Maritime Delimitation Cases before International Courts and Tribunals

Tullio Scovazzi

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A. The Role of Jurisprudence in Delimitation of the Continental Shelf and the Exclusive Economic Zone

1 Articles 74 (1) and 83 (1) United Nations Convention on the Law of the Sea of 1982 (‘UN Convention on the Law of the Sea’), relating to the delimitation of, respectively, the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts, present a rather vague character (Boundaries). They merely provide that delimitations shall be effected by agreement, on the basis of international law, in order to achieve an equitable solution. The Convention drafters chose to leave unresolved the substance of the very controversial issue of delimitation of marine jurisdictional zones beyond the territorial sea areas, in order to avoid the opening of a Pandora’s box which could have precluded the adoption of the Convention itself (Maritime Jurisdiction).

2 Article 6 (1) Convention on the Continental Shelf of 1958 (‘Continental Shelf Convention’) referred to the so-called ‘equidistance/special circumstances’ rule. It provided that, in the absence of agreement and unless another boundary line was justified by special circumstances, the boundary is given by the line every point of which is equidistant from the nearest points of the baselines of the territorial sea of the States concerned (equidistance line). While more precise than the UN Convention on the Law of the Sea regime, the Continental Shelf Convention left room for a certain margin of flexibility. Exceptions to the rule of the equidistance line were envisaged, if special circumstances (but no answer was provided as to what such circumstances should be) justified another boundary line (but no answer was provided as to how such a line should be drawn).

3 The flexibility of the Continental Shelf Convention and the evasive character of the UN Convention on the Law of the Sea explain why international jurisprudence, even with some inevitable discrepancies between one decision and another, is playing a creative role in the progressive development of rules of customary international law applicable to the delimitation of the continental shelf or the exclusive economic zone. After the seminal judgment rendered by the International Court of Justice (ICJ) on 20 February 1969 in the North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), the ICJ decided the disputes between Tunisia and Libya in the Case concerning the Continental Shelf (24 February 1982, between Canada and the United States in the Gulf of Maine case (12 October 1984; ‘Gulf of Maine Case’), Gulf of Maine Case), the Continental Shelf Case (Libyan Arab Jamahiriya/Malta) (3 June 1985), the Land, Island and Maritime Frontier Dispute Case (El Salvador/Honduras: Nicaragua Intervening) (11 September 1992; ‘Maritime Frontier Case [El Salvador v Honduras]’; Land, Island and Maritime Frontier Dispute Case [El Salvador/Honduras: Nicaragua Intervening]), the Maritime Delimitation between Greenland and Jan Mayen Case (Denmark v Norway) (14 June 1993), the Maritime Delimitation and Territorial Questions (16 March 2001; ‘Case between Qatar and Bahrain’; Maritime Delimitation and Territorial Questions between Qatar and Bahrain [Qatar v Bahrain]), and the Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria) (10 October 2002). In another instance, the ICJ found that it had no jurisdiction to entertain an application filed by Greece on the delimitation of the continental shelf appertaining to Greece and Turkey in the Aegean Sea (Judgment of 19 December 1978). Arbitral tribunals have decided in the Continental Shelf Arbitration (France v United Kingdom) (30 June 1977), on the Maritime Boundary between Guinea and Guinea-Bissau Arbitration (‘Guinea v Guinea-Bissau’) (14 February 1985), on the Maritime Boundary between Guinea-Bissau and Senegal Arbitration and Case (Guinea-Bissau v Senegal) (31 July 1989), between Canada and France on the Delimitation of the Maritime Areas (10 June 1992), in the Eritrea, Yemen Arbitration’ (17 December 1999), and between Barbados and Trinidad and Tobago (11 April 2006).

4 Moreover, rules of international law have been applied in domestic cases, such as the dispute between Dubai and Sharjah, two Member States of the United Arab Emirates (UAE), decided on
October 1981 by an arbitral tribunal (hereinafter: ‘Dubai-Sharjah Border Arbitration’) and the dispute between Newfoundland-Labrador and Nova Scotia, two provinces of Canada, decided by an arbitral tribunal on 26 March 2002. The report compiled in 1981 by the Conciliation Commission on the continental shelf between Iceland and the Norwegian island of Jan Mayen should be added as a quasi-jurisdictional instrument (Conciliation). Other decisions are likely to be rendered in the future, as cases on maritime delimitations are presently pending before the ICJ involving, respectively, Nicaragua and Honduras (application of 8 December 1999; Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea Case [Nicaragua v Honduras]), Nicaragua and Colombia (application of 6 December 2001; Territorial and Maritime Dispute Case [Nicaragua v Colombia]), Romania and Ukraine (application of 13 September 2004).

5 In short, as regards the procedure to achieve a maritime boundary

no maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence. (Gulf of Maine Case para. 112) (see also North Sea Continental Shelf Cases para. 8)

As regards the substantive rules to be applied, the imprecise formula used in Arts. 74 (1) and 83 (1) UN Convention on the Law of the Sea

allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of the body of legal rules. (Barbados-Trinidad and Tobago Arbitration para. 222) (see also Sources of International Law)

B. Equidistance as the Starting Point for Delimitation

6 When deciding the North Sea Continental Shelf Cases, the ICJ disregarded a delimitation based on the equidistance line, which, in the specific case, would have led to an inequitable result due to the concavity of the coastline of the Federal Republic of Germany. The ICJ found that there was no single method of delimitation that was in all circumstances obligatory for the Parties concerned. In departing from geometry (that is, the equidistance line), the ICJ entered the field of equity or equitable principles (Equity in International Law). According to the ICJ, ‘it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles’ (para. 85). This paved the way for the idea of the equitable solution that was subsequently retained by other judgments and the UN Convention on the Law of the Sea itself. While equidistance in general was not discarded by the ICJ, it was considered as one among various methods that, by itself or in combination, could be employed depending on the specific circumstances.

7 In fact, the equidistance line can be considered as the logical starting basis for the determination of any specific maritime boundary. Resort to such a line leads to a delimitation that can be carried out in a simple and precise way. However indented or fringed by islands the coastlines involved may be, there is always one and only one equidistance line, whose construction results from geometry and can be produced through graphic or analytical methods. From the logical viewpoint, the best way to determine the equity of a solution is to draw the equidistance line, as a criterion for reference, and then evaluate whether such delimitation does lead to an equitable solution. The first step in any process of delimitation is the drawing of the equidistance line, even if
the final result may be at variance with such a line.

8 In the *Gulf of Maine Case* (para. 222) and the *Continental Shelf Case (Libyan Arab Jamahiriya/Malta)* (paras 68 and 71), equidistance was employed by the ICJ as a first provisional step in a process to be continued by other operations. In proceeding to the *maritime* delimitation between the opposite coasts of Greenland and Jan Mayen, it made the following remark:

> [I]n respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention [= Continental Shelf Convention], but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether ‘special circumstances’ require any adjustment or shifting of that line. (*Case between Denmark and Norway* para. 51)

The ICJ followed the same approach in the *Case between Qatar and Bahrain* (para. 230) and the *Boundary between Cameroon and Nigeria Case*

The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’. (para. 288)

As remarked in the *Barbados–Trinidad and Tobago Arbitration*:

> the determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result. (para. 242)

**C. The Role of Geographical Circumstances**

9 In *maritime* delimitations geographical circumstances, while not totally excluding other kinds of factors, play a predominant role. The visual examination of maps depicting the area where the delimitation is to be effected is more important than other kinds of factors and data. Most decisions by international courts and tribunals underline the role of geographical circumstances as the basic factor to be considered in drawing the boundary line. As a consequence of the principle that the land dominates the sea, *maritime* jurisdictional zones are legally considered as accessories to sovereignty on land, and the configuration of its coast is the factual source of the rights that a State can exercise over the adjacent areas of waters or seabed. As remarked by the ICJ:

> the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. (*North Sea Continental Shelf Cases* para. 96) (see also *Case between Qatar and Bahrain* para. 185)
The application of equitable principles cannot be brought to the extreme consequence of refashioning the geographical nature of the coastline of the States concerned. As stated in the North Sea Continental Shelf Cases:

equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. ... It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result. (para. 91)

According to the decision in the Continental Shelf Arbitration (1977), ‘the function of equity ... is not to produce absolute equality of treatment, but an appropriate abatement of the inequitable effects of the distorting geographical feature’ (para. 251).

In the Boundary between Cameroon and Nigeria Case, the ICJ held that:

the geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation. (para. 295)

The priority of geographical circumstances, with respect to other kinds of factors, is particularly evident where a unique boundary for both the continental shelf and the exclusive economic zone (so-called single maritime boundary) has to be effected. In this case, geographical circumstances based on distance or configuration of the coast are best suited because of their more neutral character with respect to factors that are only related either to the seabed (such as geological or geomorphological factors) or the superjacent waters (such as biological or ecological factors) (see also International Seabed Area; International Seabed Authority [ISA]). In the Gulf of Maine Case, the Chamber of the ICJ made the following remarks:

In reality, a delimitation by a single line, such as that which has to be carried out in the present case, i.e., a delimitation which has to apply at one and the same time to the continental shelf and the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. (para. 194)

It is, accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect. (para. 195)

Similar considerations were made in the Case between Canada and France (at 1146 para. 46) and in the Case between Qatar and Bahrain (paras 224–30). Even in a case where only the continental shelf was to be delimited, the ICJ stressed that greater importance shall be given to elements, such as the distance from the coast, that are common to both the concepts of continental shelf and exclusive economic zone

In the view of the Court, even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 Convention
[= UN Convention on the Law of the Sea] demonstrates, the two institutions—continental shelf and exclusive economic zone—are linked together in modern law. Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the seabed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State. This does not mean that the concept of continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts. (Continental Shelf Case [Libya/Malta] [1985], para. 33)

13 It is true that the approach based on a provisional equidistance line has not been followed in all the cases adjudicated by international tribunals. Completely different approaches appear in the Continental Shelf Case (Tunisia/Libya) and the Case between Canada and France, which may however be criticized because, as a very consequence of having disregarded equidistance as a starting point, the boundary lines drawn by the ICJ depart in an appreciable way from the geographical reality of the coastlines involved in the delimitation.

D. Kinds of Geographical Circumstances

14 The main geographical circumstances, which have played a basic role in the settlement of disputes on maritime boundaries are the length and shape of the respective coastlines as well as the presence of islands. The existence of third States in the area to be delimited has also been taken in consideration.

1. Length and Shape of Coastlines

15 As regards the length and shape of the coast, if two linear coasts face one another or if the effect of irregularities along one coastline is broadly balanced by the effect of irregularities along the other, the application of the method of equidistance generally results in an equitable delimitation. An equidistance line was drawn in the Continental Shelf Arbitration (1977) with respect to the continental shelf boundary in the English Channel (para. 103) and in the Case between Qatar and Bahrain with respect to a single maritime boundary extending seawards into the Arabian/Persian Gulf (para. 247). In the Eritrea–Yemen Arbitration, the tribunal made the following remark:

It is a generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention [= UN Convention on the Law of the Sea], and in particular those of its Articles 74 and 83 which respectively provide for the equitable delimitation of the exclusive economic zone and of the continental shelf between States with opposite or adjacent coasts. Indeed both Parties to the present case have claimed a boundary constructed on the equidistance method, although based on different points of departure and resulting in very different lines. (para. 131)

In the Dubai–Sharjah Border Arbitration, the tribunal applied equidistance to a lateral delimitation with respect to a coast where no geographical features were present that would unduly distort an equidistant line. In the Boundary between Cameroon and Nigeria Case, the ICJ did not consider that the configuration of the coastlines relevant to the delimitation represented a circumstance that would justify the shifting of the equidistance line:

Although certain geographical peculiarities of maritime areas to be delimited may be taken into account by the Court, this is solely as relevant circumstances, for the purpose, if
necessary, of adjusting or shifting the provisional delimitation line. Here ... the Court is not required to take all such geographical peculiarities into account in order to adjust or shift the provisional delimitation line. (para. 295)

16 On the contrary, equidistance may lead to an inequitable result if the coastline of a State involved in the delimitation is concave or convex. As stated by the ICJ in the North Sea Continental Shelf Cases:

in the case of a concave or receding coast as that of the Federal Republic of Germany, the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose, to take the form approximately of a triangle with its apex seaward and, as it was put on behalf of the Federal Republic, ‘cutting off’ the coastal State from the further areas of the continental shelf outside of and beyond this triangle. The effect of concavity could of course equally be produced for a country with a straight coastline if the coasts of adjacent countries protruded immediately on either side of it. In contrast to this, the effect of coastal projections, or of convex or outwardly curving coasts such as are, to a moderate extent, those of Denmark and the Netherlands, is to cause boundary lines drawn on an equidistance basis to leave the coast on divergent courses, thus having a widening tendency on the area of continental shelf off that coast. (para. 8)

The ICJ found that such a distortion of the consequences of a natural geographical feature (concave or convex coastline) had to be remedied or compensated, as it was itself creative of inequity. Instead of relying on the equidistance line, the ICJ decided that the Parties had to delimit the continental shelf according to the method of proportionality, that is

a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline. (para. 101)

17 Where the method of proportionality is applied, instead of the shape, the course of the boundary line is influenced by the length of a coastline, as measured according to its general direction, without following all the sinuosities. As noted in the Barbados–Trinidad and Tobago Arbitration:

the orientation of coastlines is determined by the coasts and not by baselines, which are only a method to facilitate the determination of the outer limit of the maritime zones in areas where the particular geographical features justify the resort to straight baselines, archipelagic or otherwise. (para. 334)

The coastlines to be taken into consideration for the purpose of the ratio of proportionality are not the whole coastlines of the two States, but only those which determine the overlapping of the respective jurisdictional zones (see Continental Shelf Case [Tunisia/Libya] para. 75; but for a broader approach see Barbados–Trinidad and Tobago Arbitration, paras 329–31). For the same purpose, the seabed below the territorial seas and below the maritime internal waters must also be included in the calculation, even though it does not belong to the continental shelf in strictly legal terms:

It should be reaffirmed that the continental shelf, in the legal sense, does not include the sea-bed areas below territorial and internal waters; but the question is not one of definition, but of proportionality as a function of equity. The fact that a given area is territorial sea or internal waters does not mean that the coastal State does not enjoy 'sovereign rights for
the purpose of exploring it and exploiting its natural resources'; it enjoys those rights and more, by virtue of its full sovereignty over that area. Furthermore, the element of proportionality is linked to lengths of the coasts of the States concerned, not to straight baselines drawn round those coasts. (*Continental Shelf Case [Tunisia/Libya] para. 104*)

18 In several cases, proportionality was applied as a test of the equitableness of a delimitation achieved by other means. A disparity or disproportion between the length of the relevant coasts determined a shifting of the equidistance line in favour of the State whose coasts were longer in the *Gulf of Maine Case* (para. 222; the ratio between the relevant coasts of the US and Canada was 1.38 to 1), the *Continental Shelf Case (Libya/Malta)* (1985) (paras 68 and 73; the ratio between the relevant coasts of Libya and Malta was 192 to 24), and the *Case between Denmark and Norway* (para. 61; the ratio between the relevant coasts of Greenland and Jan Mayen was 9 to 1). In the *Continental Shelf Arbitration (1977)*, the ICJ observed that the ratio between the Canadian (Newfoundland and Nova Scotia) and French (Saint-Pierre-et-Miquelon) coastlines in the region was 15.3 to 1, while the ratio between the respective *maritime* areas was 16.4 to 1, 'thus confirming that there is certainly no disproportion in the areas appertaining to each of the Parties' (paras 33 and 93). In the *Eritrea–Yemen Arbitration*, the tribunal concluded that the line of delimitation it had decided upon resulted in no disproportion (para. 168; see also *Case between Qatar and Bahrain*, paras 241–43). As stated in the *Boundary between Cameroon and Nigeria Case*:

> the Court acknowledges ... that a substantial difference in lengths of the parties’ respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line. The Court notes that in the present case, whichever coastline of Nigeria is regarded as relevant, the relevant coastline of Cameroon ... is no longer than that of Nigeria. There is therefore no reason to shift the equidistance line in favour of Cameroon on this ground. (para. 301)

In the *Barbados–Trinidad and Tobago Arbitration*, the tribunal remarked that
decisions of international courts and tribunals have on various occasions considered the influence of coastal frontages and lengths in *maritime* delimitation and it is well accepted that disparities in coastal lengths can be taken into account to this end, particularly if such disparities are significant. (para. 237)

It decided to shift the equidistance line in a certain part of the area to be delimited to meet the relevant circumstance of the more lengthy coastal frontage of Trinidad and Tobago (paras 369–73).

19 Unlike the length of the coastline, the extension of the landmass lying behind the *maritime* front of the States concerned is not relevant for the purpose of proportionality:

Landmass has never been regarded as a basis of entitlement to continental shelf rights, and such a proposition finds no support in the practice of States, in the jurisprudence, in doctrine, or indeed in the work of the Third United Nations Conference on the Law of the Sea. It would radically change the part played by the relationship between coast and continental shelf. The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the *maritime* front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect. What distinguishes a coastal State with continental shelf rights from a landlocked State which has none, is certainly not the landmass, which both possess, but the existence of a *maritime* front in one State and its absence in the other. The juridical link between the State’s territorial sovereignty and its rights to certain adjacent *maritime* expanses is established by means of its coast. The concept of adjacency measured by distance is based entirely on that of the coastline, and not on that of the landmass. (*Continental Shelf Case (Libyan Arab Jamahiriya/Malta*, para.
49) (see also Guinea–Guinea-Bissau Arbitration, para. 119) (see also Land-Locked States)

20 Another geographical circumstance that has sometimes been taken into consideration is the general direction of the coast. In the Guinea–Guinea-Bissau Arbitration, the tribunal disregarded the method of equidistance, because of its effect of ‘amputation’ in the presence of a concave coast (para. 103), and chose for a segment of the boundary line the method of the perpendicular to the general direction of the coast of West Africa (para. 110). In the Continental Shelf Case (Tunisia/Libya), the second segment of the boundary was drawn on the basis of the fact that ‘the most evident geographical feature of the coastlines fronting on that area of shelf relevant for the delimitation is the radical change in the general direction of the Tunisian coastline marked by the Gulf of Gabes’ (para. 122). In the Gulf of Maine Case, in the presence of a complex coastal configuration, the ICJ applied, inter alia, the method of the bisector of the angle formed by the two lines perpendicular to the basic coastlines of Canada and the US in the region (para. 213). Another segment of the same boundary line was found on the basis of the method of the perpendicular to the closing line of the Gulf of Maine (para. 224) (Bays and Gulfs; Enclave).

21 A very particular geographical circumstance was taken into consideration in the Maritime Frontier Case (El Salvador v Honduras). The ICJ decided that the closing line of the Gulf of Fonseca—a historic bay the waters of which are held jointly in sovereignty by the three bordering States, namely El Salvador, Honduras, and Nicaragua—constituted the baseline of the territorial sea and that entitlement to territorial sea, continental shelf, and exclusive economic zone seaward of the central portion of the closing line appertained to all the three bordering States, including Honduras that is enclaved within the gulf (para. 432).

2. Islands

22 Among the geographical circumstances, the presence of islands in the area involved in the delimitation has often played a special role in determining a maritime boundary. As stated by the ICJ in the Case between Qatar and Bahrain:

   in accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory. (para. 185)

The ICJ consequently rejected the assumption by Qatar that only the mainland should be taken into consideration to construct the equidistance line. The only exception to the principle that an island generates the same maritime jurisdictional zones as a land territory occurs in the case of a ‘rock’ (Rocks). According to Art. 121 (3) UN Convention on the Law of the Sea, ‘rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf’. However, the Convention does not precisely provide a definition of a rock.

23 Even if they are in principle entitled to produce their own jurisdictional zones, the effect of islands on a delimitation of the continental shelf or exclusive economic zone varies. Different instances may occur, depending on the location, size, and number of the islands (see the Guinea–Guinea-Bissau Arbitration, para. 95).

24 In certain cases, islands located in the vicinity of mainland have been given a full effect on a boundary line to be determined according to the equidistance method, as if they were incorporated into the mainland. In the Eritrea–Yemen Arbitration, the tribunal gave a full effect to the Dahlak Islands, a fringe of islands located in the immediate vicinity of the Eritrean mainland:

   This tightly knit group of islands and islets, or ‘carpet’ of islands and islets as Eritrea preferred to call it, of which the larger islands have a considerable population, is a typical example of a group of islands that forms an integral part of the general coastal
configuration. It seems in practice always to have been treated as such. It follows that the waters inside the island system will be internal or national waters and that the baseline of the territorial sea will be found somewhere at the external fringe of the island system. (para. 139)

Likewise, along the Yemeni coast, the tribunal granted a full effect to a number of islands located in the vicinity of the mainland, namely the ‘relatively large, inhabited and important island of Kamaran’ (para. 150), as well as the smaller islands of Kutama and Uqban, appearing ‘to be part of an intricate system of islands, islets and reefs which guard this part of the coast’ (para. 151).

A reduced effect—often, but not necessarily, a half effect—in the determination of the equidistance line has been granted to certain islands of limited size. The Continental Shelf Arbitration (1977) gave a half effect to the Scilly Isles, located in the Atlantic Ocean outside the territorial sea off the British mainland:

The method of giving half effect consists in delimiting the line equidistant between the two coasts, first, without the use of the offshore island as a base point and, secondly, with its use as a base point; a boundary giving half effect to the island is then the line drawn midway between those two equidistance lines. (para. 251)

Under the Continental Shelf Case (Tunisia/Libya), the second segment of the boundary line gives a half effect to the Tunisian islands of Kerkennah, located at about 11 nautical miles from the mainland coast:

The Court would recall … that a number of examples are to be found in State practice of delimitations in which only partial effect has been given to islands situated close to the coast; the method adopted has varied in response to the varying geographical and other circumstances of the particular case. One possible technique for this purpose, in the context of a geometrical method of delimitation, is that of the ‘half effect’ or ‘half angle’. Briefly, the technique involves drawing two delimitation lines, one giving to the island the full effect attributed to it by the delimitation method in use, and the other disregarding the island totally, as though it did not exist. The delimitation line actually adopted is then drawn between the first two lines, either in such a way as to divide equally the area between them, or as a bisector of the angle which they make with each other, or possibly by treating the island as displaced toward the mainland but half its actual distance therefrom. Taking into account the position of the Kerkennah Islands, and the low-tide elevations around them, the Court considers that it should go so far as to attribute to the Islands a ‘half-effect’ of a similar kind. (para. 129)

In the Gulf of Maine Case, the Chamber of the ICJ gave a half effect to the small Canadian Seal Island, located off the coast of Nova Scotia:

The Chamber considers that Seal Island (together with its smaller neighbour, Mud Island), by reason both of its dimensions and, more particularly, of its geographical position, cannot be disregarded for the present purpose. According to the information available to the Chamber it is some two-and-a-half miles long, rises to a height of some 50 feet above sea level, and is inhabited all the year round. … The Chamber however considers that it would be excessive to treat the coastline of Nova Scotia as transferred south-west-wards by the whole of the distance between Seal Island and that coast, and therefore thinks it appropriate to give the island half effect. (para. 222)

26 In other instances, courts and tribunals decided to give no effect to certain islands. In the case between Tunisia and Libya no effect was given by the ICJ to the Tunisian island of Djerba, which is of a considerable size—about 514 square kilometres—and is located close to the mainland. This was due to the fact that the ICJ chose to rely on historical circumstances for the first segment of the
boundary line, on which Djerba would produce its effect. The choice made by the ICJ was the subject of criticism, as it departed from the geographical circumstances of the case. In the Continental Shelf Case (Libyan Arab Jamahiriya/Malta), the ICJ found it equitable not to take account of the uninhabited Maltese islet of Filfla in the determination of the boundary line (para. 64). In the Dubai–Sharjah Border Arbitration, the tribunal disregarded the island of Abu Musa, located 35 nautical miles off the coast of Sharjah, whose sovereignty was disputed between Sharjah and a State not party to the arbitration—Iran. The tribunal found that to give even a half-effect to the island would have produced a disproportionate effect and so granted to the island only a 12-nautical-mile arc of territorial sea around it. In the Eritrea–Yemen Arbitration, the tribunal addressed the issue of the effect on the maritime boundary of certain Yemeni mid-sea islands (al-Tayr and the group of al-Zubayr), which have a barren and inhospitable nature and are located well out to sea (para. 147). The tribunal began with the general remark that the requirement of an equitable result directly raises the question of the effect to be allowed to mid-sea islands which, by virtue of their mid-sea position, and if allowed full effect, can obviously produce a disproportionate effect—or indeed a reasonable and proportionate effect—all depending on their size, importance and like considerations in the general geographic context. (para. 117)

It reached the conclusion that the islands in question would have no effect upon a boundary determined according to the equidistance method (para. 147). In the Case between Qatar and Bahrain, the ICJ discussed the effect of Fasht al Jarim, ‘a sizeable maritime feature partly situated in the territorial sea of Bahrain’ (para. 245). The ICJ found that, if given full effect, Fasht al Jarim would distort the boundary and have disproportionate effects and concluded that such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord with all the relevant factors referred to above. In the circumstances of the case considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line in the northern sector. (para. 248)

27 The method of the enclave was once applied around islands located on the so-called wrong side of the median line; that is islands located closer to a State different from the State to which they politically belong. These kinds of islands are those which are most likely to produce a disproportionate effect of the equidistance line. Under the Continental Shelf Arbitration (1977), an enclave was drawn around the Channel Islands archipelago, a dependency of the British Crown west of the Cotentin peninsula of France, at the entrance to the Gulf of Saint-Malo, composed of five main islands (Jersey, Guernsey, Alderney, Sark, and Herm; Channel Islands and Isle of Man). As remarked by the arbitral court, ‘the Channel Islands are not only “on the wrong side” of the mid-Channel median line but wholly detached geographically from the United Kingdom’ (para. 199). In the actual circumstances of the region, ‘where the extent of the continental shelf is comparatively modest and the scope for adjusting the equities correspondingly small’, the arbitral courtfound that ‘the situation demands a twofold solution’ (para. 201). The Channel Islands were enclosed in an enclave made up, to their north and west, of a 12 nautical miles-series of radiuses and, to their east, south and south-west, of the boundary of the territorial sea between them and the French coast, the exact course of which was outside the competence of the arbitral court to specify (para. 202). France was thus accorded a substantial portion of continental shelf in mid-Channel which is continuous with its continental shelf to the east and west of the Channel Islands region.

28 In another instance of islands on the wrong side of the median line, the respective tribunal rejected the submission of Canada to draw a 12 nautical miles enclave around the French islands of Saint-Pierre-et-Miquelon and chose the method of the corridor (St Pierre et Miquelon Arbitration). The small archipelago of Saint Pierre et Miquelon lies within a marked concavity formed by the bigger Canadian islands of Newfoundland and Cape Breton and the opening of the Gulf of St
Lawrence. It has an area of 237 square kilometres and is located as close as 10 nautical miles from the nearest Canadian coast and as far as 2,060 nautical miles from the nearest point on the French mainland on the other side of the Atlantic Ocean. In consideration of the fact that the archipelago of Saint Pierre et Miquelon faces, towards the south and south-east, the open ocean, the tribunal gave to France a 200-nautical-miles-long corridor of maritime areas:

Undoubtedly, the difference in length of all the relevant coasts of the Parties is an important factor to take into account for an equitable delimitation, in order to avoid disproportionate results and, subsequently, to test the equitableness of the solution finally adopted. However, the Court cannot accept the contention that particular segments of coast may have an increased or diminished projection depending on their length. The test of the seaward projection will depend, in every case, on the geographical circumstances; for example, a particular coast, however short, may have a seaward projection as far as 200 miles, if there are no competing coasts that could require a curtailed reach. (Case between Canada and France para. 45)

29 It is questionable whether the fact that an island-State is involved in the delimitation should be taken into account as a relevant circumstance in the drawing of the boundary line. In the Continental Shelf Case (Libyan Arab Jamahiriya/Malta), the ICJ rejected Malta’s view that ‘it is only in the case of dependent islands … that international law gives varying effect to them, depending on such factors as size, geographical position, population or economy’. In particular

in the view of the Court, it is not a question of an “island State” having some sort of special status in relation to continental shelf rights; indeed Malta insists that it does not claim such status. It is simply that Malta being independent, the relationship of its coasts with the coasts of its neighbours is different from what it would be if it were a part of the territory of one of them. In other words, it might well be that the sea boundaries in this region would be different if the islands of Malta did not constitute an independent State, but formed a part of the territory of one of the surrounding countries. This aspect of the matter is related not solely to the circumstances of Malta being a group of islands, and an independent State, but also to the position of the islands in the wider geographical context, particularly their position in a semi-enclosed sea. (para. 53)

The words of the ICJ, which are not fully clear, were intended in the Case between Canada and France to mean that there are no grounds for linking preferential rights to the political status of an island as an independent State (paras 49–50) (Territorial Integrity and Political Independence).

3. The Existence of Third States in the Area Designated for Delimitation

30 The presence of territory (either continental or insular) belonging to third States is a geopolitical factor that must be taken into consideration in determining the maritime boundary between two States. A number of international decisions specify only the direction of the last segment of the boundary line, as the fixing of a terminal point would involve the determination of the limit of the marine jurisdictional zones of a State which is not a party to the dispute (see the Continental Shelf Case [Tunisia/Libya] para. 130; the Case between Qatar and Bahrain para. 250; the Eritrea–Yemen Arbitration para. 162). After having rejected in 1984 an application by Italy to intervene in the proceedings between Libya and Malta, the ICJ decided that the judgment between Libya and Malta

must be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights. (Continental Shelf Case [Libyan Arab Jamahiriya/Malta] para. 21) (International Courts and Tribunals,
Intervention in Proceedings)

In the *Boundary between Cameroon and Nigeria Case*, the ICJ stated that ‘the equidistance line cannot be extended beyond a point where it might affect the rights of Equatorial Guinea’ (para. 292). The completion of the boundary line was reserved to later agreements between all Parties interested. In the *Barbados–Trinidad and Tobago Arbitration*, the tribunal found that Barbados could not be required to compensate Trinidad and Tobago since the latter had bilaterally waived its claim over the disputed maritime in favour of the other party, Venezuela (para. 347). While this agreement grants Venezuela access to the high seas, the ‘treaty is quite evidently res inter alios acta in respect of Barbados and every other country’ (paras 345–46).

E. Other Circumstances

1. Geological and Geomorphological Circumstances

31 The role played by geological (that is, related to the physical nature of the seabed) and geomorphological (that is, related to the shape of the seabed) circumstances in the determination of maritime boundaries appears to be decreasing nowadays. In the first case of delimitation of the continental shelf ever submitted to international adjudication, the ICJ considered the continental shelf in a physical sense as the natural prolongation of a land territory:

The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of appurtenance of the continental shelf to the State whose territory it does in fact prolong. (*North Sea Continental Shelf Cases* para. 95)

32 Yet the assumption that the continental shelf is the ‘natural prolongation’ of a land territory is rather misleading. The concept of ‘natural prolongation’ does not provide much help where a question of maritime boundaries arises, for in most cases it is not possible to determine with sufficient precision whether a certain area of seabed is for geological or geomorphological reasons more connected to the land territory of one State rather than another. The political geography of the world does not depend on marine geology or geomorphology. In discussing the conclusion that the continental shelf is the natural prolongation of the land territory of a State, the following remarks may be found in the *Continental Shelf Arbitration (1977)*:

So far as delimitation is concerned, however, this conclusion states the problem rather than solves it. The problem of delimitation arises precisely because in situations where the territories of two or more States abut on a single continuous area of continental shelf, it may be said geographically to constitute a natural prolongation of the territory of each of the States concerned. (para. 79)

In the *Continental Shelf Case (Tunisia/Libya)*, the ICJ disregarded the learned, but very voluminous, geological and geomorphological submissions put forward by both Parties and found that

the submarine area of the Pelagian Block which constitutes the natural prolongation of Libya substantially coincides with an area which constitutes the natural submarine extension of Tunisia. Which parts of the submarine area appertain to Libya and which to Tunisia can therefore not be determined by criteria provided by a determination of how far the natural prolongation of one of the Parties extends in relation to the natural prolongation of the other. In the present case, in which Libya and Tunisia both derive continental shelf title from a natural prolongation common to both territories, the ascertainment of the extent
of the areas of shelf appertaining to each State must be governed by criteria of international law other than those taken from physical features. (para. 67) (see also Guinea–Guinea-Bissau Arbitration para. 117 and Gulf of Maine Case para. 47)

33 The trend towards lessening the relevance of geological and geomorphological circumstances, and towards the corresponding enhancement of the relevance of the geographical circumstance of distance from the coast, is evident in the Continental Shelf Case (Libyan Arab Jamahiriya/Malta), also as a consequence of the new notion of exclusive economic zone and the new definition of continental shelf under Art. 76 UN Convention on the Law of the Sea, which are both basically understood according to a 200-nautical-mile limit. The ICJ found that greater importance must be attributed to elements, such as the geographical circumstance of distance from the coast, which are common to both concepts (para. 33). The same attitude was taken in the Case between Canada and France. The fact that geologically the French islands of Saint Pierre et Miquelon could have been considered as a natural prolongation of the Canadian territory played no substantial role in the determination of the maritime boundary line.

2. Unity of Deposit Circumstances

34 The unity of a deposit is a factual element, which has reasonably to be taken into consideration. As remarked in the North Sea Continental Shelf Cases:

yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. (para. 67)

In the Continental Shelf Case (Tunisia/Libya), the ICJ found that ‘as to the presence of oil-wells in an area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result’ (para. 107). In the Eritrea–Yemen Arbitration, the tribunal expressed the view that the Parties were bound to inform and consult one another on any mineral resources that may be discovered that straddle the single maritime boundary established between them or that lie in its immediate vicinity (Joint Exploitation Areas). It added that the historical connections between the peoples concerned, the friendly relations of the Parties and the body of State practice in the exploitation of resources that straddle maritime boundaries would rather require that Eritrea and Yemen should give every consideration to the shared exploitation of such resources (para. 86).

3. Historical Circumstances

35 In some instances historical circumstances, consisting of precedents of boundaries established for other purposes, also influenced the determination of the maritime boundary line. The first segment of the maritime delimitation established under the Continental Shelf Case (Tunisia/Libya) coincides with the limit applied de facto since 1919 as regards the exploitation of sponge-banks (paras 93 and 119). The same limit corresponded to the line dividing petroleum concession areas granted by the Parties since 1955 (para. 117). For the first part of the maritime boundary, the Guinea–Guinea-Bissau Arbitration referred to a convention on the delimitation of the respective possessions in West Africa concluded in 1886 by the predecessor States France and Portugal (para. 106). The Eritrea–Yemen Arbitration noted that a number of petroleum agreements and concessions concluded by both parties extended to a median line between their respective coastlines and lent a measure of support to such a boundary line (paras 77–78). In the Boundary between Cameroon and Nigeria Case, the ICJ pointed out that what is important are not the oil concessions by themselves, but the possibility of inferring from them the existence of an express or tacit agreement between the parties (para. 304).
4. Security Circumstances

In the Continental Shelf Case (Libyan Arab Jamahiriya/Malta), the ICJ admitted that, in principle, security and military circumstances are also not unrelated to the concept of the continental shelf (para. 51). The ICJ reached a similar conclusion in the Case between Denmark and Norway, finding that ‘while courts have been unwilling to allow such considerations of security to intrude upon the major task of establishing a primary boundary in accordance with the geographical criteria, they are concerned to avoid creating conditions of imbalance’ (para. 81). Likewise, security circumstances were taken into consideration in the Guinea–Guinea-Bissau Arbitration (para. 124).

5. Fishing Circumstances

In the Gulf of Maine Case, where a single maritime boundary was drawn, the concentration of biomass of several commercially important species in the Georges Bank area was disregarded:

The Chamber accordingly considers that the conclusion to be drawn in respect of the great mass of water belonging to the delimitation area is that it too essentially possesses the same character of unity and uniformity already apparent from an examination of the seabed, so that, in respect of the waters too, one must take note of the impossibility of discerning any natural boundary capable of serving as a basis for carrying out a delimitation of the kind requested of the Chamber. (para. 55)

However, the need to grant to both parties an equitable access to relevant fishing resources was taken into consideration in the Case between Denmark and Norway and determined a shifting of the median line (para. 76) (Fisheries, Coastal; Fisheries, High Seas). In the Case between Canada and France, the ICJ remarked that the delimitation did not have a radical impact on the existing fishing practices and on the economic well-being of the people most affected (paras 84 and 85). In the Case between Qatar and Bahrain, the ICJ did not consider the existence of pearl banks, which were in the past predominantly exploited by Bahraini fishermen, as a circumstance which would have justified the shifting of the equidistance line (para. 236) (Pearl Fisheries). In the Eritrea–Yemen Arbitration, the tribunal found that dependence on fishing, which was an important activity for both parties, could not suggest any particular line of delimitation (para. 64), adding that neither Party has succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals. (para. 72)

In the Barbados–Trinidad and Tobago Arbitration, the tribunal found that Barbados did not succeed in demonstrating that the equidistance line should be adjusted in a certain part of the area to be delimited in the light of past activities by Barbadian fisherfolk (para. 267). It remarked that ‘determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional’ (para. 269). However, the tribunal concluded that Trinidad and Tobago was obliged to negotiate in good faith (bona fide) an agreement with Barbados that granted the latter access to fisheries within the exclusive economic zone of Trinidad and Tobago (para. 292).

6. Economic Circumstances

Economic circumstances based on the different wealth of the Parties in oil or other resources have been consistently disregarded as an element which could influence the determination of a maritime boundary in favour of the economically disadvantaged Party. As stated in the Continental Shelf Case (Tunisia/Libya):

the Court ... is of the view that these economic considerations cannot be taken into
account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource. (para. 107) (see also Continental Shelf Case [Libyan Arab Jamahiriya/Malta] para. 50; Case between Denmark and Norway para. 80; Guinea–Guinea-Bissau Arbitration para. 122)

F. Some Conclusions as regards the Continental Shelf and the Exclusive Economic Zone

39 The following conclusions can be drawn from the practice of international courts and tribunals which have been called to give concrete content to the abstract rule providing for the achievement of an equitable solution in the delimitation of the continental shelf or exclusive economic zone:

a) The equidistance line plays the role of a logical starting point, as a reference to evaluate whether a delimitation effected on the basis of equidistance leads to an equitable solution.

b) If not, the equidistance line may be adjusted according to relevant circumstances, in particular geographical circumstances, such as the length and shape of the coastlines or the presence of islands.

c) Islands, which in principle enjoy the same status as continental territories, have been treated in different ways, depending on their location, size, and number; various solutions, such as full effect, reduced effect, no effect, the enclave, and the corridor, have been elaborated to deal with the effect of islands on the delimitation line.

d) Circumstances different from the geographical ones, such as those relating to geology, geomorphology, unity of deposits, history, security, or fishing, can also play a certain role, although to a lesser extent and depending on the peculiar context.

e) The cases decided hitherto by international courts and tribunals do not exhaust all the instances which may be found in the world’s political geography (for example, no specific precedent exists for the instance of a continuous chain of islands of considerable size, located on the wrong side of the median line, but closely interlinked with the State to which the chain belongs).

G. The Delimitation of the Territorial Sea

40 The codified rules on delimitation of the territorial sea seem less vague than those on the delimitation of the exclusive economic zone or the continental shelf. Article 15 UN Convention on the Law of the Sea, which is based on Art. 12 (1) Convention on the Territorial Sea and the Contiguous Zone of 1958 (‘Territorial Sea and Contiguous Zone Convention’), provides as follows:

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

Article 12 (1) Territorial Sea and Contiguous Zone Convention is deemed to have a customary character and is commonly referred to as the ‘equidistance/special circumstances’ rule (see Case
between Qatar and Bahrain, para. 175).

41 In allowing for exceptions to equidistance, Art. 15 UN Convention on the Law of the Sea departs from a full geometrical precision. It does not specify what the special circumstances to be taken into consideration are. Nor does it clarify how a historic title is to be defined (Historic Titles). Nor does it state in what manner, different from equidistance, the delimitation is to be effected if historic title or other special circumstances occur.

42 Apart from the remote precedent of the decision of 23 October 1909 by an arbitral tribunal on the maritime frontier between Norway and Sweden—known as the Banks of Grisbadarna Case—two recent decisions have, inter alia, dealt with the issue of the delimitation of the territorial sea. In the Case between Qatar and Bahrain, the ICJ, after having drawn a provisional equidistance line, considered whether there existed historic titles or other special circumstances which would lead to delimitation at variance therewith. In this regard, the ICJ deemed that the presence of a very small island (Qit’at Jaradah) about midway between the coasts of the two States concerned was a special circumstance; however, being an ‘insignificant maritime feature’, it was attributed only a minor effect on the delimitation (para 219). In the Eritrea–Yemen Arbitration, the tribunal decided to maintain an equidistance boundary line between the Yemeni islands Zuqar and Hanish and the Eritrean Haycocks and South West Rocks:

Under Article 15 of the Convention [= UN Convention on the Law of the Sea] the normal methods for drawing an equidistant median line could be varied if reason of historic title or other special circumstance were to indicate otherwise. However, the Tribunal has considered these reasons and circumstances and finds no variance necessary. (para. 158)

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