Ethiopia and by Eritrea, lent "support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands". This approach was nevertheless tempered, *inter alia*, with the need to accord some weight to the mid-sea islands (in order to preserve their territorial sea areas).

Food for thought is brought by the *Eritrea/Yemen* arbitration in relation to another type of historic regime: the traditional fishing rights[259]. Many aspects of the Tribunal's approach in this regard deserve a closer look. Such a task is beyond the scope of this study however, which will concentrate on one question. What impact, if any, had the traditional fishing regime in the delimitation? The fact to be taken into account is perhaps simple to describe: there is a community of individuals whose livelihood has relied since immemorial times on the fishing resources of a certain broadly defined area. Less simple is the question that follows. In a delimitation of states' boundaries across that area, how are the rights of this community to be weighed? The reasoning of the *Eritrea/Yemen* award may be outlined in broad terms[260]. Stressing that the "factual situation reflected deeply rooted common legal traditions which prevailed during several centuries among the populations of both coasts of the Red Sea", the Tribunal turned its attention to Islamic law. Importantly, it concluded that the sovereignty of Eritrea and Yemen was "subject to the Islamic legal concepts of the region", and that the traditional artisanal fishing regime had to be preserved for the benefit of the fishermen from both states. Central for delimitation purposes was the idea that "by its very nature" the historic *lex pescatoria* was "not qualified" by the maritime zones specified in the LOSC. The conclusion was that neither was the existence of the *lex pescatoria* dependent on the determination of the maritime boundary, nor was the determination of the latter influenced by the existence of the former[261].

(257) ILM/25/1986, pp.281, 295, paras.62, 105.
(258) Eritrea/Yemen-II, paras.75-86, 131-132.
(259) Traditional fishing rights were not considered under para.8.3.a) *supra*, because they entail an historical element that makes them distinct from access to fishing resources in general; so much so that, in the Eritrea/Yemen arbitration, the Tribunal had little doubt is considering fishing and fisheries in general as separate from the traditional fishing rights (Eritrea/Yemen-II, paras.61-74).
(260) The similarities with the situation in the *Grisbadarna* arbitration cannot hide important distinctions between the two cases. In the *Grisbadarna* arbitration, the lobster fishing by Swedish nationals was supported by state acts performed *à titre de souverain*. It was the concatenation of these two types of activity that led the Tribunal to weigh the maxim *quieta non movere*. In the *Eritrea/Yemen* arbitration, the community of fishermen was looked at as individuals separate from either state. For an analysis of this issue, a discussion on the Tribunal's use of Islamic law, and the possible recourse by analogy to the principles underlying the debate on the indigenous peoples' rights, cf. Antunes/2001, p.301-316.
(261) Eritrea/Yemen-II, para.87-112.

Highlighting that the parties had not suggested the resort to Islamic law, Reisman criticises this approach pertinently. He notes that the Tribunal's excursion into Islamic law appears, even to non-specialists, "superficial" and "unnecessary". Since the preservation of the traditional fisheries could have been founded on classical international law (through the notion of easement), he contends, the unasked use of Islamic law (with no disparagement of its richness and force) was "unwise in context". For international law seeks to mediate the relations between states of different cultures, legal systems, and belief systems through common standards[262]. This study shares some of these concerns, in particular with respect to the decontextualised assimilation of normative precepts from another system. Further, without questioning the suggestion that the concept of easement could provide a solution for the preservation of the *lex pescatoria*, perhaps this could be contextualised, by analogy, under a different umbrella: the indigenous peoples' rights[263]. State practice is not strange to this idea, having in the Australia/Papua New Guinea treaty its paradigmatic example[264]. Notably, state practice shows that it is possible, under general international law, to effect delimitations while making provision for the preservation of historic rights. By devising a special area where the Cayman Islands' fishermen were given the right to continue fishing as they have done historically, Honduras and the United Kingdom were able to agree on a boundary-line upon which such rights had apparently no direct impact[265].

In short, the impact of traditional fisheries upon maritime delimitation will always have to be examined *in concreto* (as should be expected), by reference to the patterns of activities involved. It might happen, as the Tribunal concluded in the *Eritrea/Yemen* award, that no adjustments to the boundary are required in order to accommodate those rights[266]. However, that should be a decision made by reference to delimitation law.

More generally, what conclusion can be drawn as regards the relevance of historic regimes? Concluding that the "most significant effect occurs in the use of lines primarily drawn for some other purpose", Oxman recognises that on the whole "there is no consistent pattern"[267]. Although these are indeed the two key ideas, perhaps further elaboration is required. The first point to make is that there can be no closed listing of relevant historic regimes, which can only be appraised *in concreto*. The second point concerns the impact on the choice of boundary-line. It is unlikely that adjustments to equidistance are justified on the basis of historic regimes only. Their impact in area-attribution will usually be negligible.

(262) Reisman/2000, pp.728-729.

(263) The analogy is founded on the similarities between the community of Red Sea fishermen and the indigenous peoples, notably an immemorial way of life and livelihood to which state boundaries are irrelevant (cf. Antunes/2001, p.312-316).

(264) Appendix 2, D7. On this treaty, cf. Schug/1996. On the issue of fisheries and indigenous peoples, cf. Bess/2001.

(265) Para.8.3.a) *supra*.

(266) Examples of state practice supporting this solution may be found in the India/Sri Lanka and Australia/Indonesia agreements; cf. Appendix 2, D5, D36.

(267) Oxman/1993, p.40.

More likely, a pattern of activities hinting at the 'presence' of a line might suggest a certain configuration for the boundary-line, especially where the line 'fits in geographically' (e.g. *Tunisia/Libya* case, *Eritrea/Yemen* arbitration). Thirdly, as shown in respect to traditional fishing rights, nothing excludes the possibility that these historic regimes have *in casu* no bearing on the course of the boundary.

8.4. Complementary Delimitation Elements

The terms "complementary delimitation elements" is used to refer to a number of hybrid concepts. The adjective "complementary" does not entail a minor relevancy. These elements are complementary in that the wholeness of the 'delimitation picture' depends on them. Without them, the understanding of the choice of line might be incomplete. Notice that they are neither facts *stricto sensu*, nor strictly legal aspects. What characterises them is that they couple factual and juridical elements in a way that bears, often decisively, on the outcome of the delimitation process. Because of their hybrid nature, it becomes difficult to affirm with certainty whether they will have an impact on delimitation. It might simply be that they influence the way in which the delimitation factor is formulated, without giving rise to an autonomous 'value-judgment'.

8.4.a) Delimitation Area and Geographical Scope to Redress Inequities

In maritime delimitation, it became commonplace to refer to the *delimitation area.* Lucchini and Vœlckel, which refer to Evans' study, suggest that this area may be broadly defined as a zone where there is a concurrence of entitlements of states, i.e. in which their entitlements overlap[268]. They note, nevertheless, that despite being described as a "legal concept"[269], this notion is still surrounded by great uncertainty[270]. This is indubitably true. What is deemed to be the *delimitation area* varies from case-to-case, not only as to the exactitude with which the area is identified, but also as regards its underlying basis.

That the delimitation area must comprise an area where entitlements of (at least) two states overlap stems from the concept of delimitation[271]. Delimitation is required only where such an overlapping exists. In adjudication, it is crucial that the *geographical limits of a court's jurisdiction* are set down. Determined sometimes by agreement between the states (e.g. *Anglo/French* arbitration, *Gulf of Maine* case[272]), these limits might equally

(268) Lucchini/Vœlckel/1996, pp.218-219; Evans/1989, pp.64-69.
(269) *Gulf of Maine* case, ICJ/Reports/1984, p.272, para.41.
(270) Lucchini/Vœlckel/1996, pp.220.
(271) Paras.4.3.d(i)(ii) *supra.*
(272) Article 2 of the Arbitration Agreement, RIAA/18, p.5 (Figure 79); Special Agreement, Article II, ICJ/Reports/1984, p.253.

result from a 'value-judgment' that takes into account the presence of third states (e.g. *Libya/Malta* case[273]). This issue might nonetheless be circumvented by not defining the boundary end-point (e.g. *Tunisia/Libya* case[274]), or simply by establishing the extremities of the boundary-line so that they fall short of areas where the interests of third states come into play (e.g. *Eritrea/Yemen* arbitration, *Qatar/Bahrain* case[275]).

In reality, the delimitation area and the overlapping of entitlements seldom are (if ever) coincident. Owing to the presence of third states, the former is often smaller than the latter. States might also agree to exclude from a court's jurisdiction a certain part of the area of overlapping. In the *Anglo/French* arbitration, the boundary between the southern coast of the Channel Islands and northern France was put outside the competence of the Tribunal[276]. Conversely, the area relevant for the dispute might include zones which are not part of the zone of overlap (e.g. the Jan Mayen case – Figures 80 and 81[277]).

Whether the delimitation area corresponds to the notion of *relevant area*, to which reference is made in the course of proportionality assessments, is unclear[278]. In any event, inasmuch as in such cases those areas are used in mathematical computations, they must necessarily be defined as a closed polygon. This is what happened in the *Canada/France* arbitration, when the area-attribution ratio resulting from the boundary was calculated[279]. In the *Jan Mayen* case, the delimitation area was also utilised for purposes of proportionality assessments. Although the Judgment does not reflect it openly, one need only to look into the Dissenting Opinion of Judge Fischer to realise that similar proportionality assessments were carried out in the preparation of the Judgment[280].

Distinct from the notion of delimitation area (or of relevant area) is the concept of "geographical scope to redress inequities". Assumedly a broad notion, it is intended neither to define a court's spatial jurisdiction, nor to be used for proportionality assessments. The rationale lies elsewhere. The optimisation of legal principles, from which the 'case-norm' stems, ought to be made *in casu*. The geographical context within which that optimisation takes place is therefore critical. Optimal solutions require contextualised 'value-judgments'. As regards delimitation, this can be translated into one pivotal question: How large is the geographical scope to redress inequities?

A cardinal point made by the Tribunal in the *Anglo/French* arbitration, to justify the enclaving of the Channel Islands, was that "the scope for adjusting equities" was small. To

(273) *Libya/Malta* case, ICJ/Reports/1985, pp.24-28, paras.20-23.
(274) *Tunisia/Libya* case, ICJ/Reports/1982, pp.42, 91, paras.35, 130.
(275) Eritrea/Yemen-II, paras.44-46, 136, 164. Qatar/Bahrain-Merits, paras.221-222, 250 (*in fine*).
(276) RIAA/18, p.25, para.22.
(277) ICJ/Reports/1993, pp.47-48, paras.18-21.
(278) On the notion of relevant area and its use in proportionality assessments, cf. para.8.2.e) *supra*.
(279) ILM/31/1992, p.1176, para.93.
(280) ICJ/Reports/1993, p.309.

illustrate the point, it made a contradistinction between the Channel Islands and St. Pierre and Miquelon, stressing that to the east of the latter (and unlike in the case of the former) there is nothing except "the open waters of the Atlantic Ocean"[281]. This means that the reasonableness of the *equilibrium* between the parties' interests essentially depends on *the room to manoeuvre geographically*, in moulding the boundary.

As far as the scope to redress inequities is concerned, there is a world of difference between, for example, the geographical framework of the *Jan Mayen* case and that of the *Qatar/Bahrain* case. The changes caused, in relative terms, by alterations in the boundary course are in each case dramatically different. The fact that islands are discounted fully, or enclaved, in settings characterised by close proximity between the coasts involved (taking as reference the maximum potential entitlement) is equally no coincidence. These solutions are the result of the lack of geographical scope to redress inequities.

The *Cameroon/Nigeria* case is also a good illustration[282]. The claim-line advanced by Cameroon encroaches clearly upon areas where the presence of third states must be considered[283]. In fairness, the predicament of Cameroon deserves close attention. Its coast is one of the longest in the Gulf of Guinea. However, the area attributed to Cameroon will be, most likely, the smallest amongst the five states abutting the Gulf. Such a situation results from a combination of two points: the marked concavity in the Gulf's coast; and the fact that the projection of Cameroon's coast is hampered by Bioko island (Equatorial Guinea)[284]. Ultimately, what should be stressed is that, however the Court approaches the delimitation, the scope it will have to redress any inequity is minimal.

To sum-up, the geographical scope to redress inequities is a broad concept, whose relevance surfaces when appraising the 'factual matrix'. Not surprisingly, it intertwines with other elements. For instance, the situation of Cameroon would be rather similar to that of Germany in the *North Sea* cases were it not for the presence of Bioko and of S.Tomé and Príncipe. As it happens, the presence of third states (Equatorial Guinea in particular), which are not parties to the case, lessens the geographical scope to find *equilibrium* between all interests involved. Practice indicates that in cases such as this, courts tend to delve strictly into facts related to the basis of entitlement. Questions of 'representativeness' of basepoints (especially of insular features) acquire particular relevance. However, from the conceptual viewpoint, nothing impairs attributing relevance to other facts.

(281) RIAA/18, p.94, paras.200-201.

(282) For an idea of the geographical framework, with indication of distances between the various coasts, see Figure 38. For an overview of the delimitation problem, cf. Antunes/2000c.

(283) Line GHIJK, on Figure 14. Although the author had no access to the Memorial, the description made by Professor Crawford during the oral hearings allowed a rough reconstruction of the line (cf. ICJ, Verbatim Record CR/98/02, 3 March 1998, para.35).

(284) When the case was brought before the ICJ, no boundaries had yet been delimited in the Gulf of Guinea. The situation changed in the meantime. Agreements were reached between Equatorial Guinea, Nigeria, and S.Tomé and Príncipe. Figure 37 illustrates the course of the boundaries, and the joint zone agreed between Nigeria and S.Tomé and Príncipe.

What confers autonomy on this complementary aspect, distinguishing it from facts, is that it cuts across and intertwines with different facts. Delimitation factors formulated on the basis of certain facts (e.g. basepoints, islands, coastal length, macrogeography, natural resources) reflect necessarily the scope to redress inequities. Optimising the principles of maritime zoning and of equity entails taking into account the geographical room to manoeuvre in shaping the boundary-line. Its hybridity results from the fact that it is not the geographical context, but an appraisal of the geographical context in the light of normative standards. It is an aspect of the determination of the impact of each factual element on the adjustment of the provisional equidistance-line that is in question here.

8.4.b) Continental Shelf Beyond 200 Nautical Miles

8.4.b)(i) Areas Beyond 200 Nautical Miles: Entitlement and Overlap

Underlying Libya's "rift zone" argument advanced in the *Libya/Malta* case was the existence of a fundamental discontinuity of a geophysical/geological nature. Allegedly, it resulted in two separate shelves. The argument was rejected on two grounds. Above all, the Court considered that, because up to 200 M from the coasts the basis of entitlement is no longer natural prolongation, but distance, geophysical/geological features lying in that area could not constitute a fundamental discontinuity. Secondly, the Court declared that it was not prepared to decide on a disagreement between scientists as regards the scientific data concerning the rift zone[285]. With respect to the geographical setting, there is another issue to examine: the question of continental shelf entitlements beyond 200 M. Given the approach of the Court in the *Libya/Malta* case, it would seem that in principle geomorphological and geological facts would have here a particular bearing. Conceptually, however, what is an apparently straightforward conclusion deserves further investigation.

That delimitation is required only where there is an overlapping of entitlements is indisputable. As to continental shelf delimitation, it is possible to categorise the overlapping of entitlements in three different types (Figure 90): (1) an overlapping between entitlements based on the distance criterion; (2) an overlapping between entitlements based on natural prolongation; (3) an overlapping between one entitlement based on distance, and another based on natural prolongation. In Figure 90, Scenario 1 shows an overlapping of the first type. As to Scenario 2, assuming that state A has an entitlement beyond 200 M that overlaps with the 200-mile entitlement of state B, it is possible to identify overlaps of the first and third types. With respect to scenarios 3 and 4, it must be noted that the distance between the two coasts is always greater than 400 M, which means that there can be no overlaps of the

(285) ICJ/Reports/1985, pp.34-37, paras.35-41. Cf. also para.8.2.g) *supra*

first type. Contemplating an interruption of the continental margin, Scenario 3 shows two areas of overlap of the third type. In Scenario 4, because the interruption does not exist, the whole area beyond both 200-mile limits is an overlap of the second type[286].

Should the approach of the *Libya/Malta* case be adopted, natural prolongation is immaterial for delimitations concerning overlaps of the first type. It is equally certain that the Court's reasoning did not refer to overlaps of the second type. What might raise doubts is whether natural prolongation is relevant for delimitations concerning overlaps of the third type. There are thus two crucial issues. For one thing, it becomes necessary to determine the impact of natural prolongation in delimitations whose object is an overlap of the second type. For another, it must be enquired whether one can speak of delimitation when referring to overlaps of the third type, and if so, whether natural prolongation is relevant.

Before addressing the first issue, distinction must be made between the delimitation of an overlap involving areas beyond 200 M and the question of existence and extension of such an overlap. Coastal states' rights over the continental shelf are not dependent on any declaration, or on occupation, regardless of whether they are based on distance or on natural prolongation[287]. Moreover, although the unilateral delineation of the continental shelf limits beyond 200 M is subject to a 'technical homologation' by the CLCS[288], this is without prejudice to delimitation issues[289]. Apparently, the existence and extension of an overlap depends primarily on the mutual recognition of the states involved. Despite the fact that hitherto only one claim was submitted to the CLCS[290], a number of boundaries extending beyond 200 M have already been delimited[291]. Combined with the fact that the ICJ showed in the *Libya/Malta* case little propensity for resolving quarrels of a scientific character, this suggests that it is unlikely that two states will resort to adjudication to resolve a dispute over the existence of an overlap of entitlements beyond 200 M. If the occasion ever materialises,

(286) It ought to be observed that, in scenario 4, because there is no interruption of the continental margin, those areas beyond the territorial sea limit and within 200 M from the coast of each state form part of an overlap of the third type. The entitlement of each state (based on natural prolongation) extends potentially up to the outer limit of the territorial sea of the other state.

(287) LOSC, Article 77(3). For entitlements based on distance, this idea is somewhat hard to grasp conceptually.

(288) LOSC, Article76(8) and Annex II. According to Article 4 of Annex II, each state shall submit the details of the outer limits of its continental shelf within 10 years from the date it became bound by the Convention. However, no sanction is established for the case of failure in complying with this prescription. Considering the *ab initio* and *ipso facto* nature of states' rights, it is difficult to conceive that such a failure would result in the loss of its rights. On the commencement of, and compliance with, the 10-year period, see the decision of the 11th Meeting of States Parties (UN Document SPLOS/72, 29 May 2001).

(289) LOSC, Article 76(10).

(290) Russian Federation, Submission of 20 December 2001; UN Doc. CLCS.01.2001.LOS (Continental Shelf Notification).

(291) USA/Mexico, 2000 (concerning exclusively areas beyond 200 M); Trinidad and Tobago/Venezuela, 1990; USA/USSR, 1990; United Kingdom/Ireland, 1988; Australia/Solomon Islands, 1988; Australia/France, 1982; Australia/Papua New Guinea, 1978 (cf. Appendix 2, D2, D6, F4, F39, F57, F64, F65). In some other cases, it might be argued that because the end-point of the boundary is not established, and because the outer edge of the continental margin is likely to lie beyond 200 M, the same line will extend up to it: e.g. Brazil/France, 1981; Kenya/Tanzania, 1976; Argentina/Uruguay, 1973 (Appendix 2, D1, D9, D48). On the basis of this practice, Oude Elferink suggests that, "in principle the same rules apply to the delimitation of continental shelf areas within and beyond" the 200 M (OudeElferink/1999a, p.645). There is an advantage in having already delimited adjoining jurisdictions beyond 200 M: since there is no dispute, the CLCS will have no reason to refuse a submission by either coastal state. The CLCS has made clear that it will not examine submissions in such cases unless there is consensus between all parties involved. Cf. Rules of Procedure of the CLCS (CLCS/RoP), Rule 45 and Annex I (UN Doc.CLCS/3/Rev.3, 6 February 2001).

however, perhaps international law is best served if (subject to agreement between the parties) the forum to which the question is asked calls upon the CLCS to provide neutral scientific-technical expertise[292].

Equally significant is the fact that in some cases in which states have claims beyond 200 M, boundaries were delimited up to that limit only[293]. This approach is reflected in the *Gulf of Maine* case. The area within which the end-point of the boundary had to fall was established by Canada and the USA in a way that encompasses the intersection between their respective 200-mile limits. The Chamber defined the boundary terminus on a point that, along the final segment, was positioned at the limit of the overlapping between the 200-mile entitlements. Notably, the reasoning is not based upon the fact that the parties had requested a single maritime boundary (i.e. within 200 M). Instead, the Chamber asserted that "the decisive criterion" was that the boundary sought to "divide the areas in which *the maritime projections of the two neighbouring countries' coasts*" *overlapped*[294]. Apparently, the fact that the continental shelf entitlements of both states extend, and overlap, beyond 200 M, was given no relevance. It ought to be asked, however, why the Chamber viewed the overlapping as comprising only the 200-mile entitlements. If that was owed to the terms of the parties' agreement, then perhaps it should have been stated explicitly[295]. What is clear is that this approach lends support to Lilje-Jensen and Thamsborg's view that states "give preference to the idea of considering the outer shelf as a surplus calling for a separate legal treatment"[296], and reinforces the conceptual proposition that entitlements up to 200 M have certain precedence over entitlements beyond that limit[297].

8.4.b)(ii) Overlapping of Two Entitlements Beyond 200 M

Let the case of an overlap of the second type be examined. If two states refer to adjudication a dispute over the course of the continental shelf boundary beyond 200 M, they recognise mutually their entitlements. Should this occur, it prompts an immediate question. How are geomorphological and/or geological facts relevant? Contrary to what might be thought at first glance (taking into account the *Libya/Malta* case), it is improbable that a "fundamental discontinuity" would become relevant. If this discontinuity amounts to an

(292) Nelson recognises that the CLCS is the only body really equipped to carry out the necessary assessments of bathymetry, geodesy, seismic and geophysical data entailed in delimitations beyond 200 M (Nelson/1998, pp.587-588). As to recourse by courts to neutral technical expertise, cf. para.5.1.a) *supra*. As to a possible recourse to the CLCS, cf. para.9.3.a)(ii) *infra*.

(293) Iceland/Norway (Jan Mayen), 1981 (Figure 29); Denmark (Faroes)/Norway, 1979; USA/Mexico, 1978; USA/Cuba, 1977; Cuba/Mexico, 1976; Portugal/Spain, 1976 (Figure 20) – cf. Appendix 2, D21, D30, D55, D56, D61, D62).

(294) ICJ/Reports/1984, p.339, para.228, emphasis added; see Figure 6.

(295) As evidenced by Article VII of the Special Agreement (ICJ/Reports/1984, p.255), the parties seem to have requested strictly a delimitation up to 200 M (perhaps because they sought to avoid the discussion of Article 76 before the Chamber). This provision designs a procedure for extension of the boundary seawards, whereby third-party settlement can be resorted to if agreement on this extension would not be reached subsequently. Hitherto, however, neither party seems to have considered recourse thereto.

(296) Lilje-Jensen/Thamsborg/1995, p.643.

(297) Paras.4.3.d)(iii)(iv) *supra*.

interruption of the continental margin (in the sense of Article 76), there is no overlapping of entitlements. Inasmuch as the two natural prolongations are separate, no delimitation issue arises. If the discontinuity amounts to less than a continental margin interruption, one ought to enquire on what grounds, and by what standards, should its relevance be appraised. Resembling the *Libya/Malta* case, this situation would probably have a similar outcome: a non-decision as to the relevance of the discontinuity. In short, it may be argued that, should the situation arise, it is likely that courts approach the delimitation in terms similar to those regarding an overlapping of 200-mile entitlements. Geomorphology and geology are likely to continue to have a lesser role, if only owing to the 'discomfort' that they cause to courts. Still, some analysis is required, in order to investigate how they might become relevant.

Lilje-Jensen and Thamsborg tackle the issue perspicaciously, pointing out that the continental shelf areas to be divided are legally "a featureless space", and conclude that any lawful claim thereto would be a claim to the entire area[298]. An overlapping of entitlements based on natural prolongation exists indeed only if the seabed is 'featureless', i.e. if there is no geomorphological or geological interruption of continental margin between the states involved. If it exists, their entitlements do not overlap. Lilje-Jensen and Thamsborg also note that, as to the outer shelf, "one may find an analogy between *the 200 nm opening* and *the coastal opening*, the latter known as the mediate (indirect) basis of title to shelf in areas in general"[299]. This *200 M opening* consists of the stretch of the 200-mile limit that overlaps geographically with the area of natural prolongation, i.e. the part of that limit from which the natural prolongation is projected seawards (Figures 91 and 92). Taking the analogy further, they contend that the length of the *200 M opening* should be the "basic parameter" for area allocation beyond 200 M. Finally, they argue that equidistance, reflecting bilateral proximity, will have a prominent status in these delimitations[300].

Since no specific case law exists, and state practice is scarce, arriving at conclusive ideas as to these propositions is far from easy. Things are made no easier by the fact that data on continental margins is not always available. It may nevertheless be noted that the propositions above were verified in the 2000 USA/Mexico agreement. The agreed boundary is based on equidistance, and the area-attribution favouring Mexico coincides with a longer *200 M opening* (Figure 40). Support for the proposition that equidistance is central to the delimitation of areas beyond 200 M may equally be found in other agreements[301].

(298) Lilje-Jensen/Thamsborg/1995, p.639.

(299) *Ibid.*, italics in original.

(300) *Ibid.*, pp.643-644.

(301) Appendix 2, D1, D2, D6, D9, F4, F39. Cf. Australia/Solomon Islands, Australia/France, and Australia/Papua New Guinea agreements. The UK/Ireland boundary, although a "stepped" line composed of segments of parallels and meridians, is based primarily on equidistance and its variants (e.g. modifications, bisectors). Boundaries that are perpendicular to the general direction of the coast or to bay-closing lines are also a variant of equidistance (e.g. Brazil/France; Argentina/Uruguay).

Consider now the four scenarios shown in Figures 91 and 92. Whereas in scenario 91(1) both states (A and B) have a *200 M opening*, in scenario 91(2) only state A has it. Analogously, whilst four states (A, B, C and D) have a *200 M opening* in scenario 92(1), only two states (B and D) have such a position in scenario 92(2). Can it then be suggested that only those states having a *200 M opening* have an entitlement to the outer continental shelf? Lilje-Jensen and Thamsborg give no conclusive answer[302].

To answer the question, it must be realised that if a state with no *200 M opening* claims an outer shelf, its outer shelf will be separated from its 200-mile limit by a portion of the Area, a somewhat odd situation. Without discarding this solution *in limine*, one would restrict it to cases in which it is proven that a geomorphological and/or geological continuity exists between the state's coast and the outer shelf. It is in this respect that geomorphologic and geologic facts might become decisive in delimitations beyond 200 M. In fact, this is a cardinal aspect in the *Guidelines* of the CLCS[303]. Geomorphology and geology are equally relevant for delineating the outer edge of the continental margin, on the basis of which is established the *200 M opening*, and the areas beyond 200 M that will be divided by the delimitation. Once more, if such issues arise in adjudication, perhaps courts should request the expertise of the CLCS (again subject to agreement between the parties).

Of course, speaking of a *200 M opening* presupposes that the limits of the natural prolongation beyond 200 M are already established – which raises a number of complex questions. In adjacency, this also means that the delimitation up to 200 M must necessarily have been effected. If a court is requested to delimit a boundary concerning overlaps of both the first and second types, perhaps a two-step approach based on a prior delimitation of the areas within 200 M should be followed. Although the delimitation process should continue to be approached as a whole, the conceptual advantages of this proposition justify recourse thereto as the basis for a decision. Besides, the continental shelf boundary beyond 200 M must start from the end-point of the continental shelf boundary within 200 M.

With this said, it must be emphasised that the notion of *200 M opening* ought not to be seen as an absolutely overriding fact. Its weight is to be determined in the delimitation process through an approach that integrates all relevant facts. Most importantly, insofar as Article 83(1) – which was deemed to reflect customary law – makes no distinction between the continental shelf within 200 M, and the continental beyond that limit, it appears that its normative content is applicable to both cases. The delimitation must achieve an equitable solution. And such a solution is to be attained by application of the principles of maritime

(302) Lilje-Jensen/Thamsborg/1995, pp.635-639.
(303) CLCS/Guidelines, paras.8.2.21, 8.5.. These paragraphs deal with scientific data concerning sediments.

zoning (which in this case focus primarily on geomorphology and geology[304]) and of equity. For example, Figure 93 illustrates a case in which conferring decisive effect on the *200 M opening* would lead to a manifestly inequitable result. Island B has a *200 M opening* longer than state A's. But a non-inequitable solution must weigh other significant facts: coastal length disparity, 'geological linkage' between both territories and the continental margin, and the existence of areas westwards of island B that cannot be attributed to state A.

Finally, a closer look ought to be had into the *Guinea/Guinea-Bissau* arbitration, which appears to be somewhat open to criticism. Since the parties requested a delimitation of their "maritime territories"[305] (i.e. all areas under national jurisdiction), the delimitation beyond 200 M should have deserved further investigation. The Tribunal accepted that, *in casu*, the outer edge of the continental margin lay beyond 200 M. How could it then go on to conclude that this had no effect on the reasoning (because contradictory information is received from the parties), and to delimit the boundary through an open-ended line?[306] This is to say the least very odd. Neither the notion of *200 M opening*, nor the approximate areas beyond 200 M to be divided, appeared as factors for the decision. Whether the Tribunal actually undertook the delimitation beyond 200 M without considering the area-attribution effected by the boundary-line it awarded is unclear. Should it be the case, one would argue that it would have been preferable to make no pronouncement on the delimitation beyond 200 M, and to delimit only the 200-mile overlapping of entitlements.

8.4.b)(iii) 200 M Entitlement *versus* Entitlement Beyond 200 M

It is now necessary to turn to delimitations concerning overlaps of the third type, i.e. where a 200 M entitlement overlaps with an entitlement beyond 200 M. In this instance, should we speak of delimitation? To address this question, recourse might be had to the *Canada/France* arbitration. Whereas France claimed that it had an entitlement that extended beyond 200 M, asking the Tribunal to prolong the boundary up to the 200-mile limit from the Canadian coast, Canada opposed this view on the grounds that the French claim-line might lie beyond the outer edge of the continental margin. Holding the view that a decision on areas beyond 200 M would bear on the rights of a third-party (the International Seabed Authority – ISA), the Tribunal did not pronounce on the issue, whilst stressing that this was without prejudice to the rights of both states[307].

A closer look must be had into this approach. The Area (the maritime zone to which the competences of the ISA are directed) is defined, residually, as "the seabed and ocean

(304) Para.6.3.b)(ii) *supra*.
(305) Arbitration Agreement, Article 2, ILM/25/1986, p.256.
(306) ILM/25/1986, pp.264, 292, 299, paras.19, 96, 113. Note the bathymetry development off the coast in Figure 7.
(307) ILM/31/1992, pp.1171-1173, paras.75-82. For an illustration, see Figure 10.

floor and subsoil thereof, *beyond the limits of national jurisdiction*"[308]. It consists of the maritime spaces unclaimed by states, which will indirectly set its limits. Most importantly, the regime of the Area shall not affect either the delineation of the limits of the continental shelf or the delimitation of maritime boundaries between states[309]. In short, *there can be no question of delimitation* (or of delineation of outer limits for that matter) involving the ISA. Furthermore, as Boyle observes, "where the deep seabed begins is not an abstract notion". Noting that the deep seabed limits depend on various aspects, which include distance from the coastal state, he asks a key question: "which coastal state?" Arguing that, "where two states are potentially in contention", only delimitation provides an answer, he suggests that "where the deep seabed begins may depend first on how the shelf is delimited". Because neither the ISA nor the CLCS "has any competence to delimit the boundary between the shelf and the [deep] seabed", he concludes that "it may well be erroneous" to say that there are three parties to this sort of dispute[310]. In this respect, one would contend that the key difficulty for the Tribunal was that it was not in a position to determine the existence, and extension, of an overlapping of entitlements based on natural prolongation. With Canada disagreeing with the French argument, and without the possibility of resorting to the CLCS (for the LOSC was not yet in force, which meant that the CLCS had not yet been set up), little (maybe nothing) could have been done to resolve the problem of entitlement beyond 200 M. Perhaps this would have been a sounder basis for reasoning the non-pronouncement on the boundary beyond 200 M.

With respect to the issue of the broad shelf, the *Canada/France* Award leads to a second question, raised by Judge Gottlieb in his Dissenting Opinion. He suggests that the Tribunal "should have dismissed outright all French claims to a continental shelf beyond the Canadian 200-mile limit". The fact that the French area is "zone-locked" inside the 200 M Canadian entitlement, was in his view tantamount to saying that no French rights can exist either within 200 M from Canada or beyond that distance. By referring to the "miraculous travelling" of the French claim for a 100 M or so, in a "dormant state", through the 200 M Canadian jurisdiction, to "somehow revive" beyond the Canadian 200-mile limit, he gives a bright image of the difficulties that the argument raises conceptually[311].

Commenting on Judge Gottlieb's views, Oude Elferink rejects, on two grounds, that the LOSC supports his proposition[312]. First, he argues that Article 76 makes no exception to the rule that the continental shelf extends to the outer edge of the continental margin

(308) LOSC, Article 1(1)(1), emphasis added.
(309) LOSC, Articles 84(2), 134(3)(4). Concurring with this view, cf. Nelson/1998, pp.575-576; DeLacharrière/1983, pp.15-16.
(310) Boyle/1997, p.46.
(311) ILM/31/1992, pp.1195-1196.
(312) OudeElferink/1999a, pp.462-463.

wherever the margin extends beyond 200 M. Secondly, he affirms that it is possible for an entitlement beyond 200 M of one state to overlap with a 200-mile entitlement of another state. Both statements being indubitably true, neither is sufficient to reach the conclusion that France has maritime rights outside its 'locked area', whether within or beyond the 200 M Canadian entitlement.

Conceptually, the French proposition faces great difficulties. As argued above, an argument can be made to support the notion of a hierarchy between entitlements of different types[313]. Thus, even if the sovereign right and the jurisdiction over the seabed and subsoil within 200 M are considered separately from the water column jurisdiction, there is a precedence to be considered. Attributing to one state continental shelf areas beyond 200 M, whose resource exploitation would be conditioned to payments to be made to the ISA, while removing it from the 200-mile area of another state, which could exploit those resources unconditionally, appears to be juridically illogical and untenable. Furthermore, after such an attribution, would the state whose entitlement beyond 200 M was in question still have to obtain a technical homologation of its jurisdiction-limits from the CLCS? This would not be an issue if the precedence between entitlements were considered. In negotiation, states can decide to proceed however they see it fit. In adjudication, where an overlap of the third type exists, the presumption should be that the 200 M entitlement takes full precedence.

Hence, in the *Canada/France* arbitration, perhaps the Tribunal should have asserted clearly the non-existence of any French rights to an outer shelf within the 200 M entitlement of Canada. Whether France can claim an outer shelf beyond the 200 M limit from Canada is a question that must be viewed on the same grounds as that of claims to outer shelf areas without having a *200 M opening* (the problem is then one of overlap of the second type, and not of the third type). Unless it is proven that geomorphological/geological continuity exists between the French islands and the outer shelf areas (and even then subject to other factors), such a possibility should be rejected[314]. This typically scientific issue could be referred to the CLCS for advice (should the parties agree thereto).

8.4.c) The Single Maritime Boundary Issue

8.4.c)(i) Towards the 'Territorialisation' of Maritime Boundaries

The *single maritime boundary* (SMB) issue is a consequence of the reformation that the definition of maritime zones underwent in the Third Conference. It stems from the

(313) Paras.4.3.d)(iv), 8.4.b)(i) *supra*.

(314) As Evans observes, the theory of a 'southern push' of the French entitlement may be objected on the grounds that the further seawards the French zone would project, "the less tenable this theory becomes". The further southwards the areas lie, the more the issue turns from one of natural prolongation of Newfoundland, into one of prolongation of Nova Scotia's coast (Evans/1994, pp.688-689).

solution reached on the spatial definition of the EEZ and the continental shelf. Despite their distinct historical development and different scope *ratione materiae*, and the fact that they retained in the LOSC certain systematic autonomy[315], these resource-related zones were somewhat integrated and linked as to the basis of entitlement and 'horizontal extension'[316]. Up to 200 M from the baselines, the two became coincident. However, it might be asked whether the conceptual difficulties involved in this integration were fully anticipated. As the SMB issue has been already examined extensively[317], the present section does not centre on discussing all questions involved, but on highlighting cardinal points, and contextualising the issue within the conceptual approach that has been proposed in this study.

At a prefatory level, it must be emphasised that the classical understanding is that the SMB refers solely to areas within 200 M from the baselines, and beyond the territorial sea. Speaking of SMB as including the territorial sea, or continental shelf beyond 200 M, is conceptually imprecise. Owing to the way in which some issues were dealt with in recent case law, perhaps some reconsideration is required.

In the *Eritrea/Yemen* arbitration, the Tribunal has simply asserted that "after careful consideration of all the cogent and skilful arguments put before [it] by both parties, that the international boundary [would] be a single all-purpose boundary". It added later that, as to the middle stretch, there was "added to the boundary problem of delimiting continental shelves and EEZ the question of delimiting an area of overlapping territorial seas"[318]. Why a single all-purpose boundary was awarded when the parties asked for an award "delimiting maritime boundaries" remained unclear[319]. The fact is that the single all-purpose boundary divided also territorial sea areas. In the *Qatar/Bahrain* case, the parties requested "a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters". The Court noted that the SMB would result from "the delimitation of various jurisdictions": territorial sea in the south, and continental shelf and EEZ in the northern sector. Later, it referred to "the course of that part of the single maritime boundary

(315) Whereas the EEZ regime appears in Part V of the LOSC, the continental shelf regime is set down in Part VI. Notwithstanding this, it must be noted that Article 56(1)(a) establishes that the EEZ jurisdiction encompasses also the seabed and subsoil, blurring somewhat their autonomy. Apparently, a claim to an EEZ that does not make clear that it refers to the water column jurisdiction only must be seen as encompassing also the continental shelf jurisdiction.

(316) Referring to the link between these two institutions, cf. *Libya/Malta* case, ICJ/Reports/1985, p.33, para.33. The reference to 'horizontal extension' seeks to stress that there is a spatial distinction between these jurisdictions along the vertical axis: the EEZ comprises the water column, while the continental shelf comprises the seabed and subsoil.

(317) Cf. Sharma/1989, pp.151-187; Weil/1989a, pp.117-135; Vicuña/1989, pp.195-211; Attard/1987, pp.212-229; McRae/1987, pp. 225-234; Oda/1987; Legault/Hankey/1985, pp.973-986; Reuter/1984; Peters/Tanja/1984. *Qatar/Bahrain* case, Merits – Judge Oda, Separate Opinion, paras.10-12; Judges Bedjaoui, Ranjeva, Koroma, Joint Dissenting Opinion, paras.163-168. *Jan Mayen* case, ICJ/Reports/1993: Judge Oda, Separate Opinion, pp.102-117; Judge Shahabuddeen, Separate Opinion, pp.197-202. *Guinea/Guinea-Bissau* arbitration, ILM/25/1986, pp.298-300, paras.112-117. *Gulf of Maine* case, ICJ/Reports/1984: Judgment, pp.292-295, 325-328, paras.90-96, 190-196; Judge Gros, Dissenting Opinion, pp.362-377; Canadian Counter-Memorial, paras.457-554. *Tunisia/Libya* case, ICJ/Reports/1982: Judge DeAréchaga, Separate Opinion, pp.115-116; Judge Oda, Dissenting Opinion, pp.231-249; Judge Evensen, Dissenting Opinion, pp.282-298.

(318) Eritrea/Yemen-II, paras.132, 154.

(319) Arbitration Agreement, Article 2(3). Cf. also Antunes/2001, pp.330-333.

which will delimit the territorial seas"[320]. In both instances, the division of the territorial sea was included in the SMB, an 'incorporation' that departs from the traditional understanding of the concept[321].

What may be deemed a trend towards the 'unification' of all maritime boundaries appears to extend also to areas beyond 200 M (although this is an idea still to be approached cautiously). State practice dealing with such boundaries shows little distinction in relation to delimitations within 200 M, reinforcing the suggestion that the same normativity applies in both cases[322]. What differ are the facts the appraisal of which becomes relevant. Other signs can be identified in the *Canada/France* arbitration. The Tribunal was asked to effect "a single delimitation" to "govern all rights and jurisdiction" exercisable under international law[323]. But if "single delimitation" equates to a SMB (i.e. within 200 M), there is a certain paradox in the parties' phraseology. The rights exercisable under international law include areas beyond 200 M. That the intention might have been to ask for a *single all-purpose boundary* (similar to that of the *Guinea/Guinea-Bissau* arbitration) is suggested by France's claims beyond 200 M, and by Canada's reply *in substantiam*. In this regard, Nelson argues that, for the Tribunal to reject any pronouncement on the delimitation beyond 200 M, it would have sufficed to observe that, because these areas comprise the seabed and subsoil only, there was no question of SMB. He adds that the Tribunal should have affirmed that the issue fell outside its mandate, and that further pronouncements were unnecessary[324]. Eventually, the Tribunal concluded that the delimitation should reach only "as far as the 200 nautical miles outer limit", which was "the single delimitation applicable simultaneously to the EEZ and the normal continental shelf"[325]. But its previous comments indicate that it considered to some extent the areas beyond 200 M; perhaps because the parties, having requested a line dividing "all rights and jurisdiction", raised the issue.

One would venture to suggest that there appears to be an inexorable trend towards the 'unification' of all maritime boundaries, which will eventually crystallise, and which is explicable in the light of the 'politicisation' of maritime boundaries and of the progressive 'territorialisation' of the areas beyond the territorial sea[326]. From here stems the concept of the *single all-purpose maritime boundary*. This boundary divides the maritime zones under the jurisdiction of adjoining states regardless of the precise scope of the jurisdiction that international law entitles each state to exercise over such zones, on either side of the line. In

(320) Qatar/Bahrain-Merits, paras.168-170, 221.
(321) Judge Oda makes this point in his Separate Opinion in the *Qatar/Bahrain* case (para.12).
(322) OudeElferink/1999, p.465.
(323) Arbitration Agreement, Article 2(1), ILM/31/1992, p.1152.
(324) Nelson/1998, pp.574-575.
(325) ILM/31/1992, pp.1172-1173, para.82.
(326) Cf. Bardonnet/1989, pp.39-54; Weil/1989b, pp.1024-1026.

the *Guinea/Guinea-Bissau* arbitration, the Tribunal was asked to decide upon "the course of the boundary between the *maritime territories* appertaining" to the two states[327]. For most of its course, the boundary runs along a loxodrome of azimuth 236°, which prolongs to the "outer limit of the *maritime territories* of each state"[328]. The continental shelf areas beyond 200 M that apparently exist off the coast of these states were also delimited thereby.

As shown in the 1996 Estonia/Latvia agreement, this trend appears also in state practice. Reference is made therein to a maritime boundary concerning "the territorial seas, the EEZs, the continental shelf, and *any other maritime zones which might me established by the contracting Parties* in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea and principles of international law"[329].

8.4.c)(ii) All-Purpose Line: Single Boundary and Dual-Coincident Boundaries

When in 1979 Canada and the USA requested the Chamber to delimit a SMB in the Gulf of Maine there were no judicial precedents in this respect. What existed was a fairly significant number (18 out of 47) of post-1969 agreements that resorted to a single line to divide the maritime areas beyond the territorial sea[330]. As noted by McRae, who was a legal advisor for Canada in the *Gulf of Maine* case, the USA and Canada adopted this approach due to "practical considerations"[331] – just as other states had done in negotiation, it might be added. Dual maritime boundaries are susceptible of creating great difficulties at the level of administration of maritime spaces, as the scarcity of state practice shows. It is difficult to conceive how hydrocarbon exploitation, fisheries, environmental protection, and marine scientific research – to mention only the more visible issues – can be dealt with on the basis of a strict seabed/subsoil and water column separation. Law enforcement, in particular, might require rather complex arrangements (not to mention political trust). Not surprisingly, Herriman and Tsamenyi conclude, in relation to the 1997 Australia/Indonesia agreement[332], which devises separate boundaries, that it "fails to address important issues" relating to the matters above. For the agreement to become workable, they add, further instruments of clarification might be needed[333].

Practical considerations and administrative convenience however, might not always match well with legal conceptualisation. The SMB issue is an example of this reality. As

(327) Arbitration Agreement, Article 2, ILM/25/1986, p.256, emphasis added.
(328) *Ibid.*, p.304, para.130.3)c), emphasis added.
(329) Appendix 2, F23, Article 1, emphasis added.
(330) Appendix 2, D1, D10, D13-D17, D20-D21, D27, D34, D36, D48, D61-D62, D64-D66. It is noteworthy that these states were ready to delimit their maritime spaces without having full knowledge of what would be the outcome of the Third Conference, as to the substantive scope of their jurisdiction.
(331) McRae/1987, p.225.
(332) As to the impact of the independence of East Timor (in 20 May 2002) on this treaty, cf. paras.9.2.c), 9.3.b) *infra*.
(333) Herriman/Tsamenyi/1998), pp.378-379.

McRae recognises, when Canada and the USA requested a SMB, "probably neither side realised the full implications" of their approach, "nor did they realise that this aspect [...] would so preoccupy the Chamber". Whereas "Canada assimilated the [SMB] to an EEZ boundary", the USA (although arguing that the continental shelf and the 200-mile resource zone were distinct) treated the SMB "as approximating an EEZ boundary". But "neither party devoted much attention [...] to whether such a thing as a [SMB] existed in law"[334].

From the legal standpoint, the answers to some questions that might be asked appear to have been given already, and to raise little controversy. First, it is undisputed that there is no strict normative prescription requiring the continental shelf and EEZ boundaries to coincide. Secondly, the idea that a continental shelf boundary that is already in place can be altered only by express consent of the parties is equally unchallenged. An EEZ delimitation does not *ipso facto* revoke a previous continental shelf boundary. However, if an EEZ delimitation is effected in a situation where no continental shelf boundary exists yet, due to Article 56(1)(a) of the LOSC, unless the continental shelf is explicitly excluded from the delimitation, the boundary will also divide it. Thirdly, there appears to be no requirement establishing that the water column boundary is conditioned by a previously delimited continental shelf boundary – although the alignment between the two might become *in casu* a relevant consideration.

Perhaps the most important legal question, subject of an ongoing debate, has to do with the *equilibrium* that must be reached between the parties' interests in the area of overlapping exclusiveness. The problem is outlined in the question posed by the President of the Chamber to the parties in the *Gulf of Maine* case (which appears below, somewhat rephrased, with a view to adapt it to the conceptualisation adopted in this study).

> In the event that one particular [adjustment of the provisional equidistance-line] should appear appropriate for the delimitation of the continental shelf, and another for that of the [water column jurisdiction], what [are] the legal grounds that might be invoked for preferring one or the other in seeking to determine a single line?[335]

The need to arrive at an *equilibrium* founded on an all-inclusive appraisal of facts was endorsed by both parties. The USA answered that "the matter should be considered as an integrated whole" including a "balancing" of relevant facts. Canada "recognised implicitly that there was a balancing process involved" when stating that the boundary course "should be dictated by the circumstances relating to each particular sector"[336]. The Chamber opted for resorting "to criteria that, because of their more neutral character, [were]

(334) McRae/1987, p.225.

(335) Sitting of 19 April 1984, cited by Judge Gros, Dissenting Opinion, ICJ/Reports/1984, p.362. The question referred to methods instead of adjustment of the provisional equidistance-line, and to fisheries zones instead of water column jurisdiction.

(336) For the replies of the parties, cf. McRae/1987, p.226. Judge Oda considers that both Canada and the USA "appear to have had difficulties in formulating their respective answers to this somewhat embarrassing question" (Oda/1987, p.350).

best suited for use in a multi-purpose delimitation". Turning to those 'criteria' "derived from geography", it refused to appraise facts exclusively related to either seabed/subsoil or water column[337]. What the Chamber did was, fundamentally, to appraise only the facts related to the basis of maritime entitlement, leaving aside those facts related with the regime of exclusiveness. The delimitation concerned solely areas within 200 M, and the Judgment anticipated the pronouncement made in the *Libya/Malta* case as to the irrelevance of natural prolongation in these delimitations.

In the *Jan Mayen* case, Denmark requested a single boundary for the fishery zone and continental shelf; Norway contended that, although the two boundaries could coincide, they remained distinct. The Court recognised that there was a difference between this case and the *Gulf of Maine* case, in that it had not been asked for a single boundary. As to the applicable delimitation law, it accepted the Norwegian argument that whereas for the continental shelf the boundary should stem from the Article 6 of the CS Convention, the fishery zone boundary should be based on customary law[338]. The Court concluded that both regimes required the adoption of equidistance provisionally, to be adjusted in conformity with the relevant facts. Ultimately, the boundaries awarded were deemed to be coincident, despite the fact that capelin resources, relevant exclusively for water column jurisdiction, were weighed-up as a relevant consideration.

A different concept now seems to have emerged. One appears to be faced here with *dual-coincident maritime boundaries*, instead of a *single maritime boundary*. Were it not for the relevance attributed *in casu* to the capelin resources, perhaps the concept would have raised little difficulty. The point was made by Judge Shahabuddeen who, while stating that "two lines drawn independently for each area would coincide along their entire lengths only exceptionally", considered that the location of fish stocks is not relevant to continental shelf delimitation[339]. From a similar perspective, Judge Oda noted that, although the possibility of an eventual coincidence of the two lines may not be excluded, if a single boundary was sought by the parties, then they should have agreed upon it as in the *Gulf of Maine* case. In this regard, he added:

> If the marine resources constitute a factor to be taken into account, it is unthinkable to draw a single maritime boundary without having a clear idea as to which particular circumstances ought to predominate (i.e. those relating either to the EEZ or to the continental shelf). The Court does not give any good reason why equitable access to the "fishing resources" should have also been taken into account when it drew the line constituting the boundary not only of the EEZ but also of the

(337) ICJ/Reports/1984, p.326-328, paras.192-196.
(338) ICJ/Reports/1993, pp.56-58, paras.41-44.
(339) Separate Opinion, ICJ/Reports/1993, p.201.

continental shelf. The Court erred in this respect after taking it for granted that there ought to be such a single boundary.[340]

One would argue that perhaps there is a reconciling approach. Let it be assumed that a large disparity of coastal lengths must be reflected as an adjustment of the provisional equidistance[341]. If objectified in terms of average 'distance ratio', the adjustments in the *Libya/Malta* and *Jan Mayen* cases appear similar. The difference is that, in the former, the displacement was applied equally to the whole line, whereas in the latter, equidistance was adjusted keeping one of its extremities (point A) unmoved. For area-attribution purposes, the amount of displacement remained similar; what differed was the way in which the line was displaced. The coastal length disparity being also similar in both cases, perhaps it is fair to presume that the *quantum* of adjustment was determined primarily by the coastal length disparity. If this is accepted, then it might be argued that although the 'access to capelin resources' was relevant in the *Jan Mayen* case to determine the *shape* of boundary, it was virtually immaterial as far as *area-attribution* was concerned.

Suppose now that the area-attribution was indeed determined primarily by coastal length disparity (which is relevant also in continental shelf delimitation). In the absence of other facts relevant for the continental shelf regime (e.g. known hydrocarbon resources), no impediment existed to an apportionment of areas in accordance with the requirements of the water column jurisdiction. Rather than adjusting equidistance throughout its extension, the Court displaced it unevenly, but *without altering the area-attribution* resultant from the coastal length disparity. As shown in Figure 83, other lines with similar average 'distance ratio' would have operated similar area-attributions. The significant advantage was that, in that way, the boundaries coincided. An example of discretionary powers, the Court's view is justified, particularly because it reflects practice overwhelmingly followed by states.

This preference for solutions based on coincident boundaries is equally reflected in the way in which the *equilibrium* between the interests of Iceland and Norway was devised in the *Jan Mayen* conciliation. Faced with an existing water column boundary running along the 200-mile limit from Iceland, the Conciliation Commission, which had been asked to pronounce unanimously on the continental shelf boundary, recommended that it should coincide with the water column boundary. By way of counterpoise, it proposed the consecration of joint access to, and exploitation of, hydrocarbon resources in an area of significant prospect. Although the Commission referred to proportionality *en passant* only, the large disparity of relevant coastal lengths was almost certainly decisive for retaining the Icelandic 200-mile limit as the 'dual-coincident' boundary[342]. As it subsequently happened

(340) Separate Opinion, ICJ/Reports/1993, pp.109-110, 114-117.
(341) Judge Oda questioned this idea in his Separate Opinion (ICJ/Reports/1993, p.115).
(342) ILR/62/1982, pp.124-136.

in the *Jan Mayen* case, equitable access to natural resources was a key element in balancing exclusive interests, whilst opting for a solution based on coincident boundaries.

In summary, it is important to realise that the question of the *single maritime boundary*, in adjudication, depends much on how the request is phrased by the parties[343]. A SMB can be awarded only if the parties require it. No obligation stems from the LOSC, or from general international law, in this respect. This conceptual point made, one is prompted to observe immediately that, even if EEZ and continental shelf boundaries are delimited separately, they will tend to coincide (emerging as *dual-coincident maritime boundaries*). This idea is supported on legal and factual grounds. With respect to the 'legal matrix', it suffices to note that, in the LOSC, the normativity applicable to both types of delimitations is the same. First, the textual element of Articles 74(1) and 83(1) is identical. Secondly, this is reinforced by the statement made in 1978 by the chairman of NG7, who emphasised that "in essence, [the Negotiating Group had] been considering the same set of criteria to be applied both to the EEZ and the continental shelf"[344]. As regards the 'factual matrix', insofar as the basis of maritime entitlement within 200 M is the same for the water column and the seabed/subsoil jurisdictions, all factual elements related to maritime entitlement become relevant in both cases. Perhaps Sharma is right when suggesting that there is *juris tantum* "presumption in favour of a single, general purpose maritime boundary to divide jurisdictions within the 200-mile zone, which can be rebutted if the states advance reasons for having divergent boundaries for the seabed and superjacent waters"[345]. Unless the facts impose a different solution (e.g. if sharing seabed resources is incompatible with sharing water column resources), the two lines will tend to coincide. As the facts related to maritime entitlement are in a majority, and are arguably more significant[346], the spatial coincidence of boundaries (even if delimited separately) emerges 'naturally'. One would suggest that only where it is impossible to reconcile the interests of the disputants inherent in different types of exclusiveness (primarily different types of resources), with coincident boundaries, should distinct boundaries be adopted. Evidenced in state practice, all-purpose boundaries (either single or dual-coincident) became a reality in maritime delimitation. This reality, linked to the 'territorialisation' of maritime boundaries, appears to stem from the all-purpose dividing-character of the line that is similar to that of land boundaries.

---

(343) In situations of adjacency, states should exclude explicitly areas beyond 200 M if they do not want these areas to fall within the court's mandate. A general expression such as "areas under the jurisdiction of the two states" is likely to lead courts to delimit also, through a solution of the type 'open-ended line of bearing', the areas beyond 200 M (even without having the outer limit of the continental margin defined).

(344) Doc.NG7/22, 8 September 1978, Platzöder/Documents(IX), p.427. Judge Oda recently referred to this idea (*Qatar/Bahrain* case, Separate Opinion, para.35).

(345) Sharma/1989, pp.173-174.

(346) In the *Libya/Malta* case, the Court asserted that "greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts (ICJ/Reports/1985, p.33, para.33).

8.4.d) The Emergence of 'Grey Areas'

In the *Gulf of Maine* case, Canada sought to demonstrate that the consecration of the distance principle as criterion of entitlement had a further impact upon delimitation, which gave "particular weight" to the recourse to equidistance. The departure from equidistance (at the terminus of the boundary) would result in the emergence of a 'grey area'[347].

A 'grey area' may be defined as an area lying beyond the maximum jurisdiction of state A, and which apparently also is excluded from state B's jurisdiction – although lying within its potential jurisdiction – by effect of a delimitation. This concept is illustrated in Figure 94(a). Discussed by Boggs in the 1930s, this area was characterised by him as an area that "needlessly constitutes a zone of waters of controvertible jurisdiction". He argued then (referring to a 3 M territorial sea) that the simplest boundary should run as a straight line from the land boundary terminus to the point on the 3-mile limit equidistant from the two land territories (which he named the "normal terminus")[348].

Although acceptable in the context of 3 M territorial waters, this solution faces insurmountable legal difficulties in the context of 200 M jurisdictions. The problem should perhaps be posed in different terms today. The key idea is simple. If a boundary between two adjacent states does not end at the point on the 200-mile envelope equidistant from the two baselines[349], it creates an area of 'non-enjoyed' national jurisdiction. Notably, this is not a question of the course of the boundary, but of its end-point. Adjustments to equidistance will not create a 'grey area' if the boundary ends eventually at the equidistant point on the outer envelope[350].

Let the fictitious case of Figure 94(a) above (which depicts a situation similar to that of the Gulf of Maine area) be considered. Is state B entitled to exercise jurisdiction over the 'blue-shaded area' (since the boundary stops at the perimeter of the area of overlapping entitlements)? Supposing that the outer edge of the continental margin lies beyond 200 M, entailing the prolongation of the boundary (presumably in a similar direction), may state B exercise jurisdiction over the water column jurisdiction, while state A does the same over the seabed/subsoil? These questions exemplify some difficulties posed by the emergence of 'grey areas'. Intertwined here is also the issue of precedence between different entitlements. The practical effect might be the exclusion of an area from the jurisdiction of one state to place it under a less intense jurisdiction of another state, or to take altogether from state

(347) Canadian Counter-Memorial, paras.569-576.
(348) Boggs/1937, pp.453-456.
(349) This is valid *mutatis mutandis* for the territorial sea and contiguous zone 12-mile and 24-mile envelopes.
(350) Naturally, the boundary-line would be somewhat more complex, which is necessarily a consideration to be weighed against this suggestion.

jurisdiction. May an area that would in principle be under the (territorial sea) sovereignty of a state be put under the EEZ and contiguous zone jurisdiction of an adjoining state? May an area that would in principle allow the exercise of jurisdiction over the seabed/subsoil and superjacent waters become part of the high seas and the Area (or of the high seas and of the continental shelf beyond 200 M of an adjoining state)?

Answers to these questions are far from easy, as demonstrated by Oude Elferink's analysis. Quite perceptively, he poses the problem in terms of "[w]hether it is permissible to create a grey area *in the legal determination* of an EEZ or territorial sea boundary"[351]. The crucial point is not whether 'grey areas' may be created by treaties, but whether they may result from courts' decisions. His conclusion that courts have adopted hitherto a "somewhat cautious approach" reflects the uncertain legal contours in this matter, which is entangled with "the fundamental principles applicable to the relationship of the regimes of the continental shelf and EEZ". Referring to the *Gulf of Maine* case and the *Canada/France* arbitration, he argues that the boundary was delimited only up to the 200-mile limit because the parties asked for a single maritime boundary. No doubt true as to the former, it is less clear in the latter. This is suggested by the fact that the Tribunal's non-pronouncement on the boundary beyond 200 M appears justified also on the basis of the need to consider a third-party's interests. Observing that the *Guinea/Guinea-Bissau* arbitration created a 'grey area', Oude Elferink draws attention to the "remarkable" fact that this was done "without any rationalisation", i.e. "no legal justification was given for this decision"[352].

In the aftermath of the *Gulf of Maine* case, Canada delineated the outer limit of its 200-mile zone in compliance with the Chamber's decision. Because the boundary ends at the perimeter of the overlap of 200-mile entitlements, it included the 'grey area' within its 200-mile zone. The USA was apparently unhappy with this, arguing that Canada had gone beyond the awarded line. McRae, who describes these facts, considers that this amounts to prejudging the prolongation of the boundary[353]. He then asks two questions, which can be generalised as follows. Can a 'grey area' become subject to a state's jurisdiction when lying beyond its 200-mile limit (but on the 'right' side of the boundary)? In delimitation, do EEZ rights of one state take priority over the continental shelf claims of another state?

In relation to the first question, the answer depends on its scope. In negotiation, no reason prevents a state from 'transferring' the exercise of jurisdiction over areas within its 200-mile limit to another state. This does not infringe upon the rights of the international

(351) OudeElferink/1998, p.146, emphasis added. On the 'grey area' issue, cf. also Colson/1993, pp.67-69. Both authors give examples of negotiated agreements that created 'grey areas'.
(352) OudeElferink/1998, pp.161-163, 176-177.
(353) McRae/1993, pp.168-169.

community[354]. This is the case of the 'transfer' of "special areas" in the 1990 USA/USSR agreement[355]. In adjudication, the answer is however less obvious. If the court's task is delimitation – the division of an overlapping of entitlements, it might be difficult to justify such a 'transfer'. Either the overlap is non-existent (if the continental shelf does not extend beyond 200 M), or the overlap does not comprise the same rights for the two states. This type of 'transfer' seems possible only if states explicitly empower courts to effect it.

Since this was not the case in the *Guinea/Guinea-Bissau* arbitration, the legal status of the 'grey area' created thereby might be questioned. In the 'blue-shaded area' shown in Figure 95 (estimated as being more than 2,500 sq.km), Guinea cannot exercise jurisdiction over the water column (assuming that it is entitled to a continental shelf beyond 200 M). Whether Guinea-Bissau is entitled thereto remains doubtful (for the area lies on the 'wrong' side of the boundary). If the boundary is seen as 'territorialised', then Guinea-Bissau can make no claims beyond it. If the line is viewed as merely effecting the division between an overlapping of entitlements, as there is no overlap of the water column jurisdiction in that area, theoretically, it may be suggested that Guinea-Bissau is entitled thereto. However, no court has yet addressed this issue.

The second question mentioned above concerns the possible existence of priority of EEZ rights over opposing continental shelf claims beyond 200 M. It was suggested above that, in principle, the exclusiveness concerning the 200-mile zone takes precedence over the exclusiveness beyond it[356]. Notwithstanding this, it seems doubtless that such a presumption must be contextualised within maritime delimitation law. The precedence between different entitlements relies upon the principle of maritime zoning. Practically speaking, it is rebutted when it becomes irreconcilable with the demands of the principle of equity.

Bearing in mind what was said above, the following conclusions are possible. The emergence of 'grey areas' is another element to weigh-up in the delimitation process (in particular if sizeable areas are at issue). As a rule of thumb, it may be said that the more the line departs from equidistance, the larger are the areas in question. The existence of a 'grey area' entails necessarily prejudice to one of the states involved in the delimitation; and this should be a consideration in the determination of the boundary. It is also noteworthy that the emergence of 'grey areas' is avoidable, even where departures from equidistance are required. If the end-point of the boundary is placed on the equidistant point of the outer limit, no 'grey areas' will emerge (although the line might become more complex).

(354) Cf. OudeElferink/1998, p.176; Verville, IMB/Report 1-6, p.450.
(355) Appendix 2, F65, Article 3. Figure 94(b) depicts a situation that is similar to that of the 1990 US/USSR agreement.
(356) Paras.4.3.d)(iii)(iv) *supra*.

Whether a state can exercise jurisdiction over areas located on the 'wrong' side of the boundary (in cases similar to the *Guinea/Guinea-Bissau* arbitration[357]) is an unresolved and controversial question. One would argue that perhaps the exercise of jurisdiction should not be permitted. The reasons are two-fold. First, the trend towards the 'territorialisation' of maritime boundaries signifies that they are likely to become 'watertight lines', separating adjoining spheres of jurisdiction. Secondly, inasmuch as that would lead to superimposed jurisdictions, the advantages sought with single boundaries – administrative convenience and practicality – would be offset. Indubitably, this does not happen where no rights beyond 200 M exist. In such instances, one state has an unopposed EEZ jurisdiction, and there is no obvious reason for impeding its exercise. With a view to avoiding 'non-enjoyed' areas of jurisdiction, states may opt for 'transfer solutions' similar to the USA/USSR agreement. Whether such 'transfers' might be considered and legally valid, in the balancing of interests in boundary adjudication depends perhaps much on how special or arbitral agreements are phrased. Another point deserves attention. The strength of the presumption that territorial sea entitlements take precedence over 200-mile jurisdictions is translatable in the restraint felt in the creation of territorial sea 'grey areas'. Weight is lent to this proposition by the rare character of the departures from equidistance in territorial sea delimitation. But even in relation to 200-mile jurisdiction, one would subscribe to the proposition that "the creation of a substantial grey area should be avoided to the greatest extent possible"[358].

8.4.e) Other Issues

8.4.e)(i) Simplicity of the Boundary-Line

Behind many solutions devised in state practice is an element of convenience that concerns the exercise of jurisdiction. The simplicity of boundary-lines has always been an issue for states. Even today, when satellite systems allow the determination of positions at sea with an accuracy of some ± 10 metres, a simple line facilitates greatly the exercise of jurisdiction, especially law enforcement. The most obvious expressions of this search for simplicity are treaties that resort to simplified equidistance-lines, lines of bearing, parallels and meridians. Even what seem at first glance complex lines often contain an element of administrative convenience. For instance, the 'stepped boundary-lines' of the UK/Ireland agreement (constituted by segments of meridians and parallels, which are loxodromes), appears to be orientated towards the concession blocks of both parties[359].

(357) Notice that the boundary has no defined end-point, which presumably means that it extends beyond 200 M. This distinguishes this case from *Gulf of Maine* case, where the boundary was terminated at the perimeter of the overlapping of entitlements.

(358) Legault/Hankey/1985, p.988.

(359) Appendix 2, F39; Anderson, IMB, Report 9-5, p.1770. Notice that the location of fishery resources was irrelevant, because both states are members of the European Union.

Significantly, the idea that "a degree of simplification is an elementary requisite to the drawing of any delimitation line" was sanctioned in the *Gulf of Maine* case. There, the Chamber affirmed equally its belief that the method employed observed "the advantages of simplicity and clarity"[360]. In the *Eritrea/Yemen* arbitration, the simplicity of the line was again a consideration that influenced the Tribunal. References thereto were related to the need to preserve the 12-mile territorial sea of all islands. The Tribunal asserted that having "a neater and more convenient international boundary", and the desirability for simplicity in the "neighbourhood of a main shipping lane", were considerations to be weighed-up[361]. An identical approach was taken in the *Qatar/Bahrain* case. In the delimitation of the territorial sea boundary, the Court decided, "in accordance with common practice, to simplify what would otherwise be a very complex delimitation line in the region of the Hawar Islands"[362].

Amidst other factors, the simplicity of boundary-lines might appear less relevant. There is some truth is this idea. Line simplicity cannot become an argument for effecting either significant changes of area-attribution, or different resource-sharing. Its immediate objective should be the 'smoothing' of the boundary-line, aiming ultimately at facilitating the exercise of jurisdictions in the fringe, adjoining areas. Again, the distinction must be made between the *shape* of the line, and the *area-attribution* operated thereby.

With this said, a further point must be made. If simplicity is a consideration, why are geodesic lines being systematically utilised by courts, without considering the benefits of resorting to loxodromes? Owing to the practical nature of loxodromes (a line of bearing), and the widespread use of Mercator charts amongst mariners (on which a loxodrome is a straight line), perhaps courts should review their approach to this matter. Mathematically and graphically, a geodesic is a much more complex line. The reservations in relation to loxodromes are understandable in the light of the events of the *Anglo/French* arbitration. But it is important to realise that their simplicity, and wide resort, is an asset that cannot be underestimated. Recourse thereto when very short segments of equidistance are in question is justified. Its use in longer stretches might also be acceptable, if the area-attribution that they operate is correctly comprehended. The fact that loxodromes remain widely resorted to in state practice is a token of their usefulness, and advantages, in many instances.

8.4.e)(ii) Agreement on Aspects of the Boundary-Line

The existence of delimitation disputes does not impair partial agreements between the disputants. In fact, because negotiations are likely to have been held previously, states

(360) ICJ/Reports/1984, pp.330, 333, paras.203, 213.
(361) Eritrea/Yemen-II, paras.128, 155, 160-162.
(362) Qatar/Bahrain-Merits, para.221.

referring a dispute to a third-party, for resolution, might have already agreed upon specific aspects related to the boundary-line. In the *Grisbadarna* arbitration, the parties were in agreement in relation to various aspects: (a) on the course of the boundary between points XVIII and XIX; (b) between points XIX and XX, on making the division along the median line drawn between islands, islets and reefs (disagreeing as to whether *Heiefleur* or the *Heieknub* should be the basepoint on the Norwegian side); (c) on "the great unsuitability of tracing the boundary line across important bars" (which basically meant that they wanted the Grisbadarna bank not to be divided)[363]. Quite rightly, the Tribunal accepted these partial agreements, deciding strictly on the unresolved issues. A similar approach was followed in the *Anglo/French* arbitration. Throughout the Award, the Tribunal stressed the fact that, in the Channel area, the parties had agreed that the boundary should be a median line, whilst referring to the disputed aspects for which they had sought resolution[364]. Recently, in the *Eritrea/Yemen* arbitration, one argument that the Tribunal used to justify the recourse to an equidistance-line between mainland coasts was that both parties had "claimed a boundary constructed on the equidistance method, although based on different points of departure", and that this solution was one "familiar to both parties". Equally, the relevance given to the shipping lane near the delimitation area is fully supported by the Arbitration Agreement[365].

Insofar as the resolution of the dispute is the primary goal of recourse to third-party settlement, the acceptance of this type of agreement between the parties appears logical. There is no reason to widen the unresolved issues. Hence, regardless of whether they were reached beforehand, or during the course of the hearings, courts should consider these agreements in their entirety if possible. The decision ought to seek only to 'fill-in the gaps'. Naturally, if the parties may agree to an *ex aequo et bono* decision, *a fortiori*, they may also direct courts to consider specific extra-legal elements. Besides strictly legal considerations, courts become then empowered to resort to specific non-legal considerations.

Whether the parties can agree to exclude a certain aspect from consideration during the dispute resolution appears to be a similar question. In the *Tunisia/Libya* case, the Court observed that neither party had relied on equidistance in their claims, and that it had to take account of this fact. At first glance, the Court interpreted the non-reference to equidistance as an agreement not to attribute relevance thereto. This is perhaps why it has been argued that "if both parties deny the applicability of a certain method, or the relevance of a certain factor, it is likely to be ignored"[366]. But the fact is that the Court's assertion was qualified by the idea that if it "were to arrive at the conclusion [...] that an equidistance-line would

(363) AJIL/4/1910, pp.230, 233.
(364) RIAA/18, pp.22, 24-25, 52-53, 58-59, 75, paras.15, 22, 87, 103, 146.
(365) Eritrea/Yemen-II, paras.128, 131-132, 155; Preamble of the Arbitration Agreement
(366) Evans/1989, pp.218-219.

bring about an equitable solution of the dispute, there would be nothing to prevent it from so finding even though the parties have discarded the equidistance method"[367]. No doubt, omitting reference to certain methods (or other elements for that matter) does not preclude courts from legally considering them during the delimitation process.

A word of caution is indeed necessary. Courts are bound to decide according to law. If the principle of maritime zoning demands that equidistance be provisionally applied in all delimitations, directing courts to disregard it is tantamount to an authorisation not to apply a legal standard. What is then the impact of requesting a court not to apply a legal standard? It is crucial to realise is that, when resorting to adjudication, the parties relinquish the juridical freedom that they enjoy in negotiation. An agreement of this type appears to have thus one of two effects. Either it amounts to endowing courts with what are virtually *ex aequo et bono* powers, or courts will still have to apply the law – in which case they will consider the parties' agreement only to the extent that it coincides with the legal solution (i.e. the law might require the agreement to be disregarded, wholly or partially).

8.4.e)(iii) Joint Zones

A final brief note concerns the impact of joint zones in the determination of maritime boundaries. There is no question of addressing such a complex subject here in its entirety. The intention is to highlight the fact that, in the balancing-up of exclusive interests inherent in delimitation, joint zones might become a relevant consideration.

That the establishment of zones of joint jurisdiction might be a solution to overcome issues raised by maritime delimitation became unquestionable after the *North Sea* cases[368]. Strictly speaking, however, the delimitation process is unconcerned with the creation of such zones; for it seeks to determine the course of a line. Importantly, joint zones are a second-best option in ocean management. With their creation must be associated a specific jurisdictional regime for the area in question, whose preparation might itself be a source of present and unforeseeable future difficulties[369]. Recourse to joint zones thus should occur only where states are unable to agree on a strict area-division – that underlies the notion of boundary). An agreement on a joint zone might become easier to reach, because in most circumstances joint zones entail a 'lesser' spatial 'amputation' of entitlements.

(367) ICJ/Reports/1982, p.79, para.110
(368) ICJ/Reports/1969, p.54, para.101.(C)(2).
(369) Joint development entails the resolution of two key issues. The first issue, intertwined with the basis of maritime entitlement, concerns the 'area' and the 'sharing-percentages' involved. Since the balance of interests must be related to the spatial extension of the entitlements, the location and extension of the joint area influences decisively the percentages in which the benefits are to be shared; and vice-versa. There is an interlocked relationship between these aspects. The second issue concerns the regime to implement in the joint area, as to management and administrative structure, the exploration, exploitation and management of resources, and associated peripheral issues. To a great extent, these issues can be dealt with separately. It is important to note that there is no such thing as 'genuine jointness'. Sharing of jurisdiction must be decided on a case-to-case basis. Jointness is whatever states agree to share, and can never constitute an obligation. The only obligation for states is to resolve disputes peacefully.

The brief account given here seeks to look into the question of setting-up joint zones concurrently with boundary-lines, that is, with the division of areas of exclusiveness. One typical example is the UK/Denmark (Farøe Islands) agreement[370]. Attempts to negotiate the delimitation for the fisheries zone and the continental shelf failed partially, due to questions related to the fisheries resources. The two states eventually agreed upon a continental shelf boundary, a partial fisheries zone boundary and a joint zone orientated to the water column jurisdiction. Estimated to be approximately 8,000 sq.km, this joint zone corresponds to the area of overlap of the parties' claims (which apparently were both based upon equidistance, but computed from different basepoints).

Joint zones are primarily concerned with the exploitation of natural resources. Their creation might have a specific effect in the delimitation process: to attain a balance as to the access to certain natural resources, thereby contributing to a spatial division of maritime areas in a reasonable manner. Legally, however, this is an instrument whose utilisation depends on consent. No court was hitherto empowered to decide a question of delimitation by recourse to a balance of interests on the basis of a joint zone. There is nevertheless an example of third-party settlement in which this approach was followed: the *Jan Mayen* conciliation[371]. Whilst adopting the Icelandic 200-mile limit (which was already the water column boundary) for the continental shelf boundary, the Commission recommended the creation of a joint area for exploitation of hydrocarbon resources.

Since maritime delimitation consists of achieving a reasonable balance of interests in an area of overlapping exclusiveness, it is necessary to bear in mind that such a balance may be easier with joint zones. Still, one would argue that such an approach should only be resorted to when the advantages of 'reconciling' exclusive rights significantly outweigh the advantages in terms of convenience and clarity of having separate areas of exclusive rights for each state. This matter has to be pondered on a case-by-case basis, taking account of the 'factual matrix' *in concreto*. The decision to endow a court with such powers also depends on it. Doubtlessly, the binding character of the decisions of courts, and the fact that the creation of such zones entails some discretion on the delineation of their regime, leads us to suggest that it is unlikely that states will ever refer this issue to a court. Theoretically, however, it is a possibility that cannot be ruled out. It may also happen that a court is requested to draw a boundary in an area where a joint zone is already in place, in which case the question of balancing interests would be posed in converse, but similar, terms.

(370) Appendix 2, F60; Figure 36.
(371) ILR/62/1982, pp.111-136; Figure 29. For illustrations of other joint zones set up by states, see Figures 30-35.

Chapter 9

TEST STUDY: MARITIME DELIMITATION BETWEEN AUSTRALIA AND EAST TIMOR

9.1. Introductory Notes

When attempting the conceptualisation of a subject that has been deemed to be best approached from a practical perspective, as in the present case, difficulties are likely to arise on various levels. A test-case may thus facilitate bridging the gap between the theoretical nature of the conceptualisation and the practicalities of the task to be undertaken. Seeking to test how the conceptualisation proposed in previous chapters 'performs' when applied to an actual situation, this chapter attempts to overcome the gap between theory and practice, whilst clarifying conceptual aspects that may have been left somewhat obscure.

The question arose as to which case study to select. After considering a number of possibilities, the choice fell on the maritime delimitation between Australia and East Timor. First, this is a case in which nature, history and politics 'conspired' to create a 'test' that involves a significant number of aspects. Secondly, the delimitation between Australia and East Timor has one of the most challenging factual contexts worldwide, providing thus a stern test. Thirdly, this delimitation problem is of particular interest to the author.

The objective is to examine how the maritime boundary between Australia and East Timor would be legally determined, should the conceptualisation proposed be adopted. It is thus necessary to assume that a dispute would emerge between the two states, and that such a dispute would be referred to a judicial or an arbitral forum. However, the jurisdictional questions relating thereto (which also involve the issue of the decision to litigate), will not be analysed; for they are not at the heart of the subject matter. The analysis below describes first the geographical setting between Australia and East Timor. Secondly, to establish the background of the delimitation, it provides an account of the political-legal developments concerning the continental shelf and the water column jurisdiction. The analysis will then be centred on the elements relevant for the legal determination of the maritime boundary (or boundaries) between Australia and East Timor, using the conceptualisation advanced here as the basis thereof. More than pointing to a specific line (or lines), the aim is to provide an actual illustration of how the decision-making process is envisaged in terms of the legal justification for the choice of line. Should the delimitation be effected by negotiation, such a

justification is not required. Nevertheless, in perhaps the vast majority of cases, it is clear that the negotiating strategy of states takes due account of such analyses, and of possible outcomes of judicial or arbitral proceedings.

9.2. Background Aspects

9.2.a) The Geographical Setting of the Timor Sea

The geographical framework for the delimitation between Australia and East Timor must take into account two distinct aspects: coastal geography and seabed geomorphology and geology. Both are important to understand the opposing arguments. Because coastal geography is the key factual element in maritime delimitation, it is natural that particular attention be drawn thereto. As to the seabed aspects, it is through them that the concept of natural prolongation is materialised, which might become relevant in continental shelf delimitation. The following sub-sections thus refer very briefly to these issues.

9.2.a)(i) Coastal Geography

The northern Australian coast and the island of Timor are separated by the Timor Sea[372], which is confined eastwards by the Arafura Sea and westwards by the Indian Ocean (Figure 98). If the macrogeography of the coasts of Timor and Australia are looked at in terms of straight coastal façades defined at small scales, the two coasts run in similar directions (approximately 065°-245°). The two coasts lie thus in an almost perfect relation of oppositeness, roughly 250 M apart. The Australian coast abutting on the Timor Sea, which extends from Melville Island to Cape Bougainville, is a coastal stretch that includes a deep and wide indentation, where the Joseph Bonaparte Gulf is located[373]. The perception of the Australian coastal direction at large scales thus might be somewhat different.

The territory of East Timor is that of the former Portuguese colony[374]. It includes the 'eastern-half' of the Timor island, the enclave of Oecusse in West Timor, the isle of Ataúro – off the northern coast of East Timor, and the isle of Jaco – off the easternmost tip of Timor island[375]. For purposes of the delimitation *vis-à-vis* Australia, only the eastern-part of the southern coast of the island of Timor and Jaco isle have to be considered. The coast has no marked indentations, which means that even at large scale the perception of its general direction does not change much. What is noticeable geographically is that the territory of

(372) IHO/S-23, para.5.14.. The IHO S-23 publication defines the limits of oceans and seas (which should nevertheless not be taken in very strict terms, if only because of the disclaimer that it contains as to its legal and political value).
(373) IHO/S-23, para.5.14.1.. The Joseph Bonaparte Gulf is circumscribed by a line joining Cape Rulhieres and Cape Hay.
(374) For an analysis of East Timor's land boundaries, cf. Deeley/2000.
(375) Cf. East Timor's Constitution (approved by the Parliament on 22 March 2002), Section 4(1).

East Timor is 'walled' by Indonesia. Particular relevance must be given, in the east, to the isles of Leti, Moa and Lakor, and in the west, to cape Tanjong We Toh. These geographical features control the course of the 'lateral-equidistances' between East Timor and Indonesia: an 'eastern-line' starting at a midpoint between Jaco and Leti, and a 'western-line' starting at the mouth of river Masin (Figure 99, lines AC and BD).

A final point concerns the 'frontal-equidistance' between Australia and East Timor. For purposes of its computation, the Australian coast within the indentation that comprises the Joseph Bonaparte Gulf is irrelevant. Thus, the equidistance-line has a V-shape, with its vertex pointing towards the midpoint between Cape Fourcroy and Cape Londonderry. Prescott has suggested that this line is about 120 M long – assuming that it stops at the two equidistant trijunction points with Indonesia[376]. Geometrically, however, it is possible to compute an equidistance-line extending beyond these two points. Trijunction points are, no doubt, an important reference for delimitation; they reveal the existence of third parties' interests. But as will be noted below[377], in this context, there is a particular issue concerning the maritime areas relevant for a delimitation between Australia and East Timor to which attention must be drawn. Not only has Indonesia relinquished seabed/subsoil rights *vis-à-vis* Australia, but Australia also has relinquished water column rights *vis-à-vis* Indonesia. Because Indonesia and Australia thus are precluded from claiming certain rights *vis-à-vis* each other, as a reference, the equidistant trijunction points have to be dealt with differently. Perhaps the 'frontal-equidistance' between Australia and East Timor should not be *a priori* restricted to the line between those equidistant trijunction points.

9.2.a)(ii) Seabed Aspects

A geomorphological and geological description of the seabed in the Timor Sea area is a highly difficult undertaking that, owing to the complexity of the geodynamics of the area, would require an extensive analysis. This section falls short of it, as it has merely a functional objective. It seeks to provide a brief introductory account of aspects relevant for understanding some arguments that have been made in the context of the delimitation between Australia and East Timor[378].

In terms of seabed relief, the Timor Sea comprises two outstanding features. On its southern side, there is a broad shelf (Sahul Shelf), and in the north, the Timor Trough. Off the northern coast of Australia, the geological continental shelf extends to distances of over 150 M from the coast. The seabed descends then to the bottom of the Timor Trough, the

(376) Prescott/1999, p.74; see Figure 99, points C and D.
(377) Paras.9.2.c), 9.3.c) *supra*.
(378) For further elaboration, cf. para.9.4.b)(i) *infra*.

marked geomorphological feature that stands out in the seabed relief of the northern Timor Sea. From the bottom of the Timor Trough, the seabed rises steeply, with the northern slope somewhat mirroring the southern. The three seabed profiles shown in Figure 105 illustrate the geomorphological complexity of the Timor Trough area, both in terms of contour and of depth. It appears to be indisputable that this seabed depression results from a geological process of subduction of the Australian plate under the Eurasian plate. What is discussed at present is whether, geologically speaking, Timor is separated from the Australian margin by the Timor Trough; or whether instead, Timor has accreted to the Australian margin.

9.2.b) Political-Legal Developments Concerning the Continental Shelf

The political-legal background against which the delimitation between Australia and East Timor would take place is complex, and stretches back to the 1960s. The objective of this section, and the one that follows, is not to describe the context in detail, but simply *to focus briefly on those to aspects that have a specific impact upon the delimitation issue.* The following description, regarding aspects related to continental shelf delimitation, is divided into five sub-sections that sequentially deal with: the Australian theory of the 'two shelves'; the 1972 Australia/Indonesia seabed boundary agreement; the Portuguese perspective; the 1989 'Timor Gap' treaty; and the 2001 Timor Sea Arrangement.

9.2.b)(i) Emergence of the Australian Theory of the 'Two Shelves'

As will become clear in due time, should the delimitation between Australia and East Timor be effected through adjudication, the outstanding issue would most probably be the continental shelf boundary. Hence, it is important to start by delving into the question of continental shelf entitlement, and its development in international law.

The 1958 CS Convention states that the legal term 'continental shelf' is used to encompass "the seabed and subsoil of the submarine areas adjacent to the coast but outside the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas", both in relation to continental and insular territories (Article 1). It then adds that the "rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation" (Article 2). With respect to delimitation between states, the CS Convention utilised a formula that resorted to the notion of equidistance (Article 6). In the 1969 *North Sea* cases, whereas Articles 1 and 2 were deemed to reflect customary law, Article 6 was deemed not to have such status[379].

(379) ICJ/Reports/1969, pp.40-46, para.63-81. On this issue, cf. para.2.3.b) *supra*.

The Australian interpretation of the conventional regime led to the enactment of legislation (1967) establishing an 'adjacent zone' extending roughly up to the 500-metre isobath on the southern side of the Timor Trough. On the basis of this legislation, Australia granted exploration permits in those areas. At the time, many questions relating to the extension of the legal continental shelf remained unanswered. Juristic reflection was scarce, and the ambiguity of the notion of *exploitability* left plenty of room for elaboration. Above all, the legal understanding on the location of the outer limit of the continental shelf was still being shaped by the practice of states. It is in this light that the Australian claim to the existence of two shelves should perhaps be interpreted. In October 1970, responding to doubts raised in regard to the international lawfulness of the 1967 Act, and making explicit reference to the *dicta* of the ICJ in the *North Sea* cases, the Australian Foreign Minister formulated what became known as the Australian theory of the 'two shelves'.

> The rights claimed by Australia in the Timor Sea area are based unmistakably on the morphological structure of the sea-bed. The essential feature of the sea-bed beneath the Timor Sea is a huge steep cleft or declivity called the Timor Trough, extending in an east-western direction, considerably nearer to the coast of Timor than to the northern coast of Australia. It is more than 550 nautical miles long and on the average 40 miles wide, and the sea-bed slopes down on opposite sides to a depth of over 10.000 feet. The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves, and not one and the same shelf, separating the two opposite coasts. The fall-back median line between the two coasts, provided for in the Convention in the absence of agreement, would not apply for there is no common area to delimit.[380]

9.2.b)(ii) The 1972 Australia/Indonesia Seabed Boundary Agreement

In the negotiations with Indonesia that led to the 1972 seabed boundary agreement, Australia based its position on the aforesaid theory, in particular on the idea that the Timor Trough represented a separation between continental shelves. The treaty does not reflect the strict separation along the Timor Trough advocated by the 'two-shelves theory'. What this theory did was to give Australia room to negotiate. The agreed boundary appeared thus as a 'fall back position' in relation to the 'two-shelves theory' claim, while departing minimally from the limit used by Australia in its 1967 legislation.

The 1972 boundary, which is illustrated in Figure 101, runs slightly southwards of the Timor Trough axis, and extends to areas where the rights and interests of East Timor (at the time a Portuguese possession) required consideration. Owing to this fact, the line was interrupted between points A16 and A17, leaving a gap that would become known as the

(380) AYIL/1970-73, pp.145-146. As a party to the CS Convention, Australia was bound by the contents of Article 6.

'Timor Gap'[381]. Insofar as it was positioned much closer to the Indonesian coast than to the Australian coast, the boundary amounted to the acceptance by Indonesia of the relevance of the Australian theory of the 'two shelves'. The *North Sea* Judgment, to which reference had been made in 1970 by Australia, seems to have encouraged this outcome[382].

The nomenclature 'Timor Gap', whose use became common amongst writers, will be used here. Nevertheless, it is important to stress that the gap defined by the 1972 treaty is unopposable to East Timor. Juridically, it is *res inter alios acta* (as between Australia and Indonesia). The rights and interests of East Timor are therefore protected by the *pacta tertiis* rule[383]. Nothing prevents East Timor from advancing claims extending beyond points A16 and A17. In fact, the possibility that another state (at the time Portugal) would claim areas beyond these points was explicitly recognised in the 1972 treaty[384]:

> The lines between Points A15 and A16 and between Points A17 and A18 [...] indicate the direction of those portions of the boundary. In the event of any *further delimitation agreement or agreements* being concluded between governments exercising sovereign rights with respect to the exploration of the seabed and the exploitation of its natural resources in the area of the Timor Sea, [Australia and Indonesia] shall consult each other with a view *to agreeing on such adjustment or adjustments, if any, as may be necessary in those portions of the boundary lines between Points A15 and A16 and between Points A17 and A18.*

9.2.b)(iii) The Portuguese Approach

East Timor was in the early 1970s a Portuguese territory. Thus, it is important to have a brief outline of the approach adopted by Portugal in relation to the Australian theory of the 'two shelves'. If accepted, this theory would basically mean that East Timor would have no entitlement to continental shelf beyond the Timor Trough. As the following notes show, however, such a possibility was strongly rejected by Portugal.

In the late 1960s, the *Oceanic Exploration Company* had approached the Portuguese Government to request the granting of an oil and gas concession in the continental shelf off the East Timorese coast[385]. Since the requested concession would overlap with areas over which Australia had granted permits, Portugal proposed to Australia, in November 1970, the opening of formal negotiations to delimit the continental shelf. Without rejecting it openly, Australia replied that it would prefer to wait for the result of the Third Conference,

(381) Articles 1 and 2 of the 1972 boundary treaty; IMB, pp.1215-1216.
(382) Concurring with this view, cf. Prescott, IMB/Report 6–2(2), p.1211.
(383) VCLT, Articles 34-35.
(384) Article 3, emphasis added. Insofar as trijunction points were in question, the reference to an agreement between Australia and Indonesia as to the position of those points is absolutely natural. For trijunction points to be legally valid, they require in practical terms that three bilateral agreements be reached.
(385) For the geographical limits of the requested concessions, cf. *Boletim Oficial de Timor* No.44, 1970, pp.1018-1021.

and for the conclusion of its negotiations with Indonesia. Disagreeing with the request of *Oceanic*, Australia reasserted its 'two shelves' theory in a 1971 note to Portugal[386].

It was only in 1973, after the conclusion of the negotiations with Indonesia, whose result clearly benefited it, that Australia proposed to Portugal the opening of negotiations on the delimitation of the continental shelf. Apparently due to successful negotiations with Indonesia, Australia affirmed in July 1973 that it would not accept a boundary lying more than 50 M off the East Timorese coast. Faced with this position, Portugal granted in January 1974 a concession off the coast of East Timor to *Petrotimor*, a company that was to be incorporated by *Oceanic*[387]. This concession overlapped with areas over which Australia had granted permits[388], which led to its protest. A dispute arose then as to how delimitation was to be effected. Whereas Australia argued that the principle of natural prolongation entitled it to the areas south of the Timor Trough, Portugal contended that the two states being parties to the CS Convention, Article 6 (thus equidistance) would apply. Portugal declined to enter into negotiations on the delimitation of the continental shelf, stating that it would be preferable to wait for the results of the Third Conference.

The major question here is whether, at the time, Portugal held a valid continental shelf entitlement beyond the Timor Trough. Under the CS Convention, such an entitlement would have to be based on one of two criteria: the 200-metre isobath, and the exploitability criterion. Because the 200-metre isobath off East Timor runs on average at a distance of some 2.5 M from the coast, and because at the time no exploitation could be carried out at depths of over 2,000 metres, the Portuguese entitlement beyond the Timor Trough was at first glance legally non-existent. Such an approach however, is too simplistic.

In 1967, ambassador Pardo's speech in the United Nations had demonstrated that the exploitability criterion would sooner or later render the whole of the oceans susceptible to appropriation by coastal states. Under the CS Convention, this meant that the oceans would eventually be divided on the basis of equidistance. The map used by Germany in the 1969 *North Sea* cases (Figure 44) – depicting such a division of the North Atlantic Ocean – is the paradigmatic illustration of the awareness of states in this respect. By the late 1960s, no doubt subsisted as to the future capacity of states to exploit all oceanic areas, regardless of depth. The driving force behind the process that led to the LOSC was in fact to somehow limit the maritime claims of states. The emergence of an entitlement based on distance was

(386) The following description is based partially on the Portuguese Memorial in the *East Timor* case, in particular para.7.04.

(387) *Oceanic* and *Petrotimor* filed a suit on the 21 August 2001, in the Federal Court of Australia, seeking compensation for the loss of petroleum rights in the Timor Sea. These companies contend that they were forced to flee East Timor before they could start exploration, and that they have since tried to convince Indonesian and Australian authorities of the validity of their claim. The figure of some US$ 1bn was already advanced as the amount of compensation requested. Cf. *The Sydney Morning Herald*, 23 August 2001, «Damages bid hits Timor Gap talks»; *Reuters*, 22 August 2001, «Oceanic launches Timor Sea legal claim».

(388) *East Timor* case, Portuguese Memorial, sketch-map between pp.198-199.

inevitable. It also seemed clear that such an entitlement would always extend much further than the territorial sea. The existence of Portuguese entitlement beyond the Timor Trough was thus not a question of *if*, but *when*. Faced with this scenario, Australia sought to push forward with the boundary negotiations. It negotiated with Indonesia first because its chances of success were greater. Since the timing for entering into negotiations is a prerogative inherent in the *jus tractuum*, it is however unsurprising that Portugal declined to negotiate in the aftermath of the agreement with Indonesia. Whilst anticipating the changes in international law, Portugal showed clear unwillingness to accept a boundary flowing from rapidly evanescent entitlement criteria[389].

The concession-area granted by Portugal, and that requested by *Oceanic*, are shown in Figure 103. The concession-area does not extend beyond equidistance (with exception of two extremely small areas). Its limits were legally defined as comprising only a part of East Timor's continental shelf, and as being subject to adjustments resulting from international accords[390]. The limits of the concession-area granted by Portugal are particularly significant because *Oceanic*'s request extended to areas clearly beyond equidistance. Laterally, this request was confined by what seemed two perpendiculars to the general direction of East Timor's coast. Frontally, three zones have to be considered, extending approximately up to the 200-metre isobath off Australia, the equidistance-line, and a line running on average at a distance of 180-odd M off East Timor's coast. This discrepancy between request and grant leaves no doubt as to Portugal's willingness to abide by Article 6 of the CS Convention. The limits of the concession-area purposely avoid connecting with points A16 and A17 defined in the 1972 treaty, in order to deny relevance to the 'Timor Gap' limits.

What the Portuguese conduct reveals beyond doubt is a refusal of Australia's claim to the whole of the continental shelf south of the Timor Trough[391]. Such a claim was, in the light of the coeval changes in international affairs concerning the law of the sea, an attempt to acquire maritime areas which would not belong to it in the future. In the *East Timor* case, Australia contended that the negotiations with Portugal on continental shelf delimitation did not take place for "it proved difficult to interest the then Portuguese Administration in the

(389) Lowe, Carleton and Ward argue that "Australia's position in the 1970s was not necessarily consistent with the jurisprudence of the [ICJ] in the North Sea Continental Shelf cases" – for "the ICJ determined that although the concept of natural prolongation of the physical continental shelf was fundamental, the result of any delimitation must take into account considerations of equity and fairness". They note that "[t]he manifest inequity and unfairness of Australia, with its entitlement to vast maritime zones around its coasts, forcing the continental shelf entitlement of Portugal / East Timor into a narrow strip north of the Timor Trough, explains the failure of Portugal to agree to the position upon which Australia insisted at that time". Cf. Lowe/Carleton/Ward/2002, para.12.. This view implicitly assumes the existence of an overlapping of entitlements at that time – i.e. "a single physical shelf to be divided between Portugal and Australia" (*ibid.* para.10).

(390) For the concession limits, cf. Decree No.25/74, of 31 January 1974, Article 2(1)(2)(3), published in *Diário da República, I Série*, No.26, pp.142-164. The concession contract, and a map (p.158), are included in this instrument.

(391) Lowe, Carleton and Ward observe that "Portugal appears to have taken the position that the Timor Trough was not such a geologically significant feature in this context as to divide the seabed in the Timor Sea into two separate continental shelves, north and south". Cf. Lowe/Carleton/Ward/2002, para.10..

issue" (arguably due to its general indifference to East Timor)[392]. This contention is clearly contradicted by the events above. More importantly, the 2000 Australian Senate Report on East Timor ("*Senate Report*") recognises that negotiations failed "because Portugal argued for a boundary along the mid-line"[393]. Portugal did not act indifferently. Its clear intention was to deny the Australian 'two shelves' theory any recognition (thereby preserving East Timor's future rights to larger continental shelf areas). Portugal was unwilling to negotiate with Australia at the time because it was not prepared to do so in a position that had been clearly weakened by the Indonesian acceptance of the said theory. This suggestion is plainly supported by other facts, to which attention will now be drawn.

9.2.b)(iv) The 1989 'Timor Gap' Treaty

As a consequence of the Revolution of April 25, 1974, Portugal acknowledged the right to self-determination of the peoples of all colonial territories, which included East Timor. During the attempted decolonisation, in 1975, an internal armed conflict broke out in East Timor between opposing political factions. Portugal, the state in which sovereignty was vested, struggled with acute problems in its European territory, and was thus unable to control the situation in East Timor[394]. On 7 December 1975, Indonesian forces occupied East Timor. Subsequently, the *Oceanic Company* addressed the Portuguese Government in 1976, stating that it was unable to continue its activities, and requesting a suspension of its obligations by *force majeure*. This suspension was granted a few months later.

In 1979, Australia and Indonesia initiated negotiations to 'fill the gap' left by the 1972 agreement, which corresponded to the entitlement of East Timor[395]. The purpose was initially to complete the seabed boundary. The two states were nevertheless unable to agree on a delimitation line. At that time, Indonesia had already realised how damaging the previous agreement (negotiated in the aftermath of the *North Sea* cases) had been to its interests. This idea emerges clearly in the words of the Indonesian Foreign Minister, who had been the principal member of the Indonesian negotiating team. In December 1978, he stated that Australia had in 1972 "taken Indonesia to the cleaners"[396]. The question is certainly not one of wrongdoing, but the raw realisation that the timing of the 1971-1972 negotiations decisively favoured the Australian views.

(392) *East Timor* case, Australian Counter-Memorial, para.384.
(393) Committee Hansard, Report to the Senate, 7 December 2000, Chapter 4, para.4.15..
(394) For a short summary of this process, cf. Teles/2001, pp.588-599.
(395) The Australian argument – advanced in the *East Timor* case – as to why it had to deal with Indonesia was three-fold: there was no obligation of non-recognition of the Indonesian invasion; the Indonesian effective control of East Timor entailed that Australia had no other state to negotiate with; and that these negotiations amounted to the exercise on the part of Australia of its rights under international law (*East Timor* case, Australian Counter-Memorial, paras.318-412).
(396) Cf. *The Sydney Morning Herald*, 21 December 1978, «Boundary threat to seabed leases».

During the negotiations that led to the 'Timor Gap' treaty[397], Australia continued to assert its entitlement to a continental shelf up to the Timor Trough, whereas Indonesia claimed a 200-mile entitlement (which reflected the developments in the Third Conference). The unsuccessful negotiations on delimitation evolved then to the establishment of a Zone of Cooperation, founded on the concept of joint development, which broadly encompassed the overlapping of entitlements (Figure 101). From north to south, the 'frontal-lines' which define the Areas (A, B and C) that constitute this zone are as follows: (I) a straight-line representing approximately the Timor Trough axis, i.e. the Australian claimed-entitlement; (II) a straight-line simplifying the 1500-metre isobath, which is perhaps predicated on the Australian delimitation claim (not far from the line that would join points A16 and A17); (III) an equidistance-line, which corresponds to the Indonesian delimitation claim; (IV) the 200-mile limit from East Timor, i.e. the Indonesian claimed-entitlement. Southwards of the 1972 boundary, the eastern and western lateral limits are equidistance-lines. To the north thereof, they appear to be lines agreed on pragmatic grounds.

With this agreement, Indonesia accepted an area of 50/50 revenue-split lying fully northwards of the equidistance-line. This is difficult to explain in strict legal terms. By 1985 the ICJ had already asserted the irrelevance of geological and geomorphological factors (central to the Australian theory of the 'two-shelves') in delimitations between states whose coasts lie less than 400 M apart[398]. This assertion had decisively weakened the Australian position. There is good reason to contend, therefore, that the 'Timor Gap' treaty represents a solution based on political premises, rather than legal ones. It seems indeed the result of a *quid pro quo* whereby Indonesia obtained the *de jure* recognition of its sovereignty over East Timor from its most influential neighbour.

Subsequent to the 'Timor Gap' treaty, Portugal (which under the UN resolutions was still East Timor's *de jure* administering power) seized the ICJ, in 1991, of a dispute against Australia. The Portuguese Application argued that, by entering into the 1989 treaty, Australia had infringed on the right of the East Timorese people to self-determination, and the related rights. This view reflected the principle *nemo plus juris transferre potest quam ipse habet*: one does not have the right to transfer what one does not possess. The Portuguese argument was that Australia could not deal with Indonesia, if only because Indonesia (whose occupation of East Timor was unlawful) could not dispose of rights belonging to East Timor. The Court considered that it lacked jurisdiction (for Indonesia was not a party to the case and its conduct was in question), and consequently that it could not rule upon the merits of the case. Notwithstanding this, it is politically noteworthy that the

(397) For the text of the treaty, cf. IMB, pp.1256-1328.
(398) Para.8.2.g) *supra*.

Court reaffirmed that East Timor remained legally a non-self-governing territory, and that its people had the right to free self-determination – an *erga omnes* right[399].

Of significance in this case, taking into account subsequent developments to which reference is made below, are some of the statements regarding what would potentially occur should East Timor become an independent state. To Portugal, the result of negotiations over the 'Timor Gap' between Australia and an independent East Timor would certainly not be as favourable to Australia, as had been in the negotiations with Indonesia[400]. Contradicting this perspective, Australia contended that there was "no basis for Portugal's assertion that negotiations with the people of East Timor would not have led to a result as favourable to Australia"[401]. Recent developments in this respect, which culminated with the 2001 'Timor Sea Arrangement', appear to have fully vindicated the Portuguese proposition.

9.2.b)(v) The 2001 Timor Sea Arrangement

Diplomatic negotiations held between Indonesia and Portugal under the auspices of the UN Secretary-General since 1983 sought to reach an agreement on the situation in East Timor. A treaty was eventually signed on 5 May 1999. This accord paved the way for the popular consultation of 30 August 1999, concerning the political future of East Timor, and its status *vis-à-vis* Indonesia. Voting massively (roughly 80%) in favour of becoming an independent state, the East Timorese people freely exercised its right to self-determination.

After dramatic events that followed the referendum, the United Nations eventually set up a transitional administration: the United Nations Transitional Administration in East Timor (UNTAET). Its functions were established by the UN Security Council Resolution 1272 (1999), of October 25. Considering the ongoing activities in the Timor Sea, and its powers under the said resolution, UNTAET (acting on behalf of East Timor) concluded an agreement with Australia providing for the *continuity of the terms of the 'Timor Gap' treaty*[402]. Three points need to be stressed in relation to this instrument. First, the United Nations explicitly asserted that it did not recognise the validity of the 'integration' of East Timor into Indonesia. Secondly, the agreement did not amount to the continuation of the 'Timor Gap' treaty, which was deemed to be null and void. Only the terms of the treaty were continued. Thirdly, the agreement was valid for the transitional period only. Its effects were to cease, as they did, as of the day of independence of East Timor.

A problem remained unresolved. What would happen after independence to the petroleum developments in the Timor Sea area, in areas where the rights and interests of

(399) ICJ/Reports/1995, pp.100-106, paras.23-37.
(400) Portuguese Memorial, para.2.03.
(401) Australian Counter-Memorial, para.388.
(402) Exchange of Notes of 10 February 2000, constituting an agreement between Australian and UNTAET (DOALOS website).

East Timor come into play? This was the subject of further negotiations, which took place mainly in 2000 and 2001 – but which in some respect are still in progress.

The Australian position remained largely unchanged. Australia continued to assert its entitlement up to the Timor Trough, on the basis of the 'two shelves' theory. However, today, Australia's approach to this issue is primarily driven by a political rationale. Its central problem lies in the reaction that Indonesia might have should Australia accept a boundary with East Timor differing greatly from the 1972 line. In the words of Gillian Triggs (Law Faculty, University of Melbourne), cited in the *Senate Report*, "[t]here is no doubt Indonesia will feel quite aggrieved if we have unequal boundaries in certain areas with Indonesia and we suddenly blow the boundary out and make a more equidistant one in relation to East Timor"[403]. This is why Australia approached the issue in terms of renegotiation of the 1989 treaty, referring to a new treaty only at a later stage[404].

With respect to East Timor, the position publicly expressed by the two members of the transitional cabinet who co-headed the East Timorese delegation was that the 1989 treaty was null and void. In short, unless an agreement would be reached, to enter into force after independence, a legal vacuum would exist thereinafter. Practically speaking, as far as East Timor was concerned, there would be a 'blank sheet'. All lines that had previously been agreed between Australia and Indonesia were unopposable thereto. For East Timor, the key points in the negotiations were: (a) the 1989 treaty was null and void, and there was no question of renegotiating such a treaty; (b) the 1972 boundary was not binding on East Timor. Two issues had therefore to be resolved. In respect of the 'frontal limit', East Timor claimed rights up to the equidistance-line; and in regard to the 'lateral limits', it did not recognise any effect to the 1972 boundary[405].

On 5 July 2001, Australia and UNTAET (East Timor) initialled a Memorandum of Understanding (MOU), to which is attached the 'Timor Sea Arrangement', initially devised to enter into force on East Timor's independence[406]. This instrument establishes a regime for joint development of petroleum resources and activities between Australia and East Timor, and seeks primarily to replace the 1989 treaty. A detailed discussion of its contents

(403) Cf. *Reuters*, 6 October 2000, "Australia seeks to avoid East Timor border dispute". Cf. *Senate Report*, para.4.15..

(404) Cf. *Reuters*, 31 May 1999, «Timor Gap fiscal, tax uncertainty may affect gas production projects»; *Reuters*, 15 June 1999, «Oil Companies Reassured on Timor Gap Treaty Talks»; *Australian Financial Review*, 17 January 2001, «AUSTRALIA: News – Millions at stake in Timor oil talks»; *Dow Jones*, 17 January 2001, «East Timor Ups Stakes In Oil Treaty Talks With Australia»; *Financial Times*, 26 January 2001, «E.Timor Demands Oil Money»; Reuters, 6 April 2001, «Second Round Timor Gap Talks End Without Deal»; *Herald Sun*, 25 May 2002, «Downer Rules Border Changes Out of Bounds».

(405) Galbraith/2001. Cf. *The Sydney Morning Herald*, 21 June 2000, «Timor deal set to deliver windfall for Dili»; *Reuters*, 26 June 2000, «E.Timor seeks mid-way boundary with Australia»; *New York Times*, 19 October 2000, «A tonic for East Timor's poverty»; *The Sydney Morning Herald*, 10 April 2001, «UN Talks Tough Line on Timor Gap Negotiations»; *The Sydney Morning Herald*, 28 April 2001, «East Timor Eyes Off Oil's Billions»; *The Sydney Morning Herald*, 3 May 2001, «Pressure Mounts for New Accord on Seabed Carve-up». By a declaration read on the day of independence, East Timor restated its right to negotiate its boundaries *ex novo*; cf. *Herald Sun*, 21 May 2002, «Oil Row Spoils Timor's Party».

(406) Due primarily to disagreements on the unitisation of the Greater Sunrise field, Australia and East Timor decided to maintain in force until further notice the arrangements in place before East Timor's independence; cf. Exchange of Notes of 20 May 2002.

is beyond the scope of this study. It is nevertheless necessary to briefly outline some aspects that are relevant for contextualising an analysis on continental shelf delimitation.

The area to which the Arrangement applies – the Joint Development Petroleum Area (JPDA) – corresponds to Area A of the 'Timor Gap' treaty[407]. Owing to Australia's concerns as to a possible Indonesian reaction, the acceptance of the spatial limits of the said Area A became, in effect, a *conditio sine qua non* to reach agreement. A dramatic change occurred, however, as to the revenue-split of the petroleum production in this area. Under the 2001 Arrangement the revenue-split will be 90/10, favouring East Timor[408]. This appears as a first sign of the recognition of a 'better title' over the area in question; an idea furthered by other changes on the level of management structure in relation to the 1989 treaty (in which the parties appeared on an equal footing). The Arrangement attributes East Timor a prominent role in the three-tiered management structure[409]. After a transitional period, the *Designated Authority* will be East Timor's ministry responsible for petroleum activities (or a statutory authority assigned by it)[410]. Within the *Joint Commission*, moreover, East Timor will have one more appointee than Australia[411]. Finally, it ought to be emphasised that this instrument, considered as falling within the category of practical arrangements to which Article 83(3) of the LOSC makes reference, is without prejudice of the parties' position as regards seabed delimitation[412]. Apparently, therefore, both parties appear to be entitled to continue claiming seabed areas outside the JPDA.

One ought to ask, however, whether this 'formal' safeguard is sufficient to fully prevent the practical impact of the establishment of a zone of petroleum exploitation. Since Area A of the 1989 Treaty is the JPDA of the 2001 Arrangement, and since patterns of petroleum exploitation in this area might consolidate further through the 2001 Arrangement, courts may in the future be reluctant to disturb what may become crystallised patterns of petroleum exploitation. *Quieta non movere*. The *Tunisia/Libya* case, and the *Eritrea/Yemen* arbitration are clear examples of adjudications in which such patterns influenced the choice of boundary-line[413]. The 'without prejudice clause' thus may be weakened by the fact that delimitation law places weight on *de facto* patterns of petroleum exploitation. It all depends

(407) Article 3(a), and Annex A.
(408) Article 4(a). The Exchange of Notes of 20 May 2002 has provided for the maintenance of this revenue-split.
(409) Under Article 6, the *Regulatory Bodies* are: the *Designated Authority*, the *Joint Commission*, and the *Ministerial Council*.
(410) Article 6(b)(ii). The Designated Authority will control the day-to-day activities in the JPDA.
(411) Article 6(c)(i). The Joint Commission is the organ competent for establishing the policies and regulations relating to petroleum activities in the JPDA, which is empowered also to oversee the work of the Designated Authority. It must be noted, nevertheless, that the Commissioners have an individual competence to refer directly issues to the Ministerial Council (subparagraph iii). With this, Australian Commissioners may refer to the Council majority decisions taken by the three East Timorese commissioners.
(412) Article 2.
(413) Para.8.3.d) *supra*.

on how this is balanced with the fact that, *ex vi pactum*[414], the 2001 Arrangement ceases to exist should a delimitation between Australia and East Timor be effected.

What this brief outline also shows is that the position of East Timor under the 2001 Arrangement is manifestly better than that of Indonesia under the 1989 treaty[415]. This fact evidences the advisability of the Portuguese conduct in this respect. For one thing, it is now clear that Portugal was right in not accepting to negotiate with Australia in the aftermath of the 1972 Australia/Indonesia treaty, and in continuing to claim a seabed boundary beyond the Timor Trough. For another, it confirms that Portugal was correct when suggesting, as it did in the *East Timor* case, that Australia would not obtain in a negotiation with East Timor a result as favourable as that that it had obtained in the negotiations with Indonesia.

9.2.c) Jurisdiction over the Water Column: Brief Notes

In respect of the jurisdiction over the water column, it must first be observed that the exclusiveness of fishing resources in areas further offshore crystallised in the late 1970s only, through the concept of EEZ. When the *Fisheries Jurisdiction* cases were decided (July 1974), the right of states to claim exclusive fishing zones beyond 12 M remained doubtful. The acceptance of the 200-mile limit cemented in 1976 only, during the Third Conference[416]. This inspired many states to subsequently claim jurisdiction up to this limit in domestic legislation. Australia established a 200-mile fisheries zone in 1979; Indonesia proclaimed a 200-mile EEZ in 1980[417]. What this demonstrates is that some of the relevant developments took place after the Indonesian occupation of East Timor. Not surprisingly, therefore, the contextual aspects to consider here are much more recent than those of the continental shelf. Thus, the Portuguese conduct is less relevant.

A second point is helpful for explaining why the question of the jurisdiction over the water column was less controversial than that of the continental shelf: the resources in question are significantly less relevant for the states involved. Furthermore, what could have been the contentious issue between Australia and Indonesia in this respect – the access of traditional Indonesian fishermen to those Australian waters to which they had had access over decades of time – had already been resolved in 1974, before the 200-mile limit had acquired widespread support[418].

(414) Article 22.

(415) It was reported recently that, following the agreement of December 2001 between East Timor and Phillips (as regards the field Bayu-Undan), East Timor and Australia were on the verge of negotiating a new treaty, to be signed on East Timor's independence day; cf. *Business Wire*, 21 December 2001, «Phillips Announces Agreement with East Timor On Bayu-Undan Gas Development» *The Sunday Times – Australia*, 22 December 2001, «Darwin gas pipeline back on»; *Upstream*, 15 February 2002, «Aussies to sign new Timor Gap treaty». The agreement signed however, does not seem to have substantively altered the 2001 Arrangement.

(416) Cf. Nordquist/1993, pp.550-551; Churcill/Lowe/1999, pp.284-289.

(417) In 1994, Australia has proclaimed an EEZ. The Indonesian EEZ legislation in force today was enacted in 1983.

(418) Prescott, IMB/Report 6–2(4), p.1233.

When examining the delimitation of the water column boundary between Australia and East Timor, account must be taken of two agreements entered into by Australia and Indonesia: the *1981 MOU on the Implementation of a Provisional Fisheries Surveillance Enforcement Arrangement*; and the *1997 Treaty establishing an EEZ Boundary and Certain Seabed Boundaries*[419]. The former established a 'jurisdictional-limit' concerning fisheries, which was used as a *de facto* provisional fisheries boundary. This line coincides with that adopted as EEZ boundary in 1997. According to a government source, Australia seems to have accepted the idea that the 1981-line had become in the meantime "a *de facto* water column/EEZ boundary"[420].

This strict equidistance-line became under the 1997 treaty the boundary dividing the water column jurisdiction between Australia and Indonesia in areas in which the interests of East Timor were involved (Figure 101). As shown, the line is also partially coincident with the southern limit of the JPDA. Mention must be made here of two issues. First, despite the fact that the 1997 treaty concerns also areas belonging to East Timor, as far as this state is concerned, the boundary is *res inter alios acta*. For East Timor because rejects the status of successor to Indonesia[421]. Otherwise, because boundaries are excluded from the *tabula rasa* rule, East Timor would be bound thereby[422]. Noteworthy is the fact that Portugal protested the signature of this treaty to the extent that it related to East Timor[423]. Pointing out that it purported to delimit also the EEZ boundary between Australia and the non-self-governing territory of East Timor, and contending that Indonesia's entry and continued presence in East Timor was unlawful, Portugal informed Australia that it did not recognise the intended delimitation. Secondly, it must be noted that this boundary has an effect over the water column jurisdiction that somewhat mirrors the effect of the 1972 line as to seabed/subsoil. Just as Indonesia has relinquished its seabed/subsoil rights *vis-à-vis* Australia to the south of the 1972 boundary, Australia has relinquished its water column rights *vis-à-vis* Indonesia to

(419) Appendix 2, D5, F3. The 1997 treaty is yet to be ratified. It is unlikely that the ratification takes place without the treaty being altered first to take account of East Timor's independence.

(420) Statement cited in Herriman/Tsamenyi/1998, p.365.

(421) The Preamble and Section 1(2) of East Timor's Constitution states that 28 November 1975 is the day of proclamation of independence. This suggests that East Timor seeks to be recognised formally as an independent state since 1975, which appears to entail a succession to Portugal – or at the very least that East Timor is not a successor to Indonesia. Several arguments (which due to this study's scope must be outlined in brief terms) support this standpoint. To assume that East Timor succeeds to Indonesia amounts to sanction legally the Indonesian occupation; this would have complex implications on the consecration of the rule of law in international affairs – in particular the non-use of force. Moreover, it would be inconsistent with a number of resolutions of the UN General Assembly. In addition, if the other option – succession to Portugal – is not accepted, the political status of East Timor between 1975 and 1999 will not be easy to conceive on juridical grounds. In effect, the stance taken by UNTAET during the negotiations that preceded the 2001 Arrangement is indicative of refusal of the idea of succession to Indonesia. By affirming that it did not recognise the validity of the integration of East Timor into Indonesia, that the 'Timor Gap Treaty' was null and void, and that there was no question of renegotiation of the 1989 treaty, the United Nations asserted the unlawfulness of the Indonesian occupation (para.9.2.b)(v) *infra*).

(422) VCSSRT, Article 11.

(423) Note verbale from the Portuguese Embassy in Canberra, dated 28 August 1997, addressed to the Department of Foreign Affairs and Trade of the Government of Australia (LOS Bulletin No.35, pp.97-98).

the north of the 1997 boundary. How then are the spatial limits of the water column rights claimed by East Timor in this area to be established?[424]

In terms of delimitation, the situation that has been created for East Timor with the 1972 and the 1997 boundaries is rather singular. Although the area in question was initially a tripartite overlapping of entitlements, in-between those boundary-lines (i.e. with respect to 'lateral-lines'), East Timor has to deal with one state only. Whereas its counterpart for the seabed/subsoil delimitation is Australia, its counterpart for the water column delimitation is Indonesia. As between Australia and East Timor, the impact on the delimitation is two-fold. First, the seabed/subsoil boundary and the water column boundary can never fully coincide (because the delimitation of the water column has to consider no 'lateral-lines'). Secondly, there are no grounds to suggest that the 'lateral-lines' applicable to seabed/subsoil boundary between Australia and East Timor ought to coincide with the water column boundary between Indonesia and East Timor[425].

Another problem that would emerge should the delimitation between Australia and East Timor be referred to adjudication is the 'third-state issue' – which brings about further difficulties to the water column delimitation. Unlike the 1972 treaty, the 1997 treaty has neither left a 'gap' to accommodate East Timor's rights, nor included a provision similar to Article 3 of the 1972 treaty. For practical purposes, a water-column delimitation between Australia and East Timor thus entails a 'cut' on the 1997 boundary, involving a third state. Such an issue is one with which a tribunal would perhaps deal very cautiously.

9.3. Starting Point for the Delimitation

9.3.a) The Overlapping of Entitlements

9.3.a)(i) Entitlements Based on Distance

That the existence of an overlapping of entitlements is a *conditio sine qua non* for delimitation, and that delimitation is to be effected by reference thereto, was asserted in recent case law[426]. Owing to the consecration of the distance criterion as the primary basis of entitlement, the overlapping of entitlements is typically defined through envelopes of arcs measured from the coasts of the states involved. As between Australia and East Timor, the overlapping of 200-mile entitlements extends beyond a 90-degree frontal projection of East Timor's façade (Figure 101). This image helps focusing on the idea that the potential

(424) When proclaiming – Constitution, Section 4(2) – that the "extent and limits of [...] the EEZ [...] shall be laid down in the law", East Timor is implicitly advancing a claim over the water column.
(425) Para.9.5.b)(iii) *infra*.
(426) Para.4.3.b) *supra*.

entitlement of East Timor extends well beyond the so-called 'Timor Gap', the relevance of which as limit of East Timorese claims is virtually negligible.

None of this would justify the suggestion that the whole of the said overlapping of entitlements is to be divided between Australia and East Timor exclusively. No doubt, parts thereof belong to Indonesia. Its entitlement overlaps to great extent therewith, and many parts thereof lie much closer to Indonesia's coast than to either Australia's or East Timor's coasts. Or put differently, the determination of the maritime boundaries between Australia and East Timor cannot be effected without duly considering Indonesia's entitlement[427]. An important distinction has nevertheless to be made. Whilst between Australia and Indonesia the division of areas of exclusiveness is comprehensively made through bilateral treaties, between Indonesia and East Timor such a division is yet to be undertaken.

9.3.a)(ii) The Australian Theory of the 'Two Shelves': What Relevance?

In respect of the overlapping of entitlements, another question must be asked. What relevance, if any, should be given to the Australian theory of the 'two shelves'? To properly answer the question, its scope must be refined. The original argument founded on the notion of natural prolongation meant that East Timor's continental shelf entitlement stopped at the Timor Trough[428]. Owing to the developments that took place in international law since the theory was first formulated, today this proposition finds no support. East Timor's 200-mile entitlement (including the seabed and subsoil) is beyond question. What Australia might claim is that its natural prolongation extends up to the Timor Trough. If accepted, this idea would become relevant on two specific levels. On the one hand, insofar as it concerns a continental shelf entitlement beyond 200 M, it might have an impact on the definition of the overlapping of continental shelf entitlements. On the other hand, as an element of the 'factual-matrix', the Timor Trough might lead to the formulation of a delimitation factor, to be weighed-up in the delimitation process. At this juncture, only the first issue has to be addressed. The question is whether or not Australia's argument entails a redefinition of the overlapping of continental shelf entitlements (which would then differ from the overlapping of water column entitlements).

On account of a number of reasons, which are articulated below, one would submit that, *in casu*, the answer ought to be given in the negative: this entitlement beyond 200 M should not be considered to redefine the relevant overlapping. The first argument resides in the presumption of precedence between different entitlements. In principle, East Timor's

(427) Para.9.3.b) *infra*.
(428) Para.9.2.b)(i) *supra*.

200-mile entitlement should have precedence over Australia's entitlement beyond 200 M[429]. This presumption is rebuttable only if, objectively, it would hamper achieving an equitable solution. As can be easily demonstrated, that is not the case. Suppose *ad absurdum* that the whole of the said area is awarded to Australia. This would be patently inequitable whatever the view taken as to Australia's entitlement. Hence, the boundary must *a fortiori* fall within the overlapping of 200-mile entitlements, an area which provides enough scope to avoid inequitableness. The presumption mentioned above should thus be upheld.

The second reason pertains to the bilateral relationship between Australia and East Timor. Whether geomorphological features are relevant for continental shelf entitlement has depended much on agreement between the states involved. For instance, whilst Indonesia accepted (by the 1972 treaty) that the Timor Trough was critical for its continental shelf delimitation *vis-à-vis* Australia, the UK and Norway agreed that the Norwegian Trough was irrelevant for continental shelf delimitation. Since Portugal has never acquiesced to the relevancy of the Timor Trough *vis-à-vis* East Timor, and claimed that the boundary should be based on equidistance, no claim predicated on historical consolidation can be opposed to East Timor. Therefore, unless Australia provides scientific evidence showing beyond doubt that the Timor Trough represents today a cut-off of the continental margin, its relevancy for defining the overlapping of continental shelf entitlements cannot be legally entertained.

A final argument for denying relevance to Australia's entitlement beyond 200 M is related to the fact that, scientifically, it is far from clear that the Timor Trough represents a cut-off of East Timor's natural prolongation. In fact, the Timor Trough might not represent a geological separation between Timor and the Australian margin[430]. The idea that Timor has become, and is at present, an accreted part of the Australian margin finds support amongst geologists. If so, the continental margin is not interrupted at the Timor Trough. Should this be true, the whole of the seabed/subsoil of the Timor Sea forms a continuous continental margin. The argument that only Australia has an entitlement based on natural prolongation thus would be flawed. For the possibility that Australia and East Timor have between them a continuous continental shelf, i.e. they both would have a continental shelf entitlement up to each other's outer limit of the territorial sea, must be legally contemplated.

As shown, the question of overlapping of entitlements becomes more complex when entitlements predicated on natural prolongation are claimed. Without expert advice, courts might find it altogether impossible to determine whether there is an overlap of entitlements, and/or the extension thereof. Even if that would happen, it is not certain that a decision would be made (as demonstrated in the *Libya/Malta* case). It is equally noteworthy that the

(429) Paras.4.3.d(iii)(iv) *supra.*
(430) Para.9.4.b) *infra.*

scientific-technical issues involved here are virtually the same as those raised as to the extension of the continental shelf beyond 200 M. The possibility that courts call upon the CLCS for technical expertise is however not contemplated in the Commission's *Rules of Procedure*[431]. Since courts' decisions would ultimately contribute to the discharge of the Commission's duties[432], one would suggest that, subject to an agreement between the parties, the request should be accepted. Although such an agreement might be difficult to reach in most cases[433], there will be instances in which the states involved might conclude that it is in their best interests that the issue be resolved definitively.

9.3.b) The 'Third-State Issue': Aspects Relating to Indonesia

As aforesaid, Indonesia's maritime entitlement is an issue that would surface in the delimitation between Australia and East Timor. Case law and state practice indicate that the presence of third states, *prima facie*, is not impeditive of maritime delimitation[434]. A number of decisions concerning maritime delimitation have been rendered in cases involving third states. Of these decisions, particular attention must be directed to the *Tunisia/Libya* and *Libya/Malta* cases, and in regard to some specific aspects to the *Qatar/Bahrain* case and the *Dubai/Sharjah* and *Eritrea/Yemen* arbitrations. In state practice, the presence of third states has equally not been an impediment to effecting bilateral delimitations[435] – so much so that agreements on trijunction points usually are subsequent to agreements on the bilateral boundaries that converge thereto.

Noteworthy here is also the fact that the Judgment on the preliminary objections in the *Cameroon/Nigeria* case confirmed the suggestion made above. Citing the *East Timor* case, the ICJ restated that, notwithstanding the principle of consent as basis for conferring jurisdiction, "it is not necessarily prevented from adjudicating when the judgment it is asked to give *might affect the legal interests of a state which is not party to the case*". Meanwhile, it acknowledged that, in the circumstances of the *Cameroon/Nigeria* case, the impact of the judgment required by Cameroon on third states' rights "could be such that the Court would be prevented from rendering it in the absence of these states". Whether such states would choose to intervene, it observed, remained to be seen[436]. Subsequently, Equatorial Guinea

(431) During the Open Meeting held in New York on 1 May 2000, the author asked members of the CLCS what would be the reply should the question be posed. The answer was that this possibility would be assessed only if and when it arises.

(432) LOSC, Annex II, Article 3; CLCS/RoP, Rule 55.

(433) First, unless the scientific data would have already been collected, the costs involved would be rather significant. Secondly, states are always reluctant to release scientific data (sometimes classified) regarding their continental shelf areas (which would have to occur at least in relation to the other party and to the court). Finally, the possibility that the CLCS would give a scientific answer that would not have the certainty required for courts to make a binding decision on this matter cannot be ruled out.

(434) As to the question of the presence of third states as an element of the 'factual matrix', cf. para.8.2.f) *supra*.

(435) Colson presents an overview of state practice (Colson/1993, pp.61-63).

(436) ICJ/Reports/1998, p.324, para.116, emphasis added.

requested permission to intervene in the proceedings as non-party, which was granted by the Court.

Therefore, the question to ask is whether Indonesia's position is such that a court asked to delimit the boundaries between Australia and East Timor would find it impossible to undertake its task, fully or partially, without affecting Indonesia's rights and interests. We think not, regardless of whether or not Indonesia would intervene in the proceedings[437], or would otherwise address the court to raise issues relating to its position as a third state. And this answer is without prejudice to the proposition that Article 59 of the Statute of the ICJ is insufficient to effectively protect third parties' rights and interests, owing to the imprimatur that the decision of an international court (especially the ICJ) would *de facto* confer upon the boundary adjudged[438].

Suppose that Indonesia decided to request permission to intervene. If, as suggested elsewhere, future cases on third-party intervention are decided by reference to the approach adopted in the *Cameroon/Nigeria* case, which concerned Equatorial Guinea's request for permission to intervene[439], then Indonesia's request should be granted. First, in the area between the 1972 and 1997 boundaries, Indonesia's water column rights are superimposed to Australia's and East Timor's seabed/subsoil rights[440]. Secondly, the understanding of Article 3 of the 1972 Australia/Indonesia treaty, which concerns points A15 to A18, might be under discussion. Thirdly, *in casu*, to view the Indonesian boundaries with Australia, and East Timor, as unrelated to the Australia/East Timor boundaries would be an abstraction that would serve no purpose in international law.

Assuming that Indonesia would somehow inform the court of its concerns about the outcome of the case, and would refer to a claim over a specific area[441], the most restrictive view would lead to effect the delimitation only in relation to areas over which Indonesia advanced no claims – as occurred in *Libya/Malta* case in relation to Italy's claims[442]. But perhaps this approach ought not to be repeated, for as Judge Schwebel observed "it is an unhappy precedent"[443]. The decision to cut-off the boundary at the limits of Italy's claims placed undue weight on third parties' claims. The approach adopted in the *Tunisia/Libya* case, which resorted to a boundary with an undefined end-point (thus not conditioned by

(437) As to intervention before the ICJ and ITLOS, cf. ICJ/Statute, Articles 62-63; ITLOS/Rules, Articles 99-104.

(438) Cf. Antunes/2000c, pp.178-179; also para.8.2.f) *supra*.

(439) Cf. Antunes/2000c, pp.175-187.

(440) The distinction between some water column rights and seabed/subsoil rights is in practical terms not always easy to draw. Cf. the rights concerning artificial islands (LOSC, Articles 60 and 80), and the rights concerning living resources, notably sedentary species (LOSC, Articles 68 and 77(4)).

(441) These claims would be vis-à-vis East Timor; between Australia and Indonesia, the 1972 and 1997 treaties govern the issue.

(442) ICJ/Reports/1985, pp.24-28, paras.20-23. As Judges Mosler and Schwebel show in their Dissenting Opinions, although Italy's request for permission to intervene was denied, for all practical purposes the Court has acted upon Italy's views as if such request had been granted (ICJ/Reports/1985, pp.116-117, 172-177). See Figure 8.

(443) Dissenting Opinion, ICJ/Reports/1985, p.177.

Malta's claim), appears to be preferable[444]. Notably, the position of Iran as a non-party to the 1981 *Dubai/Sharjah* arbitration was protected by recourse to a similar type of solution: a 12-mile arc with an undefined end-point[445].

Two recent decisions offer indications that case law is unlikely to follow along the lines of the *Libya/Malta* case. During the *Eritrea/Yemen* arbitration, Saudi Arabia suggested to the Tribunal that its decision should "not extend north of the latitude of the most northern point on Jabal al-Tayr island". The Tribunal decided to extend the boundary further north, while affirming that it believed that the terminal point thereof stopped nonetheless "well short of where the boundary line might be disputed by any third state"[446]. Undoubtedly noteworthy here is the fact that it was the Tribunal's perspective that fixed the limits beyond which the boundary did not extend. Furthermore, in the Qatar/Bahrain case, although only for short segments, the Court confirmed the reversion to open-ended-lines when dealing with the presence of third states (*in casu*, Iran and Saudi Arabia)[447].

Recourse to open-ended lines finds clear support in state practice, being perhaps the most commonly used approach amongst states[448]. Thus, the protection of Indonesia's rights (to which any court would have to attend) is not tantamount either to saying that delimitation should not be effected, or to restricting the boundary by reference to claims made by Indonesia (should any claims be advanced). Technically feasible in various ways, the recourse to open-ended-lines allows the delimitation of the whole disputed area to be effected without interfering with third states' positions.

A second point relating to Indonesia's legal position is more complex. It concerns the effect of the 1997 treaty, and the issue of state succession that might be intertwined here. If it were considered that East Timor succeeds to Indonesia, the 1997 boundary would be binding on East Timor. Boundary treaties are unaffected by state succession[449], even in relation to newly independent states. By taking the view that East Timor does not succeed to Indonesia, the answer acquires a different complexion. How then should a court tackle the problem of an agreement entered into by a third party (Indonesia), which nonetheless purported to delimit also the water column boundary between the two parties before it (Australia and East Timor)?

The question might appear similar to that in the *East Timor* case, in which the Court declined to exercise jurisdiction, on the basis of the *Monetary Gold* principle. There is a key difference, however. The dispute would involve an independent East Timor (claiming not to

(444) ICJ/Reports/1982, p.94, para.133.C.(3); see Figure 5.
(445) ILR/91/1993, p.680; see Figure 4.
(446) Eritrea/Yemen-II, paras.44-46, 136, 164; see Figure 12.
(447) Qatar/Bahrain-Merits, para.250, *in fine*. Cf. para.6.3.d)(iii) *supra*.
(448) Colson/1993, p.61. This author has identified five different techniques used by states to address the 'third-state issue'.
(449) VCSSRT, Article 11. On the question of East Timor as a successor state, cf. para.9.2.c) supra, fn.421.

be a successor to Indonesia), and would cover issues of state succession as regards the 1997 boundary treaty. Upholding the East Timorese viewpoint indirectly asserts the unlawfulness of the Indonesian occupation (the investigation of which seems to depend, according to the *East Timor* case, on the presence of Indonesia[450]). By contrast, considering that East Timor is a successor to Indonesia would be tantamount to underwrite the view that the Indonesian occupation was lawful, an even more questionable assertion. A 'non-decision' would loom once more. Whether jurisdiction would be exercised, and should it not be exercised, where a non-pronouncement would leave international law, can only be conjectured. What seems inadvisable is not to ponder the possibility that the *Monetary Gold* principle would lead to the dismissal of the proceedings again.

The notions of 'indispensable party', and of 'very subject-matter of the case', offer nevertheless room for discretion. It may be argued that Indonesia should not be seen as an 'indispensable party' because its conduct would not be the very subject-matter of the case: its rights would not be essentially affected should it be concluded that, as between Australia and East Timor, the 1997 agreement has no relevance. Weight is perhaps lent to this view by the *Phosphate Lands* case. Apparently, to the Court, even if the findings of a case "have implications for the legal situation" of states other than the parties, as long as "no finding in respect of that legal situation" is required as a basis for the decision, courts cannot decline to exercise jurisdiction[451]. Insofar as the decision could incorporate caveats that would be sufficient to protect Indonesia's rights (e.g. by restating the strict *inter partes* effect of the decision), the only requirement would be that the boundary-line would not extend to areas over which Indonesia could currently have a reasonable claim.

9.3.c) The Provisional Equidistance-Line

Since it was argued that equidistance is the starting point for all delimitations, it becomes necessary to determine which equidistance-line is to be utilised as the provisional line between Australia and East Timor[452]. Even at this early stage, the complexity of this delimitation will become apparent.

The first task consists of identifying the basepoints from which the provisional equidistance-line is to be computed. If account is taken only of the basepoints located on the Australian and the East Timorese coastlines, the resulting 'frontal-equidistance' runs as illustrated in Figure 99. Any doubts still subsisting as to the need to consider Indonesia's

(450) ICJ/Reports/1995, p.105, para.35.

(451) ICJ/Reports/1992, pp.261-262, para.55.

(452) On the proposition that equidistance is mandatory, cf. paras.6.3.c), 6.3.d), and Conclusions to Part II *supra*. It must be restated that the course of an equidistance-line depends on the basepoints from which it is computed (para.5.2.a)(ii) *supra*).

maritime entitlement in this delimitation disappear once this equidistance-line is computed. The further eastwards and westwards it is prolonged, the deeper the equidistance-line runs into areas where the rights and interests of Indonesia become a relevant consideration.

For the delimitation between Australia and East Timor to be possible, in the absence of Indonesia, it is necessary to safeguard Indonesia's rights and interests from its effect. Such a 'protective approach' must be weighed-up at various levels throughout this process. How it bears upon the definition of the provisional equidistance-line is the question that must be addressed at this point. To put it differently, the provisional equidistance-line for the delimitation between Australia and East Timor must be defined so that Indonesia's rights and interests are protected from the outset. As argued, equidistance and equidistant trijunction points are the reference-notions for dealing with third state issues[453]. In this case, however, account must be taken also of East Timor's singular position, resultant from the effect of the 1972 and 1997 Australia/Indonesia agreements.

The first point to make is concerned with the delimitation of the water column boundary, and the effect of the 1997 Australia/Indonesia treaty, which was entered into on the assumption that East Timor was part of the Indonesian territory. Although the boundary established thereby includes the delimitation between Australia and an 'Indonesian East Timor', inasmuch as it has been suggested that East Timor does not succeed to Indonesia, that boundary is viewed as not being binding on East Timor.

The second point concerns the concessions made by Australia and Indonesia to each other in areas where East Timor's position is compellingly strong (i.e. south-southeastwards of its coast). The fact that through the said agreements, *vis-à-vis* East Timor, neither has Indonesia waived seabed/subsoil rights, nor has Australia waived water column rights, must be dealt with cautiously. For all practical purposes, perhaps the reality should be seen as follows. South of the 1972 line, Australia may claim any seabed/subsoil rights that would otherwise appertain to Indonesia. Inasmuch as there is no doubt whatever that the 'gap' left therein was meant to accommodate the rights belonging to East Timor, this line effects a comprehensive seabed/subsoil delimitation between Australia and Indonesia. North of the 1997 boundary, in contradistinction, Indonesia may claim any water column rights that would otherwise appertain to Australia.

The third point, a corollary of the previous point, is that any delimitation involving East Timor must de undertaken in the light of the interwoven picture of 'exclusiveness' created by these agreements[454]. For the division of all Timor Sea areas that do not appertain

(453) Para.6.3.d)(iii) *supra*.

(454) It has been recently reported that Indonesia would join Australia and East Timor to negotiate their common boundaries. *Upstream*, 15 February 2002, «Aussies to sign new Timor Gap treaty». Apparently, however, Indonesia will advance no claims over what became know as the 'Timor Gap', which the Indonesian foreign affairs minister reportedly considered to be a question

to East Timor has already been effected. What is still to be effected (in terms of attribution of areas of 'exclusiveness') is the determination of which areas belong to East Timor. From a practical perspective, it may be argued that Indonesia's claims to seabed/subsoil rights south of the 1972 boundary are now vested in Australia, and that Australia's claims to water column rights north of the 1997 boundary are now vested in Indonesia. In other words, just as Australia is invested with Indonesia's potential seabed/subsoil rights south of the 1972 boundary, Indonesia is invested with Australia's potential water column rights north of the 1997 boundary. By conceiving the issue in this fashion, it becomes clear that East Timor's position in the delimitation can only be assessed, practically speaking, by reference to both Australia and Indonesia. As it turns out, therefore, the provisional equidistance-line should consider all relevant basepoints along the coasts of the three states. The line to be adjusted consists of three segments: a 'frontal-equidistance' between Australia and East Timor, and two 'lateral-equidistances' between Indonesia and East Timor (Figure 99)[455]. Notably, to the extent that these lines converge to the equidistant trijunction points involving the three states, the 'third-state issue' is considered from the beginning.

It can scarcely be overstressed that this has a crucial impact on the determination of the boundary between Australia and East Timor, if it is concluded that the boundary will not be an extension of the lines adopted by Australia and Indonesia (whether as to the water column, or as to the seabed/subsoil, or both). Should this occur (which is almost inexorable at least in relation to the seabed/subsoil boundary, one might add), despite the fact that the Australia and East Timor coasts are geographically in oppositeness, their common boundary will consist of three different segments: one 'frontal-segment', and two 'lateral-segments' (which join the Australia/East Timor and the Australia/Indonesia boundaries in question).

9.4. <u>Relevant Facts</u>

With the provisional equidistance-line determined, it is then necessary to enquire whether this line yields a reasonable solution, and if not, which adjustments are required. These questions, it is submitted, are best answered by reference to an itemised appraisal of all those facts germane *in concreto* to the delimitation process. In essence, what must be undertaken is an elaboration on which aspects are to be considered, and how they are to be considered, in the optimisation of the principles of maritime zoning and of equity. This entails delving into the 'factual matrix' *in casu*. The delimitation factors that will emerge

that regards Australia and East Timor exclusively; cf. *The Jakarta Post*, 16 February 2002, «Indonesia to discuss Timor Gap with Australia and East Timor».

(455) Para.9.2.a)(i) *supra*.

from this analysis will ultimately consist of conditions to fulfil, or objectives to attain, with a view to ensure the reasonableness of the boundary-line.

There is good reason to believe that, as happened in previous cases, the arguments advanced by the parties to justify their claim-lines would constitute an important reference for the court's reasoning. A brief summary of what could be the Australian approach may be found in Australia's Counter-Memorial in the *East Timor* case. Whilst referring to the question of competing rights in the Timor Sea area, in the light of the 1989 treaty, Australia stressed that its *coastline* "in the relevant area is *considerably longer* than that appurtenant to East Timor and that for reasons of *history, geomorphology and geography,* Australia regards the area covered by the Zone of Cooperation as being an area over which it has sovereign rights'"[456]. In relation to East Timor, official statements providing evidence of this type are harder to find. The Prime Minister's statement made on the day of independence makes only a general reference to international law. Some indication is nonetheless found in the arguments advanced by UNTAET during the negotiation of the 2001 Arrangement. Reference was made to various points, namely: (i) the overtaking of the notion of natural prolongation by *the concept of 200-mile continental shelf,* as far as maritime entitlement is concerned; (ii) the *Portuguese rejection of any delimitation based on natural prolongation*; (iii) the recourse to *equidistance* in the 'frontal delimitation'; and (iv) the *irrelevance of the 1972 boundary for delimiting 'laterally'* the areas attributed to East Timor[457]. The following analysis, without venturing into specifying possible claim-lines, attempts to discuss the relevance of these elements, and whether other elements might be weighed-up, for purposes of adjusting the provisional equidistance-line.

9.4.a) Coastal Length and Proportionality

Coastal length and proportionality are considerations that inescapably would have to be dealt with. Australia would be likely to refer thereto, to advance a claim-line probably positioned north of the 'frontal equidistance-line'. To expound on this issue, a step-by-step approach is necessary. Answers ought to be given successively to a number of questions. Stemming from the analysis made above[458], they seek to provide a coherent and organised framework for evaluating the relevance *in concreto* of this type of argument: (1) Which coasts are relevant? (2) What coastal lengths are in question? (3) Which area is relevant for

(456) *East Timor* case, Australian Counter-Memorial, para.385, emphasis added. These arguments have been, and seem to remain the basis of Australia's argument on delimitation (cf. para.9.2.b) *supra*).

(457) Cf. Galbraith/2001; para.9.2.b)(v) *supra*.

(458) For an elaboration on the conceptual foundations of coastal length and proportionality, including coastal length measurement, area-computations and 'grossness factors', cf. para.8.2.e) *supra*.

proportionality assessments (if deemed necessary)? (4) What area-apportionment is effected by equidistance? (5) What 'grossness factor' is at issue?

9.4.a)(i) Coastal Lengths

Overall, the Australian coast is probably one of the longest in the world. To answer the first question, it is necessary to determine which part of the Australian coast is relevant for purposes of the delimitation *vis-à-vis* East Timor – for it is indisputable that not all parts thereof are relevant for the present delimitation. In the *Jan Mayen* case, when establishing which part of Greenland's coast was relevant, the Court took account only of the coastal stretch between the two most extreme basepoints that contributed to the computation of the equidistance-line[459]. There is good reason to argue that, by analogy, this 'precedent' should be used here. The relevant Australian coast would then extend from Cape van Diemen to Holothuria reefs[460]. By the same token, the relevant East Timorese coast consists of the whole of the southern façade, from the mouth of the river Masin to Jaco isle.

The second step consists of determining the length of the coastal stretches involved, which as said before should be calculated along straight-line segments. Bearing in mind that no major indentations exist along East Timor's coast, its façade may be assimilated to one straight line, running from Jaco isle to the mouth of the river Masin. It is estimated that the length of this façade is approximately 148 M (Figure 102)[461].

The measurement of the relevant Australian coast is more complex. In principle, there are three possibilities. The first option consists of following the contour of the wide gulf between Cape Fourcroy and Cape Londonderry. The second possibility is to measure the coastal length along a closing-line cutting across the entrance of the said gulf. The third alternative is to consider only two coastal stretches: one from Cape van Diemen to Cape Fourcroy; and another from Cape Londonderry to Holothuria reefs. Perhaps odd at first glance, this option is justified because the coast from Cape Fourcroy to Cape Londonderry is totally irrelevant for purposes of the computation of the 'frontal-equidistance'. If the two coastal stretches mentioned were isolated islands, it would make no difference whatsoever as far as the equidistance-line is concerned. Hence, it is fair to argue that the entitlements generated by the coastal areas inside the gulf are irrelevant for delimitation purposes[462]. The coastal lengths in question for each of the three options above are roughly 462 M, 327 M, and 119 M, respectively. Choosing between them is crucial. The first interpretation cannot

(459) ICJ/Reports/1993, pp.47-48, para.20.

(460) As regards the location of these reefs, and their relevance for delimitation purposes, cf. para.9.4.c)(ii) *infra*.

(461) All calculations were made on the basis of small-scale cartographic information. The figures presented here for coastal lengths and areas should be nonetheless viewed as perfectly acceptable for purposes of legal assessment and reasoning.

(462) The coastline inside the gulf is also irrelevant for delineating the Australian 200-mile entitlement.

be upheld because it considers Australian basepoints that are irrelevant in the light of the geographical context, and because it clearly departs from the approaches endorsed in case law. As to the third interpretation, although it reflects one particular aspect of the impact of the Australian coast, it overlooks its essential continuous nature from Cape van Diemen to Holothuria reefs. The second alternative is the one that should be utilised to measure the relevant Australian coast, which is then estimated to be some 327 M long (Figure 102).

9.4.a)(ii) Proportionality

Proportionality assessments can only be conducted after defining the relevant area. Such a definition, it is argued, should take into account the relevant coasts of the two states, and its relative geographical position. As a first approximation, therefore, it may be said that the relevant area falls within the polygon limited to the north by the East Timorese façade (up to the midpoint between Jaco and Leti), to the south by the Australian façade, and to the east and west by loxodromes joining the extremities of these façades (Figure 102). But a cautious approach is required here. Owing to Indonesia's presence, the precise limits of the relevant area cannot be established. Proportionality assessments thus cannot be undertaken. Such a conclusion is unsurprising, if one ponders upon the *Libya/Malta* case. The ICJ noted then that "future delimitations with third states [could] overthrow not only the figures for [...] areas used as basis for calculations but also the ratios arrived at"[463]. And in reality, the relational-geographical analogies Libya-Australia, Malta-East Timor, and Italy-Indonesia, seem *mutatis mutandis* easy to ascertain. To make things more difficult, in this instance, the 1972 and 1997 treaties must be considered *ab initio.*

Notwithstanding this, perhaps it is useful to calculate some of the areas involved, to provide at least rough guidance in this respect. To this effect, it is necessary to bear in mind that the relevant area should consist only of the overlapping of entitlements comprised by the said polygon. Considering the 200-mile limits from both Australia and East Timor, such an area is approximately 113,440 sq.km (or 33,074 sq.M). If it is assumed (for purposes of continental shelf delimitation) that Australia's entitlement extends up to the Timor Trough, this area at issue is some 127,907 sq.km (or 37,292 sq.M)[464]. For demonstration purposes, let it now be assumed that, after delimitating its maritime boundaries *vis-à-vis* both Australia and Indonesia, *East Timor is attributed all maritime areas lying to its side of the three equidistance-lines.* This would amount to some 32,455 sq.km (or 9,462 sq.M) out of the overlapping of 200-mile entitlements, and of roughly 46,740 sq.km (or 13,627 sq.M) out

(463) ICJ/Reports/1985, p.53, para.74.

(464) Even if, for the sake of argument, it is assumed that the Timor Trough forms an interruption of natural prolongation – meaning that Australia has an entitlement up to the Timor Trough based on natural prolongation that overlaps only with the East Timorese entitlement based on distance, the outcome of the delimitation is not altered in a great measure – as shown by these calculations.

of the overlapping of continental shelf entitlements mentioned in the second case above. By comparison, as a result of the Australia/Indonesia 1972 and 1997 treaties, Australia would be attributed roughly 56,793 sq.km (or 16,558 sq.M) of water column area, and roughly 75,292 sq.km (or 21,951 sq.M) of seabed/subsoil area.

That mathematical proportionality assessments bear no dispositive effect is a given. Notwithstanding this, as far as the 'grossness factor' is concerned, the figures above suggest some conclusions. The coastal length ratio is some 2.21:1 (Australia:East Timor). The ratio between the areas apportioned is, in regard to the water column, approximately 1.75:1 (Australia:East Timor), and as to seabed/subsoil areas, some 1.61:1 (Australia:East Timor). The corresponding 'grossness factors' are 1.26 and 1.37 respectively. This signifies that, if East Timor would be able to secure all areas on its side of the equidistance-lines with Australia and Indonesia, there would be some disproportion in area-attribution *vis-à-vis* Australia. What matters, however, is whether this disproportion is manifestly unreasonable. Inequity has been deemed to exist where 'grossness factors' are at least 2:1 (often 3:1 and more). In the *Jan Mayen* case, computations based upon the overlapping of entitlements (in the relevant area defined by the Court) lead to a 'grossness factor' of 3.37. The (maximum) 'grossness factor' between Australia and East Timor is 1.37. Such a figure suggests that attributing to East Timor all areas lying inside the equidistance-lines results in no 'manifest disproportion'[465]. Figures of coastal length disparity found in previous cases, for instance, 8:1 (Libya/Malta) and 9:1 (Denmark/Norway), much larger than that of the present case, 2.21:1 (Australia/East Timor), help in explaining this conclusion.

9.4.b) Natural Prolongation: the Timor Trough

Another important argument that, most likely, would be put forward by Australia in support of its position is natural prolongation. More specifically, this argument involves the significance of the Timor Trough for the continental shelf delimitation. There are two ways in which such pleading might emerge. It might be presented as a question of relevance of geomorphological and geological aspects for continental shelf delimitation. Or it might also be advanced on the basis of a contention of historical consolidation.

9.4.b)(i) Timor Trough: Brief Geomorphological and Geological Account

The Timor Trough is a seabed depression running somewhat parallel to the southern coast of Timor island (and extending to the east thereof), at an average distance of roughly

(465) Importantly, this figure considers Australia's continental shelf entitlement up to the Timor Trough as relevant for defining the overlapping of entitlements (which as argued in para.9.3.a)(ii) *supra* should not be the case). What it demonstrates however, is that even in the most extreme possibility there is no manifest disproportion in an area-attribution based on equidistance.

30 M from it. Resulting from the geological process of subduction of the Australian plate under the Eurasian plate, the Timor Trough has a geomorphological complexion (in terms of contour and depth) that is best illustrated through the three seabed profiles shown in Figure 105. Although the seabed rises steeply on both sides of its bathymetrical axis (i.e. the line joining the deepest depths), as a seabed depression the Timor Trough is shallower and wider than oceanic trenches, with which it must not be confused. Its maximum depth varies, averaging roughly 2,500 metres. A maximum depth of some 3,300 metres appears at its eastern extremity. Equally notable geomorphologically is that, despite the existence of a geological shelf prolonging off the northern Australian coast, there is no similarity between the situation in the Timor Sea and the classical type of continental shelf seabed-profile, with shelf, slope, rise and deep ocean floor.

The collision process associated with the northwards subduction of the Australian plate under the Eurasian plate, from which the Timor Trough resulted, lies also at the centre of the creation of the island of Timor. This island appears to have emerged some 3 million years ago, in the eastern end of the Java trench. However, its geological uniqueness (as well as the geological uniqueness of the Timor Trough) defies categorisations. In typical cases, oceanic trenches run upon the convex side of islands arcs, forming areas where the greatest oceanic depths can be found (commonly 5,000 metres, and often exceeding 10,000 metres). The island of Timor, located off the Indonesian island arc, is one of the rare exceptions worldwide (the other being Barbados, off the Caribbean island arc). The island sits where the trench should be, having "weird displays of recently [in geological terms] deformed and uplifted deep-sea sediments"[466]. The orogenic nature of Timor is based on "an anomalously thick accretionary prism" which has associated "upthrusted fragments of the Australian continental margin"[467].

When analysing the Timor Trough for delimitation purposes, not much emphasis is to be put on the geological history of the area, the scale of which is commonly millions of years. Delimitation has a 'snapshot' nature. It entails the examination of facts as existent at the time at which the delimitation is to be effected.

With this said, it must be asked whether, at present, the Timor Trough amounts to a geological separation between Timor island and the Australian plate. In reality, the process of subduction has virtually ceased today south of Timor – with the Timor Trough evolving into a foreland basin. The absence of seismic activity at the Timor Trough is evidence of this situation. The zone of convergence moved northwards, to the back arc thrust. Indeed, "most of the current convergence between Australia and SE Asia occurs north of the

(466) Judson/Deffeyes/Hargraves/1976, pp.211-212.
(467) Symonds/2000, p.54.

volcanic Inner Banda Arc"[468]. The Flores-Wetar backthrust fault, in the Banda Sea, appears thus from the need to accommodate the northward motion of the Australian plate, no longer happening at the Timor Trough. As could be expected, the Flores-Wetar backthrust is today a region of significant seismic activity.

The geological complexity of the Timor region is patently illustrated in the different structural models that have been proposed (Figure 106). Noteworthy in these five models is the fact that all establish some relationship between the Australian continental margin and Timor. One represents Timor as an uplifted part of the Australian margin; another portrays it as a detached edge of the Australian margin. Significantly, no model represents Timor as 'sitting' separately on an area of oceanic crust. Recent studies on plate motion argue that the island and the continental plate are moving northwards with equal relative velocity vectors. Today, it seems that "the southeastern Indonesian island arc shows a transition from normal subduction of oceanic lithosphere south of Java to a *completed accretion of an island arc terrain to a continental margin at Timor*"[469].

In conclusion, there are strong indications of a close affinity of Timor island with the Australian margin. It is therefore very difficult to affirm straightforwardly that there is a geological detachment between Timor island and the Australian margin.

9.4.b)(ii) Timor Trough: Relevance for Continental Shelf Delimitation

That, in the *Libya/Malta* case, the Court 'checkmated' natural prolongation as a fact relevant for delimitations between states with coasts situated less than 400 M apart, and that in doing so it left no scope for elaboration on this issue, is indubitable. Further grounds for the refusal to confer weight upon geomorphological and geological elements in such cases have also been expounded[470]. Insofar as Australia and East Timor have coasts that lie some 250 M apart, therefore, the answer as to whether the Timor Trough is a relevant fact for a continental shelf delimitation between them is rather straightforward: it is not.

To reinforce this viewpoint, it ought to be observed that a decision in regard to the relevance of the Timor Trough would entail a type of decision that the Court declined to make in the *Libya/Malta* case. A determination on a disagreement between scientists as to the correct interpretation of geological data would have to be made[471].

One would further argue that, since the continental shelf can extend to the outer edge of the continental margin (as defined in Article 76), a fundamental discontinuity must

(468) Snyder *et al.*/1996, p.51.
(469) Genrich *et al.*/1996, p.293, emphasis added. Evidence of geological relationship between the Australian continental margin and Timor equally appears often in sketch-maps of various types. Cf. Longley/1997 p.316 (Fig.4); Wilson/Moss/1996, p.304 (Fig.1); Nishimura/1992, p.162 (Fig.3).
(470) Para.8.2.g) *supra*.
(471) ICJ/Reports/1985, p.36, para.41.

equate to a scientifically proven limit of the continental margin. Whatever the claims based on natural prolongation, therefore, the regime of Article 76 is necessarily to be considered. Arguments concerning a 'fundamental discontinuity' of the natural prolongation of a state's land territory cannot succeed unless founded thereon. Either there is an interruption of the state's legal natural prolongation, or no weight should be placed on such arguments. In this respect, the emphasis is to be put on marking the limits of the continental margin.

As observed above, Timor is partially constituted of upthrusted fragments of the Australian continental margin. Further, it seems to have accreted to the Australian margin. Apparently, today, the geological break of the Australian margin exists north of Flores and Wetar islands. Scientifically speaking, therefore, the existence of a geological separation between the natural prolongation of Australia and that of East Timor would be far from easy to ascertain. Bearing this in mind, expecting that a court would accredit to a scientifically challengeable assertion the weight of *res judicata* is perhaps to expect too much (especially when its legal relevance is weakened by other elements). The *Libya/Malta* case could be particularly significant in respect of the decision regarding the Timor Trough because the Court was then "confronted with one of the most pronounced geophysical features (breaks) imaginable, namely *a zone where originally separate crustal plates have collided*"[472] – which seems to be also the case of the Timor Trough.

From a conceptual standpoint, the argument that the Timor Trough is relevant faces other difficulties. To the extent that the practical impact would be to effect an area-division on the basis of various comparisons between an entitlement beyond 200 M and a 200-mile entitlement, this would seem to place on an equal footing the two types of entitlement. This is an idea that was in principle rejected in this study[473]. It may be suggested, therefore, that the concatenation of what is prescribed in the LOSC in terms of entitlement, with the developments that took place in case law (especially the *Libya/Malta* case), renders the Australian continental shelf entitlement beyond 200 M irrelevant for purposes of the delimitation *vis-à-vis* East Timor.

One final question must be asked. Can it be affirmed that the Australian continental shelf claim up to the Timor Trough has consolidated historically? The quickest of glances is enough to conclude that what is at issue here is not a *historic title*[474]. Despite the fact that there are no fixed limits in terms of years necessary to give rise to such a title, since the Australian continental shelf claim dates back to 1970, there appears to be no question of *possessio longi temporis*. But may we speak of *historic rights*? One would argue that, as far

(472) Lilje-Jensen/Thamsborg/1995, p.622, emphasis added.
(473) Paras.4.3.d)(iii)(iv), 8.4.b)(i) *supra*.
(474) Para.1.3.c)(ii) *supra*.

as East Timor is concerned, the argument would be unsuccessful. The foregoing account of Portuguese conduct as to the Australian claim is manifest evidence that such a standpoint was *ab initio* vigorously rejected. The Portuguese concession to *Oceanic*, extending well beyond the Timor Trough, is a clear rejection of Australia's claim[475]. Adding to this, there is the Portuguese conduct between 1975 and 1999. Attention must be drawn to the assertions made by Portugal in the *East Timor* case, which leave no doubt as to such a rejection[476]. Serious misgivings exist, thus, as regards the historical consolidation of the Australian claim based on natural prolongation *vis-à-vis* East Timor[477].

9.4.c) Basepoints Unrepresentative of Coastal Relationships

9.4.c)(i) The Lateral Equidistance-Lines

The fact that the lateral equidistance-lines between East Timor and Indonesia are relevant for the delimitation between Australia and East Timor is owed to the interwoven picture of 'exclusiveness' existent nowadays in the Timor Sea. It may be said that Indonesia has 'transferred' to Australia its seabed/subsoil rights southwards of the 1972 boundary. Hence, for purposes of ascertaining which areas belong to Australia, southwards of the 1972 boundary, it is fair to suggest that, as a result of the said 'transfer' of rights, the lateral equidistance-lines between East Timor and Indonesia should be utilised as starting points. However, this is in no way tantamount to saying that the area-attribution effected thereby is reasonable. Such an issue should be subject of further investigation.

One of the cases of controlling basepoints unrepresentative of coastal relationships that emerges in the present case concerns the said lateral equidistance-lines. The Indonesian coastline, both eastwards and westwards of East Timor, is salient in relation to the general direction of East Timor's façade (065°-245°). To the east, the islands of Leti, Moa and Lakor, and Meatij Miarang islet, form a façade running along the bearing 099°. To the west, Tanjong We Toh is located on the azimuth 210° from the terminus of the land boundary between East Timor and Indonesia. These are features whose basepoints control the course of the 'lateral-equidistances' up to the 'frontal-equidistance'. Geographically, East Timor's façade is flanked by 'frontage-jaws' that form 'concave-angles' of 34° and 35°, eastwards and westwards respectively, with the general direction of East Timor's coast. Accordingly, the 'lateral-equidistances' are converging lines. The distance between them at midway

(475) Para.9.2.b)(iii) *supra*.
(476) Para.9.2.b)(iv) *supra*.
(477) The suggestion that the Australian argument based on natural prolongation is irrelevant today (finding no support either on the law of maritime delimitation law, or on historic grounds) is endorsed by Lowe, Carleton and Ward – who assert that "Australia's historical arguments in relation to the natural prolongation of its continental shelf, whether or not those arguments were valid in the early 1970s, are now quite clearly irrelevant to the delimitation with East Timor" (cf. Lowe/Carleton/Ward/2002, para.31.).

towards Australia (i.e. at the 'frontal-equidistance') is some 110 M. This is 48-odd M (or 30%) less than the distance between their initial points (Figure 100).

The combined effect of these two lateral lines is a cut-off effect whereby East Timor is denied access to areas that lie directly off its southern coast. More importantly, the impact at the level of area-attribution is massive. Let it be supposed that this situation would be one in which an equidistance-line effects an equal division of the overlapping of entitlements, i.e. where the coasts of adjacent states are defined by means of straight-lines (Figure 53). This is, in other words, the same as computing perpendiculars to the general direction of the coast. If such perpendiculars to the façade would be utilised up to the 'frontal-equidistance' with Australia, out of the relevant overlapping of 200-mile entitlements East Timor would be attributed approximately 40,556 sq.km (or 11,824 sq.M). When compared with the area that results from the recourse to strict equidistance-lines – 32,455 sq.km (or 9,462 sq.M), this would represent a 25% increase. Such an effect in area-attribution, it is argued, consists of an unreasonable cut-off effect[478].

Of significance also is the fact that, on the eastern side, this cut-off effect is even more inequitable. The course of the 'lateral-equidistance', south of the 1972 boundary and up to the 'frontal-equidistance' (the area to be divided between Australia and East Timor), is controlled by basepoints located on Lakor and Meatij Miarang, whose coastal façades are respectively 10 M and 1.5 M long. Compared with the eastern-half of East Timor's façade, their coastal length stands in a ratio of 6.43:1 (East Timor:Indonesia)[479]. Even if the coastal length of Leti and Moa is added up, the ratio is approximately 2:1 (East Timor:Indonesia). The inequitableness is noticeable in the light of the fact that the greatest part (43 M out of 63.5 M, or 68%) of the equidistance-line south of the 1972 boundary is controlled by basepoints on Meatij Miarang – a very minor feature. In addition, the remoteness and size of these four insular features, lying significantly far away from any sizeable Indonesian islands, must be duly weighed-up. Taking into account case law and state practice[480], one would submit that these islands are in some degree unrepresentative of the geographical relationship between East Timor and Indonesia. Besides the cut-off that results from the relative position of the façades, it is thus necessary to weigh-up the 'unrepresentativeness' of these insular features. Their effect upon the equidistance-line is clearly unreasonable. None of these considerations are overruled by Indonesia's archipelagic state. These features stand on the archipelago's outer perimeter – no archipelagic waters are at issue.

(478) On the impact of the lateral equidistance-lines on the access to natural resources, cf. para.9.4.e) *infra*.

(479) Since between Lakor and Meatil Miarang there is a gap of 15 M, which is longer than their coasts, and there is no significant insular features behind that gap, it would be unreasonable to consider that they form a continuous façade. The same approach does not apply to Jaco island; its proximity (0.3 M) to East Timor's mainland makes it virtually a part thereof.

(480) Para.8.2.c) *supra*.

9.4.c)(ii) Australian Basepoints to the East of Cape Londonderry

A second situation of controlling basepoints that might be relevant in terms of this delimitation concerns the Australian coast to the east of Cape Londonderry. The first point to make is that, as concluded above, the system of straight baselines adopted by Australia (which covers this area) should have no bearing on the delimitation[481]. The second point to address is whether Holothuria reefs should be used to compute the equidistance-line and the outer 200-mile limit of Australia (which consequently defines the area of overlapping of 200-mile entitlements).

Eastern Holothuria reef lies within 12 M from Troughton island. This means that it may be used as a basepoint for measuring the outer limits of the Australian territorial sea and contiguous zone. Whether it is usable to delineate the Australian 200-mile limit depends on whether Troughton island can generate its own 200-mile entitlement. The island lies less than 12 M from the mainland coast (which means that its basepoints may be used for computing the 200-mile limit). However, a 'leap-frogging' effect from the mainland coast cannot found Holothuria reef's entitlement. With an area of roughly 0.87 sq.km (or 0.24 sq.M), this feature is small enough to raise questions as to its status under Article 121 of the LOSC. One would argue that Troughton island is not entitled to continental shelf and EEZ *per se*. But truly, the answer to this issue is not necessary for delimitation purposes. Regardless of the view adopted, what may be questioned, clearly, is whether Holothuria reef is relevant for delimitation. Its detachment from Australia's mainland coast makes it unrepresentative thereof, and since no similar case exists on East Timor's coast, it is equally unrepresentative of the essential geographical relationship between the two coasts[482].

The impact of Holothuria reef on the computation of equidistance is somewhat negligible, especially within the two lateral equidistance-lines. The area in question, up to the perpendiculars to the general direction of the coast, is some 500 sq.km (or 146 sq.M). Less negligible is the difference that it makes in terms of proportionality assessments, due to the impact on the location of the 200-mile limit from Australia. If Holothuria reef is fully discounted, the overlapping of 200-mile entitlements lying to the East Timorese side of the 'frontal-equidistance' is reduced by approximately 3,227 sq.km (or 941 sq.M). If the 'new' overlapping of 200-mile entitlements is adopted for 'grossness factor' computations, it leads to a decrease thereof from 1.26 to 1.14. To that extent, the attribution to East Timor of all areas within the equidistance-lines appears even more reasonable[483].

(481) Para.8.2.d) *supra*.
(482) Paras.8.2.b), 8.2.c) *supra*.
(483) Para.9.4.a)(ii) *supra*.

9.4.d) Macrogeographical Considerations

The discussion above as to the impact of macrogeographical considerations upon maritime delimitation has led to the conclusion that the question is essentially one of contextualisation. The weight to be given to certain facts, the search for an overall balance of equities, or the 'discovery' of a reasonable boundary-line, are issues the answer to which might in a certain measure depend upon the context within which the delimitation is framed. Achieving a non-inequitable solution is a task that cannot "ignore the other delimitations already made or still to be made in the region"[484]. For the delimitation between Australia and East Timor, macrogeographical considerations appear to be relevant – apart from the 'third-state issue' – in two further different ways[485].

The first issue concerns the balancing-up of exclusive maritime rights and interests, which must take account of one key macrogeographical fact. Of the three states involved in the Timor Sea, there is one which is clearly disadvantaged in terms of maritime entitlement generated by its coasts: East Timor. Owing to the regional geography, its entitlement must be 'amputated' from all directions. Whatever the direction, East Timor's entitlement can never reach 200 M from the coast. This predicament does not occur with either Australia or Indonesia. Crucially, off the northern coast, the areas of 'exclusiveness' that will belong to East Timor are primarily territorial sea areas. Only partially, and even then marginally, does East Timor enjoy maritime areas beyond 12 M (if equidistance is utilised in the delimitation *vis-à-vis* Indonesia – Figure 104)[486]. Such a marked macrogeographical disadvantage, one would argue, ought to be weighed-up in the overall balancing-up of equities.

The second macrogeographical aspect that might be relevant is the general direction of the Indonesian archipelago at Timor. From Rote island (Pamana), passing through Meatij Miarang, up to Sermata island, the archipelago has a façade of roughly 400 M running in the direction 065°-245°. Should it be concluded that using equidistance-lines as the basis for the 'lateral delimitation' would effect an inequitable area-attribution in relation to East Timor, one of the ways in which the adjustment might be determined is by reference to this macrogeographical aspect. This is to be considered, however, only at the stage of choice of boundary-line, when account is taken of the 'decision-matrix'[487].

(484) *Guinea/Guinea-Bissau* arbitration, ILM/25/1986, p.291, para.93.

(485) Cf. para.8.2.f) *supra*. Because of the way in which the 'third-state issue' was dealt with above, its macrogeographical aspect has already been contemplated; cf. para.9.3.b).

(486) It is off the coast of the Oecusse enclave that East Timor can claim a wider breadth of maritime areas. But even then, the area in question does not reach the 24-mile limit.

(487) Para.9.5.b)(ii) *infra*.

9.4.e) Natural Resources: Petroleum

Turning now to the issue of natural resources as a fact relevant for the delimitation process, and drawing from the idea that natural resources are at the heart of the concept of maritime 'exclusiveness', it is important to restate that the whole issue appears to revolve around the dialectics 'area-attribution *versus* access to resources'. Natural resources can be factored into a delimitation equation only if it is possible to retain a non-inequitable area-attribution. This type of fact is usually insufficient for justifying significant alterations of the area-attribution resulting from other facts. The paradox between, first, the exhaustible nature of natural resources and the impossibility of foreseeing future developments and, secondly, the *prima facie ad eternum* nature of boundaries, entails that preference be given to ensuring that the boundary will not become inequitable in the future. Natural resources should be assessed, therefore, primarily in terms of '*configuration*' *of the line*, and not of *amount of adjustment* applicable to the provisional equidistance-line. Importantly, taking them into account can never become an exercise of distributive justice[488].

With this said, attention must be drawn to the petroleum resources of the Timor Sea, to whether they should have any impact upon the delimitation, and if so, how they are to be weighed-up. Of the known resource-areas, three deserve particular attention – bearing in mind their importance in respect of size and location (Figure 108). *Greater Sunrise* (which includes *Sunrise*, *Sunset* and *Troubadour*) is a massive gas reserve that straddles the eastern 'lateral-equidistance'. Its reserves are estimated at 9.5 tcf[489]. *Bayu-Undan* is a gas field the reserves of which are estimated at 3.4 tcf. It is located some 9 M west of the western 'lateral-equidistance', and some 12 M northwards of the 'frontal-equidistance'. *Laminaria* is an oil field located 2 M east of the western 'lateral-equidistance'. It has been exploited by Australia for some years, on the basis of the agreements entered into with Indonesia, and its average production has been about 140,000 bpd. The nearby *Corallina* and *Buffalo* fields are in similar situations, although their production is less significant.

As to *Greater Sunrise*, because it straddles the provisional equidistance-line, the division thereof is inevitably a central issue. Regardless of whether there is an adjustment to be made, and if so, of whether such an adjustment favours Australia or East Timor, the boundary-line inevitably results in 'resource-sharing'. The slightest of adjustments to the 'lateral-equidistance' leads to a different apportionment. The question is posed differently as to *Bayu-Undan* and *Laminaria-Corallina-Buffalo*. For 'resource-sharing' to be possible, significant adjustments must be made to the provisional equidistance-line. The difficulty is

(488) Cf. para.8.3.a) *supra*.
(489) Its reserves were deemed to lie 80%/20% to east/west of the equidistance-line; cf. 2001 Arrangement, Annex E, para.(a).

that, if 'awkward' lines are to be avoided, as they should be[490], this should be considered only if there is no significant alteration of the area-attribution determined by all other facts.

Two final points deserve consideration: one is concerned with the relationship that might be established between the basis of maritime entitlement and the access to natural resources; another is related with the exhaustible character of petroleum resources[491].

With respect to the first of these issues, it is noteworthy that the prevailing view in jurisprudence and in scholarship is that the LOSC conferred upon *distance from the coast* a pivotal role in maritime zoning – thus indirectly also upon the determination of access to natural resources. If access to natural resources is to be weighed-up as a juridically relevant consideration, therefore, some relevance must be given to the position of the resources in terms of distance from the coasts involved. Other considerations absent, closer proximity may in broad terms be translated into stronger entitlement to benefit from natural resources. Furthermore, if resources are much closer to one of the coasts, sharing them between two states is likely to require an 'awkward' boundary-line, and/or a significant change in area-attribution. It is notable in this case that all resource-areas mentioned above lie closer to East Timor's coast, than to Australia's coast – in two cases substantially closer to East Timor's coast. *Greater Sunrise* field lies, on average, at a distance of 80 M from East Timor's coast; a half of the distance from the closest point on Australia's coast (160 M). *Laminaria-Corallina-Buffalo* fields are positioned in a similar relative position. On average, the distance from East Timor is 86 M, whereas from Australia it is 185 M (or 174 M if Eastern Holothuria reef is used). Although *Bayu-Undan* field is closer to East Timor, the discrepancy in terms of distance to Australia is not as marked as in the previous cases – 122 M and 161 M (or152 M).

The exhaustible character of petroleum resources becomes an issue because of the fact that *Laminaria-Corallina-Buffalo* fields have already been exploited by Australia. The resources have thus been exhausted to some degree. Since access to natural resources is a consideration relevant for maritime delimitation, it would be disconcerting that no account would be taken of the fact that resources located in the relevant overlapping of entitlements had been exhausted unilaterally[492]. The ineluctable corollary of the concurrence of rights in the area of overlap is that states are bound by an "obligation of mutual restraint". Unilateral action ought to be refrained "*when it risks depriving other states of the gains they might realise by exercising their sovereign right of exploitation*"[493].

(490) Para.8.4.e)(i) *supra*.
(491) Insofar as the 2001 Arrangement lays down (in Article 22) that it will cease to be in force if continental shelf delimitation is effected, its contents in terms of access to petroleum resources are not relevant for purposes of the delimitation.
(492) Para.4.3.d)(i) *supra*.
(493) Ong/1999, p.198, emphasis added.

In relation to the *Laminaria-Corallina-Buffalo* fields, the argument that Australia has not been acting unilaterally, but under agreements entered into with Indonesia, cannot be upheld. That Indonesia's right to dispose of the maritime rights in question was disputed was a widely known fact. The fact that the Indonesian occupation of East Timor had not been recognised, not only by the United Nations, but also by the vast majority of states, provided further evidence in that respect. As a sovereign state, Australia chose to recognise Indonesia, and to negotiate the said agreements. That approach is, however, insufficient to legitimise Australia's exploitation of the said resources. Hence, it is fair to argue that the exploitation of the *Laminaria-Corallina-Buffalo* fields by Australia was questionable even before the 1999 referendum. No doubts remained thereafter as to the need to contemplate East Timor's legal rights in the Timor Sea. Even then, Australia chose to continue the unilateral exploitation of *Laminaria-Corallina-Buffalo* fields without taking reasonable measures to safeguard East Timor's potential rights – although it became clear that East Timor sought to assert its potential rights in the Timor Sea. Since such a conduct risked (and still risks) aggravating the dispute over the maritime boundaries with East Timor, the lawfulness of Australia's conduct – i.e. the unilateral exploitation of natural resources in an area of overlapping entitlements – might indeed be questioned. Furthermore, in the light of the Portuguese conduct, no argument of historic rights can be advanced by Australia.

With this said, it nevertheless must be conceded that the problem is far from easy to address in a delimitation process. Practically speaking, how can such a fact be weighed-up in the determination of the boundary? Can, and should, a court make a decision that entails the transference of areas currently unilaterally exploited by state A to the jurisdiction of state B? Should these areas be kept under the jurisdiction of state A, the balance of equities being attained by attributing to state B other areas? One would argue that, for purposes of delimitation strictly speaking, it is irrelevant whether the area has already been exploited unilaterally. The delimitation ought to be effected by reference to the applicable normative tenets. Although the existence of resources might be relevant, their exhaustion has perhaps no bearing on the determination of the boundary. Should the delimitation attribute to state B an area that had already been exploited by state A, what might be raised is a question of compensation. Nicaragua's approach in the *Nicaragua/Honduras* and *Nicaragua/Colombia* cases illustrates the point. In its Application instituting proceedings against Honduras, Nicaragua asserted that it reserved "the right to claim compensation for interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua", and "for any natural resources that may have been extracted or may be extracted in the future to the south

of the line of delimitation that will be fixed by the Judgment" [494]. A similar point is made in the Application instituting proceedings against Colombia[495]. The problem however, is that in maritime delimitation no court has yet addressed this problem explicitly.

9.5. The Choice of Boundary-Line

Attention must finally be devoted to the choice of boundary-line[496]. As noted, the tangible outcome of the operation of delimitation is a line, which ought to be chosen in the light of all relevant facts. To overcome some difficulties that surround what is perhaps the most controversial step in maritime delimitation, and because the process has consolidated as a multiple-factor analysis, this study has proposed that a 'decision-matrix' be utilised. Its goals are essentially three-fold. First, it seeks to deconstruct the problem into smaller parts, and to provide a diagrammatic representation thereof. Secondly, it intends to allow the simultaneous visualisation of all relevant factors, facilitating their relativisation. Thirdly, by structuring the basis of reasoning, it aims at attaining better judgment and objectification of justification discourse. The recourse to a 'decision-matrix' presupposes that subsumptive logic is impossible in legal decision-making, which conversely means that 'subjectivity' (in the form of 'value-judgments') is inescapable. And because 'subjectivity' is inherent in legal decision-making, and even more so in maritime delimitation, an attempt was made to shorten the gap between legal discourse and choice of line. The said 'decision-matrix' seeks to predicate the determination of both the adjustment to be applied to the provisional equidistance-line, and the configuration of the boundary.

9.5.a) Delimitation Factors

At this stage, it is necessary to formulate the delimitation factors that stem from the foregoing appraisal of the 'factual matrix'. Each delimitation factor will be incorporated as an attribute of the 'decision-matrix' – a condition to fulfil, or an objective to attain, in order to ensure the reasonableness of the boundary-line. These factors will form the reference for determining whether the provisional equidistance-line yields a non-inequitable solution, and if not, how much and in which way it ought to be adjusted. Their formulation comprises, thus, a short assessment as to the equitableness of the provisional equidistance-line, and as to the 'amount' and 'direction' of the adjustment necessary, if any.

(494) Application, para.7.
(495) Application, para.9.
(496) For an analysis of the various aspects of the process of choice of line, cf. paras.7.1., 7.4. *supra*.

9.5.a)(i) *Factor A* – Coastal Length and Proportionality

The 'grossness factors' of 1.37 and 1.26, respectively for seabed/subsoil and water column delimitation, evince a slight disproportion to the prejudice of Australia. Case law suggests that this level of disproportion is not unreasonable. Nevertheless, it indicates that a slight adjustment to the benefit of Australia would contribute to a finer balance between the two states – although it is, on its own, insufficient to determine an adjustment of the provisional equidistance-line. Conversely, adjustments to the benefit of East Timor must be weighed-up with greater caution. Otherwise, the slight disproportion in question might as a result become unreasonable.

9.5.a)(ii) *Factor B* – Natural Prolongation (the Timor Trough)

Whether the Timor Trough represents a geological separation between Timor island and the Australian continental margin – thus interrupting the natural prolongation of the two territories – is a question the answer to which is inconclusive. Recent studies have in fact suggested that Timor island has accreted to the Australian margin. Conferring on natural prolongation any weight in these circumstances would be at least unwise. This suggestion is further upheld by the proposition – sanctioned in jurisprudence and in scholarship – that geomorphological and geological facts have no bearing on delimitations between states the coasts of which lie less than 400 M apart. State practice points in similar a direction. By giving weight primarily to solutions based on equidistance, even where natural prolongation could become an issue, it reinforces the said proposition. No delimitation factor should thus be derived *in casu* from this type of consideration. Nevertheless, because reasons that lead to discarding arguments raised by the parties should form part of the decision, reference should be made in the 'decision-matrix' to this type of consideration.

9.5.a)(iii) *Factor C* – Cut-Off Effect of the 'Lateral-Equidistances'

The Indonesian coast forms two 'frontage-jaws', on either side of East Timor, near the starting point for the 'lateral-equidistances', which as a result become converging lines. Should the said lines be adopted as boundaries, East Timor would be denied access to areas that lie directly off its coast. The impact in terms of area-attribution is of such a magnitude that it may be considered as an unreasonable cut-off effect. Both 'lateral-equidistances' must therefore be adjusted, to some degree, to compensate for this fact.

9.5.a)(iv) *Factor D* – Effect of the Islands East of Timor

South of the 1972 boundary-line, and up to the 'frontal-equidistance', the eastern 'lateral-equidistance' is controlled by basepoints on Lakor and Meatij Miarang. The coastal

length ratio between these two insular features with the eastern-half of East Timor's façade is some 1:6.4 (Indonesia:East Timor). This ratio is still 2:1 if the islands of Leti and Moa are considered. However the issue is addressed, therefore, there is a disparity of coastal lengths to be weighed-up; which is all the more significant since the relative size and remoteness of these insular features makes them unrepresentative of the Indonesian territory. If account is taken of the treatment given in case law and state practice to the question of islands, it is reasonable to reduce their effect on the determination of the boundary.

Conceptually, it is important to distinguish between *Factors C* and *D*. The former concerns the fact that the eastern 'lateral-equidistance' is 'pushed' westwards as a result of the direction of the façade of the Indonesian islands. The latter has to do with the fact that the insular features in question have short coastal lengths, and their size and remoteness from the 'main islands' of the archipelago makes them unrepresentative thereof. Even if the eastern 'lateral-equidistance' were not 'pushed' westwards by the direction of the coast, the effect of the basepoints in question would still have to be discounted.

9.5.a)(v) *Factor E* – Holothuria Reefs

Because Holothuria reefs are detached from the mainland coast of Australia, and because no similar situation exists as regards East Timor's basepoints, the effect of the said reefs on the course of the 'frontal-equidistance', and importantly on the computation of the overlapping of 200-mile entitlements, should be weighed-up. Their location is, however, insufficient to justify any adjustment whatsoever of the provisional equidistance-line. But it must be taken into account that recourse thereto creates a slight benefit to Australia. The impact of discounting it emerges as a reduction of the disproportionality concerning the water column delimitation (based on the 200 M entitlements), which appears reflected in a smaller 'grossness factor'.

9.5.a)(vi) *Factor F* – Macrogeography

Interpretations of the 'factual matrix' which withstand the idea of warranting value to certain macrogeographical settings faces risks of incompleteness, or worse, incorrectness. The reasonableness or unreasonableness of boundary-lines is an issue that might become in specific cases indelibly intertwined with the macrogeographical context. To overlook totally the fact that East Timor's entitlement is 'amputated' from all directions, and the fact that for one half of its façade the entitlement generated is little more than the territorial sea, cannot lead to an optimisation of the principles of maritime zoning and of equity. It is particularly so because this is a predicament to which neither Australia, nor Indonesia, are subject. This

delimitation, within the available scope to redress inequities, ought to award to East Timor an area of exclusiveness in the Timor Sea that reflects such a geographical predicament.

9.5.a)(vii) *Factor G* – Natural Resources

Issues of natural resources require great caution as regards their impact on boundary delimitation. In the present instance, it is necessary to distinguish between the situations of *Bayu-Undan* and *Laminaria-Corallina-Buffalo*, on the one hand, and of *Greater Sunrise*, on the other hand. Insofar as the latter straddles the provisional equidistance-line, the question of an equitable access thereto is more easily dealt with. Finer balances may be attained by minor adjustments of the provisional equidistance-line. On the contrary, the alterations in area-attribution that would be required to warrant an equitable access to *Bayu-Undan* and *Laminaria-Corallina-Buffalo* would be significant. The conclusion is thus two-fold. First, by attributing East Timor approximately only 20% of the *Greater Sunrise*, the provisional equidistance-line yields an inequitable division of resources. It is especially so because the fields in question lie much closer to East Timor than to Australia, and because it is possible to alter such a division by minor adjustments of the provisional equidistance-line. Secondly, the division of *Laminaria-Corallina-Buffalo* and *Bayu-Undan* should be considered only if that is achievable without significant alteration of the area-attribution that results from other factors. As argued before, in principle, access to resources ought not to be weighed-up for purposes of adjusting the provisional equidistance-line[497].

9.5.b) 'Discovery' of an *Equitable Solution*

9.5.b)(i) The 'Decision-Matrix'

Whilst the weight to attribute to each fact varies with the circumstances *in concreto*, the process whereby the boundary-line is to be 'discovered' may be approached in general terms[498]. The first step consists of analysing each of the claim-lines advanced by the parties, on the basis of the 'decision-matrix'. Only if neither claim-line is accepted as reasonable should an intermediate boundary-line be sought. Insofar as no actual dispute underlies this study, which is undertaken from an academic standpoint only, there are no claim-lines to be considered here. However, since the following analysis exemplifies how a non-inequitable boundary-line should be 'discovered', it must be stressed that such an exercise would be carried out only if it were concluded that international law excluded the adoption of either party's claim-line as boundary.

(497) Para.8.3.a) *supra*.
(498) Cf., in particular, para.7.4.c) *supra*.

TABLE 6
'Decision-Matrix': Delimitation between Australia and East Timor

DELIMITATION FACTORS	Provisional-Line: Adjustment	'Configuration' of the Line
A. 'Grossness factors' of 1.37 and 1.26 evince a slight disproportion prejudicing Australia; not unreasonable if compared with examples in case law, however.	Not sufficient to justify on its own any adjustment	____________
B. The existence and location of the Timor Trough should have no influence over the determination of the boundary.	No impact.	____________
C. The cut-off effect generated by the 'lateral-equidistances', as a result of the 'frontage-jaws' of the Indonesian façade, is unreasonable, and should be alleviated.	Some adjustment favouring East Timor is required	'Lateral-equidistances' should be 'opened' to avoid cut-off
D. The effect of the islands east of Timor, on the course of the provisional line, should be reduced, for they are unrepresentative of the Indonesian territory.	Effect of the islands Lakor and Meatij Miarang should be reduced somewhat	____________
E. The use of Holothuria Reefs as relevant basepoints, though insufficient to justify an adjustment of the provisional line, benefits Australia to a slight degree.	Not sufficient to justify on its own any adjustment	____________
F. The fact that East Timor's entitlement is amputated from all directions reveals a macrogeographical disadvantage that, to the extent possible, should be alleviated.	East Timor's areas off its southern coast should be maximised	____________
G. To the extent allowed by other factors, petroleum resources ought to be equitably divided, without effecting major changes in area-attribution.	Adjustments to the provisional line must be minor	Shape of line that divides resources as equitably as possible

Before proceeding further, it is useful to recall that all delimitations have more than one possible solution, and that practically speaking delimitation often amounts to a choice between different lines. The recourse to a 'decision-matrix' seeks to illuminate the factors upon which the choice is to be predicated. It aims at facilitating and substantiating such a choice, by pointing out what makes a line preferable *vis-à-vis* another. As between Australia and East Timor, the delimitation could be undertaken on the basis of a 'decision-matrix' similar to that shown in Table 6 above.

A major source of problems in delimitation lies in the 'weighing-up' of the factors identified as relevant, and the determination of their impact on the course of the boundary. It is perhaps at this stage that Benjamin Franklin's 'prudential algebra' might be helpful[499]. With all factors displayed together in one view (Table 6), it becomes necessary to estimate how their weights relate to each other. One key point is immediately noticeable. Whereas *Factor A* favours Australia, *Factors C* to *F* favour East Timor. The first, almost instinctive impression, although this is not a simple question of arithmetic, is that the overall balance of 'exclusiveness' requires that the provisional equidistance-lines be somewhat adjusted to the benefit of East Timor.

The perennial problem lies, no doubt, in the determination of a precise course for the boundary-line. How the factors identified ought to be translated geographically, in terms of adjustments to the provisional equidistance-lines, is the ultimate quandary. Conceptually, it is submitted, the difficulties can only be overcome if it is recognised that there is more than one possible solution for each maritime delimitation problem. How to reconcile the principles of maritime zoning and of equity (and indirectly certainty and justice), what is 'legally equitable' (or 'legally inequitable'), how to promote stability and finality through a manageable boundary-line, are merely some of the questions with which judges are faced. The answers inevitably entail 'subjective' appraisals. Just as courts are endowed discretion in other fields of law (domestic or international), in maritime delimitation they have also at their disposal certain discretion in the choice of line. It is also noteworthy that, in judicial decision-making, many 'value-judgments' stem from comparative analyses with previous cases. Solutions are then found by recourse to legal 'yardsticks', as it were. Bearing this in mind, one would contend that, besides case law, attention must be drawn to state practice, where recurring patterns arguably have a quasi-normative effect. Whilst expressing what states deem to be reasonable solutions, they amount to *opinio aequitatis*[500].

9.5.b)(ii) Recourse to 'Yardsticks'

To set forth the effect of the factors formulated in the 'decision-matrix, therefore, it is necessary to delve into case law and state practice. What *Factor A* shows is that, despite the slight disproportion, no adjustment of the 'frontal-equidistance' favouring Australia is required. Only with much greater disproportions than that evidenced here have adjustments been made in case law. This view is reinforced by the fact that *Factor E* entails a reduction of the disproportionality expressed by *Factor A* (owing to its impact on the computations

(499) Cf. para.7.3.b) *supra*.
(500) Paras.7.1., 7.3.c) *supra*.

related to the 200-mile entitlements), and because the only other factor that could determine an adjustment of the 'frontal-equidistance' (*Factor F*) favours East Timor. One conclusion is then possible. The 'frontal-equidistance' is *prima facie* not to be adjusted.

The practical impact of arguing that no adjustment of the 'frontal-equidistance' is required should not be underestimated. Account must be taken of the delimitations between Australia and Indonesia. First, inasmuch as the 1997 Australia/Indonesia boundary is an equidistance-line, it signifies that the water column delimitation between Australia and East Timor involves no determination of 'lateral-lines'. Secondly, as a result, the seabed/subsoil delimitation between Australia and East Timor requires the determination of 'lateral-lines' – whereby the 1972 Australia/Indonesia boundary and the 'frontal-equidistance' are to be joined. Subsequent analysis as to the equitableness of the provisional 'lateral-equidistances' (in other words the impact of *Factors C, D, F* and *G*) refers therefore exclusively to the seabed/subsoil delimitation.

Since the effect of islands has been addressed in a significant number of occurrences of case law and state practice, it would seem that the adjustment resultant from *Factor C* would be easily established. That is however not the case. Let the islands east of Timor be considered by reference to case law concerning situations in which the coastal relationship was fundamentally one of adjacency. In the *Anglo/French* arbitration, the Tribunal decided to attribute to the Scilly Islands half-effect. These islands are located some 22 M off the United Kingdom mainland, and have a coastal façade of roughly 4 M. Half-effect was also attributed to the Kerkennah Islands, in the *Tunisia/Libya* case, although through a different approach. These islands lie roughly 15 M off the mainland, and have a façade of 18 M. In the *Guinea/Guinea-Bissau* arbitration, Alcatraz island – a small feature located some 24 M off the mainland – was awarded little more than a semi-enclave. In the *Canada/France* arbitration, St. Pierre and Miquelon were attributed much less than what would have been attributed had equidistance been applied. What weight should then be attributed to Leti, Moa, Lakor and Meatij Miarang, especially the last two, which are the features that control the equidistance south of the 1972 boundary?

Extrapolations are not easy. Australia and East Timor are opposite states. The need to analyse the effect of Indonesian islands results from agreements entered into by Australia and Indonesia. That those islands ought not to be given full-effect seems indubitable; for the Indonesian islands have rather shorter coastal lengths, and their relative remoteness makes them unrepresentative for delimitation purposes. Establishing objectively what partial-effect should be given to these islands, and how exactly is that partial-effect to be computed, amounts however to an exercise of discretion. Suppose that a solution based on a half-effect is adopted. How is the half-effect to be computed? Since these islands are not located off a

mainland coast, the traditional approach to half-effect cannot be applied[501]. One possible interpretation is to view the half-effect as a 'halfway-line' between (A) the Indonesian basepoints and (B) the strict equidistance between East Timor and Indonesia (Figure 107a). Should it be considered equitable to use a ¾-effect, a possible interpretation of the ¾-effect line is a 'halfway-line' between and the above half-effect line and the equidistance-line[502]. Another interpretation of the half-effect resorts to the notion of façades and bisectors between them (Figure107b). As done in the *Gulf of Maine* case, it is possible to compute a bisector between two façades, starting at a given point – which here would be the mid-point between the closest basepoints on Jaco and Leti. A 'half-effect bisector' could then be computed between the equidistant-bisector and the façade of the Indonesian islands[503].

These two possible solutions lead to numerous questions. In negotiation, the idea of attempting various solutions until an agreement is reached is a perfectly valid approach to the delimitation process. But it is less so in adjudication. How would a court justify using half-effect, and not ¾-effect, or any other partial-effect? What would be objectively the standard for gauging the partial-effect? And after determining it, what interpretation thereof would be adopted? Arguing simply that that would depend on what appears equitable to the court is less than satisfactory if another, sounder reasoning is possible.

Whilst it is assumed as purpose of this chapter to analyse the delimitation between Australia and East Timor, it must be emphasised that one should not expect an answer that refers to *the* boundary-line, but to *a* boundary-line. This is an inescapable corollary of the existence of a sphere of discretion. What one seeks to 'discover' is one solution amongst several possible solutions. But in doing so, it is important to attempt to find a solution that appears to be objective from the legal standpoint. Building on the idea that discretionary power ought to be orientated by recourse to 'yardsticks' found in case law, preferentially, or state practice, as *opinio aequitatis*, if necessary, the following views seek to justify one solution, which resorts to the delimitation factors previously formulated.

To begin with, the impact of the islands must be integrated with the equitable access to resources. It should be noticed that giving half-effect Leti to Meatij Miarang would deny Australia any access to the *Greater Sunrise* field. That is hardly a non-inequitable boundary to Australia (which is invested in Indonesia's potential position). *Factor G* requires that a reasonable division of resources be attained; and reasonableness ought to be assessed in relation to not only East Timor, but also Australia. On another level, saying that East Timor

(501) On the technical aspects of partial-effect adjustments, cf. para.5.2.c) *supra*. See Figures 72 to 74.

(502) Technically, the partial-effect lines will depend on which points are taken into consideration in their computation.

(503) A third solution for ½-effect and ¾-effect lines is advanced by Lowe, Carleton and Ward (cf. Lowe/Carleton/Ward/2002, para.40). Apparently, these partial-effect lines are based on an "opposite coasts median line" (which seems to be referred to Leti and Jaco), and a no-effect line running in the direction of the façade of the Indonesian islands.

is in a macrogeographical disadvantage (*Factor F*) is somewhat unhelpful for quantifying objectively these adjustments to the equidistance-line.

Of all examples found in case law, none seems to incorporate sufficient elements of geographical analogy with this setting to justify straightforward extrapolations. Hence, it is necessary to turn to state practice subsidiarily. The best 'yardstick' found therein is the Dominica/France (Martinique and Guadeloupe) agreement (Figure 23)[504]. First, it illustrates the solution achieved in a delimitation setting involving islands belonging to the same island arc (the Caribbean island arc). Secondly, it concerns the delimitation between an island (Dominica) 'walled' by islands belonging to the same state (France). Thirdly, it addresses questions regarding cut-off effects caused by smaller islands (Marie-Galante and La Désirade) and by prominent geographical features (Peninsula of the Caravel).

The analogies between this 'yardstick' and the present case study are however not comprehensive. Here, the Indonesian islands are relevant only indirectly – in a delimitation between two opposite states, Australia and East Timor. Notwithstanding this, the rationale of this 'yardstick' is enough to substantiate a solution solidly. Geographically, the analogies 'Dominica-East Timor' and 'France-Indonesia' are straightforward. Equally, the problem posed by Marie-Galante and La Désirade is similar to that of Lakor and Meatij Miarang; and the same may be said about the Peninsula of the Caravel and Tanjong We Toh. In the case between Dominica and France, the boundary-lines may be 'read' as follows. The two states concluded that if Dominica would be attributed a 'corridor-area' extending westwards 86 M (on average), and eastwards 200 M, a reasonable balance would be achieved in area-attribution. Dominica's coastal projection seawards would be reasonably secured. To the east, the equidistance-lines were 'opened' to create a 'funnelling-corridor', with a width varying from 27 M to 17 M. Taking into account the overall balance, the two states deemed the area-attribution yielded by equidistance to the west of the islands as reasonable.

To what extent, then, may this 'yardstick' be utilised in the delimitation between Australia and East Timor? One immediate point emanates from it. Unlike what occurs with Dominica, East Timor does not enjoy sizeable maritime areas in two opposite directions. The Indonesian islands off its northern coast hamper its maritime projection, narrowing its jurisdictional areas significantly. The inclusion in the 'decision-matrix' of a factor reflecting the macrogeographical context was by comparison perfectly justified. A balance similar to that of the Dominica/France agreement is unattainable, due to the fact that East Timor can acquire virtually no areas beyond the territorial sea off its north coast, and to the truncation of its entitlement off its south coast[505]. Bearing this and the absence of countervailing

(504) Appendix 2, F19.
(505) The 'frontal-equidistance' lies, on average, some 140 M off East Timor's coast, far away from the potential 200 M.

arguments in mind, it may cogently be argued that the maritime areas to be attributed to East Timor off its south coast ought to be maximised. There is no other way of optimising the principles of maritime zoning and of equity. In this light, it cannot be argued that the two provisional 'lateral-equidistances' form a 'corridor' that allows a reasonable projection of East Timor's coast. Such a 'corridor' thus is insufficient to verify *Factors C, D, F* and *G* formulated in the 'decision-matrix'.

State practice provides other 'yardsticks' to cases where one state is 'walled' by another, and its coasts can project seawards in one direction only. Reference can be made to the Gambia/Senegal and the Monaco/France agreements[506]. Illustrated in Figures 27 and 39, the solutions resort to a 'corridor' based on parallel lines, thereby avoiding cut-off effects resultant from coastal features. Where coastal geography favours the 'surrounded' state, as occurred in the *Canada/France* arbitration, a similar balance was reached, the 'surrounded' state being awarded a 'corridor' whose width equalled its coastal façade[507].

Thus let the 'lateral-equidistances' between Indonesia and East Timor be adjusted enough to become two parallel loxodromes. What direction should these lines have? Case law and state practice have resorted often to perpendiculars to the direction of the coast, when the objective is to determine reasonable boundaries that reflect the wider geographical relationship. The *Grisbadarna* arbitration, the *Tunisia/Libya* (first sector) case, and *Gulf of Maine* case (outer sector) are examples that may be cited. In state practice, the cases of the Brazil/Uruguay, Brazil/France (Guiana), and Portugal/Spain (Iberian peninsula) boundaries may be noticed[508]. Should East Timor be attributed a 'corridor' formed by two loxodromes perpendicular to the archipelago's façade, extending south of the 1972 boundary up to the 'frontal-equidistance', the lines run as shown in Figure 108.

Besides these examples, the reasonableness of perpendiculars is avowed *in concreto* by two other points. First, it is surely no coincidence that they run close to points A15 and A18, set down in Article 3 of the 1972 Australia/Indonesia treaty as the limits for the adjustments to accommodate possible future claims by East Timor[509]. Secondly, in August 1999, when the United Nations entered East Timor, "Australia defined the south-western maritime boundary for the *Interfet* operational area in East Timor by drawing a line perpendicular to the general direction of the coastline starting from the mouth of the Masin River, which separates West and East Timor"[510].

(506) Appendix 2, D27, F34. Cf. also the Brunei/Malaysia continental shelf boundary (Appendix 2, B15).
(507) As to 'yardsticks' on 'corridor-solutions', cf. para.7.4.c) *supra*.
(508) Cf. Appendix 2, D9-10, D56.
(509) Para.9.2.b)(ii) *supra, in fine*.
(510) *Senate Report*, para.4.17..

Whilst attempting to contribute to the objectification of the notion of *equitable solution* in maritime delimitation, this study has had recourse to the concept of average 'distance ratio', and to its use for purposes of drawing comparisons with 'yardsticks' found in case law and state practice. Consider then the average 'distance ratios' of the solutions reached in some of the examples above. As to the Dominica/France agreement, the figures are approximately 0.85 and 0.94, favouring Dominica, for the northern and southern 'corridor-lines' respectively[511]. The two lines considered, the average figure, rounded up, is 0.90. In relation to the Gambia/Senegal agreement, Figure 39 shows that the adjustment was applied primarily to the northern equidistance-line. The average 'distance ratio' is roughly 0.91, favouring Gambia. By contrast, the southern parallel represents apparently a slight benefit for Senegal[512]. The two lines together have an average 'distance ratio' of some 0.97, favouring Gambia. These values seem to be in line with those mentioned in Table 4, which refers to values of 0.88, 0.91, and (less than) 0.90, for boundaries between adjacent states (respectively, Denmark/Germany, Netherlands/Germany and Tunisia/Libya). On account of these figures, one would argue that figures between 0.85 and 0.95 (i.e. values around 0.90) are typical in cases where boundaries were noticeably adjusted.

What are then the values of average 'distance ratio' for the perpendiculars that form the proposed 'corridor', which adjusts the 'lateral-equidistances' between Indonesia and East Timor, south of the 1972 boundary? The western perpendicular reveals an average 'distance ratio' of some 0.92, favouring East Timor. For the eastern perpendicular, that value is approximately 0.94. The average between the two is then 0.93. What these values seem to demonstrate is that the resort to two perpendiculars to the general direction of the coast falls within the span of solutions that have been used in case law and state practice. Such a solution is reasonable both in terms of 'configuration' of the boundary, and of the quantum of adjustment. Taking into account that the solution was derived from existing 'yardsticks', this is truly unsurprising.

That these lines meet the requirements of *Factors C* and *D* is clear. Doubtless, they also fulfil (at least to some extent) *Factor F.* What needs to be investigated is how they relate to the requirement imposed by *Factor G.* These lateral-lines would result in a rough 50/50 division of *Greater Sunrise*[513], which entails an equitable access to resources. By contrast, *Laminaria-Corallina-Buffalo* and *Bayu-Undan* would be attributed both to East Timor. Owing to the location of both resource-areas, any attempt to grant a shared access to

(511) Segments 7-8 and 9-10 of the boundary.

(512) The map shown in IMB, p.853, depicts the southern equidistance-line as starting slightly south of the parallel, and running across it to the north thereof. The cartographic information available to the author led to a somewhat different line.

(513) Because petroleum deposits have to be assessed in three-dimensional terms, it is rather difficult to advance a precise figure. This would require a survey directed to establish how the volume of the deposits is distributed.

these resources would entail an alteration of area-attribution which is unjustified in the light of all other delimitation factors. Accordingly, no such access should be considered. With this solution, the exploitation of resources carried out by Australia to the west of the western 'lateral-equidistance' would almost certainly give rise to the issue of compensation for unjustified resource exploitation[514].

9.5.b)(iii) The Boundary-Lines

For purposes of description of the boundary-lines that stem from the reasoning above, it is useful to distinguish between the water column and the seabed/subsoil. As stated from the outset, no attempt will be made however to define the lines technically. What is aimed at is a description of the boundary-lines in broad strokes.

Let the water column boundary between Australia and East Timor be considered first. One would argue that the boundary ought to follow the line of equidistance between Australian and East Timorese basepoints. For purposes of computation of the line, recourse to basepoints on Holothuria reefs is justified, especially because their effect compensates to some extent the slight disproportion between coastal lengths (*Factors A* and *E*). To avoid interference with Indonesia's rights and interests, those of a third party, the line ought not to be defined beyond the two equidistant trijunction points[515]. Insofar as the 1997 boundary follows also the equidistance-line, the two boundaries would 'fit' properly, thus creating no subsequent jurisdictional problems (regardless of the 'lateral-boundaries' that Indonesia and East Timor would later adopt between themselves). In any event, the final determination of the location of the trijunction points must necessarily be effected in tripartite terms. As a final note, it must be observed that there are no indications whatsoever that this boundary could result in inequitable area-attribution.

Devoting now attention to the seabed/subsoil boundary, it is perhaps easier to start by the 'frontal-line'. Even if it is conceded, for the sake of argument, that the Australian continental shelf entitlement extends up to the Timor Trough, and that such an entitlement is to be weighed-up, that would not lead to adjustments of the 'frontal-equidistance'. Not only the 'grossness factor' of 1.37 evinces no unreasonable disproportion (*Factor A*), but adjustments are also opposed by the need to maximise East Timor's jurisdictional areas (*Factor F*). Further weight is lent to this solution by another point. By keeping a boundary based on equidistance, the seabed/subsoil boundary will coincide with the water column

(514) This issue is not a matter for the delimitation process. As observed above, it appears be an issue subsequent thereto, to be addressed as states see fit, through negotiation, adjudication, or conciliation; cf. para.9.5.a)(vii) *supra*.

(515) The boundary should be described by recourse to geographical coordinates of points, to be joined by straight lines. Whether to use geodesics or loxodromes is perhaps negligible, but that depends on the spacing between the points utilised. The shorter the distance between them, the less relevant becomes this issue.

boundary partially, allowing partial *dual-coincident boundaries*. International law seems to uphold the presumption that coincident boundaries (although conceptually distinct) should be preferred wherever the delimitation regards areas within 200 M from the coasts[516].

Turning to the 'lateral-boundaries', it ought to be observed that the adopted solution is predicated upon the idea that Australia appears invested in Indonesia's potential legal position north of the 'frontal-equidistance'. For this reason, 'lateral-equidistances' based on basepoints on Indonesian territory were taken as the starting point for the delimitation. A number of factors formulated by reference to the legal and factual 'matrices' – objectified by recourse to relevant 'yardsticks' found in case law and in state practice – justify the adjustments that were made to those lines. Opting for a 'corridor-solution' stems thus from the fact that it is the type of solution that reasonably balances the delimitation factors of this case. The 'lateral-boundaries' are based on perpendiculars to the wider regional façade. They were devised to pass in the east by the midpoint point between Leti and Jaco, and in the west by the terminus of the land boundary between Indonesia (West Timor) and East Timor. From south to north, the two lines should start from the intersection of the perpendiculars above with the 'frontal-equidistance' between Australia and East Timor, and stop just short of the 1972 boundary, in the close vicinity of points A15 and A18.

The question of Indonesia's rights and interests is adequately addressed with such boundaries. To reinforce the legal protection of this third state, explicit reference might nevertheless be made to the fact that these boundaries apply exclusively between Australia and East Timor, and that their delimitation is effected without prejudice of Indonesia's rights *vis-à-vis* East Timor, as regards both the seabed/subsoil (north of the 1972 boundary) and the water column. In fact, nothing precludes Indonesia and East Timor from opting for different 'lateral-boundaries' in either case. However, recourse to perpendiculars in such delimitations should not be dismissed *in limine*.

While not rejecting out of hand that other lines may be chosen, one would argue that predicating the 'lateral-boundaries' (south of the 1972 boundary) upon perpendiculars to the general direction of the coast amounts an equitable solution. The area-attribution entailed by this solution favours East Timor in a way that is different from that assumed before in the computation of the 'grossness factor'. One would submit that its reasonableness is ensured by, and stems from, the 'weighing-up process' devised on the basis of the conceptualisation adopted in this study. Significantly, it is argued that no *ex post facto* proportionality test is required to check the reasonableness of the outcome[517]. However, to provide evidence that this is true, reference is made next to some figures of 'grossness factor'. This should not be

(516) Para.8.4.c)(ii) *supra*.

(517) Para.8.2.e) *supra*.

interpreted as an acknowledgement of validity of the said test. The objective is in effect to show that this test is dispensable, if the 'factual matrix' is assessed as suggested here.

Taking into account the 'new' area-attribution, the 'grossness factor' is 1.28 (with computations based upon the overlapping of 200-mile entitlements). When the Australian entitlement up to the Timor Trough is considered, this figure becomes 1.74, which is still short of what was deemed unreasonable in other instances. Furthermore, this conclusion is reinforced by the fact that, when the basepoints on Holothuria reefs are discounted in the former computation, the figure falls to 1.17. Revealing a certain imbalance, these figures are however acceptable in the light of East Timor's macrogeographical predicament. Australia (as well as Indonesia for that matter) does not have its potential maritime entitlements curtailed from every direction.

The argument that the 'lateral' seabed/subsoil boundaries between Australia and East Timor may not be delimited without delimiting Indonesia's water column boundaries in this area is flawed. International law has endorsed separate regimes for the seabed/subsoil and the water column, spatially and *ratione materiae*. Further, the existence of third states *per se* has never been an impediment to maritime delimitation. Water column rights and seabed/subsoil rights, if belonging to different states, are to be exercised within the limits imposed reciprocally. All that need be noted is that, whatever the solution found for the delimitation between Australia and East Timor, there will always be a situation in which the seabed/subsoil rights are vested in one state (Australia or East Timor) which is not that in which the water column rights are vested (Indonesia). *In casu*, it is never possible to benefit from the 'practical advantages' of having completely coincident boundaries. The question is whether the seabed/subsoil rights belong to Australia, or to East Timor. This inescapable reality results from the way in which the 1972 boundary was delimited and the subsequent developments on the basis of continental shelf entitlement[518].

One final brief note concerns the 'grey area' issue. The use of perpendiculars to the general direction of the coast would not create 'grey areas' in terms of continental shelf, due to the effect of the 1972 boundary (which precludes Indonesia from claiming rights to the south thereof). Nevertheless, should Indonesia and East Timor adopt boundaries coinciding with the perpendiculars proposed, 'grey areas' concerning water column jurisdiction would emerge east and west of the trijunction points. The frontal-equidistance' between Australia and East Timor (based exclusively on basepoints on their coasts) and the 1997 boundary are not coincident beyond the trijunction points[519].

(518) Cf. paras.9.2.b), 9.2.c) *supra*.

(519) These 'grey areas' – illustrated in Figure 108 – would be roughly 136 and 193 sq.km, respectively off the eastern and western perpendiculars (assuming that Holothuria reefs were relevant basepoints).

CONCLUSIONS TO PART III

To the extent that it examines how, in a process of legal determination of maritime boundaries (i.e. in adjudication), a boundary-line is to be 'discovered', this part constitutes a denouement of the conceptualisation of maritime delimitation attempted in this study.

Maritime delimitation law has been seen as a legal field in which flexibility appears paramount, if necessary at the expense of certainty, allegedly because this is inescapable in the light of the need to achieve an *equitable solution*. However, flexibility primacy is not unchallengeable. Building on the argument that, in maritime delimitation, normativity stems from the principles of *maritime zoning* and of *equity*, this part suggests that the delimitation process may be conceived in a way as to allow the necessary flexibility, whilst guaranteeing an acceptable degree of certainty. One cornerstone of this approach is the proposition that boundaries ought to be determined through adjustments of a provisional equidistance-line, that such adjustments result from the optimisation *in casu* of the two legal principles involved, and that the reasonableness of such adjustments can be analogised and objectified through the notion of average 'distance ratio'[520]. As noted, the main difficulty surrounds the concretisation of the 'case-norm' that flows from the optimisation of the two principles[521]. It is argued that the finding of the 'case-norm' emerges from a 'weighing-up process' in which the legal determination, and justification, of the amount of adjustment stems from a 'decision-matrix' composed of the relevant delimitation factors.

The conclusions reached here may be summarised into five key issues, all of which refer either to aspects of, or questions related to, the understanding of the 'weighing-up process' adopted here. The first point concerns the notion of *unicum*. The second question deals with the sphere of discretion with which courts are endowed. The rationalisation of the delimitation problem as a multiple-factor analysis is the third issue. The fourth question is related to the elements of the 'factual matrix', and related assessments. Finally, the fifth question concerns the case study through which the proposed conceptualisation was tested.

Let us turn to the notion of *unicum*. That each maritime delimitation case is in some measure unique is irrefutable. That such uniqueness entails the introduction of a degree of particularisation in the delimitation process is equally uncontroversial. From here, however,

(520) Chapter 6, Conclusions to Part II *supra*.
(521) Cf. Alexy/1989, pp.243-244; also para.7.4.a) *supra*.

one should not conclude that maritime delimitation is synonymous with 'no generalisation'. Should that be the case, there would be no room for normative standards, for normativity is necessarily synonymous with some measure of generalisation.

Bearing this in mind, the notion of *unicum* should not be overemphasised. No doubt, on account of the necessary flexibility, there can be no closed categorisation or definitive list of factual considerations that might be weighed-up. However, there is a basis for objectifying the choice of relevant considerations. These considerations have been denominated by case law as "pertinent", their pertinence being assessed through the 'legal matrix'. *Maritime zoning* balances up exclusiveness and inclusiveness in the public order of the oceans, by defining spatially the areas of exclusiveness, and those aspects of 'ocean utilisation' that differentiate each zone. Accordingly, only those elements of the 'factual matrix' that are subsumable in the zonal regime are 'weighable considerations', which thus relate either to the basis of entitlement, or to the regime of exclusiveness[522].

Besides the decision as to *which* considerations are relevant, it is crucial to decide *how* they are to be considered. Whilst it is true that maritime delimitation appears to rely on a multiple-factor analysis, it is also true that the process in question must be subject to the canons of juridical reasoning and argumentation. This proposition is another cornerstone of the argument advanced here. Bridging the gap between appraisals of the relevant facts and the choice of boundary-line has sometimes been seen as the *Achilles heel* of the legal determination of maritime boundaries. This study suggests that the contribution of each consideration to the *equitable solution* ought to be laid down with as much detail as possible. How that should be undertaken is the question that the present part has attempted to illuminate, while seeking to justify the proposal put forward.

There is one crucial point to make with respect to the notion of *unicum*. The realm in which maritime delimitation law evolves does not appear to be in any essential way different from that in which other fields of law evolve[523]. It is true that equity is central thereto. But it is also central for other fields of law. It is also true that in order to reach an equitable solution, flexibility is required. Again, however, this is a consideration with other legal fields. Hence, there seems to be no reason for delving into the challenges posed by maritime delimitation in unique terms. The obligation to achieve an equitable solution ought to be interpreted by reference to the applicable normative framework. While justifiably leaving room for discretion such a framework does not, however, open the door to arbitrariness. Whether relating to the facts to weigh-up, or to the technical methods whereby

(522) Para.7.2.c) *supra*.

(523) As observed above, strictly speaking, delimitation law applies only when maritime delimitation is effected by adjudication (cf. para.6.1.b)(i) *supra*). The delimitation process mentioned here is thus an adjudicative process.

boundary-lines are defined, choices made by courts ought to be justified and reasoned legally. Speaking of 'freedom of choice' is an overstatement – for that would contradict the very nature of judicial decision-making.

The real question is the degree of discretion conferred upon court – the second key issue around which these conclusions revolve. Far from challenging the prevailing view that 'subjectivity' is part of maritime delimitation, this study argues that 'subjectivity' is in fact inevitable[524]. Inasmuch as *Law* cannot close the door completely to 'subjective' ingredients, courts will always have some measure of discretion at their disposal. Subsumptive models of legal decision-making are long obsolete. Judges often rely, perhaps always, upon legally reasoned 'value-judgments', which Alexy defined as "either the actual giving of preference, or the judgment that a particular alternative is a better one, or the rule of preference underlying this judgment"[525]. They are indubitably central to judicial decision-making, both for *finding* the decision, and for *reasoning* it. A shift of emphasis is thus crucial. The subject of discussion ought to be *judicial discretion*, particularly how it is to be exercised.

Difficulties surrounding the exercise of judicial discretion are especially acute, and acquire great relevance, in maritime delimitation law. International law is, if compared to domestic law, a *corpus juris* with relatively low normative density. Further, the normativity in maritime delimitation flows from general principles. These normative standards have a normative density lower than rules *stricto sensu.* This means that the sphere of discretion is increased. Finally, there is the question of 'filling' the notion of equity, which is cardinal to maritime delimitation. In judicial decision-making, the possibility to reason by reference to equity necessarily entails that a court's discretionary stronghold is wider[526].

The tangible outcome of maritime delimitation is a *line.* Since the process under appraisal is an adjudicative process, and since predictability is a requirement (and indeed an aspect) of Law, it would seem at first glance that its outcome – the boundary-line – ought to be predictable. But in reality, what must be predictable are the procedural steps and choices on which the 'discovery' of the line is predicated. To steer discretion away from arbitrariness, the process must therefore be rationalised as to both the range and scope of the pertinent considerations, and the procedures whereby such considerations are weighed-up.

From this standpoint, the rationalisation of the delimitation problem in respect of juridical reasoning and argumentation becomes a focal point. On the *range* of pertinent factual elements, it was already concluded that the delimitation process must weigh-up only the elements upon which the 'legal matrix' (i.e. the zonal regime) confers relevance. The

(524) Para.7.3.c) *supra.*
(525) Alexy/1989, p.6, fn.20.
(526) Para.6.4.a)(iii) *supra.*

question of the *scope* of these elements pertains to the fourth of the key issues mentioned above. At this juncture, these conclusions will focus on the proposal advanced in this study as regards the procedures whereby the *weighing-up of considerations* is to be undertaken. Amongst the questions that have to be answered, one deserves particular attention. Since the discussion relates primarily to the exercise of judicial discretion, how are the delimitation factors translated into a specific adjustment? Or put differently, how is the reasonableness of the distance of the boundary from the coastline of each state to be gauged? Quite clearly, it is in relation to this stage of the process that case law has been openly criticised – for its failure to clarify the link between the pertinent circumstances and the course of the line.

This study subscribes to a fundamental point made in the *Tunisia/Libya* case: "no rigid rules exist as to the exact weight to be attached to each element in [each] case"; "what is reasonable and equitable in any given case must depend on its particular circumstances"[527]. Having said this, one would argue that what matters is not so much the specific impact of a factual element, as the way in which such an impact is gauged and justified. For that is the central cornerstone of reasoning discourse.

Courts' decisions ought to be predicated not only on assessments of the contribution of each factor, but also on the intertwined and relativised relationship between all factors, as far as their impact is concerned. Bearing this in mind, this study has attempted to draw a parallel between the multiple-factor approach that characterises maritime delimitation, and multicriteria decision-making. The aim was to implement a process tailored to objectify and structure decision-making through methodical relational information-processing, whilst furthering problem-perception in its entirety. Founded on theories of decision-making, this approach seeks to rationalise the questions faced by judges. Conceptually, the validity of this usage of decision-making theory is based upon four arguments. First, it deals with multi-factor decision-making. Secondly, by deconstructing the problem into smaller parts, it provides clearer problem-definition, and it facilitates the resolution of the issues raised by each specific delimitation factor. Thirdly, it improves problem-perception and reasoning discourse, and thus, better judgment. Fourthly, it enables criteria selection and evaluation by reference to the circumstances *in concreto*[528].

The 'weighing-up process' designed here endeavours to support reasoned choices – by formulating criteria relevant for choosing a line by recourse to assessments which regard the legal and factual 'matrices', and which are judged relevant in a given instance by the

(527) ICJ/Reports/1982, p.60, paras.71-72.
(528) Paras.7.3.b), 7.4.a) *supra*.

decision-maker. Ultimately, this 'decision-model' appears to allow better, more structured justification discourse, which strengthens the 'case-norm' derived therefrom.

Under this approach, *delimitation factors* were redefined as a condition to fulfil, or an objective to attain. Their contents stem from assessments undertaken, in the light of the normative framework, as to relevant factual elements. These factors are thus at the heart of the *choice of line*, which is to be effected by recourse to a 'decision-matrix' constructed on the basis thereof. The formulation of conditions or objectives, as delimitation factors, stems from the normative framework, that is, from the optimisation of the principles of maritime zoning and of equity, which entails their realisation to the highest degree possible, account taken of the factual and the legal possibilities *in concreto*. The finding of the 'case-norm' is therefore predicated on the said 'decision-matrix'. Thus, there can be no question of freedom of choice as to either the pertinent facts, or the line to adopt as boundary.

A final, and significant, point on the conceptual nature of delimitation factors must be made. Insofar as they result from the exercise of a judicial discretion which assesses the pertinent elements of the 'factual matrix' with a view to concretising the optimisation *in casu* of the principles of maritime zoning and of equity, they amount to legally reasoned 'value-judgments'. To forge these 'value-judgments', courts ought to look into the body of case law and state practice. This means that adjustments to the equidistance-line are to be derived from comparative legal analysis with the relevant 'yardsticks' found in case law and state practice. The so-called 'freedom of choice' as regards the relevant circumstances and the delimitation methods is, from this standpoint, no more than the discretion inherent in the derivation of juridically relevant analogies. The average 'distance ratio' of a line previously used as boundary may provide guidance as to the amount of adjustment required to reach a non-inequitable line. And at the level of objectification, it must equally be noted that the 'value-judgments' that lead to the 'case-norm', i.e. the delimitation factors used as 'adjusters' of the provisional line, become susceptible to detailed scrutiny. Discussion as to their validity *in concreto* will therefore contribute to refinements in the law. The debate is thus transferred to the identification of the aspects of 'typification' on the basis of which to elicit relevant analogies, as well as their scope.

It is important to comprehend that there is no fundamental departure from legal theory here. Legal thought has a 'dual-flow': downwards from normative standards to the facts of each case; upwards from the individualisation of cases back to normativity. The measure of discretion allowed to courts depends thus on the density of the 'yardsticks'. The larger the body of practice, the less scope there will be for discretion. The slow accretion of a collection of a series of individual applications of these principles is essential to furthering

certainty, without abdicating of justice. A word of caution is nevertheless required. When resorting to 'yardsticks' found in state practice, the distinct nature of the 'negotiation process' and of the 'adjudication process' must be duly taken into account.

A fourth, not inconsiderable issue concerns the significance of the 'factual matrix' for this process, and the need to discuss the more relevant of the factual elements germane for the 'weighing-up process'. It should be emphasised that the facts enumerated, which appear divided in two main groups – those relating to the basis of entitlement and those related to the regime of exclusiveness, do not form an exhaustive list[529]. No such list can be produced. As long as a specific fact interweaves with the basis of entitlement or with a regime of exclusiveness in such a way as to bear upon the maritime rights and interests of states, or upon the exercise or enjoyment thereof, it is susceptible to becoming relevant for the delimitation process.

When examining these factual elements, this work has endeavoured to place them in a perspective compatible with the conceptualisation adopted. How the relevance of each fact is appraised cannot be isolated from how the fact is perceived. Further, inasmuch as the approach proposed relies heavily upon case law and state practice, and inasmuch as the formulation of delimitation factors resorts to them as 'yardsticks', this appears to be a conceptual prerequisite.

The notion of *representativeness of the coastal relationship* is intimately related to the argument that the equidistance-line is to be utilised as the obligatory starting point for maritime delimitation. Its relevance to assessments of the effect of prominent coastal features and of islands, as well as on the derivation and use of coastal façades is crucial. Another central idea is related to proportionality. The *ex post facto* test seems unjustified. Overriding the outcome of the multiple-factor appraisal on the basis thereof would confer on proportionality an absolute primacy, whilst dispossessing the former of its significance in the delimitation process. If conversely, the assumption is that no adjustments should be made *a posteriori* to the multi-factor appraisal that would render the test meaningless. This remains the paradox to which no proper answer has yet been given. One would submit that coastal length disparity, or its non-existence, ought to be factored into the 'decision-matrix' on the same terms as other facts, and side-by-side therewith[530]. Proportionality thus should be regarded as one factor in the multi-factor analysis. Proportionality is to be intrinsic,

(529) Paras.8.2., 8.3. *supra*.

(530) Notwithstanding this, should *ex post facto* proportionality assessments be undertaken, one would endorse the recourse to the concept of 'grossness factor' as a means for objectifying the identification of manifestly unreasonable situations. Further, emphasis should be put on the overlapping of entitlements (rather than on the overlapping of claims), and the notion of relevant area should be cautiously used.

not extrinsic, thereto. One final point deserves attention. Reasonableness of the boundary, whilst bearing in mind the circumstances *in casu*, also depends upon its relevance for the regime of exclusiveness to which the boundary applies. The relevance of a fact must be assessed in view of the zone-delimitation at issue. Whereas reasonableness in territorial sea delimitation cannot overlook state security and defence, thus elevating proximity to a key concern, in EEZ and continental shelf delimitation reasonableness revolves mainly around natural resources, thus focusing on access thereto. That surfaces from the exclusiveness regimes, and is also clear in the historical development of each of these zones.

Apart from these factual elements, attention should be drawn to what were named here "complementary delimitation elements". Comprised in this notion are various issues, of a hybrid nature, that result from an intertwining of factual and juridical elements, and without which the 'delimitation picture' could be incomplete. For example, the *delimitation area* is neither legally defined, nor a strict factual element. It amounts to a legal decision on the geographical context of the delimitation problem, which thus is paramount for assessing the scope to redress inequities, and for determining the 'factual possibilities' in relation to which the principle of equity should be applied. Another example relates to the single maritime boundary issue. What are the legal requirements in this regard? What is at issue is not a fact. Nor is it strictly a legal problem. But it suffices to say that not having coincident boundaries might result from the impact of a specific factual element. The question of continental shelf entitlements beyond 200 M is another element included here. Whatever the assessments made as to natural prolongation, they should not to be set apart from the legal-conceptual understanding of maritime delimitation.

As it was recognised that delimitation is primarily a practical exercise, which the theoretical aspects enshrined in a conceptualisation might risk obfuscating, a test study was undertaken with a view to validate the proposed conceptualisation. This is the fifth point of analysis in these conclusions.

The investigation of the maritime delimitation between Australia and East Timor is to be viewed in a functional perspective. It cannot be overemphasised that it entails no attempt to argue either that this delimitation case should be resolved by recourse to adjudication or that the boundary-lines arrived at are the only equitable solution. This case study was carried out with the sole purpose of illustrating the practical application of the conceptualisation offered for consideration. One of the reasons behind the choice of this case was the challenging complexity of its 'factual matrix', and the variety of problems posed thereby, which cover a wide range of issues that might arise in maritime delimitation. In carrying out such an investigation, it became possible to exemplify how the analysis of

multifarious factual elements in maritime delimitation could be undertaken. On another level, its idiosyncratic 'factual matrix' was decisive in corroborating the proposition that notwithstanding the uniqueness of each setting, maritime delimitation can be approached in general terms. It is also significant that this test study confirms the argument that the 'gap' between the identification of relevant considerations and the choice of a boundary-line may be bridged to a greater extent than is currently typical. By the same token, it lends weight to the proposition that state practice may provide valid 'yardsticks' in the quest for an equitable line, as long as it is resorted to with the required caution. With respect specifically to the decision-making process, this test case suggests other conclusions. The resort to a 'decision-matrix' (which does not necessarily have to be formalised in the decision) as a means to structure the information-analysis appears to provide a better basis for reasoning discourse, thus allowing better justification of the choices that are made in the delimitation process. In particular, the formulation of delimitation factors – emerging as conditions to fulfil or objectives to attain – through legally reasoned 'value-judgments' covering partial aspects of the delimitation problem, offers a sounder basis for justifying the choice of one line, as opposed to any other line, within the range of possible equitable solutions.

GENERAL CONCLUSIONS

Sitting at a crossroads between politics, law and technical knowledge, maritime delimitation is a multi-faceted subject. Having discussed and problematised a number of its aspects, this work has advanced propositions which contribute to further conceptualisation. The focus of attention was the legal determination and technical definition of boundaries. Broadly speaking, whilst attempting to conceptualise the concept of maritime delimitation, this study argued that debate about normative standards cannot be isolated from associated technical issues. Insofar as the practical implementation of maritime boundary delimitations depends thereon, from an epistemological standpoint that is an inevitable consequence.

As an academic endeavour, by nature analytical and investigative, this study has *inter alia* attempted to answer questions posed at the very outset. The thoughts now offered for consideration result from what ultimately turned into a quest for a conceptualisation capable of reconciling conventional and customary law, case law and state practice. At the end thereof, these influences have converged on two planes. First, maritime delimitation revolves around an obligation of result: achieving a non-inequitable solution. Secondly, the equidistance-special circumstances formula appears to be central to the 'finding' of that solution, and to be applicable *mutatis mutandis* to the delimitation of all maritime zones. How these propositions are to be understood legally and conceptually is the cynosure of these conclusions.

In the realm of maritime delimitation law, there seems to be an uncontested *acquis*, endorsed explicitly in recent case law: maritime delimitation is required where the maritime entitlements of two or more states overlap. Put differently, the overlapping of entitlements is the object matter with which maritime delimitation is concerned. A more difficult point is the understanding of the overlapping of entitlements, in particular its significance for the delimitation problem. This study has argued that maritime entitlements are *sub conditione* entitlements. Their enjoyment is subject to the non-existence of competing entitlements over the same area or part thereof. Should an overlapping of entitlements exist, what is at issue is a situation of concurrence of rights. Maritime delimitation is intended to address cases in which (at least) two states simultaneously hold equally valid, competing rights over a certain maritime area. Inexorably, this entails the 'amputation' of (at least) one of the concurrent entitlements, regardless of how that 'amputation' is weighed-up.

This implication emerges as a crucial political problem, to which a certain level of dispute seems inescapably bound. In seeking solutions, states are bound by a paramount legal obligation: that of Article 33(1) of the UN Charter, the resort to peaceful means of dispute settlement. And it must be noted that all means are equally valid. The proposition that, in maritime delimitation, negotiation has precedence over the other dispute settlement mechanisms should be quashed. It is not required under general international law, nor is it prescribed in Articles 15, 74(1) and 83(1) of the LOSC. It has been strongly argued that the reference to agreement in conventional law and case law amounts to no more than the rejection of the possibility to effect 'unilateral delimitations'. However, this tenet falls well short of prejudicing the prerogative of states to opt for whatever peaceful means best suit their interests. Furthermore, as the timing of negotiation might bear decisively on the outcome thereof, the decision as to when to negotiate should remain within the sphere of freedom of states. It is especially so as regards boundaries, for *prima facie* they have an *ad eternum* nature, and relate to a key aspect of states: territory.

The fact that negotiation is by far the most used means in maritime delimitation is revealing on a different level. States are averse to renouncing control over the outcome of delimitation. It is this very renunciation which is the hallmark of adjudication.

Whether a boundary is delimited by negotiation, or by adjudication, is significant in other respects. Negotiated boundaries result from a process characterised by trade-off, in which elements completely unrelated to the boundary might be weighed-up, and in fact be decisive. Within this process, states are endowed with a freedom that is restricted, if not exclusively, essentially by *jus cogens* (which encompasses no rules specific to maritime delimitation). It must be reiterated at this juncture that, as stated at the outset, delimitation *proprio sensu* is a problem posed only where no boundary has yet been established, either formally or tacitly. The fact that states are endowed with such a wide freedom explains the difficulty in asserting, on the basis of bilateral state practice, the existence of an *opinio juris*. Indeed, insofar as an *opinio juris* is supposed to reveal a rule *stricto sensu* – i.e. a 'definitive ought' as regards how the course of the boundary is determined, no such *opinio juris* has emerged hitherto. In contradistinction with negotiation, adjudication is a process whereby a solution must be reached, and more importantly justified, by reference to normative parameters. Judicial decision-makers have no freedom of choice in relation to either the boundary-line, or the considerations to be weighed-up. The sphere of discretion conferred on courts must be understood differently.

To elaborate upon this problem, one must first pause to answer a key question. What are the normative standards by which judicial decisions must abide? Here, one must

return to the point from which the ILC started. As Chapter 3 shows, the work of the ILC amounted to the progressive development of normative standards. By 1949, no such standards existed; or at least they were quite incipient or embryonic. At the juridical level, the difficulties were such that the ILC felt compelled to seek advice from geographers, those who had until then most closely examined maritime delimitation issues. In fact, the consultation with the Committee of Experts, while justified by the need for advice on technical issues, is also evidence of the incipient or embryonic stage of the law. The thorough study then conducted, in which political, legal and technical issues were duly taken into account, resulted in the *equidistance-special circumstances* formula, devised to apply to both territorial sea and continental shelf delimitations. Significantly, owing to the equity-related concerns raised during the ILC's debates, which were also explicitly mentioned by the Committee of Experts, it was noted in the comments to the draft articles that this formula was to partake of flexibility. No substantive changes to this understanding were instituted by the 1958 Conference.

The revival in the *North Sea* cases of the notion of equitable principles used in the Truman Proclamation is striking. First, this notion was mentioned during the ILC work, and it was concluded that neither was it part of customary law, nor was it suitable as a normative standard. Secondly, taking into consideration post-1958 state practice, it is difficult to understand how equitable principles could have become customary law in the 1958-1969 period. This study has argued that the Court used a double standard threshold in relation to the appraisal of state practice supporting the equidistance-special circumstances formula, and that supporting equitable principles. In no part does the Judgment show the existence of a settled, extensive and uniform state practice applying equitable principles. Thirdly, it is important not to overlook the fact that the concept of equitable principles was viewed, by those who first resorted thereto, as a concept broadly based on equidistance. This is shown in the work of Boggs, who was a member of the Committee of Experts. Finally, from the standpoint of the development of international law, it is well recognised that the work of courts is irreplaceable – this should have been a cardinal consideration. Having posited that equity was at the heart of maritime delimitation, the Court could easily have justified the use of the equidistance-special circumstances rule. And by interpreting it in a way that would allow the departure from equidistance to favour Germany, it would have furthered the development of international law. The teleological substratum of the notion of special circumstances (ensuring that the boundary would not be manifestly inequitable) offered enough room for discretion. As it stands, the reasoning discourse seems flawed at two key points: the idea that recourse to 'equitable principles' (whose contents

remained unexplained) was part of customary law; and the assertion that natural prolongation (a crudely defined concept) was a normative standard in continental shelf delimitation (when it was in effect an entitlement criterion).

That an equity-oriented interpretation of the equidistance-special circumstances rule would satisfy the demands for reasonableness, particularly as to avoiding inequitable effects of geographical features, became clear with the 1977 *Anglo/French* arbitration. This award would be elevated, more than 15 years later (with the *Jan Mayen* case), to a cornerstone of the contemporary interpretation of maritime delimitation law. Its contribution extends well beyond the demonstration that the equidistance-special circumstances formula was a legally sound basis for 'finding' reasonable boundary-lines (to delimit those areas not covered by the parties' agreement, which the Tribunal homologated). Whilst asserting that it did not have *carte blanche* in the search for the boundary-lines, the Tribunal justified its decision within its sphere of discretion by reference to state practice. As it emphasised, rather than having recourse to a totally different approach, state practice showed a preference for variants of equidistance. The enclaving solution in the Channel Islands, and the half-effect solution in the Scilly Isles, stem from this approach. Regretfully, this award came too late to override the effect of the *North Sea* Judgment.

The debates in the Third Conference, which were already taking place by the time this arbitration was decided, were dominated by a 'radicalisation' of viewpoints as regards the normative standards of delimitation. Besides often being tainted by concerns related to specific maritime boundary disputes, they were clearly buttressed by the misperception that two opposing and irreconcilable interpretations of normative standards were at issue. This explains the creation of the two negotiating groups – one supporting *equitable principles*, another supporting *equidistance* – and should be taken as a significant contextual point that shapes the interpretation of the delimitation provisions of the LOSC.

What conclusions can then be reached in relation to these provisions? As regards Article 15 (territorial sea), two points may explain why the use of the equidistance-special circumstances rule was not strongly opposed. Near the coast, the potential inequitable effect of equidistance is in practical terms negligible. Because this was explicitly asserted in the *North Sea* cases, and because this Judgment seemed to be a *vade mecum* for the members of the Equitable Principles Group, the 'discrediting' of the combined rule seems not to have extended to territorial sea delimitation. With respect to Articles 74(1) and 83(1), which deal with EEZ and continental shelf delimitation, the agreement was reached virtually at the end of the Third Conference. Chapter 5 leaves no doubt as to the outcome of the doctrinal quarrel. Neither negotiating group prevailed. Those provisions incorporated what the two

groups had in common. Substantively, they lay down an *obligation of result*: to achieve an equitable solution. No specific normative standard was adopted to govern how that solution is to be attained. Put differently, no *obligation of means* was consecrated. Indeed, the *renvoi* to international law provides no practical guidance.

One must thus adhere to the view that the normative content of Articles 74(1) and 83(1), with respect to the course of the boundary-line, is confined to an obligation of result. And this obligation of result reflects, as observed in the *Jan Mayen* case, the requirements of customary law as to the delimitation of the continental shelf and EEZs. Suffice it to say that the views of both negotiating groups converged on this matter. The outstanding issue concerned the means whereby the course of the boundary was to be 'found'. Subject of lengthy debates in the Third Conference, this issue remained unresolved in the LOSC. Despite the different phraseology used in Article 15 and in Articles 74(1) and 83(1), therefore, it must not be unquestioningly assumed that they consecrate opposing, or even different, substantive normative standards.

Through a comparative analysis another proposition may be advanced. The mention of decisions "on the basis of equity and in the light of all relevant circumstances" made in Article 59 – and similarly in Articles 69(1) and 70(1) – does not appear in Articles 74(1) and 83(1). Because *legis quo volet dixit, quod non volet tacet*, one conclusion is possible. Maritime delimitation is to be effected by means (on a basis) other than equity alone; which signifies that reaching an equitable solution is not tantamount simply to applying equity. Otherwise the LOSC would have utilised the phraseology of the former articles.

What the *renvoi* to international law means is to clarify that the 'discovery' of the boundary-line is governed by a normativity laid down outside the LOSC. This normativity is to be identified in other sources of international law, in particular treaties, custom, and general principles of law. Various questions thereby arise. One concerns the application of successive treaties. How do the LOSC and the Geneva Conventions relate in this respect? Because the LOSC incorporates no general clause of supersession, and because resort to the equidistance-special circumstances formula is not contradictory with achieving an equitable solution, it is suggested that Article 83(1) of the LOSC and Article 6 of the CS Convention may be applied conjointly. Weight is lent to this proposition by recent case law, which has delimited 'equitable maritime boundaries' by applying the combined equidistance-special circumstances rule.

Another point concerns those cases in which either one of the disputants is not party to the CS Convention, or the issue refers to an EEZ, a fisheries zone, or a single maritime boundary. Insofar as there is no applicable treaty law, one would have to turn to customary

law. The mainstream view affirms that customary law requires that delimitation be effected in accordance with equitable principles, taking account of all relevant circumstances. With all due respect, one ought to disagree. This research has verified that there is no settled, extensive and virtually uniform practice of application of 'equitable principles' – either before or after the *North Sea* cases. There can be therefore no question of existence of an *opinio juris*. Having said this, it must be emphasised that this does not amount to an argument that reaching an equitable solution is not part of customary law. Two different issues ought to be distinguished.

No argument can be raised against the idea that achieving an equitable solution is part of customary law on EEZ and continental shelf delimitation. This view encounters no reservations amongst states, as was shown during the Third Conference, and is patent in bilateral state practice. However, this concerns the result of the delimitation. The argument advanced here is that no *opinio juris* has emerged in relation to the means applicable to attain equitable solutions. The cleavage that arose in the Third Conference is irrefutable evidence in that respect. If further evidence were required, one only needs look to state practice, which overwhelmingly resorts to equidistance, or variants thereof. This hampers the emergence of a settled, extensive and uniform practice on the basis of which to found the argument that equitable principles are part of customary law.

Should it then be concluded that there are no applicable normative standards? To answer this question, several points must be considered. First, the vast majority of maritime boundaries are to some extent equidistance-related; equidistance appears the starting point for delimitation. This has been noticeable in state practice, and it has been an increasing trend in case law. Secondly, it is undoubted that inequitable boundaries are to be avoided. The logical corollary is that a certain measure of flexibility – designed to avoid manifest hardship – is inherent in the determination of maritime boundaries. Thirdly, it must be emphasised that certainty is a vital constituent of normativity. Flexibility can never result in the obliteration of certainty. Otherwise one could not properly speak of *Law*.

The question for review – which led to this consideration of the normative standards of delimitation – it should be recalled, was concerned with the proper understanding of the sphere of discretion conferred on courts. From a theoretical standpoint, this issue is intertwined with the three vectors enumerated above: the recourse to equidistance, and its debated normativity; the role of equity, and the requirement of flexibility; and the fact that a certain level of certainty is inherent in normativity. The route taken in this study revolves around the concept of *principle of law* (an 'ideal ought'), which is to be distinguished from that of rule *stricto sensu* (a 'definite ought').

The proposition submitted may be summarised as follows. The normative standards with which the 'discovery' of equitable boundaries is to be underpinned are two principles of law: the principle of *maritime zoning*, of which 'closer proximity' is a corollary; and the principle of *equity*. In a concrete case, the boundary is to be determined on the basis of a 'case-norm' that stems from the optimisation of these standards *in concreto*. The discretion of courts as to the choice of line does not amount to freedom of choice because, ultimately, that choice is to be made through an argument of principle whereby the factual circumstances *in casu* are weighed-up in the optimisation of the said two principles.

The principle of maritime zoning refers to the spatial allocation of jurisdiction in the public order of the oceans, and reflects the conduct of coastal states towards maritime areas off their coasts and adjacent thereto. Proximity, which has always been linked to this 'allocation' of maritime jurisdiction, is today the primary basis for maritime entitlements. Exclusiveness areas (to which correspond a prevalence of the rights and interests of coastal states) are distinguished from inclusiveness areas (where the rights and interests of all other states are prevalent) primarily by means of geographical proximity. Maritime delimitation is a derivative of maritime zoning. It appears as a question of competing rights and interests of two (or more) states over the same area. Analogically, it is only logical that 'closer proximity' (a corollary of the primacy of proximity in maritime zoning), becomes a key reference point for resolving the issue. The legal notion of equidistance (as distinct from the technical method) thus appears a normative standard, which prescribes that all points at sea positioned in the area of overlapping entitlements which are closer to state A than to state B ought *prima facie* to be subject to the sovereignty or jurisdiction of state A.

With respect to the principle of equity, it is important to realise that it stems from a concept – equity – that is by nature 'indefinable'. Especially in international law, its precise definition remains elusive. Equity, one would argue, is the *alter ego* of justice, its workable expression. Often described as 'a sense of justice' that can only be materialised in concrete cases, equity may nevertheless appear as a normative veil, if a distinction is made between *individual equity* and *normative equity*. Authority for this view may be detected in case law, in conventional instruments, and in academic writings. Indeed, the normative refinement of equity in maritime delimitation is irrefutable. Its 'ideal ought' is the rejection of manifest inequity. It prescribes that, considering those factors which, *in casu* and according to the substantive legal regime of the maritime zones to be delimited, might bear on the rights and interests of states with overlapping entitlements, the boundary delimited between two states must not be unreasonable (i.e. manifest hardship is to be avoided). More than ensuring 'positive equity' (as an expression of distributive justice), the focal point is avoiding gross

unreasonableness. Besides the obligation of result consecrated in both conventional law and customary law, in terms of means this principle entails a certain discretionary power as to the choice of boundary-line, and the corresponding assessment of pertinent facts.

Principles are however unsuitable for providing concrete answers to concrete cases. As 'ideal oughts', they offer broad normative guidance. It is only when the 'factual matrix' *in casu* is considered that their contents are moulded. When two principles are applicable, none being superior, this signifies that they have to be optimised. The impact of each of them is to be maximised by reference to their relative relevance in the light of the factual circumstances. Such an optimisation is to be prosecuted via the three vectors of the *maxim of proportionality*: appropriateness, adequacy, and proportionality *stricto sensu*. It is through this process that the 'case-norm' is 'found'. In maritime delimitation, the optimisation of the two principles is tantamount to a quest for a non-inequitable boundary – the obligation of result – on a sliding scale orientated along two axes representing the two principles. Where equidistance yields a reasonable boundary, little or no adjustment is required. The principle of maritime zoning is dominant. Where the reasonableness of equidistance decreases the adjustment required to reach a non-inequitable boundary increases. The emphasis then shifts to the principle of equity.

From a conceptual standpoint, this proposition seems to explain better than any other the normative aspects of maritime delimitation. To begin with, it offers a conceptual framework that explains why the equidistance-special circumstances formula was adopted by ILC, why it reflects state practice, and why it is consonant with the recent reasoning utilised by courts to adjudicate boundaries. Building on the *Anglo/French* arbitration, the *Jan Mayen* Judgment affirmed that, in the equidistance-special circumstances formula, the use of equidistance is subject to the absence of special circumstances (which might justify a different line). And it noted that, where these circumstances existed, state practice has opted for solutions based on modifications or variants of equidistance. Further, the Court emphasised the inevitable tendency towards the assimilation of the concepts of 'special circumstances' and of 'relevant circumstances', in the sense that they both envisage the achievement of an equitable result. The sliding scale mentioned above reflects the three points made by the Court: (1) equidistance is the starting point; (2) departure therefrom is to take place only in the presence of special circumstances (i.e. where the line is manifestly inequitable in the light of relevant facts); (3) the equitable boundary is to be achieved primarily by modifying or varying equidistance. Significantly, this is the understanding of the combined formula that the ILC had. Geography (maritime zoning) is to be balanced-up

with justice (equity) on the basis of a rule whereby equidistance is tempered by an 'escape clause' inspired in considerations of reasonableness.

This proposition also explains the converse problem. If in the light of pertinent facts equidistance yields an extremely unreasonable boundary, the principle of equity becomes so dominant that the boundary adopted is only remotely related to equidistance.

The distinction between, on the one hand, EEZ and continental shelf delimitations and, on the other hand, territorial sea delimitations is another point that deserves attention. One would argue that there is no difference as regards the applicable normative standards. What changes is the zonal regime to be considered. Whereas the EEZ and the continental shelf zonal regimes emphasise primarily natural resources, in respect of the territorial sea the relevance of security *lato sensu* is crucial. As the references differ, 'reasonableness of the boundary' appears under a distinct light. The applicable normativity however, remains unchanged. Apparently subscribing to this approach, the *Qatar/Bahrain* Judgment describes the operation of the equidistance-special circumstances rule in territorial sea delimitation by resorting to the reasoning of the *Jan Mayen* Judgment, which refers to continental shelf and fisheries zone delimitation.

Discretion (thus flexibility) is an unavoidable ingredient of maritime delimitation. How is that to be understood in judicial decision-making? Or from another viewpoint, how is the 'gap' between legal reasoning and choice of line better bridged? Out of this work emerges a conceptually coherent answer to this problem, one that steers the flexibility required to achieve a reasonable solution away from the perspective of 'freedom of choice of line'. By postulating that the crux is 'optimisation of principles', the 'case-norm' on the basis of which the line is 'found' appears as the result of legally relevant 'value-judgments' whereby pertinent facts are weighed-up in the light of two integrated normative standards. On the legal-philosophical level, it might be argued that judges have in fact an interstitial law-making power designed to fill gaps in the legal system, and that discretion often relates to such gaps. However, it might also be contended that legal systems as such have no gaps, that judges have no law-making power, and that case-rulings must be arrived at through the 'wider' normative framework – which encompasses broad principles enshrined (though not explicitly stated) in positive law. It is the latter view that this study endorses. Although this might have no practical relevance on the outcome of cases, it is doubtless that it will shape the way in which reasoning discourse is structured.

The 'weighing-up process', the process whereby the 'factual matrix' *in concreto* is appraised by reference to the principles of maritime zoning and of equity, is a realm in which normativity intertwines with the discretion conferred upon courts – to such an

extent that the two become virtually indistinguishable. One line must however not be crossed. In maritime boundary adjudication, there is no such thing as a freedom of choice of relevant circumstances, and applicable methods. No doubt, courts are endowed with a sphere of discretion in both the assessment of the factual circumstances, and the choice of boundary-line. However, as the *Anglo/French* award notes, they do not have *carte blanche.* Each and every decision-making step ought to be legally reasoned and justified. Hence, equity should be objectified by reference to previous case law, and to state practice (as *opinio aequitatis* of a quasi-normative nature). Prior delimitations should be central to the legally relevant 'value-judgments' from which the 'discovery' of a line is to stem.

Premised on the idea that delimitation is a multi-factor analysis, and examining the theory of decision-making, it was argued that *multicriteria decision-making* be utilised as a tool to implement a process tailored to objectify and structure decision-making through methodical relational information-processing. With it, *delimitation factors* appear as conditions to fulfil, or objectives to attain. Each factor consists of an assessment of an element of the 'factual matrix', construed in terms of optimisation of the governing legal principles. Once all factors are formulated, they are included in the 'decision-matrix' of the case. By rationalising the problem, this decision-model supports reasoned choices through the formulation of factors which are deemed to be relevant by the judicial decision-maker in a given instance – account taken of the normative framework.

The adjustments to apply to the provisional equidistance-line are to be 'discovered' through the 'decision-matrix'. The delimitation factors determine the specific adjustments, and thus concretise the notion of reasonableness of the boundary. Since the 'factual matrix' varies in each case, what is reasonable in a given instance also varies, meaning that the weight of each fact cannot be extrapolated easily. This could signify that courts are entitled to formulate and weigh-up each fact as they see fit. More likely, international law requires that the sphere of discretion of courts be interpreted restrictively. Bearing this in mind, the weight of each fact ought to be estimated through 'value-judgments' predicated on analogies between 'factual matrices', which are to use the solutions adopted in case law (preferentially) and in state practice (as *opinio aequitatis*) as 'yardsticks'.

A further point concerns equitable principles, and their normativity. Case law and those who endorse the 'equitable principles doctrine' argue that these are the substantive normative standards applicable to maritime delimitation. The *Gulf of Maine* and the *Libya/Malta* cases enumerated some of these so-called principles: (i) the land dominates the sea; (ii) the equal division, in the absence of special circumstances, of the overlapping of entitlements; (iii) prevention of any cut-off of projections of the coast; (iv) drawing due

consequences from any inequalities in the extent of coasts into the delimitation area; (v) non-encroachment upon the maritime areas of another state; (vi) non-refashioning of geography; (vii) due respect to all relevant circumstances; (viii) equity does not necessarily imply equality; (ix) rejection of distributive justice.

It is argued that these are not true normative standards. They are simply expressions of normativity reflecting specific points along the sliding scale mentioned. For instance, whereas 'the land dominates the sea' reflects a point to the left of the sliding scale, in which maritime zoning predominates, 'due respect to all relevant circumstances' appears more to the right, where equity prevails. Speaking of 'cut-off of projections', or of 'inequalities in the extension of the coast into the delimitation area', also entails an intrinsic reference-line: the equidistance-line – which is to be tempered with equity. Reasoning discourse and argumentation ought therefore not to rely on the notion of equitable principles. For one thing, they add nothing to the true 'normative portmanteau' constituted by the principles of maritime zoning and of equity. For another, to the extent that they entail the argument that equidistance is not the obligatory starting point for delimitation, they not only introduce uncertainty in the discourse, but also lack a conceptual and comprehensive explanation of recent jurisprudence and state practice.

Finally, we turn, however briefly, to the issue of the technical aspects. To guarantee that the boundary-line is defined with technical accuracy, proficient expert advice must be obtained. Serious errors might occur should that not be the case, and lead to further dispute, as happened in the *Anglo/French* arbitration. Amongst all issues, one deserves particular attention. For conceptualisation purposes, it is essential to understand that the overwhelming majority of solutions adopted in case law and state practice are technically modifications or variants of equidistance. Even *ad hoc* solutions are in some measure often equidistance-related. And because whilst resorting to 'yardsticks' the technical 'foundation' of lines might need to be clarified, the work of technical experts can be crucial. Its role in the delimitation process should be viewed from two different angles: (a) while the decision-making process is underway; (b) after the course of the boundary is determined. During the decision-making process, the expert should provide technical information on a wide range of issues: possible solutions for the boundary-line; alternative choices as to, for example, the general direction of the coasts, coastal lengths, area divisions, partial-effects; technical difficulties that might surface; questions concerning the practical implementation of decisions. Once the decision is made, the technical expert is expected to 'implement' it, by translating the boundary determined into a technically accurate line, drawing attention if necessary to possible misunderstandings (notably those related to 'technically polysemic

terminology', e.g. straight-line, parallel, half-effect). The key tenet is that the technical definition of the line defers to its political-legal determination, which can never be overstepped.

The significance of technical information in maritime delimitation, and ultimately of technical experts, is illustrated in this study. Because it was argued that the discretion of courts was to be exercised by reference to relevant 'yardsticks' we were left with one problem. How to compare boundaries in terms of adjustment to equidistance? The route round this difficulty was premised on the equiratio method, from which the notion of average 'distance ratio' was derived.

In short, since every point of a boundary is located at a certain distance from the nearest basepoints on the two coasts involved, one can refer to 'distance ratio' as the ratio between these two distances. Taking into account a number of points along the line (i.e. the line is to be 'sampled') it is possible to compute an average of the 'distance ratio' values on each of these points. For examples, because on an equidistance-line the distance to the nearest basepoints on each side is always the same, the 'distance ratio' on each point is 1.0, as is its average 'distance ratio'. Being equiratio-lines defined as a line where the 'distance ratio' is constant throughout, equidistance-lines are in effect a particular case thereof. What is significant is that the notion of average 'distance ratio' allows comparative assessments of the weight given to the nearest basepoints on each coast. To the figure 1.0 corresponds to an equal weight. If a point on a boundary is at 100 M from state A, and 90 M from state B, the 'distance ratio' B/A is 0.9, which means that the weight given to the basepoint of state B is 90% of that given to state A's basepoint. A non-inequitable boundary may thus be objectified by analogies drawn with previous solutions on the basis of the notion of average 'distance ratio'. The 'discovery' of the boundary is further reasoned by recourse to previous 'validated precedents'.

There is no such thing as a complete study. However comprehensive and thorough, it will always leave something unanswered, and it will always leave scope for further and deeper investigation. This study is no exception. Further research is required, for example, to obtain a more comprehensive dataset on the use of the notion of average 'distance ratio' as means for objectifying equitableness. Were we to choose one ultimate thought, we would argue for the existence of one '*maritime delimitation rule*'. Heretical as it may sound, one would submit that the normative framework of maritime delimitation is encapsulated in the equidistance-special circumstances rule. No sounder basis for balancing-up certainty and justice, and for achieving *equilibrium* between the rights and interests of those states whose maritime entitlements overlap, has yet been developed.