

CONTINENTAL SHELF DELIMITATION AND INTERNATIONAL
JURISPRUDENCE: THE CASE OF ISLANDS

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2011

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KITA SAHANLIĞININ SINIRLANDIRILMASI
VE ULUSLARARASI HUKUK: ADALAR SORUNU

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Date of Approval :

Total Number of Pages: 10 Preliminary Pages, 135 Main Body, 34 Annexes

Anahtar Kelimeler

- a) Adalar
- b) Kıta Sahanelığı
- c) Deniz Sınırları
- d) Sınırlandırma
- e) İçtihat

Keywords

- a) Islands
- b) Continental Shelf
- c) Maritime Boundaries
- d) Delimitation
- e) Jurisprudence

Abstract

The continental shelf of the islands was a controversial issue for the states which attempted to delimit their maritime boundaries. The International Court of Justice and the other Arbitral Tribunals which undertook the task to resolve various bilateral maritime disputes didn't manage to consolidate in the international jurisprudence those fixed rules that would govern the delimitation of the continental shelf, but quite the opposite they farther perplexed the issue with their ambiguous judgments. They infringed systematically upon the islands' rights and in most of the cases they saw them, merely as a means to conciliate the claims of the litigant states. Through the study of the case law from 1969 up to 2009 is attempted to be traced in detail the practice of the courts as regards the delimitation of the continental shelf of the islands and at the same time to be accessed their contribution to the development of both the conventional and customary law in this field.

Özet

Adaların kıta sahanlığı, deniz sınırlarını sınırlandırmaya çalışan devletler için tartışmalı bir konu olmuştur. Uluslararası Adalet Divanı ve çeşitli ikili denizcilik uyuşmazlıklarını çözmeye görevini üstlenmiş diğer Tahkim Mahkemeleri, uluslararası içtihatlarda kıta sahanlığının sınırlandırılmasını yönlendirebilecek sabit kuralları pekiştirememiş, fakat tam aksine muğlak kararlarıyla konuyu daha da karmaşık hale getirmişlerdir. Mahkemeler sistematik olarak adaların haklarını ihlal etmiş ve çoğu olayda onları yalnızca davacı devletlerin iddialarını uzlaştırma aracı olarak görmüşlerdir. Dava incelemesi aracılığıyla -1969'dan 2009'a kadar olan hukuk-Mahkemelerin adaların kıta sahanlığının sınırlandırılmasıyla ilgili uygulaması ayrıntılı olarak çıkarılmaya çalışılmış ve aynı zamanda bu alandaki gerek sözleşmesel gerekse geleneksel hukuk gelişimine katkılarına da ulaşılmıştır.

Disclaimer

I hereby declare that the views expressed in this thesis are my own and in no way reflect the official views of my country or the views of the Hellenic Armed Forces I work for.

Panagiotis Lympereas

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Acknowledgements

I would like to express my sincere gratitude to my thesis supervisor Assistant Professor Harry Zachary Tzimitras, for his confidence in me and his professional assistance throughout my studies in Istanbul Bilgi University. I feel indebted to him for his generosity in sharing his time, ideas and experience as well as for his continued support, patience and understanding in every stage of this study. Without his guidance it wouldn't have been possible to accomplish this research.

I would like also to extend my thanks to my colleagues and friends Panagiotis Karkantis and Antonios Platias. Panagiotis gave me all the needed information about the Greek – Turkish relations master's program in Bilgi University and he encouraged me to participate to it. Antonios as a training officer of the Brigade I work for made all the necessary arrangements in order to be allowed to attend the courses. In addition, their motivation and friendly advice helped me to finalize successfully my studies in general and this thesis in particular. Hadn't been for their invaluable contribution, I wouldn't have even assumed my master's studies.

I dedicate this work to my beloved wife Maria, who took care of all the family affairs during the writing of this thesis, giving me the opportunity to work undistracted and with the best possible conditions. Without her unreserved support, the completion of this study would not have been possible. I wholeheartedly thank her.

Finally, I promise to my sweet daughter Nektaria that now that I have finished working on my thesis I will spend much more time with her and I will do my best to make up for the lost time.

Istanbul, May 2011

Panagiotis Lymperas

List of Abbreviations

AJIL	American Journal of International Law
ASIL	American Society of International Law
CIA	Central Intelligence Agency
CS	Continental Shelf
CWRJIL	Case Western Reserve Journal of International Law
CYIL	Canadian Yearbook of International Law
EEZ	Exclusive Economic Zone
GCCS	Geneva Convention on the Continental Shelf
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJMCL	International Journal of Marine and Coastal Law
Km	Kilometers
Km ²	Square Kilometers
Mile	Nautical Mile = 1852 meters
NYIL	Netherlands Yearbook of International Law
PCA	Permanent Court of Arbitration
REDI	Revue Egyptienne de Droit International
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	First United Nations Conference on the Law of the Sea (1956 – 1958)
UNCLOS II	Second United Nations Conference on the Law of the Sea (1960)
UNCLOS III	Third United Nations Conference on the Law of the Sea (1973 – 1982)
USA	United States of America

Introduction

The term “Continental Shelf” is used by geologists¹ generally to mean that part of the continental margin which is between the shoreline and the shelf break or, where there is no noticeable slope, between the shoreline and the point where the depth of the superjacent water is approximately between 100 and 200 meters.²

However, as a legal term the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea, to a specific distance where the coastal state has the right to exploit the natural resources, to the exclusion of others.³ Therefore, although the states have no sovereignty rights beyond their territorial waters, they have the exclusive exploitation rights all over their continental shelves.

The continental shelf started to interest the international community relatively recently. The first important assertion of exclusive rights over the marine resources beyond the territorial waters was made by the USA in the Truman Proclamation of 1945 on the Continental Shelf.⁴ The Proclamation states that “having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea – bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control”.⁵

¹ For a graphic display of the term “Geological Continental Shelf”, see figure 1 of Annex A.

² Available at: http://www.un.org/Depts/los/clcs_new/continental_shelf_description.htm.

³ For the exact definitions of the legal term “Continental Shelf” see chapter 1.

⁴ An earlier document, “The Submarine Areas of the Gulf of Paria (Annexation) Order” was issued by the United Kingdom, in 1942. It appropriated the sea – bed area of the Gulf of Paria and maintained freedom of navigation. However, the Truman Proclamation contained a rationale for the continental shelf and must be considered to be the most important, if not the first, legal instrument dealing with the subject. Available at: <http://www.fao.org/docrep/s5280T/s5280t0p.htm#TopOfPage>, accessed on December 6, 2010.

⁵ Available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=12332>, accessed on December 6, 2010.

Gradually, the concept of the maritime zones found many supporters. In 1947, Chile⁶ and Peru⁷ were the first Latin American states to establish maritime zones of 200 miles. Chile proclaimed “national sovereignty over submarine areas, regardless of their size or depth, as well as over the adjacent seas extending as far as necessary to reserve, protect, maintain, and utilize natural resources and wealth”.⁸

The Truman Proclamation had an effect not only in Latin America, but also among many Arab states. A succession of unilateral declarations was adopted by ten Arab states and emirates within a two – month period in 1949.⁹ The declarations proclaimed sovereignty particularly over the petroleum resources on the continental shelf.

Back then though, the various states conceptualized the notion of the continental shelf with divergent views and proceeded to a number of unilateral acts regarding the delimitation and the jurisdictional rights of their maritime zones. As a result, in 1956 the United Nations (UN) held its first Conference on the Law of the Sea (UNCLOS I), in Geneva. The UNCLOS I resulted in four treaties¹⁰ concluded in 1958. Among them was the Geneva Convention on the Continental Shelf (GCCS), which clarified the issue of the continental shelf, as much as possible.

⁶ Presidential Declaration Concerning Continental Shelf of 23 June 1947, *El Mercurio*, 29 June 1947. Available at: www.fao.org/docrep/s5280T/s5280t0p.htm. See also: C. Selak, “Recent Developments in High Seas Fisheries. Jurisdiction under the Presidential Proclamation of 1945”, 44 *AJIL*, No. 4, October 1950, p. 673.

⁷ Presidential Decree No. 781 of 1 August 1947, 107 *El Peruano: Diario Oficial*, No. 1983, 11 August 1947. Available at: www.fao.org/docrep/s5280T/s5280t0p.htm. See also: C. Selak, *op. cit.* p.673.

⁸ Available at: <http://www.fao.org/docrep/s5280T/s5280t0p.htm>, accessed on December 6, 2010.

⁹ The dates of adoption of the declarations are as follows: Saudi Arabia 28 May 1949, Bahrain 5 June 1949, Qatar 8 June 1949, Abu Dhabi 10 June 1949, Kuwait 12 June 1949, Dubai, 14 June 1949, Sharjah 16 June 1949, Ras al Khaimah 17 June 1949, Umm al Qaiwain 20 June 1949, Ajman 20 June 1949. From: D. Dahak, *Les Etats Arabes et le Droit de la Mer*, Tome 1, 1986, p. 123 (In French).

¹⁰ They were signed totally four conventions and an optional protocol: the Convention on the Territorial Sea and the Contiguous Zone (CTS), the Convention on the High Seas (CHS), the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR), the Convention on the Continental Shelf (GCCS) and the Optional protocol of Signature concerning the Compulsory Settlement of Disputes (OPSD). The CTS entered into force in 1964, the CHS in 1962, the CFCLR in 1966, the GCCS in 1964 and the OPSD in 1962. States bound by the Conventions and the Protocol, are as at 2008, for the CTS: 52, for the CHS: 63, for the CFCLR: 38, for the GCCS: 58 and for the OPSD: 38. Available at: <http://untreaty.un.org/cod/avl/ha/gelos/gelos.html>, accessed on December 6, 2010.

In 1960, the UN held in Geneva the second Conference on the Law of the Sea (UNCLOS II), but the six – week conference didn't result in any new agreements. Nonetheless, the discussions went on for years along with some courts decisions and many bilateral agreements between various states which contributed to the formation of some general rules that started to be accepted by the majority of the states. In 1973 the third UN Conference on the Law of the Sea (UNCLOS III) was convened in New York, with the participation of more than 160 nations. The conference lasted until 1982 and the resulting convention was the United Nations Convention on the Law of the Sea (UNCLOS). This convention established in detail the rules governing all the uses of the seas and their resources. Hence, it dealt also with all the continental shelf related issues.

While the majority of the coastal states include a number of islands in their territory, there are also many islands – states, which are consisted merely of one or more islands, as it is the case for example for Cyprus, Malta, Philippines, Jamaica and so on. As expected, in the aforementioned process of determining the states' maritime zones in general and that of the continental shelf in particular, the regime of the islands had a special position. The two conventions, the bilateral agreements, the decisions of the courts and at the same time the emerging customary law have tried to provide for their status.

I come from one of those coastal countries that have many islands under their dominion. In fact, Greece is surrounded by more than two thousand islands, islets and rocks.¹¹ They are scattered mainly in the Aegean Sea which extends from the coasts of the mainland to the eastern Aegean Islands and beyond that to the coasts of Turkey.¹²

¹¹ USA's Central Intelligence Agency (CIA), *The World Factbook*, available at: www.cia.gov/library/publications/the-world-factbook/geos/gr.html, accessed on December 12, 2010.

¹² See figure 5 of Annex A.

The study of the Greek – Turkish relations in the relevant graduate program of Bilgi University highlighted the fact that the delimitation of the continental shelf is one of the most important problems¹³ in the Aegean archipelago. Apart from its economic dimension, the delimitation of the Aegean's continental shelf is significant because it would be the final step of the solution of the dispute between the two states, as it requires that almost all the other problems would have been settled. For example, the continental shelf can't be delimited if the two states haven't agreed on the breadth of the territorial waters or the sovereignty over all the disputed islets and rocks.

The Aegean Sea's continental shelf lingering dispute, or in other words, the Aegean Islands' right to have a continental shelf of their own, may be resolved by the International Court of Justice (ICJ)¹⁴ or by another *ad hoc* arbitral tribunal. To date, the ICJ and the various other arbitral tribunals have issued numerous decisions regarding the delimitation of the islands' continental shelf.

It seems that the judicial settlement of the islands' continental shelf dispute is the most appropriate approach for two main reasons. Firstly, the authority of the international courts will make any given solution more palatable to the public opinion of the interested countries and secondly, the delimitation of the continental shelf is a purely legal/technical issue rather than a political one and the international courts have the expertise to deal efficiently with it.¹⁵

¹³ The other points of friction in Greek – Turkish relations include: The sovereignty over a number of islets and rocks (Grey Zones), the extent of the Greek air – space, the limits of the Athens FIR, the search and rescue regions, the breadth of Greece's territorial waters and the military status of the eastern Aegean Islands. Ministry of Foreign Affairs of Greece, available at: <http://www.mfa.gr/www.mfa.gr/en-US/Policy/Geographic+Regions/South-Eastern+Europe/Turkey/>. See also Ministry of Foreign Affairs of Turkey, available at: <http://www.mfa.gov.tr/sub.en.mfa?cdcc8168-4dfb-46f6-8589-fbed9909c49b>.

¹⁴ Ministry of Foreign Affairs of Greece, available at: <http://www.mfa.gr/www.mfa.gr/enUS/Policy/Geographic+Regions/South-Eastern+Europe/Turkey/Differences/Continental+Shelf/>, accessed on December 7, 2010.

¹⁵ Turkey argues that the issue of the continental shelf is mainly a political difference between the two countries. Ibid.

However, a lot of scholars support the proposition that the decisions of the courts have rather complicated the issue of the islands' right to have a continental shelf of their own than have they clarified it further.¹⁶ Thus, the aim of this thesis is to examine the case law regarding the delimitation of the continental shelf between states with opposite or adjacent coasts and to focus on those parts of the decisions that have to do with the continental shelf of the islands, in order to pore over the problem and understand the logic behind every judgment.

My intension is to find out if there are fixed and explicit criteria that the courts take into consideration before issuing their decisions. Moreover, I intend to examine the consistency of the judgments throughout the time, the dynamic that the issue has acquired over the years and the degree of predictability of any future case. Finally, my main goal is to answer the following question: were the courts' decisions pertaining to the continental shelf unfair for the islands?

The study will obtain the necessary information mainly from primary sources such as the official archives of various organizations (UN, ICJ, PCA etc) which are available on the web, but also from books, articles and a number of other relevant web – pages. It will start by reviewing the international legal framework concerning the continental shelf of the islands, as well as the existing continental shelf delimitation principles, methods and practices. In this regard, the provisions of both the conventional and the customary international law are going to be presented briefly, in the following chapters. Then, all the relevant cases which submitted to various international courts (ICJ, Arbitration Courts and Conciliation Commissions), will be presented in chronological order, starting with the North Sea continental shelf delimitation case in 1969, up to the last court decision concerning the delimitation of the continental shelf between Romania and Ukraine, in 2009.

¹⁶ H. Dipla, "The Judicial Evolution of the Principles of Maritime Delimitation and their Effect on the Greek – Turkish Dispute over the Aegean Continental Shelf", in S. Perrakis (ed.) *The Aegean Sea and the New Law of the Sea*, 1996, p. 166 (in Greek).

In the last part, the study will provide a number of general observations and will draw conclusions stemming from the analysis of the previously presented cases. The annexes, at the end of the study, include maps, drawings and sketches aiming to give a visual illustration of the various cases and a complete picture of the topic under discussion.

To conclude, the contribution of this thesis aspires to be the collection of all the relevant cases in a single study, providing therefore a general overview of the subject matter. However, it will not merely present the decisions of the courts but it will keep a critical approach on them. Moreover, it will provide the separate and the dissenting opinions of various judges, as well as the views of numerous other researchers.

Chapter 1

Conventional and Customary Law

The international law which is known as the “jus gentium” meaning “law of nations”, governs and regulates the interrelationship between sovereign states and their rights and obligations in the event of a conflict with one another. According to the Statute of the ICJ the sources of the international law are:

“a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognized by civilized nations...”.¹⁷

Thus in effect, there are two formal sources of international law as the courts have outlined also in their numerous decisions. These parallel and sometimes overlapping sources of international law are the international conventions and the international customs.¹⁸

The conventional international law as regards the continental shelf, apart from the general principles of the international law, is mainly expressed by: the Geneva Convention on the Continental Shelf and the United Nations Convention on the Law of the Sea.

According to article 30 of the Vienna Convention on the Law of the Treaties,¹⁹ when there are successive treaties relating to the same subject matter, the provisions of the later prevail to those of the earlier, when these provisions are incompatible between them. Thus, the earlier

¹⁷ Article 38, paragraph 1 of the Statute of the ICJ. Available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

¹⁸ M. Koskenniemi, *Sources of International Law*, 2002, p.77.

¹⁹ The Convention was done at Vienna on 23 May 1969 and entered into force on 27 January 1980.

treaty applies only to the extent that its provisions are compatible with those of the later treaty.²⁰ Moreover, the UNCLOS explicitly stipulates that it shall prevail over the Geneva Conventions on the Law of the Sea of 1958²¹ and therefore over the GCCS.

However, the GCCS will continue to be valid between states that have ratified it, but not the UNCLOS. In addition, most of the provisions of the GCCS are considered as reflecting customary law rules.

The customary international law finds its existence from the extensive, consistent and uniform practice of states. It comprises all those rules that have been developed “from the ground”, as customs and practices of the states evolve. Most of the times, it is finally incorporated to the conventional law, due to its widespread acceptance and recognition.

Below, the law relating to the continental shelf in general and that of the islands in particular will be presented briefly.

1.1 Geneva Convention on the Continental Shelf

The first United Nations Conference on the Law of the Sea adopted in 1958 the Geneva Convention on the Continental Shelf, which contains totally twelve articles. According to the Convention the term “Continental Shelf” is used as referring:²²

²⁰ Available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²¹ The paragraph 1 of article 311 of the UNCLOS states: “This Convention shall prevail, as between states parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.”

²² Article 1 of the Geneva Convention on the Continental Shelf. For a graphic display of the definition see figure 2 of Annex A.

“(a) To the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas

(b) To the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.”

Thus, according to the Convention there are two criteria for the delimitation of the continental shelf: the criterion of the 200m isobath and the criterion of exploitation. The criterion of the depth had appeared much earlier in the Truman’s Declaration. That of exploitation though, was new and from the first moment it was criticized strongly, because of the advantage it gave to the developed states with their advanced technological means, by which they could extend their continental shelf indefinitely, contrary to the developing nations. For this reason, this criterion was later annulled and ceased to exist in the UNCLOS.

Furthermore, the Convention established the notion of the sovereignty rights of the coastal states far beyond their territorial waters, but merely as exclusive rights for exploration and exploitation of the natural resources. In addition, it explicitly recognized the coastal states’ rights over their continental shelf independently of any declaration or claim. So, the convention directly connected the sovereignty rights with the proximity of the coastal states to their continental shelf. Finally, the convention set some rules for the continental shelf delimitation between states with opposite or adjacent coasts, as we will see in chapter 2.

The GCCS came into force in 1964 and although it tried to merge almost all the divergent views about the continental shelf that had been expressed during the previous decade, it has had limited support by the nations. Up to now, it has been ratified by only 58 states²³ but, the customary nature of many of its provisions, consequently binding on all the states, as well as its

²³ Available at: <http://untreaty.un.org/cod/avl/ha/gclos/gclos.html>, accessed on December 6, 2010.

influence to the international jurisprudence and to various bilateral agreements between the states, is something that will be discussed in the next chapter below.

Finally, noteworthy especially for the present study, are also the provisions of convention as regards the islands. As stated before, the article 1, paragraph b, stipulates that the islands have equal rights with the continental lands, regarding the continental shelf. The GCCS therefore equates the islands with the mainland without any exceptions.

1.2 United Nations Convention on the Law of the Sea

The new conventional regime of the continental shelf is regulated under the part VI and the Annex II of the UNCLOS, as well as the Annex II of the Final Act of the Convention. The relevant articles include a new legal definition of the continental shelf, lay down rules for its delimitation and establish a commission on the limits of the continental shelf. The Convention, which is often referred to as the “Constitution of the Seas”,²⁴ was opened for signature at Montego Bay, Jamaica, in 1982 and came into force in 1994, after its ratification by 60 countries. Details of its signature and ratification status are shown in Annex B.

The new legal definition of the continental shelf, according to the convention is as follows:²⁵ “The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles

²⁴ International Judicial Monitor, available at: http://www.judicialmonitor.org/archive_0706/spotlight.html. See also Time Magazine, available at: <http://www.time.com/time/magazine/article/0,9171,924405-1,00.html>, and Canadian Coast Guard, available at: <http://www.ccg-gcc.gc.ca/e0004254>, accessed on December 24, 2010.

²⁵ Article 76, para. 1.

from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”²⁶

As stipulated in the convention, a coastal state can delimit its continental shelf taking into account two criteria: the criterion of the distance or the geomorphological criterion. In any case, the minimum breadth of the continental shelf is 200 nautical miles (minus the breadth of the territorial waters), but it can extend beyond that limit if the morphology of the seabed is suitable. Then, the continental shelf can extend up to the outer edge of the continental margin but again, it shall not exceed either 350 nautical miles from the baselines from which the breadth of the territorial sea is measured, or 100 nautical miles from the 2500 meter isobath. There is one exception though to the 350 miles range limit of the continental shelf: when there are submarine elevations such as plateaus, rises, caps, banks and spurs which extend beyond the 350 miles, they are considered parts of the continental margin and the continental shelf ends beyond the 350 miles limit, until these special geomorphological features cease to exist.²⁷

The new convention as the previous, grant to the islands with the same rights as the continental lands as regards to the continental shelf, with the exception of the rocks which cannot sustain human habitation or economic life of their own. Rocks can have only a zone of territorial sea around them. The article 121 of the convention stipulates for the islands:

“1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. The territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the Convention applicable to other land territory.

²⁶ For a graphic display of the definition see figure 3 and 4 of Annex A.

²⁷ According to article 76, paragraphs 4 – 7.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

Thus, when it comes to the continental shelf, the conventional law makes no difference between continental lands and islands.

1.3 Customary Law

In the case of the international customary law the legal picture is more complex. The last paragraph of UNCLOS's preamble states that “matters not regulated by this convention continue to be governed by the rules and principles of general international law”. This means that even between states that have signed the UNCLOS the international customary law will complementarily apply. The customary international law is however of special importance when it comes to regulating relations between countries which are not bound together by the GCCS, or the UNCLOS.

Generally, the customary law rules and those contained in the international conventions are not clear cut separated between them. There are many provisions in the Vienna Convention on the Law of the Treaties which refer to the close relation between the two forms of the international law. Thus, according to article 38 of the aforementioned convention the provisions of the international treaties don't exclude “...a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such”.

Moreover, according to article 43 of the same convention there are obligations for the states imposed by international law independently of a treaty: “The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its

operation...shall not in any way impair the duty of any state to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty”.

In addition, according to article 317 of the UNCLOS, in case that a state denounces the convention this “...shall not in any way affect the duty of any state party to fulfill any obligation embodied in this convention to which it would be subject under international law independently of this convention”.

Still, in the field of the international law of the sea, tracking the international custom isn't an easy task, because most of the customary law rules have already been incorporated in the existing international conventions dealing with the law of the sea. For example, as we will see below, the ICJ in 1969 considered that certain provisions of the GCCS were the crystallization of customary law rules.

Of a great importance is the rationale of the ICJ in its judgment for the Libya – Malta continental shelf case, in 1985. It stated: “The two parties agree that the dispute is to be governed by customary international law. Malta is a party to the 1958 GCCS, while Libya is not; both parties have signed the 1982 UNCLOS, but that convention has not yet entered into force. However, the parties are in accord in considering that some of its provisions constitute the expression of customary law, while holding different views as to which provisions have this status. In view of the major importance of this convention – which has been adopted by an overwhelming majority of states – it is clearly the duty of the court to consider how far any of its provisions may be binding upon the parties as a rule of customary law.”²⁸

At another part of its decision the court reaffirmed the role of the customary law: “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states, even though multilateral conventions may have an

²⁸ Available at: <http://www.icj-cij.org/docket/files/68/6417.pdf>, p. 148.

important role to play in recording and defining rules deriving from custom, or indeed in developing them.”²⁹

Most of the provisions of the two conventions which refer to the continental shelf are the codification of the customary law rules. For instance, the islands right to have a continental shelf of their own was firstly recognized as a customary law rule and later it was incorporated initially in the GCCS and later in the UNCLOS. The ICJ in its decision for the North Sea continental shelf delimitation in 1969 reaffirmed that the islands’ right to have a continental shelf, apart from being a conventional law rule, is guaranteed in addition by the customary law.³⁰

It is concluded therefore that the customary law, although not always clear and well defined, it is equally important as the conventional law, and as we will see further below, it played a key role in many cases regarding the delimitation of the continental shelf of the islands.

To finish, another issue that is going to be discussed in the next chapter of the present study is that of the existing principles of delimitation (methods, practices and rules) between states with opposite or adjacent coasts, which are stemming from the two conventions and it is going to be traced to what degree they can be considered as representing customary law rules.

²⁹ Available at: <http://www.icj-cij.org/docket/files/68/6415.pdf>, p. 27.

³⁰ “...these three articles (i.e. articles 1, 2 and 3 of the GCCS) being the one which, it is clear, when then regarded as reflecting, or as crystallizing, received or at list emergent rules of customary international law relative to the continental shelf...”. ICJ Judgment of 20 February 1969, para. 63. Available at: <http://www.icj-cij.org/docket/files/51/5535.pdf>.

Chapter 2

Principles of Delimitation of the Continental Shelf between States with Opposite or Adjacent Coasts

2.1 Median/Equidistance Line Principle

A median/equidistance line is one for which every point on the line is equidistant from the nearest points on the baselines being used. The term “median line” refers to states with opposite coasts while the term “equidistance line” refers to adjacent states.³¹ By the application of the median line two opposite states can divide the sea area between them while using the equidistant line two adjacent states can extend their land boundary into the sea creating therefore their common maritime boundary.

The UNCLOS I established the median/equidistance line principle as the main method for the delimitation of the maritime zones between states with opposite or adjacent coasts, with the exception of the special circumstances. Especially, for the continental shelf the relevant provision is depicted in the article 6 of the Geneva Convention on the Continental Shelf:

“1. Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line,

³¹ For a graphical example of a maritime boundary delimitation between states with opposite or adjacent coasts by applying the principle of median/equidistance line, see figures 1 and 2 of Annex C.

every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.”³²

The median/equidistance line was the outcome of the perception that this method was the best delimitation technique for the demarcation of the maritime zones (including that of the continental shelf), because it was regarded as the most fair and the safest method.

The significance of the median/equidistance line principle was initially reduced with the introduction of the term “special circumstances” in the Geneva Convention and later it was downgraded further by the 1969 ICJ decision, for the case concerning the North Sea continental shelf delimitation. Then, the court didn’t accept that the median/equidistance line constitute a customary law rule and indicated that it was just a conventional rule, found only in the GCCS and therefore, not a generally accepted rule that should be necessarily followed.³³

The court though stressed the significance of the median/equidistance line method stating that “...no other method of delimitation has the same combination of practical convenience and certainty of application.”³⁴ The next court decisions were in line with the 1969 ICJ judgment, as

³² The median/equidistance line was also established during the UNCLOS I for the territorial waters by the article 12 of the “Convention on the Territorial Sea and the Contiguous Zone”.

³³ “...the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre – existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance – special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen...”. ICJ Reports 1969, para. 69. Available at: <http://www.icj-cij.org/docket/files/51/5535.pdf>.

³⁴ Ibid. para. 23.

the tribunals accepted the median/equidistance line principle merely as the one out of the many existing demarcation methods or factors. Moreover, in some cases it was considered that the median/equidistance line principle couldn't even be used as a provisional line (starting point) of the delimitation process.³⁵ According to the court this method could be adopted only if after the assessment of all the relevant circumstances this method would lead to an equitable solution.³⁶

The practice of the states however seems indifferent to the courts decisions. A number of bilateral agreements have adopted the median/equidistance line as the primary demarcation method. During the Libya – Malta continental shelf case were identified over 70 of such bilateral agreements but the court stated that the states' practice "...falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory."³⁷

The UNCLOS didn't even refer to the median/equidistance line principle within its provisions, emphasizing on the equitable result rather than on the method applied.³⁸

The most recent court decisions though, started to recognize the value of the median/equidistance line as the most appropriate delimitation method since it ensure *prima facie* an equitable result. Consequently, in many cases the judges started the demarcation process by drawing a provisional median/equidistance line and subsequently adjusted it or not, according to

³⁵ Libya – Malta continental shelf delimitation judgment, para. 77: "The fact that the Court has found that, in the circumstances of the present case, the drawing of a median line constitutes an appropriate first step in the delimitation process, should not be understood as implying that an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite States." Available at: <http://www.icj-cij.org/docket/files/68/6415.pdf>.

³⁶ Tunisia – Libya continental self delimitation judgment, para. 13: "...the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances." Available at: <http://www.icj-cij.org/docket/files/71/6527.pdf>.

³⁷ Libya – Malta continental shelf delimitation judgment, *supra* note 35. para. 44.

³⁸ The median/equidistance line principle remained valid in the UNCLOS, but only for the delimitation of the territorial waters. According to article 15: "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 therewith."

the special/relevant circumstances of each particular case, aiming to achieve an equitable solution (Two – Step Approach or Corrective Equity Approach).³⁹ The latest decisions however adopted an additional step: that of proportionality test. The whole delimitation line (equidistant or adjusted equidistant) is checked under the prism of the coastal length ratio and might be readjusted accordingly.⁴⁰

Taking into account the last courts decisions, the states' practice and hence the *opinio juris*, it is safe to conclude that the median/equidistance line principle seems to have been reinstated to its initial position. At least, it should be assumed as constituting a customary law rule which functions complementarily in the international law of the sea.⁴¹

The median/equidistance line is of vital importance for the islands: what if the law or the international tribunals recognize the islands' right to have a continental shelf of their own but in practice they attribute them partial or even no effect at all? The median/equidistance line principle therefore protects the islands from arbitrary interpretations of the law and secures their rights.

Unfortunately, further below we are going to see that in many cases the islands were sacrificed on the special/relevant circumstances altar and that of the equitable result, and therefore they were considered as a reason for deviation from the median/equidistance line principle.

³⁹ The court applied this practice for example in the Libya – Malta case in 1985 and in the Greenland/Jan Mayen case in 1993.

⁴⁰ The Three – Step Approach or Corrective Equity Approach or Adjusted Equidistance/Median Line adopted in the most recent decisions, including: Eritrea/Yemen (1999), Qatar/Bahrain (2001), Cameroon/Nigeria (2002) and Romania/Ukraine (2009).

⁴¹ I. Krateros, A. Strati, *The Law of the Sea*, 1998, p. 313 (in Greek).

2.2 Special/Relevant Circumstances

The terms “Special/Relevant Circumstances” have been used very often in the international jurisprudence in cases related to the continental shelf delimitation. They are essential components of the equitable result⁴² and they should be considered today as part of the customary law. Nonetheless the two terms are not identical and they don’t bear the same connotation.

The notion of the “special circumstances” was introduced during the UNCLOS I, as we saw before.⁴³ In general, the spirit of the Geneva Conventions was that the median/equidistance line constitutes the rule for all the delimitation cases, except for some exceptions. For these exceptions that may come up, it was also introduced the idea of the “special circumstances”, basically serving as a safeguard to the rigid rule. So, in case of the existence of special geographical features, where the application of the median/equidistance line might create inequalities and injustice, it was possible to be a deviation from the rule and it could be drawn a different boundary from that of the median/equidistance line.

In other words, the special circumstances were initially closely related to the median/equidistance line principle. Their disconnection from this principle and their application as an independent demarcation rule was a posterior phenomenon not originally planned in the 1958 Conventions. Thus, the interpretation of the term “special circumstances” and its practical use has created a lot of problems, most of them related with the islands. In many cases as we will see in the next chapter the islands per se were arbitrarily regarded as “special circumstances”, attributing them partial effect as regards their continental shelf.

⁴² See UNCLOS: articles 74 for the Exclusive Economic Zone and article 83 for the Continental Shelf.

⁴³ Article 6 of the GCCS and article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.

The international jurisprudence adopted the term “relevant circumstances” in 1969, after the decision of the ICJ concerning the North Sea continental shelf delimitation. The court didn’t apply the GCCS, because Germany hadn’t ratified it, and therefore the ICJ couldn’t refer to article 6 of the Convention and consequently to the term “special circumstances”. The geographical features of the area however couldn’t be ignored by the court. So the term “relevant circumstances” came up to describe all those geographical and other factors that ought to be assessed in order to be achieved an equitable solution.

The later court decisions followed the precedent set by the judgment of the ICJ in 1969. For the case concerning the Libya – Malta continental shelf delimitation the ICJ declared: “There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area.”⁴⁴

Thus the “relevant circumstances” concept was employed as something broader of that of the “special circumstances”. “Relevant circumstances exist in all cases; special circumstances exist only in some.”⁴⁵

But the ICJ comparing the two terms stated: “Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency 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.”⁴⁶

The relevant circumstances that should be taken into account are not however explicitly determined by the courts or the conventional law. Up to now the courts have decided for the

⁴⁴ Libya – Malta continental shelf delimitation judgment, *supra* note 35, para. 72. Available at: <http://www.icj-cij.org/docket/files/63/6267.pdf>.

⁴⁵ Separate opinion of the judge Shahabuddeen, Greenland – Jan Mayen maritime boundary delimitation, ICJ judgment 1993, p. 114. Available at: <http://www.icj-cij.org/docket/files/78/6759.pdf>.

⁴⁶ Greenland – Jan Mayen, ICJ judgment 1993, para. 56. Available at: <http://www.icj-cij.org/docket/files/78/6743.pdf>.

relevant circumstances on a case by case basis. Next, will be provided some examples of what the courts have considered as relevant circumstances so far: The general configuration of the coasts and the presence of any special or unusual features,⁴⁷ the available natural resources,⁴⁸ the proportionality of the coastal lengths,⁴⁹ the geopolitical situation and the vicinity of some islands to another country,⁵⁰ the presence of oil – wells⁵¹ and the position of the islands in the wider geographical context, particularly their position in a semi – enclosed sea⁵² (but the ICJ in 1969 declared that only islets, rocks and minor coastal projectors can be considered as special circumstances).⁵³ In addition, the courts have admitted that the delimitation of the maritime zones may create security/defense considerations to a state.⁵⁴

On the contrary, the courts haven't considered the following as relevant circumstances: the relative socioeconomic position/development of the states,⁵⁵ the geological characteristics of the sea – bed and the landmass of the states.⁵⁶

To sum up, we note that the term “relevant circumstances” covers a wide range of factors taken into account each and every time, aiming to achieve an equitable result. The term “special circumstances” is connected with those geographical factors that require an adjustment of the

⁴⁷ North Sea Continental Shelf, ICJ Judgment 1969, para. 101/D/1. Available at: <http://www.icj-cij.org/docket/files/52/5561.pdf>.

⁴⁸ Ibid. para. 101/D/2 and Libya – Malta Continental Shelf delimitation, ICJ judgment 1985, *supra* note 35, para. 50, available at: <http://www.icj-cij.org/docket/files/68/6415.pdf>.

⁴⁹ Libya – Malta Continental Shelf delimitation, ICJ judgment 1985, *op. cit.* para. 54, and Greenland – Jan Mayen maritime boundary delimitation, ICJ judgment 1993, *supra* note 46, para. 68.

⁵⁰ Anglo – French Continental shelf Arbitration, para. 197. Available at: <http://www.jstor.org/stable/20692032>.

⁵¹ Tunisia – Libya Continental Shelf delimitation, ICJ judgment 1982, para. 107. Available at: <http://www.icj-cij.org/docket/files/63/6267.pdf>.

⁵² Libya – Malta Continental Shelf delimitation, ICJ judgment 1985, *supra* note 35, para. 53.

⁵³ North Sea Continental Shelf, ICJ Judgment 1969, *supra* note 47, para. 57.

⁵⁴ Libya – Malta Continental Shelf delimitation, ICJ judgment 1985, *supra* note 35, para 51 and Greenland – Jan Mayen maritime boundary delimitation, ICJ judgment 1993, *supra* note 46, para 8. See also Anglo – French Continental Shelf delimitation, *supra* note 50, para. 161, 163 and 188.

⁵⁵ Libya – Malta Continental Shelf delimitation, ICJ judgment 1985, *supra* note 35, para. 50, and Greenland – Jan Mayen maritime boundary delimitation, ICJ judgment 1993, *supra* note 46, para. 80.

⁵⁶ Libya – Malta Continental Shelf delimitation, ICJ judgment 1985, *supra* note 35, para. 39.

median/equidistance line, in order again to reach an equitable solution. The recent jurisprudence however tends to equate the two terms.

2.3 Equitable Principles/Equity

The conceptual origin of the term “equitable/equity” dates back to the ancient Greek law. Aristotle supported that the laws are too general to cover every particular situation, so the application of the law should be done in a way that every time an equitable result is achieved. Equitable result to a case is therefore, the solution that the lawmaker should have proposed if he had known the particularities of that unique case.

By and large, there are three forms of equity: First, the equity that functions *infra legem*, which is that resulting from the interpretation of the existing law, secondly the equity that functions *praeter legem*, which complements the existing law rules, and thirdly the *contra legem* equity, which is the equity awarded against the law. The ICJ has excluded the application of the *praeter legem* and the *contra legem* equity and has explicitly declared on many occasions that the equity that will be applied to the cases submitted to it, is the *infra legem* equity. “The justice of which equity is an emanation, is not abstract justice but justice according to the rule of law.”⁵⁷

In the Law of the Sea the equitable principles were firstly appeared in the Truman Proclamation of 1945: “In cases where the continental shelf extends to the shores of another state,

⁵⁷ Ibid. para. 45. See also North Sea Continental shelf delimitation, ICJ Judgment 1969, *supra* note 47, para. 85 and Honduras – El Salvador, ICJ judgment 1992, para. 262, available at: <http://www.icj-cij.org/docket/files/75/6671.pdf>.

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.”⁵⁸

The UNCLOS and the international jurisprudence concerning the delimitation continental shelf have put the equitable principles/equity in the heart of every delimitation process. As regards the delimitation of the continental shelf between states with opposite or adjacent coasts, the article 83 (1) of the UNCLOS stipulates: “The delimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”

According to the ICJ, equity as a legal concept is directly emanating from the idea of justice and the courts whose task is by definition to administer justice are bound to apply it. Equity however was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. But, when it comes to the continental shelf delimitations, equity is applied directly as law, apparently because there is no specific rule dictating the delimitation process (apart from the median/equidistance line provision of the GCCS). Thus, regarding the continental shelf delimitation the ICJ deemed that equity can be applied directly as law.⁵⁹

When applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be however distinguished from a decision *ex aequo et bono*. The ICJ can take such a decision only on

⁵⁸ Available at: http://www.oceancommission.gov/documents/gov_oceans/truman.pdf, accessed on December 18, 2010.

⁵⁹ Tunisia – Libya Continental Shelf delimitation, ICJ judgment 1982, *supra* note 51, para. 71.

condition that the parties agree (Article 38, para. 2, of the ICJ Statute), and the court is then freed from the strict application of legal rules in order to bring about an appropriate settlement.⁶⁰

The ICJ decision in 1969 was again determinative for the later international jurisprudence. In that case, the court decided that the continental shelf delimitation should be done on the basis of the equitable principles taking into account all the relevant circumstances. The equitable principles/equity emerged therefore as the primary rule of all the delimitation processes.

The next court decisions followed this rationale and stressed the importance of equity in every dispute between the states. In some cases the court tried to define the abstract concept of “equitable/equity”, but as the court admitted during the case concerning the maritime boundary delimitation in the gulf of Maine: “There has been no systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation, and this would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations. Codification efforts have left this field untouched.”⁶¹

The court though gave some examples as to what may be considered as equitable criteria: the classic principle that the land dominates the sea; the criterion advocating, in cases where no special circumstances require correction thereof, the equal division of the areas overlapping the maritime and submarine zones appertaining to the respective coasts of neighboring states; the criterion that, whenever possible, the seaward extension of a state’s coast should not encroach upon areas that are too close to the coast of another state; the criterion of preventing, as far as possible, any cut – off of the seaward projection of the coast or part of the coast of either of the states concerned.⁶²

⁶⁰ Ibid.

⁶¹ Maritime Boundary Delimitation in the Gulf of Maine Area, ICJ judgment 1984, para. 157. Available at: <http://www.icj-cij.org/docket/files/67/6369.pdf>.

⁶² Ibid.

In a later decision, the ICJ tried to specify more the term “equitable/equity”. Thus according to the court equitable criteria may also be: the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non – encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal state enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect of all the relevant circumstances; the principle that although all states are equal before the law and are entitled to equal treatment «equity does not necessarily imply equality», nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice.⁶³

Another equitable criterion that is closely related with the continental shelf of the islands is that of proportionality. This means that the proportion of the continental shelf appertaining to each state, will be related to the proportion of the lengths of the coastlines of the two states. For the Libya – Malta continental shelf delimitation the ICJ stated: “The significant difference in lengths of the respective coastlines is an element which may be taken into account at a certain stage in the delimitation process”.⁶⁴

In fact, it can be concluded that there is no legal limit to the considerations that the courts may take into account for the purpose of making sure that they reach an equitable result. In addition, according to the ICJ, the term “equitable/equity” characterize both the result to be achieved and the means to be applied to reach this result. In order to describe this obscure situation the judge and later president of the ICJ Schwebel noted in his dissenting opinion for the

⁶³ Libya – Malta Continental Shelf delimitation, ICJ judgment 1985, *supra* note 35, para. 46.

⁶⁴ *Ibid.* para. 58. See also North Sea Continental Shelf Delimitation, ICJ Judgment 1969 *supra* note 47, para. 101/D/3, Canada – France Continental Shelf delimitation, arbitration 1992, para. 93 and Anglo – French Continental Shelf delimitation, arbitration 1977, *supra* note 50, para. 99 and 100.

case concerning the maritime delimitation of the area between Greenland and Jan Mayen: “what is equitable is as variable as the weather of The Hague”.⁶⁵

It remains to be seen in the next chapter if the courts stayed within the limits of the *infra legem* equity or if they applied also the *praeter legem* and even the *contra legem* equity as regards to the parts of their decisions concerning the continental shelf of the islands.

⁶⁵ Separate opinion of the judge Schwebel, Greenland – Jan Mayen, ICJ judgment 1993, p. 86. Available at: <http://www.icj-cij.org/docket/files/78/6757.pdf>

Chapter 3

Court Decisions

3.1 North Sea Continental Shelf Delimitation (ICJ 1969)

On February 20, 1969 the ICJ delivered its judgment, by 11 votes to 6, for the case concerning the North Sea Continental Shelf Delimitation.⁶⁶ The dispute, which had been submitted to the court two years earlier, related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other.⁶⁷ The parties asked the court to state the principles and rules of international law applicable, and they undertook thereafter to carry out the delimitations on that basis.

The court rejected the argument that the delimitations in question had to be carried out in accordance with the equidistance principle as defined in article 6 of the 1958 GCCS, because Germany hadn't ratified it and therefore wasn't legally bound by its provisions. In addition, the court pointed out that the equidistance principle wasn't a customary law rule.

The court also rejected Germany's claim that the continental shelf should be apportioned into just and equitable shares. It held that each party had an original right to those areas of the continental shelf which constituted the natural prolongation of the states' land territory into and under the sea and it added that it wasn't a question of apportioning or sharing out those areas, but

⁶⁶ North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3. Available at: <http://www.icj-cij.org/docket/files/52/5561.pdf>.

⁶⁷ See figure 1 of Annex D.

of delimiting them.⁶⁸ The court found that the boundary lines in question were to be drawn by agreement between the Parties and in accordance with equitable principles and it indicated certain factors to be taken into consideration for that purpose.

The North Sea continental shelf delimitation judgment was the first court decision regarding the delimitation of the continental shelf and therefore it created a legal precedent, affecting all the later courts decisions and to a degree even the same the UNCLOS. Moreover, it affected directly or indirectly the issue of the continental shelf of the islands.

In the North Sea, there are many islands belonging to the three litigant countries. The islands of Borkum, Juist, Norderney, Langeoog, Pellworm, Nordstrand, Wyko and Sylt belong to Germany, the islands Romo, Mando and Fano to Denmark and the Frisian Islands belong to the Netherlands. Most of these islands are close to the mainland, up to a distance less than 12 miles from the coasts of the continent.⁶⁹

In this case the presence of numerous islands wasn't though the main consideration for the court. In fact, the islands didn't play any important role at all, to the delimitation process. This was partly for the reason that none of the parties was very keen to raise the issue of the islands, maybe because almost all of them were parallel to the coasts, constituting an insular line not far away from the mainland, hence not affecting much the final demarcation line and the states' access to the oil reserves of the area. Nevertheless, this doesn't justify the court as it was its duty to take into account the fact that the area was dotted with many islands which should have had an effect on the delimitation of the continental shelf. Actually, the German islands of Borkum, Helgoland and Sylt could have had a considerable effect on the delimitation of the maritime boundaries.

⁶⁸ North Sea Continental Shelf, Judgment, ICJ Reports 1969, *supra* note 66, para. 18.

⁶⁹ See figure 2 of Annex D.

The islands could have constituted the outer points of the baselines and the points from which the equidistance line of the delimitation could have been measured, or otherwise the court should have explained the reasons for ignoring the existence of the islands. The court even though didn't take into account the islands, it failed also to give the reasons for its stance.

Thus, it is difficult to be understood the rationale of the court which ignored big and important islands such as Borkum, which was then a significant fishing harbor and it was inhabited by around three thousand people. "While some insular features may have little claim for extending substantially their metropolitan state's natural prolongation those with communities upon them, or an economic life of their own, or having prime economic significance in maritime affairs, severally present quite different bases for continental shelf delimitations."⁷⁰

The court avoided any discussion about the islands and the only reference to them made in paragraph 57 of its judgment where it stated that the maritime boundary could be delimited by means of the median line, "ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means". This statement though proves that the court didn't consider the islands as belonging to the category of the "special/relevant circumstances", considering them as having the same rights over the continental shelf as the mainland.

So, contrary to its practice, the court nowhere in its judgment explicitly questioned the islands' right to have a continental shelf of their own, but quite the opposite, its positive stance on the issue is proved from its position on the GCCS and especially the articles 1 – 3 of it. According to the court these three articles regarded as reflecting, or as crystallizing, received or at

⁷⁰ E. Goldie, "The International Court of Justice "Natural Prolongation" and the Continental Shelf Problem of Islands", 4 *NYIL*, 1973, p. 245.

least emergent rules of customary international law relative to the continental shelf.⁷¹ In addition, the court treated the article 1 as a unity, accepting therefore the rights of the islands over the continental shelf, a right which is binding for all the states, not only for those which had signed the GCCS, since it stems from the customary law.

The customary nature of the articles 1 – 3 was supported also by many judges through their separate or dissenting opinions. The judge Padilla Nervo in his separate opinion supported the view that the three first articles of the GCCS were broadly declaratory of the existing international customary law.⁷² The customary law character of these articles is defended also by the judge Tanaka who stated in his dissenting opinion that “even those states which have not ratified or acceded to the convention (GCCS) could not deny the validity of these provisions against them. Denying the principles enunciated in Articles 1 – 3 would deprive the non – contracting states of the basis of all rights over their continental shelves”⁷³.

The customary nature of these articles and therefore the islands’ right to have a continental shelf of their own was supported also by other judges of the ICJ. The judge Lachs stressed the international states’ practice over the issue,⁷⁴ while the vice – president Koretsky said that the principles and the rules of the GCCS had become general principles of the law⁷⁵. Finally, the judge Sorensen concluded that “...as a result of a continuous process over a quarter of a

⁷¹ North Sea Continental Shelf, Judgment, ICJ Reports 1969, *supra* note 66, para. 63.

⁷² Separate Opinion of Judge Padilla Nervo, ICJ Reports 1969, p. 96. Available at: <http://www.icj-cij.org/docket/files/52/5573.pdf>

⁷³ Dissenting Opinion of Judge Tanaka, ICJ Reports 1969, p. 179. Available at: <http://www.icj-cij.org/docket/files/52/5579.pdf?PHPSESSID=fc96a714e7809ba1075015a48d29f09f>.

⁷⁴ Dissenting Opinion of Judge Lachs, ICJ Reports 1969, p. 229. Available at: <http://www.icj-cij.org/docket/files/52/5583.pdf>

⁷⁵ Dissenting Opinion of Vice – President Koretsky, ICJ Reports 1969, p. 157. Available at: <http://www.icj-cij.org/docket/files/52/5577.pdf>

century, the rules embodied in the GCCS have now attained the status of generally accepted rules of international law”⁷⁶.

It worth mentioning that during the presentation of the German – Denmark memorandum in the German parliament, the government of Germany stated that the maritime boundary between the two states is equidistant from the German island of Sylt and the Denmark promontory of Blaavandshik.⁷⁷ This means that the two litigant parties intended to treat the islands in the same way as the continental lands, and in accordance with the conventional and customary law.

Further elements of great importance for the islands’ continental shelf and for the median/equidistance line principle are found again in the separate and the dissenting opinions of the judges of the court. The judge Fouad Ammoun in his separate opinion supported that the delimitation could be done applying an equidistance line and taking into account a baseline starting from a point out of the island of Borkum up to a point out of the island of Sylt, undoubtedly supporting the article 6 of the GCCS and the islands’ right to have a continental self of their own.⁷⁸

In the same direction was also the dissenting opinion the judge Tanaka, who argued that the provision of the special circumstances in the delimitation processes, should be limited to such cases as the existence of insignificant islands, promontories, etc., which should be ignored in

⁷⁶ Dissenting Opinion of Judge Sorensen, ICJ Reports 1969, p. 247. Available at: <http://www.icj-cij.org/docket/files/52/5585.pdf?PHPSESSID=fc96a714e7809ba1075015a48d29f09f>

⁷⁷ J. Andrassy, “Application of the Geneva Convention, 1958, in Delimiting the Continental Shelf of the North Sea Area”, 23 *REDI*, 1967, p. 10.

⁷⁸ Separate Opinion of Judge Fouad Ammoun, ICJ Reports 1969, para 56 and attached map. Available at: <http://www.icj-cij.org/docket/files/51/5549.pdf?PHPSESSID=c216bbcf361633c404ea0fb03be0ea1a>.

drawing the equidistance line.⁷⁹ Thus, he supported also that the islands should be taken into account for the delimitation of the continental shelf.

The judge Morelli held the same position. In his dissenting opinion he defended the median/equidistance line principle and the islands' right to have a continental shelf of their own by saying that: "Even the case of the existence of an island or promontory which has an abnormal influence on the equidistance line, does not by any means constitute an exception, because such a circumstance does not in itself prevent the equidistance rule from operating."⁸⁰

Finally, it's obvious that also the judge Sorensen backed the islands' right to have a continental shelf by asserting that the equidistance line principle should be applied in a mechanical manner. He went on saying that a narrow interpretation of the term "special circumstances" should be preferred because of its vagueness.⁸¹ We conclude therefore that geographical features such as the islands couldn't be included in the judge's "special circumstances" list, because otherwise it should be decided each and every time if an island belongs to the category of the "special circumstances" according to its size, location, population, etc., making the process not mechanical.

As discussed before, in this case were introduced the equitable principles while at the same time the article 6 of the GCCS regarding the median/equidistance line principle, was degraded by the court. But how the court, even if it didn't explicitly say it, left practically out of the delimitation process the islands, in the name of the equity?

⁷⁹ Dissenting Opinion of Judge Tanaka, ICJ Reports 1969, *supra* note 73, p. 186. He also supported the value of the equidistance line principle because "...the equidistance principle is imperative to the concept of the continental shelf and no State can depart from it any more than it can from the concept itself. The equidistance rule is, alike the concept, a part of customary international law", *Ibid.* p 184.

⁸⁰ Dissenting Opinion of Judge Morelli, ICJ Reports 1969, para. 11, p. 207. Available at: <http://www.icj-cij.org/docket/files/52/5581.pdf?PHPSESSID=fc96a714e7809ba1075015a48d29f09f>.

⁸¹ Dissenting Opinion of Judge Sorensen, ICJ Reports 1969, *supra* note 76, p. 257 – 257.

The court accepted that the delimitation of the maritime boundaries couldn't be a process of "completely refashioning nature" or "totally refashioning geography"⁸² but it seems that it did so by ignoring the existence of the islands by its judgment. In addition, the number, the location and the arrangement of the islands in the region can't be described as "incidental special features"⁸³ with strongly disruptive effects, as to be ignored by the court. Additionally, the court stated that the continental shelf constitutes the natural prolongation of the land into the sea and the rights of the coastal state over it exist *ipso facto* and *ab initio*,⁸⁴ so how could the islands be deprived arbitrarily and without any justification of their rights?

For the abovementioned reasons the decision of the court has been characterized as controversial, a kind of "distributive justice"⁸⁵ and as "a decision *ex aequo et bono*, under the guise of interpretation"⁸⁶. Even the vice – president of the court questioned the court's practice as regards the issue of equity and he added that introducing "so vague a notion into the jurisprudence of the international court may open the door to making subjective and therefore at times arbitrary evaluations, instead of following the guidance of established general principles and rules of international law in the settlement of disputes submitted to the court."⁸⁷

To conclude, the ICJ in the first judicial settlement of the continental shelf, failed to stay within the limits of the existing law rules and to consolidate them in the international jurisprudence. It confirmed the validity only of some existing provisions of the law, such as the articles 1 – 3 of the GCCS, recognizing therefore the islands' rights over the continental shelf but,

⁸²North Sea Continental Shelf, Judgment, ICJ Reports 1969, *supra* note 66, para. 91.

⁸³ Ibid.

⁸⁴ Ibid. para. 19.

⁸⁵ W. Friedman, "The North Sea Continental Shelf Cases: A Critique", 64 AJIL, 1970, p. 236.

⁸⁶ Ibid. See also G. Tanja, *The Legal Determination of International Maritime Boundaries*, 1990, p. 75.

⁸⁷ Dissenting Opinion of Vice – President Koretsky, ICJ Reports 1969, *supra* note 75, p. 166. See also Dissenting Opinion of Judge Tanaka, ICJ Reports 1969, *supra* note 73, p. 196. "It may be said also that the Court seems, by this decision, to be making a legislative consideration on the apportionment of the continental shelf which is not of declaratory but of constitutive nature contrary to the concept of the delimitation and which has been denied by it."

it established the equitable principles not only as the desirable end – state, but also as a method for the maritime delimitations, relegating at the same time the median/equidistance line principle which had been constituting until then, a conventional and to a degree a customary rule law. It set a precedent which has been followed for many years by the courts, increasing thereby the subjectivity and the uncertainty of the delimitations and undermining the authority of the international tribunals. Finally, regarding the islands, although the court didn't *expressis verbis* question their rights, it treated them as inferior to the continental lands.

3.2 Anglo – French Continental shelf Delimitation (Arbitration, 1977)

After several years of unsuccessful negotiations, the governments of the United Kingdom and France agreed in 1975 that the delimitation of the continental shelf between the two countries should be submitted to an *ad hoc* Court of Arbitration. Accordingly, the court delivered an initial decision on June 30, 1977 and a second one on March 14, 1978 after the UK's request to amend the initial decision. The former decision was unanimous while the latter had a dissenting opinion.⁸⁸

The court decided that in the English Channel should be adopted the median line giving full effect to all the islands, including the Eddystone Rocks,⁸⁹ except for the Channel and Scilly Islands to which it gave limited and half effect respectively as discussed below.

The study of the court's decision is particularly interesting because it was the first decision specifically addressing the issue of the islands' continental shelf. The decision of the court came in a period of intense discussions within the context of UNCLOS III and tried to compromise the divergent views regarding the delimitation of the continental shelf, moving between the limits of the equitable principles and that of the median/equidistance line.

During the court hearings the UK supported that the GCCS and especially the article 6 could be used by the court while France opposed to that, arguing that the delimitation should be done by applying the customary law and the equitable principles. Moreover according to France even if the GCCS was considered as the applicable law, then the special circumstances of the area

⁸⁸ Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf. Decisions of the Court of Arbitration dated 30 June 1977 and 14 March 1978. American Society of International Law, *International Legal Materials*. Vol. 18, No 2 (March 1979), pp. 397 – 494. Available at: <http://www.jstor.org/stable/20692032>.

⁸⁹ "...the Court concludes that it should treat the Rock [Eddystone] as a relevant base – point for delimiting the continental shelf boundary in the channel." Ibid. para. 144.

rendered the median/equidistance line as an inappropriate method for the delimitation. Both of them though had agreed that the median line could be adopted by the court as the first step of the delimitation process between the opposite continents, with the exception of the Channel Islands' area.⁹⁰

The Channel Islands are an archipelago of British Crown Dependencies in the English Channel, off the French coast of Normandy.⁹¹ They are consisted of the populated islands of Jersey, Guernsey, Alderney, Sark, Herm, Jethou and a number of islets and rocks, with some of them being inhabited. The total area of the islands is 195 km² and they have a population of about 160,000. The islands are not part of the United Kingdom, but rather are possessions of the British Crown with independent administrations, but still their inhabitants are British citizens.⁹²

On the one hand, the UK supported that not only the article 6 of the GCCS but also the customary law provides for the continental shelf of these islands and proposed the application strictly of the median/equidistance line. According to the UK the islands couldn't be considered as special circumstances due to their size and their economic importance and moreover the median/equidistance line was the method that could produce an equitable result.⁹³ In addition, the existence of a separate government, legislature and courts, made the islands being semi – autonomous.

On the other hand, France insisted on the special circumstances of the area and objected to the median/equidistance line as it couldn't lead to an equitable result because it would reduce the continental shelf appertaining to France with a corresponding gain to the UK, wholly disproportionate to the size of the Channel Islands and to the length of their coasts. Furthermore,

⁹⁰ “They [the Parties] are agreed that throughout the English Channel where the coasts of the French Republic and the United Kingdom are opposite each other the boundary should, in principle, be the median line. They are in radical disagreement as to the appropriate method of delimitation in the Channel Islands region”. Ibid. para. 87.

⁹¹ See figure 3 of Annex D.

⁹² Available at: http://news.bbc.co.uk/2/hi/europe/country_profiles/7515502.stm, accessed on January 3, 2011.

⁹³ Court decision, *supra* note 88, para. 153.

it would sever the continental shelf of France into two separate zones.⁹⁴ France therefore proposed that the Channel Islands should be encircled with a six – mile enclave boundary: three – mile territorial waters and three – mile continental shelf. France also supported that the islands were located within its territorial waters so it didn't recognize the authority the court for the area between the islands and the coast of France.

The court deemed that the Channel Islands belonged to the UK⁹⁵ and concluded that it should treat them “...only as islands of the United Kingdom, not as semi – independent states entitled in their own right to their own continental shelf *vis-à-vis* the French Republic.”⁹⁶ So presumably the court was of the opinion that autonomous islands have more rights over the continental shelf than the islands which belong to a continental state. But if this is the case, then the reasoning of the court is totally unfounded because both the conventional and the customary law provide for the right of the islands to have a continental shelf of their own, irrelevantly of their political status.

Furthermore, even though the court explicitly stated that the delimitation process couldn't be “...a question of completely refashioning nature...”⁹⁷ it seems that it proceeded contrary to its statements during the delimitation. It asserted that if the islands hadn't existed the continental shelf of the area would have accrued to France,⁹⁸ but the islands did exist and they had rights over the continental shelf. Moreover the court seems that tried to apportion the areas of the continental

⁹⁴ Ibid. para. 161.

⁹⁵ “...the legal position of the Channel Islands in regard to maritime jurisdiction appears to confirm that, in matters relating to the continental shelf, it is the United Kingdom Government which is the responsible authority, both internally and externally”. Ibid. para. 186.

⁹⁶ Ibid.

⁹⁷ Ibid. para. 101.

⁹⁸ Ibid. para. 196.

shelf, trying to make equal what nature created unequal.⁹⁹ If this isn't distributive justice then what is it?

It also stated that even if the delimitation had been done according to the GCCS and not according to the customary law, then again the islands would have been considered *prima facie* as constituting special circumstances because of their vicinity to the French coast.¹⁰⁰ It failed though to explain how the islands can be deprived of their entrenched rights due to their location and why they don't have *prima facie* a continental shelf and later in a second stage to be examined the existence of any special circumstance, hence maybe reducing their effect over this continental shelf. The approach of the court wasn't fair for the islands and the judgment doesn't seem to be impartial but rather it was an attempt from the court to find the "golden mean" between the claims of the two litigant parties.

The court finally decided that the Channel Islands should be encircled with a twelve – mile enclave boundary to the north and north – west, respecting the previously established twelve – mile fishery zone of the islands and declared that it wasn't competent under the Arbitration Agreement to delimit the boundary in the narrow belt east and south of these Islands.¹⁰¹

The court didn't explain the rationale of its judgment: why twelve and not for example fifteen – mile zone around the islands? In fact, the court didn't recognize any continental shelf at all for the islands. The UK had stressed the possibility to extend its territorial waters from three to twelve miles and had asked the court to respect its right to do so.¹⁰² The twelve – mile territorial waters zone had started to be consolidated within the UNCLOS III and within the customary law

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid. para. 202.

¹⁰² Ibid. para. 179.

through the practice of various states¹⁰³ and the court knew about this fact.¹⁰⁴ So in practice, the court with its judgment deprived the Channel Islands of their right to have a continental shelf and gave them only a twelve – mile zone of territorial waters.

The other part of the court decision that has to do with the islands, is that which refers the Scilly Isles. These Isles is an archipelago of five inhabited islands and numerous other small rocky islets (around 140 in total) 28 miles off the southwestern tip of the Cornish peninsula of the UK, with a total population of just over two thousand.¹⁰⁵ In this case the court used the median/equidistance line giving half effect to the islands of Scilly as it considered that they constituted special circumstances.

The characterization of the islands as special circumstances was done by the court not only because they were islands but also for the reason that they were related with the Cornish promontory which according to the court it had the “...tendency to distortion of the equidistance line, as the projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of special circumstance ...[and which] constitute an element of distortion which is material enough to justify the delimitation of a boundary other than the strict median line”.¹⁰⁶ These islands were then arbitrarily regarded as being the continuation of the Cornish peninsula into the sea and their effect over the median/equidistance line had to be reduced.

The half effect came up from the comparison of two distances: the distance between the UK’s mainland and the Scillies and that between the French mainland and the island of

¹⁰³ “State practice would suggest that such a rule has emerged”. M. McRae, “Delimitation of the Continental Shelf between the United Kingdom and France: the Channel Arbitration”, 15 *CYIL*, 1977, p. 189.

¹⁰⁴ Court decision, *supra* note 88, para. 187.

¹⁰⁵ Available at: <http://www.scillyonline.co.uk/>. Accessed on January 4, 2011.

¹⁰⁶ Court decision, *supra* note 88, para. 244.

Ushant¹⁰⁷. Since the former is twice the latter the court considered that the half effect of the Scillies and the full effect of the Ushant would lead to an equitable result. The court again didn't justify its rationale: so if twice the distance means half effect does four times the distance mean one fourth effect? Does it mean then that the remote islands have no effect at all? It seems that for the sake of "equity" the courts sometimes can think very creatively.

In this case the court tried to marry the conventional and the customary law and to apply the median/equidistance line principle together with the equitable principles. Moreover, it tried to reconcile as much as possible the claims of the two states by apportioning equal shares to both of them. In general terms and compared with that of 1969, the 1977 court decision can be characterized as a positive step towards the restoration of normality and the establishment of a degree of predictability in the delimitation processes. The same though isn't true for the islands which were treated as inferior to the continental lands. They came again in second place and deprived, either partially or even completely, of their rights.

¹⁰⁷ The island of Ushant (Quessant) located 14 miles off the Brest peninsula and has around 2500 inhabitants. See figure 3 of Annex D.

3.3 Continental Shelf Delimitation between Iceland and Jan Mayen (Conciliation Commission, 1981)

In 1979 Iceland established a 200 – mile exclusive economic zone around its country and in addition it asserted that it was also entitled to a continental shelf in Jan Mayen Ridge which is an underwater area south of the Norwegian island of Jan Mayen and beyond the 200 – mile limit of the Icelandic EEZ.

Jan Mayen is a volcanic island, located in the North Atlantic Ocean, 513 miles west of Norway, 324 miles north of Iceland and 246 miles west of Greenland. It is 55 Km long, has a maximum width of 15 Km and its area is 377 Km². It has no indigenous inhabitants but on the island stay a number of personnel who are running a navigation station and a meteorological station. Also on the island work the people who maintain the island's infrastructure such as the buildings, roads, airstrip, power station and so on. Usually there are around 18 – 20 people who spend the winter on the island, but the population may double during the summer, when heavy maintenance is performed. Personnel serve either six months or one year, and are exchanged twice a year in April and October.¹⁰⁸

Jan Mayen Ridge is an area beyond the 200 – mile exclusive economic zone of Iceland, and back then there were indications that it might contain exploitable oil deposits. It's worth noting that the Icelandic exclusive economic zone was already extending in a considerable area beyond the median/equidistance line between Iceland and Jan Mayen.¹⁰⁹ Since no agreement was

¹⁰⁸ Available at: <http://www.jan-mayen.no/> and <https://www.cia.gov/library/publications/the-world-factbook/geos/jn.html>, accessed on January 6, 2011.

¹⁰⁹ See figure 4 of Annex D.

reached between the two countries, they agreed to refer to a Conciliation Commission¹¹⁰ which was established under the Agreement of 28 May 1980.¹¹¹ The Commission was set up on 16 August 1980 and was asked to make its unanimous recommendations to the governments of the two states. These recommendations were not to be legally binding on the Parties.¹¹²

The Conciliation Commission submitted its recommendations in May 1981. The Commission bearing in mind Iceland's strong economic interests in these areas and the fact that Iceland was totally dependent on imports of hydrocarbon products,¹¹³ recommended that although no new boundary line might be established between Iceland and Jan Mayen as the continental shelf boundary beyond Iceland's 200 – mile EEZ limit, a specific area for joint development should be established.

The area proposed by the Commission comprises some 45,475 Km², out of which the part north of the 200 – mile exclusive economic zone line comprises 32,750 Km² and the area south of the line comprises 12,725 Km².¹¹⁴ As a result, Iceland could be entitled to acquire a 25% interest in joint venture arrangements or other forms of exploitation in the area north of the 200 –

¹¹⁰ The procedure provided for in article 33, para. 1, of the Charter of the UN: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Available at: <http://www.un.org/en/documents/charter/chapter6.shtml>.

¹¹¹ The Conciliation Commission consisted of three members: one nominated by Iceland, another by Norway and the third, who was the chairman, was agreed upon between the Parties. Chairman was the then leader of the USA delegation to UNCLOS III and members were the leaders of the respective delegations of Iceland and Norway. P. Jagota, *Maritime Boundary*, 1985, p. 165.

¹¹² Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, p. 7. Available at: http://untreaty.un.org/cod/riaa/cases/vol_XXVII/1-34.pdf.

¹¹³ "...the Commission shall take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances." and "Iceland is totally dependent on imports of hydrocarbon products." Ibid. p. 7 and p. 24.

¹¹⁴ Ibid. p. 25.

mile EEZ line and more or less, the same was the case for Norway in the area which falls south of the 200 – mile EEZ line of Iceland.¹¹⁵

The study of this case it's interesting not only because it has to do with the delimitation of the continental shelf between a continental state and an island but also it is particularly interesting because of the nature of Jan Mayen as an island. Thus the first question that should be answered by the Commission was if Jan Mayen was indeed an island and if it could “sustain human habitation or economic life of its own”, according to the article 121 of the UNCLOS which at that time had almost been finalized. The case is also interesting for the inventive solution that the Commission proposed to the parties.

As regards the first issue Iceland tried to relegate the island to the category of the rock stating that Jan Mayen “...was simply a small protuberance on the Iceland's continental shelf”, but contrary to its arguments it had measured the breadth of its EEZ from its outlying, tiny islands such as Hvalbakur and Kolbeinsey, upgrading therefore for its own interests the status of the small islands.¹¹⁶

In addition, the UNCLOS definition (article 121, para. 1) of the term “island” wasn't something new in the international law; actually the very same definition had been existed in the article 10 of the Geneva Convention on the Territorial Sea and the Contiguous Zone,¹¹⁷ and undoubtedly it was also part of the customary law. Regarding the paragraph 3 of the same article according to which “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”, there are two remarks opposing to Iceland's arguments.

¹¹⁵ Ibid. pp. 30 – 33.

¹¹⁶ R. Churchill, “Maritime Delimitation in the Jan Mayen Area”, 9 *Marine Policy*, 1985, pp. 19 – 20.

¹¹⁷ “An island is a naturally formed area of land, surrounded by water, which is above water at high tide.” Available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf.

First, the aforementioned article states that only “rocks” with specific features can’t be entitled to a continental shelf, but can an island of such magnitude as Jan Mayen be described as a rock? Secondly, the fact that Jan Mayen didn’t sustain back then human habitation or economic life of its own, didn’t necessarily mean that wasn’t possible such a possibility. In fact there were many reports that in the past some groups of hunters had wintered on the island without outside support.¹¹⁸

Consequently it wasn’t a surprise that the Commission turned down the argument of Iceland that the Jan Mayen Ridge was the natural prolongation of its landmass, concluding also that the article 121 of the UNCLOS draft “...reflects the present status of international law on this subject. ...[so] Jan Mayen must be considered as an island. Paragraphs 1 and 2 of Article 121 are thus applicable to it. Therefore, Jan Mayen is entitled to a territorial sea, an economic zone and a continental shelf. ... Articles 74 and 83 concerning delimitation are also applicable.”¹¹⁹

The second interesting issue about this case has to do with the proposal of the Commission per se, which by the way, was totally accepted by the two states with their bilateral agreement that was signed in October 1981 and came into force in June 1982.¹²⁰ Hence, Iceland established two identical maritime zones: the EEZ and that for the continental shelf, with a breadth of 200 – miles. In addition, the two states could jointly exploit a particular region on both sides of their common maritime boundary, potentially rich in oil reserves. This case therefore brought to the fore an alternative approach, highlighting the prospect of joint management and co – exploitation of the natural resources of a sea area, hitherto unprecedented in the international practice.

¹¹⁸ H. Tzimitras, *The Continental Shelf of Islands in International Jurisprudence*, 1997, p. 70 (in Greek).

¹¹⁹ Report, *supra* note 112, p. 10.

¹²⁰ The Agreement is available at: http://untreaty.un.org/unts/144078_158780/9/2/2438.pdf.

Here it should be stressed however the good neighborly relations of the two states and their dedication to find a mutually accepted solution to their dispute. One of the tasks of the Conciliation Commission was to promote the cooperation and the friendly relations between the two countries. In this respect it was free to apply not only legal criteria but also it could take into account other considerations such as the economic interests, in order to reach to a solution.¹²¹ Nonetheless, this case can constitute a precedent for those countries that seek to solve their differences in a spirit of understanding and cooperation, but not for those that have fundamental different views as to the appropriate solution. There the recourse to the international judicial bodies appears to be the only feasible solution.

As a final point, it should be noted the particular value of this case for the islands. It was confirmed the rule that the islands are entitled by definition to a continental shelf and this still applies even if they are uninhabited, desolate, barren or remote from the mainland. However, the particular characteristics of the islands may act in a second stage of the delimitation so as to reduce accordingly their effect on the continental shelf, in order to be achieved an equitable result. In this regard “the treatment of islands in the Jan Mayen case ... seem to constitute a useful and persuasive precedent in other maritime delimitation disputes involving barren and remote islands, of which there are quite number.”¹²²

¹²¹ Ibid. p. 4.

¹²² R. Churchill, *supra* note 116, p. 26.

3.4 Tunisia – Libya Continental Shelf Delimitation (ICJ, 1982)

On February 24, 1982 the ICJ delivered its judgment by 10 votes to 4, for the case concerning the delimitation of the continental shelf between Tunisia and Libya.¹²³ Under the special agreement between the parties, the court had to decide on the principles and rules of international law applicable for the delimitation of the continental shelf appertaining to them. Moreover, the court according to the agreement had to take its decision according to the “equitable principles”, and the “relevant circumstances” of the area, as well as according to the hitherto accepted trends in the UNCLOS III. Also, the court was further requested to clarify the practical method for the application of these principles and rules in that specific situation, so as to enable the experts of the two countries to delimit the continental shelf without any difficulty.¹²⁴

As neither Tunisia nor Libya was a contracting party to the GCCS,¹²⁵ the two states asked the court to apply in this case the customary law, adopting at the same time the interpretation that the ICJ had made to it in the case concerning the North Sea continental shelf delimitation. Thus, the litigant parties referred to the terms “equitable principles” and “relevant circumstances” of the area, which was the terminology that the court had used in 1969. Moreover they requested from the court to take into account the accepted trends in the UNCLOS III, most probably because the parties had understood that the almost complete convention would express the universally accepted Law of the Sea and it would actually crystallize all the existing customary law rules.¹²⁶

¹²³ Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18. Available at: <http://www.icj-cij.org/docket/files/63/6267.pdf>.

¹²⁴ ICJ Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Vol. 1, article 1. Available at: <http://www.icj-cij.org/docket/files/63/9511.pdf>.

¹²⁵ I.C.J. Reports 1982, *supra* note 123, para. 36.

¹²⁶ The Court declared that “...the Court would have had *proprio motu* to take account of the progress made by the Conference even if the Parties had not alluded to it in their Special Agreement; for it could not ignore any provision

Recognizing the value of the draft UNCLOS both states should have all together acknowledged therefore the islands' right to have a continental shelf of their own, a right guaranteed by both the conventional and the customary law. It is noted that the ICJ in 1969 had confirmed the customary nature of the article 1 of the GCCS and therefore the islands' right to have a continental shelf.

Tunisia indeed stressed the fact that the presence of a number of islands was a factor that the court ought to take into consideration¹²⁷ but Libya argued that the Tunisian islands were insignificant and therefore they shouldn't play any role at all, to the delimitation process.¹²⁸ Moreover Libya quarreled with the application of the equidistance method saying that in that case that method would be "...inequitable and inappropriate."¹²⁹

The court initially accepted that "...the presence of the island of Jerba and of the Kerkennah Islands and the surrounding low – tide elevations is a circumstance which clearly calls for consideration"¹³⁰ but right after this statement it unexplained excluded the island of Djerba from the delimitation process stating that "...The practical method for the delimitation to be expounded by the court hereafter is in fact such that, in the part of the area to be delimited in which the island of Jerba would be relevant, there are other considerations which prevail over the effect of its presence; the existence and position of the Kerkennah Islands and surrounding low –

of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre – existing or emergent rule of customary law." I.C.J. Reports 1982, Ibid. para. 24. See also the separate opinion of Judge Jimenez de Arechaga who in para. 32 supports that the trends "...must be, or have become, rules of customary international law." Available at: <http://www.icj-cij.org/docket/files/63/6275.pdf?PHPSESSID=5012316907cd0b81c9d4634f8331c408>

¹²⁷ Memorial of Tunisia, pp. 12 – 13. Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=c4&PHPSESSID=5012316907cd0b81c9d4634f8331c408&PHPSESSID=5012316907cd0b81c9d4634f8331c408&case=63&code=tl&p3=90>.

¹²⁸ "...in arriving at the general direction of the coastlines, the Island of Djerba invites omission, since it is clearly an exceptional feature and its inclusion would introduce irrelevant complications. Similarly, the Kerkennah Islands should be excluded since they occupy little more than 180 square kilometers". I.C.J. Reports 1982, *supra* note 123, para. 79.

¹²⁹ Memorial of Libya, para. 149. Available at: <http://www.icj-cij.org/docket/files/63/9517.pdf>.

¹³⁰ I.C.J. Reports 1982, *supra* note 123, para. 79.

tide elevations, on the other hand, are material.”¹³¹ The court though didn’t clarify its reasoning and didn’t provide the considerations which prevail over the effect of the presence of such an important island as Djerba. This finding of the court was extremely unfortunate and its legality is very questionable.

The court later on in its decision, considered the Kerkennah islands as relevant circumstances and concluded that they should be given partial effect. It stated that “The relevant circumstances...to be taken into account in achieving an equitable delimitation include the following:...the existence and position of the Kerkennah Islands.”¹³² They “constituting by their size and position a circumstance relevant for the delimitation, and to which the court must therefore attribute some effect.”¹³³

The Island of Djerba (or Jerba) has an area of 514 Km² and it is the largest island of North Africa, with a population of around 60,000. The island is located very close to the mainland and between it and the mainland are shallow waters inappropriate for general navigation. During the low – tide the island almost unites with the promontory of Zarzis. The Kerkennah archipelago consists of two main islands and a number of smaller islands with a total area of 160 Km² and a population of around 14,000. The Kerkennahs lie 11 miles to the east of the mainland but are virtually a continuation of the mainland by virtue of the extreme shallowness of the waters separating them from the mainland. Navigation in the passage between the islands and the mainland is difficult and only possible for small crafts.¹³⁴

Taking into account the geographical, demographical and the economical realities of the islands it is concluded that both, the island of Djerba and the Kerkennahs should have been given

¹³¹ Ibid.

¹³² Ibid. para. 133.

¹³³ Ibid. para. 128.

¹³⁴ Ibid.

full effect regarding the continental shelf. This was the usual practice between the states¹³⁵ and in addition the fact that the islands were within the – would become – 12 miles Tunisian territorial waters, could have made them the outer edge of the straight baselines from which the breadth of the maritime zones should have been measured.¹³⁶ This would be also in accordance with the international law and the jurisprudence of ICJ. For instance, for the Fisheries Case between the UK and Norway the ICJ had decided in 1951 that Norway could use straight baselines which were drawn at the outer edges of the islands and the small islets (skjaergaard) which were close to the coast of the mainland.¹³⁷ Besides, this practice had already been incorporated in the article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.¹³⁸

The court finally apart from completely disregarding the island of Djerba as if it hadn't been existed, gave half effect to the Kerkennah islands. The exact wording of the court regarding the effect of the Kerkennahs on the demarcation line was as follows: "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

¹³⁵ See for example the agreement on the maritime boundary in the gulf of Manaar and the bay of Bengal (India – Sri Lanka, 1976), the agreement concerning the delimitation of the CS between Iran and Oman (1974), the treaty concerning the delimitation of the CS under the North Sea (Netherlands – Germany, 1971), the treaty concerning the delimitation of the CS in the Baltic Sea (Poland – Germany, 1968) and the agreement on the delimitation of the CS between Italy and Yugoslavia (1968).

¹³⁶ "...an islet should be prima facie entitled to recognition of its own coasts as a component of a baseline for demarcation of seabed boundaries if any portion of the islet lies within 24 nautical miles of the coast of its owner's mainland or major island. This is because the island's 12 – mile contiguous zone merges with the 12 – mile contiguous zone of the larger land territory, the two thus forming an envelope encompassing both." C. Ely, "Seabed Boundaries between Coastal States: the Effect to be given to 'Islets' as 'Special Circumstances'", 6 *International Lawyer*, 1972, p. 219. See also H. Jayewardene, *The Regime of Islands in International Law*, 1990, p. 478: "...the general academic opinion indicates that islands within the 12 miles should be granted full weight".

¹³⁷ "...it is the outer line of the "skjaergaard" which must be taken into account in delimiting the belt of Norwegian territorial waters." Fisheries Case, Judgment of December 18th, 1951: ICJ Reports 1951, p. 166, p. 128. Available at: <http://www.icj-cij.org/docket/files/5/1809.pdf>.

¹³⁸ "In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands long the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured." Available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf.

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 bisector of the angle which they make with each other, or possibly by treating the island as displaced toward the mainland by half its actual distance therefrom.”¹³⁹ In other words the court drew a line between the Kerkennahs and the mainland which was used as the baseline for the measurement of the continental shelf.¹⁴⁰

The rationale of the court is difficult to be understood. How it completely omitted from the delimitation process a whole island such as Djerba which is almost part of the mainland and it is nearly twice as big as Malta? Why did it give half effect to the Kerkennah Islands which are virtually located in the Tunisia’s territorial waters? Moreover, the fact that in the area there were the Italian islands¹⁴¹ which on the one hand were very smaller than the Tunisian islands and on the other hand they had been taken into account for the delimitation of the continental shelf between Italy and Tunisia,¹⁴² strengthen the argument that the Tunisian islands should have had a better treatment by the court.

“Such a decision which issued without any reasonable justification, is certainly contrary to the equitable principles and the law itself...it is proved finally that the handling of the case by the court was contrary not only with the generally accepted principles of international law on the subject, but even contrary to its own findings.”¹⁴³ Moreover, as another scholar commented on the court decision “...giving only half effect to the Kerkennahs...was an unwarranted

¹³⁹ I.C.J. Reports 1982, *supra* note 123, para. 129.

¹⁴⁰ See figure 5 of Annex D.

¹⁴¹ These are the islands of Pantelleria, Lampedusa and the tiny islets of Linosa and Lampione. See the relevant map, I.C.J. Reports 1982, *supra* note 123, p. 36.

¹⁴² *Ibid.* para. 20.

¹⁴³ M. Stavrinos, *The Problem of the Aegean Continental Shelf*, 1986, p. 156 (in Greek).

refashioning of the geography of the Tunisian coastline, the equity of which is surely questionable.”¹⁴⁴

The Judge Evensen in his dissenting opinion argued that “Disregarding completely these [promontory of Zarzis and island of Djerba] special characteristics of very relevant sections of the Tunisian coastline and only giving half effect to the Kerkennah Archipelago is in my respectful opinion a refashioning of nature which is neither warranted in law nor by the facts, nor is the disregard of such important geographical features equitable.”¹⁴⁵ He concluded by saying that the court decision “...is not warranted in law and does not correspond to equity.”¹⁴⁶

The judge Gros in his dissenting opinion held that “Islands separated from the coast by an area of shoals less than 12 miles wide, which is the case of the Kerkennahs, are not an abnormal geographical feature and must be employed as base points for lines of delimitation.”¹⁴⁷

The ruling of the court has been characterized again by many scholars as distributive justice and as an effort to apportion the continental shelf of the area in both states. For example the professor Charney supported that “...it appears that the boundary line adopted by the court divides in half the water area between the claims of the parties. This fact, viewed in the context of the gap in the court’s analysis, gives the impression that splitting the difference was the court’s prime objective.”¹⁴⁸

It seems from the above analysis that in this case the islands were misjudged by the court. The fact that the islands belonged only to one Party confute the argument of the court that it wanted to achieve equity. Equity for example could have been achieved by the mutual exclusion,

¹⁴⁴ D. Hodgson, “The Tuniso – Libyan Continental Shelf Case”, 16 *CWRJIL*, 1984, p. 30.

¹⁴⁵ Dissenting opinion of Judge Evensen, para. 17. Available at: <http://www.icj-cij.org/docket/files/63/6281.pdf>.

¹⁴⁶ *Ibid.* para. 18.

¹⁴⁷ Dissenting opinion of Judge Gros, para. 14. Available at: <http://www.icj-cij.org/docket/files/63/6277.pdf?PHPSESSID=5012316907cd0b81c9d4634f8331c408>

¹⁴⁸ J. Charney (ed.), “ICJ Decision in the Libya – Tunisia Continental Shelf Case”, 76 *Proceedings of the ASIL*, 1982, p. 155.

from the delimitation process, of all the relevant geographical features of both parties in an attempt to balance up a given situation. Besides, a decision based on equity is separated by a decision *ex aequo et bono* by a very thin line. It appears that in this case the court crossed this line and moved beyond the limits of the law. The exclusion of an island from the delimitation process as non – existent and the attribution of half effect to others is nothing more than a refashioning of nature and contradicts with the law, both customary and conventional.

Another point to note is the stance of the court regarding the median/equidistance line principle. The court rejected the application of this principle without explaining in depth the reasons for that. It declared that the “...equidistance is not, in the view of the court, either a mandatory legal principle, or a method having some privileged status in relation to other methods”¹⁴⁹ and concluded that the median/equidistance line is just a “factor” of the desirable equitable result.¹⁵⁰ “The court went much further in this case to downgrade the equidistance method than had the tribunals in the North Sea and Anglo – French disputes.”¹⁵¹ “Thus, the equidistance ‘principle’, already relegated to the category of method by the Anglo – French Continental Shelf Arbitration, became, in 1982, no more than a ‘factor’.”¹⁵²

In this case the court had the opportunity to distance itself from the 1969 ruling. It had the chance to clarify the applicable law regarding the delimitation processes and to interpret the provisions of the UNCLOS in such a way as to be established clear and undisputed delimitation rules. The court though fell short of the expectations. It increased the subjectivity of the delimitations and decreased the possibility of predicting the outcome of any future case. This has been probably the most misguided court ruling concerning the maritime delimitations and has

¹⁴⁹ I.C.J. Reports 1982, *supra* note 123, para. 110.

¹⁵⁰ *Ibid.* para. 126.

¹⁵¹ J. Charney, *supra* note 148, p. 163.

¹⁵² L. Herman, “The Court Giveth and the Court Taketh Away: An Analysis of the Tunisia – Libya Continental Shelf Case”, 33 *ICLQ*, 1984, p. 835.

been harshly criticized by many scholars. It was the apotheosis of relativity and the “case by case” approach regarding the application of the law, for the delimitation of the continental shelf.¹⁵³

¹⁵³ C. Rozakis, *In Search of the Lost Time: The Law of the Continental Shelf in the Decision of the International Court of Justice for the Libya – Malta Case*, 1989, p. 29 (in Greek). See also H. Tzimitras, *supra* note 118, p. 159.

3.5 Canada – USA (Gulf of Maine) Maritime Boundary Delimitation (ICJ, 1984)

On October 12, 1984 the Chamber of the ICJ¹⁵⁴ delivered its judgment by 4 votes to 1, for the case concerning the maritime boundary delimitation between Canada and the USA.¹⁵⁵ The parties by their Special Agreement had asked the court to delimit a single maritime boundary that would divide the continental shelf and the exclusive fishery zone of the two States in the area of the Gulf of Maine. The parties requested therefore from the court not only to define the rules of the delimitation but also to draw the maritime boundary between the two states. Thus, in this case the court had to delimit a single boundary for two different zones, or in other words, a common marine and submarine boundary.

The first problem that the court had to answer was that of the applicable law in this case. The two states had signed the GCCS and consequently its provisions could have been applied for the solution of their dispute, but this was true only for the part concerning the continental shelf. By signing the Geneva Convention the two states had recognized the right of the islands to have a continental shelf of their own, as well as the validity of the article 6 of the same convention regarding the delimitation method. Moreover as stated before, the customary nature of the articles 1 – 3 of the GCCS was an unquestioned fact. Nonetheless, the issue here was primarily about the other half of the dispute, i.e. the delimitation of the exclusive fishery zone. The delimitation of a single boundary meant that the court had to take into account those criteria that were common for both zones. So the court “...rule[d] out the application of any criterion found to be typically and

¹⁵⁴ This was the first time that a dispute of this kind was submitted to a Chamber of the ICJ, instead of the Plenary Court. The procedure provided for in the articles 26 – 31 of the Statute of the ICJ. According to article 27 “A judgment given by any of the chambers ... shall be considered as rendered by the Court.” Available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_I.

¹⁵⁵ Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246. Available at: <http://www.icj-cij.org/docket/files/67/6369.pdf>.

exclusively bound up with the particular characteristics of one alone of the two natural realities that have to be delimited in conjunction.”¹⁵⁶

The court clarified that if it had to delimit only the continental shelf between the two states and if there weren't any special circumstances dictating the usage of another method, then there would be no doubt as to the mandatory application of the median/equidistance line method.¹⁵⁷ So “had the dispute been limited to a continental shelf delimitation, however, the Chamber would have been under an obligation to apply the provisions of the article 6”¹⁵⁸ of the Geneva Convention. The court therefore took a clear stance regarding the GCCS and by extension positioned itself for the rights of the islands.

In the Gulf of Maine there are some islands and numerous islets and rocks. The most important of them, which are going to be discussed in the next paragraphs, are the Canadian islands of Cape Sable and Seal and the USA island of Nantucket.

Nantucket Island is located 30 miles south of Cape Cod. The permanent population of the island is approximately 10,000 and it has an area of 124 km². Cape Sable Island is located at the southernmost point of the Nova Scotia peninsula. In the past it was separated from the mainland by the narrow strait but it has been connected to it by a causeway since 1949. It covers about 40 km² and has a population of close to 4,000. It forms the eastern limit of the Gulf of Maine, opposite Cape Cod. The island of Seal is located some 13 miles south – west of the Nova Scotia peninsula. It is 2.5 miles long, has an area of around 4 Km² and it is practically uninhabited.¹⁵⁹

Canada initially supported the application of the median/equidistance line, as it was depicted in the article 6 of the GCCS, but a year later, right after the decision of the Court of

¹⁵⁶ Ibid. para. 193.

¹⁵⁷ Ibid. para. 118.

¹⁵⁸ G. Tanja, *supra* note 86, p. 218.

¹⁵⁹ See figure 6 of Annex D.

Arbitration regarding the Anglo – French continental shelf delimitation, reneged on its thesis and proposed a median/equidistance line that wouldn't take under consideration the Cape Cod, as well as the USA's islands of Nantucket and Martha's Vineyard. It considered these geographical features as special circumstances which they shouldn't have had any effect at all on the delimitation line, invoking again the 'special circumstances'¹⁶⁰ of the same article, as well as the equitable principles, as they had been outlined by the arbitral tribunal in the Anglo – French case.¹⁶¹

It contended that if Cape Cod and Nantucket Island were taken into account, they would have a disproportionate and inequitable effect upon the course of a median/equidistance line boundary. These features would attract a sea area too large in comparison with their land territory. It further argued that the ratio between the land area of these features and the sea area that they would attract was 1 to 8.4.¹⁶² It seems therefore that Canada changed its attitude, not only because of its commitment to the law, but because of its ulterior motives. The decision of 1977 gave it the opportunity and the law grounds to claim a broader area in the Gulf of Maine, at the expenses of the USA.

The USA in contrast, didn't refer to the conventional law (i.e. the GCCS) but put emphasis on the equitable principles¹⁶³ and proposed a number of these principles that the delimitation process should be based on.¹⁶⁴ According to these equitable criteria, a delimitation

¹⁶⁰ “The circumstances in question were the projections seawards of the exceptionally long peninsula of Cape Cod and the islands of Nantucket and Martha's Vineyard, added to the marked protrusion of the United States coastline southeast of Boston; the delimitation line should therefore be an equidistance line drawn without reference to these coastal projections.” Judgment, I.C.J. Reports 1984, *supra* note 155, para. 71.

¹⁶¹ *Ibid.* para. 71.

¹⁶² Canada Counter – Memorial, para. 708. Available at: <http://www.icj-cij.org/docket/files/67/9599.pdf>.

¹⁶³ “The cardinal principle in delimiting a single maritime boundary is that the delimitation shall be in accordance with equitable principles, taking account of the relevant circumstances in the area, to produce an equitable solution.” USA Memorial, para. 8. Available at: <http://www.icj-cij.org/docket/files/67/9597.pdf>.

¹⁶⁴ “Among the equitable principles to be applied to produce an equitable solution in a single maritime boundary case are: (1) principles regarding the relationship between the relevant coasts of the parties and the maritime area lying in front of those coasts, including nonencroachment, proportionality, and (where applicable) natural prolongation; (2)

method that ignores the islands, yields the maritime area lying in front of their coasts to another state, which in practice is nothing more than the encroachment of one state over the area of another. The USA didn't make any distinction between mainland and islands stating that "in the view of the United States, there is no justification in international law for discounting the effect to be given to Cape Cod and Nantucket Island in determining the maritime boundary in the Gulf of Maine area...[they are] of great historical, political and economic importance to the United States, [and they] do not constitute distorting projections."¹⁶⁵ Unlike its islands though, the USA disregarded the Canadian islands of Seal and Cape Sable and it went further and considered even the Nova Scotia peninsula as a special circumstance.¹⁶⁶

The court concluded as regards to the applicable law that the "...delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."¹⁶⁷ Again, the court rejected the application of the median/equidistance line as unsuitable for this case.¹⁶⁸ According to the court, the application of the equitable principles adapted to the relevant circumstances of the case, was consistent with the previous rulings of the courts and compliant with the UNCLOS.¹⁶⁹ The court however failed to define those fixed rules and principles that govern the demarcation process, preserving once again the subjectivity and the uncertainty of the delimitations.

the principle of conservation and management of the resources of the area; (3) the principle of minimization of the potential for international disputes; and (4) the general principle that delimitation should take account of the relevant circumstances in the area." Ibid. para. 238.

¹⁶⁵ Ibid. para. 160.

¹⁶⁶ Ibid. para. 286.

¹⁶⁷ I.C.J. Reports 1984, *supra* note 155, para. 112.

¹⁶⁸ Ibid. para. 209 – 211. The Judge Gros defends the median/equidistance line principle throughout his dissenting opinion. Available at: <http://www.icj-cij.org/docket/files/67/6375.pdf>.

¹⁶⁹ I.C.J. Reports 1984, *supra* note 155, para. 91 – 96.

The court indeed accepted that “there has been no systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation, and this would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations. Codification efforts have left this field untouched.”¹⁷⁰ The court therefore didn’t try to clarify the applicable law and proceeded just by adding some more criteria in the never – ending list of the equitable principles.

In this case the court highlighted the importance of geography as an equitable criterion and especially its role as a common denominator for the dual delimitation. In this context the court underlined “...the necessity of granting some effect, however limited, to the presence of a geographical feature such as an island or group of small islands lying off a coast...”.¹⁷¹ But what was finally the ruling of the court, regarding the islands?

The court accepted the USA’s island of Nantucket and the Canadian island of Cape Sable to be the two most advanced basepoints for the delimitation, giving therefore full effect to them.¹⁷² This was also in accordance with the final position of the parties, as both of them had accepted the rights of these two islands, before and during the court hearings. Furthermore, it gave half effect¹⁷³ to the Seal Island (together with its smaller neighbor, Mud Island) because according to the court it couldn’t be totally ignored because of its dimensions and more particularly because of its geographical position.¹⁷⁴

Finally the court “...point[ed] out the potential disadvantages inherent in any method which takes tiny islands, uninhabited rocks or low – tide elevations, sometimes lying at a

¹⁷⁰ Ibid. para. 157.

¹⁷¹ Ibid. para. 198.

¹⁷² Ibid. para. 225.

¹⁷³ The delimitation line is constituted of three different parts. One part of it (i.e. delimitation of opposite coasts) coincides with the median line giving half effect to the island of Seal. See Ibid, Technical Report.

¹⁷⁴ Ibid. para. 222 and Technical Report.

considerable distance from *terra firma*, as basepoint for the drawing of a [demarcation] line...”¹⁷⁵ It went on saying that “If any of these geographical features possess some degree of importance, there is nothing to prevent their subsequently being assigned whatever limited corrective effect may equitably be ascribed to them, but that is an altogether different operation from making a series of such minor features the very basis for the determination of the dividing line, or from transforming them into a succession of basepoints for the geometrical construction of the entire line.”¹⁷⁶

Judging from the result, it seems that in this case the court was fair with the islands. It gave full effect to the relatively big, populated islands, half effect to the smaller, uninhabited islets and no effect at all to the tiny islets which actually can be characterized as rocks. However, the objection here is about the procedure, or to put it another way, the rationale of the court isn't again convincing enough. Why for example did it give half effect and not let's say one fourth effect to the island of Seal? Why the median/equidistance line couldn't be used throughout the delimitation? Why the court selected to use these particular 'equitable' criteria for the delimitation and not some other?

The ICJ failed to provide those clear – cut rules governing the delimitations, and in particular these of the continental shelf. Moreover, the right of the islands to have a continental shelf of their own should have been taken for granted by the court from the very first moment, without any vacillation or doubt, especially since the two states were contracting Parties to the GCCS. In addition, the median/equidistance line should have been used, at least, as the first step of the delimitation process and later on, in the light of any special circumstances, the importance of the islands could have been reassessed reducing if necessary their effect.

¹⁷⁵ Ibid. para, 201.

¹⁷⁶ Ibid.

Instead of following the safe path of the established law, the court opted to wander again in the realm of the equitable principles and sought to resolve the dispute applying ambiguous criteria. Was this due to the twofold objective of the delimitation? If that which affected all the process was the fact that the court had to delimit simultaneously two maritime zones, then the *modus operandi* of the court could be to some extent understood and justified.

3.6 Guinea – Guinea Bissau Maritime Boundary Delimitation (Arbitration, 1985)

On February 14, 1985, the *ad hoc* Arbitration Tribunal consisting of three members of the International Court of Justice issued its unanimous decision concerning the delimitation of the maritime boundary between Guinea and Guinea – Bissau.¹⁷⁷ Since the Franco – Portuguese Convention of 1886¹⁷⁸ didn't establish a maritime boundary between the two adjacent states¹⁷⁹ and since the attempts to reach a negotiated settlement had proved unsuccessful, the two states agreed in 1983 to submit their dispute to a binding Arbitration Tribunal. As a result of the arbitration, Guinea and Guinea – Bissau were among the first African nations that settled their maritime boundaries.

With their agreement the two states requested from the court to determine in accordance with “the relevant rules of international law”, the course of the boundary between the “maritime territories” appertaining to each of them.¹⁸⁰ Both Parties invoked as “relevant rules of international law”, the customary law, the previous judicial and arbitral decisions and the various conventions concluded under the UN auspices. They also invoked the relevant provisions of the Geneva Conventions of 1958, particularly those concerning the territorial sea and the continental shelf, though neither state was a contractual party to any of these conventions. As to the UNCLOS, although it wasn't yet in force (Guinea – Bissau had signed it), both Parties mentioned

¹⁷⁷ Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea – Bissau. Award of 14 February 1985. International Legal Materials, Vol. 25 No 2, March 1986, pp. 251 – 307. Available at: <http://0-www.jstor.org.library.bilgi.edu.tr/stable/20692951>.

¹⁷⁸ Guinea was a French Colony till October 2, 1958 and Guinea – Bissau a Portuguese Colony till September 24, 1973. Ibid. pp. 263 – 264.

¹⁷⁹ After a relevant question from the parties, the court indeed ruled that the Franco – Portuguese Convention of 1886 didn't establish a maritime boundary between the two states (Franco – Portuguese possessions at that time). According to the court, the line laid down in the aforementioned convention had no other purpose than to designate the Portuguese islands and not to determine the exact maritime boundary of the two former colonies. Ibid. p. 288.

¹⁸⁰ Article 2 of the Bilateral Agreement. Ibid. pp. 255 – 256.

several of its provisions which they considered to be consistent with the evolution of the international custom.¹⁸¹ It is concluded therefore that the dispute had to be resolved on the basis of the international customary law as neither party was bound by any Convention. The aforementioned conventions and treaties were the general guidelines for the court and their provisions could be applied as far as they were the crystallization of customary law rules.

The court declared that its aim was to find an equitable solution in accordance with the spirit of the UNCLOS. It stated that “For the Tribunal, the essential objective consists of finding an equitable solution with reference to the provisions of Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention of 10 December 1982 on the Law of the Sea. This is a rule of international law which is recognized by the Parties and which compels recognition by the Tribunal. However, in each particular case, its application requires recourse to factors and the application of methods which the Tribunal is empowered to select. This nevertheless does not mean that the Tribunal is endowed with discretionary powers or is authorized to decide *ex aequo et bono*. Its findings must be based on considerations of law.”¹⁸²

Furthermore, the term “maritime territories” that the Parties used, was referred to the delimitation of the territorial waters, the exclusive economic zone and the continental shelf. The two states asked therefore the court to define a single maritime boundary that would include all these zones. This meant that the arbitral tribunal had to take into account those criteria that were common for the delimitation of the marine and submarine zones.¹⁸³

¹⁸¹ The tribunal concluded that it should also consider those rulings of the ICJ that were relevant to the case under discussion. It stated that “The tribunal must consider these factors, which the International Court of Justice took into account in the Fisheries Jurisdiction case, the Tunisia/Libyan case and the Gulf of Maine case, (I.C.J. Reports 1974, pp. 23, paragraph 53, and 192, paragraph 45; 1982, pp. 37 – 38, paragraph 23 – 24; 1984, p. 294, paragraph 94).” Ibid. p. 272.

¹⁸² Ibid. p. 289.

¹⁸³ Ibid. p. 272.

For this delimitation the presence of numerous islands, the vast majority of which belonged to Guinea – Bissau, played a crucial role as they were one of the most distinctive geographical features of the region.¹⁸⁴ The court distinguished three types of islands in order to determine their effect on the delimitation line. So according to the court, in the area there were the following categories of islands:

“a) The coastal islands, which are separated from the continent by narrow sea channels or narrow water courses and are often joined to it at low tide, must be considered as forming an integral part of the continent.

b) The Bijagos Islands, the nearest of which is two nautical miles from the continent and the furthest 37 miles, and no two of which are further apart than 5 miles, can be considered, if the 12 – mile rule accepted by the Parties is applied, as being in the same territorial waters as each other and as being linked to those of the continent.

c) There are also the more southerly islands scattered over shallow areas (Poilao, Samba, Sene, Alcatraz), some of which may be taken into account for the establishment of baselines and be included in the territorial waters. Although it cannot be denied that, somehow or other, the delimitation must leave to each state the islands over which it has sovereignty, it nevertheless remains that, in the search for the general criteria to be applied, it is above all the islands in categories (a) and (b) that are considered as relevant.”¹⁸⁵

The court concluded that a critical element that would determine the delimitation process was the configuration and the length of the coasts of the two states. It stated that for the evaluation of each country’s coastline, the coastal islands and the Bijagos Archipelago should be taken into account but not the scattered islands belonging to the third category above. It also

¹⁸⁴ See figure 7 of Annex D. See also a detailed description of all the islands in the region made by the court, *Ibid.* pp. 264 – 265.

¹⁸⁵ *Ibid.* pp. 291 – 292.

pointed out that the relevant islands must not be taken into account by merely adding together their perimeters, but as elements determining the general direction of the entire coastline of the country considered. The coastlines without the islands were 154 and 128 miles long for Guinea and Guinea – Bissau respectively, but the Tribunal ruled that the total coasts of the two states had, more or less, the same length because of the Guinea – Bissau’s islands, which were balancing the difference in the length of the mainland’s coasts.¹⁸⁶ Thus, the court in this case took account of the islands and indisputably confirmed their importance.

During the court hearings Guinea claimed that the maritime boundary should be delimited in a way that it would constitute roughly an extension of the land boundary of the two states into the sea. It opposed to the application of the equidistance line and stated that if an equidistance line was finally used then it shouldn’t take into account the Bijagos Archipelago. In contrast, Guinea – Bissau, in the written pleadings, supported the application of the equidistance line and later on, during the oral procedure it added that the equidistance method should take into account all the relevant circumstances so that to be achieved an equitable solution. Moreover, due to the fact that the proposed equidistance line was passing south of the Alcatraz Rock, leaving it to Guinea – Bissau side, Guinea – Bissau proposed that the Guinea’s islet should be encircled with a two – mile enclave boundary.¹⁸⁷

The court positioned itself for the method that should be applied stating that “The Tribunal itself considers that the equidistance method is just one among many and that there is no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. The method of delimitation to be used can have no other purpose than to divide maritime areas into

¹⁸⁶ Ibid. pp. 292 – 293.

¹⁸⁷ Ibid. pp. 261 – 263 and 294 – 295.

territories appertaining to different states, while doing everything possible to apply objective factors offering the possibility of arriving at an equitable result. Such an approach excludes any recourse to a method chosen beforehand. On the contrary, it requires objective legal reasoning and the method to be used can come only as a result of this.”¹⁸⁸ It stated also that there was no question of changing the nature and that as far as possible any cut – off effect or enclavement should be avoided.¹⁸⁹

Finally, the court decided to leave Alcatraz Islet to the Guinea side of the maritime boundary and to give it “...2.25 nautical miles of territorial waters to the north...”, as there wasn’t any reason, according to the court, to give it more extensive territorial waters in that direction, since the 2.25 miles marked the maximum claim of Guinea. In addition, the court considered it equitable to grant the islet the 12 miles provided for in the UNCLOS, at least towards the west.¹⁹⁰

The rest of the maritime boundary was delimited in a way giving full effect to the coastal islands and the Bijagos Archipelago. The court therefore in this case addressed the issue of the islands with an exemplary manner. Its ruling was in accordance with the international law and the international practice and at the same time it somehow redressed the injustice of the previous courts. As for the scattered islands which were disregarded during the delimitation process, it should be noted that they were actually uninhabited small islets or rocks. Moreover, if they had been taken into account their distortive effect on the delimitation line would have been too great in comparison with their importance. In addition, the court was fair to the litigant parties as it excluded mutually from the process the islands of both of them.

¹⁸⁸ Ibid. p. 294.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid. p. 298.

Another point that should be underscored is the fact that the court accepted the customary nature of the rule according to which the territorial waters of a state can be extended up to 12 miles. This is proved by the fact that the court applied this rule even if the UNCLOS hadn't come yet into force and moreover its provisions couldn't in any way be binding upon the parties as Guinea hadn't signed it. This rule applied even for Alcatraz islet which as stated before was an isolated, outlying rock.

To end with, if someone wanted to find a weak point to the court reasoning, this wouldn't be other than that of the application of the equidistance line method. As mentioned above, the court rejected the equidistance line as the primary method for the delimitation and by extension its mechanical application, but in its place, it extolled the equitable principles as the basis for any delimitation process. Yet it didn't elaborate on those other methods that could be applied so that to be achieved the equitable result. With its stance, the whole delimitation process appeared more like an attempt by the court to apportion the "maritime territories" than an effort to delimit them. To this end, the arbitral tribunal, once again, didn't manage to promote the objectiveness and improve the predictability of the future courts decisions.

3.7 Libya – Malta Continental Shelf Delimitation (ICJ, 1985)

On June 3, 1985 the ICJ issued its decision for the case concerning the delimitation of the continental shelf between Libya and Malta, by 14 votes to 3.¹⁹¹ This case was different from the previous cases that the ICJ had tried, as it was the first time that the court had to delimit exclusively the continental shelf between states with opposite coasts. Besides, the Libya – Malta case is very interesting for this study because the ICJ delimited the continental shelf between a continental and an insular state, or to put it another way, between a mainland and a group of islands.¹⁹²

The two states agreed that the dispute had to be resolved on the basis of the international customary law, because on the one hand only Malta was a contractual Party to the GCCS and on the other hand, although both of them had signed the UNCLOS, it hadn't come yet into force. Consequently, the court had to issue its decision under the umbrella of equity/equitable principles and to take under consideration all the relevant circumstances.¹⁹³

The court applied the median line (ignoring Filfla as a basepoint) as the first step of the delimitation. As a second step, and in the light of the relevant circumstances as they determined by the court, it transposed the provisional line northward in order to produce an equitable result.¹⁹⁴ The circumstances and factors that were taken into account in achieving an equitable delimitation were the following:

¹⁹¹ Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13. Available at: <http://www.icj-cij.org/docket/files/68/6415.pdf>.

¹⁹² Malta covers around 315 Km² in land area and it is consisted of four inhabited islands (Malta, Gozo, Comino, Cominotto) and one tiny uninhabited islet (Filfla). Ibid. para. 15.

¹⁹³ Ibid. para. 29.

¹⁹⁴ Ibid. para. 73. See figure 8 of Annex D.

“(1) The general configuration of the coasts of the Parties, their oppositeness, and their relationship to each other within the general geographical context.

(2) The disparity in the lengths of the relevant coasts of the Parties and the distance between them.

(3) The need to avoid in the delimitation any excessive disproportion between the extent of the continental shelf areas appertaining to the coastal state and the length of the relevant part of its coast, measured in the general direction of the coastlines.”¹⁹⁵

The fact that the court applied the median line, even only as a provisional line, was a breakthrough for the jurisprudence. The court “...noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between states with opposite coasts... But it is in fact a delimitation exclusively between opposite coasts that the court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result... Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question.”¹⁹⁶

Although the court denied that the median line had a preferential status in international law, it undoubtedly upgraded it. The ICJ accepted that it could, at least, be the first step of the delimitation of the continental shelf between states which are geographically opposite. The provisional median line could be modified under the light of the special circumstances of each particular case, so that to be achieved finally an equitable result. Thus, the reasoning of the court doesn't seem to be much different than the logic of the article 6 of the GCCS. It appears therefore

¹⁹⁵ Judgment, I.C.J. Reports 1985, *op. cit.* para.79.

¹⁹⁶ *Ibid.* para. 62, 63.

that after many years of wandering, the jurisprudence began to return back to the safe principles that the previous tribunals had rejected. The assumption of the court that the median line could be a starting point for the delimitation of the continental shelf was certainly a turning point in the international jurisprudence.

The right of the islands to have a continental shelf of their own is closely related with the median/equidistance line principle. This principle as it has been stated before protects the islands from arbitrary decisions and safeguards their rights. The fact that one of the two opposite states was an island didn't prevent the court to apply the median line method. Quite the opposite, the court's argumentation about the median line was general and it didn't discriminate against the islands. The consolidated right of the islands to have a continental shelf of their own was therefore reaffirmed by the court and the possibility to be characterized *prima facie* as special circumstances was avoided. On the contrary, the islands have *prima facie* a continental shelf and in a second stage is examined the existence of any special circumstance, so that the provisional median line may be adjusted accordingly.

The court rejected the landmass argument of Libya as a relevant geographical consideration. Libya contended that a state with a greater landmass should have more rights over the continental shelf. The court though didn't accept Libya's argument and stated that "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."¹⁹⁷ It went on saying that "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

¹⁹⁷ Ibid. para. 49.

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.”¹⁹⁸ It should be noted that the rejection of Libya’s argument is very important for the islands, which are generally lacking in landmass and consequently a possible adoption of such an argument by the court would have brought them in a second place in comparison to the continental lands.

Another issue that the court had to address was the establishment of the baselines that should be taken into account for the delimitation of the continental shelf. Malta had adopted a system of straight baselines which they included the islet of Filfla. The court however denied to take account of Filfla in the calculation of the provisional median line as it found it inequitable, stating that the court could in any case choose basepoints which were different from that of the coastal state. It concluded by saying that “...the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain ‘islets, rocks and minor coastal projections’ ...”.¹⁹⁹ The court repeated here the phrase ‘islets, rocks and minor coastal projections’ which it had firstly used in the 1969 decision. It failed though to explain cogently why it rejected the island of Filfla from the delimitation process. This island is less than 5 Km away from the other islands and it is not totally detached from them. Was the fact that it was uninhabited? Or was the fact that it was too small to be considered an island and therefore the court considered it a rock?

The court dealt also with the fact that Malta was an island state. The two countries agreed that the entitlement to a continental shelf should be in principle the same for an island as for a mainland. Libya however supported that although there should be no distinction between an

¹⁹⁸ Ibid.

¹⁹⁹ Ibid. para. 64.

island state and an island politically linked with a mainland state, when it comes to the continental shelf delimitation, all the islands might be treated in a particular way, as was the case for the Channel Islands. Malta quite the reverse stated that island states should have a privileged status in comparison to islands politically linked to a mainland state, but only for purposes of continental shelf delimitation. In Malta's view, the international law gives full effect to island states – a right stemming from the principle of the equality of states – and varying effect to dependent islands, depending on such factors as size, geographical position, population or economy. The court took a clear stance on this issue stating that "...it is not a question of an 'island state' having some sort of special status in relation to continental shelf rights".²⁰⁰

Another point that is going to be discussed in this study is the unprecedented finding of the court about the 'general geographical context'. Instead of seeing the two states as they actually were and merely delimit the area between them, it looked into the wider region and considered them as parts of some broader geographical formations. The court saw Malta as part of Europe and Libya as part of Africa and ostensibly attempted to delimit the continental shelf between the two continents, seeing Malta as a small island or rock of Europe. It characteristically stated: "In the present case, the court has also to look beyond the area concerned in the case, and consider the general geographical context in which the delimitation will have to be effected. The court observes that that delimitation, although it relates only to the continental shelf appertaining to two states, is also a delimitation between a portion of the southern littoral and a portion of the northern littoral of the Central Mediterranean. If account is taken of that setting, the Maltese islands appear as a minor feature of the northern seaboard of the region in question, located substantially to the south of the general direction of that seaboard, and themselves comprising a very limited coastal segment. From the viewpoint of the general geography of the region, this

²⁰⁰ Ibid. para. 52 – 54.

southward location of the coasts of the Maltese islands constitutes a geographical feature which should be taken into account as a pertinent circumstance; its influence on the delimitation line must be weighed in order to arrive at an equitable result.”²⁰¹

It appears that the courts sometimes, due to their result – oriented approach, can be very inventive trying to justify their actions and make their final decision seem not as taken before – handed, but as being the output of a thorough and a well – based process. So in this case because ‘there is to be no question of refashioning geography’ the court broadened it. In this general geographical context the islands of Malta appeared as a relatively small feature in a semi – enclosed sea. Thus, although the court didn’t deny the geographical realities, it integrated them in a greater geographical context, reducing therefore their importance.

Perhaps due to its problematic reasoning the court tried to rationalize its decision so that not to be characterized as an *ex aequo et bono*, or even due to the lack of authorization, a *contra legem* decision.²⁰² So the court tried to prove that it acted within the limits of the law highlighting once again the importance of the equitable principles and using them as a pretext for any possible criticism. The recourse though to equity leaves a lot of questions answered. For example, what criteria did the court apply in order to adjust the median line and move it to its final position? Did it really treat the same way the insular with the continental lands, or rephrasing it, did it treat the same way two sovereign states?

In brief, the positive aspects of this case were definitely the shift of the court regarding the median line and the emphasis that it put on geography. The negative aspects continue to include

²⁰¹ Ibid. para. 69.

²⁰² The court wanting to prove that it acted within the limits of the law repeated the expression that it had used in 1982: “the legal concept of equity is a general principle directly applicable as law”. Thus, no matter what criteria it may use, since they fall in the category of “equity” the court’s decisions can’t be characterized as *ex aequo et bono* or *contra legem* judgments. Ibid. para. 45.

the court's decided views for the islands and its failure to contribute to the establishment of general and objective rules governing the maritime delimitations.

3.8 Delimitation of Maritime Areas between Canada and France (Arbitration, 1992)

On March 30, 1989 following a series of unsuccessful negotiations, Canada and France signed an agreement by which they established a Court of Arbitration to carry out the delimitation of the maritime areas appertaining to them, around the islands of St. Pierre and Miquelon, off the coasts of Canada. The two states by another agreement signed in 1972 had partially delimited their maritime areas but in view of the differences between them, the two states hadn't completed the delimitation. The court had to keep the maritime boundary established by the aforementioned agreement and to continue the delimitation, by drawing a single boundary for all the maritime zones. The court issued its decision on June 10, 1992 by a narrow majority of 3 votes to 2.²⁰³

St. Pierre and Miquelon is an archipelago of eight French islands in the North Atlantic Ocean. The main islands are St. Pierre (26 km²) and Miquelon, which in fact consists of two islands (Great Miquelon and Little Miquelon or Langlade) that are connected with a narrow sandy strip (total 216 km²). Collectively the area of the islands is 242 km² and the total coastline is 120 Km long. St. Pierre is separated from Miquelon by a 3.2 miles strait. Their distance north – south from Newfoundland is 32 miles. The islands are even closer to Burin Peninsula, which is situated just 13 miles to the east. In addition, Green Island, which belongs to Canada, is located about halfway between the southern part of Miquelon and Newfoundland at only 6 miles from

²⁰³ Court of Arbitration for the Delimitation of Maritime Areas between Canada and France: Decision in Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon). *International Legal Materials*, Vol. 31, No 5, September 1992, pp. 1145 – 1219. Available at: <http://0-www.jstor.org.library.bilgi.edu.tr/stable/20693736>.

both Miquelon and St. Pierre. The population of the islands is around 6,000 inhabitants the vast majority of whom live in St. Pierre.²⁰⁴

On the one hand, France based its arguments on two basic principles: the principle of equality of sovereign states and the principle of the equal capacity of islands and mainland to generate maritime areas. On these grounds it argued that the delimitation should take place on the basis of the equidistance line, as it was stipulated in the article 6 of the GCCS. Moreover, it invoked the article 121 (3) of the UNCLOS under which “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf” and asserted that in no way could these islands be classified as rocks, taking into account their size, population and economic activities. In contrast though to its arguments, France drew the proposed equidistance line ignoring almost completely the Canadian island of Sable, as it considered this inhabited, outlying island, a “Geographical accident” which had a disproportionate distortive effect upon the course of the equidistance line.²⁰⁵ In addition, the position of France appears in this case to be radically different from that it had supported a few years before in the Anglo – French case, where France had proposed that the Channel Islands should have been encircled with a six – mile enclave boundary.

On the other hand, Canada contended that the dispute should be settled on the basis of the equitable principles and asserted that the French islands should be entitled only to a zone of territorial waters and they should be deprived of all the other maritime zones. It invoked a criterion according to which the delimitation should be based on the comparative coastal lengths in order to be avoided disproportionate results. It also tried to prove that the small isolated

²⁰⁴ USA’s Central Intelligence Agency (CIA), *The World Factbook*, available at: www.cia.gov/library/publications/the-world-factbook/geos/sb.html. See also *Ibid.* pp. 1159, 1160 and figure 9 of Annex D.

²⁰⁵ H. Tzimitras, *supra* note 118, p. 181. See also G. Politakis, “The French – Canadian Arbitration around St. Pierre and Miquelon: Unmasked Opportunism and the Triumph of the Unexpected”, 8 *IJMCL*, 1993, p. 124, who states: “It is indeed surprising how similar it sounds the French reasoning a propos the island of sable with analogous remarks of the Canadian side concerning St. Pierre and Miquelon”.

depended islands, unlike the island states, should have partial effect and limited rights over the maritime zones and adduced the examples of the Anglo – French and the Libya – Malta cases to support its claims. Moreover, it argued that the international practice as well as, the previous courts decisions had given, in general partial effect to the islands but, due to the fact that the islands in question were too far from the continental France²⁰⁶ and for the reason that they were actually superimposed on the Canadian continental shelf, their effect should be reduced to zero.

According to Canada, all the continental shelf off its coasts belonged to it and if any continental shelf was awarded to the French islands this would be actually done at the expenses of the Canadian continental shelf.²⁰⁷ It invoked the principle of non – encroachment which meant that the delimitation should leave to Canada the areas that constituted the natural prolongation or seaward extension of its coasts, avoiding therefore any cut – off effect of them. Canada’s position was though entirely unfounded in international law, since in reality Canada didn’t recognize the right of the islands to have a continental shelf of their own, an entrenched right in both the conventional and the customary international law.

In general, Canada’s approach was degrading for the islands, but it seems that Canada actually refuted its own arguments which it had used in the Gulf of Maine case. There, Canada had rejected the USA’s argument according to which some coasts should be considered as ‘primary’ and others as ‘secondary’, so that the former would be regarded as of greater importance than the latter for the delimitation purposes.²⁰⁸

²⁰⁶ Canada characteristically stated that the French islands were actually not only at the wrong side of the median line but at the wrong side of the ocean. Canadian Memorial p. 172.

²⁰⁷ Decision of the Court of Arbitration, *supra* note 203, p. 1164.

²⁰⁸ I.C.J. Reports 1984, *supra* note 155, para. 36. See also *ibid.* p. 1200.

The court rejected the claims of both Parties as being “exaggerated”.²⁰⁹ In the view of the court there were no grounds for contending that the extent of the maritime rights of an island depended on its political status. It stated that no distinction in this respect had been made by Article 121 of the UNCLOS or by the corresponding provisions of the Geneva Conventions.²¹⁰ Moreover, it rejected the Canadian proposal according to which the islands should be confined in an enclave, giving them only territorial waters, by saying that “The French islands have a coastal opening towards the south which is unobstructed by any opposite or laterally aligned Canadian coast. Having such a coastal opening, France is fully entitled to a frontal seaward projection towards the south until it reaches the outer limit of 200 nautical miles, as far as any other segment of the adjacent southern coast of Newfoundland. There is no foundation for claiming that St. Pierre and Miquelon frontal projection in this area should end at the 12 mile limit of the territorial sea.”²¹¹ With the above statement the court actually answered also to the Canadian assertion that the French islands were superimposed on the Canadian continental shelf.²¹²

The court declared that all the coasts had an equal title, no matter if they were continental or insular and rejected the notion of ‘relative reach’ according to which the seaward projection of the coasts were relative to their length. Canada had claimed that coasts of limited length should have a correspondingly diminished prolongation as against longer coasts. The court answering to this argument stated that “...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

²⁰⁹ Decision of the Court of Arbitration, *supra* note 203, para. 49, p. 1165.

²¹⁰ *Ibid.* para. 64 – 65, p. 1169. See also para 52, p. 1165, 1166, where the court rebutted the argument of Canada which questioned the rights of the French islands. The court stated that “Without comparing and even less equating the economic or political significance of the territories involved in this case, it must be concluded, from a strictly legal point of view, that Newfoundland, although much larger in size than Saint Pierre and Miquelon, is equally an island which does not enjoy the status of a politically independent or semi – independent.”

²¹¹ *Ibid.* para. 70, p. 1170.

²¹² See also the Dissenting Opinion of Judge Weil who states that even for the delimitation of the CS the geological or geophysical factors of the seabed should be excluded, in favor of the distance method. *Ibid.* pp. 1214 – 1215.

disproportionate results and, subsequently, to test the equitableness of the solution finally adopted...[but] the court cannot accept the contention that particular segments of coast may have an increased or diminished projection depending on their length. The extent of the seaward projections 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.”²¹³ The criterion of proportionality could be therefore an equitable criterion, but the ratio of coastal lengths couldn’t be of itself determinative for the maritime delimitations.²¹⁴

The court concluded that the delimitation should be done in accordance with the equitable principles, taking into account all the relevant circumstances, in order to be achieved an equitable result.²¹⁵ The court again put emphasis on geography but it neither determined what equitable criteria it would apply nor specified the relevant circumstances that were affecting the delimitation. Again in this case, the delimitation of a single boundary for all the maritime zones meant that the court had to take into account those criteria that were common for all the zones. Having regard to all these factors, the court proceeded with the delimitation. It divided the area around the islands in two different sectors: the western and the south sector, since according to the court’s view the islands had a varying effect over the delimitation line, depending on the sector.²¹⁶

For the western sector the court awarded to St. Pierre and Miquelon a 12 – mile territorial sea and an additional 12 – mile contiguous zone, noting that the seaward extension beyond the island’s territorial water, unavoidable involved some degree of encroachment and cutting off of

²¹³ Ibid. para. 44 – 45, p. 1164.

²¹⁴ Ibid. para. 63, p. 1168.

²¹⁵ Ibid. para. 38, p.1163.

²¹⁶ Ibid. para. 66 – 74, p. 1169.

the Canadian seaward projections. In the northwestern area of this sector, where the distance between the French islands and the Canadian coast was less than 48 miles, was adopted the median line.

For the south sector which according to the court, was 10.5 miles in width, there was no obstruction to a full coastal projection of 200 miles and therefore the French islands were awarded with all the maritime zones, in their entirety. Additionally, in the southeastern area the islands were awarded only with a 12 – mile zone of territorial waters.²¹⁷

Undoubtedly, the solution given by the court was in any case strange and unprecedented. It introduced the notion of the ‘frontal projection’ of the coasts which in turn produced a mushroom shape delimitation line. Consequently, it was severely criticized even by the very judges of the case. The judge Weil for example in his dissenting opinion referring to the ‘frontal projection’ said: “I fail to understand how the majority of the court could have endorsed this strange theory...A maritime projection...[is not only]...perpendicular to the general direction of the coastline... It radiates in all directions, creating an envelope of ocean around the coastal front. In a word, it is radial.”²¹⁸

The legality of the decision is also questionable. The aforementioned judge said that “...the delimitation in the strange form of a mushroom...does not seem to me a result achieved ‘on the basis of law’.”²¹⁹ In addition, the judge Gotlieb criticizing the court’s decision stated that according to him “...the judgment is not in accordance with international law... The solution ...fails to employ equitable principles and fails to reach an equitable result.”²²⁰ Finally, another

²¹⁷ Ibid.

²¹⁸ Dissenting Opinion of Judge Weil in Ibid. p. 1200.

²¹⁹ Ibid. p. 1197.

²²⁰ Dissenting Opinion of Judge Gotlieb. Ibid. p. 1181.

scholar commenting on the shape of the delimitation line, noted that "...the construction of a corridor, resembles more an *ex aequo* apportionment than the application of legal principles"²²¹

The court again in this case didn't explain its reasoning and left many questions answered: how did the concept of the 'frontal projection' come up? Don't all the coasts, including those of the islands, generate the same rights all around them, in a radial manner? Why did the court give a 24 – mile zone to the islands in the western sector and a 12 – mile zone to the southeastern area and not more or even less? Did the court give more weight to the applicable criteria (proportionality, non – encroachment, avoidance of cut – off) than the basic entitlement of the islands to maritime zones?

At first sight though, the rights of the islands in this case were in principle recognized and reaffirmed by the court. The islands were awarded to some extent with all the maritime zones, as it happens with the continental lands. Even in this extreme case where some small islands were located far beyond of their mainland, to a very close distance with another state, these islands weren't deprived of their entitlements, at least at the side of the open sea. Undisputedly their gains were limited as regards the actual marine areas that attributed to them, but they weren't in principle discriminated, against the continental lands. Nowhere the court accepted the argument that some insular coasts can be classified as second class coasts with fewer rights than the continental coasts. Thus, in theory the rights of the islands were recognized, but the final delimitation line shows that the views of the court weren't completely implemented in practice.

However, the solution given by the court proved also another rule: the courts decisions can be imaginative and totally unpredictable. Nobody could have foreseen before the ruling of the court that such a strange delimitation could take place. After this decision though, everyone

²²¹ G. Marston, "St. Pierre – Miquelon Arbitration. Canada – France Maritime Delimitation Award", *17 Marine Policy* No 3, May 1993, p. 170.

understood how volatile the delimitation processes could be. Such is indeed the volatility, that it seems sometimes that the courts move beyond the limits of the law. The whole process sometimes appears to be more a political affair than a legal matter. "...all judicial bodies appear to have [been] engaged in a political operation of apportioning satisfaction, striving for innocuous compromises, instead of [issuing] rigid legal verdicts."²²²

²²² G. Politakis, *supra* note 205, p. 134.

3.9 Maritime Delimitation in the Area between Greenland and Jan Mayen (ICJ, 1993)

Norway delimited its maritime boundary with Iceland around the Jan Mayen Island in 1981 after the proposals of the Conciliation Commission, as discussed in the section 3.3 above. The maritime dispute though between Norway and Denmark was settled by the ICJ, after a unilateral application of Denmark.²²³ The court delivered its judgment by 14 votes to 1, on June 14, 1993 by which it was established a single maritime boundary for both the continental shelf and the fishery zones of Denmark and Norway, in the area between Greenland and Jan Mayen.²²⁴

The distance between Jan Mayen and Greenland is 246 miles and therefore their full extended maritime zones would overlap each other. The two countries had radical opposite views as regards the appropriate settlement of their dispute. On the one hand, Denmark asserted that Greenland was entitled to a continental shelf and a fishery zone extending 200 miles from the baselines of Greenland leaving therefore to Jan Mayen merely the residual part, while on the other hand, Norway supported the application of the median line between Greenland and Jan Mayen, for both zones.

The court stated that it would initially examine separately the two zones and it would draw two different lines, one for each zone, and in a second stage it might merge them into one. It

²²³ Both Countries had accepted in general the authority of the ICJ and therefore according to article 36, para. 2 of the Statute of the ICJ, the court could try a dispute without the existence of a special agreement between the litigant parties. The aforementioned article is as follows: "The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation." Available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

²²⁴ Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, p. 38. Available at: <http://www.icj-cij.org/docket/files/78/6743.pdf>.

declared that for the delimitation of the continental shelf it would apply the conventional law, namely the article 6 of the GCCS, which was binding upon the two countries as both of them were contractual Parties to the Geneva Convention. For the fishery zone it would apply the relevant provisions of the international customary law.²²⁵

It should be noted that this was the first time that a court explicitly stated that the delimitation of the continental shelf should be done on the basis of the article 6 of the GCCS. Till then, apart from the Anglo – French case where the provisions of this article were partially applied, in all the other cases either one or more of the litigant states hadn't signed the GCCS or, even if they had signed it, the delimitation of a single boundary for all the zones had prevented its application. According to the court, the median line would have been used, even if the delimitation had taken place on the basis of the customary law. Thus, after years of controversy, the ICJ upgraded the median line principle and indirectly but clearly, tried to integrate it in the customary law.²²⁶ It is noteworthy that the court reused in this case, the term “equidistance principle”.²²⁷ So after a long period in which the equidistance/median line was considered as one of the methods of even a factor for the delimitations, it seems here that it was reinstated to its proper position.

The fact that the court upgraded the median line didn't necessarily mean that it would dogmatically apply it. This principle could have been applied in a mechanical manner, on the premise that there weren't any special circumstances indicating another line as more appropriate.

²²⁵ Ibid. para. 44.

²²⁶ “Thus, in respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether ‘special circumstances’ require any adjustment or shifting of that line.” Ibid, para. 51. The marriage of the conventional and the customary law by the court, seems also from the fact that it tried to assimilate the terms “special circumstances” with “relevant circumstances”, which had been used in the conventional and the customary law respectively. Ibid. para 56.

²²⁷ Ibid. para. 55.

Thus the court declared that it would use the median line as a provisional one, and later on in the light of any special circumstances it might adjust it, so that to be achieved an equitable result. It stated that “...special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle”²²⁸ and it identified two specific circumstances that should be taken into account: the difference of the coastal lengths between Greenland and Jan Mayen and the access to the living resources of the area.²²⁹

The court took under consideration the disparity or disproportion between the lengths of the “relevant coasts”, which meant that it compared not the lengths of all the coasts but only those which were opposite to each other, or in other words the coasts that were within the specified area of delimitation (i.e. the coasts lying between points E and F on the coast of Jan Mayen and G and H on the coast of Greenland, as shown in figure 10 of Annex D). It calculated that the ratio between the coast of Jan Mayen and that of Greenland was approximately 1 to 9 and it concluded that due to the disparity of the coastal lengths the median line should be shifted closer to the coast of Jan Mayen. The court contended also that this adjustment of the median line was equitable for the continental shelf delimitation, as well as for the fishery zones. It clarified though that “...taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen.”²³⁰

As for the second special circumstance, the court had to ensure that the delimitation should not entail any “catastrophic repercussions for the livelihood and economic well – being of

²²⁸ Ibid.

²²⁹ Ibid. para. 61, 72.

²³⁰ Ibid. para, 69.

the population of the countries concerned.”²³¹ The ICJ had therefore to adjust the median line, in a way to make sure an equitable access to the fishery resources, for the fishing communities of both areas. For the reason that most of the fishery resources were in the south – eastern part of the area of overlapping claims, closer to Jan Mayen, the court decided that it would be equitable if the delimitation line was shifted eastward, allowing therefore Greenland to have access in a considerable part of these area.²³²

Although the expressed intention of the ICJ was to examine separately the special and the relevant circumstances which were affecting the delimitation of the continental shelf and the fishery zones respectively, it appears finally that the court put all these factors together and came up with a modified median line, which was common for both zones. Otherwise how can be explained the fact that the court took into account the access to the fishery resources and adjusted the boundary related to the continental shelf, which is a factor totally irrelevant with the delimitation of the continental shelf? Consequently, the court examined the special/relevant circumstances or the provisions of conventional/customary law together as a whole and adjusted the provisional median line accordingly.

It is important to be noted though that the two abovementioned reasons which dictated the shift of the median line were unrelated to the nature of Jan Mayen as an island. The court nowhere questioned the rights of the islands to have a continental shelf of their own, as well as an unobstructed access to the living resources of the area surrounding them and consequently it treated them in the same way as the continental lands throughout the delimitation process.²³³ It stated characteristically that “the coast of Jan Mayen, no less than that of eastern Greenland,

²³¹ Ibid. para, 75. The court here reiterated the phrase that the chamber of the ICJ had used for the Gulf of Main case (I.C.J. Reports 1984, *supra* note 155, p. 342, para. 237).

²³² Ibid. para. 76.

²³³ Greenland as well is an island, but it has an area 21 times more than Iceland and 5,807 times the area of Jan Mayen. Due to its size therefore the delimitation should be considered as not being between two islands, but between an island and a continental land.

generates potential title to the maritime areas recognized by customary law, i.e., in principle up to a limit of 200 miles from its baselines.”²³⁴

This statement of the court proves that the islands cannot be in any way considered as *prima facie* special circumstances and moreover it shows that the special features of an island such as its population, economy, political status, size and its distance from its mainland country shouldn't be necessarily taken into account, in the process of establishing its maritime zones.

According to the court, the delimitation line was to lie between the median line and the 200 – mile line from the baselines of Greenland. For the purposes of the delimitation, the court divided this area of the overlapping claims into three zones. The southernmost zone was divided into two parts of equal area, one for each state. The northernmost zone was divided in a way as to give Greenland the one third of it and Jan Mayen the remaining two thirds. The middle zone was divided by drawing a line which connected the shares of the two other zones, giving therefore Greenland an area more than one third but less than half of it and leaving the remainder area (more than half but less than two thirds) to Jan Mayen.²³⁵

The court again didn't explain its rationale. “Like so many of the previous maritime boundary delimitation cases, the court's judgment in the present case is poorly reasoned, and opaque and difficult to follow in places...”²³⁶ Why for example the delimitation took place in the area between the median line and that of the 200 – mile line from the baselines of Greenland and not in the area between the overlapping maximum claims of the two states, i.e. the 200 – mile line from the baselines of Greenland and Jan Mayen? Why the area of delimitation was divided in three zones and why each zone was further divided in the way described above? A lot of scholars

²³⁴ I.C.J. Reports 1993, *supra* note 224, para. 70.

²³⁵ *Ibid.* para. 91 – 93. See also figure 10 of Annex D.

²³⁶ R. Churchill, “The Greenland – Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation”, 9 *IJML*, 1994, p. 27.

and even the judges of the court disagreed with the final solution of the court. For example the vice – president Oda in his separate opinion said that “...in choosing this line rather than any other, the court seems to have taken a purely arbitrary decision.”²³⁷

It appears that the court tried to split the difference between the two states by dividing the area of their overlapping proposals. “Had Norway pressed for a full 200 – mile zone for Jan Mayen *vis – a – vis* Denmark this area would have been considerably enlarged and an equal division of zone 1 [as well as of zone 2 and 3] would have produced a very different result. [So]...there is force in the point that the court is encouraging states to maximize their claims by adopting such an approach.”²³⁸ In the same spirit the judge Schwebel in his separate opinion said that “...the court’s judgment may tend to encourage immoderate and discourage moderate claims in future.”²³⁹

Apart from its problematic reasoning and the adoption of a pretty much arbitrary boundary, the decision of the court was undoubtedly positive in all respects. It tried to clarify the law governing the delimitations and to this end it introduced unequivocal and generally accepted criteria. It reaffirmed the validity of the GCCS and tried to integrate the article 6 of this convention in the customary law, reinstating therefore the median line principle to its initial position. Finally the decision of the court was very important for the islands. The court treated a small, isolated, outlying and almost uninhabited island as equal to the continental lands. It accepted that all the islands can generate full extended maritime zones in the same way as the other land masses do, regardless of their geographical features or other special characteristics.

²³⁷ Separate Opinion of Vice – President Oda, para. 91. Available at: <http://www.icj-cij.org/docket/files/78/6755.pdf>.

²³⁸ M. Evans, “International Court of Justice: Recent Cases”, 43 *ICLQ*, 1994.

²³⁹ Separate Opinion of Judge Schwebel, p. 127. Available at: <http://www.icj-cij.org/docket/files/78/6757.pdf>.

3.10 Eritrea – Yemen Maritime Boundary Delimitation (Arbitration, 1999)

On December 17, 1999 the Arbitral Tribunal convoked by Eritrea and Yemen, rendered the second award in a process that the two states had elected to conduct in two stages. In the first stage, the court addressed all the issues related with the sovereignty over some disputed islands lying between the two mainland countries, while in the second and final stage it delimited the maritime areas appertaining to each of these states.²⁴⁰ This case is very interesting for this study because the existence of the islands lying between the two opposite states was the court's main concern during the delimitation process.

Eritrea and Yemen have extensive coasts which they face each other across the Red Sea. Eritrea is located in the northeast Africa and Yemen is situated in the southwest part of the Arabian Peninsula. In the north, the continental coasts of the two states are approximately 150 miles apart. In the south, where the Red Sea funnels down to the Bab el – Mandeb straits, their continental coasts are less than 24 miles apart. In the north therefore the delimitation had to divide the continental shelf and the EEZ of the two states while in the south the court had to delimit the territorial seas appertaining to them.

Both countries have a lot of islands in the Red Sea. On the one hand, Eritrea has sovereignty over the Dahlak archipelago to the north, over a cluster of some small islands consisted of the Haycock islands, Mohabbakah islands and the Southwest Rocks to the south and also over the islands of Fatuma, Derchos and Ras Mukwar in the Assab bay. On the other hand, Yemen has sovereignty over a cluster of islands and rocks off its northern coast, the most

²⁴⁰ Eritrea – Yemen Arbitration Award 1999, Phase II: Maritime Delimitation. Available at: <http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF>.

important of which are the islands of Kamaran, Uqban, Kutama and Tiqfash. It owns also the lone mid – sea island of Jabal al – Tayr and the mid – sea island group of Jabal al – Zubayr. Finally, it has sovereignty over the island of Zuqar and the Hanish group to the south of the delimitation area.²⁴¹

The article 2 of the Arbitration Agreement stipulated that in determining the maritime boundary the Tribunal was to take into account “the United Nations Convention on the Law of the Sea, and any other pertinent factor”.²⁴² So although Eritrea hadn’t become a party to the UNCLOS its provisions could be applied by the court for the resolution of the dispute.²⁴³ There was no reference in the Agreement to the customary law, but the court ruled that many of its relevant provisions had already been incorporated in the UNCLOS.²⁴⁴ In addition, the court interpreted the phrase “any other pertinent factors” as including all the aspects relevant to the delimitation process such as proportionality, non – encroachment and the presence of the islands.²⁴⁵

Both Parties asked for the drawing of a single maritime boundary and proposed a median line, but their respective median lines followed very different courses and didn’t coincide. Yemen divided the proposed median line in three sectors. In the northern sector, the proposed Yemen line was calculated as being the median line between the Eritrea’s Dahlak islands and the Yemen’s mid –sea island of Jabal al – Tayr and Jabal al – Zubayr island group. It assumed that the Dahlak islands, a closely knit group of some 350 islands and islets, the largest of them having a considerable population, should be recognized as being part of the Eritrean mainland coast and

²⁴¹ See figure 11 of Annex D. The Arbitral Tribunal had adjudicated for the ownership status of a number of these islands in its first award, dated on October 9, 1998. Available at: <http://www.pca-cpa.org/upload/files/EY%20Phase%20I.PDF>.

²⁴² Eritrea – Yemen Arbitration Award 1999, *supra* note 240, para. 6.

²⁴³ Eritrea hasn’t signed the UNCLOS yet. Yemen signed it on December 10, 1982 and ratified it on July 21, 1987. Available at: http://www.un.org/Depts/los/reference_files/status2010.pdf.

²⁴⁴ Eritrea – Yemen Arbitration Award 1999, *supra* note 240, para. 130.

²⁴⁵ *Ibid.*

the waters within them as being internal waters. Yemen contended also that its mid – sea islands should be used as basepoints as well, because they were as important, or even more important, than the very small uninhabited outer islets of the Dahlak group. To this end, Yemen argued that there would be a “balance” in the treatment of the islands of both countries in the northern area, as “each Party possesses islands of a comparable size, producing similar coastal facades lying at similar distances from their respective mainlands”²⁴⁶.

In the central sector the line proposed by Yemen was an equidistant between the Eritrean mainland and the Yemen’s Hanish island group. Yemen supported that the “small Eritrean islets in between” the Eritrean mainland coast and the larger Yemen islands were inappropriate to be taken into account for the delimitation. Thus, the proposed boundary ignored the Southwest Rocks, the Haycock and the Mohabbakah islands as being nothing more than small rocks. Yemen proposed that all these islands should be placed within limited enclaves.

In the southern sector where the line entered the narrow sea which was free from complicating mid – sea islands, Yemen proposed a simple median line between the two opposite mainland coasts. Yemen however recognized the islands of Fatuma, Derchos and Ras Mukwar as basepoints, accepting that the Bay of Assab was an area of Eritrean internal waters.

On the whole, Yemen proposed that all the islands should have full effect in the delimitation process, with the exception of the small Eritrean islets in the central sector. In addition it stated that there was no need for any adjustment of this median line as it was equitable and there weren’t any relevant circumstances calling for its modification.

In contrast Eritrea’s proposed line was one drawn as a median between the opposite coasts and ignoring the existence of the mid – sea islands of Yemen, but taking into account only its own islands. It supported its rationale on the basis that the maritime boundary already had

²⁴⁶ Ibid. para. 15.

been existed, calling it the “historic median line” boundary between the two countries and therefore the first award of the court by which certain islands were attributed to Yemen, shouldn’t result in changing this existing maritime boundary. Eritrea maintained that Yemen’s “recently acquired” sovereignty over these islands made them of less importance as factors to be taken into consideration for the purposes of the delimitation. Thus, Eritrea considered that “...the [mid – sea] islands come within the category of small uninhabited islands of recently acquired sovereignty and near the median line that should be recognized by the Tribunal to possess diminished maritime zones.”²⁴⁷

It also proposed the establishment of “joint resource areas” or “shared maritime zones around the [mid – sea] islands”²⁴⁸ of Yemen. Eritrea further contended that the court should take full account of Southwest Rocks and the Haycock islands. It objected to the Yemen’s proposed enclaves because this would in practice mean that there would be no access corridor for Eritrea through the surrounding Yemen territorial sea, leaving therefore these islands “completely isolated”²⁴⁹. In addition Eritrea contended that the enclave solution would result in “inclusion of both of the main shipping channels within what would be Yemen’s territorial waters...”²⁵⁰ making Yemen the ‘key – holder’ of the Bab el – Mandeb Strait.

The court stated that both the state practice and the case – law indicated that the median line normally led to an equitable result in accordance with the requirements of the articles 74 and 83 of the UNCLOS. However, the court perceived the median line as one between the two opposite mainland coasts. It proceeded therefore to the maritime delimitation with a mainland – to – mainland approach. The Tribunal characteristically declared that “...the international

²⁴⁷ Ibid. para. 32.

²⁴⁸ Ibid. para. 27.

²⁴⁹ Ibid. para. 26.

²⁵⁰ Ibid. para. 26.

boundary shall be a single all – purpose boundary which is a median line and that it should, as far as practicable, be a median line between the opposite mainland coastlines”²⁵¹. The coastal islands thought were deemed by the court as being integral parts of the coasts and were taken into account for the construction of a straight baselines system. The effect however that had to be given to the mid – sea islands was an issue which assessed by the court on a second stage. For this reason the court divided the area into sectors and examined the role of each particular island or island group on the boundary line.

More specifically, in the northern sector the court accepted that the Dahlak islands were a group of islands that were an extension of the general costal configuration of Eritrea. Thus, the waters inside this island system were internal or national waters and the baselines should be found at the external fringes of this cluster of islands. In addition, the Dahlak islands formed an appropriate situation for the establishment of a straight baseline system as provided in article 7 of the UNCLOS. The court though didn’t accept to include in the delimitation process the outlying Negileh Rock because it considered it rather a reef than an island.

Likewise the court ruled that “the relatively large, inhabited and important island of Kamaran”²⁵² off the Yemen coast, together with the smaller islands close to the mainland such as the Kutama, Uqban and Tiqfash were part of an intricate system of islands and islets which should be taken into account and therefore should constitute the basepoints of a straight baseline system. Quite the opposite though, the Tribunal decided that the single island of al – Tayr and the island group of al – Zubayr should have no effect at all upon the boundary between the two countries due to “their barren and inhospitable nature and their position well out to sea”²⁵³.

²⁵¹ Ibid. para. 132.

²⁵² Ibid. para. 150.

²⁵³ Ibid. para. 147.

In the middle sector the court rejected the enclave solution which had been proposed by Yemen for the small Eritrean islands of Southwest Rocks, Haycock and Mohabbakah islands and stated that “there is no doubt that an island, however small, and even rocks provided they are indeed islands proud of the water at high – tide, are capable of generating a territorial sea of up to 12 miles ... It follows that a chain of islands which are less than 24 miles apart can generate a continuous band of territorial sea.”²⁵⁴ In this area therefore the court deemed that the median line between these islands and the Yemen Hanish group was the appropriate solution.

In order to connect the median line boundary of the northern sector with that of the middle sector, the court drew a line by which not only it deprived the west coasts of the Greater Hanish and Zuqar islands of their continental shelf and their EEZ, but also it curtailed their territorial sea. Thus the west facing coasts of the Yemeni islands in this area received nothing more than a truncated zone of territorial waters. Finally, in the south sector, where there weren't any islands other than those in the Bay of Assab, the maritime boundary followed the median line between the two mainland coasts. There, the Bay of Assab with its islands was considered as part of the coast of Eritrea.

The court then examined the equitableness of the delimitation. The Tribunal calculated the ratio of the lengths of the relevant coasts and the ratio between the water areas it had attributed to the Parties. The ratio of the coastal length of Yemen compared to Eritrea was 1 to 1.31. The ratio of the water areas, including the territorial seas, of Yemen compared to Eritrea was 1 to 1.09. The Tribunal concluded that the line of delimitation it had decided upon resulted in no disproportion.

It seems though from the last finding of the court that the intention of the Tribunal was to divide in approximately equal parts the sea area between the two mainland countries and to this

²⁵⁴ Ibid. para. 155.

end the islands were treated accordingly. The court compared the ratio of the coastal lengths with the ratio of the sea area appertaining to each country and concluded that since these ratios were around the same then the delimitation was equitable. But if the criterion of proportionality is applied in this way, then what is the role of geography? How can the special geographical features such as the islands affect the maritime boundary? Is it right to ignore those islands that considerably affect the course of the demarcation line for the sake of proportionality? Isn't then the whole process an apportionment rather than a delimitation? Didn't the court try in this case to make equal what nature had made unequal? Isn't it a refashioning of nature?

The fact that the court unquestionably accepted that the median line was a method which in general produced an equitable result was in itself a positive development. The question here is for which exactly median line are we talking about? That which is automatically constructed by the geographical realities of a given area or that which serves a predetermined decision? Depending on the coasts that are chosen to be taken as basepoints and the effect that are given to some special characteristics such as the islands, the final median line can take a variety of shapes and can be positioned in many different places. This is affirmed by the fact that although the two states and the court constructed a median line, their versions didn't coincide. So it isn't enough to declare that the median line principle is going to be applied, if the fundamental rules of constructing it aren't followed.

The court placed the basic right of the islands to have a continental shelf of their own in a second place and put emphasis on their geographical position. Thus as far as the islands served the court's notion of equity their rights were protected, but when they were located in a "wrong place" they were deprived of their rights without explanation. The Tribunal ruled that the island of Jabal al – Tayr and the Jabal al – Zubayr island group couldn't generate maritime zones around them because of "their barren and inhospitable nature and their position well out to sea", but this

reasoning is totally unfounded in international law. Did the court classify these islands as “rocks which cannot sustain human habitation or economic life of their own”? Is it possible that, islands of such magnitude²⁵⁵ to be classified as rocks? And if it is so why the court didn’t say it but left the impression that the rights of the islands can be viewed on a case by case basis? Additionally, while even rocks are entitled to a full zone of territorial sea why the court awarded the Yemeni islands with a limited one? Finally, how can the location of the islands prevail over their basic entitlement to a continental shelf and to an EEZ?

This case is therefore typical of the court’s distributive justice approach and can be characterized as a decision *ex aequo et bono*. The UNCLOS provided for the rights of the islands but the court seems to have acted beyond the limits of the applicable law and deprived the mid – sea island of their rights. Instead of drawing a median line taking into account all the islands and then in a second phase adjusting it if it was necessary, the court began by considering a median line between the two opposite mainland coasts and then examined the proportionate or disproportionate effect of the mid – sea islands. This approach speaks volumes about the intentions of the court.

At least the court didn’t question the rights of the coastal islands. All the Dahlak islands, the islands in the Assab Bay and the Kamaran, Uqban, Kutama and Tiqfash islands were given full effect and their outer edges were used as basepoints for the straight baselines system. The court therefore treated them as being a continuation of the mainland even if some of them located many miles away from the coast of their mainland. The outer islands of the Dahlak group for example are some 50 miles away from the mainland of Eritrea.

²⁵⁵ Jabal al – Tayr is 4.3 Km long and 3.1 Km wide while the biggest island of the Jabal al – Zubayr group is 5.5 Km long and 3.3 Km wide.

3.11 Qatar – Bahrain Maritime Boundary Delimitation (ICJ, 2001)

On March 16, 2001 the ICJ delivered its judgment by which it settled a long – running dispute between Qatar and Bahrain relating to the ownership status of the area around the city of Zubarah and the islands lying between the two mainland countries. In addition, it delimited the maritime areas of the two states.²⁵⁶

On the one hand, the court found that Qatar had sovereignty over the Zubarah region, Janan Island and the low – tide elevation²⁵⁷ of Fasht ad Dibal and on the other hand it concluded that Bahrain had sovereignty over the Hawar Islands and Qit’at Jaradah Island. The court also, by 13 votes to 4, drew a single maritime boundary that divided the territorial waters, the continental shelf and the EEZ of the two countries.²⁵⁸

Qatar and Bahrain are both located in the southern part of the Persian Gulf. Qatar is a peninsular country which projects northward into the Persian Gulf, while Bahrain is composed of a number of islands, islets and shoals situated off the eastern and western coasts of its main island. The Hawar islands are located in the immediate vicinity of the central part of the west coast of the Qatar peninsula, to the south – east of the main island of Bahrain and at a distance of approximately 10 miles from the latter. The island of Janan is located off the south – western tip of Hawar Island. Fasht ad Dibal and Qit’at Jaradah are two maritime features located off the

²⁵⁶ Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I. C. J. Reports 2001, p. 40. Available at: <http://www.icj-cij.org/docket/files/87/7027.pdf?PHPSESSID=b423c056409aa111aa4d02938569f048>.

²⁵⁷ “A low – tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.” Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 11, para. 1 and UNCLOS, Article 13, para. 1.

²⁵⁸ See figures 12 and 13 of Annex D.

north – western coast of the Qatar peninsula and to the north – east of the main island of Bahrain.²⁵⁹

After deciding for the sovereignty over the abovementioned islands and the low – tide elevations the court turned to the question of the maritime delimitation. Both states had agreed that their dispute had to be resolved on the basis of the international law. As neither Bahrain nor Qatar was party to the Geneva Conventions and for the reason that Bahrain had ratified the UNCLOS but Qatar was only a signatory to it, the court concluded that the international customary law was the applicable law for the case. Both Parties however agreed that most of the provisions of the UNCLOS were reflecting customary law rules.²⁶⁰

The two states had requested from the court “to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent water”.²⁶¹ In the southern part of the delimitation area the coasts of the two states were opposite to each other and the distance between these coasts was nowhere more than 24 miles. Thus, the boundary there would exclusively demarcate the territorial waters of the two countries. More to the north however, where the coasts of the two states were no longer opposite to each other but were rather comparable to adjacent coasts, the court had to carry out the delimitation of the continental shelf and the EEZ of both countries. The court pointed out that the delimitation of a single boundary for different jurisdictional zones “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...[zones] to the

²⁵⁹ I.C.J. Reports 2001, *supra* note 256, para 35.

²⁶⁰ *Ibid.* para. 167.

²⁶¹ *Ibid.* para. 168.

detriment of the other and at the same time is such as to be equally suitable to the division of either of them.”²⁶²

The court concluded that the delimitation of the boundary in the area where the two states were opposite to each other had to be carried out in accordance with the median line principle. As regards the delimitation of the territorial waters both countries had agreed that the median line principle accompanied by the special circumstances clause was, apart from a conventional law rule,²⁶³ a part of the customary law. The court accepted that the most logical and widely practiced approach was first to draw a provisional equidistance line and then to consider whether that line should be adjusted, in the light of the existence of any special circumstances.

The court followed the same approach for the delimitation of the continental shelf and the EEZ.²⁶⁴ It drew a provisional equidistance line and then it considered adjusting it according to the needs of the special circumstances, so that finally to be achieved an equitable result. The court further noted that the equidistance/special circumstances rule and the equitable principles/relevant circumstances rule as it had been developed in the case law and the practice of the states, were closely interrelated.²⁶⁵

The drawing of a median/equidistance line wasn't though an easy task. This line could only be drawn if the baselines were known, but neither Party had specified these baselines before submitting the case to the court. The court therefore concluded that it would determine the

²⁶² Ibid. para. 173. The Court reiterated the finding of the Chamber of the ICJ, in the Gulf of Maine case (I.C.J. Reports 1984, op. cit., para. 194).

²⁶³ Article 15 of the UNCLOS stipulates: “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 sea 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 therewith.” This article is virtually identical to article 12, para. 1, of the Geneva Convention on the Territorial Sea and the Contiguous Zone.

²⁶⁴ I.C.J. Reports 2001, *supra* note 256, para 230.

²⁶⁵ Ibid. para. 231.

relevant coasts of the Parties, from which it would determine the baselines and the pertinent basepoints, enabling therefore the equidistance line to be measured. The existence of many low – tide elevations and shoals made the whole process very complex.

On the one hand, Qatar argued that for the construction of the median line should be applied the mainland – to – mainland method. The notion of mainland included also the main islands of both countries but not the small islands, islets, rocks and the low – tide elevations. In addition in Qatar’s view the equidistance line had to be constructed by reference to the high – water line.²⁶⁶

On the other hand, Bahrain contended that it was an archipelagic state, and as that, it couldn’t be reduced to a limited number of so – called ‘principal’ islands, as this would be a distortion of reality and a refashioning of geography. It supported therefore that it could draw “straight archipelagic baselines joining the outmost points of the outmost islands and drying reefs of the archipelago.”²⁶⁷ Bahrain further contended that according to the law, it was the low –water line which was determinative for the breadth of the territorial sea and for the overlapping territorial waters.²⁶⁸

The ICJ ruled that under the international law the breadth of the territorial waters are measured from the low – water line²⁶⁹ but rejected the claim of Bahrain that it belonged to the category of the archipelagic states and that it could use therefore the method of the straight baselines for the delimitation of its maritime zones.²⁷⁰ It also rejected Qatar’s proposal about the mainland – to – mainland method and stated that all the islands could be taken into account for the construction of the median/equidistance line. Furthermore, it concluded that Fasht ad Dibal

²⁶⁶ Ibid. para. 179.

²⁶⁷ According to article 47 of the UNCLOS.

²⁶⁸ I.C.J. Reports 2001, *supra* note 256, para. 180.

²⁶⁹ Article 5 of the UNCLOS. Ibid. para. 184.

²⁷⁰ I.C.J. Reports 2001, *op. cit.* para. 201, 208, 212 and 215.

was a low – tide elevation and stated that when such features were not part of the coastal configuration but were lying in a distance from the coast, then they neither could have a territorial sea of their own nor they could “generate the same rights as islands or other territory.”²⁷¹ The court here therefore clearly recognized the rights of the islands to generate maritime zones in the same way as the continental lands.

For the drawing of the median/equidistance line, the court indeed took into account all the islands using them as basepoints, no matter how small they were, with the exception of two islands which it ruled that they constituted special circumstances and therefore they should be totally disregarded during the delimitation process.²⁷²

It identified that the island of Fasht al Jarim was a special circumstance that shouldn't be taken into account for the delimitation of the continental shelf and the EEZ. Fasht al Jarim is actually a remote, isolated projection of Bahrain's coastline and of which at most a minute part is above water at high tide. According to the ICJ, if this island was given full effect, it would “distort the boundary and have disproportionate effects” on it. In the view of the court such a distortion would not lead to an equitable solution and therefore it decided to give no effect at all to this feature.²⁷³

The other island which the court regarded as a special circumstance and gave it no effect at all was the Bahraini island of Qit'at Jaradah.²⁷⁴ The court observed that Qit'at Jaradah was a

²⁷¹ Ibid. para. 207.

²⁷² The fact that the court gave full effect to all the islands (with the exception of Fasht al Jarim and Qit'at Jaradah), even to the very small ones, and used them as basepoints was a reason for criticism by many scholars and by some of the judges of the case. See Separate opinion of Judge Oda para. 21, Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, para. 188, and Dissenting Opinion of Judge *ad hoc* Torres Bernardez, para. 505. See also J. Charney and R. Smith (eds), “International Maritime Boundaries”, Volume IV, *ASIL*, 2002, pp. 2851, 2852.

²⁷³ I.C.J. Reports 2001, *supra* note 256, 247.

²⁷⁴ Many of the Judges however contested the court's finding that Qit'at Jaradah was actually an island. They supported that Qit'at Jaradah was a tiny, sandy maritime feature which was constantly changing its physical condition and therefore it should have been treated like the islands of the deltas. See Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, para. 194 - 201. See also the Declaration of Judge Vereshchetin, para. 13, and Dissenting Opinion of Judge *ad hoc* Torres Bernardez, para. 524 – 528.

very small island, uninhabited and without any vegetation. This tiny island was situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently according to the court, if its low – water line were to be used for determining a basepoint in the construction of the equidistance line, “a disproportionate effect would be given to an insignificant maritime feature.”²⁷⁵ The court thus found that there was a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah, depriving it of all the maritime zones to this direction, even the zone of the territorial waters.

Another issue that requires special mention is the position of the court as regards Fasht al Azm. The court dithered about the status of this geographical feature. Should it be regarded as a part of Sitrah Island or a separate low – tide elevation? If this feature was to be regarded as part of the island of Sitrah, the basepoints for the purposes of determining the equidistance line would be situated on Fasht al Azm’s eastern low – water line. If it was not to be regarded as part of the island of Sitrah, Fasht al Azm could not provide such basepoints. The court in order to determine whether this feature was part of the island of Sitrah drew two equidistance lines reflecting each of these hypotheses: one giving full effect to Fasht al Azm, and another giving no effect at all to it. It finally ruled that a third line passing between the two aforementioned lines would lead to an equitable solution. From this practice of the court can be inferred the following: first the rights of the islands were again reaffirmed, and secondly, the decision of the court wasn’t based on geographical criteria but was an apparent attempt to equally divide the sea area and satisfy both states.

²⁷⁵ I.C.J. Reports 2001, *supra* note 256, para 219. The court gave also some examples from its jurisprudence, in order to support its assertion that some small islands can be disregarded during the delimitation process. It stated: “In similar situations the Court has sometimes been led to eliminate the disproportionate effect of small islands (see North Sea Continental Shelf; I.C.J. Reports 1969, p. 36, para. 57; Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C. J. Reports 1985, p. 48, para. 64)”.

All in all, the Two – Step Approach or Corrective Equity Approach that the court applied throughout this case was by all means a positive development.²⁷⁶ The ICJ unquestionably accepted that the median/equidistance line principle was the most appropriate method for the delimitation of the maritime boundary and it didn't involve in the process the ambiguous equitable principles. Hence, it started with a provisional median/equidistance line and then in a second stage it adjusted it, so that to reach an equitable result.

In addition, the court recognized in principle the rights of the islands and accepted that they can generate all the maritime zones, in the same way as the continental lands. These rights were irrelevant to their individual characteristics, such as their size or population. It should be underlined that Bahrain itself is a multiple – island state and the ICJ didn't treat it in a different way than Qatar which is a continental state.

The geographical position of some island was though for the court a reason to deviate from the general rule. As far as the islands served the notion of equity as it had been conceived by the court their rights were confirmed, but when they considerably affected the line that had been destined to approximately divide equally the disputed area, then their rights were curtailed without explanation. Hadn't the court taken as special circumstances the two Bahraini islands and hadn't it apportioned the area near Fasht al Azm, then it would have been an exemplary delimitation.

For the abovementioned reasons this case is indicative of the court's distributive justice approach. How else can be characterized a judgment which disregarded completely two Bahraini islands? or a judgment which wasn't based merely on geographical criteria near Fasht al Azm, but it obviously apportioned the sea area between the two states? a judgment that didn't even give a zone of territorial waters towards the east, to the island of Qit'at Jaradah? It appears therefore

²⁷⁶ The court used the term "Adjusted Equidistance Line". Ibid. para. 220, 249.

that in this case the ICJ tried ‘to make equal what nature had made unequal’. Hence, it seems that the intension of the court was to apportion the disputed area in a way that it would satisfy as much as possible both countries and for this reason some islands were sacrificed on the special circumstances altar.

If this case is to be contrasted to the Eritrea – Yemen Arbitration, as both of them dealt with the maritime boundary between states with opposite coasts and with a considerable number of islands lying between them, then we will realize how different the approach of the ICJ was in comparison with the approach that the arbitral tribunal had adopted a few years earlier. The court which dealt with the Eritrea – Yemen case approached the maritime delimitation with a mainland – to – mainland equidistance approach, which reflected the macro – geographical dimension of the delimitation. In contrast the court in this case used a micro – geographical approach, addressing minor geographical features, giving them effect and only adjusting the equidistance line when it deemed it to be necessary. It is remarkable though that both awards reached to the same result: the islands that could considerably affect the course of the median line and therefore could produce a boundary other than that which approximately divided the disputed area in equal parts, were deprived of their rights for the sake of a misconceived notion of equity.

3.12 Cameroon – Nigeria Maritime Boundary Delimitation (ICJ, 2002)

On October 10, 2002 the ICJ delivered its judgment on the case concerning the delimitation of the land and maritime boundary between Cameroon and Nigeria, by which it was fixed the course of the boundary line between the two adjacent, West African countries.²⁷⁷ Although Cameroon and Nigeria have no considerable islands, the delimitation process was affected by the islands of third states, namely by the Equatorial Guinea's island of Bioko and the islands of Sao Tome and Principe which lie opposite the parties' coastlines.²⁷⁸

Bioko is an island which belongs to Equatorial Guinea and it is located 32 Km off the coast of Cameroon. It has an area of 2,017 Km² and its population is around 124,000. It is 70 Km long and 32 Km wide. Sao Tome and Principe is an island nation in the Gulf of Guinea. It consists of two islands: Sao Tome and Principe, located about 140 Km apart. With an area of 964 Km² and a total population around 176,000 inhabitants, it is the second – smaller African country (the Seychelles being the smallest). Sao Tome is 50 Km long and 32 Km wide, while Principe is around 30 Km long and 6 Km wide.²⁷⁹

Since the delimitation of the maritime boundary between Cameroon and Nigeria would have affected the rights of the islands in the Gulf of Guinea, Equatorial Guinea requested to intervene as a non – party intervener, but Sao Tome and Principe chose not to intervene on any basis. The ICJ accepted the request of Equatorial Guinea and ruled that in fixing the maritime

²⁷⁷ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I. C. J. Reports 2002, p. 303. Available at: <http://www.icj-cij.org/docket/files/94/7453.pdf>.

²⁷⁸ See figure 14 of Annex D.

²⁷⁹ Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/tp.html>, accessed on February 7, 2011.

boundary between Cameroon and Nigeria, the court had to ensure that it didn't adopt any position which might affect the rights of Equatorial Guinea and Sao Tome and Principe.

Cameroon contended that the maritime area between the two states had been partially delimited by earlier agreements²⁸⁰ and it asked the court to establish the boundary for the continental shelf and the EEZ beyond that area. It proposed the adoption of an 'equitable line'²⁸¹ and rejected the equidistance principle as being a principle of customary law that was automatically applicable in every maritime boundary delimitation between adjacent states. Nigeria in contrast denied the existence of any maritime boundary and maintained that the whole delimitation had to be undertaken *de novo*. Finally, Equatorial Guinea requested that the boundary to be fixed by the court should nowhere encroach upon the median line between the coasts of Bioko Island and those of Cameroon and Nigeria. It added that this was "a reasonable expression of its legal rights and interests that must not be transgressed in proceedings to which Equatorial Guinea is not a party."²⁸²

Both Cameroon and Nigeria were parties to the UNCLOS²⁸³ and they had agreed that the single boundary delimitation for the seabed and the superjacent waters had to be carried out in accordance with the international law. Thus, the court emphasized the importance of the articles 74 and 83 of the UNCLOS and reiterated that the aim of the court was to "achieve an equitable solution". It said that the equitable principles/relevant circumstances method was similar to the equidistance/special circumstances method, when a line covering several zones of coincident

²⁸⁰ These agreement were the *Anglo – German agreement* of 11 June 1913, the *Yaoundé II Declaration*, signed on April 4, 1971, by which the two states accepted a 'compromise line' passing through 12 numbered points and the *Maroua Declaration*, signed on June 1, 1975, by which it was established an additional 8 points boundary line (A, A1, B...G). See figure 15 of Annex D.

²⁸¹ I. C. J. Reports 2002, *supra* note 277, para. 241, 272, 275 and 279.

²⁸² *Ibid.* para. 284.

²⁸³ Cameroon signed the UNCLOS on December 10, 1982 and ratified it on November 19, 1985. Nigeria signed it on December 10, 1982 and ratified it on August 14, 1986. Available at: http://www.un.org/Depts/los/reference_files/status2010.pdf.

jurisdictions was to be determined.²⁸⁴ This method involved first drawing an equidistance line and then considering whether there were factors calling for the adjustment of that line in order to be achieved an ‘equitable result’. The court ruled that it would apply the same method in the present case.

The court however stressed that delimiting with a concern to achieving an equitable result, as required by the international law, wasn’t the same as delimiting in equity. It stated that according to the court’s jurisprudence, equity wasn’t a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation. It went on saying that the geographical configuration of the maritime areas that the court was called upon to delimit was a given. It wasn’t an element open to modification by the court but a fact on the basis of which the court had to effect the delimitation.²⁸⁵

Cameroon however supported that the presence of Bioko Island, which was closer to its own coast than to that of Equatorial Guinea, was a relevant circumstance which had to be taken into account by the court. It drew an analogy with the case concerning the delimitation of the Anglo – French continental shelf, and proposed that Bioko Island had to be given partial effect and had to be confined in an enclave within Cameroon’s continental shelf. It further contended, that the delimitation regime wasn’t identical for an island state and for a dependent, isolated island and it argued that Bioko Island shouldn’t be given therefore full effect. Moreover it contended that it should be avoided a “radical and absolute cut – off of the projection of [Cameroon’s] coastal front” and in this regard it referred to the case concerning the delimitation of the maritime areas between Canada and the France (St. Pierre et Miquelon), in which the arbitral tribunal stated that “the delimitation must leave to a state the areas that constitute the

²⁸⁴ I. C. J. Reports 2002, *supra* note 277, para. 288.

²⁸⁵ *Ibid.* para. 294.

natural prolongation or seaward extension of its coasts, so that the delimitation must avoid any cut – off effect of those prolongations or seaward extensions”.²⁸⁶

Nigeria from its part took the view that Bioko Island couldn't be treated as a relevant circumstance. It argued that this island was a major part of an independent state, which generated its own maritime areas, on which the court wasn't entitled to encroach. In Nigeria's view this was also true for the archipelago of Sao Tome and Principe. It stated that it wasn't for the court to compensate Cameroon for any disadvantages suffered by it as a direct consequence of the geography of the area and that it wasn't the purpose of the international law to refashion geography.²⁸⁷

The court pointed out the fact that Bioko Island was subject to the sovereignty of Equatorial Guinea, a state which wasn't a party to the proceedings. Consequently the effect of Bioko Island on the seaward projection of the Cameroonian coastal front was an issue between Cameroon and Equatorial Guinea and not between Cameroon and Nigeria, and wasn't relevant to the issue of delimitation before the court. The ICJ didn't therefore regard the presence of Bioko Island as a circumstance that would justify the shifting of the equidistance line as Cameroon had claimed.²⁸⁸

The court concluded that the earlier agreements, by which it had been established a maritime boundary between the two states, were valid and the court had only to delimit the continental shelf and the EEZ by extending southwards the existing boundary along the equidistance line. It ruled that there weren't any reasons for deviating from the equidistance line as this line represented an equitable result. However, the equidistance line adopted by the court couldn't be extended very far. The ICJ stated that it could take no decision that might affect the

²⁸⁶ Ibid. para. 274.

²⁸⁷ Ibid. para. 296.

²⁸⁸ Ibid. para. 299.

rights of Equatorial Guinea's Bioko Island. In these circumstances the court considered that it could do no more than indicate only the general direction of the boundary between the parties' maritime areas.

To sum up, there are two conclusions arising from this case: first the value of the equidistance line principle was reaffirmed and secondly the rights of the islands were fully respected by the court. Thus the court in this case started with a provisional equidistance line and in the absence of any significant special/relevant circumstance it didn't adjust it. Although the parties had proposed a number of special/relevant circumstances, such as the oil concessions, the configuration of the coasts (concavity of Cameroon's coastline), the existence of the islands, etc, the court rejected all of them and kept the equidistance line as the advisable maritime boundary.

The ICJ respecting the rights of the islands in the region didn't establish a boundary beyond the median line which separated the sea area between the continental states of Cameroon and Nigeria on the one side and the island of Bioko on the other side. Although this island was located right off the coasts of Cameroon, significantly restricting therefore its seaward projection and although it lied away from its mainland country the ICJ didn't question its rights. In addition, the rights of Sao Tome and Principe weren't also in any case violated by the court.

3.13 Barbados – Trinidad and Tobago Maritime Boundary Delimitation

(Arbitration, 2006)

On April 11, 2006 the Permanent Court of Arbitration (PCA)²⁸⁹ rendered its unanimous award for the case concerning the delimitation of the maritime boundary between Barbados and Trinidad and Tobago.²⁹⁰ This case is quite interesting because it was the first time that an arbitral tribunal delimited the maritime boundary between two island countries and at the same time it applied the provisions of the UNCLOS.²⁹¹

Trinidad and Tobago is an island nation lying just off the coast of Venezuela, in South America. It is made up of the islands of Trinidad, with an area of 4,828 km² and an approximate population of 1,210,000, the island of Tobago with an area of 300 km² and an approximate population of 54,000 and a number of much smaller islands that are close to those two main islands.²⁹² The distance between Trinidad and Tobago is 19 miles. Around 70 miles to the

²⁸⁹ The Permanent Court of Arbitration was established in 1899 as one of the acts of the first Hague Peace Conference, which make it the oldest global institution for settlement of international disputes. Its creation was a landmark in the history of institutionalization of the third party mechanisms of peaceful resolution of disputes between states. The court however provides arbitration also in disputes between international organizations and between states and international organizations. The PCA facilitated the subsequent conception and creation of the Permanent Court of International Justice, of which the present ICJ is the successor. Today the PCA and the ICJ are complimentary institutions, each having its own unique role to play in the global network of mechanisms of third party dispute resolution. The PCA is considered to be more flexible than the ICJ because of the adjudicatory nature of the latter. The PCA share the premises of the Peace Palace in The Hague, together with the ICJ. Many members of the ICJ, past and present, were or are members of the PCA. This was the second maritime boundary delimitation case that was resolved under the umbrella of the PCA, the first being the Eritrea – Yemen case.

²⁹⁰ Decision of the Permanent Court of Arbitration in Case Concerning the Delimitation of the Maritime Areas between Barbados and Trinidad – Tobago. Available at: <http://www.pca-cpa.org/upload/files/Final%20Award.pdf>.

²⁹¹ Barbados signed the UNCLOS on December 10, 1982 and ratified it on October 12, 1993. Trinidad and Tobago signed it on December 12, 1982 and ratified it on April 25, 1986. Available at: http://www.un.org/Depts/los/reference_files/status2010.pdf.

²⁹² See figure 16 of Annex D.

northwest, starts a chain of rugged volcanic islands known collectively as the Windward Islands, made up of Grenada, the Grenadines, St. Vincent, St. Lucia, Martinique, Dominica, and others.²⁹³

Barbados is also an island country and it is situated around 115 miles northeast of Tobago. It consists of a single island with a surface area of 430 km² and a population of approximately 285,000. It is 80 miles east of St. Lucia, the closest of the Windward Islands and it is the easternmost island in the Lesser Antilles.²⁹⁴

On February 16, 2004 Barbados initiated the arbitration proceedings concerning its maritime boundary with Trinidad and Tobago and asked the court to draw a “single unified maritime boundary line, delimiting the exclusive economic zone and continental shelf between it and the Republic of Trinidad and Tobago, as provided under Articles 74 and 83 of UNCLOS”.²⁹⁵

Barbados contended that the case law clearly prescribed that the tribunal should start the process of delimitation by drawing a provisional median line between the coasts of the two states. This line according to Barbados should be adjusted in a second stage, so as to give effect to the special circumstances and thus lead to an equitable solution. Barbados maintained that in this case there was only one special circumstance that was calling for the modification of the median line: the established traditional artisanal fishing activity of Barbadian fishermen south of the median line, close to the island of Tobago.²⁹⁶ The equitable solution to be reached therefore was one that would give to Barbados the area of traditional fisheries enjoyed by Barbadian fishermen,

²⁹³ Decision of PCA 2006, *supra* note 290, para. 42, 44 and 45. See also USA’s Central Intelligence Agency (CIA), *The World Factbook*, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/td.html#top>, accessed on February 18, 2011.

²⁹⁴ Decision of PCA 2006, *supra* note 290, para. 43. See also USA’s CIA, *The World Factbook*, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/bb.html>, accessed on February 18, 2011.

²⁹⁵ Decision of PCA 2006, *supra* note 290, para. 57.

²⁹⁶ In November 1990 two states concluded the “Fishing Agreement between the Government of the Republic of Trinidad and Tobago and the Government of Barbados” (the “1990 Fishing Agreement”), regulating, *inter alia*, aspects of the harvesting of fisheries resources by Barbadian fishermen in Trinidad and Tobago’s EEZ, and facilitating access to Barbadian markets for Trinidad and Tobago’s fish. *Ibid.* para. 52.

by shifting the west part of the median line in a way leaving to Tobago only a 12 – mile zone of territorial waters.²⁹⁷

Trinidad and Tobago was too in favor of the “median line corrective equity approach”, but the special circumstances it invoked were different from that of Barbados. It contended that in the western sector, where the coasts of the two states were opposite to each other, there was no basis for deviating from the median line. In the eastern sector however, where the coasts of the Parties were in a situation of adjacency rather than oppositeness, Trinidad and Tobago claimed that the equidistance line wasn’t anymore an equitable solution. It invoked three principal relevant circumstances that in its view justified the adjustment of the equidistance line: the avoidance of any cut – off effect or encroachment on the projection of its relevant coasts; the regional considerations of the delimitation; and the proportionality of the relevant coastal lengths.²⁹⁸

The court agreed that the determination of the line of delimitation normally followed a two – step approach. First, a provisional line of equidistance was posited as a hypothesis and a practical starting point. This convenient starting point however couldn’t in many circumstances ensure an equitable result in the light of the peculiarities of each specific case. The second step therefore required the examination of this provisional line in the light of the relevant circumstances, which were case specific, so as to determine whether it was necessary to adjust the provisional equidistance line in order to achieve an equitable result. The court said that this approach was usually referred to as the “equidistance/relevant circumstances” principle and went on saying that “there will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as

²⁹⁷ Ibid. para. 58 – 61.

²⁹⁸ Ibid. para 320.

practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation.”²⁹⁹

The court indeed drew the equidistance line and then examined in detail the relevant circumstances of the case. It rejected the argument that the alleged historic artisanal fishing practice of Barbados was a sufficient reason to affect the course of the boundary of the continental shelf and the EEZ. It stated that the fishing regime in the disputed area could be determined later, by an agreement between the two countries. According to the court, the previous tribunals hadn’t applied in general any resource – related criteria as a relevant circumstance. It stated that the case of *Jan Mayen* was an exception to the general rule and said that the application of this criterion should be restricted to circumstances in which catastrophic results might follow from the adoption of a particular delimitation line.³⁰⁰

It also rejected the argument of Trinidad and Tobago about the avoidance of any cut – off effect or encroachment on its coastal projection. Trinidad and Tobago contended that the median line in the eastern sector of the delimitation area would confine the projection of its eastwards – facing coastal frontage and therefore it should be adjusted and follow an eastward direction so that to leave the coastal frontage of Trinidad and Tobago to project unimpeded towards the Atlantic Ocean.³⁰¹ It further argued that the coasts of a state project frontally in the direction in which they face, as held by the arbitral tribunal in the case of *St. Pierre and Miquelon*. The line delimiting the competing claims, should be therefore drawn so as to avoid “cutting – off” any state from its

²⁹⁹ Ibid. para 244.

³⁰⁰ Ibid. para, 241, 271, 293.

³⁰¹ Ibid. para. 62, 63.

maritime projection under the principle of non – encroachment.³⁰² The court however ruled that the orientation of Trinidad and Tobago’s coasts and therefore the direction of their projection was a very relative issue and in addition it stated that a coast could project in all directions in a radial manner.³⁰³

The court rejected also the argument that the regional considerations could constitute a relevant circumstance for the delimitation process. Trinidad and Tobago had argued that the court should see this delimitation in a broader framework and in connection with the already existed agreements. As the tribunal in Guinea – Guinea Bissau case held that an equitable delimitation cannot ignore other delimitations already made or still to be made in the region,³⁰⁴ Trinidad and Tobago asserted that the already existed delimitations in the region, needed to be considered in this dispute as they entailed a departure from the equidistance line in order to be avoided a cut – off effect for Trinidad and Tobago. The court stated that the existed agreements of Trinidad and Tobago were *res inter alios acta* in respect of Barbados and as a result it ruled that the regional circumstances didn’t have any role to play in the delimitation.³⁰⁵

The Tribunal concluded that the lengths of the relative coastal frontages were a circumstance relevant to delimitation and that their considerable difference required an adjustment of the provisional equidistance line. The court reiterating the finding in Greenland – Jan Mayen case said that “the differences in length of the respective coasts of the Parties are so significant that this feature must be taken into account during the delimitation operation ...”³⁰⁶. It also referred to the Libya – Malta case in order to support its view. Due to this relevant

³⁰² Trinidad and Tobago brought as examples the North Sea Continental Shelf case, the Libya – Malta case and the Cameroon – Nigeria case. *Ibid.* para. 321.

³⁰³ *Ibid.* para. 239.

³⁰⁴ Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea – Bissau. Award of 14 February 1985, *supra* note 177, para. 104. See also *ibid.* para. 340.

³⁰⁵ Decision of PCA 2006, *op. cit.* para. 346.

³⁰⁶ I.C.J. Reports 1993, *supra* note 224, para. 68.

circumstance the court adjusted the equidistance line giving to Trinidad and Tobago a small portion of the area it had claimed.

The Tribunal noted however that proportionality didn't in any case mean a mathematical application of the relationship between the coastal lengths or that proportionality could be used as an independent method of delimitation, hence producing by itself a boundary line. It argued that proportionality could only be used as a final check upon the equity of the delimitation. Proportionality "...serves to check the line of delimitation that might have been arrived at in consideration of various other factors, so as to ensure that the end result is equitable and thus in accordance with the applicable law under UNCLOS."³⁰⁷

The arbitral tribunal in this case moving to the right direction attempted to maintain consistency with the judicial precedents in the field of maritime delimitations. In order to reach to an equitable result the court resorted to the safe principle of equidistance line and didn't employ at all in the process the vague equitable principles. Moreover, the court accepted the predominance of the geographical factors, a view that echoed the recent trend of the case law. The fact however that the outcome of the delimitation process looks again as if the court not only delimited the disputed area, but also split the difference between the claims of the two states make someone have second thoughts. Did the court keep the equidistance line almost unchanged due to the fact that there weren't any significant relevant circumstances calling for its adjustment, or did it so because the equidistance line served the court's notion of equity, from the moment that it divided in almost equal parts the area of the overlapping claims? Although the tribunal declared that it wouldn't resort to any form of "splitting the difference" and that it wouldn't

³⁰⁷ Decision of PCA 2006, *supra* note 290, para. 240.

attribute to one Party what as a matter of law might belong to the other,³⁰⁸ the final delimitation line isn't convincing enough for these declarations of the court.

Furthermore, the criterion of proportionality as a relevant circumstance is of great importance for the islands which are generally lacking in coastal length in comparison with the other land territories. Hence, upgrading and accepting in general this criterion as a relevant circumstance, the basic entitlement of the islands to a continental shelf is curtailed and their rights are subjected to a case by case interpretation of the term "proportionality" by the courts that will be called to settle a maritime dispute. This situation definitely isn't contributing to the establishment of some objective, fixed rules governing the delimitations and to the creation of a degree of predictability for the future cases. The court indeed accepted that there are no "magic formulas"³⁰⁹ for reaching to an equitable result, stressing once more the subjectivity of the issue.

It is concluded therefore that a maritime delimitation can be a very subjective process. The court in this case accepted only the proportionality of the coastal lengths as a relevant circumstance and it rejected a number of other factors as being relevant circumstances, although they had been regarded as such by the courts in the past. It is certain therefore that nobody can predict which criteria are going to be employed in the next cases. Moreover, the fact that the courts have upgraded the median/equidistance line with their latest decisions is surely a positive development, but it is apparent that the final line can be adjusted in any possible way, according to the relevant circumstances and the weight that the courts may give to them.

Apart from the abovementioned concerns regarding the subjectivity of the delimitations, in the present case the rights of the islands were again confirmed by the arbitral tribunal. The court undertook to delimit the maritime areas of the islands, which in itself is a proof that they

³⁰⁸ Ibid. para. 338.

³⁰⁹ Ibid. para. 373.

can generate maritime zones around them, with the same way as the continental lands. In fact the court nowhere showed that the delimitation of the maritime areas of the islands was something different from a delimitation between two mainland countries. It also respected the rights of the other islands in the region and it didn't, by any means, transgress their rights.

3.14 Honduras – Nicaragua Maritime Boundary Delimitation (ICJ, 2007)

On October 8, 2007 the ICJ issued its decision for the case concerning the territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea.³¹⁰ The court decided for the ownership status of a number of islets and by 14 votes to 3, it delimited the maritime area appertaining to both countries. This case is studied because first of all the maritime delimitation was affected by the presence of a number of small islands and secondly because it is indicative of the court's distributive justice.

The coasts of Honduras and Nicaragua roughly form a right angle that juts out to sea. The convexity of the coast is compounded by the cape Gracias a Dios, which is formed at the mouth of river Coco. This cape marks the point of convergence of both states' coastlines. It abuts a concave coastline on its sides and has two points, one on each side of the margin of the river Coco, separated by a few hundred meters. The continental margin off the coast of the two states has the form of a relatively flat triangular shaped platform, with depths around 20 m. In this shallow area close to the mainland there are numerous reefs, some of which reach above the water surface in the form of cays.

Cays are small, low islands composed largely of sand derived from the physical breakdown of coral reefs by wave action and subsequent reworking by wind. Larger cays can accumulate enough sediment to allow for colonization and fixation by vegetation. The insular features present in front of cape Gracias a Dios include Bobel Cay, Savanna Cay, Port Royal Cay,

³¹⁰ Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p. 659. Available at: <http://www.icj-cij.org/docket/files/120/14075.pdf>.

South Cay and Edinburgh Cay, located between 30 and 40 miles east of the mouth of the River Coco.

The delta of the river Coco and even the coastline north and south of it show a very active morpho – dynamism. The result is that the river mouth is constantly changing its shape and unstable islands and shoals form in the mouth where the river deposits much of its sediment.³¹¹

On December 8, 1999 Nicaragua asked the court to determine the course of a single maritime boundary between the areas of territorial sea, continental shelf and EEZ appertaining respectively to Nicaragua and Honduras in the Caribbean Sea. It proposed a method of delimitation consisting of the bisector of the angle formed by two straight lines that were deemed to represent the entire coastal front of both Parties. These lines were constructed as straight lines through a process of “planing” or “smoothing” the coastal geography of both countries. As regards the islands off the coasts of both states, Nicaragua didn’t dispute that they could generate a territorial sea of up to 12 miles but argued that, were they to be “attributed to Honduras and were thus to be located within Nicaraguan territory”, their “size” and “instability” would act as “equitable criteria” justifying their being enclaved within only a 3 – mile territorial sea.³¹²

Honduras in contrast contended that the single maritime boundary between the two states had already been delimited and claimed that it was coincided with the 15th parallel. It claimed that this line represented the equidistance line measured from the coasts of the two states but, in case that the court didn’t accept the 15th parallel as the established maritime boundary, Honduras proposed alternatively an adjusted equidistance line. Honduras maintained that the construction of a provisional equidistance line was possible and that there was no reason to depart from “the practice almost universally adopted in the modern jurisprudence, both of this court and of other

³¹¹ See figure 17 of Annex D.

³¹² I.C.J. Reports 2007, *supra* note 310, para. 83, 263, 300.

tribunals, that is to begin with a provisional equidistance line”.³¹³ In addition, concerning the islands it contended that, due to the fact that the breadth of the territorial sea of both Parties was 12 miles, there was “no justification ... for employing a different standard with regard to the islands”.³¹⁴

Although Nicaragua wasn’t Party to the UNCLOS at the time it filed the application in this case, the parties were in agreement that UNCLOS was then in force between them and that its relevant articles were applicable in their dispute.³¹⁵ The court therefore had the opportunity to apply the provisions of the conventional law and at the same time to clarify and consolidate them in a manner contributing to the establishment of clear and objective rules.

Both parties agreed that the four islands in dispute north of the 15th parallel, which the court attributed finally to Honduras, as well as Nicaragua’s Edinburgh Cay south of the 15th parallel, were entitled to generate their own territorial sea, but no claim was made by either Party for other maritime areas. The court accepted the position of the litigant parties and ruled that the islands were only entitled to a 12 – mile zone of territorial waters but not to a zone of continental shelf or an EEZ. It didn’t explain however the reason why the islands couldn’t have rights over the other maritime zones.³¹⁶ Were the islands deprived of their rights because of the will of the parties? Was it because they were too small and the court classified them as rocks which couldn’t sustain human habitation or economic life of their own? Was it because their distortive effect on the delimitation line would have been too great in comparison with their importance? The ICJ didn’t justify its reasoning and left all these questions unanswered. The court ought to have

³¹³ Ibid. para. 91.

³¹⁴ Ibid. para. 86 – 91, 263. For a graphic display of the positions of the parties see figure 17 of Annex D.

³¹⁵ Honduras signed the UNCLOS on December 10, 1982 and ratified it on October 5, 1993. Nicaragua signed it on December 9, 1984 and ratified it on May 3, 2000. Available at: [http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea) and at: http://www.un.org/Depts/los/reference_files/status2010.pdf.

³¹⁶ I.C.J. Reports 2007, *supra* note 310, para. 137, 302.

explained why these features, for which it had previously ruled that they were indeed islands,³¹⁷ couldn't generate a zone of continental shelf and similarly an EEZ. Avoiding doing so, one can easily generalize and conclude that all the islands in general may have different treatment in comparison with the continental lands.

At least, the ICJ accorded a 12 – mile zone of territorial sea to these islands as it accepted that the right of a state to extend its territorial waters up to 12 miles was stemming from both, the conventional and customary law, the islands being no exception to this.³¹⁸ In addition, the court ruled that where there were overlapping zones of territorial waters then the drawing of a provisional equidistance line would be the most advisable solution as the first step of the delimitation. The court indeed drew an equidistance line between the islands of Honduras and that of Nicaragua and kept it as the final boundary between them, as it saw no special circumstances requiring the adjustment of this equidistance line.³¹⁹

Although the court applied the equidistance principle for the delimitation of the territorial sea around the islands, it didn't do the same for the delimitation of the continental shelf and the EEZ. Instead of applying the equidistance principle which seemed that it had been established in its latest jurisprudence as the most appropriate method for the maritime delimitations, the ICJ opted for another method, that of the bisector line. The court however accepted that the equidistance line had “a certain intrinsic value because of its scientific character and the relative ease with which it can be applied”³²⁰ but it also said that “the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances,

³¹⁷ Ibid.

³¹⁸ Article 3 of the UNCLOS: “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”

³¹⁹ I.C.J. Reports 2007, *supra* note 310, para. 302 – 305. See also article 15 of the UNCLOS and article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, which provide for the delimitation of the territorial sea between states with opposite or adjacent coasts.

³²⁰ I.C.J. Reports 2007, *op. cit.* para. 272.

there may be factors which make the application of the equidistance method inappropriate.”³²¹ It further stated that the bisector method like equidistance was a geometrical approach and “in instances where, as in the present case, any base points that could be determined by the court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method. ...”³²²

The court maintained that the difficulty in identifying reliable basepoints, due to the unstable nature of the area of the cape Gracias a Dios and the concavity of the coasts of both countries, rendered the application of the equidistance line unsuitable in this case. Thus, the existence of “special circumstances” precluded the application of the equidistance principle. The court though didn’t explain why it didn’t use the method of “straight baselines” so that to overcome the aforementioned problems. In fact, the method of “straight baselines” is advocated in the article 7 of the UNCLOS for cases where due to “the presence of a delta and other natural conditions the coastline is highly unstable”.

“The efforts of recent years to make judicial decisions in this field more objective by firstly drawing a provisional equidistance line, even if this subsequently has to be adjusted in the light of “special” or “relevant” circumstances, have thus been set aside. There is thus a return to the idea of *sui generis* solutions for each delimitation, in other words a relapse into pragmatism and subjectivity.”³²³ The geographical configuration of the coastline as well as the instability of the delta of the river Coco couldn’t “justify abandoning the equidistance method in favour of one

³²¹ Ibid.

³²² Ibid. para. 287.

³²³ Dissenting Opinion of Judge Torres Bernardez, para. 122. Available at: <http://www.icj-cij.org/docket/files/120/14085.pdf?PHPSESSID=a55e96f370f1f9bb85e5ef4d6c6f3b10>.

such as the bisector, which creates far more serious problems of law and equity than equidistance.”³²⁴

It seems that the criteria that the court applied once again weren't totally based on law principles. It appears that the intention of the court was to approximately divide in equal shares the area of the overlapping claims of the Parties satisfying therefore as much as possible both of them.³²⁵ Otherwise how can be explained the fact that the court drew the maritime boundary not only as the bisector of the angle formed by the coasts of the two countries but also as the almost bisector of the angle formed by the lines of maximum claims of the states? Why the ICJ didn't use the safe and objective method of the equidistance principle but it engaged the bisector method, which is totally subjective? Depending on the relevant coasts that someone chooses to employ in order to draw the straight lines representing the coastal front, the result can be totally different. For instance in the present case, had the court used a more limited part of the coasts so that to form the angle of the coastlines, the result would have been very different in favor of Honduras. The court indeed extended the relevant coasts beyond those directly concerned by the area of delimitation in order to produce its version of the bisector. It should be noted that although Nicaragua too proposed the bisector method, the boundary line it produced was different from that of the court because it took into account as relevant coasts the entire coastal front of both countries and not a part of them as did the ICJ. The inherent dangers of this method weren't however unknown to the court. It characteristically stated: “where the bisector method is to be applied, care must be taken to avoid ‘completely refashioning nature’.”³²⁶

³²⁴ Ibid. para. 128. See also Separate Opinion of Judge Ranjeva, para. 7. Available at: <http://www.icj-cij.org/docket/files/120/14079.pdf?PHPSESSID=a55e96f370f1f9bb85e5ef4d6c6f3b10>.

³²⁵ See Separate Opinion of Judge Ranjeva who states for example in para. 9: “The bisector is used in apportionment or division of the area concerned...the Court was requested to carry out a maritime delimitation and not an apportionment or division.”

³²⁶ Ibid. para. 289. The court repeated the phrase it had initially used in the first decision of this kind in 1969. See also Dissenting Opinion of Judge Torres Bernardez, *supra* note 323, para. 128 – 130 and P. Weil, *Perspectives du*

Regarding the islands there are two conclusions that come up from this case. First, the court should have explained in detail why it didn't give the islands under discussion a zone of continental shelf (and an EEZ). Since it had ruled that they were indeed islands they should have generated all the maritime zones in exactly the same manner as the other land territory. Presumably the court did so because it considered them as rocks which couldn't sustain human habitation or economic life of their own, but in any case, it ought to have clarified it in a way not open to speculations. The ICJ obviously avoided addressing the controversial question of what exactly distinguishes a 'rock' from a full – fledged island and its decision is therefore questionable. Secondly, the fact that the court gave a full zone of territorial sea to these small islands can be seen as a positive sign: the islands are entitled to a full maritime zone no matter their size or importance.

droit de la délimitation maritime, 1988, p. 65 and also P. Weil, *The Law of Maritime Delimitation — Reflections*, 1989, p. 59: “The bisector method is possible only where two clearly distinguished coastlines form a sharply defined angle; if not, it rests on artificially reconstructed coastal directions.”

3.15 Romania – Ukraine Maritime Boundary Delimitation (ICJ, 2009)

On February 3, 2009 the ICJ delivered its unanimous decision for the case concerning the maritime boundary delimitation between Romania and Ukraine.³²⁷ After six years of unsuccessful negotiations, Romania initiated proceedings in September 2004 and asked the court to establish “...a single maritime boundary between the continental shelf and the exclusive economic zones of the two states in the Black Sea”³²⁸ so that to be ended a long standing dispute between the two neighboring nations. Romania and Ukraine disagreed on the course of the maritime boundary to be established, and in particular on the role in this respect of Serpents’ Island.

Romania and Ukraine are situated in the northwestern Black Sea region. Because of the particular nature of the delimitation area, the Romanian coast is both adjacent and opposite to the Ukrainian coast or in other words, the Ukrainian coast consist of two portions: one adjacent to the Romanian coast and another opposite to it. Serpents’ Island is an Ukrainian island located approximately 20 miles east of the Danube delta. It is the only island in the region and it has a surface area of approximately 0.17 Km² and a circumference of around 2,000 m. On the island live a small number of people consisted of some frontier guard servicemen, technical and research personnel.³²⁹

On the one hand, Romania argued that Serpents’ Island was actually a rock incapable of sustaining human habitation or economic life of its own, and therefore it shouldn’t have a continental shelf or an EEZ, as provided for in the UNCLOS. Moreover, it asserted that under the

³²⁷ Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 6. Available at: <http://www.icj-cij.org/docket/files/132/14987.pdf?PHPSESSID=28d0f9aff72e7a6570ff46225255df8b>.

³²⁸ Ibid. para. 11.

³²⁹ See figure 17 of Annex D.

international jurisprudence and the state practice, small islands, irrespective of their legal characterization, had frequently been given very reduced or no effect in the delimitation of the continental shelf, EEZ or other maritime zones due to the inequitable effect they would produce. Finally, it contended that according with the 1949 agreement between Romania and the USSR, Serpents' Island was entitled only to a 12 – mile zone of territorial sea and it shouldn't be given by the court any effect at all beyond this limit.³³⁰ It proposed therefore that the course of the maritime boundary should follow the 12 – mile arc of the island' territorial sea, continue along the equidistance line between the adjacent Romanian and Ukraine mainland coasts and then follow the median line between the opposite coasts of the two countries.

On the other hand, Ukraine argued that Serpents' Island was indisputably an island rather than a rock and it contended that the evidence showed that Serpents' Island could sustain human habitation and an economic life of its own. In particular, it asserted that the island had vegetation, a sufficient supply of fresh water, buildings and accommodation for an active population. Thus in Ukraine's view, the coast of the island constituted part of Ukraine's relevant coasts and it couldn't be reduced to just a relevant circumstance as Romania had supported. Ukraine therefore contended that the Serpents' Island could generate all the maritime zones around it and proposed as a maritime boundary between the two states a line which was produced by giving full effect to the island in question.³³¹

³³⁰ The court rejected the argument of Romania that the USSR had forfeited its entitlements beyond the 12 – mile limit of its territorial sea with respect to any other maritime zones. Consequently, the court said that there was no agreement in force between Romania and Ukraine delimiting the EEZ and the CS around the Serpents' Island. Judgment, I.C.J. Reports 2009, *supra* note 327, para. 76.

³³¹ For a graphic illustration of the parties claims see figure 17 of Annex D.

Both Romania and Ukraine were parties to the UNCLOS.³³² The court stated that this convention, as it had been interpreted in its jurisprudence, was therefore the applicable law between the Parties and more specifically the paragraph 1 of the articles 74 and 83 of it. However, when Romania had become party to the UNCLOS it had made a declaration according to which “...the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal states”³³³. The court ruled that according to article 31 of the Vienna Convention on the Law of Treaties, Romania’s declaration as regards the uninhabited islands had no bearing on the present case.³³⁴ The court therefore clearly positioned itself and accepted that, unless they were rocks, the uninhabited islands without economic life could have a continental shelf (and an EEZ) of their own.

Thereafter the ICJ followed the methodology which it had developed in its previous jurisprudence. It held that for the drawing of a single maritime boundary, the case law up to then had established a well – defined process consisting of three specific and distinct stages. First, the court had to draw a provisional line, using geometrically based methods. In the vast majority of the cases the equidistance line method had been used between states with adjacent coasts and the median line had been applied when the parties had opposite coasts.³³⁵ For the construction of this provisional equidistance/median line the court didn’t have to be concerned about the existence of any relevant circumstances and the line had to be plotted on strictly geometrical criteria on the basis of objective data.

³³² Romania signed the UNCLOS on December 10, 1982 and ratified it on December 17, 1996. Ukraine signed it on December 10, 1982 and ratified it on July 26, 1999. Available at: http://www.un.org/Depts/los/reference_files/status2010.pdf.

³³³ Judgment, I.C.J. Reports 2009, *supra* note 327, para. 35.

³³⁴ *Ibid.* para 42.

³³⁵ The court said that there might have been some deviations from the equidistance/median line method when there were compelling reasons that made this method unfeasible in a particular case. It referred the example of the Honduras – Nicaragua case where the geographical realities of the area rendered this method inappropriate to be applied. *Ibid.* para. 116.

In the next stage of this process the court had to consider whether there were factors calling for the adjustment or shifting of the provisional equidistance/median line in order to achieve an equitable result. In the third and the last stage, the court had to apply the criterion of proportionality in order to verify that the provisional equidistance line which may or may not had been adjusted by taking into account the relevant circumstances, led to an equitable result. The purpose of this final stage was therefore to make sure that there was no significant disproportionality between the ratio of the coastal lengths and the ratio of the marine areas attributed to each party. The ICJ clarified though that the delimitation process shouldn't in any case be the outcome of a mathematical application of the relationship between the lengths of the coastlines, because "the sharing out of the area is therefore the consequence of the delimitation, not vice versa"³³⁶.

Hence, the court followed this three – step process for the case under discussion. In the first stage, it ruled however that the Serpents' Island couldn't serve as a basepoint for the construction of the provisional equidistance/median line between the coasts of the parties, since it didn't form part of the general configuration of the coast. The court characteristically said: "To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes. The court is thus of the view that Serpents' Island cannot be taken to form part of Ukraine's coastal configuration...For this reason, the court considers it inappropriate to select any base points on

³³⁶ The court reiterated its finding in the Greenland – Jan Mayen case. I.C.J. Reports 1993, *supra* note 224, para. 64.

Serpents' Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine"³³⁷.

Then, the court proceeding at the second stage of the delimitation considered if the presence of Serpents' Island constituted a relevant circumstance calling for an adjustment of the provisional equidistance/median line. It ruled though that any possible entitlements generated by Serpents' Island were fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself and concluded that the presence of Serpents' Island wasn't an adequate reason for adjusting the provisional equidistance/median line.

When later the court applied the test of proportionality it found that the coast of Serpents' Island was so short that it made no real difference to the overall length of the relevant coasts of the parties and therefore it wasn't also taken into account in the third stage of the delimitation process. Thus the court concluded that the Serpents' Island should have no effect on the course of the maritime boundary, other than that stemming from the role of the 12 mile arc of its territorial sea. The ICJ said that as its jurisprudence had indicated, "...the court may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration"³³⁸.

The court refrained from considering whether Serpents' Island fell under paragraph 2 or 3 of the Article 121 of UNCLOS and once again it avoided to address the question of what exactly distinguishes a rock from an island. Moreover, although the law provides that even rocks are entitled to a full zone of territorial waters the court hinted that the 12 – mile territorial sea was

³³⁷ Judgment, I.C.J. Reports 2009, *supra* note 327, para. 149. The court in order to support its argument referred to the Libya – Malta case where the court hadn't accepted that the islet of Filfla was relevant for the choice of the basepoints.

³³⁸ *Ibid.* para. 185. The court brought as examples the Libya – Malta case, the Qatar – Bahrain case and the Honduras – Nicaragua case.

attributed to Serpents' Island due to the previous agreements between the Parties and not because of its legal entitlement.

The rationale of the court is difficult to be understood. The court ruled that due to the reason that the Serpents' Island wasn't part of the mainland coastal configuration it couldn't provide any basepoint for the construction of the provisional equidistance/median line. It argued that to count Serpents' Island as a relevant part of the coast would be a refashioning of geography, but wasn't a refashioning of geography the total disregard of the unique island in the region? Since when and which convention provides that only the coastal islands which are included within the coastal system of baselines, can provide the basepoints for the delimitation? What then is the role of geography and how can the special characteristics of an area be taken into account?

The court declared many times in its judgment that the "delimitation is a function which is different from the apportionment of resources or areas"³³⁹, but disregarding Serpents' Island from the delimitation process it didn't prove it in practice. The codification of the delimitation process and the strengthening of the role of the equidistance/median line principle was in all respects a positive outcome of this case, but again only the declaration that the equidistance/median line is going to be used doesn't entail an objective delimitation if in reality this line doesn't take into account all the geographical features of a given area. The selected basepoints can fundamentally influence the location of the equidistance/median line and their objective selection is therefore of utmost importance. A fact that shows how subjective it may be the process of applying the equidistance/median line principle is that the provisional equidistance/median line drawn by the court didn't coincide with the provisional lines drawn either by Romania or Ukraine. Hence,

³³⁹ Ibid. para. 163.

apart from the codification of the delimitation process, the courts should also systematize the method of drawing the equidistance/median line.

The decision of the court would have been acceptable if the court had specified the legal status of Serpents' Island and if it had clearly classified it as a rock. Then, on the one hand, the whole delimitation process would have been both equitable and exemplary since the court applying the equidistance/median line principle would have given to the "Serpents' Island Rock" a full 12 – mile zone of territorial waters, and on the other hand the rights of the islands in general wouldn't have been questioned. Avoiding doing so, the court implied that the rights of the islands, can be viewed on a case by case basis and their basic entitlements to maritime zones can be put in a second place after their characteristics such as size, importance, habitation and geographical position.

Chapter 4

Conclusions

Undoubtedly the 1969 decision of the ICJ was decisive for all the later jurisprudence. The court back then introduced the notion of the equitable principles/relevant circumstances and actually distanced itself from the equidistance/median line/special circumstances conventional provision, setting a precedent which has been followed for many years by the courts. Since then the jurisprudence has been wandering without having yet established those fixed rules governing the delimitations of the maritime boundaries as it hasn't yet completed the seems to be endless list of the equitable principles.

The equidistance/median line principle is very important for the islands because it automatizes the delimitation process, making it a mechanistic procedure and if it is applied correctly (i.e. if all the geographical features, such as the islands, are taken into account) it can safeguard the rights of the islands with regard to their maritime zones. Up to now, the importance that the courts have given to it has undergone many changes. From a law principle, it was relegated to the category of method by the Tribunal in 1977, became a factor in 1982 and much later it was gradually reintroduced under the general umbrella of the equitable principles enunciated by the ICJ and the requirements of the UNCLOS for an equitable result. The international Tribunals have started lately to recognize its equitable nature, its practical convenience and its certainty of application. In addition, the fact that all the recent disputes required the drawing of a single maritime boundary for all the maritime zones, made a distance related criterion such as the equidistance/median line much more appropriate and at the same time arguments such as the natural prolongation became obsolete.

Today, the equidistance/median line principle is usually applied by the courts through a three – step process: application of a provisional equidistance/median line, possible corrections/adjustments of it according to the relevant circumstances of a given case and finally the *ex post facto* proportionality test in order to be verified whether this provisional line as modified or not is equitable. If the proportionality test implies that the adopted maritime boundary doesn't lead to an equitable result then it is further amended.

Even today though the rights of the islands are not guaranteed as long as the process of plotting the equidistance/median line isn't systematic, based on objective data and also since the relevant circumstances are not limited to geographical factors but they can potentially include almost everything. Moreover, the test of proportionality is unfair for the islands which are generally lacking in coastal length in comparison with the other land territories. Hence, the basic entitlement of the islands to a continental shelf is subjected to a case by case interpretation of the ambiguous relevant circumstances and in addition their rights can be further curtailed by the application of the proportionality criterion. The study of the case law shows that there were many cases where the basic entitlement of the islands to a continental shelf came in second place after the court had weighed more than that, other factors such as their geographical location, distance from their mainland country, size, economic importance, political status, population and coastal length.

The international Tribunals have avoided addressing so far the question of what exactly distinguishes a rock from an island. In many cases they didn't attribute a zone of continental shelf to some small islands presumably because the courts considered them as rocks which couldn't sustain human habitation or economic life of their own, but in any case, they ought to have clarified it in a way not open to speculations. Avoiding doing so, someone can easily generalize and conclude that all the islands in general can be treated differently than the continental lands.

Although the UNCLOS defined what should be regarded as a rock, it seems that the courts in many cases interpreted the law in a way that was detrimental to the rights of the islands. Nonetheless, although both the conventional and the customary law provides that even rocks are entitled to a full zone of territorial waters, there were cases in which the courts deprived some islands even from this entitlement.

The judgments of the courts were in many cases poorly, if at all reasoned. Failing to explain their rationale the courts increased the subjectivity and the uncertainty of the delimitations and undermined the authority of the international judicial bodies. The islands were those most affected by this obscure situation. The delimitation of their maritime zones was done on a case by case basis, exacerbating thereby the confusion about their rights. These subjective and at times arbitrary rulings neither have helped the establishment of general rules of broad application nor have consolidated a degree of predictability and certainty in the delimitations of the maritime boundaries and by no means have they secured the rights of the islands.

The ICJ declared in the 1969 landmark case that the delimitation of the maritime boundaries couldn't be a process of "completely refashioning nature" or "totally refashioning geography" but inconsistent to these declarations the later courts didn't give geography the importance it deserved. In fact, geography should have been the common denominator of every case brought before the courts and the special geographical features such as the islands should have played a more active role on the course of the boundary line. Quite the opposite though, the courts not only didn't take into account the geographical particularities of some areas, but they tried in many cases to compensate a state for its geographical disadvantages and attempted to refashion the geography of some regions by disregarding those islands that could considerably affect the final demarcation line.

In most of the cases the Tribunals tried to conciliate as much as possible the demands of the litigant states by dividing approximately in half the water area between their maximum claims. However, by adopting such an approach the courts have encouraged the states to have excessive demands and have discouraged moderate and reasonable claims. In many cases the parties didn't hesitate to contest the entrenched rights of the islands in an apparent attempt to gain as much sea area as possible from the delimitation process. The courts therefore by their practice failed to foster a climate conducive to the resolution of the international maritime disputes without the need to resort to a third – party assistance.

The international tribunals seem that have been engaged in a political operation of apportionment and compromise and the delimitation process in most of the cases appeared to be rather a political affair than a legal issue. The courts never awarded a total victory to one state but instead they tried to split the difference and find the “golden mean” between the claims of the litigant parties so that to satisfy all of them as much as possible. In most of the cases the whole process appeared more like an attempt by the courts to apportion the maritime territories than an effort to delimit them. The islands were the easy victims of the courts' distributive justice. Most of the times they were deprived either partially or totally of their rights as an easy solution for the courts which tried to allocate almost equal shares to both states in an effort to make equal what nature had made unequal, apparently forgetting the fundamental principle that justice doesn't necessarily mean equality.

The ICJ as well as the other arbitral Tribunals seems to have adopted a result – oriented approach and they weren't always consistent with the legal principles that they ought to have followed. They highlighted the importance of equity and they used it as a scapegoat for any possible criticism. Thus, in many cases they moved beyond the limits of the applicable law and their judgments can be characterized as decisions *ex aequo et bono* or even due to the lack of

authorization as *contra legem* decisions.³⁴⁰ Typical examples of such decisions are those where a number of islands were totally disregarded from the delimitation process as non – existence.

From the above analysis it is obvious that in many cases the decisions of the courts were unfair for the islands as they were discriminated against the continental lands. In most of the cases they were considered as *prima facie* relevant/special circumstances something which is totally unfounded in the international law. The courts ought to have clearly acknowledged that the islands can generate all the maritime zones around them in the same way as the continental lands do and that their basic rights over the continental shelf exist *ipso facto* and *ab initio* no matter if they are small, uninhabited, desolate or remote from their mainland. On the contrary, the courts put the basic right of the islands to have a continental shelf of their own in a second place and laid emphasis on their characteristics.

The decisions of the courts have been inconsistent with each other as regards the continental shelf of the islands and therefore they haven't created a specific dynamic in this field that would enable someone to safely predict the outcome of a future case. What is certain is the fact that the continental shelf, as well as the other maritime zones of the islands will continue to be the “apple of discord” for many states and this for the most part is due to these vague decisions of the courts.

³⁴⁰ H. Tzimitras, *supra* note 118, pp. 216, 217.

A n n e x e s

Graphic Display of the Continental Shelf

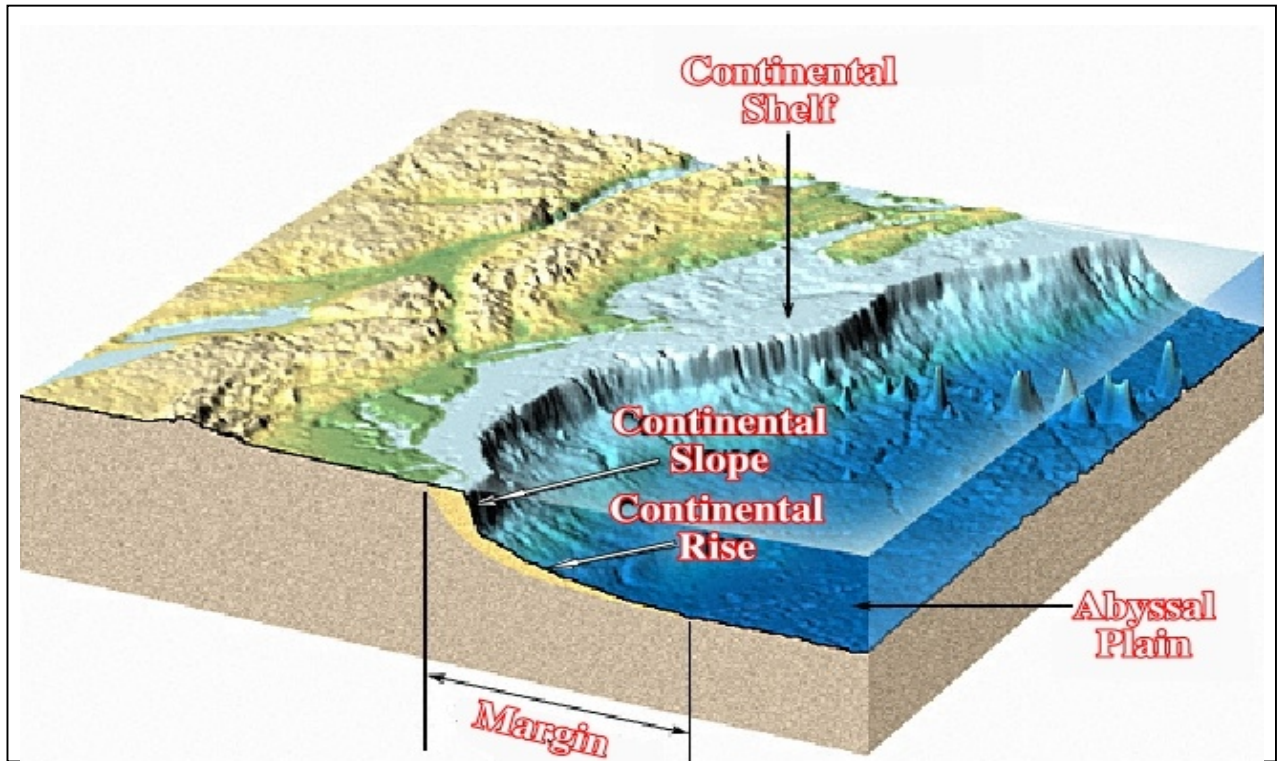


Figure 1³⁴¹

Legal Definition of the Continental Shelf According to 1958 Geneva Convention

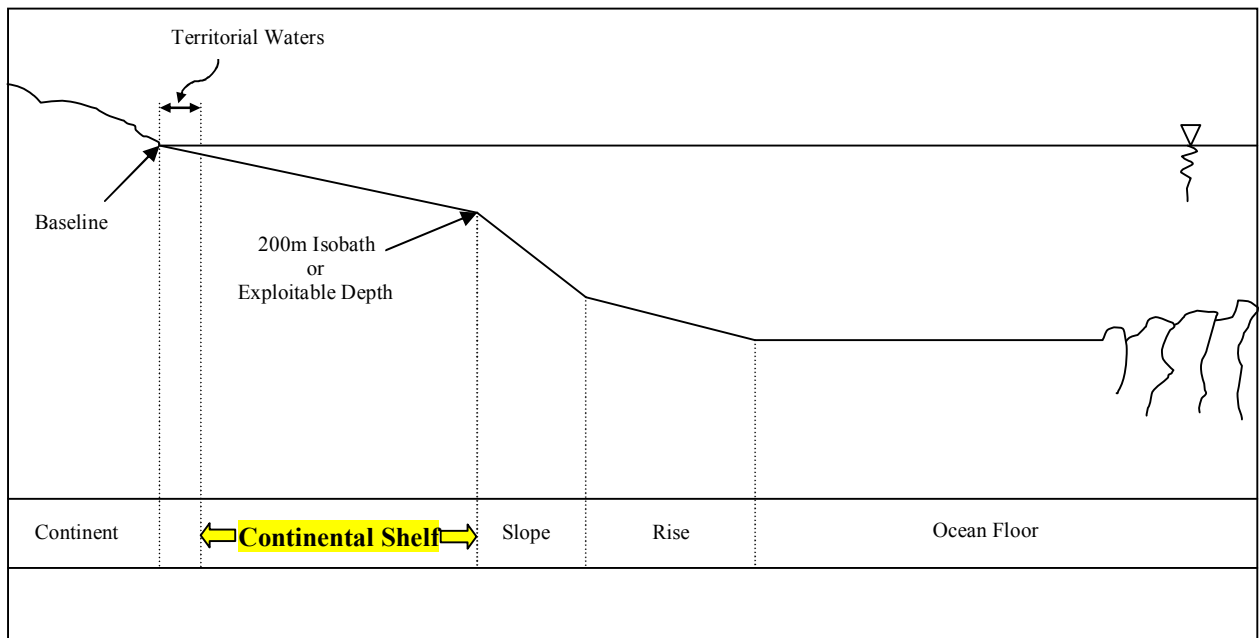


Figure 2

³⁴¹ Available at: <http://www.google.com/images?q=Continental+Shelf,+pictures&rls=com>. Accessed on December 6, 2010.

Legal Definition of the Continental Shelf According to 1982 UNCLOS
 (When Continental Margin \geq 200 Nautical Miles)

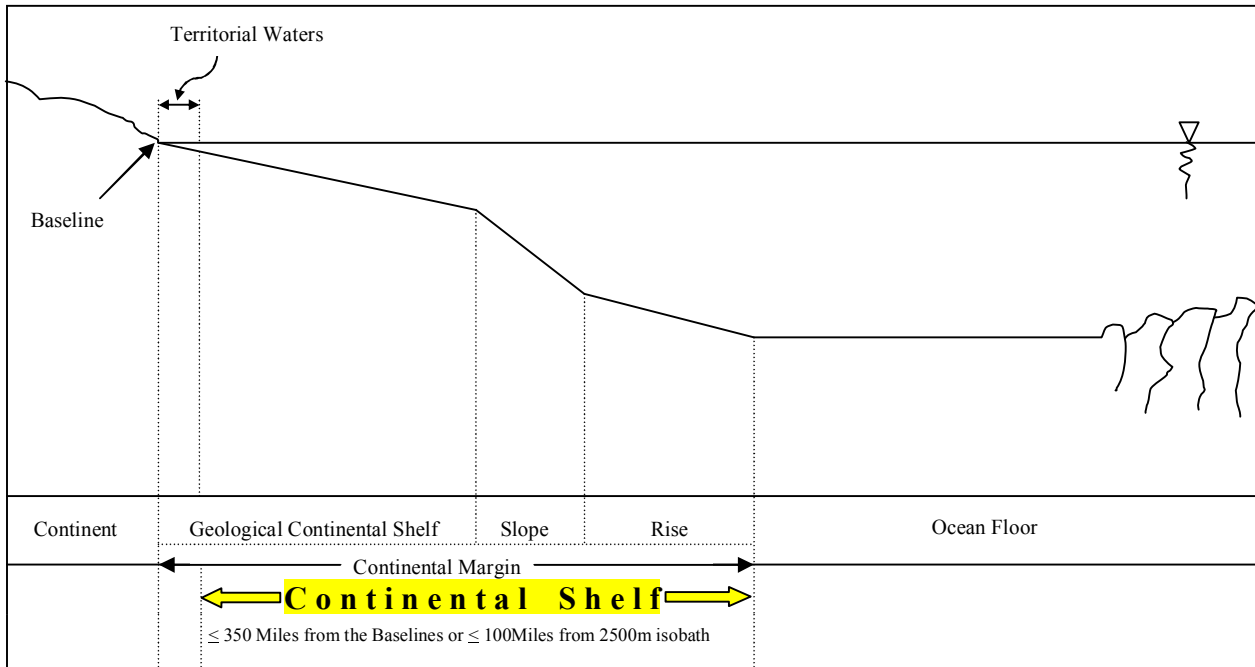


Figure 3

Legal Definition of the Continental Shelf According to 1982 UNCLOS
 (When Continental Margin \leq 200 Nautical Miles)

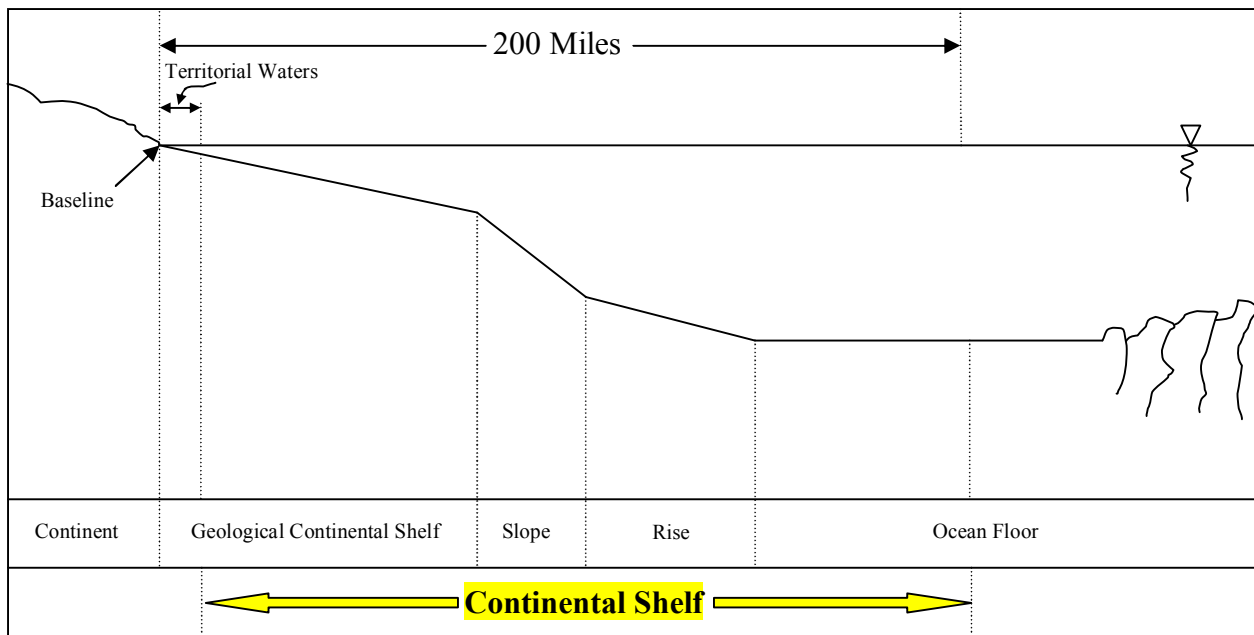


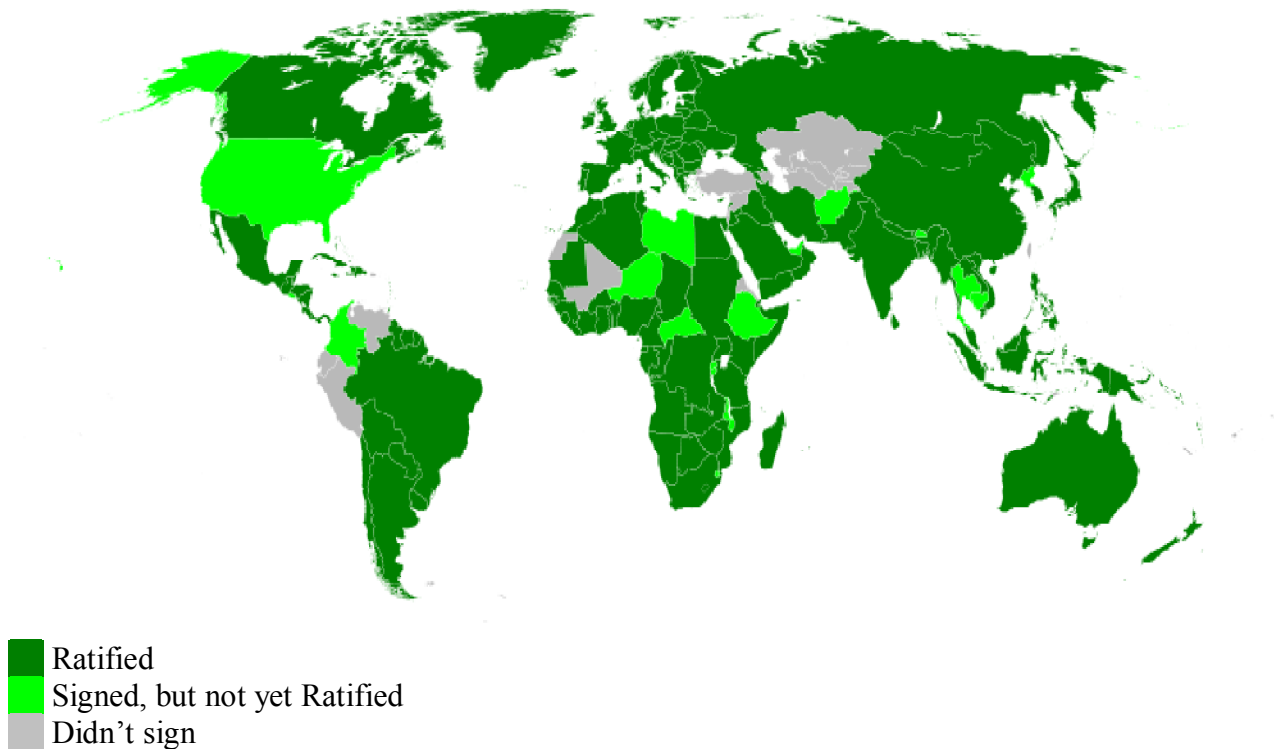
Figure 4

The Aegean Sea with its Islands Lies between Mainland Greece and Turkey



Figure 5

Signature and Ratification Status of the 1982 UNCLOS



To Date:³⁴²

161 States and the European Union **have ratified** the convention.

18 Countries **have signed, but not yet ratified** it: Afghanistan, Bhutan, Burundi, Cambodia, Central African Republic, Colombia, El Salvador, Ethiopia, Iran, North Korea, Libya, Liechtenstein, Niger, Rwanda, Swaziland, Thailand, United Arab Emirates and the USA.

16 Countries **have not signed** it: Andorra, Azerbaijan, Ecuador, Eritrea, Israel, Kazakhstan, Kyrgyzstan, Peru, San Marino, Syria, Tajikistan, Timor – Leste, Turkey, Turkmenistan, Uzbekistan and Venezuela.

³⁴² Available at: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm and http://www.un.org/Depts/los/reference_files/status2010.pdf, accessed on December 9, 2010.

**Maritime Boundary Delimitation between States with Opposite Coasts
(The Median Line)**

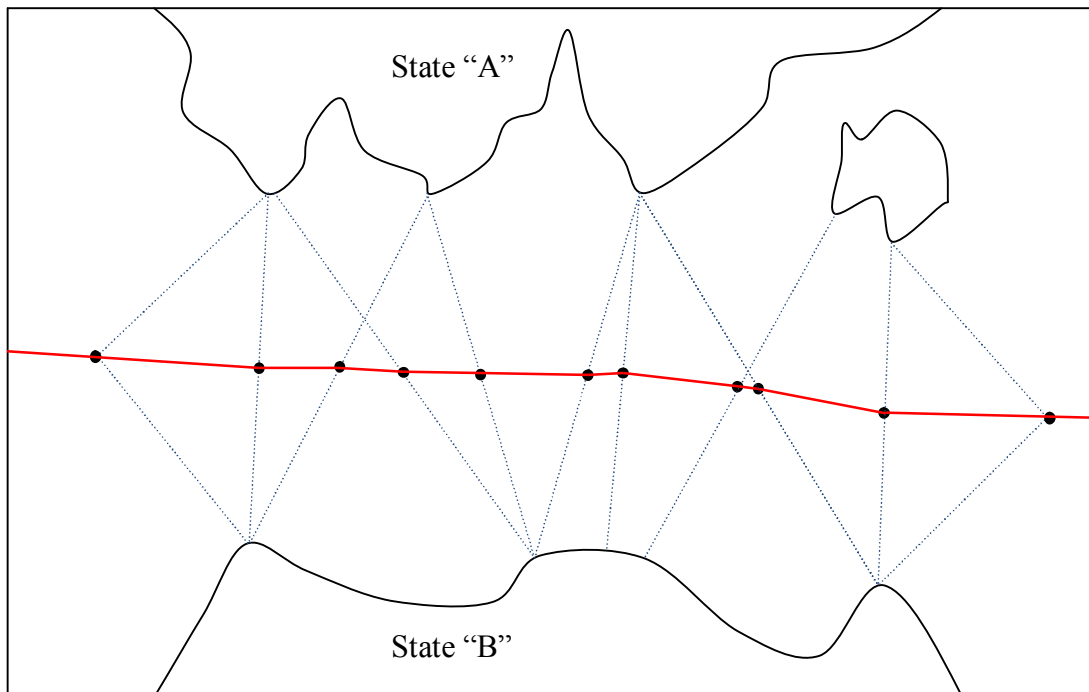


Figure 1

**Maritime Boundary Delimitation between States with Adjacent Coasts
(The Equidistance Line)**

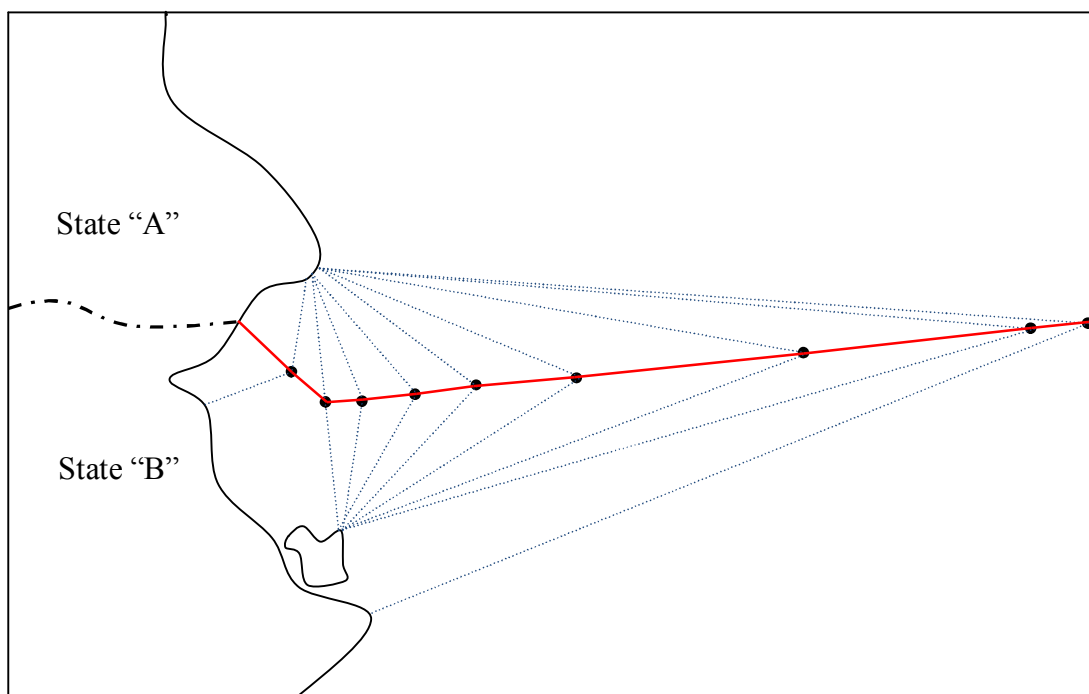


Figure 2

North Sea Continental Shelf Delimitation



Equidistance Line: ———
Proposed boundaries by:
Denmark: B – E

Agreed Boundaries: A – B, C – D
Germany: B – F, D – F
Netherlands: D – E

Figure 1

The Islands of North Sea



Figure 2

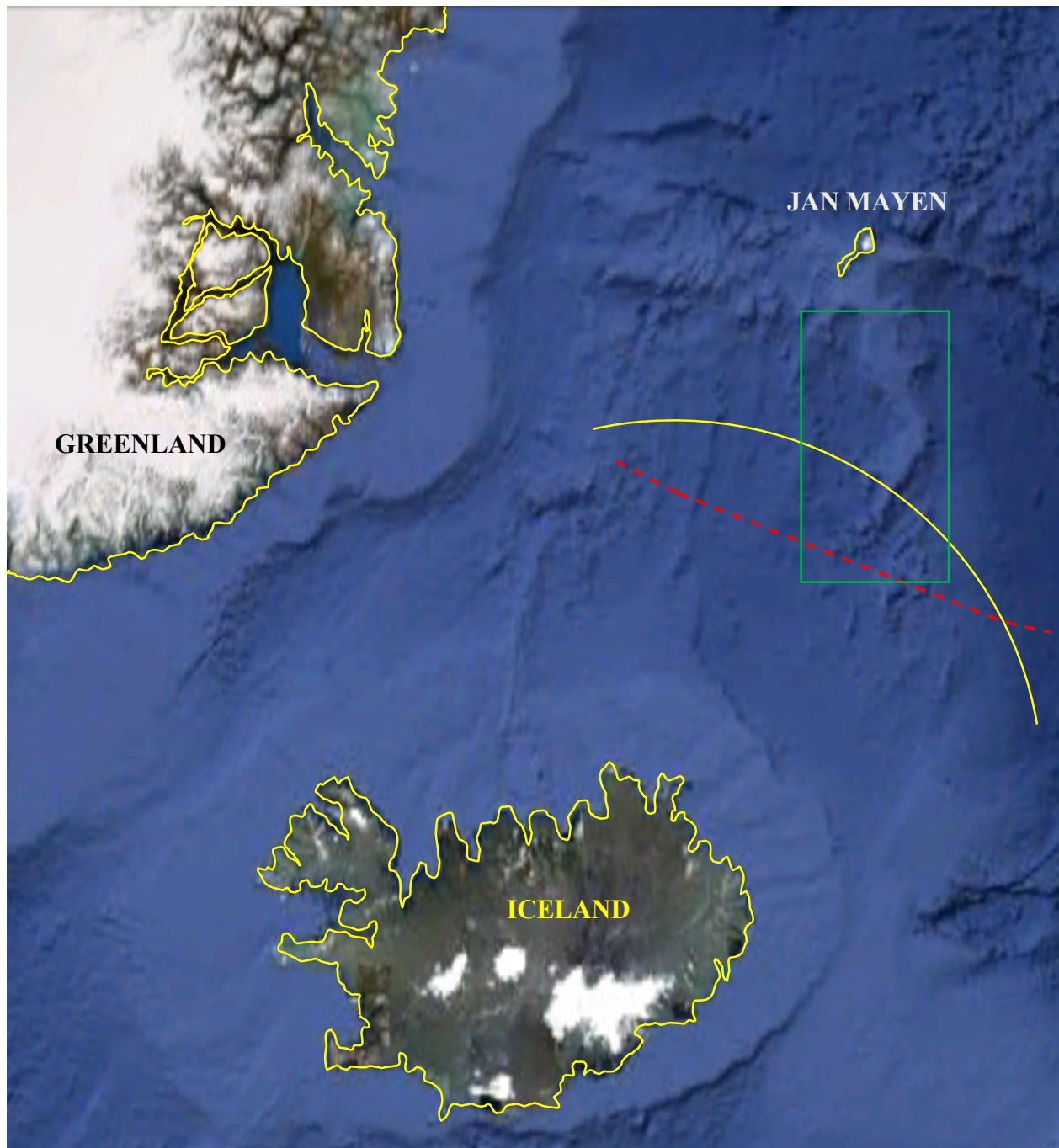
Anglo – French Continental Shelf Delimitation



Court's Decision: —————
French Claim:
U.K. Claim: - - - - -

Figure 3

Continental Shelf Delimitation between Iceland and Jan Mayen



Icelandic 200 – mile Zone Line: ————
Median/Equidistance Line: - - - - -
Joint Development Area:

Figure 4

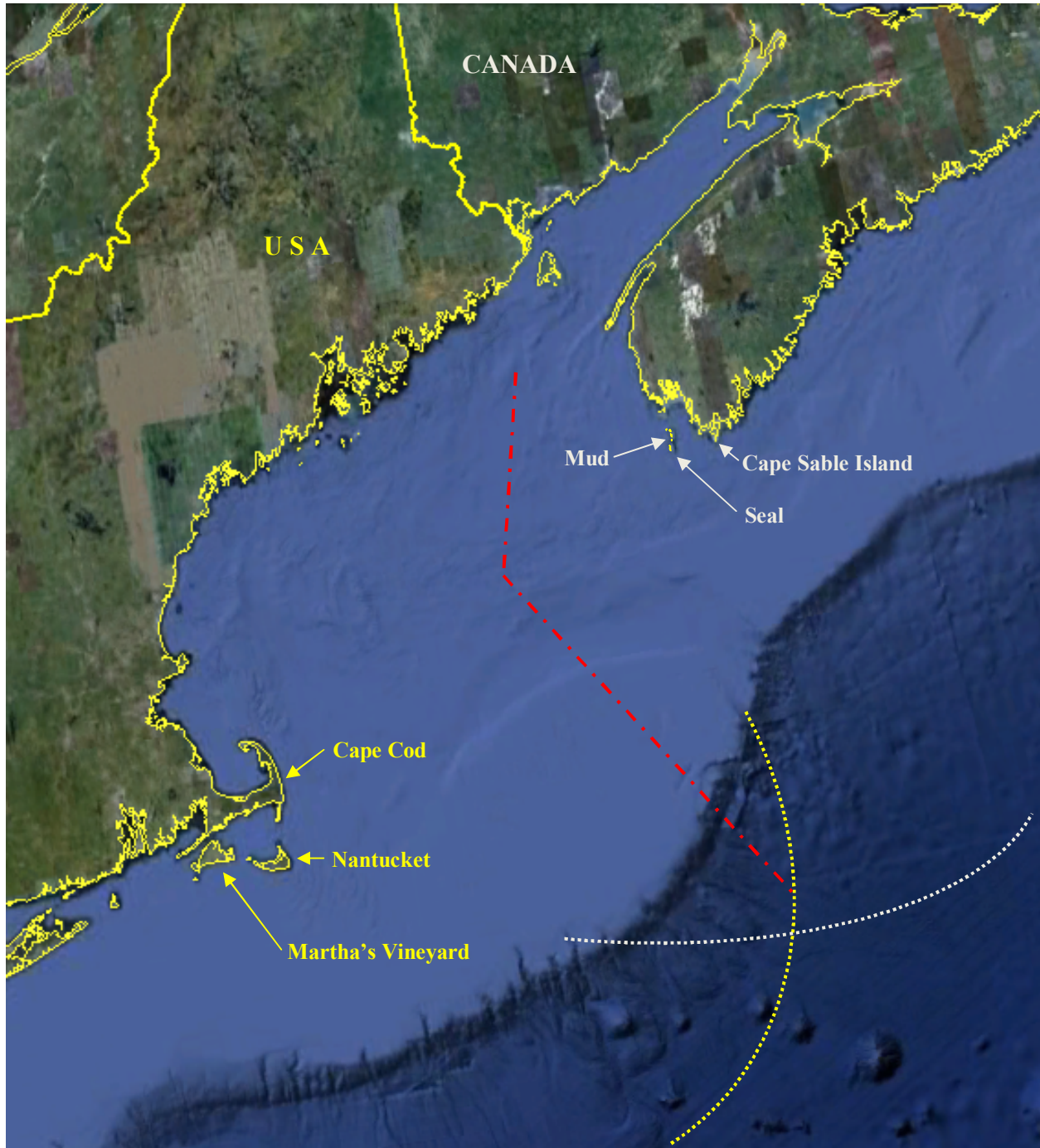
Tunisia – Libya Continental Shelf Delimitation



Tunisia – Libya Land Boundary: —————
Court’s Decision: - - - - -
Delimitation Line with Half Effect to Kerkennah Islands:
Delimitation Line with Full Effect to Kerkennah Islands:
Auxiliary Lines: ————— - - - - -

Figure 5

Canada – USA (Gulf of Maine) Maritime Boundary Delimitation



Court's Decision: 
Canada's 200 – mile Zone Line: 
USA's 200 – mile Zone Line: 

Figure 6

Guinea – Guinea Bissau Maritime Boundary Delimitation



Court's Decision: - - - - -

Figure 7

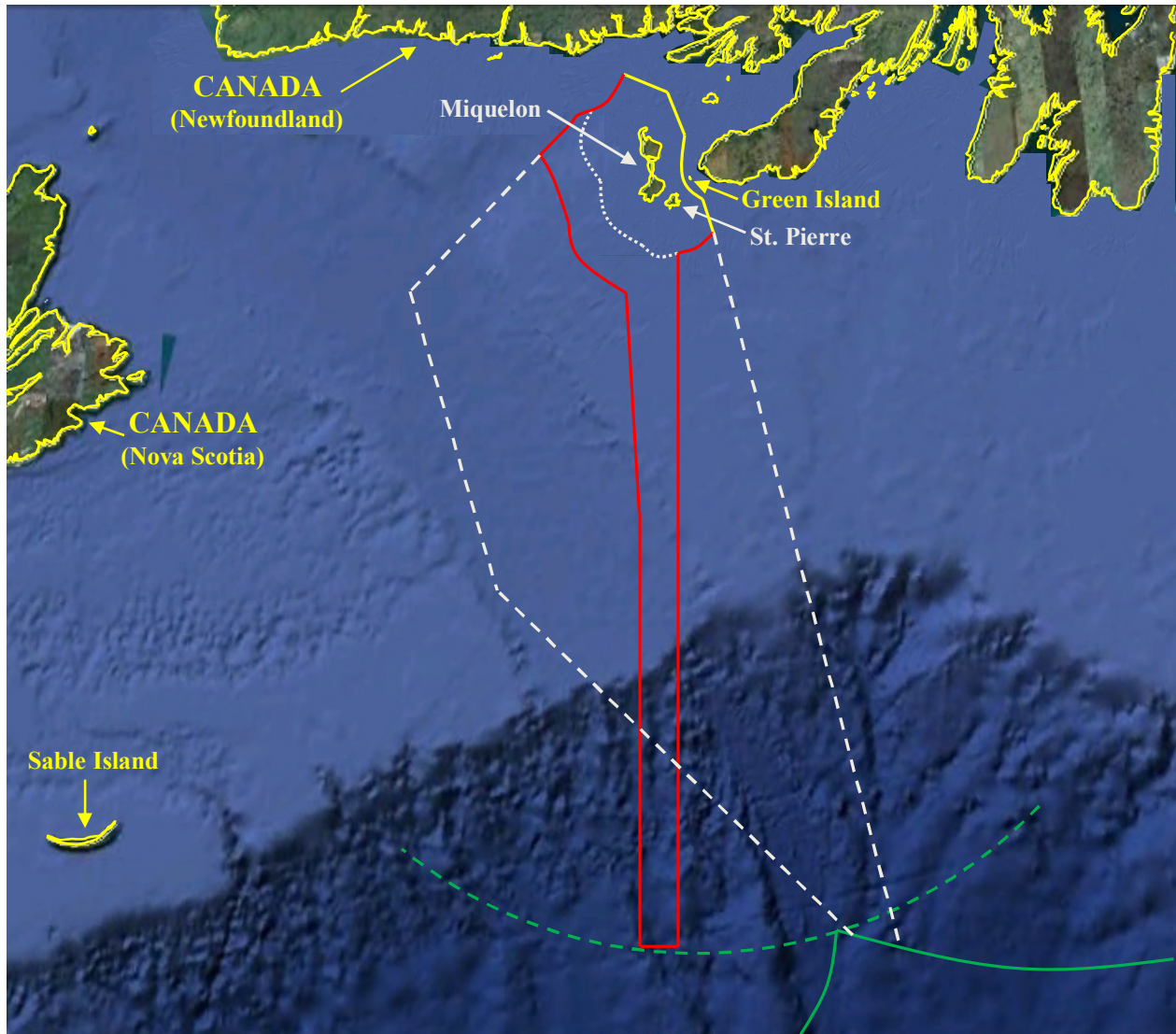
Libya – Malta Continental Shelf Delimitation



Provisional Median Line:
Court's Decision: _____

Figure 8

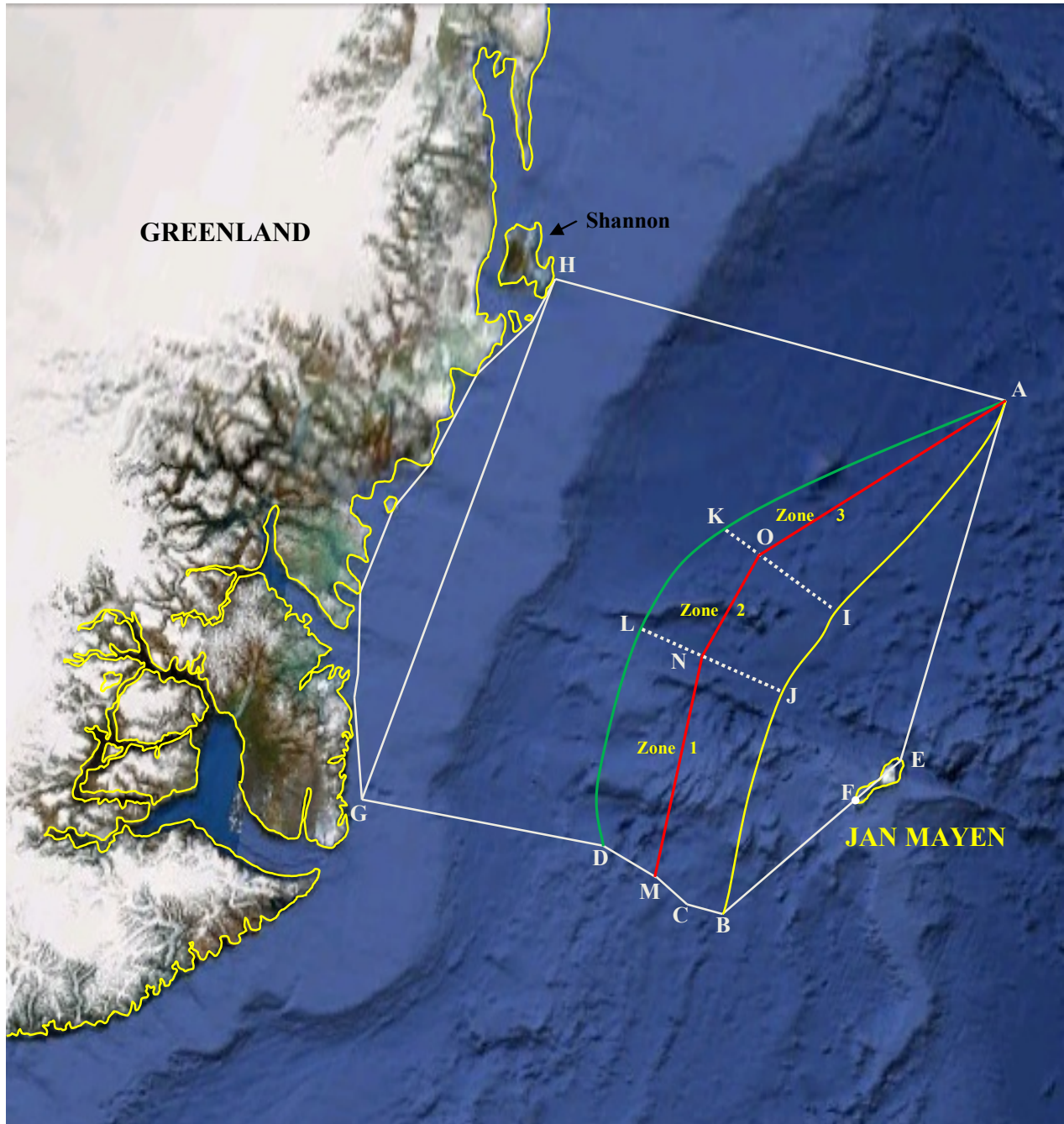
Delimitation of Maritime Areas between Canada and France



- 1972 Agreement Boundary: —————
- French Claim: - - - - -
- Canadian 200 – mile Fishing Zone: —————
- Possible Limit of French EEZ: - - - - -
- 12 – mile Zone:
- Court’s Decision: —————

Figure 9

Maritime Delimitation in the Area between Greenland and Jan Mayen



Greenland's 200 – mile Line: —————
 Median Line: —————
 Court's Decision: —————
 Lines Indicating the Area of Delimitation: —————
 Lines Dividing the Zones:
 Distances: $DM=MB$, $LN=NJ$, $IO=2 OK$

Figure 10

Eritrea – Yemen Maritime Boundary Delimitation



Court's Decision:

Figure 11

Qatar – Bahrain Maritime Boundary Delimitation



Court's Decision: —————
Low Water Line and Low Tide Elevations:

Figure 12

Qatar – Bahrain Maritime Boundary Delimitation



Court's Decision: —————
Low Water Line and Low Tide Elevations:
Auxiliary – Equidistance Lines:

Figure 13

Cameroon – Nigeria Maritime Boundary Delimitation



Court's Decision: _____

Figure 14

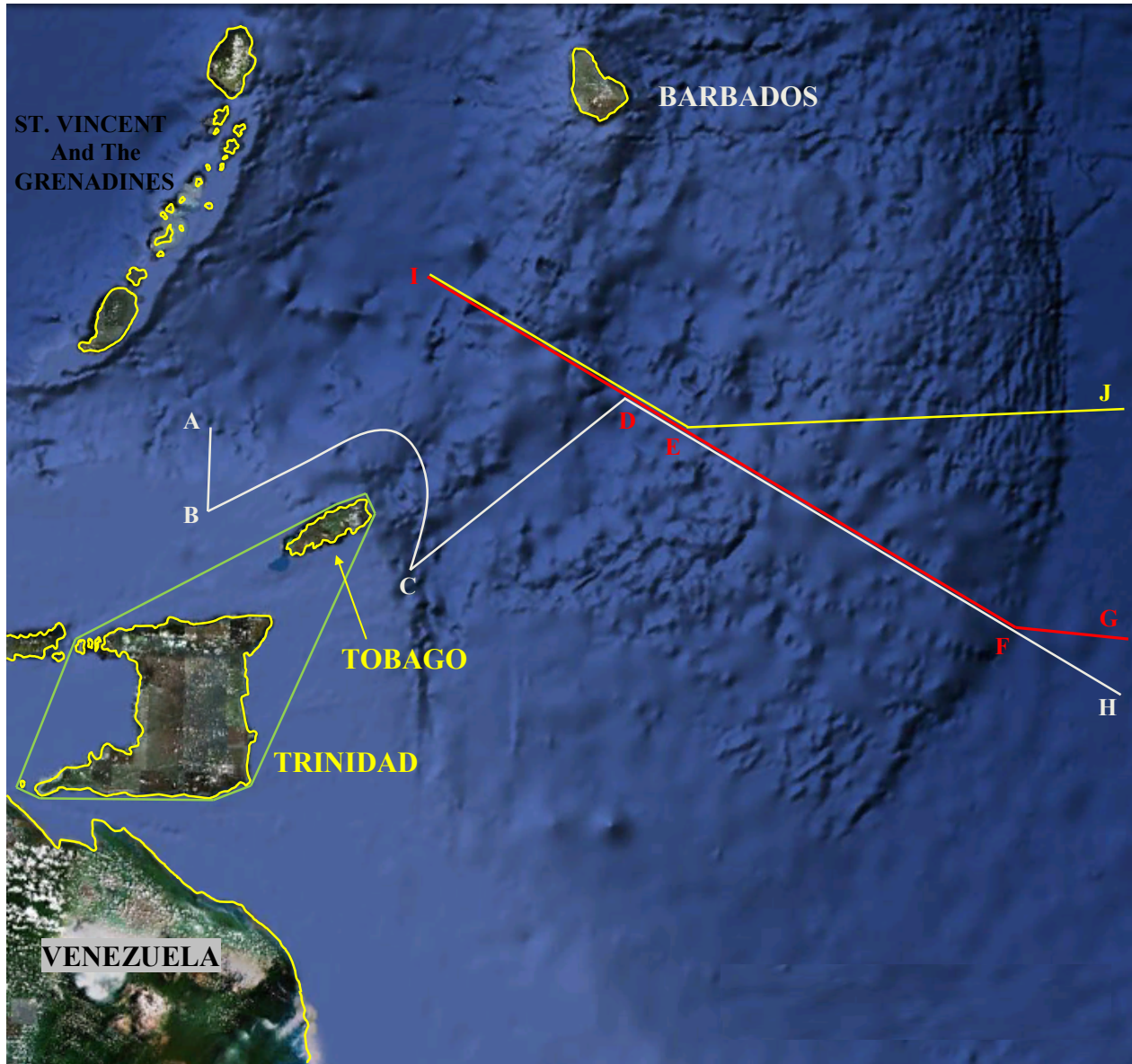
Cameroon – Nigeria Maritime Boundary Delimitation



1 – 12: Yaoundé II Declaration
A – G: Maroua Declaration
X and beyond: Equidistance Line
Court's Decision:

Figure 15

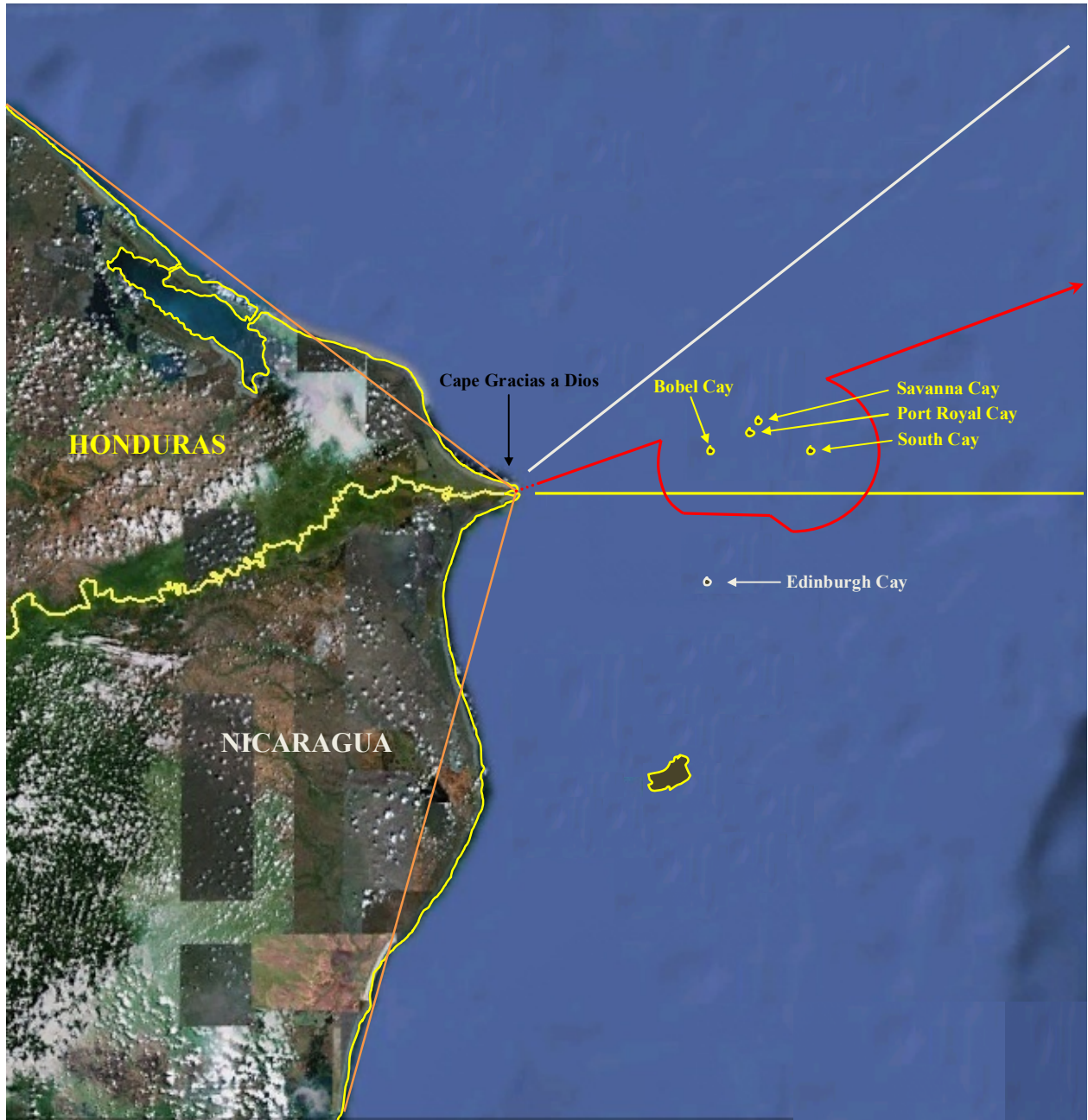
Barbados – Trinidad and Tobago Maritime Boundary Delimitation



- Archipelagic baselines: —————
- Barbados Claim: —————
- BC: 12 – mile Arc DH: Equidistance Line
- Trinidad and Tobago Claim: —————
- IE: Equidistance Line
- Court's Decision: —————
- IF: Equidistance Line

Figure 16

Honduras – Nicaragua Maritime Boundary Delimitation



Court's Decision: _____
Auxiliary Lines Forming the Angle of the Coasts: _____
Honduras's Claim: _____
Nicaragua's Claim: _____

Figure 17












































Romania – Ukraine Maritime Boundary Delimitation












































- 12 – mile Arc: (dotted line)
- Romania’s Claim: _____ (grey line)
- Ukraine’s Claim: _____ (yellow line)
- Court’s Decision: _____ (red line)








































Figure 18

The Judges of the Courts

Judge	Nationality	Case															
		1969	1977	1981	1982	1984	1985	1985 ¹	1992	1993	1999	2001	2002	2006	2007	2009	
Abraham, Ronny	 France															√	√
Ago, Roberto	 Italy				√	√		√		√							
Aguilar-Mawdsley, Andrés	 Venezuela										√						
Ajibola, Bola Adesumbo	 Nigeria										√		√				
Al-Khasawneh, Awn Shawkat	 Jordan											√	√		√	√	
Ammoun, Fouad	 Lebanon	√															
Andersen, G. Hans	 Iceland			√													
Arangio-Ruiz, Gaetano	 Italy									√							
Bedjaoui, Mohammed	 Algeria								√		√		√				
Bengzon, César	 Philippines	√															
Bennouna, Mohamed	 Morocco							√								√	√
Briggs, Herbert	 USA		√														
Brownlie, Ian	 UK													√			
Buergenthal, Thomas	 USA											√	√		√	√	
Bustamante y Rivero, José Luis	 Peru	√															
Castrén, Eric	 Finland		√														
Cohen, Maxwell	 Canada					√											
Cot, Jean-Pierre	 France																√
De Lacharrière, Guy Ladreit	 France								√								
Elaraby, Nabil	 Egypt												√				
Elias, Taslim Olawale	 Nigeria				√				√								
El-Khani, Abdallah Fikri	 Syria				√				√								
El-Kosheri, Ahmed Sadek	 Egypt											√					
Evensen, Jens	 Norway			√	√						√						
Fischer, Paul Henning	 Denmark										√						
Fitzmaurice, Gerald Gray	 UK	√															
Fleischhauer, Carl-August	 Germany											√	√				
Forster, Isaac	 Senegal	√			√												
Fortier, L. Yves	 Canada											√					
Gaja, Giorgio	 Italy															√	
Gotlieb, E. Allan	 Canada									√							
Gros, André	 France	√	√		√	√											
Guillaume, Gilbert	 France										√		√	√			
Herczegh, Géza	 Hungary											√	√				
Higgins, Dame Rosalyn	 UK											√	√		√	√	
Highet, Keith	 USA											√					
Jennings, Robert Yewdall	 UK								√		√	√					
Jessup, Philip c.	 USA	√															
Jiménez de Aréchaga, Eduardo	 Uruguay				√				√	√							
Keith, Kenneth	 New Zealand															√	√
Kooijmans, Pieter H.	 Netherlands											√	√				
Koretsky, M. Vladimir	 USSR	√															
Koroma, G. Abdul	 Sierra Leone											√	√		√	√	

Judge	Nationality		Case														
			1969	1977	1981	1982	1984	1985	1985 ^E	1992	1993	1999	2001	2002	2006	2007	2009
Lachs, Manfred		Poland	√			√		√	√								
Lowe, Vaughan		UK												√			
Mbaye, Kéba		Senegal						√	√				√				
Morelli, Gaetano		Italy	√														
Morozov, Platon Dmitrievich		USSR				√			√								
Mosler, Hermann		Germany	√			√	√		√								
Nagendra, Singh		India				√			√								
Ni, Zhengyu		China									√						
Oda, Shigeru		Japan				√			√		√		√	√			
Onyeama, D. Charles		Nigeria	√														
Owada, Hisashi		Japan														√	√
Oxman, H. Bernard		USA															√
Padilla, Nervo Luis		Mexico	√														
Parra-Aranguren, Gonzalo		Venezuela											√	√		√	
Petrén, Sture		Sweden	√														
Ranjeva, Raymond		Madagascar									√		√	√		√	√
Rezek, Francisco		Brazil											√	√			
Richardson, L. Elliot		USA				√											
Ruda, José Maria		Argentina								√							
Schachter, Oscar		USA									√						
Schwebel, M. Stephen		USA				√	√		√		√	√			√		
Sepúlveda-Amor, Bernardo		Mexico														√	√
Sette-Camara, José		Brazil				√				√							
Shahabuddeen, Mohamed		Guyana										√					
Shi, Jiuyong		China											√	√		√	√
Simma, Bruno		Germany														√	
Skotnikov, Leonid		Russian Fed.														√	√
Sørensen, Max		Denmark	√														
Tanaka, Kotaro		Japan	√														
Tarassov, Nikolai Konstantin.		Russian Fed.										√					
Tomka, Peter		Slovakia														√	√
Torres Bernárdez, Santiago		Spain											√			√	
Ustor, Endre		Hungary		√													
Valticos, Nicolas		Greece								√							
Vereshchetin, Vladlen Stepan.		Russian Fed.											√				
Vicuña, Francisco Orrego		Chile														√	
Waldock, Humphrey		UK		√													
Watts, Arthur		UK														√	
Weeramantry, Chr. Gregory		Sri Lanka										√					
Weil, Prosper		France									√						
Zafrulla, Khan Muhammad		Pakistan	√														
Total Judges per Case			17	5	3	14	5	3	17	5	15	5	17	16	5	17	15

Aggregated List with the Nationality of the Judges

Nationality of Judge		Number of Judges*
	USA	16
	UK	13
	France	12
	Japan	8
	Germany	7
	Italy	
	China	5
	Madagascar	
	Nigeria	
	Senegal	
	Brazil	
	Jordan	4
	Poland	
	Russian Federation	
	Sierra Leone	
	Venezuela	
	Algeria	
	Canada	
	Hungary	3
	Mexico	
	Morocco	
	Norway	
	Uruguay	
	USSR	
	Denmark	
	Egypt	
	India	
	Netherlands	2
	New Zealand	
	Slovakia	
	Spain	
	Syria	
	Argentina	
	Chile	
	Finland	
	Greece	
	Guyana	
	Iceland	
	Lebanon	
	Pakistan	
	Peru	
	Philippines	
	Sri Lanka	
	Sweden	

* Each Judge is counted as many times as the number of the cases he participated to. Thus for example the first line of the list doesn't imply that 16 different judges from the USA were members of the courts, since some of them participated to more than one case, as indicated in the first list of this Annex.

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The **Google Earth** application was used for the satellite images of Annex D.