

**THE NOTION OF EQUITY IN THE DETERMINATION OF
MARITIME BOUNDARIES AND ITS APPLICATION TO THE
CANADA-UNITED STATES BOUNDARY IN THE BEAUFORT
SEA**

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ABSTRACT

Of the maritime boundaries yet to be delimited between Canada and the United States, the Beaufort Sea might be the more pressing one, considering its strategic location in a rapidly developing Arctic region and its vast economic potential. In accordance with the Law of the Sea Convention (UNCLOS), maritime boundaries are to be delimited 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 reach an equitable solution. When an agreement cannot be reached, parties can resort to third-party arbitration.

While jurisprudence has determined that international law does not mandate a particular method of delimitation, it requires the consideration of equitable principles, also called special circumstances or factors. The notion of equity is therefore the foundation of boundary determination. But, what is equity and how is it applied? This thesis examines the various forms of equity, their origins in legal philosophy and domestic law and how they have been incorporated in international law.

The main focus, however, is to analyse the differences between how international tribunals or courts have interpreted and applied equity in boundary determination and how States have applied it in negotiated agreements. While tribunals have tended to consider equitable principles as equivalent to geographical proportionality, States have considered those principles more in keeping with the notion of distributive justice and, more and more, are taking a globalised approach to boundary determination.

On the basis of this analysis, this thesis evaluates the potential outcome of a third-party arbitration of the Beaufort Sea boundary dispute between Canada and the United States as well as the options for settlement negotiations between the Parties. In the Beaufort Sea area where hydrocarbon development is intrinsically linked not only to the development of the local population but also to the entire Arctic region, be it on issues related to the environment, navigation or security, the thesis concludes that a third-party adjudication would not serve the interests of the States. As delimiting boundaries nowadays is only one aspect of the management of oceans related issues, interests are best served when delimitation is understood as part of this global approach.

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The Notion of Equity in the Determination of Maritime Boundaries and its Application to the Canada-United States Boundary in the Beaufort Sea

INTRODUCTION

Since 1783 and the *Treaty of Paris* by which Great Britain recognized the independence of the United States, the issue of the boundary between the North-American neighbours has been most contentious. Boundary disputes have led, at times, the two countries to the brink of war; settlement of these disputes, more often than not, has left the citizens, on both sides, dejected and resentful. By 1925, however, the final territorial boundary treaty was signed¹ and the whole length of the border, from sea to sea, was definitely settled.² The same cannot be said about the maritime boundaries. Although questions of jurisdiction over maritime expanses have been the subject of disputes for over one hundred years, notably in the Bay of Fundy and in Dixon Entrance, it was the rapid expansion of coastal states' rights over wide oceanic areas, in the second half of the 20th century, that led to most of the current disputes. In 1984, Canada and the United States settled one of those disputes, in the Gulf of Maine over Georges Banks, by referring the matter to a Chamber of the International Court of Justice.³ There are currently four remaining disputes over claims to adjacent continental shelves, territorial seas and 200 mile exclusive economic zones: 1) on the East Coast, in the Bay of Fundy, between the middle of

¹ *Treaty Between Canada and the United States of America to Define more Accurately and to Complete the International Boundary Between the Two Countries*, 24 February 1925, UST no 720 (ratifications exchanged July 17, 1925).

² There is, however, one territorial dispute remaining, that of the sovereignty of Machias Seal Island in the Bay of Fundy. That dispute has no bearing on the territorial boundary between Canada and the US per se but is central to the determination of the maritime boundary in that area.

³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)*, [1984] ICJ Rep 246 [Gulf of Maine].

Grand-Manan Channel⁴ and the 1984 Gulf of Maine award; 2) on the West Coast, westward of Juan de Fuca Strait;⁵ 3) on the West Coast, within the Dixon Entrance and westward⁶ and 4) in the Beaufort Sea, northward from the land boundary between Alaska and the Yukon Territory. On the East coast, the extended continental shelf seaward from the Gulf of Maine also remains undetermined. Of those disputes, only the one in the Beaufort Sea involves both continental shelf and water boundary issues that could potentially be treated separately in view of the wide continental shelf claims by Canada and its Arctic neighbours. I have chosen to look into the possible settlement of this boundary because it has been identified as a priority for both countries and is linked to important economic and political considerations. The way in which the Parties will decide to proceed, whether through a negotiated agreement or by referring the decision to a tribunal, and the resulting boundary in either case, will have a major impact on the future of the entire region. Although international law has traditionally emanated from State practice, I will argue that in applying the notion of equity, which is the basis of boundary determination, international tribunals have not taken their leads from State practice but have developed a body of law which could be said to be based on a different interpretation of equity than that applied by States between themselves. In the case of the Beaufort Sea, these two

⁴This boundary was established under the terms of the 1892 Treaty between Canada and the United States through the middle of Grand-Manan Channel up to a point where the distance between the coasts was more than 6 miles: *Treaty between the United Kingdom and the United States of America respecting the Boundary between Canada and the United States in Passamaquoddy Bay & c.*, 21 May 1910, [1910] UKTS 22 [*Passamaquoddy Bay Treaty*].

⁵The boundary in the Fuca Straits was finalised by the *Protocol of Agreement Between Her Majesty and the United States of America, Defining the Boundary Ligne Through the Canal de Haro, in Accordance with the Award of the Emperor of Germany, of October 21, 1872*, 10 March 1873, PRO FO 93/8/62/0: 0.

⁶There are actually two different issues relating to this dispute: One regarding the boundary between the entrance to Portland Channel and Cape Muzon known as the AB line referred to in the Alaska Boundary Decision and the other regarding the boundary westward of Cape Muzon.

interpretations, while not exactly opposite but certainly based on a different interpretation of the principles of justice underlying the notion of equity, would likely lead to differing results.

The debate as to whether sovereignty could be acquired over ocean spaces has lasted from Roman times, when countries had only the force of arms to ensure effective control of any area. The advent of modern international law, the prevalent customs accepted by nations since the 16th century, brought the accepted notion of freedom of the sea. It was not until the 20th century that the notion of sovereignty, and sovereign rights with regards to maritime areas, started to be viewed differently by the community of nations. This expansion of sovereignty, of course, brought disputes over delimitation of boundaries between States.

Delimiting boundaries is a fundamental exercise of sovereignty, a "matter of grave importance" according to the International Court of Justice (ICJ).⁷ International law relating to maritime boundary delimitation has developed mostly in the past forty years. It has developed around the core notion of equity or equitable principles. The Courts have stated that there was no obligatory rule or method of delimitation, it is the application of equitable principles, leading to a reasonable result that is imperative: "(...) the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of

⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, [2007] ICJ Rep 659 at para 253 [*Nicaragua v Honduras*].

equitable principles, a reasonable result is arrived at."⁸ The doctrine of equitable principle is therefore not about method since it does not consider any single method as being obligatory. Rather, the doctrine requires the consideration of relevant circumstances to achieve an equitable result. The method, according to the jurisprudence, is then chosen as a vehicle for the application of the principles. As stated by Judge Mosler in his dissenting opinion in the

Libya/Malta case:

The determination of the method is therefore indicated by the applicable principles and rules, even when the choice of one method does not logically or necessarily follow from the definition of the principles and rules. If the principles and rules can be carried into effect by more than one method, the choice between them is a matter of judicial propriety.⁹

As such, the method and the evaluation of the circumstances are two different processes. I will therefore refer to them as two sets of principles, procedural and substantive. Considering that the method itself is secondary, and that equity would apply regardless of which one were chosen, I will review the two separately, with an analysis first of the development of the method, as a practical application, in order to provide an understanding of the basic starting point in the development of equitable principles.

While it is true, as we will see, that the method of equidistance has recently been adopted as somewhat of a peremptory one, the fact remains that no method is required under law. The main aim of this thesis is to focus on the equity principles, i.e. the substantive

⁸ *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at para 90 [*North Sea*].

⁹ *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, [1985] ICJ Rep 13, dissenting opinion of Judge Mosler at 119 [*Libya v Malta*].

principles, and not the method per se. However, it is important to understand the method as the practical vehicle for the application of the equitable principles. As such, I will review the development of the use of equidistance, as the main method of contention, by the jurisprudence.

Similarly, because equitable principles and rules may operate only within the framework of principles and rules governing the legal regime of the respective maritime areas and their delimitation,¹⁰ it is important to understand the legal basis for each area and concept and how its development has affected the particular method or principles applicable to each. For example, when the concept of the continental shelf passed from that of natural prolongation under the sea to one determined by distance from the coast, the criteria applied in determining both its extent and its delimitation have changed radically. This might change again with the new definition of the extended continental shelf. Thus, before I can analyse the relevance of the criteria themselves and how they have emerged, I will give an overview of the various areas to be delimited and their historical development.

The crux of this thesis is the analysis of the difference in understanding between how equitable principles are applied in the context of maritime boundary delimitation, and how this could affect the delimitation in the Beaufort Sea. The notion of equity is one very much present in all legal systems, emanating from the philosophical concept of justice. I will review the

¹⁰ Barbara Kwiatkowska, "The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and its Impact on the International Law of the Sea" in A Bloed & P van Dijk, *Forty Years International Court of Justice: Jurisdiction, Equity and Equality* (Utrecht:Europa Instituut, 1988) 119 at 137 [Kwiatkowska, "The ICJ Doctrine"].

various forms of equity in order to understand how this notion has been defined by international law in the context of maritime delimitation. Other than the fundamental norm - that equity is determined by the resultant delimitation- there has been confusion in jurisprudence as well as doctrinal writings, as to what this means, especially in relation to relevant or special circumstances. Professor Weil considers that there are three currents in the concept, each corresponding to a different level of normative density. At the lowest end, the notion that there are no principles or methods dictated by law, it is up to the judge to extract equitable principles and applicable methods on a case-by-case basis. The second level would assign some degree of normative prescription regarding applicable equitable principles while keeping the method to be used in the operational phase, either at the beginning or at the end of the evaluation, within the discretion of the judge. Finally, the highest normative density prescribes not only the equitable principles and relevant circumstances but also the methods themselves.¹¹ This is important considering that most of the controversy, even within the International Court of Justice, regarding the application of equity, has been with regard to the jurisdiction of the Court to apply certain forms of equity and whether decisions fall into one or the other category. The aim of this study is mainly to review whether international tribunals apply a different form of equity, or weigh the equitable factors differently, than nations that reach negotiated agreements. Besides reviewing the various forms and applications of the notion of equity, I will also analyse the differences between each mode of settlement and how equity is understood and applied practically through the analysis of decisions and agreements.

¹¹ Prosper Weil, *Perspective du droit de la délimitation maritime* (Paris:Pedone, 1988) at 174-176.

Having analysed this past practice, I will examine what the various approaches to the determination of boundaries could mean for the Canada-US boundary in the Beaufort Sea. As in any legal case, however, a factual underpinning is indispensable to the application of legal principles. In the case of maritime boundaries, case law has shown that historical facts, as well as public perceptions, have been considered fundamental in what nations consider equitable. Even if, as we will see, tribunals have been reluctant to consider history as a factor in delimitation, this has not stopped countries from presenting extensive evidence and arguments with regard to the place of history in an equitable delimitation. This is because territory, including maritime areas, is often linked to the creation of the national identity. In the case of the North, this is very much the case for both Canada and the United States. Consequently, this identity will affect the perception of equity for both Parties. In order to understand this important historical context, and because history could not be disassociated from the political stakes at play in a potential boundary determination, I have included a short historical overview at the beginning.

HISTORICAL BACKGROUND TO THE BEAUFORT SEA BOUNDARY DISPUTE

In the 18th Century, the North-Pacific Coast of America was the object of exploration from many of Europe's Great Powers in their thirst for acquisition of territory. Spanish and British ships explored along the coast, coming from the South. Earlier than most documented explorations from the south, however, the Russians had started to explore the Eastern North-Pacific and the Arctic from Siberia, across the Bering Sea. It was indeed Vitus Bering, a Dutch captain commissioned by the Russian monarch Peter the Great who undertook the first voyage from Kamchatka, in 1728, to determine whether Asia and America were connected. He fulfilled this mandate by crossing the Strait that separates the continents and that now bears his name. In his second voyage, Bering explored the southern coast of the Alaskan mainland and later died in the Aleutian Islands. Multiple exploratory sea voyages and hunting expeditions followed and, in 1799, a charter was given by the Russian Czar to the Russian-American Company, not only for the monopoly of fur trade but also to provide some quasi-government control over settlements.¹² While the Russians' presence in Alaska was mostly concentrated within the rich fur grounds of the Aleutian Islands and the Pacific Coast, the fur traders from the Northwest and the Hudson's Bay Companies followed the exploratory trips, in the late 18th-early 19th century, of Mackenzie and Franklin down the Mackenzie River to the Arctic. They established trading

¹²This was done very much in the model of the British East India Company. The Russian ukase not only gave rights and privileges to "use and enjoy" the entire Russian territory between 55 degrees of latitude north and the Bering Strait, including the Aleutian and Kurile Islands, but also made land and sea forces available for assistance and encouraged further exploration and occupation of lands south of 55 degrees and north of the Bering Strait. The text of the ukase as well as more detail of Russian history in Alaska can be found in: Hubert Howe Bancroft, *History of Alaska* (San Francisco: The History Company, 1890) at 379.

posts along the Yukon and other rivers and were competing against the Russian-American Company for the trade with the Indigenous people. American hunters and traders also continued doing business with the Indigenous people living along the Pacific Coast. To counter the "suffering from the existence of illegitimate traffic,"¹³ and discourage ships from trading with Alaskan posts, the privileges granted to the Russian-American Company were extended, in the renewal of its charter, by the 1821 ukase. The ukase, or decree, was meant to close off the coast of North America, thus prohibiting foreigners from approaching within 100 miles from the coast.¹⁴ The territory covered by the decree included the entire coast north of 51 degrees of latitude north.

The United States and Great Britain both strongly protested the ukase, denying that Russia had any right to forbid navigation within 100 miles of the coast. Negotiations between Russia on the one hand and the United States and Great Britain jointly on the other, soon started. However, after considering the potential conflict of their own interests with those of the United States and after the assertion of the Monroe Doctrine,¹⁵ Great Britain thought it best not to join the United States in negotiations.¹⁶ In 1824, the United States signed a Treaty with Russia,¹⁷ by which Russia renounced her claim to maritime jurisdiction and permitted free

¹³ *Ibid* at 531-532. Communication between the company and the Russian Senate a few days before the ukase of 1821.

¹⁴ Henry W Clark, *History of Alaska* (Freeport:Books for Library Press, 1930) at 54.

¹⁵ In 1823, US president James Monroe declared, in an address to Congress, that the American continents were not to be considered for further colonisation by European powers. For further explication and analysis of the doctrine, see inter alia, Francis Loomis, "The Position of the United States on the American Continent: Some Phases of the Monroe Doctrine" (1903) 22:1 *The Annals of the American Academy of Political and Social Science* 1 and Mark T Gilderhus, "The Monroe Doctrine: Meanings and Implications" (2006) 36:1 *Presidential Studies Quarterly* 5.

¹⁶ James White, *Boundary Disputes and Treaties* (Toronto:Glasgow, Brooks & Company, 1914) at 920.

¹⁷ *Convention between the United States and Russia*, 17 April 1824, 8 US Stat 302.

access to Alaskan ports. The treaty also recognized 54° 40' north latitude as the boundary between Russian America and the Oregon Territory.¹⁸ A similar treaty was signed the following year between Russia and Great Britain.¹⁹ Additionally, however, the Anglo-Russian treaty of 1825 contained a line of demarcation between their respective possessions from the Pacific coast to the Arctic.

Although expertly negotiated by the best diplomats of their time on both sides, the treaty suffered from the lack of knowledge of precise geographical information about the area. It was not until after the sale of Alaska to the United States, and the onset of the gold rush, that the issue of the lack of a definite boundary became a source of serious conflict between the United States and Canada. Negotiations having failed to clarify the issue, the parties agreed to an arbitrated settlement. The Alaska Boundary decision of 1903 settled the land boundary definitively. As we will see in more detail in Part III, however, the issue of the maritime boundaries remains a source of conflict. Canada relies on the 1825 treaty to argue that the boundary has been established in the Beaufort Sea, whereas the United States relies on the inter-temporal interpretation of international law of the period to assert that the treaty was only meant to determine land allocation. The 1903 decision was meant to interpret the 1825 treaty as to the exact location of the boundary. However, the question as to whether it delimited maritime boundaries also remains disputed.

¹⁸ The terms of the 1818 Treaty between the United States and Great Britain regarding the Oregon Territory provided for joint occupancy of the land west of the Rockies. The border between the British possessions and the United States was settled at the 49th parallel in 1846 by the Oregon Treaty: *Treaty between Great Britain and the United States of America, for the Settlement of the Oregon Boundary*, 15 June 1946, PRO FO 93/8/18/0: 0.

¹⁹ *Convention Between Great Britain and Russia*, 28 February 1825, annexed to the *Alaska Boundary Case (Great Britain v United States)* (1903), 15 RIAA 481.

PART I –EQUITY IN JUDICIAL DECISIONS

Chapter 1 –Methods and Areas

1.1 Status of the Continental Shelf and Maritime Areas

1.1.1. Continental Shelf

The notion of continental shelf as it is understood legally is somewhat different from what has traditionally been understood by scientists. While the scientific concept of the continental shelf has slowly developed with advances in technology, permitting a greater understanding of the geology and geography of the seabed, its legal meaning has been moving away from a scientific definition. Encyclopedia Britannica defines the continental shelf as: "A broad, relatively shallow submarine terrace of continental crust forming the edge of a continental landmass."²⁰ National Geographic offers this definition: "A continental shelf is the edge of a continent that lies under the ocean. (...) A continental shelf extends from the coastline of a continent to a drop-off point called the shelf break. From the break, the shelf descends toward the deep ocean floor in what is called the continental slope."²¹ Starting in the mid 19th century, and especially following the Truman Proclamation, a more precisely defined legal concept of continental shelf became required, to allow States to better understand the extent of their

²⁰ *Encyclopedia Britannica*, online, <<http://www.britannica.com/EBchecked/topic/134970/continental-shelf#>>.

²¹ *National Geographic*, online: <http://education.nationalgeographic.com/education/encyclopedia/continental-shelf/?ar_a=1>.

rights. The legal definition of the continental shelf has changed considerably since, further highlighting the fact that the legal and the physical concepts are potentially quite different, even though it is not apparent that this was the intent of the Truman Proclamation. In its report to the General Assembly of the United Nations in 1956, the International Law Commission (ILC) recognized that the legal concept it was developing was somewhat different from the geological concept as it had been understood.²² It thus explored the possibility of using a different term, such as "submarine areas" in order to avoid the confusion of terms. In the end, it recommended that the term continental shelf be retained, since whatever term was used would need to be defined anyway. After debates were held as to which term should be used to describe the area where States' rights could be exercised, the *1958 Convention on the Continental Shelf* kept the term "continental shelf" but did not use any scientific, i.e. geological or geographical, identifier to define it. It identifies the continental shelf as: "(...) 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 area (...)."²³ The area was thus defined partly in very practical terms, i.e. as limited by the depth of the water, and partly as an undefined area subject to constant change, i.e. the exploitability criterion. Numerous authors have raised the vagueness and ambiguity of the exploitability criterion. This led to arguments that rich and advanced countries could take advantage of the definition to leave the seaward

²² "Report of the International Law Commission to the General Assembly covering the work of its eighth session" (UN Doc A/3159) in *Yearbook of the International Law Commission* 1956, vol 2 (New York:UN, 1957) at 297 [ILC Report 1956].

²³ *Convention on the Continental Shelf*, 28 April 1958, 499 UNTS 311, (entered into force 10 June 1964), art 1 [1958 CSC].

limits of the shelf completely undetermined.²⁴ Indeed, at the 1967 session of the Seabed Commission, many States expressed some concern that technological advances, coupled with the ill-defined rules governing exploration and exploitation, would lead to exorbitant claims to the deep seabed.²⁵ Consequently, many States started advocating in favour of using a distance criterion to determine the extent of the continental shelf. During the lengthy debates of the Third Conference on the Law of the Sea, there was even thought of assimilating the concept of the continental shelf within that of the exclusive economic zone.²⁶ As could have been expected, States with large shelves, including Canada, not only opposed this, but sought even more access to resources through an even broader expansion of the concept. Many coastal States, including the United States, viewed the continental margin as being part of the continental shelf and advocated a definition more in-line with the notion of "natural prolongation." In the end, everyone got something as the *UN Convention on the Law of the Sea (UNCLOS)* defines the continental shelf using distance, geomorphology and depth criteria:

Article 76

Definition of the continental shelf

1. The continental shelf of a coastal State comprises the sea-bed 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 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.
2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

²⁴ M Habibur Rahman, *Delimitation of Maritime Boundaries* (Rajshahi: N.M. Rahman Talukder, 1991) at 158-159.

²⁵ Karl Steinacker, *The Legal Principle of the Common Heritage of Mankind and Deep Seabed Mining outside the U.N. Convention on the Law of the Sea* (Berlin: Wissenschaftlicher Autoren-Verlag, 1985) at 12.

²⁶ Francis Rigaldies, "La délimitation du plateau continental entre états voisins" (1976) 14 ACIDI 116 at 117.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
(ii) A line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4(a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.²⁷

In its decision on the continental shelf delimitation between Libya and Malta, the International Court of Justice (ICJ) stated that the continental shelf, although a concept that had a physical origin, had become, with *UNCLOS*, a juridical concept that is defined in part by distance and in part by geomorphological factors: "The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf."²⁸ Both, however, need not be present concurrently, as a State with no prolongation would still be able to claim a shelf up to the 200-nautical mile limit.

²⁷ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [UNCLOS].

²⁸ *Libya v Malta*, *supra* note 9 at para 34.

Besides the area covered by the concept of the continental shelf, the issue as to what jurisdiction States could exercise over that area needed to be established. Due to their inaccessibility, States had not found necessary, before the 20th century, to address the status of the resources found in the sea's sub-soil. Early thoughts were likely that the sea's soil and sub-soil had the same status as that of the sea itself, i.e. that it was *res communis* and that only the resources themselves were *res nullius* and could be appropriated by anyone.²⁹ Certain authors were, however, of the opinion that appropriation of the seabed was possible by a State by prescription, in order to exploit sedentary species, such as oysters, sponges and corals.³⁰ In September 1945, US President Truman declared that natural resources found on the sea-bed and in the sub-soil of the continental shelf contiguous to the territory of the United States were "subject to its jurisdiction and control."³¹ Although President Truman did not claim sovereignty over these areas, many States started pushing the idea, seizing the opportunity to promote their acquisition of vast natural resources at little cost. Renowned French jurist Georges Scelle, then a member of the International Law Commission, with the mandate to prepare the preparatory work for the conference that was to codify the Law of the Sea, opposed the notion of continental shelf altogether. He saw it as an affront to the principle of freedom of the seas and as a potential source of conflict, through unregulated competition between States for increased sovereignty.³² Nevertheless, the *Convention on the Continental Shelf*, signed in 1958 in Geneva, not only defined the notion of the continental shelf, but stated that coastal states exercised

²⁹ Theodore G Kronmiller, *The Lawfulness of Deep Seabed Mining*, vol 1 (London: Oceana Publications, 1980) at 133.

³⁰ H Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 Brit YB Int'l L 376 at 401.

³¹ *Policy of the United States with respect to the natural resources of the subsoil and seabed of the Continental shelf*, Proclamation 2667, 10 FR 12303 (1945) [Truman Proclamation].

³² Georges Scelle, "Plateau continental et droit international" (1955) 58 RGDIP 5 at 7.

"sovereign rights for the purpose of exploring it and exploiting its natural resources."³³ Although sovereign rights were assigned to the shelf in terms suggesting that the area was assimilated, or equivalent, to the territory of the State, the second and third paragraphs of Article 2 leads one to believe that States were not ready to assimilate the concept completely to that of territory. Indeed, those paragraphs specify that even if the State does not exploit the resources, no other State may do so and that the rights of States do not depend on occupation. In keeping with the dictum that the land dominates the sea, occupation of the shelf itself could not lead separately to its acquisition, contrary to customary law on acquisition of sovereignty over land territory. The "land under the sea" is dependent on the land itself and not a separate territory that can be acquired independently. This interpretation was confirmed by the International Court of Justice in the first case following the conclusion of the Convention, where it found that the continental shelf is not a previously undetermined area that could be apportioned, but a natural prolongation of the territory that already appertains to States. On that point, the Court stated that the 1958 Convention merely enshrined the most fundamental rule regarding the continental shelf:

(...) the rights of the coastal state in respect of the area of the continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed.³⁴

³³ 1958 CSC, *supra* note 23, art 2(1).

³⁴ *North Sea*, *supra* note 8 at para 19.

Although neither the 1958 Convention, nor *UNCLOS* specify whether it is possible for the coastal State to assert claims of sovereignty equivalent to territorial claims, it is widely agreed that only sovereign rights over the resources are available: "In other words, neither the Continental Shelf Convention, nor the LOS Convention, has given authority to the coastal state to regard the continental shelf or the EEZ as a sovereign part of its territory."³⁵ The practical differences between the two terms, i.e. sovereignty and sovereign rights, however, have little incidence for our purpose.

1.1.2. Maritime Areas

A. Territorial Sea

The concept of territorial sea is the earliest to appear in international law. The legality of States occupying actual sea areas was disputed by early publicists, but there appears to have been an understanding that States had rights to the sea area that they could defend from land with their cannons. Up to the middle of the 18th century, however, there appears to have been no identification of a measurable distance being assigned to the area, as an alternative, or an equivalent, to the cannon-shot range.³⁶ In the 18th century, States started to claim jurisdiction over a belt of sea adjacent to their coasts, mostly for the purpose of restricting fishing, or for enforcement of customs and police regulations. The United States was an early proponent of the three-mile rule, as early as 1793.³⁷ Others were much bolder. Indeed, it was the Russian

³⁵ Rahman, *supra* note 24 at 189-190.

³⁶ Windham L Walker, "Territorial Waters: The Cannon Shot Rule" (1945) 22 Brit YB Int'l L 210 at 226.

³⁷ Philip C Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York: G.A. Jennings Co., 1927) at 6. See also reference to the adoption of the provisional limit of one sea-league in a letter from Secretary of State

ukase of 1821, claiming jurisdiction over a 100-mile sea belt along the coast of North America, which prompted the negotiation of the boundary treaties of 1824, between the United States and Russia, and of 1825, between Great Britain and Russia. Although the 3-mile rule appears to have been considered customary law by the end of the 19th Century,³⁸ certain regional customs allowed for different breadth, such as that of a 4-mile limit in Scandinavian countries,³⁹ or a 6-mile limit in the Mediterranean Sea. At the end of the Second World War, however, the second Truman Proclamation, regarding fisheries on the high seas,⁴⁰ prompted a number of countries, especially in South America, to extend their territorial seas up to 200-miles.⁴¹ The subject of much debate in the travaux préparatoires to the 1958 Convention, the breadth of the territorial sea was left unspecified in the Convention since neither States nor the International Law Commission itself could agree on a principle.⁴² However, the 12-mile limit allocated to an area called the contiguous zone, a concept also included in the Convention, would have meant that there was, indirectly, an effective limit on the area that could be claimed, since the territorial

Jefferson to Minister of Great Britain, dated 8 Nov 1823, in Francis Warton, ed, *Digest of the International Law of the United States, Taken from Documents Issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys General*, vol 1, 2d ed (Washington: Government Printing Office, 1887) at 100.

³⁸ Jessup, *supra* note 37 at 64.

³⁹ This was indeed illustrated early in the 20th Century in the *Grisbadarna Case (Norway v Sweden)* (1909), 11 RIAA 147 [Grisbadarna], and then later in the *Fisheries Case (United Kingdom v Norway)*, [1951] ICJ Rep 116 [Fisheries Case], where the United Kingdom agreed to a 4-mile territorial sea for Norway.

⁴⁰ "In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States." *Policy of the United States with respect to coastal fisheries in certain areas of the high seas*, Proclamation No. 2668, 10 FR 12304 (1945).

⁴¹ *Declaration on the Maritime Zone (Chile, Ecuador, Peru)*, 18 August 1952, 1006 UNTS 323.

⁴² See notes from the work of the International Law Commission, 308th, 309th, 310th meetings, in *Yearbook of the International Law Commission 1955*, vol 1 (New York: UN, 1960) from 152.

sea could not be wider than the contiguous zone, and, logically, had to be narrower, or else the contiguous zone would be redundant. The failure to achieve, in 1958, an agreement on the breadth of the territorial sea, as well as the fishing limits, was considered a serious impediment to world order and peace. It prompted the UN General Assembly, the very same year, to request a second conference on the law of the sea to address those issues.⁴³ Nothing came out of the Second Conference other than it emboldened South American countries to aggressively pursue their 200-mile claims.⁴⁴ By the time of the Caracas Session of the Third Convention on the Law of the Sea, in 1974, however, agreement on a 12-mile limit was so widespread that there was virtually no debate on the issue.⁴⁵

As previously stated, States first considered the territorial sea concept in terms of security and enforcement. It was usually referred to in terms of maritime jurisdiction as opposed to sovereignty. When it was referred to in terms of sovereignty, it appears that the principle applied somewhat differently than otherwise understood at the time for land territory. In 1862, the United States Secretary of State expressed the concept in these terms to the Spanish envoy: “A third principle bearing on the subject is also well established, namely, that this exclusive

⁴³ *Convening of a second United Nations conference on the law of the sea*, GA Res 1307(XIII), 13th Sess, UN Doc A/Res/1307(XIII), (1958).

⁴⁴ See *Montevideo Declaration on the Law of the Sea*, 8 May 1970, 9 ILM 1081, and *Declaration of Santo Domingo*, 9 June 1972, 11 ILM 892.

⁴⁵ John R Stevenson & Bernard H Oxman, “The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session” (1975) 69 AJIL 1 at 13.

sovereignty of a nation, thus abridging the universal liberty of the seas, extends no farther than the power of the nation to maintain it, by force, stationed on the coast, extends."⁴⁶

This is illustrated by the fact that, in 1935, Norway issued a decree identifying a 4-mile zone along its coast where its nationals had exclusive fishing rights. The decree did not identify the territorial sea; however, the International Court of Justice concluded that they were indeed the same.⁴⁷ Had there been an understanding of sovereignty over the territorial sea, this would not have been necessary. It was only in the 1958 Convention that it was made clear that the sovereignty of States extended to the water area, subject only to the right of innocent passage.⁴⁸ Although the notion of innocent passage was further explained in the *UNCLOS* of 1982, the status of the territorial sea remained the same.

B. Contiguous Zone

The contiguous zone has its root in the *Hovering Acts* of the 18th and 19th centuries, popular in Great Britain and the United States. This type of legislation was meant to provide a buffer zone to prevent breaches of law in the territorial sea or the territory itself. It only became a concept of its own in the 1958 Convention, in tandem with the expansion of the rights attached to the territorial sea itself. The concept almost disappeared during the Third Conference on the Law of the Sea. Since the territorial sea had been extended to 12 miles, the maximum breadth of the contiguous zone under the 1958 Convention, many felt that the

⁴⁶ Warton, *supra* note 37 at 102.

⁴⁷ *Fisheries Case*, *supra* note 39 at 13.

⁴⁸ The language adopted in the 1958 Convention was indeed very similar to that of the Santiago Declaration of 1952, see *supra* note 41.

contiguous zone itself had become superfluous.⁴⁹ In the end, *UNCLOS* allowed for a doubling of the breadth of the zone, to 24 miles, but the rights attached to it, i.e. the prevention and punishment of infringements of customs, fiscal, immigration or sanitary laws, remained the same.

C. Exclusive Economic Zone (EEZ)

At the first session of the Third Conference on the Law of the Sea in Caracas in 1974, like the 12-mile territorial sea, the concept of the 200-mile EEZ garnered an early consensus. The concept was promoted mostly by the maritime powers, who had until then fiercely defended the freedom of the seas, and by the newly independent post-colonial countries who were seeking an expanded resource base.⁵⁰ Although the concept of a separate territorial sea and fishing zone was present during the First Conference on the Law of the Sea, the limits and the jurisdiction were not clearly defined. In the early 1970s, Asian and African States held a series of meetings to discuss the concept of an "Economic Zone," separate from the territorial sea, and where states would have exclusive jurisdiction over the exploitation of the resources.⁵¹

The EEZ, as adopted by *UNCLOS*, measures 200 nautical miles and grants coastal States "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of

⁴⁹ Stevenson & Oxman, *supra* note 45 at 14.

⁵⁰ John R Stevenson, "Lawmaking for the Seas" (1975) 61 ABA J 185 at 186.

⁵¹ See notably the *Yaounde Declaration*, 12 ILM 210.

the sea-bed and its subsoil (...)."⁵² The sovereign rights assigned to the EEZ overlap those of the continental shelf over the 200-mile breadth as far as exploitation of the soil and sub-soil is concerned. Although the article refers to "sovereign rights," these are understood as related only to the resources themselves and not the area as such. There is no question here of sovereignty; States do not have automatic rights to the EEZ as they have for the continental shelf. The EEZ is not considered as appertaining to the coastal state. The area remains part of the high seas and navigation is unimpeded.

1.2 Methods in Customary Law

As commented by Professor Robert Kolb, in the introduction to his book *Case Law on Equitable Maritime Delimitation*, the jurisprudence on maritime boundary delimitation represents perhaps the most extreme example of the tension between the normative, i.e. equidistance, and the individual, i.e. equity, in international law.⁵³ Although a number of conventions have addressed the issue of applicable rules in boundary-making between States, there remains sufficient room between the two poles of tension for the courts to have a wide-ranging effect on the interpretation of both customary and conventional law in the field. In the last 20 years, the pendulum appears to have swung towards the normative, however, the

⁵²UNCLOS, *supra* note 27, art 56.

⁵³Robert Kolb, *Case Law on Equitable Maritime Delimitation, Digest and Commentaries* (The Hague: Martinus Nijhoff, 2003) at xxiv.

number of States still willing to refer their disputes to third-party arbitration⁵⁴ suggests that States are still looking for a degree of equity in decision-making by international tribunals.

1.2.1 Before the 1958 Conventions

Although the median line had been regularly used in treaties to delimit areas between opposite coasts, its use to delimit the boundary between adjacent coasts had not been considered part of customary standard methods. Lapradelle mentions two methods of delimitation between adjacent States: The prolongation of the land boundary and the line perpendicular to the general direction of the coast. The most popular method was that of the line perpendicular to the general direction of the coast. This generated little controversy, since many of the agreements involved more or less straight coasts and, considering the narrow breadth of the territorial sea, any unusual features were less likely to create a distorting effect. However, these methods, in their application, were not very determinate or precise. Indeed, they could vary greatly depending on the length of the land boundary, or of the coast, used to draw the boundary line. It was a geographer, Samuel Whittemore Boggs, who illustrated how these methods created zones of encroachment where waters within the 3 mile limit of one country fell on the other side of the dividing line, but more than 3 miles from the other country. This issue prompted Boggs to develop the concept of equidistance for territorial sea boundary delimitation, using parallels with the widely used median lines in lakes and rivers.⁵⁵

⁵⁴ There have been six decisions by international and arbitral tribunals in the past 10 years, and there is one pending case at the International Court of Justice.

⁵⁵ S Whittemore Boggs, "Problems of Water-boundary Definition: Median Lines and International Boundaries through Territorial Waters" (1937) 27:3 Geographical Review 445 at 454-455.

But before Boggs' method became widely used, the perpendicular to the coast method appears to have been the norm. In the *Grisbadarna Case*, the arbitral tribunal was required to assess the state of customary law from the 17th century, in keeping with the principle of inter-temporal interpretation. The tribunal found that drawing a median line midway between inhabited lands would not have been the law of nations in the 17th century. It found that, since the maritime territory constituted an appurtenance to the land territory, the proper delimitation should be made by tracing a line perpendicular to the general direction of the coast. However, the Court found that the result of such exercise, in this particular case, would be "inconvenient" since it would mean that the line would cut across fishing banks. It thus proceeded to correct the line by allocating each Norway and Sweden a separate fishing bank. Kolb views this as the first precedent of the application of equity:

Although equity has not yet been erected by normative proclamation into the touchstone of the law of maritime delimitation, it already applied, in the *Grisbadarna Case*, as a corrective force, seeking to reconcile the geometric constructions with the human realities. In this sense, the *Grisbadarna Case* was the first precedent in which a tribunal decided for an equitable maritime delimitation.⁵⁶

In the *Grisbadarna Case*, however, it was the Parties who specified that, in addition to taking the customary law into account, the tribunal needed to look at special circumstances.

Consequently, it would not be accurate to state that equity was part of the application of customary law as it would have been understood at the time. Surely, if it had been, the Parties would not have had to make a specific reference to it. As we will see later, however, it has since

⁵⁶ Kolb, *supra* note 53 at 16.

become the view of the Courts that the principle of equity itself is an integral part of the rule of law, to be applied to all decisions.

Before that 1909 Court decision, there is little indication that special circumstances, or equity, were considered part of boundary delimitation determination. In its Report to the General Assembly on the work of its 8th Session, the International Law Commission describes the usual methods as:⁵⁷

1. Continuation of the land frontier,
2. Perpendicular to the coast at the point of the land frontier,
3. Perpendicular to the direction of the coast,
4. Equidistance.

Nevertheless, a Committee of Experts struck to provide advice on law of the sea issues, in preparation for the Law of the Sea Conference, recommended that equidistance from the respective coastlines be adopted as a method in cases of opposite, as well as adjacent boundaries. The International Law Commission agreed with the conclusions of the Committee and recommended this method.⁵⁸

The article adopted for the *Convention on the Continental Shelf* followed that recommendation:

⁵⁷ ILC Report 1956, *supra* note 22 at 272.

⁵⁸ "Having regards to the conclusions of the committee of experts referred to above, the Commission now felt in the position to formulate a general rule, based on the principle of equidistance, applicable to the boundaries of the continental shelf both of adjacent States and of States whose coasts are opposite to each other. (...) Moreover, while in the case of both kinds of boundaries, the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances." "Report of the International Law Commission to the General Assembly" (UN Doc A/2456) in *Yearbook of the International Law Commission 1953*, vol 2 (New York:UN, 1959) at 200, para 82 [ILC Report 1953].

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.⁵⁹

The *Territorial Sea Convention* uses much of the same language:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.⁶⁰

The *Convention on Fishing and Conservation of Living Resources of the High Seas* was not concerned about maritime areas *per se*, however, it is still interesting to mention that it nonetheless included a delimitation method in that it referred directly to article 12 of the *Territorial Sea Convention*.⁶¹

It appears from the formulation of the pertinent articles, in all the 1958 Conventions, that States intended to have equidistance applied as the basic principle, to be deviated from only in the case of special circumstances and, in the case of the territorial sea, also historic title. Although the wording is somewhat different between the *Continental Shelf* and the *Territorial*

⁵⁹ 1958 CSC, *supra* note 23, art 6(2).

⁶⁰ *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964), art 12(1).

⁶¹ *Convention on Fishing and Conservation of Living Resources of the High Seas*, 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966), art 7(5).

Sea conventions, there is no indication that the meaning was meant to be different as both iterations emanated from the same Report of Experts, but were later drafted by two different Committees.⁶² The addition of "historic title" in the *Territorial Sea Convention* was the result of a request by Norway to include an exception for rights of delimitation that could be at variance with the provision "through prescriptive usage,"⁶³ that is, a line determined by the conduct of the parties.

Although equidistance was never regarded as an absolute rule, it was clearly viewed as the basic method. That meant not only that equidistance was considered the "general rule" or the "basic principle" in opposition to special circumstances, but that there was a presumption in favour of the rule altogether.⁶⁴ The instances where it would not be appropriate to use equidistance were considered to be for "exceptional configuration of the coast, as well as the presence of Islands, or navigable channels."⁶⁵ This formulation, then considered based on State practice,⁶⁶ would require more than the proof that there existed factors that could fall in the "exceptional circumstances" category; it would require the proof that those circumstances *necessitated* a deviation.⁶⁷ Although the Court in *Grisbadarna* started with a perpendicular line,

⁶² Faraj Abdullah Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Oxford: Clarendon Press, 1993) at 43. In the Commentary to the then proposed article on delimitation of adjacent continental shelves, the Commission notes: "For the determination of the limits of the continental shelf, the Commission adopted the same principles as for the articles 12 and 14 concerning the delimitation of the territorial sea." In ILC Report 1956, *supra* note 22 at 300.

⁶³ Norway: proposal (articles 5, 7, 8, 9, 12 and 14), UN Conference on the Law of the Sea, 1958, A/CONF.13/C.1/L.97.

⁶⁴ ED Brown, "Anglo-French Continental Case, The Law of the Sea Symposium" (1978-1979) 16 San Diego L Rev 461 at 505.

⁶⁵ ILC Report 1953, *supra* note 58 at 216.

⁶⁶ Ahnish, *supra* note 62 at 32.

⁶⁷ *Ibid* at 42.

and not an equidistant one, the shifting of the line to reflect historical fishing patterns, and the desire to avoid altering the status-quo between the States, was viewed as a "required correction," in keeping with the instructions to consider "factual circumstances." The perpendicular line was later rejected, as a rule of general application, by the International Law Commission, in preparation for the First Conference on the Law of the Sea.⁶⁸ The method suggested, however, substituting the equidistance line for the perpendicular, was very much in keeping with the *Grisbadarna* decision.

1.2.2. From North Sea to Gulf of Maine

Strangely enough, as soon as the 1958 Conventions were adopted, and even though the equidistance/special circumstances method was considered more reflective of State practice,⁶⁹ Courts sought to minimize its application. In the *North Sea Continental Shelf* cases, involving Germany, the Netherlands and Denmark, the Court rejected the argument from Denmark and the Netherlands that the equidistance-special circumstances rule, as understood by the 1958 Convention, was part of customary international law. It pointed out that, although the rule has shown to be convenient and offer some degree of certainty of application, this was not sufficient in itself to make it an obligatory rule of customary law.⁷⁰ Although both Denmark and

⁶⁸ The Commission found the method «too vague for purposes of law.» ILC Report 1956, *supra* note 22 at 272.

⁶⁹ In the UK\France case, the decision quotes part of the North Sea case where the judges mention that the equidistant method is indeed a very convenient one used in numerous cases. It goes on to state: «The truth of these observations is certainly borne out by State practice, which shows that up to date a large proportion of the delimitations of the continental shelf have been effected by the application either of the equidistance method or, not infrequently, of some variant of that method.» *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1977), 18 RIAA 3 at para.85 [UK v France].

⁷⁰ *North Sea*, *supra* note 8 at para 23.

the Netherlands were party to the 1958 *Convention on the Continental Shelf*, Germany was not a party to the Convention; therefore, the Court's decision was based on the customary law in force at the time. The Court was asked to indicate the principles and rules of international law, but not to draw a particular line. In this particular case, Germany was much disadvantaged due to the concavity of the coastline in the semi-enclosed sea. Evidently to the Court, an equidistant line would have been much to the detriment of Germany. However, instead of highlighting the need to consider "special circumstances" as part of the equation, the Court sought to marginalize the principle altogether, by seemingly assimilating it to a rigid equidistant method that would be totally inappropriate in this case. Having stated that equidistance was not a rule of customary law, the Court stated that there was not one method of delimitation but many. Furthermore, more than one method could even be used at the same time since it was the goal that was important, not the method.⁷¹ Since this was the first Court case on delimitation of a continental shelf, the Court insisted that whatever method was used, the area to be delimited constituted the most natural prolongation of the land territory, and not an area to be shared among coastal states. It thus rejected Germany's argument that it was entitled to an equitable share, as the process of delimitation was not one of apportioning a previously undelimited area, but one of drawing an equitable boundary line between areas already appertaining to one or the other State.⁷²

In its application of whatever method the Parties decided to use, the Court went back to the Truman Proclamation that States would determine their boundaries in accordance with

⁷¹ *Ibid* at para 92.

⁷² *Ibid* at para 20.

"equitable principles."⁷³ This, the Court said, was not a question of the applicability of equity as a matter of abstract justice but of the inherent nature of the rule of law applicable to the legal regime of the continental shelf.⁷⁴ However, since the rule of law refers to equity, the difference appears to have no practical relevance. Subsequent decisions by courts and tribunals have indeed shown that, for many years, equity, applied on a case by case basis, became the guiding principle. The reliance on equity, or even its applicability, was strongly criticized in the dissenting opinions in this case.⁷⁵

The Third Convention on the Law of the Sea was still in the process of negotiation when an arbitral tribunal was asked to delimit the continental shelf between the United Kingdom and France.⁷⁶ Although the emerging formula, according to Professor Brown, should have been relevant to the deliberations of the tribunal, as part of the development of international law,⁷⁷ it decided instead that the developments had not superseded the 1958 Convention, to which both States were Parties. It adopted a variant of the equidistance principle by using the rules of customary law identified in the *North Sea* case, to interpret Article 6 of the 1958 Convention. While reaffirming that equidistance was not an obligatory rule under customary law, it stated that equidistance/special circumstances was one rule, and not two, and that the role of special circumstances is to ensure an equitable result. Thus, the tribunal appears to have wanted to

⁷³ *Ibid* at para 47.

⁷⁴ *Ibid* at para 85.

⁷⁵ See, especially, dissenting opinions of judges Koretsky, Tanaka and Morelli.

⁷⁶ The Arbitration Agreement between the United Kingdom and France was signed in 1975, see *UK v France*, *supra* note 69. The Third Law of the Sea Conference ran from 1973 to 1982.

⁷⁷ Brown, *supra* note 64 at 527-528. The argument was made by France that the work of the Conference had rendered the previous customary law obsolete. The author argues that the text being negotiated offered more scope to consider special circumstances.

correct the rigidity, incompatible with the perceived conventional rule, that had been assigned to the equidistance principle in the *North Sea* cases, but all the while still retaining some latitude over the final result. The treaty principle, it stated, is one that "gives particular expression" to the customary norm that delimitation should be determined on equitable principles.⁷⁸ Consequently, although it had been thought that the objective of the Convention was clarity and precision,⁷⁹ the decision opened the door to a possible subjective evaluation of inequities. For, as long as coasts are equal and there are no exceptional features, particularly between opposite coasts, the equidistant line would be equitable. Furthermore, contrary to what had been suggested in past decisions and practice, the tribunal stated that there was no difference in legal principle for delimitation between opposite or adjacent coasts. The common application of equidistance in the case of opposite coasts is more a factor of geography, which renders the process more equitable, than of legal designation.⁸⁰ The difficulty arises with the assessment of factors that would be taken into consideration to determine whether the line was equitable or whether there existed "special circumstances."⁸¹ Although the tribunal stated that the geographical factors are "facts of nature" and that the aim is not to "completely refashion nature," its assessment of what was inequitable in this case opened the door to broader uncertainty in delimitation, as will be seen in subsequent decisions. According to Kolb, this decision created a change in paradigm in that the heart of delimitation was no longer a question

⁷⁸ *UK v France*, *supra* note 69 at para 70.

⁷⁹ Patricia Birnie, "Delimitation of Maritime Boundaries : Emergent Legal Principles and Problems " in Gerald Blake, ed, *Maritime Boundaries and Ocean Resources* (New Jersey: Barnes and Noble Books, 1987) 15 at 20.

⁸⁰ *UK v France*, *supra* note 69 at para 95.

⁸¹ DM McRae, "Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration" (1977) 15 *Can YB Int'l L* 173 at 184.

of method (equidistance) but of objective (equity).⁸² Indeed, in his separate opinion, Judge Briggs expressed the concern that the shifting of the burden of proof of special circumstances from States to the Court would erode the rule of Article 6 by identifying it with equitable subjective principles.⁸³

In the continental shelf delimitation between Tunisia and Libya,⁸⁴ the International Court was asked to define the rules and principles of international law that might apply to the delimitation of the continental shelf, and to make its decision according to equitable principles and relevant circumstances, as well as the new accepted trends in the Third Conference on the Law of the Sea.⁸⁵ The Court was thus put in a position where it was asked to define the state of international law with regards to boundary delimitation, and then, potentially, to render a decision on another set of principles, i.e. on equity, with some thought to the development going on at the Third Convention on the Law of the Sea. The Court could have had to state a method under customary law, apply a different method under equitable principles, which, in turn, could have been in conflict with the work of the Conference. The Court sidestepped all those issues by declaring that there really were no methods or legal rules: "Clearly, each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to over

⁸² Kolb, *supra* note 53 at 108.

⁸³ *UK v France*, *supra* note 69, separate opinion of Judge Brigg at 126.

⁸⁴ *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, [1982] ICJ Rep 18 [*Tunisia v Libya*].

⁸⁵ *Ibid* at para 1, quoting the special agreement between the Parties.

conceptualize the application of the principles and rules relating to the continental shelf."⁸⁶

Whatever method used needed to arrive at an equitable result. Consequently, the Court must decide on a case by case basis which principles apply to ensure an equitable result: "(...) the principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result."⁸⁷ Although the Court continued to use the term "equitable principles," it moved away from the usual understanding of the terms, using them more as circumstances or "equitable criteria" as they would later be referred to in the *Gulf of Maine* case. The Court made a point of stating that the lack of method or rules did not mean that the decision was anything other than the application of the law, and not an exercise in apportioning.⁸⁸ This was contested, however, by a number of strongly worded dissenting opinions. The argument of the dissenters was that the Court purposely aimed for apportionment. They suggested that the decision followed a "principle of non-principle," was subjective and reached through an eclectic approach, instead of sound legal principles.⁸⁹ The views of the dissenting judges to the effect that the upcoming Law of the Sea Convention's tendency towards a distance criterion for maritime claims would militate in favour of a strengthening of the use of equidistance/special circumstances, and not its erosion, would later be confirmed.

⁸⁶ *Ibid* at para 132.

⁸⁷ *Ibid* at para 70.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*, dissenting opinions of Judges Gros, Evensen and Oda. Those opinions, regarding the notion of equity, as well as the dissenting opinion of Judge Gros in the *Gulf of Maine* case will be further analysed in Chap 2.

In *Gulf of Maine*, the Chamber of the International Court stated that there were still no principles of international law formed for maritime boundary delimitation and that, at the time, international law could only provide "a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective."⁹⁰ Consequently, the Court decided that, if agreement could not be reached, then a third party would effect the delimitation "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."⁹¹ The decision followed in the footsteps of the *Libya\Tunisia* case, in that the "principles" discussed by the Court were not legal ones but practical criteria, and that each case needed to be decided based on its own facts and criteria with no particular method to be applied.⁹² In stating that there were no methods, that the application of a method depended on the case and that, similarly, the criteria to be applied not only would depend on the case, but, how they would be assessed would also depend on the case, the Court reached the apogee of its "dogma of the unicum."⁹³

Thus, although the Chamber stated that it must apply the fundamental norms of international law, those were couched in very subjective terms:

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

⁹⁰ *Gulf of Maine*, *supra* note 3 at para 81.

⁹¹ *Ibid* at para 112.

⁹² *Gulf of Maine*, *supra* note 3 at para 81.

⁹³ Kolb, *supra* note 53 at 253.

most appropriate ; all this with the final aim in view of reaching an equitable result in the above circumstances.⁹⁴

The Chamber later does mention, however, that only methods based on geometry would serve to give effect to the geographic criteria, the only ones that could be suitable for delimitation of both the continental shelf and the maritime areas.⁹⁵ This statement, as well as the statement that overlapping areas should be equally divided, with some adjustment consistent with the difference in length of the respective coastlines was, in the view of some authors, a signal towards a more rules-based approach to delimitation.⁹⁶

In the case between Guinea and Guinea Bissau, the Court of Arbitration took the view that equidistance was a method amongst others. It should not be given priority, but used only if it achieved an equitable result. The method to be used should be determined by the result and the consequent judicial reasoning.

As illustrated above, in the cases decided under the shadow of the upcoming *United Nations Convention on the Law of the Sea*, courts generally had moved towards a formula that expressed the delimitation process almost solely in terms of objective and result, giving themselves the latitude to consider a large range of factors and to determine what weight to be

⁹⁴ *Gulf of Maine*, *supra* note 3 at para 191.

⁹⁵ *Ibid* at para 199.

⁹⁶ Although they viewed positively the apparent emergence of a more “refined” method by the Court, Professors McDorman, Saunders and VanderZwaag criticised the limitative nature of the criteria used and the false sense of objectivity assigned to geographic criteria in Ted L McDorman, Phillip M Saunders & David L VanderZwaag, “The Gulf of Maine Boundary, Dropping Anchor or Setting a Course?” (1985) 9:2 *Marine Policy* 90 at 100.

allocated to each factor. It was not the process that was to determine the result but the result that would determine the appropriate process to be used.

1.3 Law of the Sea Convention and Boundary Delimitation

1.3.1 The Triumph of Equidistance

The International Court's decisions on maritime boundary delimitation had a profound impact on state practice and the jurisprudence of other courts and tribunals. In particular, the *North Sea* judgement underpinned the debates on both the delimitation of the continental shelf and other maritime spaces, as well as the legal regime of those spaces, at the Caracas session of the Third Conference of the Law of the Sea.⁹⁷ However, there was the realization that discussion on any precise formula for bilateral delimitation would hopelessly bog down the Conference.⁹⁸ The misinterpretation of the rule of Article 6 of the 1958 Convention persisted and, consequently, there was a perception that the equidistance/special circumstance rule was diametrically opposed to the rule of equitable principles.⁹⁹ Although the Conference had little trouble supporting equidistance/special circumstances for the delimitation of territorial seas between States, the delimitation between continental shelves and the EEZ was most controversial. The text achieved at the tenth session in 1981 was portrayed as a consensus and

⁹⁷ Barbara Kwiatkowska, "International Court of Justice and the Law of the Sea –Some Reflections" (1996) 11 Int'l J Mar & Coast L 491 at 527.

⁹⁸ Stevenson & Oxman, *supra* note 45 at 17.

⁹⁹ Ahnish, *supra* note 62 at 73. Besides the misinterpretation of the Court stemming from the *North Sea* case, the author also argues that self-interests of States with undetermined boundaries has played a part in the lack of apparent willingness of parties to evaluate the reasoning behind the Court's dictum.

a big accomplishment in the face of the uncertainty facing the whole of the Conference at the time.¹⁰⁰ It states at Article 74:

1.The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.¹⁰¹

Article 83(1), for the continental shelf delimitation, uses the exact same formulation.

In the late 1980s, although *UNCLOS* was not yet in force, it appeared that the jurisprudence had been fixed, based on *UNCLOS* and the then recent decisions of international courts and tribunals. The emerging consensus sought to rely on international law to recognise that delimitation of maritime boundaries was to be achieved by agreement based on an equitable solution.¹⁰² *UNCLOS* had apparently codified customary law, which the Courts felt compelled to recognize.¹⁰³ However, in his dissent in the *Gulf of Maine* case, Judge Gros declares that both the articles of *UNCLOS*, as well as the jurisprudence, starting with the *Tunisia\Libya* case, represented a “new regime” and certainly not a codification of customary law.¹⁰⁴ He also made clear that, in his view, these were not positive developments: “In redefining the law of maritime delimitation on the basis of Articles 74 and 83 of the 1982 Convention, the Chamber has exposed the disservice rendered international law by the Third United Nations

¹⁰⁰ Bernard H Oxman, “The Third United Nations Conference on the Law of the Sea: the Tenth Session (1981)” (1982) 76 AJIL 1 at 13 [Oxman, “the Tenth Session”].

¹⁰¹ *UNCLOS*, *supra* note 27, art 74.

¹⁰² Birnie, *supra* note 79 at 15.

¹⁰³ *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (1985), 19 RIAA 146 [*Guinea v Guinea-Bissau*].

¹⁰⁴ *Gulf of Maine*, *supra* note 3, dissenting opinion of Judge Gros at para 7.

Conference.”¹⁰⁵ In short, he stated that the equidistant/special circumstances rule contained in the 1958 Convention, and applied in the *North Sea* and *UK/France* decisions, had been eroded in the *UNCLOS* because States could not agree on any other text than one that did not contain any rule.¹⁰⁶ This view was shared by many, even at the time of the negotiation of the *UNCLOS*. It was mentioned by the US ambassador that, instead of a rule that would have served to help solve disputes, the Conference agreed to "an anodyne text that cannot achieve these purposes and that may indeed have the opposite effect of adding confusion to the law (...)."¹⁰⁷

Ironically, after having stripped the 1958 Convention’s rule of equidistance/special circumstances of all its normative content in the 1980s, it would be under the no-rule provisions of *UNCLOS* that the Court would return to it.

At the Third Conference on the Law of the Sea, States had no difficulty agreeing to the rule of the 1958 Convention for the territorial sea delimitation:

Article 15

Delimitation of the territorial sea between States with opposite or adjacent coasts

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,

¹⁰⁵ *Ibid* at para 27

¹⁰⁶ *Idib* at para 8.

¹⁰⁷ Statement of the US Ambassador to the plenary at the tenth session, quoted in Oxman, “the Tenth Session”, *supra* note 100 at 15. Author Philip Allott, when referring to the adopted text states: “Judged only by the standards of alchemy could it be said to be anything other but bizarre.” In Philip Allott, “Power Sharing in the Law of the Sea”, (1983) 77 AJIL 1 at 20.

however, where it is necessary by reason of historic title or special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Delimitation of the territorial sea is thus focused on equidistance, mentioning the special circumstances or historical title, as an exception rather than as a part of the method. This is due to the fact that, because of the narrow breath of the territorial sea, it has generally been believed that a line based on equidistance would result in an equitable one.¹⁰⁸ For longer boundaries, the distorting effect of various geographical features was seen as the most serious with regards to equity, as it had indeed been aptly demonstrated by Germany in the *North Sea* case.

The first case to start reclaiming equidistance/special circumstances as the main method of determination was that of the continental shelf delimitation between Libya and Malta. The fact that there were opposite coastlines made this easier but the main reason was the change, due to *UNCLOS*, in the definition of the continental shelf. The identification of the continental shelf went from a depth to a mostly distance-based concept. Furthermore, it was partly linked to the EEZ, a concept solely based on distance.¹⁰⁹ No doubt responding to the strong dissents and fierce criticisms in the few previous cases (*Tunisia\Libya*, *Gulf of Maine* and *Guinea\Guinea-Bissau*), the Court emphasized that equity, applied in the context of the rule of law, should

¹⁰⁸ Robert W Smith, "Geographic Considerations in Maritime Boundary Delimitation" in Dorinda G Dallmeyer & Louis DeVorse, eds, *Rights to Oceanic Resources: Deciding and Drawing Maritime Boundaries* (Dordrecht: Martinus Nijhoff, 1989) 3 at 6.

¹⁰⁹ *Libya v Malta*, supra note 9 at para 33.

display "some consistency and a degree of predictability."¹¹⁰ The Court continued to reject the use of equidistance as a required, or preferred, method, an opinion not altered by the fact that distance was now the basis for entitlement to the continental shelf. It nevertheless found it judicious, in the circumstances of opposite coasts, to use the median line as a first step.

Although the Court had called for the normalization of equitable principles, it had not yet called on the normalization of a method.¹¹¹ The Court used the same method in the continental shelf delimitation between Greenland and Jan Mayen, although it continued to insist that equidistance was neither an obligatory nor even a priority method. Because the Court was required to draw two separate but concurrent lines, one for the continental shelf and one for EEZ, and because the 1958 Convention applied to the continental shelf and not to the EEZ in this case, it sought to harmonize the rules. The Court recalled the decision in the *UK/France* case where the arbitral tribunal had stated that the equidistance/special circumstances rule in the Convention was a particular expression of the general norm that boundaries are to be determined on equitable principles.¹¹² It then went on to state that it would be in accordance with both the Convention, as well as customary law, to begin by drawing a median line as a provisional line and then to ask whether "special circumstances" required any adjustments.¹¹³

¹¹⁰ *Ibid* at para 45.

¹¹¹ Weil, *supra* note 11 at 191.

¹¹² *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, [1993] ICJ Rep 38 at para 46 [*Denmark v Norway*].

¹¹³ *Ibid* at para 51.

In the arbitration between Eritrea and Yemen, the Court of Arbitration reiterated that it was generally accepted that, between opposite coasts, the median line normally provided an equitable boundary.¹¹⁴ In the case between Qatar and Bahrain, although *UNCLOS* had entered into force, it was not applicable between the Parties. The International Court determined, however, that, for the territorial sea, the rule of equidistance\special circumstances reflected both conventional (1958 Convention and *UNCLOS*) as well as customary law.¹¹⁵ For the continental shelf and the EEZ, the Court merely stated that it would proceed as in *Libya\Malta*, i.e. by drawing a provisional equidistance line and then examining the factors that might suggest a shifting of that line to achieve an equitable result.¹¹⁶ This method was applied for both the sector featuring opposite coasts and for the sector where the court considered that the relationship between the States was more akin to adjacency, thus removing the final hurdle for the method to become the norm for all delimitations. For the first time, also, the Court did not make it a point to explain that the equidistance rule was not a preferred method or any of the caveats previously used to minimize the impact of the decision on legal development. It simply proceeded to use the method, merely noting that the equidistance\special circumstances rule applicable for the territorial sea was "closely related" to the "equitable principles\relevant circumstances" rule developed by case-law.¹¹⁷ The two rules became so closely intertwined that, by the time of the first decision where *UNCLOS* was applicable to both Parties, the two methods were indistinguishable, the Court stating that the equitable principles\relevant

¹¹⁴ *Maritime Delimitation (Eritrea v Yemen)* (1999), 22 RIAA 335 at para 131 [*Eritrea v Yemen*].

¹¹⁵ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, [2001] ICJ Rep 40 at para 176 [*Qatar v Bahrain*].

¹¹⁶ *Ibid* at paras 228-230.

¹¹⁷ *Ibid* at paras 230-231.

circumstances method itself required "(...) first drawing an equidistant line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'"¹¹⁸ The same year, the arbitral tribunal, in its decision on the maritime delimitation between Newfoundland and Nova Scotia declared: "In the context of opposite coasts and latterly of adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it."¹¹⁹

The International Court of Justice decision in the delimitation between Nicaragua and Honduras demonstrates the adaptability of this method and the appropriate use of the notion of special circumstances as it was intended. Indeed, although both Parties had argued against equidistance, the Court found that the equidistance\special circumstances method still applied, since the notion of exception is included within the principle. The Court found that the geomorphological construction of the coast constituted "an exceptional configuration of the coast" of the very nature that was raised by the drafters of the 1958 Convention. Furthermore, also as originally envisioned by the drafters of the Convention, the Court interpreted the special circumstances narrowly, using a bisector to the general direction of the coast where it could not identify base points, and using equidistance in other sectors. Although it could have come to the

¹¹⁸ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, [2002] ICJ Rep 303 at para 288 [*Cameroon v Nigeria*].

¹¹⁹ *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas as defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act, Second Phase* (2002) <[www2.unb.ca/lawlibrary/boundaryarbitration/pdfs/Awards%20&%20Maps/PhaseII_Award_English\[1\].opt.pdf](http://www2.unb.ca/lawlibrary/boundaryarbitration/pdfs/Awards%20&%20Maps/PhaseII_Award_English[1].opt.pdf) - 90k - 2010-07-12> at para 2.28 [*Newfoundland v Nova Scotia*].

same conclusion in the case between Canada and France concerning St-Pierre and Miquelon, this was not the position taken by the arbitral tribunal at the time. For although the tribunal recognised that the equidistance\special circumstances method did not call for equidistance *tout court*, it stated that the fundamental norm of the *UNCLOS* method (equitable principles\relevant circumstances) placed the emphasis on equity and promoted the rejection of any obligatory method.¹²⁰

Following the settling of the method, the debate shifted to the consideration of relevant coastlines and appropriate basepoints. This was indeed already presaged in the Jan Mayen case,¹²¹ and became a main bone of contention in the *Qatar\Bahrain* case where three judges dissented over the particular interpretation of adequate basepoints by the majority.¹²² The question of the relevant coastlines also became a central issue in many cases. The Court was concerned about identifying an objective criterion that was directly related to the very source of entitlement, i.e. the coast.¹²³ This was especially important since the Court was returning to the concept of verifying the equitability of the resulting line against the principle of proportionality. Since it had become the coastal geography that was of fundamental importance in the delimitation process, it was thus natural that the coasts that generated the provisional equidistance line were to become the only relevant coasts for the *ex post facto* verification of

¹²⁰ *Delimitation of Maritime Areas between Canada and France* (1992), 21 RIAA 265 at para 38 [*Canada v France*].

¹²¹ *Denmark v Norway*, *supra* note 112 at para 89. In that case, the Court accepted the basepoints identified by the Parties but did state that the determination of the line would be automatic following defined basepoints.

¹²² *Qatar v Bahrain*, *supra* note 15, joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma.

¹²³ *Barbados v The Republic of Trinidad and Tobago* (2006), 27 RIAA 147 at para 231 [*Barbados v Trinidad and Tobago*].

the equity of the method.¹²⁴ This principle was adopted in the recent case between Romania and Ukraine in the Black Sea¹²⁵ and proved fundamental in the recent decision between Nicaragua and Colombia.¹²⁶

In conclusion, although the Courts sought to reject the equidistance\special circumstances method when it was clearly adopted by States in the 1958 Convention, they have interpreted it as both a customary and a conventional rule under *UNCLOS*, in circumstances where States had specifically refused to adopt it.

1.3.2 Trend towards a Single Boundary

The new provisions of *UNCLOS*, defining a 200-mile wide EEZ, as well as the change of definition of the continental shelf, from a depth to a distance criterion up to 200 miles, meant that in many places, the two areas overlapped over a considerable distance. The issue of overlap of the two zones was not only in relation to the physical definition but also in relation to the extent of jurisdiction in the two zones. The EEZ included rights over the sea-bed and sub-soil, which were, until then, part of the continental shelf concept. This required some rethinking of

¹²⁴ *Guyana v Suriname* (2007), (Arbitral Tribunal Constituted Pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law Of The Sea), online: PCA <http://www.pca-cpa.org/showpage.asp?pag_id=363> at para 352 [*Guyana v Suriname*].

¹²⁵ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, [2009] ICJ Rep 61 [*Black Sea*].

¹²⁶ *Territorial and Maritime Dispute (Nicaragua v Colombia)* (2012), General list no 124 (International Court of Justice), online: ICJ <<http://www.icj-cij.org/>> [*Nicaragua v Colombia*]. The decision of the Court to use basepoints on Nicaraguan islands and to not allocate basepoints on certain Colombian islands was determinative in the placement of the line. Further analysis will be done in Chap 2.

the rules and principles which had governed the delimitation of the continental shelf only,¹²⁷ and, to a lesser extent, the territorial sea.

Even before the adoption of the *UNCLOS*, the issue had been raised, as many countries had already declared extended fishing zones. In the late 1970s, when taking their dispute in the Gulf of Maine to a Chamber of the International Court of Justice, Canada and the United States requested that the decision draw a single boundary for both the continental shelf and the fishing zone. The Court, after pondering the issue, decided that there was no rule against a single boundary since it had been requested by agreement of the Parties, even if it meant that certain criteria unique to one or the other of the area would have to be sacrificed.¹²⁸ Despite the strongly held views of the dissenting judge in the case, that the two concepts were quite distinct legally and that their respective delimitation followed distinct principles, the Court, rightly, saw the request as illustrating a trend that would become prevalent in boundary delimitation. In order to proceed with a common delimitation of two distinct areas, the Court rejected the application of the 1958 *Convention on the Continental Shelf*, which would have applied, as both Parties were members. It also rejected most of the criteria that had been used by the jurisprudence in continental shelf delimitation. This, and the fact that the continental shelf, under *UNCLOS*, would heretofore be determined by distance, meant that geographical factors would gain pre-eminence over geological or geomorphological factors. The Chamber concluded that, as the delimitation concerned an integrated unit, precedence should be given to

¹²⁷ Louis B Sohn, "Boundary Dispute Settlement" in Dallmeyer & DeVorse, *supra* note 108, 153 at 158.

¹²⁸ For example, the Court decided that the criterion of fish distribution and single-management of the resource was solely relevant to the fisheries zone, and thus would be an inappropriate consideration in the context of a single all-purpose boundary: *Gulf of Maine*, *supra* note 3 at para 168.

neutral factors best suited for a multipurpose line. This was confirmed in a dramatic fashion when, shortly after the *Gulf of Maine* decision, the Court was asked to determine the line between Libya and Malta over the continental shelf only. It stated that:

In the view of the Court, even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 Convention demonstrates, the two institutions - continental shelf and exclusive economic zone – are linked together in modern law.¹²⁹

The Court went on to say that although the concept of the continental shelf had not been absorbed by that of the EEZ, the elements and criteria common to both concepts, such as distance, would take on more importance.¹³⁰

Although the trend towards a single boundary has continued, the Court and States are careful to avoid the complete assimilation of the two concepts and highlight the fact that, despite the partial assimilation of the concepts, the trend is due more to practical than legal reasons:

The Court observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various - partially coincident- zones of maritime jurisdiction appertaining to them.¹³¹

In the *Jan Mayen* case, the Parties did not agree to ask the Court to delimit a single boundary, consequently, two separate but coincident boundaries were determined. In the

¹²⁹ *Lybia v Malta*, *supra* note 9 at para 33.

¹³⁰ *Ibid.*

¹³¹ *Qatar v Bahrain*, *supra* note 115 at para 173.

Eritrea\Yemen arbitration, the Parties called for a single all-purpose boundary, even though Eritrea had not ratified *UNCLOS* and was not even claiming an EEZ. This showed that although the trend was towards a single boundary, the norm remained that there existed two separate legal entities. Thus, for the Court to make such a determination, there continues to be a requirement that States specifically agree to a single boundary.

The issue of islands has also raised the question of multipurpose delimitations and the growing difficulty in keeping the various concepts completely distinct. For example, in the *Dubai\Sharjah* arbitration, although the tribunal was asked to delimit the continental shelf only, it proceeded to allocate a 12-mile territorial sea to the island of Abu Mousa so as not to give it any incidence on the location of the equidistance line between the two continental shelves.

The practice of States does confirm the trend predicted by the Chamber of the ICJ in the *Gulf of Maine* case, as many States have either agreed to single boundaries for all their maritime areas since, or have extended the same boundary used for one area to the others. This started even before the entry into force of *UNCLOS*. Examples can be found in the Russia-Turkey agreement in the Black Sea¹³² and between Finland and the USSR, who, already in 1985, decided to extend to the EEZ the 1965 continental shelf delimitation. Even though it has not been approved by the US Senate, the United States and Russia agreed to extend the line described in

¹³² *Exchange of Notes Constituting an Agreement between the Government of the Republic of Turkey and the Government of the Union of Soviet Socialist Republics on the Delimitation of the Exclusive Economic Zone of the Two Countries in the Black Sea*, 6 February 1987, 1460 UNTS 135.

the 1867 *Treaty of Cession of Alaska* to include their territorial sea, EEZ and continental shelf.¹³³

Sometimes, however, the Parties have not clearly stated what is included in the agreement, as is the case in the recent agreement between Norway and Russia in the arctic. The treaty simply refers to "Maritime Delimitation"¹³⁴ and no article clearly mentions what areas are purportedly delimited. It is only when reading the articles themselves that we can infer that it applies to both the EEZ and the continental shelf.

Although there are certain obvious practicalities in having a single line for all purposes, some countries have found that separate lines do better serve their interests in certain circumstances. Such is famously the Torres Strait Treaty between Australia and Papua New Guinea¹³⁵ where, although no reference is made to the continental shelf per se, the rights appertaining to the sea-bed and subsoil follow a different boundary than those related to fisheries.

Although it is indeed the practice of many States to extend one boundary to cover all areas, the Court has not found that this practice has become part of customary law. In the single line delimitation case between Guyana and Suriname, the Court decided that, although an

¹³³ *Agreement between The United States Of America and The Union Of Soviet Socialist Republics on the Maritime Boundary, with Annex*, 1 June 1990, in *Message from the President of the United States*, 101st Cong, 2nd session, Treaty Doc 101-22 (not in force)[*US/USSR Boundary Agreement*].

¹³⁴ *Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, 15 September 2010, UNTS Reg no 49095, English translation in Tore Enriksen & Geir Ulfstein, "Maritime Delimitation in the Arctic: The Barents Sea Treaty" (2011) 42 *Ocean Devel & Int'l L* 1 at app 2 [*The Barents Sea Treaty*].

¹³⁵ *Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area Known as Torres Strait, and Related Matters*, 18 December 1978, [1985] ATS 4 (entered into force 15 February 1985) [*Torres Strait Treaty*].

agreement existed, since 1936, between the Parties providing for a boundary between territorial seas, that agreement could not be extended automatically when the territorial sea went from three to twelve miles. This suggests that the Courts will interpret existing agreements narrowly and will refuse to automatically extend, or superimpose, an existing agreement. This interpretation was confirmed in the *Romania/Ukraine* case where the Court declared:

State practice indicates that the use of a boundary agreed for the delimitation of one maritime zone to delimit another zone is affected by a new agreement. (...) [I]f States intend that their territorial sea boundary limit agreed earlier should later serve also as the delimitation of the continental shelf and/or the exclusive economic zones, they would be expected to conclude a new agreement for this purpose.¹³⁶

The recent case of *Nicaragua/Colombia* also involved a single boundary as does the pending case of *Peru/Chile*.

Chapter 2 -Equity Factors

2.1 Notion of Equity in International Law

The notion of equity, like that of justice itself, has occupied the discourse of philosophers for much longer than that of lawyers and judges. In his *Nicomachean Ethics*, Aristotle discusses the notion of justice in terms of universal justice and particular justice. Of particular justice, he identifies what is fair and equal. Distributive justice is part of this concept of particular justice and is defined, not in terms of absolute equal distribution, but of proportional distribution, "for

¹³⁶ *Black Sea*, supra note 125 at para 69.

proportion is the equality of ratios."¹³⁷ As we will see later, proportionality in boundary delimitation has become identified with the measure of equity; however, it originates from the concept of justice itself, according to Aristotle, and not from equity. The concept of distributive justice has often been raised and debated in maritime boundary delimitation. Although it has generally been rejected by the courts, States, individually and collectively, would grow to incorporate this principle more and more in their relations. We will see in more detail in Part II how States have applied the principles of distributive justice as part of their boundary relations.

Equity is defined, not in the context of justice, but in the context of what is just. It is identified as a corrective of legal justice, as a concept to temper the universal application of the law in cases that would not have been envisaged by the legislator, with the goal of achieving justice, or something just: "Hence the equitable is just, and better than one kind of justice –not better than absolute justice, but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality."¹³⁸ As to its application, Aristotle lays the foundation to the just naturalist's view of intrinsic moral judgement: "(...) a man of understanding and of good or sympathetic judgement consists of being able to judge about the things with which practical wisdom is concerned; for what is equitable is the common concern of all good men in their dealings with others."¹³⁹ This philosophical root of equity is the basis for the view of many jurists

¹³⁷ Aristotle, *The Nicomachean Ethics*, translated by David Ross (Oxford: Oxford University Press, 2009) at 85.

¹³⁸ *Ibid* at 99.

¹³⁹ *Ibid* at 113.

that equity is a path to justice that is different than that followed by the law, and that it is based on subjective feelings of what is just or unjust, depending on the individual.¹⁴⁰

2.1.1 Sources of equity

From its philosophical root in morality and ethics, equity has evolved into multiple facets, including actual legal rules that would have been the opposite of its original concept. It has also entered international law through various sources and in more than one form. These various forms of equity have often been raised in the context of boundary delimitation either to justify or to criticize a certain decision. We therefore need to review what forms equity can take and how each concept is understood and applied.

A. Equity as Ex Aequo et Bono

The term *ex aequo et bono* derives from Roman law. It has been interpreted in international law as permitting the parties to enable the court to "(...) render a fair and equitable decision, especially when a decision according to the strict letter of the law might produce an injustice."¹⁴¹ In that, it is consistent with Aristotle's views of equity. It appears, however, that the term *equity* in that sense was replaced by *ex aequo et bono*, in doctrinal writing and in legal documents, including the Statute of the International Court. This is probably due to a desire to avoid confusion between the notions considering that there is a tendency to assimilate this form of equity with the rules emanating from the development of the term in the

¹⁴⁰ VD Degan, *L'Équité et le Droit International* (La Haye : Martinus Nijhoff, 1970) at 4.

¹⁴¹ LC Green, *International Law: A Canadian Perspective*, 2d ed (Ontario: The Carswell Company, 1988) at 74.

common law. The difference between the two will become crucial, however, as only the latter will be available as a set of principles to be used in the Court's judgements, outside of an express agreement by the Parties to apply the former. Before the advent of the International Court of Justice, international arbitration mostly left to the discretion of the Parties the duty to establish the rules applicable to particular disputes. The wider discretion of those arbitrators often led them to decide on the basis of equity, rather than law.¹⁴² In 1920, the Advisory Committee of Jurists discussed the inclusion of equity as a source of law to be applied by the international court. The different perceptions of the term became apparent and, for lack of consensus, the reference to it was deleted. It was replaced by the current reference to the application of *ex aequo et bono* by express consent of the Parties, in section 38(2) of the Statute of the International Court of Justice. That a separate section is used to permit the application of equity outside the purview of the law serves to highlight the fact that judges are bound to apply only legal rules when rendering decisions.

B. Equity as a Part of International Law

There was a school of thought, especially in the early 20th century that saw international law as a completely distinct body of law from municipal law, with different subjects, objects and

¹⁴² Alain Pellet, "Article 38" in Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm, eds, *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006) at 681. The author also refers to Elihu Root's instructions to the American Delegation to the Hague Conference of 1907 to the effect that arbitrators often act as negotiators effecting settlements rather than as judges deciding questions of fact and law. This practice originated from medieval Europe when Kings and Popes were often called upon to arbitrate disputes between other sovereigns. For a history of this practice, see George Schwarzenberger, "International Law in Early English Practice" (1948) 5 Brit YB Int'l L 52 at 82-85.

history. As a separate system, there would have to be underlying principles of justice that would serve as a foundation. Equity was one of them:

The words "law and equity" used in the special agreement of 1921 cannot be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence. The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State.¹⁴³

How equity would have entered the realm of international law, however, is not very clear. Indeed, rules and principles incorporated into international law, either through convention or custom, usually have their origin from some common understanding of what justice was at the domestic level. The adoption of Section 38 (c) of the Statute of the ICJ, however, gave jurisdiction to judges to extract principles from municipal law without those principles having entered international law through the normal process of positive State action. There were then concerns to the effect that particular systems of law would increasingly be called upon to provide international law rules: "(...) there is ground for supposing that the *ius gentium* in the Roman sense will increasingly become a source of the *ius gentium* in the modern sense."¹⁴⁴ This might have augured a shift in international law making. It, however, ignored the fact that long before the adoption of the Statute, the *ius gentium* had been a source of international law, with Roman law maxims and principles widely used in arbitral decisions. Indeed, the process of customary law making, as explained by Professor Kelsen, is one of collaboration between all of the subjects of a particular legal order.¹⁴⁵ This means that States have always brought to the

¹⁴³ *Norwegian Ship owners' Claim (Norway v USA)*(1922), 1 RIAA 307 at 331.

¹⁴⁴ J Walter Jones, "The Pure Theory of International Law" (1935) 16 Brit YB Int'l L 5 at 11.

¹⁴⁵ Hans Kelsen, "Essential Conditions of International Justice" (1941) 35 Am Soc Int'l L Proc 70 at 75.

international arena their own legal principles. These became part of international law through treaties or were fed into customary law by practice.

In medieval Europe, international law was almost solely treaty-based. The few acknowledged customs were in the field of commerce or maritime law. It was also left to domestic courts to settle disputes that did not involve sovereigns, such as those involving spoils and piracy. In those cases, in the absence of treaties, courts would be left to rule on the basis of "justice and equity."¹⁴⁶ It was thus left to domestic courts to apply international law, which meant that many of the principles known to judges domestically were being incorporated in the decisions. As for modern principles of international law, as expressed by early publicists such as Grotius and Vitoria, they were descendents of moral conduct, of the moral principles applicable between men. As Professor Fenwick declared, while the Second World War was raging: "There is (...) but one standard of conduct for nations as for individuals."¹⁴⁷ Consequently, equity has always been a part of international law. It was, however, in the more philosophical sense or broader understanding of justice, not in the rules and principles as we will see applied in maritime boundary delimitation cases.

C. Equity as General Principle of Law

The expression "general principles of law" refers to principles usually applied in a domestic context. It was added as a source of law to be applied in international disputes in the Statute of

¹⁴⁶ Schwarzenberger, *supra* note 142 at 87.

¹⁴⁷ Intervention of professor Fenwick in Kelsen, *supra* note 145 at 95.

the Permanent Court of International Justice, following the report of an Advisory Committee of Jurists in 1920. The main goal of this inclusion was to avoid instances where the absence of positive international law would make a judicial decision impossible. There had been much debate regarding the addition of this source of law, with many jurists being of the view that only positive international law should be considered, in order to avoid giving the Court the power to legislate.¹⁴⁸ However, authors such as the former president of the ICJ, Lord McNair, are of the opinion that, as seen previously, much of the content of international law has been developed by tribunals and writers out of these principles anyway.¹⁴⁹ Article 38 of the Statute of the International Court retains this source of "general principles of law as recognized by civilized nations," although the last part of the definition has been generally dropped in the post-colonial era.¹⁵⁰ It is not, however, understood that rules and principles of domestic law be simply imported into international law. The aim is to find general principles that are reflective of the idea of justice in various systems and that could be transposed in an international context. That equity would be such a principle has rarely been disputed:

For if there is a principle recognized by the municipal law of the community of nations which demands adoption by analogy into international law as a general principle of law, at least as much as so many others which it has already borrowed, it is clearly the principle which nominates equity as the basis of law and as the objective of its implementation.¹⁵¹

¹⁴⁸ Pellet, *supra* note 142 at 686.

¹⁴⁹ Lord McNair, "The General Principles of Law Recognized by Civilized Nations" (1957) 33 Brit YB Int'l L 1 at 15. In his separate opinion in the case of the International Status of South-West Africa, he states that international law has recruited and continues to recruit many of its rules and institutions from private systems of law: *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep 128 at 148 [*South-West Africa*].

¹⁵⁰ An extensive criticism on the use of this term is made by Judge Ammoun in his separate opinion in the *North Sea Continental Shelf* cases where, inter alia, he states that the term 'civilized nations' is incompatible with the relevant provisions of the UN Charter: *North Sea*, *supra* note 8, separate opinion of Judge Ammoun at para 33.

¹⁵¹ *Ibid* at para 35.

If the existence of a principle of equity is common to most legal systems, its nature, definition and application remains a source of debate. According to Pellet, although equity plays an important part in international law, it is neither a substitute, nor a source of law; it is rather a postulated attribute inherent to law.¹⁵² This would be true in the philosophical sense of the nature of justice. However, as international tribunals have had to defend its application in the context of their mandate, they needed to find some more concrete expression of the principles to avoid the perception that they were ruling *ex aequo et bono*, for which they would require the express consent of the Parties. The principles, as they had evolved in the main legal systems of the world and were eventually incorporated in positive law, offered a convenient way to skirt the debate. Although equity is found in most legal systems, including Islamic law, Hindu law and Chinese law,¹⁵³ we will limit our review here to the principle as developed from Roman law into English and civil law, since the Courts have usually referred to those in their decisions.

In Roman law and English law, equity started, as understood by Aristotle, as a way to correct the rigidity of the law. Praetors, in Roman law, and chancellors in English law, had the duty to decide cases based on a moral ideal of justice.¹⁵⁴ However, this philosophical and morality based approach was later to be developed into more strictly applied rules themselves, through codification, procedural requirements or, in English law, the rule of stare decisis. In Common law these rules are now rigidly part of positive law and form a parallel system that

¹⁵² Pellet, *supra* note 142 at 730.

¹⁵³ A review of many of those are found in the separate opinion of Judge Ammoun in the *North Sea Continental Shelf* cases: *North Sea*, *supra* note 8 at para 38, as well as by Judge Weeramantry in CG Weeramantry, *Universalising International Law* (Leiden: Martinus Nijhoff, 2004) at 305-309.

¹⁵⁴ Degan, *supra* note 140 at 8.

appears to have lost its *raison d'être*, especially considering the heavy procedural requirements involved. While it is the original, as opposed to the latter, version of equity that international law sought to channel¹⁵⁵ through the door of general principles of law, the application by international courts and tribunals of such principles as estoppels, together with others, such as equality of the Parties,¹⁵⁶ show that there still exists confusion as to the exact source of the concepts.

Civil law traditions, although rooted also in Roman law, has, much earlier on crystallized the notion of equity. From the codification of the Roman law under Justinian, domestic law of Roman tradition is entirely codified, and thus leaves very little space for the application of equity. Indeed, the preamble of the Civil Code of Quebec specifies that all legal issues are covered by the Code, either explicitly or implicitly, in the letter, spirit or object of its provisions.¹⁵⁷ Equity is specifically mentioned and allowed to be used as a complement in a few narrowly defined unforeseen circumstances.¹⁵⁸ By specifically referring to equity in very few articles, the legislator makes it clear that judges have very little latitude to evaluate and correct the potentially unjust application of specific provisions.

¹⁵⁵ In 1937, the Institut de Droit international issued an opinion to the effect that equity is normally inherent to the application of the law, for international judges as for domestic judges : Institut de Droit international, "La compétence du juge international en équité" Session de Luxembourg, 3 Septembre 1937, online : IDI < <http://www.idi-iil.org/>>.

¹⁵⁶ Justice Weeramantry lists concepts such as good faith, pacta sunt servanda, jus cogens, unjust enrichment and rebus sic stantibus as concepts of international law having their origin in equity : Weeramantry, *supra* note 153 at 247.

¹⁵⁷ Preliminary provision CCQ.

¹⁵⁸ In the right of accession for moveable property, art 975 CCQ, and in the effect of binding contracts between parties, art 1434 CCQ.

As we will see, judges in international decisions have referred to equity as a rules-based concept, which is more in line with the development of the concept under English law, to render decisions that, at least to their critics, were really more in line with the philosophical and early juridical concept of equity, i.e. a decision outside the formal rules of law, based on the judge's own sense of what is just or unjust.

The question as to whether the source of equity in international law is from treaties, custom or general principles of law was the subject of much debate in the first half of the 20th century. This was concomitant with the wider positivist vs. naturalist debate that was permeating legal and philosophical discourse at the time. However, as Lauterpach asserts, some rules of international morality are so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations.¹⁵⁹ This view, that there is an interrelation between natural law and general principles applied in many legal systems was also the view of Sir Henry Maine in the 19th century, who stated that Grotius and Ayala had followed the Antonine jurists to conclude that *Jus Gentium* and *Jus Naturale* were identical and that the law of nature is the code of States.¹⁶⁰ Evans concludes that equity is the exact point of contact between the *Jus Gentium* and the *Jus Naturale*.¹⁶¹ In conclusion, equity could have integrated international law either directly, through its basic philosophical construction, through custom, or through general principles of law found in municipal systems.

¹⁵⁹ Quoted in R St. J McDonald, "Fundamental Norms in Contemporary International Law" (1987) 25 Can YB Int'l L 115 at 129.

¹⁶⁰ Morgan O Evans, *Theories and Criticisms of Sir Henry Maine* (London: Stevens and Haynes, 1896) at 26.

¹⁶¹ *Ibid* at 19.

It is more likely that it has indeed permeated through all those sources together, considering a largely common philosophical and juridical heritage. The important question, however, is not really the origin of the concept of equity in international law itself, but what it means and what its function is. Rules of morality and rules of equity are not equivalent concepts anymore, as they would have been originally intended.

2.1.2 Function of Equity

From its original function of correcting the rigours of law, equity has taken on many forms and functions, all of which will appear in the debate surrounding the application of equity in maritime delimitation. It is thus important to understand what these are and what application they have.

A. Equity contra Legem

This form of equity conforms to the Aristotelian view of corrective justice, in that it is based on a sense of the just and the unjust and is a means to adapt the rigour of law to the specificity of the particular case. It has been argued that this form of equity is inherent in international law itself and must be applied by judges as part of their mandate.¹⁶² This form has been assimilated to equity *ex aequo et bono* reviewed above. While it might have been part of the notion of justice and included *ab initio* in international law, States have decided to withdraw the jurisdiction of judges to apply it to international disputes. As we will see later, the difference

¹⁶²Ronualdo Bermejo, "Place et rôle de l'équité dans le droit international nouveau" (1984) 37 RHDI 53 at 59.

between the various forms and applications of equity is the object of some divergence of opinion, with many judges and authors being of the opinion that certain decisions were really taken *ex aequo et bono* under the guise of equity as a principle of law itself.

B. Equity praetor Legem

The first modern instance where states have sought to identify sources of international law to be applied in international disputes stemmed from the 1907 *Hague Convention* and the attempt to create an International Prize Court. The Convention provided that if no rule of law could be found in the treaty itself, or in rules of international law, the Court was to give judgement in accordance with the general principles of justice and equity.¹⁶³ It appears thus that the drafters then saw equity as a superlative of law, a principle that could be used to fill the gap in the law, rather than correct the unjust results of too strict a rule. This is what is understood by *equity praetor legem*. This is consistent with Degan's view that there was, by the time of the negotiation of the Statute of the ICJ, a fusion of the notion of equity as it had developed in English law, with the principle as understood originally.¹⁶⁴ The jurisdiction of the judge of international tribunals to apply *equity praetor legem* is consequently the matter of some controversy. As international law required positive State action or acquiescence, it would be difficult for the Court to justify applying it outside the express consent of the Parties.¹⁶⁵ There

¹⁶³ Pellet, *supra* note 142 at 683.

¹⁶⁴ Degan, *supra* note 140 at 11.

¹⁶⁵ Judge Alvarez, in his dissenting opinion in the *Status of South-West Africa* Advisory Opinion states that what could be viewed as the Court creating new law is in fact a declaration of what is the "new law" on a given issue, since the law must have undergone profound changes in keeping with the profound changes affecting society at the time. *South-West Africa*, *supra* note 149, dissenting opinion of M. Alvarez at 177.

is, however, also the argument that this process of filling the gap is intrinsic, like *infra legem*, to the function of the judge and thus forms part of general principles of law.¹⁶⁶ Considering that the insertion of the notion of general principles of law as a source of law in the Statute of the International Court was for the precise purpose of avoiding situations of *non liquet*, and that judges have the general mandate to make decisions, it would seem that the balance should, in such cases, tip in favour of judges using, albeit with restraint, general principles of law and equity to fill the gap and make a decision. Again, the difference of opinion might stem from the different legal cultures. In continental/civil law, there are purportedly no gaps in the law and judges are to use, as a matter of course, interpretation of various principles to extract the rule to be applied. In that latter definition, there would be no incompatibility to using *praetor legem* since there would be no creation of law, only an interpretation using legal analysis.

C. Equity infra Legem

This type of equity is seen by many authors and judges as being part of the rule of law itself by which the law must be adapted, molded to the particular circumstances of a case. It is not a concept separate from law but an accessory of it in that the judge always seeks to harmonize facts and law, since the core of the judges' duty is to render an equitable decision when applying the rule of law.¹⁶⁷ As we will see later, this is indeed the position taken by the ICJ in maritime boundary cases. In that, there appears to be a slight difference of opinion between authors of common law heritage and those of continental background, for whom this form of

¹⁶⁶ *North Sea*, *supra* note 8, separate opinion of Judge Ammoun. See also, Bermejo, *supra* note 162 at 67.

¹⁶⁷ Degan, *supra* note 140 at 27.

equity constitutes a method of interpretation of the law in force,¹⁶⁸ a tool to assist the judge in choosing, between various interpretations, the one more appropriate in the circumstances:

"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."¹⁶⁹ In practice, however, there is very little difference between the two approaches. Consequently, it can be said that there is general agreement that this form of equity is an inherent part of the judge's mandate.

2.2 Application by the Courts

2.2.1 Equitable Principles

As previously seen, arbitral tribunals, steeped in the traditions of medieval and Great Power politics, have had much latitude to apply equity, or other forms of compromise, to their decisions. This is illustrated in Canadian history particularly through the Commission set up by the *Jay Treaty* of 1794 where commissioners were required to take an oath to decide complaints based on "justice and equity."¹⁷⁰ Although in that case, Parties specifically mandated the use of equity, tribunals have not necessarily felt that they required that kind of direction to apply the principle. In the *Alaska Boundary* decision,¹⁷¹ for example, although the Parties had specifically

¹⁶⁸ In the case of the Frontier Dispute between Burkina Faso and Mali, the Court specifically states that it could not rule in *ex aequo et bono* considering that it was not tasked to do so by the Parties. It also states that it would neither consider equity *contra legem* nor equity *praeter legem*. On the other hand, it chose to apply equity *infra legem* as it considered it a method of interpretation. *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*, [1986] ICJ Rep 554 at para 28.

¹⁶⁹ *Tunisia v Libya*, *supra* note 84 at para 70.

¹⁷⁰ *Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America*, 19 November 1794 (Quebec: Guillaume Vondenvelden, 1794), art 6 [*Jay Treaty*].

¹⁷¹ *Alaska Boundary Case (Great Britain v United States)* (1903), 15 RIAA 481 [*Alaska Boundary Case*].

requested the tribunal to interpret a specific treaty, the decision was widely viewed as a compromise, a political solution that would be acceptable to both sides, i.e. a decision *ex aequo et bono*. Indeed, the allocation of the strategically important islands at the mouth of Portland canal was more an undeclared exercise of distributive justice than of pure treaty interpretation. This was the basis on which two of the members dissented.¹⁷² Another example is the *Grisbadarna* case.¹⁷³ As we saw earlier, in that case, the tribunal allocated each Party a fishing bank simply because it found it unsuitable to draw a boundary across fishing banks. More recently, even considering the effort made by the International Court of Justice to carefully state, in almost every case, that "the legal concept of equity is a general principle directly applicable in law,"¹⁷⁴ the arbitral tribunal, in the *Guinea/Guinea-Bissau* maritime delimitation, stated that the decision of the tribunal must, in addition to being well founded in legal reasoning, "reflect the deep-seated convictions of the Arbitrators and their sense of justice".¹⁷⁵

With the advent of the Permanent Court of International Justice, this possibility was restrained by the application of Article 38 which limited the sources of law that the Court could use. It is indeed through Article 38 that Judge Hudson, in the case of the *Diversion of Water from the River Meuse*, first referred to equity as a principle to be applied by the Court: "It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that article, the Court has some freedom to consider principles of equity as part of the international

¹⁷² Louis Jetté specifically mentions this issue in his dissenting opinion whereas Aylesworth mentions it in a subsequent letter to the Boundary Commissioner, *infra* note 612.

¹⁷³ *Grisbadarna*, *supra* note 39.

¹⁷⁴ *Lybia v Malta*, *supra* note 9 at paras 45-46.

¹⁷⁵ *Guinea v Guinea-Bissau*, *supra* note 103 at para 90.

law which it must apply."¹⁷⁶ In his opinion, Judge Hudson appears to find the basis for his application in section c) of Article 38, as he quotes this section before stating that equity is found in many systems of law and thus part of international law. He then goes on to apply a particular principle of equity, that of equality of the Parties, found in English and Roman law. However, in a subsequent book, he states that the source of equity in international law is not from the general principles of law but emanates from international law itself:

The Permanent Court of International Justice did not hesitate to apply a principle of equity in the *Meuse Case* in 1937, when it held that the Netherlands was not warranted in complaining of the construction and operation of a lock by Belgium in circumstances such as those in which the Netherlands had previously followed a similar course. Nor was this application of equity put upon the ground that the Court had been directed by its Statute to apply "the general principles of law recognized by civilized nations." Equity may be said to form a part of international law, serving to temper the application of strict rules, to prevent injustice in particular cases, and to furnish a basis for extension where lines have been forged by experience. Hence a tribunal may include principles of equity in the law which it applies, even in the absence of an express mandate.¹⁷⁷

Although Judge Hudson had used a defined rule of equity in his decision and cautioned about the need for sparing application and scrupulous regard for limitations,¹⁷⁸ the Court was subsequently emboldened to use its discretion with less restraint. In the *North Sea Continental Shelf* cases, although the Court maintained that it applied equity in the very normative context that Judge Hudson had used, caution towards subjectivity was strongly raised in the dissenting opinions. The *North Sea Continental Shelf* was the first case on continental shelf delimitation and, because the Court had been asked not to delimit the boundary, but to indicate which rules

¹⁷⁶ *Diversion of Water from the Meuse (Netherlands v Belgium)* (1937), PCIJ (Ser A/B) No 70, separate opinion of Judge Hudson at 77 [*Meuse*].

¹⁷⁷ Manley O Hudson, *International Tribunals, Past and Future* (New York: Kraus Reprint Co., 1972) at 103.

¹⁷⁸ *Meuse*, *supra* note 176, separate opinion of Judge Hudson at 77.

and principles of international law would be applicable to the delimitation, the judgement was considered pivotal at the time and has indeed had a profound, if at times misinterpreted, influence on subsequent delimitation cases. The Court first excluded the notion that the concept of distributive justice had anything to do with boundary delimitation. This was on the basis of the definition itself of the continental shelf, as a natural prolongation of the territory of a State. Since the continental shelf had always belonged to the State, albeit in its undelimited form, there could be no question of other States being attributed a share of it. Following this decision, however, not only did the concept of the continental shelf itself change, but political and legal developments in environmental and resources law, which are closely linked to the law of the sea, would bring the global community into rethinking the place of distributive justice in boundary making.¹⁷⁹ The Court, in this case, having found that there were no conventional rules that applied between the Parties, and that customary law did not impose a particular method, referred to the Truman Proclamation to extract the two basic concepts of maritime delimitation: delimitation by mutual agreement and delimitation in accordance with equitable principles.¹⁸⁰ It was apparent that this exercise by the Court was spurred by the particular circumstances of the coast of Germany, which sat at the bottom of a concavity, by their inner sense of what was just and unjust in this case. Although the Court could have solved this inequity, as suggested in a separate opinion by Judge Nervo, by simply justifying a non-equidistant boundary on the basis of special circumstances, it chose to evoke equity as the foundation for the delimitation method itself: "(...) it is not a question of applying equity simply as a matter of abstract justice, but of

¹⁷⁹ This issue will be further analyzed in part II.

¹⁸⁰ *North Sea*, *supra* note 8 at para 47.

applying a rule of law which itself requires the application of equitable principles (...)."¹⁸¹ Since the court was not mandated to proceed with the delimitation itself, it referred to such basic principles as good faith, natural prolongation and non-encroachment as equitable principles to be applied by the Parties in their negotiations.¹⁸² It also gave examples of inequities that would need to be remedied, such as that resulting from an irregularity of the coastline. The Court was careful, however, to specify that "Equity is not equality" and that there was no question of refashioning nature.¹⁸³ This statement will become important since, subsequently, there appears to have been in the Court's decisions, this exact tendency to try to equalize the inequities of nature. Also, this position will increasingly appear to be contrary to the views of States during the negotiations leading to the *Law of the Sea Convention*, where principles of equality and the idea of sharing will become prevalent. In the *North Sea* case, however, the notion of equality seems to be limited to the proportionality of the coastlines, which were not unequal in this particular case. The Court does refer to certain factors that would need to be weighed in applying equitable procedures, such as geological or geographical considerations. It does not, either, make it clear whether there is a difference between the equitable principles and equitable procedures or criteria or what the legal basis for these principles altogether is. Indeed, in the subsequent jurisprudence, most critics have raised the fact that this collage of equitable principles, rules, criteria, methods, as well as special or relevant circumstances has

¹⁸¹ *Ibid* at para 85.

¹⁸² *Ibid*.

¹⁸³ *Ibid* at para 91.

created a confusion that has fostered a concern that judges have used equity to admit arguments not otherwise admissible.¹⁸⁴

In boundary delimitation, following the lead of the *North Sea*, the courts have subsequently elevated equity from a principle included in the general principles of law, to be applied when rendering a decision, to the object of the decision itself. In *Tunisia/Libya*, Judge Arechaga, in his individual opinion states:

It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. The term 'equitable principles' cannot be interpreted in the abstract. It refers back to the principles and rules which may be appropriate in order to achieve that end.¹⁸⁵

It is this notion of equity, as the end result of a process, which was retained in *UNCLOS* as the basis for delimitation between States. The fact that the only equitable principle had become the result led the Court, starting in the *Gulf of Maine* case, to state that the factors to be considered in search of the result are not principles themselves but criteria, i.e. factors that are relevant to the determination of the result.

¹⁸⁴ Christopher R Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking*, (New York: Transnational Publishers, 1993) at 215. Judge Jennings referred to the Court's equitable principles references as "a jumble of different and disparate elements" in RY Jennings, "Equity and Equitable Principles" (1986) 42 *Ann suisse dr int* 27 at 38.

¹⁸⁵ *Tunisia v Libya*, *supra* note 84, individual opinion of Judge Arecha at para 70.

In his strongly worded dissent in the *Gulf of Maine* case, judge Gros criticized this seemingly disorderly application of equity, which, in his view, moves the principle from being an integral part of the rule of law to an exercise in discretion:

So long as equity was conceived as the application of a rule of law prescribing recourse to equitable principles, it was distinguishable from arbitrariness and *ex aequo et bono*. As each contentious case has its own characteristics, the judge's work was performed within the bounds of the application of legal rules to the facts; even if Article 6 of the 1958 Convention left room for an assessment of the effect of special circumstances, that assessment remained under control. By introducing disorder into the conception of equitable principles, and freedom for the judge to pick and choose relevant circumstances and criteria, the Court, in the Judgement of February 1982, and the States participating in the Third United Nations Conference, by the Convention of December 1982, have given equity in maritime delimitation this doubtful content of indeterminate criteria, methods and corrections which are now wholly result-oriented. A decision not subject to any verification on its soundness on a basis of law may be expedient, but it is never a judicial act. Equity discovered by an exercise of discretion is not a form of application of the law.¹⁸⁶

The President of the Arbitral Tribunal in the *Guinea/Guinea-Bissau* case stated that the tribunal was bound to apply equity and that factors to be considered and methods to be applied were at the discretion of the tribunal.¹⁸⁷ This statement appears removed from the notion of equity *infra legem* and more in line with that of equity *contra legem*, where the law is found to be unjust and is therefore replaced by equity. The resulting decision would thus be of the nature of *ex aequo et bono*, even though, in the same paragraph, the President specifically denies that this is the case. Although many publicists and judges, such as Judge Gros, were indeed of the opinion that the Court was engaging in subjective findings that had no basis in law, others

¹⁸⁶ *Gulf of Maine*, *supra* note 3, dissenting opinion of Judge Gros at para 37.

¹⁸⁷ *Guinea v Guinea-Bissau*, *supra* note 103 at para 88.

viewed this emphasis on a flexible approach as choices that decision makers necessarily make as part of their jurisdiction and their inherent mandate to interpret.¹⁸⁸

As we saw earlier, the wave of criticism, both inside and outside the judicial arena led the Court, in *Libya/Malta*, to call for some consistency and predictability in decision-making. Following this decision, there was a wave of authors seeking to establish a coherent framework and find identifiable and predictable procedures.¹⁸⁹ It would be through these more objective principles that the aim of predictability and consistency would be attained. As stated by Judge Valticos, in his separate opinion in that case:

In the present field, where the legal rule (the equitable solution) is a guideline framed in deliberately broad terms, it is by means of a gradual refinement of its scope, through the resolution of particular questions, that the Court will eventually be able to elicit objective principles capable of guiding States which encounter similar problems (and there are many such States, apparently). In so doing, it will also be able to contribute to that clarity, certainty, predictability and stability which are so essential in international law.¹⁹⁰

Although the Court had stated earlier that the application of equitable principles should not be over conceptualized,¹⁹¹ by then, the winds had changed and the search for normativity was preoccupying both the Court and publicists. Indeed, while the Court made it a point, in

¹⁸⁸ Rossi, *supra* note 184 at 237.

¹⁸⁹ For example, Evans finds that the Court attempted to limit what could be considered as relevant circumstances by limiting those circumstances that had a more indirect connection with the shelf or its legal regime, in Malcolm D Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances" (1991) 40 ICLQ 1 at 21. Professor Charney considered the decision as a process in the common law tradition of progressively refining the legal rule through a continuing series of judgements, in Jonathan I Charney, "Progress in International Maritime Boundary Delimitation Law" (1994) 88 AJIL 227 at 233. Professor Weil was of the opinion that the criteria should have a legal basis and flow from the legal title to the area, such as adjacency and coastal projection: Weil, *supra* note 11 at 54.

¹⁹⁰ *Lybia v Malta*, *supra* note 9, separate opinion of Judge Valticos at para 13.

¹⁹¹ *Tunisia v Libya*, *supra* note 84 at para 132.

every case, to assert that its decision was always in keeping with the rule of law, it was met with increasing scepticism. In the *Tunisia/Libya* case, for example, the Court stated: "While it is clear that no rigid rules exist as to the exact weight to be attached to each element on the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice."¹⁹² In the opinion of Judge Oda, shared by Judges Gros and Evensen, however, the application of so-called rules of equity by the Court amounted to little more than a "principle of non-principle" and the decision was much more akin to an *ex aequo et bono* decision than one grounded in law.¹⁹³ Maybe not surprisingly, the core group of judges who have criticized the "equitable" approach of the Court from 1969 tend to come from Civil law countries, where, as we saw earlier, there is less of a tradition of supplementing the law than is usually understood in Common law countries. Professor Weil, who had been a strong critic of the Court's approach in his doctrinal writing,¹⁹⁴ issued a consistent dissent in the *Canada/France* award: "I am at a loss to identify the principles and rules which could justify in law the delimitation which has been decided, and I fear that the Decision may in some respect jeopardize the development of the law of maritime delimitation, which had been dramatically moved by the *Libya/Malta* decision towards a more secure legal foundation."¹⁹⁵

Since the decision in the case of *Jan Mayen*, and the assimilation of special or relevant circumstances with equitable criteria, the Court simply refers to the factors that it considers as

¹⁹² *Tunisia v Libya*, *supra* note 84 at para 70.

¹⁹³ *Ibid*, dissenting opinion of Judge Oda at para 1.

¹⁹⁴ Notably in Weil, *supra* note 11.

¹⁹⁵ *Canada v France*, *supra* note 120, dissenting opinion of Judge Weil at para 1.

relevant circumstances. Although the Court continues to state that there is no limit to what it can consider, it has usually, in an effort at consistency and transparency, limited itself to geographical factors that have a distorting effect on boundaries, much as the drafters of the 1958 Convention had envisaged.

2.2.2 Equitable Criteria/Relevant Circumstances

As we saw earlier,¹⁹⁶ the International Law Commission (ILC), when drafting the 1958 Conventions, considered that "special circumstances" justifying a departure from the equidistance rule would be geographical, i.e. islands or exceptional coastal configurations or navigational. However, both State practice and jurisprudence came to view this principle as "a concept which embodies a general appeal to equitable considerations rather than a notion of defined or limited categories of circumstances with an exceptional effect."¹⁹⁷ Indeed, starting with the *North Sea* cases, the Court has reiterated that there was no legal limit to the factors or circumstances that could be considered.¹⁹⁸ In the *UK/France* case, the Court argued that the function of equity is "not to produce absolute equality of treatment, but an appropriate abatement of the inequitable effects of the distorting geographical features," which appears to have been closer in approach to what was envisaged by the ILC. While some concepts, which we would refer to as "principles," such as proportionality or estoppel, were used by the Court, many factors that have been used to assess or correct inequities are more of the nature of "criteria" as the Court stated in the *Gulf of Maine* case. These criteria are then chosen by the

¹⁹⁶ See above at 25.

¹⁹⁷ Ahnish, *supra* note 62 at 44.

¹⁹⁸ *North Sea*, *supra* note 8 at para 93.

Court for their relevancy in the particular case. This assimilation of equitable principles to relevant circumstances, and, from the *Jan Mayen* case, to special circumstances was summed up by Professor Feldman when commenting on the *Tunisia/Libya* case: "(...) consideration of equitable principles cannot be divorced from the relevant circumstances. Inasmuch as the Court did not elaborate equitable principles as such, its analysis focused primarily on identifying and balancing up the relevant circumstances."¹⁹⁹ Consequently, for our purpose, criteria, factors and circumstances are used in the same sense.

In order to understand the wide variety of criteria and circumstances that have been used by the Courts, I have divided them in three groups: The first group is linked to the original concept of the continental shelf, i.e. the natural prolongation of the territory, the second flows from the principle that the land dominates the sea and the third includes the non-physical factors, i.e. those linked to human activity.

A. Natural Prolongation

As we saw earlier, the continental shelf was first defined in physical terms, as a natural prolongation of the land territory of a State. The early jurisprudence, consequently, considered factors linked to this physical definition as being relevant. As stated in the *North Sea Continental Shelf* cases, geology, geomorphology and unity of deposits are attributes of the continental shelf itself. One of the basic equitable principles mentioned by the Court is: "(...) the continental shelf

¹⁹⁹ Mark B Feldman, "Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise" (1983) 77 AJIL 219 at 234.

of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State."²⁰⁰ This principle, however, has been difficult to define in practical terms. Although the Court was submerged, in every case, with scientific and technical evidence and theories on plate tectonics, continental drift and other data and concepts related to the physical nature of the shelf, none of these made any difference in the decisions.²⁰¹ In the recent case of *Nicaragua/Colombia*, the Court reiterated that geological and geomorphological considerations were not relevant to the delimitation of overlapping entitlements within 200 nautical miles of the coast.²⁰² This illustrates the fact that determining what constitutes the continental shelf itself is not something that the Court is inclined to do, as it would mean choosing between competing scientific theories; the Court would much more readily state that the boundary to be decided affects a single shelf. Furthermore, although the jurisprudence has asserted that the continental shelf belongs to the State *ab initio*, as early as the *UK/France* arbitration, the concept of natural prolongation was found not to be an absolute concept and thus subject to restrictions linked to relevant circumstances.²⁰³ This could be seen as restricting the very foundation of the concept of the continental shelf itself as expressed in the Truman Proclamation.²⁰⁴ It could be said that natural prolongation could not be an equitable principle or criterion for delimitation since it is the basis

²⁰⁰ *North Sea*, *supra* note 8 at para 85.

²⁰¹ Keith Highet, "Whatever Became of Natural Prolongation?" in Dallmeyer & DeVorse, *supra* note 108, 87 at 88-89.

²⁰² *Nicaragua v Colombia*, *supra* note 126 at para 214.

²⁰³ *UK v France*, *supra* note 69 at para 191.

²⁰⁴ Elizabeth Zoller, "L'affaire de la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du nord" (1977) 23 AFDI 359 at 391-392.

of entitlement itself.²⁰⁵ In the *Tunisia/Libya* case, however, the Court distinguished between the notion of natural prolongation, as a definition of the continental shelf, and as a factor to be considered towards an equitable solution. Finally, the Court completely rejected factors linked to the sea-bed in the *Libya/Malta* case, in view of the distance criterion favoured in the *UNCLOS*, at least within the 200-mile limit.²⁰⁶ In his separate opinion, Judge Valticos goes even further, stating that chance configuration of the sea-bed could have hardly been a legitimate basis for an equitable delimitation.²⁰⁷ Although the Court itself had assimilated the concept of natural prolongation to that of the physical shelf, author Mark Feldman has agreed with the separate opinion of Judge Jimenez Arechaga in the *Libya/Malta* case, that the concept of natural prolongation includes also a geographical element, in that it comprises the principle of non-encroachment.²⁰⁸ As the principle of non-encroachment is considered more widely, not as being limited to the continental shelf, but more in terms of projection from the coast, for our purpose, it will be reviewed as part of the geographical factors.

With the potential extension of the continental shelf beyond the 200-mile limit, geological and geomorphological factors might experience a renaissance in the delimitation of the continental shelves when the distance factor and the overlap with the EEZ cease to be determinative. The definition of that part of the shelf is mostly geologically based and it appears

²⁰⁵ Kwiatkowska, "The ICJ Doctrine", *supra* note 10 at 137.

²⁰⁶ *Libya v Malta*, *supra* note 9 at para 40.

²⁰⁷ *Ibid*, opinion of Judge Valticos at para 4.

²⁰⁸ Feldman, *supra* note 199 at 227.

probable that, at least in the Arctic, States intend to rely heavily on those factors in advancing their claims.

B. Geographical Factors

Geographical factors are based on the principle that the land dominates the sea. This means that the Court will assess criteria like the configuration of the coastlines, coastal protuberances that would cut-off the maritime area lying in front of one State, as well as other particular features that might cause an inequitable distortion of the boundary. Islands are often an important factor to consider since they impact on a boundary line in multiple ways depending on their location and size. The issue of proportionality has become central to boundary determination. It has been used both as a factor in determination and as a principle to verify the equitableness of a particular line. We will be reviewing the issue as part of the geographic factors since, in the end; the effect is the same regardless of how the Court has qualified it.

Because of the trend and the nature of a single line boundary, encompassing both the continental shelf and the exclusive economic zone delimitation, the Court, starting in the *Gulf of Maine* case, highlighted the importance of criteria derived from geography as the only ones common to both zones. Geographical considerations had always been used prominently in determining boundaries, however, it is only more recently that geography would be the main, and usually the only, source of relevant circumstances.

Proportionality

The issue of proportionality appeared first in the *North Sea* cases, not as a purely geographical concept but as part of the notion of equity raised by the Court. The Court found that the equidistance method would be inequitable to Germany since, despite having a coastline of about equal length to those of her neighbours, the resulting delimitation would mean her having a much smaller maritime area. This accident of geography, placing Germany at the back of a concave bay, would be so distorting as to be unreasonable. In the *Anglo-French* case, the Court reiterated that proportionality was not an independent source of rights but a relevant factor. It was disproportion, rather than proportionality, that was to determine the effect that the Court would give to a particular geographic feature.²⁰⁹ In that case, and subsequent ones, the Court would assert that proportionality was not a criterion in itself but a means of validating the line established using other criteria.²¹⁰ In his separate opinion in the *Jan Mayen* case, Judge Weeramantry stated that disproportionality constituted both a "special circumstance" under Article 6 of the 1958 Convention and a "relevant circumstance" under customary international law. He also stated that proportionality can be used as a test to verify the equity of delimitation.²¹¹

Proportionality was originally not defined as relating solely to the length of the coastline. Most cases have made this direct link but there could be other factors to be considered, such as the ratio of maritime areas that was also checked against proportionality in the case between Romania and Ukraine. In the more recent case of *Nicaragua/Colombia*, the

²⁰⁹ *UK v France*, *supra* note 69 at para 100-101.

²¹⁰ *Gulf of Maine*, *supra* note 3 at para 185.

²¹¹ *Denmark v Norway*, *supra* note 112, separate opinion of Judge Weeramantry at para 232.

Court declared that the purpose of the disproportionality test is to see whether the respective shares of the relevant area are disproportionate to the respective coastlines.²¹² In both the *Gulf of Maine* and the *Libya/Malta* cases, the Court made a direct link between the equal entitlement to the overlapping area and the differences in the length of the coasts, thus linking the rule of proportionality directly to the length of the coast. In the late 20th century, the Court changed the method it used to determine the boundary line, as we saw in Chapter 1. It went from looking at all the factors to determine what was relevant in the construction of a line, to first establishing an equidistance line and then adjusting it after considering special circumstances. Since the adjustment is made as part of the determination of the shifting of the equidistance line, there is less impact in having an a posteriori review using proportionality. Thus, as seen in cases such as *Jan Mayen* and *Trinidad and Tobago/Barbados*,²¹³ the Court has used the difference in length of the coasts as special circumstances that justified an adjustment to the equidistance line. Similarly, in the *Nicaragua/Colombia* case, the Court identified the disproportion of the coastlines as a relevant circumstance and adjusted the line accordingly, thus rendering somewhat moot the proportionality test at the end of the process. The Court did so by disregarding certain small islands and low-tide elevations as basepoints²¹⁴ and then giving a different weight to basepoints from each country.²¹⁵ It must be said, however, that, even in the earlier cases, the adjustment was also done at the outset so that the Court never had to find

²¹² *Nicaragua v Colombia*, *supra* note 126 at para 193.

²¹³ The Court stated that the identification of the relevant coasts abutting the areas to be delimited was an objective criterion, relating to the very source of entitlement : *Barbados v Trinidad and Tobago*, *supra* note 123 at para 231.

²¹⁴ *Nicaragua v Colombia*, *supra* note 126 at para 202.

²¹⁵ The Court weighed each basepoint for Colombia one to three for Nicaragua: *Ibid* at para 234.

the result disproportionate. It only found that, had equidistance been used, the result would have been disproportionate. Therefore, despite an apparent complete reversal in the way the Court assesses the delimitation, the effect of the differences in coastal lengths has not really changed. What has changed, with the method of first applying an equidistance line and then looking at factors, is the part of the coastline that is considered relevant. Previously, because factors were looked at in the abstract, the relevant coastline to be considered by the Court was also a factor to be weighed by the Court. This led to criticism that there was too much subjectivity and uncertainty in the assessment. Recent cases have inserted a higher level of predictability in this factor by considering only the coastlines used in the determination of the equidistance line as relevant coastlines and excluding coasts that did not project towards the area to be delimited, such as in the case of bays. In the delimitation between Romania and Ukraine, the International Court stated that the relevant coastline has two legal aspects, first, to determine the overlapping area, and second, to assess proportionality.²¹⁶ In that same case, the Court referred to its judgement in the *Tunisia/Lybia* case and its statement that “the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court.”²¹⁷ For this reason, the Court refused to accept Ukraine’s contention that the coast of Karkinitits’ka Gulf formed part of the relevant coast.²¹⁸

²¹⁶ *Black Sea*, *supra* note 125 at para 78.

²¹⁷ *Tunisia v Libya*, *supra* note 84 at para 75, quoted in *Black Sea*, *supra* note 125 at para 99.

²¹⁸ *Ibid* at para 100.

Configuration of the Coastline

This criterion has been shown to be the one, with the presence of islands, that most affects the delimitation, especially in earlier cases. It includes the relationship between the coasts of the relevant States, a change of direction of the coast, as well as the presence of unusual features, such as bays or projections. Although the Court has consistently maintained that its role was not to "refashion geography" or to try to equalise the Parties, its growing propensity to find inequity in coastal incidents was met with an equally growing chorus of criticism that it was doing exactly that. Starting from the *North Sea* cases, the Court stated that: "It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity."²¹⁹ Since the Court had determined that inequities caused by geographical features were, more often than not, present, subsequent decisions relied heavily on coastal configuration to determine the boundaries, and sought to address every irregularity that could have a distorting effect on the boundary. While it was understandable for the Court to find the coastal configuration relevant in the *North Sea* cases, in view of its deep concavity and the fact that Germany was sitting at the back of it, the subsequent interpretation of this decision led to an increasing individualization of decisions to the detriment of principles. The International Law Commission had envisaged special circumstances to include "exceptional coastal configuration"; the Court's decisions appear to demonstrate that those exceptions were prevalent, making special circumstances more of a norm than an exception. In the *UK/France*

²¹⁹ *North Sea*, *supra* note 8 at para 89.

case, the tribunal stated that irregularities of one coast compensated for the irregularities of the other,²²⁰ leading to the conclusion that all coastal events could have an impact on the line, not just the ones that created a disproportionate effect considering their importance. Indeed, in cases such as *Guinea/Guinea-Bissau* and *Gulf of Maine*, every aspect of the coastal geography was weighed and considered, including, in the *Guinea/Guinea-Bissau* case, the coast of the entire West African region.²²¹ In the past 10 years, however, the Court has returned to the principle of the *North Sea* cases: "It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result."²²² The exceptional character of the principle is very evident in that very few circumstances related to coastal geographic elements have been found in the last 10 years to have warranted a line other than the equidistance line. An important case on the issue is the case of *Nicaragua/Honduras* where the changing morphology of the coast made it impossible to identify basepoints. In that case, the Court relied on the special circumstances exception to apply the method of the perpendicular to the coast in order to achieve an equitable result.

In view of the primary importance that coastlines and geography play in boundary delimitation and the current method, as seen in Chapter 1, of first drawing a provisional equidistance line and then evaluating the relevant circumstances, the issues of relevant

²²⁰ *UK v France*, *supra* note 69 at para 103.

²²¹ *Guinea v Guinea-Bissau*, *supra* note 103 at para 104.

²²² *North Sea*, *supra* note 8 at para 91.

coastlines and basepoints have become crucial. Previously, what constituted relevant coastlines was considered one of the factors to be decided and weighed by the tribunal. Indeed, the method of identifying the relevant coastlines, and of measuring their relevant lengths, was the basis of the dissent of Judge Gotlieb in the *Canada/France* determination around St-Pierre and Miquelon, especially the fact that the tribunal had considered coasts that were not even facing towards the area to be delimited. The Court has since determined that the relevant coastlines are the ones belonging to the States to be delimited, and not that of third States,²²³ facing the area to be delimited,²²⁴ and used for the drawing of the provisional equidistance line.²²⁵ This, in turn, has made the identification of basepoints important. International law does not stipulate that the basepoints used to delimit maritime areas between States be the same as those used to fix external boundaries of a State between its own maritime areas and the high seas.²²⁶ The Court has often proceeded to establish its own basepoints when making a determination. As such, it has ignored basepoints used by the Parties, especially islands and other protuberances. In the case of *Romania/Ukraine*, for example, the Court eliminated as a basepoint both the seaward end of Sulina dyke and Serpent Island,²²⁷ and, in the *Qatar/Bahrain* case, the Court eliminated a number of low-tide elevations of both Parties. In the *Nicaragua/Colombia* case, the Court used basepoints on the islands fringing the coast of Nicaragua and disregarded small islands and cays on the Colombia side, arguing that placing basepoints on very small features far

²²³ *Cameroon v Nigeria*, *supra* note 118 at para 291.

²²⁴ *Black Sea*, *supra* note 125 at para 99.

²²⁵ *Guyana v Suriname*, *supra* note 124 at para 352.

²²⁶ *Eritrea v Yemen*, *supra* note 114, joint dissent of Judges Bedjaoui, Ranjeva and Koroma at para 183.

²²⁷ *Black Sea*, *supra* note 125 at paras 138-140 and 149 respectively.

from the coast of other islands would create too much distortion.²²⁸ This, however, demonstrates some sort of inconsistency in the method applied by the Court in that, instead of drawing a provisional line according to geography as it finds it, and then adjusting it in view of the criteria, the Court looks at the factors that could distort the line before it even draws an equidistance line and then eliminates or compensates for those a priori. Not surprisingly, in the end, the Court, having already adapted the equidistance line, usually finds no circumstance that would justify an adjustment to the line.

Islands

The issue of islands has been one of the most difficult for the Court to address in view of the specificity of each case. Their status themselves, as being generators of maritime areas, was one of the most contentious debates in the Third Law of the Sea Conference, with various factors such as their size, population, geological structure or contiguity to the principal territories having been suggested as potential determining factors.²²⁹ In the end, the Parties agreed on a rather unclear definition, in that only islands that can sustain human habitation or economic life of their own shall have an EEZ or a continental shelf.²³⁰ In many cases, because of that definition, the Court avoids having to make a determination as to the legal status of a particular island, only assessing its relevance to the boundary between States. It will rather consider islands as a distorting factor on a boundary line or in reference to the proportionality

²²⁸ *Nicaragua v Colombia*, *supra* note 126 at paras 201-202.

²²⁹ Shigeru Oda, *International Law of the Resources of the Sea* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979) at 105.

²³⁰ UNCLOS, *supra* note 27, art 121.

principle. Islands have been considered by the Courts in relation to their size, position and status. As reminded recently by the International Tribunal for the Law of the Sea (ITLOS) in the case between Bangladesh and Myanmar, neither case law nor State practice indicate a general rule concerning the impact to be given to islands.²³¹ In many cases, islands, when they are rather unimportant, are ignored completely in the delimitation. Such was the case, for example, of Sable Island between Newfoundland and Nova Scotia,²³² of Filfa Islet in the *Libya/Malta* case²³³ or of Al-Tayr and the island group of Al Zubayr in the *Eritrea/Yemen* case.²³⁴ In some other cases, they will be given half effect, such as the case of the Scily Isles in the *UK/France* arbitration. In that case, the Court clearly stated that the islands would create a distorting effect while the rest of the coastlines were relatively equal. Equity thus necessitated a remediation of this effect which would be achieved by allocating only half the effect that the islands would otherwise have on an equidistant line.²³⁵ The Court took the same view in the *Tunisia/Libya* case in relation to the Kerkennahs, finding that to give them full effect would be inequitable.²³⁶ The Court did not, however, as pointed out by Judge Schwebel in his separate opinion, really explain why the effect of the islands would be excessive.²³⁷ In the *Bangladesh\Myanmar* decision, the tribunal stated that, for the EEZ and the continental shelf, giving effect to St-Martin

²³¹ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Case no.16, 14 March 2012 (International Tribunal for the Law of the Sea), online: ITLOS <<http://www.itlos.org/index.php?id=2&L=0>> at para 147 [*Bangladesh v Myanmar*].

²³² In that case, the tribunal first started by giving half effect to Sable Island. It found, however, that the cut-off effect of the island required further adjustment. This adjustment, i.e. giving no effect to Sable Island, was also found relevant in view of the disparities in the length of the Parties's coasts in *Newfoundland v Nova Scotia*, *supra* note 119 at paras 5.13, 5.15.

²³³ *Lybia v Malta*, *supra* note 9 at para 64.

²³⁴ *Eritrea v Yemen*, *supra* note 114 at para 148.

²³⁵ *UK v France*, *supra* note 69 at paras 249-251.

²³⁶ *Tunisia v Libya*, *supra* note 84 at paras 128-129.

²³⁷ *Ibid*, separate opinion of Judge Schwebel.

Island would cut-off Myanmar's seaward projection in a manner that would cause an unwarranted distortion of the line. It therefore concluded that the island was not a relevant circumstance and did not give it any effect.²³⁸ For the territorial sea boundary, the tribunal had also refused to consider St-Martin Island as a special circumstance; however, in that event, the tribunal came to the conclusion that not being a relevant circumstance meant that the island should be given full effect.²³⁹ It would have been more accurate for the tribunal to simply state that the island was indeed a special circumstance and that, for that reason, it warranted a different assessment for the territorial sea than for the EEZ. Although there was some debate as to whether the status of an island as an independent country, such as the case of Malta, would require the Court to apply different rules, this approach was eventually rejected by the Court. The only time where the status of islands will have an impact is if they belong to one Party while lying closer in distance to the other, i.e. on the "wrong" side of the line. In that case, the Court will usually, in keeping with State practice in this area, allocate a 12-mile territorial sea around an island but not take it into consideration when establishing the boundary between the two states. This creation of an enclave was done, for example, with the Anglo-Norman islands off the coast of France²⁴⁰ as well as to Abu Musa Island in the dispute between Dubai and Sharjah.²⁴¹ More recently, a number of small Colombian islands were enclaved in the *Nicaragua/Colombia* case.²⁴² Besides the issue of what effect is to be given to islands in the determination of the boundary, the Court also needs to determine whether a particular island

²³⁸ *Bangladesh v Myanmar*, *supra* note 231 at paras 318-319.

²³⁹ *Ibid* at para 152.

²⁴⁰ *UK v France*, *supra* note 69 at para 202.

²⁴¹ *Dubai-Sharjah Border Arbitration* (1981), 91 ILR 543 at 677.

²⁴² *Nicaragua v Colombia*, *supra* note 126 at para 238.

should be used as a basepoint for the tracing of the equidistance line and whether the coastal length of the island is to be included in the measurement of the total length for the proportionality test.²⁴³ In the *Nicaragua/Colombia* case, the Court disregarded small islands to determine basepoints when drawing the provisional equidistant line, and then weighted each basepoint three to one in favour of Nicaragua to adjust the line to reach an equitable solution in view of the ratio of coastal lengths.²⁴⁴ This illustrates the fact that factors and criteria are not independent from each other but are intertwined, and it is only the interplay between them that will allow the Court to determine what it considers an equitable boundary.

Non-encroachment

Non-encroachment has often been referred to as a principle, rather than a factor or a criterion to be used as relevant or special circumstances. The Court has linked it to the rights of states over their shelf and maritime areas as 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."²⁴⁵ In that the principle of non-encroachment is closely linked to the notion of distance, which has sometimes been used as a criterion in itself but has, since the *UNCLOS*, mostly been considered rather as a principle of entitlement. Since adjacent or opposite States both have the same entitlement with regard to distance for the EEZ and continental shelf, the notion itself is not very useful in determining the delimitation of any overlapping area. At least one author views non-encroachment as a

²⁴³ *Black Sea*, *supra* note 125 at para 127-149 and 163-168 respectively.

²⁴⁴ *Nicaragua v Colombia*, *supra* note 126 at para 234.

²⁴⁵ *Lybia v Malta*, *supra* note 9 at para 46.

fundamental equitable principle, in that it includes factors such as adjacency, proximity, distance and coastal projection.²⁴⁶ As we saw earlier, it has served mostly in the use of the method of equidistance as a preliminary line to be drawn before the evaluation of relevant circumstances. As such, it has a procedural rather than a substantive impact on the delimitation. In the *Gulf of Maine* case, the Court rejected the proximity (and thus the equidistance) argument on the basis that international law conferred on a coastal state a title to an adjacent continental shelf and maritime zone and not that it recognized the title conferred by adjacency.²⁴⁷ Similarly, in the *Libya/Malta* case, the Court rejected equidistance as a method, although it called non-encroachment a principle, and distance from the coast a basis for entitlement.²⁴⁸ This, in my view, leaves non-encroachment as the equivalent of a relevant circumstance, like the others, that will be assessed by the Court in determining an equitable solution. This is indeed what happened in the *Nicaragua/Colombia* case where the Court had to determine the boundary between the coast of Nicaragua and a fringe of small islands belonging to Colombia that stretched almost the same length. The Court found that the cut-off effect of Nicaragua's coastal projection was produced by a few small islands which were many nautical miles apart. This was a relevant consideration which required an adjustment.²⁴⁹

²⁴⁶ Roger Gillot, "The Principle of Non-Encroachment: Implications for the Beaufort Sea" (1994) 32 Can YB Int'l L 259 at 270.

²⁴⁷ *Gulf of Maine*, *supra* note 3 at para 103.

²⁴⁸ *Libya v Malta*, *supra* note 9 at para 43.

²⁴⁹ *Nicaragua v Colombia*, *supra* note 126 at para 215.

C. Non-geographic Factors

Although the Court has repeatedly stated that there was no limit to the considerations which States can use to delimit their boundaries, in making its decisions, it has almost solely depended on geographic considerations. Non-geographic factors are numerous, including economic and social considerations, but also historical, navigational, environmental or security considerations. Other legal principles, such as estoppel and the conduct of the parties can also be considered as factors. In every case to be determined by third party decision-makers, States have submitted evidence linked to those factors. This is consistent with the fact that those factors have the most impact on States and are usually at the root of the desire to delimit their boundaries. Indeed, as the Court pointed out in its very first case: " (...) States in most cases had not found it necessary to conclude treaties or legislate about their lateral sea boundaries with adjacent States before the question of exploiting the natural resources of the seabed and subsoil arose (...)." ²⁵⁰ However, even though the impetus for boundary delimitation is usually linked to resources exploration and exploitation, both of the continental shelf and of the water superjacent, the Court has only, in a very limited fashion, opened the door to such factors as criteria in boundary delimitation. In doing so, the Court has sought to avoid the appearance of subjectivity. Factors related to geography have the advantage of being directly linked to the very foundation of entitlement to any zone, whereas it would be more difficult to establish what impact non-geographical factors should or could have on a particular boundary. In the *Gulf of Maine* case, a case, if ever there was any, that had fisheries at its very core, the Court declared:

²⁵⁰ *North Sea*, *supra* note 8 at para 48.

It should be emphasized that these fishing aspects, and others relating to activities in the fields of oil exploration, scientific research, or common defence arrangements, may require an examination of valid considerations of a political and economic character. The Chamber is however bound by its Statute, and required by the Parties, not to take a decision *ex aequo et bono* but to achieve a result on the basis of law.²⁵¹

Paradoxically, it was in the same case that the Court not only stated that there were no limits to factors that it could consider, but also that it was up to the Court to determine what weight to be given to each factor. Therefore, despite having raised the process of boundary delimitation to the summum of subjective assessment, the Court refused to consider factors relevant to the very foundation of the request, on the basis that it would call for an assessment based on corrective or distributive equity.

This concern, and the difficulty with which the evaluation of such considerations could be fraught, has led, according to Judge Weeramantry, to a breach of equity: "In the anxiety to concretize equitable principles by relating them to demonstrable and quantifiable data such as geographic data we may perhaps shut out important considerations relevant to equity."²⁵² For our purpose, we have grouped these factors into three categories: 1-Historical rights/conduct of the Parties; 2-Economic factors, including access to resources; and 3-Navigational and security considerations.

Historical Rights/Conduct of the Parties

Historical rights as discussed here is not the same as historical title as defined in Article 15 of the *UNCLOS*. Historical title refers to a maritime area already delimited by agreement of the

²⁵¹ *Gulf of Maine*, *supra* note 3 at para 59.

²⁵² Weeramantry, *supra* note 153 at 292.

Parties or other method. We are here reviewing historical rights arising out of State practice and considered a special or relevant circumstance in a delimitation not otherwise already established:

If some right arising out of any situation has been the regular practice, then this right should be regarded as established in law. That is to say, it is better not to modify a 'settled state of things'. It is rather better to regard this right as the 'historic right'. If this right is modified, friction may arise between the claimants concerned. From this point of view, the 'historic right' is considered as constituting 'special circumstances'.²⁵³

For the Court to consider that the conduct of the Parties establishes some sort of historic right requires more than mere toleration by one Party of the use of the area by the other. There must be evidence that the Parties themselves had considered a particular line as constituting a boundary. This consensus between the Parties will not definitely establish the line but will be a factor to be taken into consideration in the Court's evaluation. This evidence could be adduced through the history of fishing and management of the area, such as was the case in the *Grisbadarna* arbitration, or through the tacit or express agreement of the Parties on oil concession grants such as in the *Nigeria/Cameroon* case. In the *Guyana/Suriname* case, the Court considered that an agreement between the Parties, albeit not signed into a treaty, but applied by the Parties themselves for many years, constituted sufficient evidence of a consensus as to the determination of the boundary, especially if that agreement was based on factors that could also themselves be considered special circumstances, such as, in this case, navigational considerations.²⁵⁴ In the *Tunisia/Libya* case, the line established by the conduct of the parties

²⁵³ Rahman, *supra* note 24 at 177-178.

²⁵⁴ *Guyana v Suriname*, *supra* note 124 at paras 295-309.

was not only for both oil resources and fishing but also corresponded to the line perpendicular to the coast at the terminus of the land frontier. The Courts, however, will be very reluctant to find that there exists a tacit agreement between the Parties: "Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily presumed."²⁵⁵ This statement by the ICJ was recently quoted with approval by the ITLOS in its first maritime boundary determination case.²⁵⁶ This reluctance is also due to the fact that the Courts do not wish to impede the ability of States to cooperate along disputed borders in the fear that a *modus vivendi* or even a formal arrangement could lead to a crystallization of the boundary: "It would be contrary to the public interest in the peaceful resolution of international disputes if a state that exercised restraint in its activities in an area claimed by another state were punished by implying it had consented to that claim."²⁵⁷ In its boundary dispute with Nicaragua, Colombia argued that the conduct of the Parties with regards to the 82nd meridian constituted a relevant circumstance even though the Court had previously ruled that the boundary had not been established either by treaty or by tacit agreement. The Court declared that "[w]hile it cannot be ruled out that conduct might need to be taken into account as a relevant circumstance in an appropriate case, the jurisprudence of the Court and of arbitral tribunals shows that conduct will not normally have such effect."²⁵⁸

²⁵⁵ *Nicaragua v Honduras*, *supra* note 7 at para 253.

²⁵⁶ *Bangladesh v Myanmar*, *supra* note 231 at para 117.

²⁵⁷ Feldman, *supra* note 199 at 234.

²⁵⁸ *Nicaragua v Colombia*, *supra* note 126 at para 220.

The conduct of the parties leading to evidence of a consensus is not the same as the issue of estoppel, which has sometimes been raised in disputes. Estoppel has not successfully been used by one Party to argue for a particular boundary. This no doubt is due to the fact that it is very difficult to prove estoppel since it requires: conduct or declarations which are clear and unequivocal; an effective and legitimate reliance, in good faith, on the part of the other party leading to particular conduct; and, a loss or damage resulting from that reliance.²⁵⁹ Indeed, estoppel was raised recently by Bangladesh against Myanmar in their territorial sea boundary dispute but was rejected by the tribunal.²⁶⁰

Economic Factors

The issues of exploration and exploitation of resources is at the core of most boundary disputes. These resources are increasingly valuable and include fisheries as well as hydrocarbon and minerals. It is indeed the extension of the continental shelf and, later, the creation of the EEZ that led to the explosion of boundary disputes in the last fifty years. However, as stated in the recent decision of the ICJ in the *Romania/Ukraine* case, itself quoting the *Barbados/Trinidad and Tobago* arbitral ruling: "Resource-related criteria have been treated more cautiously by the decisions of the international courts and tribunals, which have not generally applied this factor as a relevant circumstance."²⁶¹ In the *North Sea* cases, however, the Court had left the issue open, identifying "unity of deposits" as a factual element to be considered by the Parties in their

²⁵⁹ Kolb, *supra* note 53 at 34.

²⁶⁰ *Bangladesh v Myanmar*, *supra* note 231 at para 125.

²⁶¹ *Black Sea*, *supra* note 125 at para 198.

negotiation.²⁶² In his separate opinion in the *North Sea* cases, Judge Ammoun takes the opposite view, raising two objections to the consideration of economic factors or objectives, including unity of deposits, as relevant. Firstly, the delimitation according to resources would constitute an apportionment of the shelf, i.e. distributive justice, which the court could not do, and secondly, new discoveries would require rectification of the boundary over time.²⁶³ Having identified the issue, however, the Court gave no indication as to how this factor could be evaluated, only that there could be a risk of wasteful or prejudicial exploitation by one State to the detriment of the other. This same ambiguous identification of factors was made also in the *Libya/Tunisia* case when the Court stated that, although economic factors could not be considered since they were too variable, the presence of oil-wells could possibly be considered when weighing the factors to achieve an equitable result.²⁶⁴ In the *Libya/Malta* case, the Court did state that natural resources of the continental shelf might constitute relevant circumstances since those are at the very heart of the claim itself, however, it completely rejected consideration of the relative economic positions of the States as a consideration.²⁶⁵ This again leaves us with very little guidance as to the practical effect that natural resources would have on a particular delimitation should they be considered a criterion. The Court attempted to clarify this in the *Gulf of Maine* case, especially considering the evidence adduced by both Parties with regard to the importance of fisheries, as well as sub-soil potential, in the disputed area. It stated

²⁶² *North Sea*, *supra* note 8 at para 97.

²⁶³ *Ibid*, separate opinion of Judge Ammoun at para 53.

²⁶⁴ *Tunisia v Libya*, *supra* note 84 at para 107.

²⁶⁵ *Lybia v Malta*, *supra* note 9 at para 50.

that while factors stemming from "human and economic geography"²⁶⁶ where ineligible to be considered as part of the delimitation itself, these considerations could be relevant to the assessment of the equitable character of the line established from criteria of physical and political geography:

What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the Livelihood and economic well-being of the population of the countries concerned.²⁶⁷

Since the Court found no such catastrophic repercussion in that case, there is no indication as to what effect such finding could have on the delimitation itself.

It is only in the *Greenland/Jan Mayen* case that the Court used access to natural resources, in this case fishing, as a determining factor in the a priori determination of the boundary. It stated that this was required to give the Parties equal access to the resource.²⁶⁸ Although the judgement quotes the case of the *Gulf of Maine* with regard to the requirement to avoid catastrophic repercussions, it makes no mention of what those repercussions could be that they would seek to avoid. The only reference is to the fact that equal access was required "for the vulnerable fishing communities concerned."²⁶⁹ In the same decision, however, the Court stated

²⁶⁶ *Gulf of Maine*, *supra* note 3 at para 232.

²⁶⁷ *Ibid* at para 237.

²⁶⁸ *Denmark v Norway*, *supra* note 112 at para 92.

²⁶⁹ *Denmark v Norway*, *supra* note 112 at para 75.

that the respective socio-economic situation of the populations was not a factor, quoting its previous decision in the *Libya/Malta* case:

The Court does not however consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law. It is clear that neither the rules determining the validity of legal entitlement to the continental shelf, nor those concerning delimitation between neighbouring countries, leave room for any considerations of economic development of the States in question. While the concept of the exclusive economic zone has, from the outset, included certain special provisions for the benefit of developing States, those provisions have not related to the extent of such areas nor to their delimitation between neighbouring States, but merely to the exploitation of their resources." (*I.C.J. Reports* 1985, p. 41, para. 50.)²⁷⁰

The Court then goes on to conclude that "there is no reason to consider either the limited nature of the population of Jan Mayen or socio-economic factors as circumstances to be taken into account."²⁷¹ This lack of explanation for allocating equal access to the resources was raised by Judge Oda in his separate opinion, while Judge Schwebel questioned whether the Court was repudiating its own dicta that there could be no question of distributive justice by allocating equal access, even in the absence of any evidence of "catastrophic repercussion."²⁷² This "innovation" as referred to by Judge Schwebel, of considering distributive justice as part of an equitable delimitation, was not followed in subsequent cases where the jurisprudence went back to the ex post facto test of 'catastrophic repercussions' in cases such as *Canada/France* and *Romania/Ukraine*. In the case of *Canada/France*, the delimitation established by the tribunal

²⁷⁰ *Ibid* at para 80.

²⁷¹ *Ibid*.

²⁷² *Ibid*, separate opinion of Judge Schwebel at 120.

assigned an EEZ to France much smaller than the one that had been claimed and of a size that would be insufficient to sustain the local fisheries industry. Considering the importance of fisheries to the local economy, the result could have been found to be catastrophic to the local economy. The Court, however, relied on a fisheries agreement between the Parties to find that there would be no catastrophic repercussion on fishermen. This illustrates well the fact that the Court is not likely to put much weight on evidence of repercussions as those are mostly unquantifiable or transitional, while the delimitation of the boundary is final. To borrow the words of Judge Ammoun in the *North Sea* cases, should reliance be placed on human circumstances, the line would have to be adjusted in relation to the economic prosperity of the local population. This would create much more instability and friction than drawing a line and then leaving the Parties to negotiate an agreement on resource-sharing.

In the most recent case, between Nicaragua and Colombia, the ICJ does not refer to a possible catastrophic repercussion test with regard to the effect of a boundary on natural resources distribution. It merely quotes with approval the statement of the arbitral tribunal in *Barbados/Trinidad and Tobago* that resources-related criteria are not generally applied as relevant circumstances. It does not close the door entirely however, by stating that “(...)the present case does not present issues of access to natural resources so exceptional as to warrant it treating them as a relevant consideration.”²⁷³ This leaves the state of jurisprudence a bit

²⁷³ *Nicaragua v Colombia*, *supra* note 126 at para 223. This even though there were reports that the islands' inhabitants, who had been fishing in what had become Nicaraguan waters, feared for their livelihoods: “Colombia and Nicaragua –Hot Waters”, *The Economist* (29 November 2012) online: The Economist <<http://www.economist.com>>.

uncertain as to whether the issue of natural resources should be assessed in an ex post facto test when catastrophic repercussions could colour whether a determined boundary is indeed an equitable solution or as a relevant circumstance in exceptional cases. As for the proportionality issue, it would probably not make much difference whether the factor were used as a consideration in establishing the line or as a method of assessing the equity of the decision *in fine*. Contrary to what we will see in Part II, i.e. in negotiated outcomes, for the Courts, it will only be in the rarest of decisions that such factors would be considered pertinent.

Navigational and Security Considerations

The presence of navigable channels was identified as a circumstance that might warrant a departure from the equidistance line by the International Law Commission in preparation for the 1958 Convention.²⁷⁴ These factors have not been raised very forcefully by States in most cases, probably due to the fact that the delimitations undertaken to date have mostly been controversial over the issue of resources in more open water, farther from the coasts. In the *UK/France* case, the Court did consider navigational, defence and security interests but, considering the status of the Channel as a main navigational route, found them insufficient to warrant a departure from the median line.²⁷⁵ In the delimitation between Guyana and Suriname, the Court referred to the work of the ILC and to the *Beagle Channel* case where the tribunal had considered the desirability of each State being to navigate in its own waters as relevant. It then concluded that, in that particular case, the special circumstance of navigation

²⁷⁴ ILC Report 1956, *supra* note 22 at 300.

²⁷⁵ *UK v France*, *supra* note 69 at para 188.

justified a deviation from the median line.²⁷⁶ Had a median line been used, it would have effectively cut-off Suriname from navigating through its own waters to enter the Corentyne River's navigational channel. However, as we saw previously, the Court had already stated that historical rights and the conduct of the Parties had established the boundary. Consequently, it is not clear what effect, if any, the Court would have given to this issue had a specific line not been already agreed between the Parties. In the recent case between Bangladesh and Myanmar, the ITLOS stated that the question of unimpeded navigation was not an issue to be considered in respect of delimitation.²⁷⁷ However, in the most recent case of *Nicaragua/Colombia*, the ICJ stated that the Court had recognised that legitimate security concerns might be a relevant consideration if a maritime delimitation was affected particularly near to the coast of a State, and declared that it would keep this consideration in mind when determining what adjustment to make in the line.²⁷⁸ However, when the Court explained how it modified the provisional equidistant line, it made no mention of navigation or security and appeared to rely solely on coastal length. Once the line had been modified based on the proportionality factor and the cut-off effect tempered, however, the security issue would no longer have been a concern since Nicaragua gained wide unimpeded access between its coast and the high seas.

In view of the foregoing, we must conclude that, although there is no limit to the factors that the Court can consider in reaching an equitable result, and although the Parties do submit evidence of important considerations of an economic, social or security nature, the Court will

²⁷⁶ *Guyana v Suriname*, *supra* note 124 at para 306.

²⁷⁷ *Bangladesh v Myanmar*, *supra* note 231 at para 170.

²⁷⁸ *Nicaragua v Colombia*, *supra* note 126 at para 222.

most likely rely exclusively on what it has referred to as 'physical and political geography' to determine the boundary between States.

2.3 Future Perspectives

The rules and principles relating to the delimitation of maritime boundaries were established by the Court at the beginning of the expansion of maritime areas, at a time when technology for exploration and exploitation of the resources of the soil and sub-soil of the sea was limited. In the *North Sea* cases, the Court stated that the question of natural resources was less one of delimitation than one of exploitation.²⁷⁹ The Court has taken great care in stating that economic factors were not factors to be considered in decision-making. It has sought, thus, to avoid the perception that its allocation was based on principles of distributive justice, which would be *contra legem*.²⁸⁰ However, this disregards the fact that economic factors are the main interests at stake in boundary disputes. The Court has avoided this debate and failed to solve the issue by taking a narrow approach based on the same principles of sovereignty applicable to territory:

(...) the criteria which relate almost exclusively to division of the seabed of the continental shelf are concerned more with territorial acquisition than with resource management. Rights to ocean space allocated on that criterion focus on boundary location in the off-shore. Planning and management activity within such a spatial framework becomes inhibited or constrained from dealing with functional realities of the ocean system.²⁸¹

²⁷⁹ *North Sea*, *supra* note 8 at para 17.

²⁸⁰ Rossi, *supra* note 184 at 194.

²⁸¹ Kenneth P Beauchamp, "The Management Function of Ocean Boundaries" (1986) 23 San Diego L Rev 611 at 658.

In the post-colonial era, newly independent countries started demanding an equal share of the resource as part of boundary delimitation disputes. States, in the context of the New International Economic Order, sought to employ equity as a primary tactic to gain access to resources according to the principle of *res communis*, when not able to secure outright appropriation.²⁸² This idea of equal sharing and distributive justice permeated the Third Law of the Sea Conference. The preamble to *UNCLOS* calls for establishing a legal order for the seas that will, inter alia, promote "the equitable and efficient utilization of their resources " in order to achieve "the realization of a just and equitable international economic order which takes in to account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked." Many articles refer to the rights of land-locked or disadvantaged States to participate on an equitable basis, in the exploitation of the resources of coastal States or other forms of redistribution.²⁸³

Although the Court has stated that there is the possibility of wasteful or prejudicial exploitation of boundary straddling resources by one State, the apportioning of resources has not been integrated in the jurisprudence of boundary delimitation. The Court prefers to view the issue separately and to leave to States the responsibility of reaching resource-sharing agreements on the margin of boundary delimitation decisions. In that, the Court is at odds with the practice of States, as we will see in Part II. This also has the potential to leave States with unequal negotiating power since agreements would need to be negotiated after a judicial

²⁸² Rossi, *supra* note 184 at 199-200.

²⁸³ Notably articles 69 and 70 on the exploitation directly by certain countries of the resources of others, and article 82 on the redistribution of profits by exploiting countries from their own extended continental shelves.

decision, as opposed to as part of a general boundary agreement. The decisions regarding the extended continental shelves might bring the issue of equal sharing to the forefront and force the Court to address it in view of the fact that the principle of the sharing of the economic benefits of those resources has been specifically included in the *UNCLOS*.²⁸⁴ A parallel might be drawn here with the international law related to water resources where the sovereignty of States is limited by the similar rights of countries sharing the same basin,²⁸⁵ and where apportionment of the resource, and of the benefits deriving from its exploitation, is considered acceptable under the legal principle of 'equitable participation'.²⁸⁶ One could see a time when the principle of equality of access to resources, as defined in the *Jan Mayen* case, might gain more legal persuasion in boundary delimitation law, as States continue to push for equal access as a basic principle in relation to resource law.

Another possible future influence on boundary delimitation law is the rapidly developing international environmental law, especially in relation to pollution and conservation. Although environmental factors were raised in some disputes, notably the *Gulf of Maine* case, the Court has not considered them relevant up to now. Since States have all the same obligations under *UNCLOS* and a number of other international environmental conventions, should the Court consider a State's unwillingness or incapacity to meet those obligations and consider this a relevant factor in order to allocate more area to a State that will better protect the ecosystems

²⁸⁴ *UNCLOS*, *supra* note 27, art 82.

²⁸⁵ Dante A Caponera, *Principles of Water Law and Administration, National and International*, 2d ed, revised and updated by Marcella Nanni (London: Taylor & Francis, 2007) at 217.

²⁸⁶ *Ibid* at 219.

and the resources for the future? The notion of proportionality, which, from its philosophical root, is meant to allocate resources based, at least partly, on merit, would appear not to find such a proposal unreasonable.

Finally, the issue of the extended continental shelf, which has received little attention from the Court to date, could see a shifting of criteria, considering the clear prescription, in *UNCLOS*, that the benefits derived from the exploitation of this area should be shared. Furthermore, considering that exploitation of sea-bed and sub-soil resources is the sole reason for such claims, and that the area is so far removed from the coasts, the principle that land dominates the sea would appear to be of little relevance. Geological or geomorphological factors might make a comeback, however, the difficulties associated with those, as we saw earlier, would remain. Indeed, in the recent decision between Bangladesh and Myanmar, the ITLOS completely ignored the extensive geological evidence that was presented by Bangladesh to show that the shelf in the outer Bay of Bengal was a geological extension of its territory.²⁸⁷ Instead, the tribunal simply extended the same line, making no difference between the distance-based continental shelf and the outer shelf.²⁸⁸

²⁸⁷ The Tribunal found that the evidence was not relevant since the single boundary is determined by geography not geology or geomorphology : *Bangladesh v Myanmar*, *supra* note 231 at para 322.

²⁸⁸ *Ibid* at para 462.

PART II –EQUITY IN STATE PRACTICE

INTRODUCTION

After having seen how the Courts view equity in terms of maritime boundary delimitation, this section will explore how equity is assessed by States themselves when reaching negotiated settlements. In his separate opinion in the *Libya/Malta* case, Judge Valticos expressed his view that the rule of law should reflect States' perception of what constitutes an equitable delimitation. He stated that it would be "highly unfortunate" that there be a divorce between State practice and the Court's jurisprudence.²⁸⁹ He was referring to the use of the median line by States and the fact that the Court had steadfastly refused to consider it as a customary law method of delimitation. His words, however, could also be applied to the notion of equity itself, and how it is considered by States when negotiating maritime boundaries. As seen in Part 1, the Law of the Sea Convention is replete with the notion of distributive justice and authors have advocated for the principle that equity, as applied in international law, should promote harmony and compensation,²⁹⁰ and not constitute merely a geographical equivalent of a mathematical equation. The development of the jurisprudence in maritime boundary delimitation took place in a time of changing views on how States interact with each other and

²⁸⁹ *Libya v Malta*, *supra* note 9, separate opinion of Judge Valticos at para 11.

²⁹⁰ Bermejo, *supra* note 162 at 69. Although not a boundary case, judge Alvarez, in his dissenting opinion in the Status of South-West Africa advisory opinion, argues very much along those same lines when he states that new international law should bring about social justice: "The purposes of the new international law, based on social interdependence differ from those of classical international law :they are to harmonize the rights of States, to promote cooperation between them and to give ample room to common interests; its purpose is also to favour cultural and social progress. In short, its purpose is to bring about what may be called *international social justice*." *South-West Africa*, *supra* note 149 at para 176.

with the global community. The United Nations was formed, and new States were becoming independent at an unprecedented rate. These States were clamouring for a New International Economic Order where the sharing of wealth would be the foundation of international relations. However, following the lead of the International Court of Justice in the *North Sea* cases, the notion of sharing, or apportioning, was rejected time and again by international courts and tribunals. The issue we will explore in this Part is whether States, when negotiating agreements amongst themselves, consider factors other than those elaborated by the Courts, as part of the equitable principles that they use to arrive at their own equitable results. If they consider the same factors, do they analyze their impact and importance in the same manner? In other words, does States' notion of equity correspond to that elaborated by the Courts? Although few maritime boundaries are delimited between neighbours with vastly different development or wealth levels, the evidence appears to suggest nonetheless that the sharing of resources, the very issue that is at the core of the impetus for the delimitation itself, plays a much larger role in State practice than has been allowed to play in third-party determination. This, of course, is much in keeping with the dramatic changes in international relations within the 20th century, a time of rapid globalization and the realization by States that their prosperity and security is more closely inter-dependent than at any other time previously. Consequently, in this Part, we will review the practice of States in the broader context of the new understanding of sovereignty and of modern imperatives spurred by technological advances and the insatiable search for resources. This will lead us to examine the notion of distributive justice as an equitable principle in boundary delimitation, how it influences States in determining their

boundaries and the various models of agreements that are redefining the idea of a single all purpose boundary.

Chapter 1-International Context

1.1. Rethinking Sovereignty in a Global World

Although the notion of sovereignty is at the core of the organizational relationship between States, the understanding of what this means for States has changed considerably in the past hundred years. In the 19th century, States were the sole subject, and object, of international law. Sovereignty was still understood as being inherited from the Peace of Westphalia. The two main sources of international law, convention and custom, are inherited from the fundamental philosophy that forms the foundation of the concept of sovereignty, that of positive absolute State action. However, that relationship model, based on the particular historical imperative of the delicate balance between the Great Powers, was slowly confronted by the realization of a deep interdependence between nations and the need to consider common interests.

The conduct of the Franco-Prussian War (1870-1871), particularly the fact that Parties had ignored their conventional obligations towards injured soldiers, led European jurists to reconsider the impacts of this absolute positivism of States. This renewed interest for natural law among jurists, who considered themselves "internationalists," led to the creation, in 1863, of the Institute of International Law the mandate of which was the development of international law. In the view of its founders, the Institute would be considered the legal conscience of the

civilized world.²⁹¹ Many of the social and philosophical movements of the end of the 19th century, particularly liberalism and socialism, made their way into the legal and international arenas through the works of European jurists. For many liberals, the nation-state system had become a threat to the survival of humanity collectively.²⁹² They promoted limitations on sovereignty, the adoption of a genuine international law and the joining of States into federations or schemes of world government.²⁹³ Political thinkers, such as the influential Leon Bourgeois, the French representative at the Hague Conference of 1899, and, later a founder of the League of Nations, viewed international law as a vehicle to create a solidarity that would act as a universal conscience.²⁹⁴ The Great War precipitated the morphing of sovereignty from an absolute, sacred and unassailable principle into an astonishingly flexible notion.²⁹⁵ This was partly due to the widespread perception amongst jurists that it was this extreme vision of national sovereignty that was the main cause of the war.

In the years that followed, there were two international agreements that, in my opinion, are reflective of the change in how countries perceived their sovereignty with regard to their jurisdiction over their territory. This is fundamental in understanding many of the State practices that developed in the area of boundary delimitation subsequently, as well as their perception of equity in that context.

²⁹¹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, Cambridge University Press, 2002) at 41.

²⁹² Michael Joseph Smith, "Liberalism and International Reform" in Terry Nardin & David R Mapel, eds, *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992) 201 at 219.

²⁹³ *Ibid* at 215.

²⁹⁴ Koskenniemi, *supra* note 291 at 287. Judge Alvarez of the ICJ was very much of that philosophy, see *supra* note 290.

²⁹⁵ Richard B Lillich, "Sovereignty and Humanity: Can they converge?" in Atle Grahl-Madsen & Jiri Toman, eds, *The Spirit of Uppsala: Proceedings of the joint UNITAR-Uppsala University Seminar on International Law and Organization for a New World Order* (Berlin: Walter de Gruyter, 1984) 406 at 413.

The first is the Treaty concerning the archipelago of Spitsbergen,²⁹⁶ north of Norway. The group of islands was considered *terra nullius* until 1920, when the Great Powers agreed to recognize it as part of Norway. Although signatories to the Treaty agreed to recognize Norway's sovereignty over the territory, the convention also stipulates that all the signatories retain full economic rights over the territory, on an equal footing, with Norway. The fact that sovereignty, in this case, did not include absolute rights over the territory was a novel concept that would have been unthinkable even a few years previously. This new concept would lead Robert Lansing, who would later become US Secretary of State, to ask: "Now in Spitsbergen the proposition is to establish a government which can exercise its functions within a territory over which it has no sovereign powers, and which derives no authority from territorial dominion, for none exists. Can it be done?"²⁹⁷ This form of acquisition of territory, involving the disassociation of sovereignty from the rights of exploitation of resources, would prove a strong precedent for States facing expanding territorial claims for the continental shelf or other maritime areas in the second half of the 20th century.

The other influence regarding the intersection of state sovereignty with the notion of acquisition of territory is that of the Antarctic Treaty.²⁹⁸ In signing this treaty, the Parties did not abandon their respective territorial claims. They recognized, however, that "in the interest of all mankind" these claims needed to be suspended in order for states to cooperate in scientific and environmental research. The Treaty thus creates a kind of "joint sovereignty" over the entire territory, where members have the rights and responsibilities in common. Members even

²⁹⁶ *Treaty concerning the Archipelago of Spitsbergen, and Protocol*, 9 February 1920, [1925] ATS 10.

²⁹⁷ Robert Lansing, "A Unique International Problem" 11 AJIL 763 at 765.

²⁹⁸ *The Antarctic Treaty*, 1 December 1959, 402 UNTS 70 (entered into force 23 June 1961).

include States with no territorial claims on the land. These treaties were also the inspiration for the concept of the Common Heritage of Mankind, found in the Outer Space Treaty and the Law of the Sea Convention, where acquisition of sovereignty by States is completely prohibited altogether. More and more, States had come to realize that their fate was intertwined and that the old notion of sovereignty no longer met the needs of this global world.

Even a few years before the Antarctic Treaty, Georges Scelle, then a member of the International Law Commission, mandated to prepare the work of the First Law of the Sea Conference, had warned against the push towards expanded claims over the continental shelf. He suggested that the concept of sovereignty not be attached to the shelf in the draft convention:

The introduction of the concept of sovereignty in the Commission's latest draft appears, on reflection, particularly inadmissible and should be abandoned. It is calculated to multiply the causes of friction between governments and to jeopardize peaceful relations by reverting to imperialist and mercantile occupation practices.²⁹⁹

Georges Scelle had been a persistent critic of the notion that states could be the source of positive law and viewed sovereignty as a fiction and a logical impossibility.³⁰⁰ States, of course, were not ready to abandon the notion completely. As a consequence, the mid-20th century saw a race to acquire more and more of what remained of unclaimed land and water. This race, and the vast difference in capacity between nations to exploit the new found resources, soon led to the realization that, indeed, the mercantile occupation practices and resource exploitation were

²⁹⁹ Proposal by Mr Scelle in "Law of the Sea-Regime of the High Seas" (UN Doc A/CN.4/L.51) in *Yearbook of the International Law Commission 1955*, vol 1 (New York:UN,1960) at 8.

³⁰⁰ Georges Scelle, *Précis de droit des gens, principes et systématique: Première partie: Introduction -Le milieu social* (Paris: Librairie du Recueil Sirey, 1932) at 13-14.

leading to conflicts in areas that were subject to multiple claims. With the more malleable notion of sovereignty acquired in the meantime, however, States were open to the exploration of novel ways to cooperate with their neighbours for the pursuit of interests that they viewed as more and more inter-dependent. It is because of this vision of the pursuit of a wide range of interests that States have translated the more flexible notion of sovereignty into the consideration of distributive justice, or apportioning, to be applied as a principle of equity into the determination of maritime boundaries. Indeed, the development of international law with a view towards social justice, i.e. towards a redistribution of resources, happened at the same time as the maritime areas were being extended with the aim of greater exploitation of the resources of the sea. This, coupled with the evolving notion of sovereignty, are key to understanding how States, considering that their interests in maritime areas are wide-ranging, are applying the principles of distributive justice in order to reach what they consider equitable boundary delimitations. We will therefore review first what is distributive justice in a more philosophical and then legal context before reviewing how States' understanding of the concept translate into practical arrangements.

1.2 Distributive Justice as Equitable Principle

1.2.1 What is Distributive Justice?

As we have seen in Part 1, Aristotle made a distinction between two forms of justice, distributive justice and corrective justice. Distributive justice is manifested in the "distributions of honour or money or the other things that fall to be divided among those who have a share in

the constitution."³⁰¹ He then goes on to explain that the just distribution is that which is proportional.³⁰² The proportionality could take various forms and could be assessed based on such criteria as merit or need.

The ideal of distributive justice, in the context of the New International Economic Order of the post-colonial era, was the subject of renewed interest, and debates, among philosophers, political theorists and jurists.³⁰³ Rawls, in particular, was influential in advancing the theory of distributive justice with the publication, in 1971, of his *Theory of Justice*. Although he refused to see the theory expanded into the international sphere, many others, notably Pogge, strongly argued that there were no reasons not to, advocating a need for institutions to regulate how global resources should be distributed. This "vigorous debate (...) about the nature of distributive justice"³⁰⁴ was often linked to the view that the modern industrial economy had given us the unprecedented power to alter our natural and social condition and that the ancient inequalities were no longer justifiable.³⁰⁵ The nature of the debate is beyond the scope of the present study; however, the fact that issues of global justice and equitable distribution of wealth were widely discussed had an impact on various aspects of international relations. It mirrored many of the social debates and changes affecting nations and the relationship between the people and their government:

³⁰¹ Aristotle, *supra* note 137 at 84.

³⁰² *Ibid* at 85.

³⁰³ See notably Samuel Freeman, "Distributive Justice and *The Law of the Peoples*" in Rex Martin & David A Reidy, *Rawls' Law of Peoples, A Realistic Utopia?* (Oxford: Blackwell Publishing, 2006) at 243-260.

³⁰⁴ Charles Taylor, "The Nature and Scope of Distributive Justice" in Frank Lucash, ed, *Justice and Equality Here and Now* (Ithaca: Cornell University Press, 1986) 34 at 34.

³⁰⁵ *Ibid* at 50-51.

The shift in meaning of 'international justice' during the present century from issues concerning the rule of law to those of distributive justice is thus the result of a declining confidence in and appreciation of the civil conception of international society, and its gradual and partial replacement by a welfare-oriented conception of international society reflecting the application to international relations of concepts and principles that have come to be widely accepted in thinking about internal politics.³⁰⁶

Newly independent countries were demanding a new economic order where the concept of equity went beyond the ideal of equal access to trade. They demanded a concept of equity linked to distributive justice.³⁰⁷ It meant, for them, more control over their resources or at least a more equitable share of the world's wealth: "States associated with the New International Economic Order employ equity as a primary tactic to secure a division and use of resources according to the principles of *res communis* when they are not able to secure an individual appropriation."³⁰⁸ The concept of the Common Heritage of Mankind as well as the Outer space and the Moon treaties are good examples of the use of novel approaches for territories that were determined to be *res communis* in anticipation of certain States acquiring the technology to be able to exploit them. The demand for distributive justice was pushed even further, from the concept mainly focused on redistribution of wealth to an alteration of the basic rules and institutions of international society itself.³⁰⁹ Considering the link between maritime boundaries and the perceived distribution of wealth through the resources of the sea and the continental

³⁰⁶ Terry Nardin, "Distributive Justice and the Criticism of International Law" (1981) 29:2 Political Studies 232 at 241.

³⁰⁷ Dorothy V Jones, "The Declaratory Tradition in Modern International Law" in Nardin & Mapel, *supra* note 292, 42 at 51.

³⁰⁸ Rossi, *supra* note 184 at 199-200.

³⁰⁹ Nardin, *supra* note 306 at 242.

shelf, it is not surprising that the debate would be intrinsically linked to development in how States approach negotiations over their boundaries.

1.2.2 Does it Apply to the Law of the Sea?

As we have seen in Part I, although closely contiguous land under the sea is considered an extension of the territory of a State, *UNCLOS* provides for a variety of terms and concepts that appear to demonstrate that the rights exercised by a State over the under-water territory are not exactly the same as those generally understood to have always been applied to the land territory. Although the terms used are not explained precisely in the context of the Convention itself, certain terms or concepts would not have been possible without the shifting in the understanding of the relationship between States and their sovereignty. Indeed, *UNCLOS* refers to "sovereign rights" in the EEZ and the continental shelf, whereas artificial islands are the subject of, variably: "jurisdiction" in art. 56(1)(b), "exclusive rights" (art. 60(1)) as well as "exclusive jurisdiction" (art. 60(2)). There is no need, for our purpose, to debate the meaning of these various terms and it does not appear, in any case, that States themselves consider them to differ from each other substantively. Suffice to say that the use of various terms illustrates the fact that the concept of sovereignty had ceased to be monolithic and rigid and States wished to recognize the possible various limitations that could be attached to rights of States.

The *UN Convention on the Law of the Sea* has been found by international tribunals, and is widely considered by authors, to reflect customary international law with regards to the manner

in which boundaries are determined between States. Delimitation of both the continental shelf and the EEZ is to be effected by agreement between States, on the basis of international law, in order to achieve an equitable solution. *UNCLOS'* preamble states that one of the goals of the Convention is to facilitate the equitable and efficient utilization of the resources of the oceans. It further states that the achievement of these goals "will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole (...)." The question is whether States consider the achievement of an 'equitable solution' in boundary delimitation to be linked to the achievement of the overall goal of the Convention itself, as expressed in the preamble. Is an equitable boundary one that facilitates the equitable utilization of the resources? International courts have stated that the basis of international law, in the case of maritime boundaries, is the application of equitable principles through the consideration of relevant circumstances. In the *Libya/Malta* case, it specifically stated that, although *UNCLOS* provides for certain provisions that were meant to benefit developing States, those were exclusively related to the exploitation of the resources of the EEZ and not applicable to delimitation between States.³¹⁰ The jurisprudence has never considered the goal of the Convention as a relevant circumstance or even as an underlying principle. Although the equitable principles, or relevant circumstances, are, in theory, limitless, the courts have, consistently, considered only a very restricted category of circumstances as being relevant. Considering that the reason behind boundary negotiations is overwhelmingly the exploitation of resources, States have not been so categorical in excluding one from the

³¹⁰ *Libya v Malta*, supra note 9 at para 1203.

other. In view of State practice, we will consider whether an agreement reached after consideration was given to socio-economic factors and the principles of distributive justice, through proportional apportioning, could be viewed as a decision made in accordance with equitable principles as understood in law. Or is the notion of sharing itself more within the realm of conciliation and outside the notion of equity? Some authors view conciliation as equivalent to the Court's jurisdiction *ex aequo et bono*, both sitting outside the realm of equity altogether.³¹¹ In the *Tunisia/Libya* case, the Court stated that it was bound to apply equitable principles *as part of international law* and went on to say: "While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice."³¹² By this, the Court appears to be of the view that distributive justice is not an equitable principle that is considered a part of international law. As we saw in Part 1, although the Court has consistently stated that there is no limit to the consideration of factors that could be part of equitable principles, it has also consistently refused to consider the sharing of resources as pertinent.³¹³ Even when it has sought to review the equity of its findings through consideration of proportionality, in an *ex post facto* exercise, it has refused to consider considerations linked to the sharing of resources or the proportionality of economic benefits. In view of the foregoing, it appears that the Court considers the sharing of resources to be an issue of distributive justice and distributive justice not to be an equitable principle for the purpose of delimitation. The

³¹¹ LFE Goldie, "Equity and the International Management of Transboundary Resources" (1985) 25 Nat Resources J 665 at 669.

³¹² *Tunisia v Libya*, *supra* note 84 at para 71.

³¹³ There are a few exceptions to this which were addressed in Part I.

issue of natural resources, however, is at the heart of the boundary question. The possible difficulties in making rules-based delimitation immune from the resource question was raised, as early as 1950, by the International Law Commission, when it was asked to study this new concept of the continental shelf, and make recommendations in preparation for the First Law of the Sea Conference. It stated that any method or solution for delimiting a common shelf would be superficial if it did not address conservation and exploitation issues.³¹⁴ It recognized the difficulties in trying to delimit boundaries when knowledge of the resources was not well established, and thus was of the view that boundary delimitation would need to be "completed" by other agreements on what it termed more "delicate and pressing" issues.³¹⁵ Even though it viewed the management of resources as part of an issue to be settled separately by States, the International Law Commission nevertheless continued to consider that boundary making methods themselves should remain flexible and not rigidly regulated by a particular method:

Toute limite admise en matière de conservation et d'exploitation des ressources naturelles du PC devra donc être une limite souple. Il n'est pas possible d'arrêter net les limites en deçà desquelles les forages sous-marins seront permis et celles à partir desquelles ils ne le seront plus, qu'il n'est possible de fixer une limite rigide pour la protection des bancs de pêche.³¹⁶

Reaching separate agreements, however, either before or after a boundary has been delimited, presents some difficulties and, as we will see later, States will seek to mitigate those through various strategies.

³¹⁴ "Memorandum of the Regime of the High Seas presented by the Secretariat" (UN Doc. A/CN.4/32) in *Yearbook of the International Law Commission 1950*, vol 2 (New York:UN, 1957) at 67, paras 337-338 [ILC 1950].

³¹⁵ *Ibid* at para 337.

³¹⁶ *Ibid* at para 338.

In the *North Sea* case, the International Court of Justice rejected Germany's argument regarding allocating States their 'fair and equitable share' because the argument was based on a premise of distributive justice which would control the partitioning of an area held in common or undivided share.³¹⁷ Because the Court had held that the continental shelf had always belonged to a particular State *ipso facto et ab initio*, it could rely neither on the concept of *res nullius* nor on that of *res communis* in its assessment of proportionality. Before that, there had been a consensus, albeit rather ill defined, that the sea and the seabed were *res communis*, i.e. they belonged to all, could be enjoyed by all but could not be appropriated. The resources of the sea and the seabed, however, were *res nullius*, i.e., they belonged to nobody and could be appropriated by whoever could exploit them.³¹⁸ This thinking was predicated, of course, on the perception that resources were infinite and thus inexhaustible. The realization that this was not so had already led to developments in fisheries management that could have been used in the development of jurisprudence in delimitation. However, since the Court has held that the continental shelf had always been a part of the territory of the State, it argued that it could not consider allocating competing States their "fair share ". The continental shelf was neither *res nullius* nor was it territory previously *res communis*. Consequently, obligations that would have originated in those two legal concepts could not be applied. Furthermore, although the concept of the EEZ replaced that of the fisheries zone, to which the notion of equitable sharing had been applied,³¹⁹ the Court still assimilated the principles of the acquisition of the area to that of the

³¹⁷ Goldie, *supra* note 311 at 670.

³¹⁸ Kronmiller, *supra* note 29 at 133.

³¹⁹ In its decision in the Fisheries Jurisdiction case between the United Kingdom and Iceland, the International Court states that the fishery zone is a concept between that of the territorial sea and the high seas where the priority

continental shelf for the purpose of delimitation, with the effect that resources that had previously been managed and shared became a source of dispute since they could be exploited by a single state within an exclusive area. The notion of proportionality was raised by the courts in keeping with the focus on equity and equitable principles; however, the court applied the concept in a very narrow and restrictive manner, without considering the precedents in the areas of resource or environmental law. This “reductionist geographical approach” led Professor McDorman, shortly after the *Gulf of Maine* decision, to wonder whether States would not be encouraged to negotiate boundaries rather than litigate in order to ensure that the broader range of their interests, such as socio-economic and historic dependency, would be given due weight.³²⁰

In keeping with distributive justice principles, an argument could be made that equity, in terms of apportioning, could be measured by reference either to the proportion of each State’s share of the common deposit or to their technological, managerial or monetary contribution to the exploitation of the resource. Another way of applying it would entail that the relative needs of each State could also bring about distributive justice by using the resource’s capacity to ameliorate per capita wealth.³²¹ Whichever way proportionality is applied by the Parties, however, it appears that some sort of sharing of resources is not contrary to equitable principles but rather in keeping with them. Unless negotiated settlements of boundaries are considered

rights of the coastal States and those of other States need to be reconciled equitably: *Fisheries Jurisdiction (United Kingdom v Iceland)*, [1974] ICJ Rep 3 at para 70 [*Fisheries Jurisdiction*].

³²⁰ McDorman, Saunders & VanderZwaag, *supra* note 96 at 90.

³²¹ Goldie, *supra* note 311 at 684.

inequitable, and that could only happen when one of the parties has substantially more power than the other, agreements can be considered intrinsically equitable. Consequently, if apportioning, proportionality and distributive justice have been principles considered by the parties themselves as determinative factors in their boundary settlements, they should be considered equitable principles applicable generally in boundary determination.

1.3 Distributive Justice in International Law

Distributive justice is a principle of equity that is part of international law, and, as we have seen above, there appears to be no reason why it cannot be applied to the law of the sea. In fact, there are precedents for the application of the principle in various areas of international law where global challenges and State relations are at stake.

In the second half of the 20th century, developing countries' demand for access to wealth, the realization that the world's resources were not infinite, as well as the globally felt impact of environmental degradation, were all factors in the development of international law in areas that are now intertwined with maritime boundary issues, such as resource law, economic law and environmental law. Since States have longer histories of relations with regards to those areas of law, it is not surprising that their influence would be felt, and principles considered, in the context of boundary determination.

International Environmental Law's view of distributive justice goes beyond the traditional concept of distribution of wealth and income, to one of sharing globally and intergenerationally in the benefits of the environment, and thus also in responsibility for its preservation. Indeed, there could be no true discussion of an international environmental regime without addressing equally the issue of access to energy and the potential environmental impact of accidents, either from oil spills, industrial accidents or nuclear meltdowns.³²² If distributive justice is part of equity, it is through the notion of proportionality that this particular form of justice is put into effect:

The principle of proportionality derives from the fact that justice is not an arithmetical equality but equality in relation and in proportion –an aspect underlined by the distinction between commutative justice and distributive justice. The principle of proportionality has been a guiding idea particularly in matters related to the distribution of natural resources, e.g. water.³²³

Boundaries mean very little in this context and States understand that their interests are intimately linked to others' interests as well as to global stewardship.

On the issue of resources of the sea, by the year of the *North Sea* decision, authors, such as Professor Goldie, viewed the need to develop legal concepts to both maximize the exploration and exploitation of the ocean resources as well as establish functional standards for equitable allocation of the benefits as a "momentous and pressing challenge."³²⁴ This was not easily done indeed, and soon, the issue of exploitation became intertwined with the growing

³²² Rossi, *supra* note 184 at 255.

³²³ Ruth Lapidot, "Equity in International Law" (1987) 81 Am Soc Int'l L Proc 138 at 146.

³²⁴ LFE Goldie, "The Oceans' Resources and International Law –Possible Development in Regional Fisheries Management" (1969) 8 Colum J Transnat'l L 1 at 4.

realization that sustainable stewardship of the environment was becoming a pressing global challenge. The resources in question were mainly water, oil and gas, and fisheries. Thus, although the resources were those either straddling an existing boundary or in a disputed area, the delimitation of the boundary itself was not the most pertinent factor, considering either the mobility of the resources, or the fact that it was shared by two or more States. In turn, the development in those areas of international law continues to have an impact on the way in which maritime boundaries are delimited. It is important, consequently, to review what the principles of resources and environmental law are in order to understand, in Chapter 2, what influence those have in boundary negotiations.

1.3.1 Resource Law

The exploitation of resources had always been based on the law of capture. Since resources were considered *res communis*, they could be appropriated by whomever had the technical capacity to do so. Furthermore, when considered in conjunction with the notion of total sovereignty, this meant that States could exploit resources from their own territory even if that resource straddled a boundary or had a detrimental effect on those who shared the resource. As seen earlier, the post-war period, however, saw the explosion of resource exploration and exploitation worldwide, together with the changes in the way States view their sovereignty and their inter-relations. The principle of distributive justice and equitable sharing has been part of the evolution of this area of law also.

In the *North Sea* case, Germany argued for a just and equitable share of the continental shelf, mostly in reference to natural resources, and made the parallel with the sharing of boundary water resources by referencing Judge Hudson in the *River Meuse* case. This comparison with water as a resource was highlighted in the separate opinion of Judge Jessup in the *North Sea* case.³²⁵ He went on to state that, in cases of known or unknown resources straddling the disputed area, the simplest way to achieve an equitable apportionment would be to place the area under joint control and exploitation.³²⁶ Judge Jessup stated that it would not be "irrelevant to recall the principle of international cooperation in the exploitation of a natural resource in other international practice" such as water, fisheries or land-based resource exploitation. However, in his opinion, this principle could not be viewed as an indication of an emerging rule of international law, but may contribute to the further understanding of the principles of equity, which are part of international law.³²⁷ Consequently, it appears that even then, he saw that issues of distributive justice could be seen as part of equity. Although Judge Jessup did not consider that cooperation in exploitation of resources was even at the level of an emerging rule at the time, the practice of States was quickly developing and, since that time, there has been much change in the development of the practice of States as well as conventional law. Doctrinal writing, as well as State practice, considers that the issue of utilization of resources could not be considered as completely distinct from that of the delimitation, contrary to what the Court had consistently found:

³²⁵ Judge Jessup quotes from the German Memorial which emphasizes, quoting from Judge Hudson, that the economic value of mineral deposits should be taken into consideration for boundary determination: *North Sea*, *supra* note 8, opinion of Judge Jessup at 67.

³²⁶ *Ibid* at 73.

³²⁷ *Ibid* at 83-84.

Law of the sea developments up to the mid-1960s tended to emphasize unilateral rights and the phraseology of the doctrine of the continental shelf, with its emphasis on 'sovereign rights for the purposes of exploration and exploitation' tends to emphasize this. But this concept must now be read together with that of interdependence and sustainable development, including optimum conservation and the balancing interests in the oceans.³²⁸

Since the rights are for the purpose of the exploitation of resources, it would follow that the development of principles and obligations by States, with regard to the exploitation of the resources, would also affect the obligations in relation to the source of the right itself, i.e. the area.

In the area of natural resources of the sea-bed and sub-soil, the issue of distributive justice appears to have been adopted shortly after the *North Sea* cases as a leading principle in relations between adjacent states. The 1973 UNGA Resolution 3129 on cooperation in the environment concerning natural resources shared by two or more states saw the beginning of an attempt towards the development of principles governing the exploitation of joint resources.³²⁹ Following this Resolution, the UN Environmental Programme drafted some principles and guidelines on shared natural resources which put forward, as its first principle,

³²⁸ Ian Townsend-Gault & William G Stormont, "Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?" in Gerald H Blake, et al, *The Peaceful Management of Transboundary Resources* (London: Graham & Trotman, 1995) 51 at 59-60. McDorman also criticises the fact that court decisions are divorced from the resource issue and deplores the uncertainty created over how to manage those resources, in McDorman, Saunders & VanderZwaag, *supra* note 96 at 101.

³²⁹ Rodman R Bundy, "Natural Resource Development (Oil and Gas) and Boundary Disputes" in Blake, *supra* note 328, 23 at 36-37.

the concept of "equitable utilisation of shared natural resources."³³⁰ These draft principles were recommendations and, considering the lack of consensus amongst States at the time as to what they meant, did not create or express rules of international law.³³¹ However, in the years following, the widespread State practice of co-operation in oil and gas exploitation created, at least, a customary duty to consult, and perhaps notify, States of new developments.³³² Recently, the work of the International Law Commission on the issue of shared natural resources (oil and gas) was halted, in part because of the close relation that States hold between the resources and the issue of boundary delimitation: "Maritime delimitation, which, in political terms, was a very delicate issue for the States, would be a prerequisite for the consideration of this as sub-topic, unless the parties had mutually agreed not to deal with delimitation."³³³

1.3.2 Fisheries

With regard to fisheries, States had already realized that, for common areas of the high seas, it would be more beneficial to cooperate in order to regulate the fisheries than to participate in a race to extinction of the stocks. When fishery zones started expanding into what had previously been the high seas, the issue of the rights attached to these zones was being developed by State practice as well as through the jurisprudence. In the *Fisheries Jurisdiction* case between the United Kingdom and Iceland, the Court found that the concept of the fishery

³³⁰ *Environmental Law Guidelines and Principles on Shared Natural Resources*, UNEP, principle 1, online: UNEP: <<http://www.unep.org/>>.

³³¹ *Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States* in *Report of the Governing Council on the work of its sixth session*, UNEP, 1978, Supp No 25, UN Doc A/33/25, 416.

³³² Bundy, *supra* note 329 at 39.

³³³ *Report of the International Law Commission on the work of its sixty-second session*, UNGAOR, 65th Sess, Supp No 10, UN Doc A/65/10, (2010) at 344.

zone, as well as that of preferential fishing rights for coastal States dependant on fisheries, had crystallized based on general consensus.³³⁴ The dependence of the coastal State would be assessed not only as it related to the livelihood of the people but also to the economic development. The rights of other States would then be weighed and then the interests of both would be reconciled in "as equitable a manner as is possible."³³⁵ This illustrates that the fishery zones, the precursor of the EEZ, were not viewed by the Court as being an *ab initio* appendage to the coastal States and, more importantly, it shows that economic dependence and development were considered equitable factors. If these could be considered equitable factors when referring to an area where the rights of the coastal state versus that of any other state were rather ill defined, there is no reason that the same could not apply to an area of overlapping claims to sovereign rights by two coastal states.

1.3.3 Water

In the case of water, equitable utilization or "resource equity" has regularly been used as a principle in international cases involving international fluvial law,³³⁶ and is one of the key principles recognized by the international community.³³⁷ In 1997, the General Assembly of the UN adopted the *Convention on the Law of the Non-navigational Uses of International*

³³⁴ *Fisheries Jurisdiction*, *supra* note 319 at para 50.

³³⁵ *Ibid* at para 62.

³³⁶ Betsy Baker, "The 'Precedential Judge Hudson'? Rivers, Oceans, Equity, and International Tribunals" in Russel A. Miller & Rebecca M. Bratspies, eds, *Progress in International Law* (Leiden: Martinus Nijhoff, 2008) 451 at 463.

³³⁷ Dante A Caponera, "Shared Waters and International Law" in Blake, *supra* note 328, 121 at 123.

Watercourses.³³⁸ This convention, not yet in force, contains the obligation by States to utilize the resource in an "equitable and reasonable manner."³³⁹ The factors to be used in order to achieve this equitable utilization include, besides geographical and other natural factors, the economic and social needs of states, the dependence of a population on the watercourse as well as conservation and protection requirements.³⁴⁰ These principles were largely inspired by the Helsinki Rules, approved in 1966 by the International Law Association, that, although not binding, were used by States in negotiation for treaties on water use and waterways management. This was the case between Canada and the United States. As early as 1967, the International Joint Commission stated, in its report on the Cooperative Development of the Pembina River Basin, that it had given "due consideration" to all the factors listed in the Helsinki Rules in its recommendation to the Governments on the development of the water basin.³⁴¹ In allocating 60% of the resource to Canada, the report states that an important factor was the optimisation of the exploitation and the net advantage to each country. Since both the cost and the drainage problems would be lower in Canada,³⁴² it attributed a greater proportion to Canada.

In view of the foregoing, we must conclude that, on issues of fisheries, hydrocarbon and water resources, distributive justice, as part of equity, has emerged as a principle from State

³³⁸ *Convention on the Law of the Non-navigational Uses of International Watercourses*, GA Res 229(51) UNGAOR, 51st Sess, Supp No 49, UN Doc A/51/229, (1996).

³³⁹ *Ibid*, art. 5.

³⁴⁰ *Ibid*, art 6.

³⁴¹ International Joint Commission, *Report of the International Joint Commission Canada and the United States on the Cooperative Development of the Pembina River Basin* (Ottawa: Queen's Printer, 1967) at 31.

³⁴² *Ibid*.

practice and is viewed as being part of the recent theories of international relations. These issues are at the root of boundary delimitation negotiations and, it would appear, States are less and less likely to separate the two while negotiating agreements. In 2009, the then Canadian Minister of Foreign Affairs was quoted as saying that joint regimes are "based on the principle that precious natural resources should be managed for the benefit of all."³⁴³

1.4 Agreement as part of Boundary Determination

As we just saw, the principle of distributive justice and socio-economic factors are widely accepted as being part of the equitable principles to be considered in the field of shared resources. Although the jurisprudence has often recognized that the issue of resources was central to the boundary question, when addressing the particular issue of apportioning resources, it has mainly considered this as something outside the question of boundary determination itself. Certain authors have agreed with the views of the courts that resources and economic issues are best dealt with in separate agreements.³⁴⁴ In the Canada-France Arbitration, the tribunal stated that "It is evident from the pleadings that access to, and control of, the fisheries in the disputed area are central to the dispute over delimitation."³⁴⁵ The tribunal also referred to, in this case, a tentative agreement between the Parties wherein France would have accepted a reduced continental shelf in exchange for certain economic advantages related

³⁴³ International Joint Commission, *The International Watersheds Initiative: Implementing a New Paradigm for Transboundary Basins, Third Report to Governments on the International Watersheds Initiative* (Ottawa: International Joint Commission, 2009).

³⁴⁴ Charney, *supra* note 189 at 240. McDorman simply suggests that the courts are not well suited to elaborate the complex arrangements required: McDorman, Saunders and VanderZwaag, *supra* note 96 at 101.

³⁴⁵ *Canada v France*, *supra* note 120 at para 83.

to hydrocarbon exploration and exploitation in the continental shelf of the region.³⁴⁶ However, the tribunal did not take any economic or resources factor into consideration for the boundary determination, finding that the respective populations would not suffer catastrophic repercussions following the definition of the boundary, since the fisheries relation between the Parties was governed by the 1972 Agreement granting reciprocity to each in the other's zone. This conclusion by the tribunal, that a consequence of one decision could be determined on the basis of another agreement, appears fraught with uncertainty, especially when the decision on the boundary creates circumstances where the same Parties no longer maintain the same negotiating powers. Indeed, on the issue of hydrocarbon exploration and exploitation, it was not until 2005 that Canada and France reached an agreement.³⁴⁷

The case of the *Gulf of Maine* illustrates even better the reasons why most negotiated boundaries currently include some form of resource sharing agreement within the boundary treaty itself. In 1979, Canada and the United States reached a fishery agreement for the east coast. The agreement was to ensure that there was to be "reciprocal access in perpetuity to all boundary stock of interest to fishermen on both sides, *regardless* of where an agreed maritime boundary might eventually be drawn."³⁴⁸ At the same time, the Parties agreed to submit the boundary determination to third party decision-making. Those two agreements, however, were meant to be connected. As stated at the time by Canada's negotiator, Marcel Cadieux: "They stand or fall together. The rationale for this arrangement was that the two Governments might

³⁴⁶ *Ibid* at para 11.

³⁴⁷ That agreement, not yet ratified, is not publicly available.

³⁴⁸ Erik B Wang, *Canada-United States Fisheries and Maritime Boundary Negotiations: Diplomacy in Deep Water* (Toronto: Canadian Institute of International Affairs, 1981) at 17.

be more disposed to agree to a boundary settlement if there was a shock absorber, an insurance policy, to reduce the impact of an adverse court or arbitral decision."³⁴⁹ Unfortunately, this was not to be the case as the fisheries agreement collapsed after the US increasingly viewed it as an attempt to divide the resources.³⁵⁰ Consequently, the boundary determination case went forward independently. In its decision on the delimitation, the Court understood that the issue of fisheries was of great importance. It found, however, that the line it had determined was not inequitable since there would be no catastrophic repercussion on the livelihood of the fishermen. To reach this conclusion, the Court referred to the long "tradition of fruitful and friendly co-operation in maritime matters" and was confident that the "(...) Parties will surely be able to surmount any difficulties and take the right steps to ensure the positive development of their activities in the important domains concerned."³⁵¹ It appears, however, that the Court's confidence was misplaced since, contrary to its optimism, the decision on the boundary caused more tension and increased violations, considering that there has been a complete exclusion of each other's fishermen and the imposition of differing management philosophies on each side.³⁵² In the ten years following the decision, escalating boundary violations and the danger of violence led to the 1990 Reciprocal Enforcement Agreement. Although there were informal consultations between scientists during those years, there was an absence of formal cross-

³⁴⁹ *Ibid* at 28.

³⁵⁰ Sang-Myong Rhee, "Equitable Solutions to the Maritime Boundary Dispute between the United States and Canada in the Gulf of Maine" (1981) 75 AJIL 590 at 598-599. The US industry was convinced that the boundary to be determined by the Chamber would be to their benefit and did not want to be bound to share George's Bank with the Canadians.

³⁵¹ *Gulf of Maine*, *supra* note 3 at para 240.

³⁵² Douglas Day & Glen Herbert, "Fisheries Violation of an Arbitrated Maritime Boundary: The Gulf of Maine Case" in Blake, *supra* note 328, 427 at 430.

boundary efforts with respect to fisheries management and conservation.³⁵³ In revisiting the *Gulf of Maine* decision 25 years later, Professor Norchi of the University of Maine, remarked that the marine ecosystem between the two countries needs a joint recovery plan to deal with endangered species, an agreement for marine protected areas and for integrated management planning.³⁵⁴ Many of these provisions had indeed been included in the cancelled 1979 fisheries agreement. Contrary to what had been thought by the Court, the determination of the boundary has been a hindrance to the negotiation of fisheries and other resource management arrangements, to the detriment of the environment and the fisheries. It was only because “(...) increased fishing efforts on both sides of the boundary, throughout the 1980s, led to the over-exploitation of the transboundary groundfish stocks”³⁵⁵ that Canada and the United States eventually agreed to develop initiatives to address the issue.

The UN Convention on the Law of the Sea was not in force at the time of the *Gulf of Maine* negotiations or the Court’s decision. Since it provides for an obligation of cooperation in the exploitation and management of living resources of the sea, it could be argued that the lack of cooperation that took place in the Gulf of Maine would no longer be tolerated. States that are members of *UNCLOS* could rely on its provisions to ensure adequate management of the resource between neighbours. However, an agreement to cooperate does not necessarily lead

³⁵³ Glen J Herbert, “Fisheries Relations in the Gulf of Maine, Implications of an Arbitrated Maritime Boundary” (1995) 19:4 *Marine Policy* 301 at 314.

³⁵⁴ Charles H Norchi “Introduction: Twenty-Five Years of the Gulf of Maine Judgement” (2010) 15 *Ocean & Coastal LJ* 177 at 181.

³⁵⁵ Emily J Pudden & David L VanderZwaag, “Canada-USA Bilateral Fisheries Management in the Gulf of Maine: Under the Radar Screen” (2007) 16:1 *RECIEL* 36 at 36.

to an agreement on management. Protracted discussions can have a devastating effect on the resource and the environment. As for the management of the non-living resources of the seabed, no such obligation to cooperate is included in *UNCLOS*. On the other hand, as seen above, many authors consider that a customary rule has developed to create an obligation that States must, at the very least, inform other interested States of their plan to exploit a resource. The evidence also suggests that State practice is becoming consistent in that exploitation regimes, or at least the obligation to cooperate, are being integrated as part of boundary determination agreements.

As early as 1969, the year of the *North Sea* decision, countries started incorporating some provisions regarding exploitation of joint resources in boundary agreements. For example, various agreements between Malaysia, Indonesia and Thailand relating to the delimitation of the continental shelves provided that Governments were to seek an agreement as to the manner in which a straddling resource should most effectively be exploited.³⁵⁶ In 1971, Australia and Indonesia signed a seabed boundary agreement that included a commitment to seek an agreement on the most effective manner of exploitation of hydrocarbons and natural gas that would be found straddling the boundary, as well as "equitable sharing" of the benefit of that exploitation.³⁵⁷ Provisions concerning the exploitation of any oil and gas field which might later be discovered straddling an agreed boundary were also included in most bilateral treaties in

³⁵⁶ David Ong, "South-east Asia State Practice on the Joint Development of Offshore Oil and Gas Deposits" in Blake, *supra* note 328, 77 at 83 [Ong, "South-east Asia"].

³⁵⁷ *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries*, 18 May 1971, [1973] ATS 31 (entered into force 8 November 1973), art 7 [*Australia and Indonesia Seabed Boundaries Agreement*].

northern and western Europe.³⁵⁸ In discussing the 1982 Agreement between Iceland and Norway (Jan Mayen) Professor Churchill highlighted the fact that simply drawing a line is a once and final solution. When an uncertainty exists with regard to resources, this can lead to tension and disputes. He then argues that it is better to bring the management of fish stocks and straddling seabed deposits within the drawing of the boundary line as one package at the onset, rather than leaving those issues to be tackled one at a time piece-meal on an ad hoc basis.³⁵⁹ In 1993, about 20% of boundary agreements contained provisions for some form of cooperation arrangements on resource exploitation. By 2005, authors Cisse and McRae found that two thirds of agreements included such provisions.³⁶⁰ The inclusion of such "straddling deposit" provisions in maritime delimitation agreements is currently widespread enough for certain authors to argue that there is a legal principle enjoining states to cooperate in respect of offshore oil and gas deposits found either straddling an established border or situated in overlapping claims areas.³⁶¹

Chapter 2 –State Practice

2.1 Equitable Principles

As seen in Part I, the Courts have avoided setting both an excessively rule-oriented standard as well as criteria that would entail redistributive implications, by narrowly defining

³⁵⁸ Michael C Wood, "Northern and Western European Maritime Boundaries" in David A Colson & Robert W Smith eds, *International Maritime Boundaries*, vol 5 (Leiden: Martinus Nijhoff, 2005) 3493 at 3500-3501.

³⁵⁹ RR Churchill, "Maritime Delimitation in the Jan Mayen Area" (1985) 9 *Marine Policy* 16 at 27.

³⁶⁰ Yacouba Cissé & Donald McRae, "The Legal Regime of Maritime Boundary Agreements" in Colson & Smith, *supra* note 358, 3281 at 3291.

³⁶¹ Ong, "South-east Asia", *supra* note 356 at 84.

boundaries based on the continental shelf as a physical fact.³⁶² States, however, have regularly considered as equitable principles factors directly linked to the purpose of the boundary itself, not just its definition. It is reflective of the principle of good faith that States put, front and centre, the issues that drove them to negotiate boundaries in the first place. In negotiation, States can consider their wider interests and relationship and use the settlement towards the peaceful resolution of those disputes. Indeed, boundary treaties often mention, in their preamble, the wish of the parties to maintain and strengthen good-neighbourly relations³⁶³ or to act in a spirit of cooperation, friendship and goodwill.³⁶⁴

The issue of sharing of transboundary resources has been included, in one form or another, in almost all boundary agreements. In earlier agreements, even if the potential of the area around the boundary was not known, States nevertheless wished to include some provision on equitable sharing should hydrocarbons be found to be exploitable. Thus, the principle of equitable sharing, i.e. distributive equity, became embedded in boundary agreements in forms such as: "(...) Governments will seek to reach agreement on the manner in which the accumulation or deposit shall be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation."³⁶⁵ Another principle that States regularly

³⁶² Rossi, *supra* note 184 at 234.

³⁶³ *Agreement between the Government of the Kingdom of Denmark along with the Local Government of Greenland and the Government of the Republic of Iceland on the Delimitation of the Continental Shelf and the Fishery Zone in the Area between Greenland and Iceland*, 11 November 1997, *Law of the Sea, Bulletin No 39* (New York: UN, 1999) at 35.

³⁶⁴ *Torres Strait Treaty*, *supra* note 135; *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991).

³⁶⁵ *Australia and Indonesia Seabed Boundaries Agreement*, *supra* note 357, art 7.

raise as an impetus for negotiating boundaries is the common responsibility with regards to the protection of the environment, conservation and sustainable management of the resources. Indeed, it is the complexity of those integrated issues that make negotiations more able to reach a comprehensive scheme, considered equitable according to a wider range of factors.

2.2 Geographic Factors

2.2.1 Natural Prolongation

The original notion of the continental shelf as a natural prolongation of the territory of States was reflected in the positions that States took with regards to their claim. Before the negotiations for *UNCLOS* began, there were very few delimitation agreements where geomorphology was a determining factor. However, the extensive submissions on the issue in the context of third party settlement procedures testify to the fact that the physical circumstances of the continental shelf were considered as potentially pertinent, even after many judicial decisions had ignored those realities. The best example of the impact of the natural prolongation concept on a boundary is that of the continental shelf boundary agreements between Australia and Indonesia in 1971 and 1972. In that agreement, the Timor Trough, a deep ridge closer to Indonesia, was used as the boundary. Subsequently, East Timor was annexed by Indonesia, and Australia recognized the latter's sovereignty over the territory. By that time, the ICJ had issued its ruling on the *Libya\Malta* case and the *UNCLOS* had changed the nature of the continental shelf from a physical concept to a rather juridical area extending to 200 miles, regardless of the shape of the sea-bed. Although Australia continues to maintain its

position on the natural prolongation of its territory, it could no longer convince Indonesia to come to an agreement over the Timor Gap on the basis of the physical divide of the shelf. More illustrative of State practice is the United Kingdom and Norway Agreement of 1965.³⁶⁶ Although that agreement was one of the first delimitation agreements following the Truman Proclamation and the 1958 Convention, it was already ignoring the presence of a main geomorphological trench near the coast of Norway. As was also the case in the Norway-Denmark agreement of the same year, the Norwegian Trough was considered an accidental feature and ignored. However, since the trough is located very near the Norwegian coast, the fact that it was ignored could be more reflective of the consideration that the resulting line would have been markedly inequitable,³⁶⁷ rather than a consideration that geomorphology was not a relevant consideration. The presence of a geomorphological structure, the Okinawa Basin, was also the main argument in the dispute between Japan and the Republic of Korea over the boundary delimitation. The Parties sidestepped the issue by agreeing to a Joint Development Zone in the overlapping area. Geomorphological considerations dominated the negotiations between France and Spain in the Bay of Biscay. The boundary, as a result, appears to have divided equally an area of deeper seabed between the areas of shallow seabed lying in front of the respective coasts.³⁶⁸

³⁶⁶ *Agreement between the Government of the United Kingdom and the Government of Norway relating to the Delimitation of the Continental Shelf between the two Countries*, 10 March 1965, [1965] UKTS 70 [UK and Norway Continental Shelf Agreement].

³⁶⁷ C Cook, "Filling the Gap- Delimiting the Australia-Indonesia Maritime Boundary" (1981-1983) 10 *Aus YB Int'l Law* 131 at 148.

³⁶⁸ Wood, *supra* note 358 at 3503.

Geomorphological factors could play a renewed role with regard to delimitation of the extended continental shelf. In the dispute between China and Japan in the East China Sea, China claims an extended shelf up to the western slope of the Okinawa Trough whereas Japan claims an equidistance line, which would mean no continental shelf beyond 200 n.m. for either State.³⁶⁹ Since there are few agreements with regard to delimitations between extended continental shelves, no consistent State practice can be determined. However, the limited number of agreements tends to suggest that, for adjacent boundaries at least, the same criteria are used along the whole length of the boundary.³⁷⁰ This is also consistent with the recent ITLOS decision in the Bangladesh/Myanmar case.

2.2.2 Islands

The presence of islands within a boundary area is probably the factor that contributes the most, in general, to the final determination. Although the US had been of the view, in the 1960s and 1970s, that islands should be given full weight in measuring equidistance,³⁷¹ State practice shows anything but an adherence to this view. Whether islands are given full, partial or no weight at all, their presence will always be a factor in negotiations. According to one author, the deciding factors in the decision as to whether islands close to the mainland are to be

³⁶⁹ Suk Kyoong Kim, "China and Japan Maritime Disputes in the East China Sea: A Note on Recent Developments", (2012) 43:3 *Ocean Devel & Int'l L* 296 at 297.

³⁷⁰ David A Colson, "The Delimitation of the Outer Continental Shelf between Neighboring States", *Notes and Comments*, (2003) 97 *AJIL* 91 at 96.

³⁷¹ Mark B Feldman & David Colson, "The Maritime Boundaries of the United States" (1981) 75 *AJIL* 729 at 750.

ignored or taken into consideration is convenience and the possibility of reciprocity.³⁷² The wide variety of actual agreements, however, tends to show that there are many more factors that could influence a particular decision than those two. The definition itself of what is or is not an island has sometimes been a factor. However, States tend to avoid delving into this question by finding a compromise that avoids having to qualify a particular feature. In considering islands during negotiations over boundaries, States have shown great flexibility and adaptability. Examples of agreements where islands have influenced delimitation lines abound. No precise rule or practice can be extracted from the various agreements, only certain trends. In the agreement between Sweden and Denmark, the parties assigned variable weight to islands depending on their closeness to certain coastlines and their sizes. Inside the Sound, where mainlands are very close, islands, even larger ones, were discounted whereas outside that area, smaller islands were given full effect.³⁷³

In the agreement between China and Vietnam in the Gulf of Tonkin, islands were also given a range of effect. Particularly, the mid-ocean island of Bach Long Vi, sitting about 50 miles from the coast, was given 25% effect while the closer islet of Con Co, only 8 miles from the coast, was given 50% effect.³⁷⁴ This trend, that the further islands are from the coast, the less

³⁷² Donald E Karl, "Islands and the Delimitation of the Continental Shelf: A Framework for Analysis" (1977) 71 AJIL 642 at 657.

³⁷³ E Franckx, "Finland and Sweden Complete their Maritime Boundary in the Baltic Sea" (1996) 27:3 Ocean Devel & Int'l L 291 at 296 ["Finland and Sweden Maritime Boundary"].

³⁷⁴ Zou Keyun, "The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin" (2005) 36:1 Ocean Devel & Int'l L 13 at 15.

weight they carry, was also reflected in the partial effect given to the Greek islands of Othonoi and Nisi Stamfani in the delimitation between Greece and Italy.³⁷⁵

Although States have often been guided by jurisprudence as to the effect to be given to islands which have a distorting effect on a boundary line, agreements suggest that many more factors enter into consideration between States. States have considered important, for example, the status of the islands themselves, whether they are inhabited or not, and their dependency on natural resources. In the Denmark\Iceland agreement, the inhabited island of Grimsey was given full weight whereas the uninhabited island of Kolbeinsy was only given partial weight.³⁷⁶ The weight to be given to islands can also factor into a wider consideration and balanced with socio-economic factors. The Swedish islands of Gotland and Gotska were given 75% effect in both the Swedish\Poland agreement and the Swedish\USSR agreement, although, in the latter, this was linked to a 20 year fisheries concession at the same ratio of 75\25.³⁷⁷ Another example of an island having had a different effect from one agreement to the other is the Venezuelan island of Aves. While it was given full weight in Venezuela's agreements with both Trinidad and Tobago and the United States (Porto Rico\Virgin Islands), it was given less than full weight in the Venezuela\France (Martinique\Guadeloupe) agreement.³⁷⁸ In the Venezuela\Netherlands (Antilles) agreement, Aves Island was given full weight and so were the

³⁷⁵ *Continental Shelf Boundary: Greece-Italy*, in US, Department of State, "International Boundary Studies, Limits in the Sea", no 96 (Bureau of Intelligence & Research: Office of the Geographer, 1982) at 4.

³⁷⁶ Alex G Oude Elferink, "Bilateral Agreements on the Delimitation of the Continental Shelf and Fishery Zone" (1998) 13 Int'l J Mar & Coast L 607 at 608.

³⁷⁷ *Ibid.*

³⁷⁸ A number of small island States have registered objections to the fact that Aves Island is considered an island under Art 121(3) of UNCLOS. This dispute, however, will not be addressed here as it is not pertinent to our analysis.

small Dutch islands directly facing it. However, the three bigger Dutch Islands, Aruba, Bonaire and Curacao, were given less than full weight considering their proximity to the Venezuelan mainland.³⁷⁹ If, in the case of Venezuela and the Netherlands, there was a quid pro quo with regards to consideration of islands, this was not the case for the agreement with the United States. The reason for the United States agreeing to giving Aves Island full weight lies rather in the broader interest of the United States in having islands, in general, being given full weight and because, in this case, there was not much to lose in terms of resources.³⁸⁰

Small islets on both sides of a boundary are often given only very limited recognition, such as in the agreement between Denmark and Sweden.³⁸¹ In many cases, they are completely ignored, such as the string of islets called Adam's bridge between India and Sri Lanka³⁸² and all islands in the Persian Gulf between Qatar and Iran.³⁸³ However, islands that are generally identified with the mainland are usually given full effect,³⁸⁴ as are islands that are against

³⁷⁹ *Maritime Boundaries: Colombia - Dominican Republic and Netherlands (Netherlands Antilles) – Venezuela* in US, Department of State, "International Boundary Studies, Limits in the Sea" no 105 (Bureau of Intelligence & Research: Office of the Geographer, 1986) at 7.

³⁸⁰ Bernard H Oxman, "International Maritime Boundaries: Political, Strategic, and Historical Considerations" (1994-1995) 26 U Miami Inter-Am L Rev 243 at 259 ["Considerations"]. It is indeed standard practice of the United States to give full effect to islands. This is part of their general approach favouring equidistance with very few accommodations for special circumstances. Roach lists only one agreement, the US\Russia agreement, where special circumstances were taken into account. J. Ashley Roach, "Maritime Boundary Delimitation: United States Practice" (2013) 44:1 Ocean Devel & Int'l L 1 at 4.

³⁸¹ Eric Franckx, "Maritime Boundaries and Regional Cooperation in the Baltic" (1992) 20 Int'l J Legal Info 18 at 19 ["Cooperation in the Baltic"].

³⁸² Lewis M Alexandre, "Baseline Delimitations and Maritime Boundaries" (1983) 23 Va J Int'l L 503 at 524.

³⁸³ *Continental Shelf Boundary: Iran-Qatar* in US, Department of State, "International Boundary Studies, Limits in the Sea", no 25 (Bureau of Intelligence & Research: Office of the Geographer, 1970) at 2.

³⁸⁴ Eric Franckx, "Baltic Sea Boundaries" in Colson & Smith, *supra* note 358, 3507 at 3533.

mainland coasts.³⁸⁵ For example, the Shetland Islands were given full effect in the Norway\UK agreement of 1965.³⁸⁶ Islands that are close to what would otherwise be an equidistant line are usually not given any effect on the line but an arc is traced around them to give them a particular width, usually the width of a territorial sea, 12 miles, but not always. Similarly, islands on the opposite side of a line are usually given only territorial seas. In the agreement between Italy and Tunisia, the Italian island of Lampione, close to the Tunisian coast, was given a 12-mile arc whereas the bigger islands of Pantelleria, Linosa and Lampedusa were given 13-mile arcs.³⁸⁷ In the Italy\Yugoslavia agreement, the Yugoslav islands of Pelagruz and Kajola were given 12-mile arcs, due to their location, whereas the fringing islands along the coast of Yugoslavia were given full effect through their uses as basepoints.³⁸⁸ In the Persian Gulf, islands on both sides of the Iran\Saudi-Arabia boundary were given 12-mile territorial seas while being disregarded for the tracing of the boundary line³⁸⁹ and in the Iran\United Arab Emirates (Dubai) continental shelf agreement, the 12-mile territorial sea given to the Iranian island of Sirri was made to coincide with the boundary line.³⁹⁰ Islands that constitute a substantial portion of a state's territory or islands that have a particular historical or economic significance can also be

³⁸⁵ Victor Prescott & Gillian Triggs, "Islands and Rocks and their Role in Maritime Delimitation" in Colson & Smith, *supra* note 358, 3245 at 3245.

³⁸⁶ Ahnish, *supra* note 62 at 114.

³⁸⁷ *Continental Shelf Boundary: Italy-Tunisia* in US, Department of State, "International Boundary Studies, Limits in the Sea", no 89 (Bureau of Intelligence & Research: Office of the Geographer, 1980) at 8.

³⁸⁸ *Continental Shelf Boundary: Italy-Yugoslavia* in US, Department of State, "International Boundary Studies, Limits in the Sea", no 9 (Bureau of Intelligence & Research: Office of the Geographer, 1970) at 6.

³⁸⁹ *Continental Shelf Boundaries: The Persian Gulf* in US, Department of State, "International Boundary Studies, Limits in the Sea", no 94 (Bureau of Intelligence & Research: Office of the Geographer, 1981) at 7.

³⁹⁰ *Continental Shelf Boundary: Iran-United Arab Emirates (Dubai)* in US, Department of State, "International Boundary Studies, Limits in the Sea", no 63 (Bureau of Intelligence & Research: Office of the Geographer, 1975) at 3.

considered as warranting special consideration.³⁹¹ For example, in the Iran\Saudi-Arabia agreement,³⁹² the Iranian island of Kharg was given partial effect not only for its proximity to the coast but also due to its importance to the development of Iran's offshore oil industry and the historical patterns of oil exploration and recovery in the Persian Gulf.³⁹³ Disputes over sovereignty over islands have sometimes led to imaginative solutions between States. In the Canada\Greenland agreement, the parties have omitted the boundary around the disputed island of Hans,³⁹⁴ whereas, in the Argentine\Uruguay agreement, the island of Martin Garcias, situated very close to the Uruguay coast, was recognised as Argentinean but not given any territorial sea and its use limited to a nature reserve.³⁹⁵

2.2.3 Basepoints, Baselines and Coastlines

The use of specific base points or even artificial coastlines to measure a boundary is also a factor used by States to help determine an equitable boundary, as it is often used to compensate for other distorting effects. Such was the case in the Bahrain\Saudi Arabia agreement where only certain basepoints were used to calculate the boundary line. Many small islands and low-tide elevations were completely ignored when establishing basepoints. Since those basepoints did not necessarily reflect the actual coastline, the result was a modified

³⁹¹Karl, *supra* note 372 at 662.

³⁹² *Continental Shelf Boundary: Iran-Saudi Arabia* in Department of State, "International Boundary Studies, Limits in the Sea", no 24 (Bureau of Intelligence & Research: Office of the Geographer, 1970) at 2.

³⁹³ Karl, *supra* note 372 at 658.

³⁹⁴ *Continental Shelf Boundary: Canada-Greenland* in Department of State, "International Boundary Studies, Limits in the Sea", no 72 (Bureau of Intelligence & Research: Office of the Geographer, 1976) at 7.

³⁹⁵ *Continental Shelf Boundary: Argentina-Uruguay* in Department of State, "International Boundary Studies, Limits in the Sea", no 64 (Bureau of Intelligence & Research: Office of the Geographer, 1975) at 4.

equidistant line.³⁹⁶ In the Sweden\Finland agreement, a particular basepoint for Finland, the Bogskar island group, was used in order to compensate for the loss of fishing area when the two countries synchronized their continental shelves and fisheries zone boundaries.³⁹⁷ In the France\UK (Jersey) agreement, only some low-tide elevations were used as basepoints and others were discarded in order to get a simplified straight line.³⁹⁸ Whereas in the France\UK (Guernsey) agreement, the use of rocks and low-tide elevations created a straight line, leaving no reason to discard any basepoints.³⁹⁹ Low-tide elevations were also discounted in Belgium's agreements with France and the UK, whereas in its agreement with the Netherlands, the latter's low-tide elevations were given partly full weight and partly partial weight.⁴⁰⁰

Baselines are also factors that are considered in State practice and adapted in a search for an equitable result. In the Sweden\Denmark agreement, the States' straight baselines were generally used to calculate the equidistant line, however, a few baselines, on each side, were only given half effect, leading to a modification of the equidistant line.⁴⁰¹ In the Timor Gap treaty of 1989, neither the Australian straight baselines, nor the Indonesian archipelagic

³⁹⁶ *Continental Shelf Boundary: Bahrain-Saudi Arabia* in US, Department of State, "International Boundary Studies, Series A, Limits in the Sea", no 12 (Bureau of Intelligence & Research: Office of the Geographer, 1970) at 5 and *Continental Shelf Boundaries: The Persian Gulf*, *supra* note 389 at 4.

³⁹⁷ Franckx, "Finland and Sweden Maritime Boundary", *supra* note 373 at 300. The continental shelf boundary had been established previously and had been influenced by history whereas the fisheries line was equidistant, creating fisheries pockets over the other state's continental shelf. When they merged the fisheries line with the continental shelf line, Sweden had gained fisheries area.

³⁹⁸ The use of each basepoint was a matter of negotiation between the Parties: Prescott & Triggs, *supra* note 385 at 3253.

³⁹⁹ *Ibid* at 3248.

⁴⁰⁰ Wood, *supra* note 358 at 3499.

⁴⁰¹ Franckx, "Finland and Sweden Maritime Boundary", *supra* note 373 at 296. One baseline on each side was contested by the other. To reach a compromise, it was decided that the area generated by those disputed baselines would be cut in half.

baselines were used,⁴⁰² while in the US\Cuba agreement, artificial "construction lines" were drawn around the southern Florida coast to compensate for the straight baselines used by Cuba, which the US did not recognize as legitimate.⁴⁰³ France and Spain also made use of the construction of artificial coastlines in their agreement in the Bay of Biscay. Those lines differed from the coastlines with the purpose of reflecting proportional coastal lengths while delimiting the continental shelf in the outer bay area.⁴⁰⁴

2.2.4 Proportionality

Whereas courts and arbitral tribunals consider proportionality as a post-facto validation that a particular line is equitable, States do not appear to consider it the same way. It appears that, rather than evaluating proportionality in retrospect against a particular line, States tend to consider it as one of the numerous factors that are considered within the negotiation process. Consequently, contrary to what occurs in case law, where proportionality is regularly assessed, in State practice, its use remains rather exceptional.⁴⁰⁵ One agreement that illustrates the role of proportionality in the negotiation process is the agreement between Venezuela and the Netherlands (Antilles). Even though the coast of Venezuela is twice as long as that of the Dutch Antilles, the Parties recognized the importance for the latter of ensuring the means for its economic development. Therefore, proportionality was partly compensated by economic

⁴⁰² Colson & Smith, *supra* note 358, Report 6-20(1) and (2) at 3808.

⁴⁰³ Robert W Smith, "The Maritime Boundaries of the United States" (1981) 71 *Geo Rev* 395 at 402.

⁴⁰⁴ *Territorial Sea and Continental Shelf Boundaries, France-Spain (Bay of Biscay)* in US, Department of State, "International Boundary Studies, Limits in the Sea", no 83 (Bureau of Intelligence & Research: Office of the Geographer, 1979) at 12.

⁴⁰⁵ Yoshifumi Tanaka, "Reflections on the Concept of Proportionality in the Law of Maritime Delimitation" (2001) 16 *Int'l J Mar & Coast L* 433 at 453.

factors and the Dutch Antilles received 56% of the area that would have been allocated under strict equidistance.⁴⁰⁶ Proportionality appears to have been one of the factors used in the agreed boundary between Russia and Norway,⁴⁰⁷ and in the 1969 agreement between Indonesia and Malaysia where, in the northern part of the boundary, the median line was adjusted in favour of Malaysia due to the length of its coast facing small scattered Indonesian islands at that point.⁴⁰⁸ However, in many agreements, the impact of proportionality remains unclear. Following the conclusion of the agreement on the delimitation of the EEZ and the continental shelf in the Gulf of Tonkin between China and Vietnam, China claimed that the two sides were "basically equivalent" whereas Vietnam, with slightly over 50% of the area, claimed that this was a result of its longer coastline and more numerous islands.⁴⁰⁹ In the agreement between France and Spain in the Bay of Biscay, the outer portion of the Bay represents an equidistance line that appears to have been modified to allocate to each country an area in proportion to its coastal length.⁴¹⁰ In the Cyprus\Egypt agreement on the exclusive economic zone,⁴¹¹ the difference in coastal length did not alter the equidistance line, due to a desire to strengthen good neighbourly ties between the two states.⁴¹²

⁴⁰⁶ *Ibid* at 455.

⁴⁰⁷ Henriksen & Ulfstein, *supra* note 134 at 6.

⁴⁰⁸ Ahnish, *supra* note 62 at 116.

⁴⁰⁹ Keyun, *supra* note 374 at 15.

⁴¹⁰ *Territorial Sea and Continental Shelf Boundaries, France-Spain (Bay of Biscay)*, *supra* note 404 at 13.

⁴¹¹ *Agreement between the Republic of Cyprus and the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone*, 17 February 2003, *Law of the Sea, Bulletin No 52* (New York: UN, 2003) at 45.

⁴¹² Colson & Smith, *supra* note 358, Report 8-15.

2.3 Non-geographic Factors

The most pronounced difference between State practice and jurisprudence is undoubtedly the consideration of economic and other non-geographical factors. While it is not always clear how those factors have influenced delimitations exactly, the text of the agreements and their negotiating histories often highlight the importance that human factors play as a guiding principle. Preambles of treaties establish the intention of the Parties and the aim of the treaty. Besides the more general aim of preserving neighbourly relations and friendship, more and more treaties mention the responsibility to cooperate in environmental protection, conservation, management and sharing of resources. States consider boundaries and activities around boundaries as part of the same issue. The recently concluded treaty between Norway and the Russian Federation recalls their "primary interest and responsibility as coastal States for the conservation and rational management of the living resources of the Barents Sea and in the Arctic Ocean (...)." ⁴¹³ The title itself of that treaty, referring to maritime delimitation and cooperation indicates that States do not separate determining boundaries from the purpose for which they are doing so. One major factor recognized in the Treaty between Australia and Papua New Guinea was "the importance of protecting the traditional way of life and livelihood of Australians who are Torres Strait Islanders and of Papua New Guineans who live in the coastal area of Papua New Guinea in and adjacent to the Torres Strait." ⁴¹⁴

The conciliation commission mandated to make recommendations to Norway and Iceland regarding the settlement of their continental shelf boundary was specifically instructed to "take

⁴¹³ *The Barents Sea Treaty*, *supra* note 134, preamble para 8.

⁴¹⁴ *Torres Strait Treaty*, *supra* note 135, preamble para 2.

into account Iceland's strong economic interests in these sea areas."⁴¹⁵ The agreement, in the end, was tinged with distributive justice and recognized as such by the International Court of Justice:

The settlement between Iceland and Norway (Jan Mayen), where the boundary is provided by Iceland's 200 n.m. limit towards Jan Mayen, may be seen as determined primarily by political considerations, in particular in Norway's view as 'a political concession to an island State heavily dependent on its fisheries and moreover enjoying special relations with Norway.'⁴¹⁶

What the Court sees as a political concession, however, is really the consideration and weighing of the economic factors in determining the boundary. States appear to agree that equity principles based on non-geographical factors are of primary importance when they negotiate maritime boundaries.

2.3.1 Historic Rights

As we saw in Part I, historic rights have often been claimed by States, and forcefully argued, as special circumstances in front of courts or tribunals. However, the jurisprudence has taken a very restrictive approach to those rights, requiring clear evidence of a consensus between Parties as to the existence of such rights. In State practice, it seems that historic rights claims are often abandoned early in the negotiation process, likely because States see very little interest in maintaining those claims to the detriment of the other factors to be considered, and because compromise cannot easily be achieved on such an issue. In abandoning historic claims

⁴¹⁵ *Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen* (1981) 20 ILM 797 at 800 [Conciliation Commission Iceland-Jan Mayen].

⁴¹⁶ *Denmark v Norway*, *supra* note 112 at para 84.

to a particular boundary, States will prefer to negotiate rights of access to the resources of the area. The aim of the historic claims is often to avoid dislodging traditional fishers anyway or to keep access to particular resources. This can usually be achieved within the agreement itself. This was the case when Estonia objected to a Latvian claim of historic waters for the Gulf of Riga.⁴¹⁷ This was also the case in the Sino-Vietnamese agreement in the Gulf of Tonkin where Vietnam abandoned its claim that the boundary had been set by the 1887 Treaty between France and the Qing Dynasty and that the waters on its side were internal waters due to this historic claim.⁴¹⁸

It is true that many of the cases decided by third-parties have seen arguments based on historical claims or old treaties. Parties bringing these disputes wished to have a legal analysis in the hope that it would settle the issue in their favour. Considering that practically none of the historical claims have been upheld by the Courts, it is likely that more countries will choose to abandon those in favour of a negotiated settlement that protects a wider-range of interests. Many agreements recognize the historical status of a body of water as between the signatories, but this recognition has usually no incidence on the determination of the line *per se* and usually serves to bolster one or both of the parties' claims related to other disputes.⁴¹⁹

⁴¹⁷ Erik Franckx, "Two New Maritime Boundary Delimitation Agreements in the Eastern Baltic Sea" (1997) 12 Int'l J Mar & Coast L 365 at 368.

⁴¹⁸ Keyuan, Zou, "The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin" (2005) 36:1 Ocean Devel & Int'l L 13 at 15. The claim had been made through the *Declaration on Baseline of Territorial Waters* by Vietnamese Council of Ministers on 12 November 1982 at para 3, cited in *Straight Baselines: Vietnam*, US, Department of State, "International Boundary Studies, Limits in the Sea" no 99 (Bureau of Intelligence & Research: Office of the Geographer, 1983) at 5-7.

⁴¹⁹ For example, in the Costa Rica-Panama Boundary Agreement, the following language was added in the final article : " (...)The Republic of Costa Rica, aware that its specific recognition that the Gran Golfo de Panama (Gulf

2.3.2 Navigation

The issue of navigation is often linked with both strategic interests as well as commercial interests for coastal States. There are very few third party decisions that address this issue, although there are a number of negotiated settlements where this factor was of prime importance. It is probable that faced with such an important issue as their strategic interests, states prefer a negotiated settlement, where they can protect their vital interests, to an all or nothing decision that is often the case in arbitral or judicial decisions. In the Baltic Sea, where shipping is of great importance, about half of the boundaries were adapted for navigational interests.⁴²⁰ For example, in the 1989 maritime boundary agreement between the German Democratic Republic and Poland, the German island of Greifswalder, although located in a crucial geographic position and used previously for the continental shelf agreement, was disregarded in order to move the line to the west to secure Polish navigational interests, which were the navigational approaches to the ports of Szczecin and Swinoujscie.⁴²¹ A similar consideration governed the 1974 agreement between the two Germanys. In order to give the Federal Republic of Germany access to the ports of Lubeck and Travemunde, the boundary line was made to coincide with the south-east edge of the shipping route.⁴²² There was also a deviation from equidistance in the Estonia\Latvia agreement in order to take into consideration

of Panama) has the nature of an historic bay is very important insofar as the incontestability of that nature is concerned, declares that it does not object to provisions to that effect set forth by the Republic of Panama in its Law No. 9 of January 30, 1956." India and Sri Lanka have also agreed that both Palk Bay and the Gulf of Mannar are historic waters although this factor had no incidence on the tracing of the boundary line between them.

⁴²⁰ Erik Franckx, "Maritime Boundaries and Regional Cooperation" (1990) 5 Int'l J Estuarine & Coastal L 215 at 221.

⁴²¹ Franckx, "Cooperation in the Baltic", *supra* note 381 at 21.

⁴²² Erik Franckx, "The 1989 Maritime Boundary Delimitation Agreement between the GDR and Poland" (1989) 4 Int'l J Estuarine & Coastal L 237 at 243.

navigational interests.⁴²³ Access through navigational corridors or bodies of water has also played a role in many other delimitation agreements around the world. Belize limited its territorial sea claim to three miles between the mouth of the Sarstooth River and Ranguana Caye in order to give Guatemala a corridor of unimpeded transit to the Caribbean Sea.⁴²⁴ Both Korea and Japan limited their territorial sea claims to three miles in the Korean Straits area in order to permit unimpeded passage.⁴²⁵ Navigational interests linked to strategic interests have also influenced the maritime boundary between the then USSR and North Korea. In their 1985 territorial sea agreement, the boundary line was modified from the equidistance line to ensure access for the USSR's main Pacific naval fleet base at Vladivostok.⁴²⁶ Similarly, a few years later, the agreement between the Russian Federation and Finland established a belt of high seas between the territorial seas of the Soviet island of Gogland and islands close to the Finnish mainland coast in order for Russia to have unimpeded access to the Baltic Sea.⁴²⁷ In the Mediterranean Sea, also a crucial route for trade and strategic interests, navigation was a key factor in many boundary agreements. The agreement between France and Italy in the Straits of Bonifacio, and the one between Italy and Yugoslavia in the Gulf of Trieste, ensure for each party access to its coast without entering the territorial sea of the other.⁴²⁸ The agreement between Indonesia and Singapore also shows that the parties were influenced by navigation as the boundary follows the navigation channel, even crossing into Indonesia's archipelagic baselines

⁴²³ Franckx, "Baltic Sea Boundaries", *supra* note 384 at 3527.

⁴²⁴ Jon M Van Dyke, "The Republic of Korea's Maritime Boundaries" (2005) 18 Int'l J Mar & Coast L 509 at 520-521.

⁴²⁵ *Ibid.*

⁴²⁶ Oxman, "Considerations", *supra* note 380 at 274.

⁴²⁷ Alex G Oude Elferink, "The Law and Politics of the Maritime Boundary Delimitations of the Russian Federation, Part 1" (1996) 11 Int'l J Mar & Coast L 533 at 544

⁴²⁸ Oxman, "Considerations", *supra* note 380 at 278.

at one point.⁴²⁹ Navigation as a factor in boundary delimitation, in view of its strategic importance to States, has been widely illustrated in numerous agreements. It has also been explicitly promoted by States, as illustrated by the 1974 Saudi-Arabia/United Arab Emirates agreement on land boundary and sovereignty over some islands. That agreement included an article calling for the settlement of the maritime boundary between the two States, now that sovereignty over the islands and the land boundary had been settled. In that agreement, navigational interests are clearly described as a fundamental principle of equity to be considered as part of an equity-based negotiated settlement:

(...) They shall do so on such a basis of equity as will ensure free and direct access to the high seas from the territorial waters of that part of the territory of the Kingdom of Saudi Arabia adjacent to the territory of the United Arab Emirates and from the territorial waters of Huwaysat island, mentioned in paragraph 1 above, and in such a manner as to take account of suitability for deep-water navigation between the high seas and that part of the territory of the Kingdom of Saudi Arabia indicated above. The High Contracting Parties shall have joint sovereignty over the entire area linking the territorial waters of the Kingdom of Saudi Arabia and the high seas, in accordance with the provisions of this paragraph.⁴³⁰

2.3.3 Economic Factors

The ownership of resources usually dominates maritime boundary negotiations.⁴³¹ This is true for both sea-bed and subsoil resources as well as fisheries. It is with regard to those factors that States have applied principles of distributive justice in the most wide-ranging and

⁴²⁹ *Ibid* at 277.

⁴³⁰ *Agreement between the Kingdom of Saudi Arabia and the United Arab Emirates on the Delimitation of Boundaries*, 21 Aug 1974, 1733 UNTS 23, art 5(3).

⁴³¹ Debbie B Hamman, "The Role of Fisheries in a Namibia\South Africa Narrative Boundary Delimitation" (2000) 12 *Afr J Int'l & Comp L* 659 at 661.

imaginative ways, illustrating that "ocean issues will be settled in the most satisfactory manner once jurisdictional and conceptual approaches are abandoned and functional solutions sought."⁴³² Because of political considerations, States have often publicly presented boundary treaties as elements in the broader area of economic or resource management. When announcing the ratification of the treaty between Russia and Norway in the Barents Sea, the Foreign Ministers framed the agreement in resource terms, stating that the treaty would allow continued cooperation in fisheries and new opportunities for petroleum activities and cooperation in the Barents Sea.⁴³³ In the preamble to their 1971 agreement on the continental shelf, following the *North Sea* decision of the ICJ, Denmark and Germany stated that they were "anxious to regulate the economic exploitation of the continental shelf insofar as this is in their common interest."⁴³⁴ The wording of the mandate of the Commission established to make recommendations on the dividing line between Iceland and the Norwegian island of Jan Mayen specifically highlighted the importance of economic factors: "(...) the Commission shall take into account Iceland's strong economic interests in these sea areas, (...)."⁴³⁵ It was indeed specifically because of its economic reliance on resources that the agreed EEZ and continental shelf boundary favoured Iceland.⁴³⁶ In the negotiations between Namibia and Angola, leading to their

⁴³² H. Burmester, "The Torres Strait Treaty: An Ocean Boundary Delimitation by Agreement" (1982) 76 AJIL 321 at 323.

⁴³³ Clive Schofield & Ian Townsend-Gault, "Of Parallels and Meridians : Implications of Barents Sea Dispute Resolution for the Beaufort Sea " (2011) 7.1 Int'l Zeitschrift 1 at 4-5.

⁴³⁴ *Treaty concerning the delimitation of the continental shelf under the North Sea*, Denmark and Germany, 28 January 1971, 857 UNTS 119 (English translation), preamble. The same text appears in the preamble to the German-Netherlands Continental Shelf Boundary done at the same time: *Treaty concerning the delimitation of the continental shelf under the North Sea*, Netherlands and Germany, 28 January 1971, 857 UNTS 131.

⁴³⁵ *Conciliation Commission Iceland-Jan Mayen*, *supra* note 415 at 823.

⁴³⁶ *Agreement between Norway and Iceland on Fisheries and Continental Shelf Questions*, 2125 UNTS 226 (English translation), preamble.

2002 agreement, the Parties agreed, at the first meeting, that equitable sharing of resources would be the overriding principle of the negotiations.⁴³⁷ The principle of "equitable and fair sharing of resources" was also raised by Namibia in its negotiations with South Africa.⁴³⁸ Even before the conclusion of the *UNCLOS*, at a time where the issue of delimitation was one of the more controversial of the Law of the Sea Conference, and where maritime boundary issues were better known for conflicts than agreement, States were concluding agreements in consideration of equity principles linked to distributive justice. In its 1978 agreement with the Netherlands, Venezuela agreed to a boundary that did not reflect the proportional length of its coast in order to allow the Netherlands Antilles access to more resources, and thus recognized "the essential importance of the Netherlands Antilles of ensuring the means for its economic development."⁴³⁹ That same year, Australia and Papua New Guinea were able to reach a landmark treaty for their boundary in the Torres Strait. The foundation of the agreement, and the impetus for Australia, was the protection of the inhabitants of the Torres Strait and their traditional ways, as well as the recognition of the special environmental vulnerability of the area.⁴⁴⁰ The agreement also contained special provisions regarding the exploitation of resources and revenue sharing that were to the benefit of Papua New Guinea.⁴⁴¹ As with the Torres Strait Treaty, socio-economic factors are often couched in historical or human terms, i.e. to preserve traditional ways of life. They relate mostly to two important economic factors linked to the exploration and the

⁴³⁷ Leon Edward Moller, "The Outstanding Namibian Maritime Boundaries with Angola and South Africa" (2003) 18 *Int'l J Mar & Coast L* 241 at 253.

⁴³⁸ *Ibid* at 251.

⁴³⁹ *Boundary Delimitation Treaty between the Republic of Venezuela and the Kingdom of the Netherlands*, 30 March 1978, English translation in US, Department of State, "International Boundary Studies, Series A, Limits in the Sea", no 105 (Bureau of Intelligence & Research: Office of the Geographer, 1986) at 11.

⁴⁴⁰ *Torres Strait Treaty*, *supra* note 135, preamble.

⁴⁴¹ Burmester, *supra* note 432 at 330.

exploitation of resources from the sea and from the subsoil: fisheries and hydrocarbons. While hydrocarbon are a rather recent resource issue, fisheries disputes have been around for a long time and directly affect coastal populations. We will therefore review those separately.

2.3.4 Fisheries

Although the issue of fisheries is often central to boundary negotiations, its influence on the boundary delimitation line itself is often less obvious. There are only two judicial cases where fisheries have objectively influenced the determination of the boundary. In the first case, *Grisbadarna*, the line was moved to preserve the integrity of a particular fishery and, in the second case, *Jan Mayen*, the line was adjusted in order to ensure shared access to the resource. The practice of states, however, focuses more on the sharing aspect and accomplishes this rather through a comprehensive boundary treaty than a particular line. Fisheries are very often considered integral to a boundary agreement, and "fishing stocks are almost always a factor coastal States consider relevant when *negotiating* a boundary."⁴⁴² This was the case for the China\Vietnam agreement in the Gulf of Tonkin, the first maritime boundary delimitation agreement by China. China insisted that the boundary agreement include fisheries arrangements such as the recognition of traditional fisheries by Chinese fishermen. Negotiations did not proceed until Vietnam agreed to that request.⁴⁴³ What the agreement finally established was a common fisheries zone where the amount of fishing is determined annually and guided

⁴⁴² Hamman, *supra* note 431 at 660.

⁴⁴³ Zou Keyuan, "The Sino-Vietnamese Fisheries Agreement for the Gulf of Tonkin" (2002) 17 Int'l J Mar & Coast L 127 at 132.

by the principle of equality and mutual benefit.⁴⁴⁴ The boundary between Iceland and Norway (Jan Mayen) was heavily influenced by the economic dependence of Iceland on the fisheries,⁴⁴⁵ and thus accorded Iceland a much larger area than what would have been determined by equidistance. The preservation of traditional fishing rights for Cayman Islanders was an important factor in the 2001 delimitation treaty between the UK (Cayman Islands) and Honduras, which was in turn compensated by taking into account certain oil concessions.⁴⁴⁶ As stated above, the Sweden\USSR agreement's consideration of the Swedish islands of Gotland and Gotska Sandon was linked to a twenty year fisheries concession in the same ratio. In the 1978 *Torres Strait Treaty*, the EEZ line differs from the continental shelf line in recognition of the importance of the resource to the inhabitants since "it was designed to try to accommodate PNG's wishes for a share of the exploitable resources of Torres Strait, while preserving the right of the Torres Strait islanders to enjoy the fisheries surrounding their islands."⁴⁴⁷ In that case, fisheries, in a delimited protected zone, are managed by a special regime where the allocation of resources is predetermined and also includes special allocations in recognition of the special economic significance of certain catches to the inhabitants.⁴⁴⁸ Many agreements between neighbouring States with important local traditional fisheries make provisions, within the boundary treaty, for a common fishing zone straddling the boundary in order to avoid disputes

⁴⁴⁴ *Ibid* at 134.

⁴⁴⁵ *Denmark v Norway*, *supra* note 112 at para 84.

⁴⁴⁶ *Delimitation of Maritime Boundaries within CARICOM*, Background paper for Report, online: Caribbean Regional Fisheries Mechanism: <http://www.caricom-fisheries.com/website_content/publications/documents/Delimitation_of_Maritime_Boundaries_within_CARICOM.pdf>.

⁴⁴⁷ Stuart Kaye, "The Torres Strait Treaty: A Decade in Perspective" (1994) 9 *Int'l J Mar & Coast L* 311 at 315.

⁴⁴⁸ Burmester, *supra* note 432 at 344.

and ensure long-term cooperation.⁴⁴⁹ In the case of the *Barents Sea Treaty*, the preamble specifically states that the treaty is not to adversely affect the fishing opportunities of the two States.⁴⁵⁰ The importance of the fisheries factor is also illustrated by treaty negotiations between Baltic States, following their independence. The issue had not been raised during the Latvia\Lithuania negotiations leading to the 1999 agreement. However, it was raised by the Latvian Parliament at the time of ratification debates and became a stumbling block.⁴⁵¹ For the Latvia\Estonia agreement, fisheries had been the trigger for the negotiations, even though the issue was not settled in the end.⁴⁵² The Baltic States' accession to the European Union, which is responsible for fisheries policy, was later instrumental in settling those differences by making the issue irrelevant.

2.3.5 Mineral Resources

In the jurisprudence, mineral and hydrocarbon resources have not been influential factors. The principle of "unity of deposit" had been put forward by the International Law Commission in preparation for the first Law of the Sea Conference.⁴⁵³ The ICJ, in the *North Sea* case, had mentioned that the preservation of unity of deposit within a single national ownership would qualify as a special circumstance, in accordance with Art 6 of the 1958 *Continental Shelf Convention*, and could result in a shifting of a potential boundary. Unity of deposit seeks to

⁴⁴⁹ This is the case notably for the Kenya-Tanzania agreement of 1976, the Argentina-Uruguay agreement of 1973 and Colombia-Dominican Republic agreement of 1978.

⁴⁵⁰ Henriksen & Ulfstein, *supra* note 134 at 7.

⁴⁵¹ Franckx, "Baltic Sea Boundaries", *supra* note 384 at 3511.

⁴⁵² *Ibid.*

⁴⁵³ See Gidel in ILC 1950, *supra* note 314 at 112.

avoid drawing a line that would have the effect of dividing mineral deposits. The concept of "unity of deposit" has been raised by the Court as a potential factor in the determination of a boundary. However, already in 1968, Oronato was of the opinion that States would probably not follow this principle.⁴⁵⁴ By the mid-70s, it was widely considered that "[t]ime and practice, however, has now proved conclusively that it is not an approach that has been accepted or will be followed."⁴⁵⁵ Indeed, very few agreements actually follow this principle. One example is the Caspian Sea boundary between Azerbaijan, Russia and Kazakhstan where the parties have sought to avoid as much as possible the division of known petroleum deposits.⁴⁵⁶

In the case of geological structures that did end up straddling the boundary, the Russia /Kazakhstan agreement on the seabed⁴⁵⁷ assigns sovereignty to one state but with participation of the other in the development.⁴⁵⁸ In the agreement between Denmark and Germany, following the *North Sea Continental Shelf* case, an area where drilling had commenced by Danish concessionaires was retained by Denmark, even though the terms of the judgement and geographical factors may have indicated otherwise.⁴⁵⁹ Although there are indeed a few examples of States following at least a version of the principle of unity of deposit, general State practice is quite the opposite. To think that States would readily negotiate giving up their stake in a potentially lucrative mineral deposit might have been a bit premature.

⁴⁵⁴ William T Oronato, "Apportionment of an International Common Petroleum Deposit" (1968) 17 ICLQ 85 at 87.

⁴⁵⁵ William T Oronato, "Apportionment of an International Common Petroleum Deposit" (1977) 26 ICLQ 324 at 325.

⁴⁵⁶ J Ashley Roach & Robert W Smith, "Caspian Seabed Boundaries" in Colson & Smith, *supra* note 358, 3537 at 3545.

⁴⁵⁷ Since the Caspian Sea is a lake, the seabed is not referred to as a continental shelf. However, the principles that apply to the delimitation of the seabed and the water zones are the same.

⁴⁵⁸ *Agreement between Kazakhstan and Russia on the Delimitation of the Caspian Seabed*, 6 July 1998, English text in: Colson & Smith, *supra* note 358, Report 11-1, 4013 at 4016.

⁴⁵⁹ Wood, *supra* note 358 at 3500.

States generally appear to consider the resource factor differently than the Court. Their approach is more in line with the concept of distributive justice. They would rather share the resources than letting it either entirely into the hands of their neighbour or squandered for lack of an agreement:

That such a deposit would not be allowed to fall under only one state's jurisdiction is supported by state practice in bilateral treaties delimiting offshore boundary that implicitly contemplate that offshore petroleum fields might be joint property, as well as the increasing number of joint development agreements.⁴⁶⁰

The 1965 UK\Norway Agreement is typical of the earlier version of agreements on shared resources. Specific articles ensured that if some resources were found that could be exploited from either side of the line, the Parties would negotiate to make an arrangement as to how these would be exploited. This is indeed what happened with the Frigg Gas Field Reservoir agreement in 1977, the first of its kind after the discovery of the resource. Most of the agreements reached in the 1960s, by Norway or the United Kingdom, were indeed concluded before location of hydrocarbon resources were known in the area. This is why they contained a common clause on single hydrocarbon structures to the effect that the parties shall seek to reach agreements as to the manner in which the structure shall be most effectively exploited.⁴⁶¹

In the Saudi-Arabia\Bahrain continental shelf delimitation, concluded in 1958, the agreement provided that half the revenues would be given to Bahrain even though an oil field was located

⁴⁶⁰ David M Ong, "Joint Development of Common Oil and Gas Offshore Deposits: 'Mere' State Practice of Customary International Law?" (1999) 93 AJIL 771 at 778 [Ong, "Joint Development"].

⁴⁶¹ *UK and Norway Continental Shelf Agreement*, *supra* note 366, art 4; *Agreement between the Government of the United Kingdom and the Government of Denmark relating to the Delimitation of the Continental Shelf between the two Countries*, 25 November 1971, [1973] UKTS 6, art 4; *Agreement between Denmark and Norway relating to the Delimitation of the Continental Shelf*, 634 UNTS 71, art 4.

entirely on the Saudi Arabian side.⁴⁶² In the 1969 continental shelf boundary agreement between Qatar and Abu Dhabi, the Al-Bunduq field was to be jointly shared. Although the revenues were to be divided equally, the exploitation was to be undertaken by Abu Dhabi in accordance with a previously granted concession.⁴⁶³ In the Bay of Biscay agreement between Spain and France, although the overlapping zone was apportioned in accordance with coastal ratio, "[t]he Contracting Parties encourage[d] exploitation of the zone conducive to equal distribution of its resources."⁴⁶⁴ Whereas the 1989 *Timor Gap Treaty*, between Australia and Indonesia, provided for an equal share of the production, the 2002 agreement between Australia and the new independent state of East Timor favours East Timor by allocating 90% of the share of the production in the Joint Petroleum Development Area to East Timor. Australia agreed to this in order to help promote economic viability with a near neighbour.⁴⁶⁵

2.4. Joint Development and Cooperation

Although hydrocarbon resources are a main impetus for countries to negotiate maritime boundaries, those resources *per se* do not appear to greatly affect the location of the boundary itself as seen by State practice. This is because States, by attaching revenue sharing agreements within boundary agreements, or by setting up joint development zones (JDZ), are removing the

⁴⁶² Vivian Louis Forbes, *The maritime boundaries of the Indian Ocean region* (Singapore: Singapore University Press, 1995) at 113-114.

⁴⁶³ *Agreement Concerning Settlement of Offshore Boundaries and Ownership of Islands between Qatar and the United Arab Emirates*, 20 March 1969, English version in US, Department of State, "International Boundary Studies, Series A, Limits in the Sea", no 18 (Bureau of Intelligence & Research: Office of the Geographer, 1970) at arts 6-7.

⁴⁶⁴ *Convention between France and Spain on the Delimitation of the Continental Shelves of the Two States in the Bay of Biscay*, 29 January 1974, 996 UNTS 333 at Annex 2, art 1.

⁴⁶⁵ Report 6-20(1) and (2) in Colson & Smith, *supra* note 358 at 3808.

reason for the dispute itself and ensuring that the resource issue is tied permanently to the boundary. It may be that the establishment of a JDZ is not a solution to the jurisdictional problem; it is nevertheless a mechanism of a functional nature for the attainment of the goal of resource exploitation.⁴⁶⁶ The importance of the location of the boundary is diminished and the equity factors are used in the revenue sharing agreements to determine each party's share.

According to author Richard E. Swarbrick, the apportionment of the resources is an important element of equity and should be based on non-technical considerations.⁴⁶⁷ Straddling resources have been the subject of competing legal arguments, that of the rule of capture versus the principle of cooperation.⁴⁶⁸ The rule of capture means that the first to undertake the extraction has a right to exploit the entire field. This theory has largely been discredited, as explained above, as being foreign to modern international relations. While the principle of cooperation has been enshrined in the *UNCLOS* with regards to the living resources of the sea (art. 63), no such provision has been extended to the non-living resources of the seabed. As stated in the previous chapter, however, some authors have argued that the obligation not to cause damage to another state, as well as the obligation to consult, usually understood in other areas of international law, would be sufficient to create such an obligation with regards to the exploitation of continental shelf trans-boundary resources.⁴⁶⁹

⁴⁶⁶ Townsend-Gault & Stormont, *supra* note 328 at 53.

⁴⁶⁷ Richard E Swarbrick, "Oil and Gas Reservoirs Across Ownership Boundaries: The Technical Basis for Apportioning Reserves" in Blake, *supra* note 328, 41 at 50.

⁴⁶⁸ Ong, "Joint Development", *supra* note 460 at 777.

⁴⁶⁹ Rainer Lagoni, "Oil and Gas Deposits Across National Frontiers" (1979) 73 AJIL 215; also Oronato, *supra* note 455 at 327-328.

While the practice of States has, indeed, widely favoured a cooperative approach in the form of unitization agreements or joint development, there is no indication that, currently, customary law requires a certain form of cooperation or even rejects the rule of capture as applicable.⁴⁷⁰ However, in the *Eritrea/Yemen* case, the Court appears to state that a rule emerging from State practice "import that Eritrea and Yemen should give every consideration to the shared or joint unitized exploitation of any such resources."⁴⁷¹ Indeed, State practice has shown great adherence to cooperation and consultation.

2.4.1 Unitization

The concept of unitization had not been raised in international law when the foundations of maritime boundary determination were being determined. Following the practice of States, however, it soon replaced the concept of "unity of deposit" suggested by the ILC in 1950. Unity of deposit required moving the boundary to ensure that a particular geological structure fall entirely on one side or the other of the boundary. On the contrary, States preferred to agree to share sovereignty over structures that straddle the boundary. The structure is thus considered a "unit" and the process of delimiting the shared structure and how it will be managed, "unitization". This unitization had been common place in domestic law, mostly in the United States, where private ownership of minerals had often resulted in

⁴⁷⁰ Ong, "Joint Development", *supra* note 460 at 778. In 2003, Japan complained that China was siphoning off hydrocarbon resources from its EEZ when it exploited an oil field 3,1 n.m. from Japan's claimed boundary. China simply replied that it was exploiting the resource from its own EEZ and that Japan had no right to complain: Kim, *supra* note 369 at 298.

⁴⁷¹ *Eritrea v Yemen*, *supra* note 114 at para 86.

fractionalized ownership of the resource in a common reservoir.⁴⁷² It is a specialized form of cooperative development that requires a strong degree of political consensus that goes beyond the procedural requirement to cooperate under customary international law.⁴⁷³ It is this absence of clear obligation under customary law that prompted States to include mineral deposit clauses in maritime boundary treaties.⁴⁷⁴

Most maritime boundary treaties have indeed included articles related to cooperation in the development of resources. These articles do not always refer specifically to unitization, but this form of cooperation is the most common.

When the resources are not known at the time of the boundary agreement, such as with many agreements from the earlier days, in the North Sea for example, the boundary treaty provides that another agreement will be reached to determine how the resource will be exploited and how the revenues will be shared. The earlier treaties contained usually a single article much like that used by the UK and Norway in 1965:

If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or

⁴⁷² Jacqueline Lang Weaver & David F Asmus, "Unitizing Oil and Gas Fields Around the World: A Comparative Analysis of National Laws and Private Contracts" (2006) 28 Hous J Int'l L 3 at 6.

⁴⁷³ Ana E Bastida, et al, "Cross-border Initization and Joint Development Agreements: An International Law Perspective" (2006-2007) 29 Hous J Int'l L 355 at 380.

⁴⁷⁴ Charles Robson, "Transboundary Petroleum Reservoirs: Legal Issues and Solutions" in Blake, *supra* note 328, 3 at 9.

field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned.⁴⁷⁵

The more recent agreements, such as the 2010 Norway\Russia Treaty in the Barents Sea have much more detailed obligations, including an Annex to the Treaty specifying the particular provisions of the unitization agreement.⁴⁷⁶

In the Persian Gulf, where resources were already being exploited before the continental shelf developments of the 1960s, sharing agreements were concluded quickly to avoid disruption. Kuwait and Saudi Arabia agreed to exercise equal rights in the zone beyond their territorial sea "by means of shared exploitation."⁴⁷⁷

In the Iceland\Norway (Jan Mayen) agreement, the allocation of resources favours Iceland in recognition of its greater size and population and the fact that its economy is reliant on the resource. Although the agreement contains the usual provision on unitization of deposits straddling the boundary,⁴⁷⁸ a special area, covering over 45,000 sq. km., straddling the boundary is also created. Over 60% of that area lies on the Jan Mayen side.⁴⁷⁹ Each party is entitled to 25% of the revenue from hydrocarbon exploitation from the other party's side of the boundary

⁴⁷⁵ *UK and Norway Continental Shelf Agreement*, *supra* note 366, art 4.

⁴⁷⁶ *The Barents Sea Treaty*, *supra* note 134, Annex 2.

⁴⁷⁷ *Agreement between the State of Kuwait and the Kingdom of Saudi Arabia relating to the Partition of the Neutral Zone*, 7 July 1965, (1965) 4 ILM 1134, art 8(2) [*Kuwait-Saudi Arabia Agreement*].

⁴⁷⁸ *Agreement between Norway and Iceland on the continental shelf between Iceland and Jan Mayen*, 22 October 1981, 2124 UNTS 262 (translation) (entered into force 2 June 1982), art 8.

⁴⁷⁹ *Ibid*, art 5-6.

within the special area.⁴⁸⁰ However, if a deposit straddles the special area line and the continental shelf on the side of Iceland, unitization will apply but if the deposit straddles the special area line on the Jan Mayen side, it will be considered to be wholly contained within the special area.⁴⁸¹

2.4.2 Joint Development Zones

Joint Development Zones (JDZ) or Joint Development Areas (JDA) have existed even before *UNCLOS*. Although *UNCLOS* does create an obligation for States to cooperate in entering into provisional arrangements,⁴⁸² it is rather the benefit of this cooperation that motivates States to reach agreements rather than the *UNCLOS* obligation itself. More and more, disputed zones are covered by JDZ with regards to hydrocarbon resources. On the fisheries side, true JDZ are not very common, in the sense that they are reached in the context of a maritime boundary delimitation negotiation as a provisional agreement. In most cases, fisheries management is addressed through separate purpose treaties that encompass a wide area, not necessarily limited to a disputed boundary area, considering the sometimes widespread mobility of the resource. Although boundary agreements like the Argentine-Uruguay agreement of 1973 provides for what is referred to as a common fisheries zone,⁴⁸³ this is not a real joint development zone as a lateral boundary between the States has been delimited separately from

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*, art 8.

⁴⁸² *UNCLOS*, supra note 27, arts 74(3), 83(3): "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

⁴⁸³ *Treaty between Argentina and Uruguay concerning the Rio Plata and the corresponding Maritime Boundary*, 19 November 1973, 1295 UNTS 306 (translation) at chap 16.

the area included in the common fisheries zone. Furthermore, there is no joint management in that each State's allocation is based on the amount of fish determined scientifically to be on their own side.⁴⁸⁴ In this case, it is more typical of a fisheries agreement where each States allows the other to fish in its zone for a total allowable catch that is determined and shared in advance. A number of those agreements, however, do reflect the idea of distributive justice where the allocation of the resource becomes an equity factor, without which no boundary agreement would have been possible. This is the case with the agreement between Iceland and Norway. Not only has Norway recognized a full 200 n.m. EEZ boundary for Iceland, even in areas where there is less than 400 n.m. between them, it has also accepted less than half the total allowable catch, even on its own side of the special area.⁴⁸⁵ Many maritime boundary treaties do provide for a kind of buffer zone, straddling an agreed boundary line, where small traditional fishermen can fish unimpeded, in order to avoid excessive enforcement or disputes, but these cannot be considered joint development areas.⁴⁸⁶ Some agreements cover both living and non-living resources, such as the Colombia\Jamaica agreement of 1993.⁴⁸⁷ One of the only examples of a JDZ exclusive to fisheries is found in the agreement between the United Kingdom and Denmark for the delimitation of the boundaries between the Faroe Islands and Scotland. In that agreement the entire continental shelf boundary is defined. The fisheries zone boundary overlaps the continental shelf boundary for most of the delimitation but leaves a gap where a

⁴⁸⁴ The lateral boundary is described as the equidistance line calculated from an imaginary baseline between two points: *Ibid*, art 70. The proportionality of the catches to the ownership of the resources is found at art 74.

⁴⁸⁵ *Agreement on Fisheries and Continental Shelf Questions*, supra note 478, art 5.

⁴⁸⁶ This is the case, for example, between Kenya and Tanzania: *Exchange Of Notes between the United Republic Of Tanzania And Kenya concerning the Delimitation of the Territorial Waters Boundary between the two States*, 17 December 1975, 1039 UNTS, art 3.

⁴⁸⁷ *Maritime Delimitation Treaty between Jamaica and the Republic of Colombia*, 12 November 1993, *Law of the Sea, Bulletin No 26* (New York: UN, 1999) 50, art 3.

"Special Area" is defined.⁴⁸⁸ However, although the boundary remains undefined, it is still not a true Joint Development Zone as each party's regulations apply to its fishery and its vessels in the zone. There is no joint management in this case. It is probable also that the internationalisation of fisheries issue in the context of Regional Fisheries Organizations (RFO) has tempered the need for bilateral arrangements.

For hydrocarbon resources, however, there is clearly a trend towards JDZ:

When evaluating new trends that have emerged since the conclusion of the Geneva Conventions on the Law of the Sea in 1958, it is apparent that the use and acceptance by states of joint development or cooperative management agreements has increased dramatically during the last fifty years. More significantly, these agreements, taken together with the exploration, management and exploitation of common maritime natural resources, have become an effective mechanism for achieving peaceful resolution of maritime boundary disputes. As a result, joint development or cooperative management strategies have become a common component of modern maritime boundary delimitation treaties.⁴⁸⁹

A true JDZ requires the pooling of the rights of the respective States, which rights are then exercised in common and the revenue shared on the basis of an unambiguous agreement.⁴⁹⁰

Such zones are created either as part of a boundary determination agreement or as a provisional agreement under *UNCLOS* article 83(3).

⁴⁸⁸ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland, on the one hand, and the Government of the Kingdom of Denmark together with the Home Government of the Faroe Islands, on the other hand, relating to the Maritime Delimitation in the area between the United Kingdom and the Faroe Islands*, 18 May 1999, [1999] UKTS 76, art 3.

⁴⁸⁹ Luis E Rodriguez-Rivera, "Joint Development Zones and Other Cooperative Management Efforts Related to Transboundary Maritime Resources: A Caribbean and Latin American Model for Peaceful Resolution of Maritime Boundary Disputes", online: (2008) 7:1 *Issues in Legal Scholarship* 2 < <http://www.degruyter.com/view/j/ils> > at 1.

⁴⁹⁰ Townsend-Gault & Stormont, *supra* note 328 at 55.

The issue here is not to survey every one of the estimated fifty JDZ agreements⁴⁹¹ but to determine what factors play a role in their successful negotiation. For countries in South America and the Caribbean, Professor Rodriguez-Rivera argues that besides a culture of solidarity and peace, important factors such as "economic dependence on the sustainable development of living and non-living maritime common natural resources, the development of the technological means to exploit said resources in an equitable way, and the desire to focus on economic development opportunities instead of disputing over sovereignty issues,"⁴⁹² are key. This was indeed the case in favour of the first JDZ agreement, between Japan and South Korea, in 1974, where the preamble to the agreement mentions the mutual interest in exploring and exploiting the resources.⁴⁹³ The last article stipulates that once the exploitation of the resources is no longer viable, the Parties can revise or terminate the agreement.⁴⁹⁴ It should be noted that most of the JDZ would fall on the Japanese side of what would be an equidistance line. This was based on South Korea's argument of natural prolongation of its continental shelf up to the islands of the Tori-Shima group, separated from the Japanese mainland by a deep trench.⁴⁹⁵ In view of the abandonment of natural prolongation as a factor in maritime boundary delimitation, the agreement has proven beneficial to South Korea. While most agreements aim to split the cost and revenues between the Parties in half, many agreements contain an unequal apportioning. In the Tunisia\Libya agreement, although the boundary was determined following

⁴⁹¹ Rodriguez-Rivera, *supra* note 489 at 1-2.

⁴⁹² *Ibid* at 21-22.

⁴⁹³ *Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries*, 30 Jan. 1974, 1225 UNTS 136.

⁴⁹⁴ *Ibid*, art 27.

⁴⁹⁵ Van Dyke, *supra* note 424 at 523.

the ICJ decision, a JDZ was established by which Tunisia was given 10% of the revenue from the El Bouri oil fields that would have otherwise fallen on the Libyan side of the boundary.⁴⁹⁶ Following years of litigation, and in the absence of a settlement, Guinea-Bissau and Senegal agreed on a JDZ covering all resources. While fisheries resources were split evenly, mineral resources were allocated to Senegal for 85%, subject to revision in the event of new discoveries.⁴⁹⁷ The *Timor Sea Treaty* between Australia and East Timor is probably the best example of a treaty predicated on the principle of distributive justice. Australia accepted 10% of the revenues generated in the JDZ, giving 90% to East Timor so that the Treaty "would promote economic viability with a near neighbour."⁴⁹⁸

Joint Development Zones require many elements to be successful. The agreement particularly needs to respect the rights of third States and not hamper the reaching of a final determination.⁴⁹⁹ Practically, there are many models that have been developed over the years. Once the area has been determined, the issue of the sharing of resources "is a key element to the success of the joint agreement as the perception that the basis for sharing is equitable and fundamental to the ongoing relationship between the two states."⁵⁰⁰ The management structure is also key and the models vary widely. The degree of integration and of independence of the management model depends very much on the political relationship

⁴⁹⁶ Ong, "Joint Development", *supra* note 460 at 787.

⁴⁹⁷ Bastida, *supra* note 473 at 408.

⁴⁹⁸ Report Number 6-20(1) and (2), *supra* note 465 at 3807.

⁴⁹⁹ Masahiro Miyoshi, "The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental" (1988) 3 Int'l J Estuarine & Coastal L 1 at 15.

⁵⁰⁰ Bastida, *supra* note 473 at 415.

between countries and the similarities between their business philosophies. In the Japan-South Korea agreement, for example, the management is left to each country's concessionaire in joint venture with the other's. Otherwise, most agreements provide for the management by a Joint Authority or Agency that is bi-national. This is the case, for example, of the Thailand\Malaysia agreement of 1979 where a joint authority was created, in 1990, to assume all rights and responsibilities on behalf of the two Governments to explore and exploit resources in the joint development area.⁵⁰¹

Although JDZ agreements are becoming the norm rather than the exception, political commitment from successive governments is required to ensure their efficiency and resolve disputes. The requirement of common grounds to facilitate joint development rests on factors such as security and economic considerations and close political and cultural ties.⁵⁰² This trend is also a witness to the growing importance of environmental imperatives in the long-term exploitation of the resources that require, in any case, a closer cooperation among States.

⁵⁰¹ Malaysia-Thailand Joint Authority, online: <<http://www.mtja.org/aboutus.php>>.

⁵⁰² Townsend-Gault & Stormont, *supra* note 328 at 66.

PART III -EQUITABLE PRINCIPLES APPLIED TO THE CANADA-UNITED STATES MARITIME BOUNDARY IN THE BEAUFORT SEA

INTRODUCTION

Under the Law of the Sea Convention, delimitation of maritime boundaries is done preferably by agreement between States. It is only when an agreement cannot be reached within a reasonable time that States shall resort to dispute resolution mechanisms.⁵⁰³ Although the United States is not party to the *UNCLOS*, there is currently wide acceptance to the effect that this principle reflects the state of customary law. Since it is also the notion that was put forward in the Truman Proclamation of 1947, there is nothing to indicate that the United States does not feel bound by this principle.⁵⁰⁴

The areas to be delimited include the territorial seas, the exclusive economic zones as well as the continental shelves of Canada and the United States in the Beaufort Sea and beyond, that is from the land boundary between the United States' State of Alaska and the Canadian Territory of the Yukon.

We shall proceed as a tribunal would, first by determining whether there already exists an agreement for parts or all of the areas to be delimited. This will be done by analysing two treaties and two previous judicial decisions that can shed light on whether there exists a binding

⁵⁰³ *UNCLOS*, *supra* note 27, art 83 (1), 83 (2).

⁵⁰⁴ It is likely anyway that the Truman Proclamation was creative of obligations for the United States as it would be consistent with the guiding principles explained by the International Law Commission in *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto*, UN Doc. A/61/10.

agreement between the Parties. If there is no explicit legal agreement, we will determine whether there exists a de facto or tacit agreement. If no agreement exists, we will review what a third party settlement would look like considering the principles reviewed in the previous chapters as well as the particular circumstances of the geographical area.⁵⁰⁵ To do this, we will apply the method that has become the norm in boundary decisions as explained previously. This method consists of drawing a provisional equidistance line, then assessing whether special circumstances exist that warrant an adjustment of that line to ensure an equitable result. In the case of the territorial sea delimitation, historic title is mentioned as a potential special circumstance and will be reviewed accordingly. The third step of the process is to verify the equitability of the delimitation by determining whether there is a disproportion between the respective length of coastlines and the maritime areas allocated to each party.

As was recently stated by the International Tribunal on the Law of the Sea, an agreement may take a number of forms and be given a diversity of names.⁵⁰⁶ To be considered an agreement for our purposes, however, the Parties must have had the intention to create obligations. Finally, we will see how the principle of equity, as understood by State practice, could be applied in negotiations between the Parties and what kind of agreement could be reached. As we will see, a negotiated agreement or agreements would have the advantage of addressing a wider range of interests and imperatives important to both countries, such as resource exploration and exploitation, sustainable development, environmental and

⁵⁰⁵ There is no compulsory jurisdiction between Canada and the United States for the settlement of such disputes. Consequently, they would have to agree to a particular jurisdiction as they have done with previous disputes.

⁵⁰⁶ *Bangladesh v Myanmar*, *supra* note 231 at para 90.

navigational considerations. As we have seen in Part II, these aspects are not marginal to the boundary determination but intrinsic to what is considered by States in reaching an equitable solution.

Chapter 1. Is There an Agreement between the Parties?

1.1 Positions of the Parties

1.1.1. Canadian Position

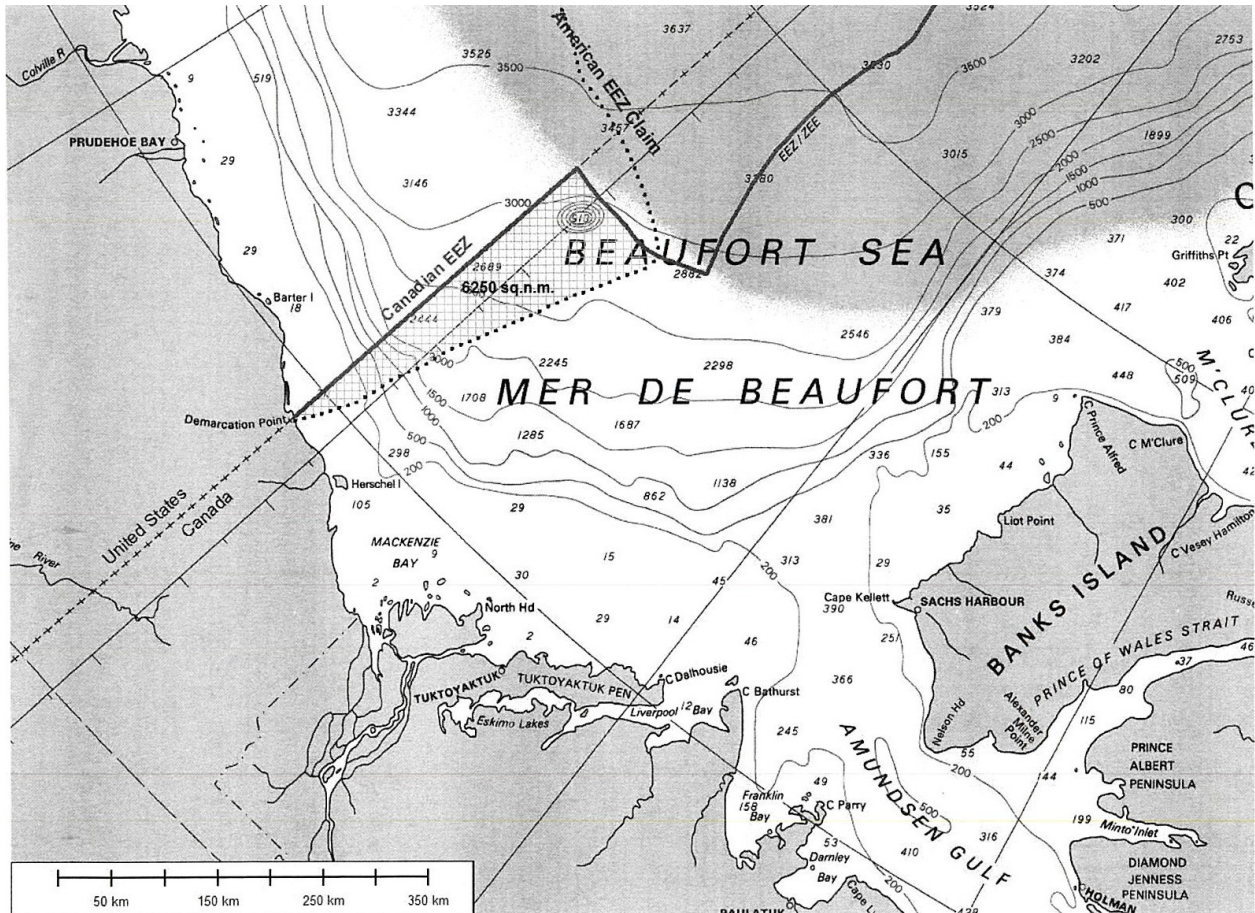
Authors consistently refer to the Canadian position as being that of a maritime boundary formed by the extension of the 141st meridian from the land into the sea.⁵⁰⁷ There is however some confusion as to whether this position is a negotiating position, or whether it is the Government's contention that this boundary has been established many years previously by agreement between the parties. It is generally understood to be either that the nineteenth century treaty establishing the boundary included the maritime area or that "special circumstances' require a deviation from the equidistance principle and asserts that the land boundary line of the 141st meridian constitutes 'special circumstances.'"⁵⁰⁸ In the latter case, the argument would have been developed following the extension of maritime areas over the continental shelf and the EEZ and with a view to eventual negotiations as required by the

⁵⁰⁷ Gillot, *supra* note 246 at 260 for example, and Donald R Rothwell, *Maritime Boundaries and Resource Development: Options for the Beaufort Sea* (Calgary: Canadian Institute of Resource Law, 1988) at 30. More recently, authors Baker and Byers stated that it was Canada's claim that the 1825 Treaty established both the land and the sea borders along the 141st meridian, in James S Baker & Micheal Byers, "Crossed Lines: The Curious Case of the Beaufort Sea Maritime Boundary Dispute" (2012) 43:1 Ocean Devel & Int'l L 70 at 72.

⁵⁰⁸ SJ Rolston & TL McDorman, "Maritime Boundary Making in the Arctic Region" in Douglas M Johnston & Phillip M Saunders, eds, *Ocean Boundary Making, Regional Issues and Developments* (Beckinham: Croom Helm Ltd, 1988) at 48-49.

UNCLOS, since “special circumstances” are factors that are weighed with other factors in order to reach an agreement, or a decision, on a particular line. Consequently, we are facing an apparent single position that supposes opposite premises. One, that the boundary has been determined and the other, that the boundary has not.

Illustration of the respective Canadian and American positions



Even research done for Canada's Parliament presents those two opposite theses as somehow being part of the same argument:

Le Canada fonde sa revendication sur le traité de 1825 entre la Russie et la Grande-Bretagne qui établit la limite entre ce qui est maintenant l'Alaska et le Yukon le long du 141e méridien. Ce traité dispose que la frontière s'étend jusqu'à la "mer Glaciale". Le Canada maintient qu'il s'agit du bon critère pour déterminer la frontière maritime et que celle-ci doit être établie le long du 141e méridien.⁵⁰⁹

It appears that many authors are of the opinion that because the treaty could be argued as a special circumstance for the delimitation, it follows that the boundary has already been delimited by the treaty. This, however, is a false argument. Either the treaty has already delimited the boundary or it has not. If the boundary has not been explicitly delimited, then we need to look at whether there has been a de facto or tacit delimitation. It is only in the context of the adjustment of the provisional equidistance line that the issue of historic or other special circumstances can be examined. The issue of special circumstances will be reviewed in the next chapter.

There is further confusion stemming from Canada's use of the 141st meridian as the boundary for its sector claim to the entire Arctic Archipelago. Some authors assert that the line used in delimiting the sector claimed by Canada is used as such because it constitutes a boundary established by treaties.⁵¹⁰ This, however, denotes a misunderstanding of the principles

⁵⁰⁹ Parliamentary Information and Research Service PRB 07-47F, *Revendications controversées du Canada à l'égard des eaux et des zones maritimes arctiques* by Robert Dufresne (Ottawa : Library of Parliament, 2008) at 11.

⁵¹⁰ For example, Karin Lawson: "The treaties of 1825 and 1867 are often cited for the proposition that the 141st meridian boundary between Canada and the United States was meant to extend northward to the Pole. Canada, along with the Soviet Union frequently refers to the treaty language establishing the 141st meridian

behind the establishment of maritime boundaries. Even if the sector theory were to be widely accepted for territorial claims, there has been very little claim of its legitimacy to claim jurisdiction over water areas. Canadian officials recognized the limitation of using the demarcation line to claim sovereignty over the water, following an attempt by Russia to argue the opposite: "Extension of sovereignty over the navigable portions of the sea would carry the 'sector' theory to an extreme unjustifiable in international law. It is expected that the Soviet Government will not make the attempt."⁵¹¹

To argue that general boundary treaties could form a legal basis for the sector theory is not the same as to argue that the same treaties have established the maritime boundaries, as well as the land boundaries.⁵¹² As we will see in more detail in the Behring Sea Arbitration section, a line drawn through water in order to separate islands or land between countries does not necessarily constitute a maritime boundary between them unless there is a specific agreement to do so.

The issue here is precisely whether there has indeed been such an agreement between the parties. As explained previously, it will be difficult for Canada to argue, considering

boundary as an example of, and a basis for, a sector division in the Arctic Region" in Karin Lawson, "Delimiting Continental Shelf Boundaries in the Arctic: The United States-Canada Beaufort Sea Boundary" (1981-1982) 22 Va J Int'l L 221 at 229. Similarly, Bloomfield: "Canada argues that the 1826 British-Russian treaty carrying the sector line to the Pole along the 141st meridian is still in effect. The United States prefers the dividing line through waters to be drawn on the principle of "equidistance", meaning that points along the line represent equal distance between adjacent or opposite states." Bloomfield, Lincoln P., "The Arctic: Last Unmanaged Frontier" (1981) 60 Foreign Aff 87 at 99.

⁵¹¹ *Canadian Sovereignty in the Arctic*, Memorandum by author identified as F/S, 29 October 1930, Ottawa, National Archives of Canada (RG 25 G-1, vol 1564, file 237).

⁵¹² The sector theory in itself is not widely accepted in international law.

the object and purpose of the 1825 treaty, that the Parties intended to delimit their maritime boundaries.

Besides the issue of the sector theory, many government officials appear to have recognised that a maritime boundary in the Beaufort Sea does not exist. As part of an extensive consultation project by an Interdepartmental Committee in the 1930's, the Boundary Commissioner, in explaining the nature of the demarcation process states, regarding the Arctic Ocean: "Monument No.1 of the 141st Meridian boundary is 200 feet south of the shore of the Arctic Ocean. The boundary dividing the territorial waters of Canada from those of Alaska at this point is not defined by treaty."⁵¹³ Ten years later, the same opinion was rendered by an official of the Prime Minister's office:

That part of the boundary separating Yukon Territory from Alaska and which, from the vicinity of Mount St-Elias follows the 141st meridian of west longitude to Demarcation Bay in Beaufort Sea, was not a subject of controversy in 1903. The projection of the boundary seaward from Demarcation Point into Beaufort Sea is (1947) still a subject of negotiations.⁵¹⁴

The official government position, however, was never that precise. It appears that without having a clear position, the government chose to remain consistently vague and undefined on the issue, as illustrated by this exchange, in March 1979, in the House of Commons between M.P. Erik Nielsen from Yukon and Prime Minister Trudeau:

⁵¹³ *Boundary Commissioner's Memorandum*, Appendix C to Report of the Interdepartmental Committee on Territorial Waters, 2 July 1937, Ottawa, National Archives of Canada (RG 25 series A 3-b, vol 2680, file 10600-40) at 7.

⁵¹⁴ *The Evolution of the Canada-United States Boundary*, Memorandum by J.A. Gibson of the Prime Minister's Office, 13 March 1947, Ottawa, National Archives of Canada (RG 25 series A 3-b, vol 2679, file 10471-40, vol 5) at 22.

Mr Nielsen: A supplementary question Mr Speaker. Since Canada has always operated under the sector theory, the 141st meridian, therefore, would be the established boundary of Canada's territorial waters.

Can the Prime Minister assure us that the Canadian government is taking that stance; that it is insisting upon the application of the sector theory, and that the 141st meridian is the established rigid boundary of Canada's territorial waters in that area of the country?

Mr Trudeau: Mr Speaker, the sector theory is the one which gives us the broadest scope of sovereignty. It is, of course, the one we are pushing for and prefer, but it is not the one which is accepted in international law or by the United States.

It would be very nice to go up to the North Pole and say that part of the North Pole is ours, but it would be another thing to get the rest of the world to admit that claim. The hon. Member knows the difficulties when there are competing claims by different countries. You have to resolve those claims by negotiations, as we have been successful in doing on the east coast and as we hope to be successful in doing elsewhere. Failing that, we will use the other means at our disposal under international law.⁵¹⁵

The position of Canada with regard to the Arctic was further impeded for many years due to the largely unknown geography of the area and the presence of permanent ice that presented unusual circumstances. In the early 20th century, some publicists argued that permanent and immobile ice in the Arctic Ocean could be assimilated to land and thus appropriated by occupation.⁵¹⁶ However, this legal reasoning was based on the faulty premise of the

⁵¹⁵ *House of Commons Debates*, 30th Parl, 4th Sess, vol. IV (1979) at 3758.

⁵¹⁶ This was the case notably of René Waultrin in the early 20th Century: René Waultrin, "Le problème de la souveraineté des poles" (1909) 16 RGDIP 649 at 655. With the nature of arctic sea ice being better understood in later years, some mid-century publicists, notably W.H. McConnell were of the opinion that at the very least, permanent shelf ice should be assimilated to territory : WH McConnell, "The Dispute on the Arctic Sovereignty: A Canadian Appraisal" (1972-73) 25 U Fla L Rev 465 at 483. Other publicists were opposed to the idea, stating that there was no reason to consider the Arctic any differently than other seas just because navigation could be partially or even completely obstructed by ice: AR Clute, "The Ownership of the North Pole" (1927) 5:1 Can Bar Rev 19 at 21.

permanency of the ice, since little was known at the time of the circumstances in the Arctic.⁵¹⁷

Since the ice in the Beaufort Sea is neither immobile nor permanent, as we now know, the debate is not really relevant for our purpose other than to understand the possible genesis for the Canadian view that the 141st meridian constitutes the maritime boundary up to the North Pole.

1.1.2 United States Position

In 1965, the US Department of State issued an official interpretation as to whether the 1867 Alaska Treaty established a maritime boundary between the US and Russia in the Arctic:

It should be noted that the original Convention language stated that the line 'proceeds thence due north, without limitation, into the same Frozen Ocean.' Since the United States does not support so-called 'sector claims' in the Polar Regions, the northernmost point for the representation of the Convention line was agreed to be 72° 00' N. Furthermore, in keeping with the policy that the line does not constitute a boundary, the standard symbol for the representation of an international boundary should never be used. Furthermore, labelling of the line as 'U.S.-Russia Convention of 1867' is recommended.⁵¹⁸

This, as we will see, is not the position that the United States took during the Behring Sea Arbitration but it reflects the consistent position taken since the decision in 1892.

Although this declaration concerns the western boundary-between the US and Russia-described in the 1867 Treaty, the same principle must be applied to the eastern boundary, i.e. the one between the United States and Canada in the Arctic. Furthermore, unlike the western

⁵¹⁷ The whole debate regarding sovereignty over permanent ice is discussed in Susan B. Boyd, "The Legal Status of the Arctic Sea Ice: A Comparative Study and a Proposal." (1984) 22 Can YB Int'l Law 98 at 121-123 and also in Donat Pharand, "Freedom of the Seas in the Arctic Ocean" (1969) 19 UTLJ 211 at 211.

⁵¹⁸ *Ibid* at 228.

boundary, there is no indication that the United States ever took the position that the eastern boundary line described in the 1867 Treaty, which was copied from the 1825 Russian-Great Britain Treaty, was ever meant to delimit the extent of respective sovereignty over either the continental shelf or the water of the area thus delimited.

The fact that Washington regards the Arctic Ocean as any other ocean is further seen through the extent of its activities there for the last fifty years or more; US submarines, icebreakers, aircraft, and scientists on drifting ice stations have been a constant reminder that it considers the area as high seas open to all nations.⁵¹⁹

Since the United States' position is that the maritime boundary in the Beaufort Sea is not established, its further position as to the proper means of delimitation finds its origin in the Truman Proclamation of 1945, that is that the boundary shall be determined by negotiations in order to reach an equitable result. The United States considers that an equidistant line would be equitable as there exist no special circumstances that could influence the delimitation. This is consistent with their general policy favouring equidistance in most cases.

⁵¹⁹ *Ibid.*

1.2 Existing Treaties, Decisions and Agreements

1.2.1 The 1825 Treaty between Great Britain and Russia

A. Object and Purpose of the Treaty

The treaty, between Great Britain and Russia, written in French and in English establishes the boundary between the two countries in these words:

Article III.

Commencing from the southernmost part of the Island called Prince of Wales Island, which point lies in the parallel 54°40', and between the 131st and 133rd degrees of west longitude (meridian of Greenwich) the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude. From this last mentioned point the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude (of the same meridian), and, finally, from the said point of intersection, the said meridian line of the 141st degree in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the North-west.⁵²⁰

In the French version of the treaty, the term “jusqu’à la Mer Glaciale” is used for “as far as the Frozen Ocean,” and the term “possessions” is used as in the English version. We must then consider whether the parties meant to include any maritime area in the term “possessions” and whether the term “Frozen Ocean” was intended to mean “North Pole,” in effect extending the land boundary along the 141st meridian to the North Pole and including sovereignty over the sea as part of the negotiations. There would, however, be the issue as to whether two countries could, under customary law existing at the time, appropriate and then

⁵²⁰ *Convention Between Great Britain and Russia*, *supra* note 19.

divide amongst themselves, part of what would have been considered the high seas. If they could not, the boundary would have been opposable only between them. The later extension of sovereignty over the continental shelf and rights over large maritime areas would have, in any case, resolved the matter and renders the question, for our purpose, theoretical.

The 1825 treaty was negotiated following a protest from Great Britain over the Russian ukase of 1821 that purported to extend Russian jurisdiction over a maritime belt extending 100 miles from the coast of North America, from the Behring Sea in the North to the northern tip of Vancouver Island. The Russian-American Company's interests were being hurt by the competition from the trade with the natives by American and British ships along the North Pacific coast. The Company had pressured the Russian Czar into declaring this part of the sea a "mare clausum" in order to protect its monopoly. It was this attempt that had prompted Great Britain to protest the ukase and to deny "the right of Russia to forbid navigation within one hundred miles of the coast".⁵²¹

Great Britain, which had not protested the issuance of the 1799 charter to the Russian-American Company, also used the occasion to register its objection to the claim of sovereignty over the territory itself. In the exchanges of notes between Great Britain and Russia, Great Britain asserted that, although the priority of discovery could be disputed, the occupation and use, through Hudson's Bay and North-West Companies' forts, would give a more conclusive title

⁵²¹ White, *supra* note 16 at 918.

to Great Britain. However, as Russia pointed out, neither of these companies had posts along the coast between the 51st and 60th parallels.⁵²²

Russia's claim to extravagant maritime jurisdiction had already been abandoned in the Russian-American Treaty of 1824, through its Article I: "It is agreed that, in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, (...)." ⁵²³ Of course, no mention was made of the Arctic Ocean in the Treaty, as there was neither navigation nor fishing by the Parties north of the Behring Strait at the time. Since the issue was the principle of free navigation and fishing, the particular geographical description of the area is of minor importance.⁵²⁴ This Article was reproduced in the Anglo-Russian Treaty.⁵²⁵

The British, having been roused into action by Russia's maritime jurisdiction claim and, intent on protecting their cherished freedom of the sea, could hardly have had the intention of negotiating maritime boundaries with the Russians. Indeed, the history of the negotiations clearly illustrate that what was being agreed upon in Article III was the division of land. When the negotiations about the exact location of the line of demarcation threatened to fall apart, the instructions to Sir Stratford Canning, the plenipotentiary on the part of Great Britain, show that the issue of navigation and the division of territory were considered two separate issues. The issue of freedom of the sea had already been settled since the conclusion of the

⁵²² *Ibid.*

⁵²³ *Convention between the United States and Russia, supra note 17.*

⁵²⁴ Some argument will, however, be made later by the United States as to the geographical importance of the description in the Fur Seal Arbitration.

⁵²⁵ *Convention Between Great Britain and Russia, supra note 19, art 1.*

1824 treaty between Russia and the United States. Consequently, Great Britain understood the remaining negotiations to be exclusively related to territory:

His Majesty having been graciously pleased to name you his Plenipotentiary for concluding and signing with the Russian Government a Convention for terminating the discussions which have arisen out of the promulgation of the Russian Ukase of 1821, and for settling the respective territorial claims of Great Britain and Russia on the North-west Coast of America, (...) It remains only in recapitulation to remind you of the origin and principles of this whole negotiation. It is not, on our part, essentially a negotiation about limits. It is a demand of the repeal of an offensive and unjustifiable arrogation of exclusive jurisdiction over an ocean of unmeasured extent; but a demand qualified and mitigated in its manner, in order that its justice may be acknowledged and satisfied without soreness or humiliation on the part of Russia. We negotiate about territory to cover the remonstrance upon the principle. But any attempt to take undue advantage of this voluntary facility we must oppose. If the present Project is agreeable to Russia, we are ready to conclude and sign the Treaty. If the territorial arrangements are not satisfactory we are ready to postpone them, and to conclude and sign the essential part, that which relates to navigation alone, adding an Article stipulating to negotiate about territorial limits hereafter.⁵²⁶

The negotiations threatened to fall apart over Great Britain's suggestion that the line of demarcation be between Prince of Wales Island and the other islands, through the Duke of Clarence Sound and then east to reach the mainland at 56° 30' North : "Une ligne de démarcation qui tout en conservant à la Russie pour limite méridionale sur les îles le degré de latitude désigné par l'Oukase de 1799, assigneroit en même temps à la Grande Bretagne pour limite sur la côte de la terre ferme la latitude de 56°30' Nord."⁵²⁷ The Russians, however, were interested in keeping a foothold on the continent, even though most of their presence had been

⁵²⁶ Final instructions to S. Canning from G. Canning, Foreign Office, 8 December 1824, reprinted in UK, Colonial Office, *Report on the Location of the British-Alaskan Boundary under the Anglo-Russian Convention of 1825* by Colonel D.R. Cameron (London: Eyre & Spottiswoode, 1886) at 53-56 [Cameron Report].

⁵²⁷ *Sir C. Bagot's Objections to the Observations made by the Russian Plenipotentiaries on his Amended Proposals, now further modified*, Attachment D to Despatch No. 23, Sir C. Bagot to Right Hon. G. Canning, St-Petersburg, March 17/29, 1824, reprinted in Cameron Report, *supra* note 526, 44 at 45.

concentrated on the islands fringing the coast. They were concerned that being isolated from the coast would put them at risk and they would not be able to supply or protect their island settlements. Indeed, in his report to Count Lieven on the conduct of the negotiations, Count Nesselrode, the Russian negotiator, wrote:

Si l'île du Prince de Galle nous demeure, il faut qu'elle puisse nous être de quelque utilité. Or, d'après le plan de l'Ambassadeur de l'Angleterre, elle ne seroit pour nous qu'une charge et presque un inconvénient. Cette île, en effet, et les établissements que nous y formerions, se trouveroient entièrement isolés, privés de tout soutien, enveloppés par les domaines de la Grande-Bretagne et à la merci des établissements Anglais de la côte. (...) la Russie quant à elle insiste sur la conservation d'un médiocre espace de terre ferme, n'insiste au fond que sur le moyen de faire valoir, nous dirons plus, de ne pas perdre, les îles environnantes.⁵²⁸

Consequently, in its reply to the British proposal, Russia declares : "Que la possession de l'île du Prince de Galles sans une portion de territoire sur la côte située vis-à-vis de cette île ne pourroit être d'aucune utilité à la Russie."⁵²⁹

The Hudson's Bay Company, the main trading company at the time, controlling huge tracts of land on the continent, was keeping the pressure on Great Britain to keep the Russians away from the mainland, in order to prevent collisions between traders of each country,⁵³⁰ even though it had no presence at all along the coast north of 54 degrees of latitude north.

⁵²⁸ Count Nesselrode to Count Liven, St-Petersbourg, 5 April 1824, reprinted in Cameron Report, *supra* note 526, 46 at 46-47.

⁵²⁹ *Decision of Russian Government in which they insist upon the demarcation as described in the Contre Projet*, Attachment E to Despatch No. 23, Sir C. Bagot to Right Hon. G. Canning, St-Petersburg, March 17/29, 1824, reprinted in Cameron Report, *supra* note 526, 45 at 45.

⁵³⁰ Hudson's Bay Company (J.H. Pelly) to Foreign Office, Hudson's Bay House, 20 October 1824, reprinted in Cameron Report, *supra* note 526 at 53.

From the foregoing, it is clear that the purpose of the negotiations was solely to assign territory and not maritime areas. This is confirmed by the comments made by the British negotiator to the Foreign Office during the negotiations:

With respect to the right of fishing, no explanation whatever took place between the Plenipotentiary and myself in the course of our negotiations. As no objection was started by them to the article which I offered in obedience to your instructions, I thought it inadvisable to raise a discussion on the question, and the distance from the coast at which the right of fishing is to be exercised in common passed without specification, and consequently rests on the law of nations as generally received.⁵³¹

So how did this intention to negotiate territory translate into a geographical description that includes so much reference to maritime areas?

As stated in the ultimate sentence of the Article, the line was intended to mark the limits of the respective *possessions* of both Parties. The debate as to whether sovereignty could be acquired over oceanic spaces had taken place amongst the Great Powers more than a century before the treaty and was well settled. Although the line clearly was marked as to pass over water, it is highly unlikely that the Parties understood any of that water to be part of their *possessions*. Indeed, drawing lines over water to delimit territorial possessions, especially in cases where the lands were yet to be discovered or where the geography was uncertain, had been done for hundreds of years, most famously by Pope Alexander VI in 1493.⁵³²

⁵³¹ Mr S. Canning to Rt Hon. G. Canning, St-Petersburg, April 3/15, 1825, reprinted in Cameron Report, *supra* note 526 at 58.

⁵³² The Bull Inter Ceetera of 4 May 1493 drew a line 100 leagues west of the Azores and Cape Verde, from the Arctic Pole to the Antarctic Pole, to the west of which all land and island discovered or to be discovered were assigned to the King of Castille and Leon.

Geographical uncertainty was similarly the reason for the use of a meridian as the boundary between Russian and British North America in the North. The northern part of the land boundary, besides a few proposals on the various degree of longitude to be used, was the subject of very little discussion. Indeed, virtually nothing was known of the geography of the area. Since the negotiators did not know how much land, frozen ocean, or islands existed, it is not surprising that they would have used a longitudinal line as the line, without defining any particular geographical features. This was the conclusion reached by Colonel D.R. Cameron in a 1886 report commissioned by the British authorities on the issue of the Alaska Boundary:

(...) it is certain that the belief of the negotiators that Vancouver's inland topography was not reliable led to their defining a line which might have as well been described had the map before them presented only the sea lone –on an otherwise blank sheet- from Portland Inlet to Mt St.Elias and thence to the Arctic Ocean. Both the British and Russian negotiating authorities recorded their sense of the necessity of describing such a line as should be independent of the location given to inland features on the maps before them.⁵³³

The fact, however, that they decided to specify that the line of longitude was not to be followed in its entirety, but would go to the Frozen Ocean, suggests that they understood the limitations of what they could claim as far as sovereignty. The ocean as a limit for a territorial boundary was used both on the east coast in the *Treaty of Paris* of 1783: "(...) Down along the middle of St.Marys river to the Atlantic Ocean (...);"⁵³⁴ and on the west coast in the *Oregon*

⁵³³ Cameron Report, supra note 526 at 23.

⁵³⁴ *The Definite Treaty of Peace*, 30 September 1783, General Records of the United States Government, International Treaties and Related Records, 1778-1974, Record Group 11, Washington, National Archives, art 2.

Treaty of 1846: “(...) southerly, through the middle of the said channel, and of Fuca’s Straits to the Pacific Ocean (...).”⁵³⁵

Since the impetus for the negotiations leading to the treaty originated from the outrage expressed by Great Britain with the arrogation of jurisdiction by Russia over the ocean, it is improbable that the purpose of the treaty would have been the allocation of that same space between the two Powers. Especially considering that the Russian-American treaty did not include any specific delimitation, whereas the United States, at the time, had joint occupation rights over the Oregon territory up to 54°40' north latitude.⁵³⁶ Since American whalers were very active on the North Pacific coast at the time, any attempt to limit the area where they could hunt would have no doubt caused some protest. As it stood, the Russian-American treaty only limited the areas where the citizens of either country could land, not where they could hunt, fish or navigate. Since both Russia and Great Britain would have known that any maritime boundary extending more than 3 miles from the coast would have been contrary to international law at the time, and would not have been enforceable against the United States, it would have been unlikely that they would have agreed to limit their own citizens to a confined maritime zone.

B. Conduct of the Parties

The 1825 Treaty did not translate into a better definition of a physical boundary; disputes persisted on the ground between the Russian-American and Hudson’s Bay Companies.

⁵³⁵ *Oregon Treaty*, *supra* note 18, art 1.

⁵³⁶ The Oregon territory was jointly managed by the United States and Great-Britain until the conclusion of the Oregon Treaty in 1846.

After one particularly violent incident, at the mouth of the Stikine River,⁵³⁷ Great Britain issued strong protests. In 1839, the dispute reached a resolution with the Russian Company agreeing to lease its territory to the Hudson's Bay Company in exchange for furs and supply. The lease included all the continental territory between Cape Spencer and latitude 54°40'. The payment was to be done in land-otter skins.⁵³⁸ No maritime area was described in the lease. This could mean that the Russians understood that they could not lease areas over which they had, themselves, no right. However, considering that the Hudson's Bay Company's business was mostly land-based, it more likely was not even a subject of discussion.

Of greater import is the fact that American whalers continued, even after the expiration of the 1824 treaty, to whale on the Alaskan Coast, even as far north as the Bering Strait and the Arctic.⁵³⁹

In order to ascertain whether the parties conducted themselves as though a maritime boundary had been established in 1825, it is important to examine their conduct also with regard to the line established in Dixon Entrance. There were, indeed, over the ensuing years, more events and discussions dealing with the Western side of the boundary than with the Northern side. These events are, consequently, better suited to assist in this facet of our interpretation. If it can be established that the intent of the Parties was to settle the maritime boundary, through the conduct of the Parties in the region of Dixon Entrance, then we could

⁵³⁷ The ship *Dryad* had been commissioned by the Hudson's Bay Company to set up a trading post on the Stikine River. In 1934, as it came to the mouth of the river, the ship was boarded by the Russians and turned back. See White, *supra* note 16 at 928.

⁵³⁸ Bancroft, *supra* note 12 at 556.

⁵³⁹ Clark, *supra* note 14 at 57.

conclude that the same intention was present in the North, even though there is very little record of any activity in that region.

It appears that, shortly after British Columbia entered the Confederation, the Government asserted claims that the waters of Hecate Strait were territorial waters. In 1897, the Canadian fisheries protection vessel « Quadra » warned a U.S. fishing vessel against fishing in Hecate Strait. The U.S. protested, denying claims that Hecate Strait constituted territorial waters, and requesting an official statement from Great Britain as to its position with regards to Hecate Strait:

Hecate Strait appears on the charts as the most northerly portion of Vancouver Straits, an open arm of the Pacific Ocean, lying between Graham and Moresby Island and the mainland, and joining the open sea waters of Dixon Entrance on the north with Milbank Sound on the south. At the narrowest part this thoroughfare is twenty-eight miles and for the most part is much wider. As this is the first information that has come to my knowledge that these open waters of the Coast may be claimed to be territorial possessions of British Columbia, I have the honour to invite attention to the circumstances in the confident belief that the notice so served upon an American shipmaster, pursuing a lawful calling in those Pacific waters will be found to have origin in a misapprehension of the facts which will be promptly corrected.⁵⁴⁰

Having received no reply, and following further incidents in Hecate Strait, the US Secretary of State wrote again to the British Ambassador twelve years later:

The Department is now in receipt of further complaints of a character similar to those of 1897 and 1905. I should be glad therefore if you would recall the former inquiry to the attention of the Foreign Office with a view to securing some official statement as to the British position with respect to Hecate Strait.⁵⁴¹

⁵⁴⁰ John Sherman, US Department of State to Sir Julian Pauncefote, Great-Britain Embassy, Washington, 20 March, 1897, Ottawa, National Archives of Canada (RG 25, vol 1118, file 103).

⁵⁴¹ Note Verbale from US Department of State to the British Ambassador at Washington, 28 April 1909, Ottawa, National Archives of Canada (RG 25, vol 1118, file 103).

Of interest is the fact that both notes only refer to Hecate Strait and that the original note clearly refers to Dixon Entrance as “open sea waters.” No reference to any arraignment inside Dixon Entrance is mentioned in the correspondence. There is, therefore, no indication that, at any point before 1909, the issue of the status of Dixon Entrance was in any dispute or that the Canadian Government considered it of similar status as Hecate Strait. The exchange of correspondence and the internal documentation of the Government only refers to Hecate Strait. It would appear that Canada was, already then, pushing the boundaries of the development of international law in the area of maritime claims. Indeed, there was much debate at the time over the geographical conditions needed to draw baselines across bodies of waters for the purpose of claiming those as either internal or territorial. This was the subject of various international conferences⁵⁴² and debates with no clear definition having been agreed upon: “One may conclude that by the end of the nineteenth century, many variations on the precise limitation theme had been promulgated with bay-closing lines of six miles, ten miles and twelve miles recognised as reasonable under international law.”⁵⁴³ The issue of the closing of bays and estuaries came to a head, without, however, much final resolution, between Great Britain and the United States on the East Coast as illustrated by the *North Atlantic Coast Fisheries* arbitration case.⁵⁴⁴ On the West Coast, however, the policy appeared to be to ascertain a claim but refrain from enforcing it. Indeed, starting in 1909, Canada was steadfast in maintaining, in

⁵⁴² The Institute of International Law met to discuss the issue in 1888, 1894 and the International Law Association met in 1895.

⁵⁴³ Gail Westerman, *The Juridical Bay* (Oxford: Clarendon Press, 1987) at 61.

⁵⁴⁴ *North Atlantic Coast Fisheries (Great-Britain v United States)* (1910), 11 RIAA 167.

words but not in deeds, its claim to sovereignty over Dixon Entrance⁵⁴⁵ and the nature of the maritime boundary established by the 1825 treaty. The articulation of this claim has not been very clearly explained or supported, however, and, considering the lack of enforcement, it is difficult to conclude that the conduct of the Government of Canada was consistent with the position that it believed from the onset that the treaty did in fact settle the maritime boundary.

1.2.2 The Alaska Purchase of 1867

A. Object and Purpose of the Treaty

By mid-19th century, Russia and Great Britain were at war in the Crimea and the Russian Empire was on the verge of collapse. Although they had agreed to neutrality with regards to their North-American possessions for that particular conflict, Russia soon realised that these possessions would be very near impossible to defend in case of war. Furthermore, the income from the fur trade had severely diminished, due to overkill, during the same period, making Alaska more of a burden than an investment.⁵⁴⁶ The United States, having settled the Oregon boundary in 1846, wanted to prevent the transfer of the territory to an unfriendly Power. They were also keen to extend their interest in the North-Pacific in order to consolidate their supremacy in the Pacific, to have access to rich fisheries grounds and lucrative trade with Japan and China.⁵⁴⁷ This was also in keeping with the Monroe Doctrine which was articulated by US

⁵⁴⁵ *Report of the Committee of the Privy Council, approved by His Excellency the Administrator*, 6 July 1909, Ottawa, National Archives of Canada (RG 25, vol 1093, file 42-1909) [PC Report].

⁵⁴⁶ Clark, *supra* note 14 at 60.

⁵⁴⁷ Bancroft, *supra* note 12 at 595.

President James Monroe at the time of the start of the negotiations for the 1824 treaty with

Russia:

At the proposal of the Russian Imperial Government, made through the Minister of the Emperor residing here, a full power and instructions have been transmitted to the Minister of the United States at St-Petersburg, to arrange, by amicable negotiation, the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal has been made by His Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. The Government of the United States has been desirous, by this friendly proceeding, of manifesting the great value which they have invariably attached to the friendship of the Emperor, and their solicitude to cultivate the best understanding with his Government. In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European Power.⁵⁴⁸

It is thus that, after rather short negotiations, the United States purchased Alaska from the Russians in 1867 for the sum of 7,2 million dollars.⁵⁴⁹ So what exactly had the Americans purchased? Article 1 of the Treaty states that it was : “(...) all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth (...)” The same article goes on to define the eastern limit as “(...) the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain, of February 28 - 16, 1825, and described in Articles III and IV of said convention (...)” The treaty reproduces the exact description of the boundary contained in the 1825 Convention.

⁵⁴⁸ *President's annual message*, 23 December 1823, Annals of the Congress of the United States, 18th Cong, 1st Sess at 14.

⁵⁴⁹ *Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America*, 30 March 1867, 15 US Stat 539.

The western limit, however, needed to be settled. It was done in a similar fashion as the 1825 Treaty, i.e. by drawing a line in the ocean meandering between islands and into the unknown “Frozen Ocean”:

The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest through Behring's straits and Behring's sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a south-westerly direction, so as to pass midway between the island of Attou and the Copper island of the Kormandorski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety- three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian islands east of that meridian.⁵⁵⁰

The text of the treaty of cession of 1867 only refers to words used in land sovereignty, i.e. possessions, territory, dependencies, appurtenances. There is no indication that the parties intended to divide the ocean. Of course, in the context of the time, as in 1825, there was uncertainty as to whether there was a continent to the North of Alaska.⁵⁵¹ However, spurred by events, the question was raised shortly thereafter as to what exactly was covered by the transfer of sovereignty from Russia to the United States:

The boundary in question marks the *western limit within which the territories and dominion conveyed are contained*. This terse description may be regarded as a shorter and more convenient mode of expression than the separate enumeration of

⁵⁵⁰ *Ibid*, art 1.

⁵⁵¹ Donat Pharand, “Legal Regime of the Arctic, Some Outstanding Issues” (1983-1984) 39 Intl J 742 at 755.

a bewildering number of islands, yet it involved a confusing implication – that Russia intended by these words to convey to the United States, not only all the islands lying east of the imaginary line so designated, but, indeed, the actual sea itself, with full and exclusive dominion over the same.⁵⁵²

The question of delimitation was raised because of a dispute regarding pelagic sealing in the Behring Sea. Although it concerned the western boundary, the arguments and the arbitral decision are applicable to the eastern boundary also.

1.2.3 The 1892 Fur-seal Arbitration

A. The Decision

The 1892 *Fur-seal Arbitration* controversy was really about, as its name indicates, an attempt to manage the seal fishery in a time of unfettered access to the bounties of the sea in international waters. Indeed, international law at the time provided that all resources of the sea were *res communis*, and thus could be appropriated by anyone for their own use.

Consequently, in trying to manage the pelagic hunting of seals in order to prevent their extinction, the United States needed to claim some sort of jurisdiction over the high seas. The dispute was brought in front of an arbitral tribunal tasked to decide what was the nature of the boundaries described in the various treaties and how did those affect the status of the waters.

As one contemporary author puts it:

The important question –had Russia, by her assertions, gained a valid title to the waters of Bering Sea, and then, had the United States really acquired by purchase a dominion over this extensive body of water, or even greater privileges of navigation

⁵⁵² John B Henderson, *American Diplomatic Questions* (New York: The MacMillan Company, 1901) at 3-4.

therein than are enjoyed in common by all nations?- formed one of the issues in the Bering Sea arbitration trial, held in Paris, in the spring and summer of 1893.⁵⁵³

Shortly after the Alaska Purchase Treaty, the United States extended its laws regarding customs, commerce and navigation to the new territory. It also enacted a law that stated that no person shall kill fur-bearing animals “within the limits of Alaska territory, or in the waters thereof (...)” and various other stringent measures aimed at conservation and sustainable harvest.⁵⁵⁴ The question centered on the extent of what areas were included in the “waters.” The measures regarding hunting of the fur-seals were rather easy to enforce in Alaskan territory since the hunt by American sealers was land-based, on the mainland and, especially, on the various islands used by the seals following their migration from the south. However, pelagic sealing in the Behring Sea, by Canadian and British sealers, was growing, creating fear that this unregulated hunt would lead to extinction of the herd. In order to address this issue, the Collector of the Port of San Francisco, in 1872, requested permission from the Secretary of the Treasury to despatch a revenue cutter to prevent pelagic sealing. The Secretary of the Treasury replied: “I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose unless they made such attempts within a marine league of the shores.”⁵⁵⁵ This shows that the United States Government considered “the waters thereof” to be the widely accepted three-mile territorial sea at the time. This was indeed in

⁵⁵³ *Ibid* at 4.

⁵⁵⁴ See examples of legislation in US, Department of State, “Alaskan Fur Seals: Diplomatic Negotiations for the Settlement of the Fur-seal Question, and the position of the United States and Foreign Governments with respect to the Sealing Industry, 1867-1906” by Chandler P Anderson (Washington: Government Printing Office, 1906) at 3.

⁵⁵⁵ Quoted in Henderson, *supra* note 552 at 14.

keeping with the broader policies of the United States regarding law of the sea and the principle of *mare liberum*. However, the profitability of the fur-seal hunt and the expansion of pelagic sealing pushed the United States to reverse its position and, in 1881, in a reply to a renewed inquiry from the Collector of the Port of San Francisco, the then Acting Secretary of the Treasury, in reference to the boundary described in the Treaty between the United States and Russia, states:

(...) you are informed that the treaty with Russia of March 30, 1870, by which the territory of Alaska was ceded to the United States, defines the boundary of the territory so ceded. (...) It will be seen therefrom that the limit of the cession extends from a line starting from the Arctic ocean and running through Behring Strait to the north of St. Lawrence Islands. The line runs then in a southwesterly direction, so as to pass midway between the island of Atou and Copper Island of the Komondorski couplet or group in the North Pacific Ocean, to meridian of 193 of west longitude. *All the waters within that boundary to the western end of the Aleutian Archipelago and chain of islands are considered as comprised within the waters of Alaska territory.*⁵⁵⁶

On the basis of this position, in the following years, US Revenue cutters started seizing British vessels more than three miles from the coast. The masters of these vessels were usually tried in Alaska, found guilty and their vessels seized. The British Government protested. An American author also pointed out the weakness of the American argument:

In a sea so full of islands as the Behring, a line similar to the one drawn in this treaty is a terse method of indicating the islands conveyed. It avoids the tedium of enumeration. Therefore, the apparent grant of sea which the drawing of such a line effected ought not to deceive.⁵⁵⁷

⁵⁵⁶ *Ibid* at 15.

⁵⁵⁷ Stephen Berrien Stanton, *The Behring Sea Controversy* (New York: Albert B. King Publisher, 1892) at 43.

Nevertheless, diplomatic negotiations followed whereby the United States Secretary of State attempted to negotiate an international agreement regulating the fur-seal industry. Negotiations went nowhere and the Parties agreed to arbitration.⁵⁵⁸ The aim of the United States was never to limit the freedom of the sea but to force conservation measures for the fur-seal. Indeed, even US agent John Foster, recognised that the arguments in favour of a wide oceanic jurisdiction were weak:

Early in the preparation of the case of the United States the conclusion was reached that it would be difficult to sustain the claims which had been put forward by the United States in the diplomatic correspondence as to the exclusive jurisdiction exercised by Russia over the waters of Bering Sea previous to the cession of Alaska.⁵⁵⁹

It was thus no surprise that the Arbitral Tribunal found that all of Russia's rights were transferred to the United States in 1867 but that the right to an exclusive fishery did not extend past the three-mile territorial sea:

As to the fourth of the said five points, We, the said Arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea, east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, did pass unimpaired to the United States under the said Treaty.

As to the fifth of the said five points, We, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that the United States has not any right of protection or property in the fur seals frequenting the islands of the

⁵⁵⁸ *Treaty between Great Britain and the United States of America relating to Behrings Sea*, 29 February 1892, [1892] UKTS 8.

⁵⁵⁹ Final Report of the Agent of the United States in US, *Proceedings of the Tribunal of Arbitration Convened at Paris under the Treaty between the United States of America and Great Britain, concluded at Washington February 29th 1892, for the Determination of Questions between the two Governments Concerning the Jurisdictional Rights of the United States in the Waters of Bering Sea*, vol 1 (Washington: Government Printing Office, 1895) 5 at 9.

United States in Bering Sea, when such seals are found outside the ordinary three-mile limit.⁵⁶⁰

The Tribunal had clearly stated that there was a difference between a “water boundary” and a “maritime boundary.” The Tribunal also found, in response to the first question, that Russia had never had exclusive rights over the Behring Sea, as the United States had argued. The Behring Sea, therefore, had never been a *mare clausum*. This, as we saw earlier, was indeed the whole point of Russia’s Treaties of 1824 with the United States and of 1825 with Great Britain:

By the Ukase of 1821 Russia claimed jurisdiction in the sea now known as the Bering’s sea to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that from that time up to the time of the cession of Alaska to the United States Russia never asserted in fact or exercised any exclusive jurisdiction in Bering’s Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.⁵⁶¹

B. Conduct of the Parties

In accordance with the findings of the Tribunal, that there existed no exclusive jurisdiction over the waters of the Behring Sea, the seal hunt continued unrestricted, save for specific agreements between certain parties.⁵⁶² This was also true for whaling and other various fisheries, not only in the Behring Sea but throughout the Pacific and Arctic oceans, outside of

⁵⁶⁰ *Fur-seal Arbitration (United States v United Kingdom)* (1893), 28 RIAA 263 at 269.

⁵⁶¹ *Ibid* at 268-269.

⁵⁶² Part of the Award of the Tribunal included provisions for regulations of the seal-hunt with a direction to further negotiate an international agreement. These negotiations eventually fell apart with the consequence that the fur-seal hunt collapsed within a few years.

the widely agreed three-mile territorial sea. Following the expansion of maritime territories, in the second half of the 20th century, the United States and the Soviet Union (now Russia) did sign an agreement in 1990 to transform the western limit set in the Alaska Purchase Agreement as a maritime boundary.⁵⁶³

The decision of the Arbitral Tribunal that the demarcation line described in the 1867 Alaska Purchase Agreement was not a maritime boundary is an important precedent with regard to the nature of the line described in the 1825 Treaty as they use similar language and were drafted for similar purposes, i.e. to identify separate territory.

1.2.4 The 1903 Alaska Boundary Decision

A. The Dispute

The Committee of the Privy Council, in a Report dated 6 July 1909, expresses what was to remain Canadian policy until now on the issue of Canadian claims to exercise jurisdiction in Hecate Strait and Dixon Entrance. This Report was issued following a query on the Canadian position by the Secretary of State for the United States, in 1897, after an American vessel had been hailed for fishing in Hecate Strait outside the three mile limit.

The Privy Council, after quoting Cameron's report that the British most certainly did not intend the 1825 Treaty to determine water sovereignty, appear to agree, at most, that the issue remained unclear:

Whether the framers of the Treaty of 1825 between Great Britain and Russia intended the line to be drawn between the southernmost point of Prince of Wales Island and Portland

⁵⁶³ *US/USSR Boundary Agreement, supra* note 133.

Channel as one of territorial demarcation on the sea, or merely as determining the ownership of such islands as might be found to lie between these points, is perhaps doubtful.⁵⁶⁴

The Privy Council, however, considered that any doubt remaining was settled by the Alaska

Award:

However, that may be, it is submitted that a consideration of the terms of the Convention of the 24th January, 1903, and of the London Award thereunder, made on the 20th October in the same year, lends a different aspect to the case. The object of the Convention as set forth therein was to appoint a Tribunal to determine and lay down the boundary line 'between the territory of Alaska and the British possessions in North America'. (...) As possessions include territorial water as well as land, it is inferred that the waters on either side of the line A-B are territorial.⁵⁶⁵

This statement illustrates the most significant logical gap in the argument. If the argument were to be accepted, it would mean that sovereignty claims could be made over waters independently of land and that the Award Tribunal had established a boundary over a body of territorial water regardless of the sovereignty over adjacent lands. The weakness in the Canadian argument was indeed raised by the British Law Officers who were asked for an opinion on the Canadian position by the Colonial Office. The Law Officers argue that, to consider the demarcation line, agreed to by Britain and Russia in the 1825 Treaty, to be an apportioning of the sea as well as the land, would be contrary to both well-known rules of international law as well as article 1 of the same treaty. They further argue:

The line was intended to delimit the territorial possessions of England and Russia on either side and this would include territorial waters, but it would not purport to make waters territorial which by international law should properly be regarded as free and open sea. If that had been the intention it ought to, and most probably would, have been

⁵⁶⁴ PC Report, *supra* note 545 at 6.

⁵⁶⁵ *Ibid* at 6-7.

explicitly stated in the treaty, as the contracting parties could scarcely have failed to realise that in such a case they were acting in disregard of an international right.⁵⁶⁶

The Committee of the Privy Council, in its report of 1914 calling for arbitration on the issue raises the same specious argument as it did in its 1909 report:

North of the line AB is United States territory, land and water. If south of the line be not British territory what is it? Surely not high sea, for the Tribunal had no authority to define a line which should divide United States territory from the high sea. Since then the water south of the line is British and a 'possession', it is territorial.⁵⁶⁷

This is all the more surprising in that it was only a few years previously that Canada had argued the opposite in the Behring Sea Arbitration, i.e. that countries could not appropriate part of the sea by merely drawing lines across it. Indeed, the Privy Council, in the same document, makes reference to the case in support of its request for arbitration:

While the Minister has no disposition to ignore the fact that the Canadian contention is not free from difficulty, he submits that it is supported by arguments quite worthy of consideration by an arbitral tribunal. No one familiar with the various international controversies relating to the north west coast of America that have occurred during the last century, can doubt that the Canadian case for Hecate Strait rests on stronger grounds than the claims of the United States to exclusive dominion over Behring Sea; yet the United States pressed their extravagant pretensions to regard Behring Sea as a Mare Clausum, to Arbitration, at a very considerable expenditure both of energy and of public money.⁵⁶⁸

It is of note that the Privy Council, in this passage, only refers to Hecate Strait and not to the boundary in Dixon Entrance, showing the misunderstanding between the two issues. More

⁵⁶⁶ Lord Crewe to Lord Grey, Downing Street, 10 February, 1910, Ottawa, National Archives of Canada (RG 25, vol 1102, file 263) at para 4.

⁵⁶⁷ Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 4 May 1914, P.C. 1147, Ottawa, National Archives of Canada (RG 25, vol 7282, file 10471-40 pt 6) at 3-4 [PC Meeting 1914].

⁵⁶⁸ *Ibid* at 5-6.

importantly, however, it seems that the main impetus behind the request for arbitration is that they wanted their own opportunity to press their extravagant claim at “very considerable expenditure of both energy and public money.”

The issue remains that, if Dixon Entrance were international waters before the 1903 decision, it would still be international waters after the decision since the Tribunal could in no way have had the jurisdiction to render territorial what was the high seas. If Dixon Entrance was territorial waters before the 1903 decision, it could have only been so following the 1825 treaty. This means not only that the territoriality of the waters could have only applied between the parties themselves, since the treaty apportioning part of the high seas could not have been opposed to third parties, but also, as stated by the Law Officers, that the negotiators would have purposely acted against recognised international law.

Records of the negotiations of the 1825 Convention show that the negotiators were attuned to international law of the day and knew the extent of territorial sea acceptable under it. Regardless of international law, Britain even considered negotiating exclusive fishery rights over parts of the same international waters but abandoned the idea of limiting her own fishing rights after the signature of the United States-Russia treaty which contained no limitation on the freedom of the sea:

It will of course strike the Russian Plenipotentiary that by the adoption of the American article respecting navigation, &c., the provision for an exclusive fishery of two leagues from the coasts of our respective possessions falls on the ground. But the omission is in

truth immaterial. The Law of nations assigns the exclusive sovereignty of one league to each power off its own coasts, without any specific stipulation, (...).⁵⁶⁹

Although the issue of freedom of the sea had been reiterated in article 1 of the Treaty, the record shows that the British negotiator, Sir Stanford Canning, remained concerned about the status of the coastal waters:

With respect to the right of fishing, no explanation whatever took place between the Plenipotentiary and myself in the course of our negotiations. As no objection was started by them to the article which I offered in obedience to your instructions, I thought it inadvisable to raise a discussion on the question, and the distance from the coast at which the right of fishing is to be exercised in common passed without specification, and consequently rests on the law of nations as generally received. Conceiving, however, as a later period that you might possibly wish to declare the law of nations thereon jointly with the Court of Russia in some ostensible shape, I broached the matter anew to Count Nesselrode, and suggested that she should authorise Count Lieven, on your invitation, to exchange notes with you declaratory of the laws as fixing the distance at one marine league from the shore.

Count Nesselrode replied that he should feel embarrassed in submitting this suggestion to the Emperor just at the moment when the ratifications of the Convention were on the point of being despatched to London, and he seemed exceedingly desirous that nothing should happen to retard the accomplishment of that essential formality. He assured me at the same time that his Government would be content, in executing the Convention, to abide by the recognised law of nations, and that if any question should hereafter be raised upon the subject, he should not refuse to join in making the suggested declaration, on being satisfied that the general rule under the law of nations was such as supposed.⁵⁷⁰

The statement of the Committee of the Privy Council establishing Canada's position on the AB line does not clearly state whether it is of the view that the boundary was established by the 1825 Treaty and only clarified by the Alaska Boundary Tribunal or whether it was allocated as part of the Award. The Privy Council makes no mention of the Beaufort Sea boundary in its statement. Although it was made in reply to an inquiry about fishing in Hecate Strait and thus

⁵⁶⁹ Final instructions, *supra* note 526 at 56.

⁵⁷⁰ Mr S. Canning to Rt Hon G. Canning, *supra* note 531 at 58.

not concerned with the Arctic, the arguments concerning a potential boundary in the Dixon Entrance would have to be applicable to the other demarcation line agreed to in the 1825 Treaty.

Should it be argued that the Alaska Boundary Award only clarified the 1825 Treaty as far as the exact location of the boundary, but not the existence itself of a boundary as delimiting territorial waters, then it would follow that the 141st meridian, which hardly needs any clarification, constitutes the maritime boundary between Alaska and Canada as agreed in the Treaty. Should the Alaska Award be understood to have created the boundary, then, it would follow that there were no maritime boundaries previously. Since the Alaska Award makes no mention of the 141st meridian, we would have to conclude that no boundary had been agreed upon by the Parties, at least up to 1903.

Archival documents show that even within the Government of Canada, the question was unclear. In a 1905 memorandum, W.F. King, the Chief Astronomer and Boundary Commissioner for Canada states:

The treaty of 1825 between Great Britain and Russia does not define the boundary line across the stretch of sea, intervening between Prince of Wales Island and the mouth of Portland Channel. (...) The omission may have been accidental, consonant with the vagueness of certain other parts of the same description, or the negotiators of the treaty may have hesitated, in consideration of the circumstances under which the negotiations took their rise, to define a territorial boundary line on the sea. Under either supposition the practical result was the same. If the line existed, it was undefined, and the two powers could not ascertain what were their exclusive rights, which were therefore inoperative. If the line did not exist, they were restricted to the lands and islands they respectively

possessed, and the territorial waters appertaining to them by international custom.

Beyond these waters they would have no exclusive rights to exercise.

The Treaty of 24th January, 1903, between Great Britain and the United States seems to alter the aspect of the case, and to establish rights over these waters beyond the three mile limit.⁵⁷¹

The comments of the Chief Astronomer appear to say that the 1825 treaty *might* have settled the boundary but it would have been in an inchoate state, which the 1903 decision perfected somehow. It was also in that same memorandum that the Chief Astronomer argues that since the demarcation line is meant to separate territorial possessions, which include territorial waters, therefore all the waters on both sides of the line are territorial waters.⁵⁷²

The confusion was not cleared up in the following years. In 1928, the International Boundary Commissioner, in a draft Memorandum states:

Whether the Alaska Boundary tribunal considered that they were making a division of territorial waters, when they established the line AB above referred to, is unknown. Only one of the British members still lives, Senator A.B. Aylesworth and he was not one of the majority of the tribunal who agreed upon this line.⁵⁷³

In 1931, a comprehensive memorandum was prepared on the issue by the International Boundary Commission Engineer in view of the problems that the Commission was experiencing in mapping the Dixon Entrance area. The Canadian position is described as follows:

⁵⁷¹ *Memorandum* from W.F. King, Chief Astronomer to W.W. Cory, Deputy Minister of the Interior, 13 February, 1905, Ottawa, National Archives of Canada (RG 25 serie A 3-b, vol 2680, file 10600-40) at 1-2.

⁵⁷² *Ibid* at 3.

⁵⁷³ *Draft Memorandum on the situation, with reference to the International Boundary, at Cape Muzon, Dall Island Alaska, and to the course of the International Boundary through Dixon Entrance*, International Boundary Commissioner, 18 July 1928, Ottawa, National Archives of Canada (RG 25 serie A 3-b, vol 2680, file 10600-40).

Previous to 1903 the Government of Canada apparently wished to maintain the view that the waters of Hecate Strait and Dixon Entrance were territorial waters, but was not anxious to press matters.

Subsequent to 1903 and up to 1909 the Government of Canada considered their claim had been greatly strengthened by the Award of the Alaska Tribunal, but at the same time it did not 'desire to push things to extremes.'

By 1914 the Canadian Government wished its claim to the territoriality of Hecate Strait and Dixon Entrance pressed to arbitration.

From 1914 to 1925 there is little or nothing on the files of the International Boundary Commission to indicate the attitude of the Canadian Government. It is probable that its attitude regarding Hecate Strait and Dixon Entrance remained unchanged from that of 1914.

From 1925 the Hecate Strait and Dixon Entrance question has been involved with the general question of territorial waters and the attitude of the Canadian Government with regard to the former question is not clear. It is possible, in opposition to naval opinion, that it would like to have Dixon Entrance and Hecate Strait territorial, but as pressing the matter now might cause embarrassment, any action is apparently being postponed.⁵⁷⁴

Adding to the confusion as to the basis for the claim of sovereignty over the waters of Dixon Entrance, is the fact that before 1903, Canada apparently took no action with regard to those waters and appears to have made no claim to them at all. The protest letter from the United States Secretary of State refers to fisheries warning in Hecate Strait only. All the documents pre-dating 1903 also only refer to claims over Hecate Strait. This claim to Hecate Strait, however, is not related in any way to any boundary treaty but appears to take its origin in claims regarding closing of Bays, Straits, and Estuaries.⁵⁷⁵ The concept of drawing baselines across headlands in

⁵⁷⁴ *Memorandum on the international boundary in Dixon Entrance between Cape Muzon and the southern end of Portland Canal, otherwise known as the line "AB"* by Engineer to the Commission, 25 September 1931, Ottawa, National Archives of Canada (RG 25 series A 3-b, vol 2680, file 10471-40) at 21 [Engineer's Memo].

⁵⁷⁵ It is not clear when this claim to Hecate Strait originated. However, it appears to have waned in mid-20th Century as illustrated by a memorandum to file from the then Legal Adviser to the Department of External Affairs who quotes Mr Pearson (then Minister of External Affairs) replying to a press report indicating that claims to the Gulf of St. Lawrence and Hecate Strait had already been made as follows: "The (press) story indicated we had already laid claim to the Gulf of St. Lawrence and Hecate Straits as national waters. That is not accurate. We have not decided whether we will put this forward or not at this time." Department of External Affairs, *Memorandum for*

order to claim the landwards waters as internal has a long history in international law. Its application was, at the end of the 19th century, the subject of debate and, indeed, played a key role in the *North Atlantic Fisheries* case between Canada and the United States.⁵⁷⁶

It is only after 1903 that, in Government documents, the waters of Dixon Entrance are appended to the waters of Hecate Strait as one claim, now apparently originating in either the 1825 treaty or the 1903 decision.

However, as far back as 1899, the Government of Canada had a confidential opinion, from Sir Louis Davis, then Minister of Marine and later Chief Justice of the Supreme Court, who, after quoting from the negotiating instructions to the British Plenipotentiary⁵⁷⁷ states:

Holding these views, how could it have been possible for English statement to agree to set a boundary in the ocean which should serve as a line of demarcation between Britain's possessions and those of another power, without regard to the rest of the world, whose rights in those seas rested on the same fundamental principle as her own? Such a procedure Canning himself declared to be a thing not to be tolerated by England (underlined in the text).⁵⁷⁸

From about 1935, the United States Government began pressing Canada for a resolution of the boundary questions in the Pacific. In a 1942 note prepared for consideration by the Cabinet in support of a draft exchange of notes between the two Governments, the issue of the foundation for the claim to sovereignty over Dixon Entrance is explained as follows:

file by J.S. Nutt, 13 November 1956, Ottawa, National Archives of Canada (RG 25, vol 7283, file 10471-40 pt 6.2).

⁵⁷⁶ *North Atlantic Coast Fisheries*, *supra* note 544.

⁵⁷⁷ « It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possessions on the Continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measures of public effectual remonstrance against it. »

⁵⁷⁸ Quoted in *Memorandum Re the nature of that section of the boundary, the line AB from Cape Muzon to the mouth of Portland Canal in Dixon Entrance*, by J.A. Pounder, January 20, 1932, Ottawa, National Archives of Canada (RG 25 series A 3-b, vol 2680, file 10471-40) at 13.

While Canada has repeatedly claimed sovereignty over the whole of Dixon Entrance (P.C. July 6, 1909 and P.C. May 14, 1904 (sic)), the United States has consistently refused to accept that contention. On the other hand, while claiming sovereignty over Dixon Entrance, Canada never enforced its sovereignty by exercising jurisdiction, over that area in such matters as customs and fisheries. The Canadian courts, including the Supreme Court of Canada, have taken it for granted that the waters of Dixon Entrance were subject to the standard rule of international law whereby sovereignty can only be exercised within a three mile limit from the coast. It must be said there that, from the point of view of international law, the Canadian contention cannot be substantiated.⁵⁷⁹

The proposal called for a new line to be drawn across Dixon Entrance, which line would then, clearly, constitute a maritime boundary between the two countries. There remains, however, the pesky issue regarding the fact that Dixon Entrance was outside of three miles of any shore and thus would still be part of the high seas. The suggestion of Government officials was that: “In the light of these considerations, it is proposed that the waters of Dixon Entrance become historic or national waters of the United States and Canada respectively with a line of demarcation marked B-1-2-3-4, constituting the boundary between the two countries.”⁵⁸⁰

Although Cabinet had approved the proposal, fierce objection from British Columbia⁵⁸¹ forced it to back down and an agreement was never reached. The argument regarding Dixon Entrance as historic waters remained however and, as we will see, will also be used in the Arctic.

⁵⁷⁹ Note for Consideration by the Cabinet, *Boundary Questions Affecting Canadian Waters in the Pacific* (unsigned and undated but likely the one prepared following an interdepartmental meeting and referred to in other documents as being of 8 September 1945), Ottawa, National Archives of Canada (RG 25 series A 3-b, vol 2680, file 10600-40) at para 5.

⁵⁸⁰ *Ibid* at para 6.

⁵⁸¹ G.S. Wismer, Attorney General of British Columbia to the Right Honorable L. St. Laurent, Secretary of State for External Affairs, 21 February 1947, Ottawa, National Archives of Canada (RG 25 series A 3-b, vol 2680, file 10600-40).

The United States, on the other hand, has maintained the position that the AB line determined by the Alaska Boundary Award, is meant to allocate land territories and continues to object to any claim of territoriality over waters of Hecate Strait and Dixon Entrance.⁵⁸² There has, however, been a perception in Canada that regardless of the official statements, the United States had acted as if the AB line were a boundary since it apparently considered the waters north of the AB line to be United States territorial waters.⁵⁸³ One argument advanced by the Canadian Government in support of the position- that the Alaska Boundary decision settled the maritime boundary, as well as the land boundary,- is the belief that the United States Government, after the decision, began treating the waters of Clarence Strait as internal waters.⁵⁸⁴ Therefore, the thinking went, if the United States considers the waters north of the AB line as internal and Canada considers the waters south of the AB line as internal, the demarcation line between the two must have been understood by the Parties to have been a boundary. The problem with this argument is that it is based on a *presumption* that the United States used the 1903 decision to claim the waters of Clarence Strait as territorial or internal.⁵⁸⁵ That conclusion, apparently never confirmed with United States Government officials, was reached by the then Under Secretary of State for External Affairs, Joseph Pope, after he had

⁵⁸² Engineer's Memo, *supra* note 574 at 10, 22.

⁵⁸³ The committee of the Privy Council was of the view that the United States was exercising a vigilant jurisdiction over the waters of Clarence Strait: PC Meeting 1914, *supra* note 567.

⁵⁸⁴ This view appears to have been held by the Committee of the Privy Council : PC Report, *supra* note 545 at 8.

⁵⁸⁵ In a letter to Martin Burrell, Minister of Agriculture, Joseph Pope, then Under-secretary of State for External Affairs states : « The United States treat Clarence Strait –which in parts is as wide as the Northern entrance to Hecate Strait – as territorial waters on the ground, I take it, of the Alaska boundary arbitration award. Surely it is not to be contended that that award did not operate equally, and that the same conditions do not prevail on both sides of the line which the Arbitrators laid down through Dixon Entrance : Joseph Pope, Under-secretary of State for External Affairs to Martin Burrell, Minister of Agriculture and Representative of B.C., 15 May 1912, Ottawa, National Archives of Canada (RG 25, vol 1118, file 103).

asked for an investigation, by the Inspector of Customs in Vancouver, B.C., of ships navigating Alaskan waters.⁵⁸⁶ This investigation consisted of statements by boat Captains⁵⁸⁷ explaining the procedure to be followed in entering Alaskan waters with regards to customs. There is no record of Canada seeking an explanation or protesting these rules, as was done by the Americans in 1897 with regards to the arraignment of the vessel *Edith* in Hecate Strait.⁵⁸⁸ What the statements of the Captains make clear, however, is that whatever rules existed in 1910, i.e. at the time the statements were made, pre-dated the 1903 Alaska Tribunal decision. In the word of one Captain: “There is no difference in the administration of the United States Customs laws in Alaska now than prior to the Alaskan Boundary Award of 1903. The United States Government claimed and administrated the laws of Alaska prior to 1903 the same as they do now.”⁵⁸⁹

Since the rules applied by the United States regarding the waters of Clarence Strait pre-date the 1903 award, it could scarcely be argued that the conduct of the Americans demonstrates that they view the award as setting a maritime boundary that would have, as a consequence, to render all waters on both sides either territorial or internal. The other assumption made by Mr Pope is that since the United States administers the waters outside the 3- mile limit from the coast, they must consider all the waters of Clarence Strait as territorial.

⁵⁸⁶ In a letter to Joseph Pope, E.S. Busby reports on the investigation requested by Mr Pope and attaches letters from two captains having navigated Alaskan waters : E.S. Busby, Inspector of Customs to Joseph Pope, Under Secretary of State for External Affairs, 17 November 1910, Ottawa, National Archives of Canada (RG 25, vol 1102, file 263).

⁵⁸⁷ L.P. Locke, Master S.S. « Amur », C.P.R. Coast Service to E.S. Busby, Inspector of Customs, 8 November, 1910 and C.D. Neroutsos, Master, SS Princess Royal, to E.S. Busby, Inspector of Customs, 29 October 1910, Ottawa, National Archives of Canada (RG 25, vol 1102, file 263).

⁵⁸⁸ Note from US Secretary of State , *supra* note 540.

⁵⁸⁹ Locke, *supra* note 587.

The evidence, however, points to the fact that the Americans did not consider those waters to be territorial but applied what was then known as “Hovering Laws” to an area within four leagues of the coast. This zone, the precursor to the present 24 mile customs zone, by which the United States claimed some limited jurisdiction with regard to customs and revenue within four leagues of the coast for ships destined to US ports, was enacted in 1799.⁵⁹⁰ In 1868, the US extended its laws related to commerce, customs and navigation to the “mainland, islands and waters” of the territory ceded to the United States by the Emperor of Russia.⁵⁹¹ These “hovering acts,” intended to curb smuggling, were enacted also in Britain as early as 1709.⁵⁹² What should have alerted Canadian officials that the United States applied the provisions of the Hovering Act, and was not claiming the inter-island waters as territorial, was the case of the *Coquitlam* in 1896.⁵⁹³ The *Coquitlam* was a supply vessel that was arrested less than one-half mile from land after a sealing vessel had unloaded its catch and taken in some supplies less than four leagues from the coast of the United States. The Circuit Court of Appeals reversed the decision of the District Court and held that the cargo of the supply ship and the fishing vessels were not forfeitable since the vessels were not bound for the United States and the cargo was not destined for the United States.⁵⁹⁴ One can only conclude from the foregoing that the following comments from Professor Jessup, in reply to Fulton’s charge that the American Government had various claims to the extent of territorial waters according to its policy, are equally applicable to Mr Pope’s charge: “The statement is believed to be due to that eminent writer’s failure to

⁵⁹⁰ Stanton, *supra* note 557 at 68-69.

⁵⁹¹ Henderson, *supra* note 552 at 10.

⁵⁹² William E. Masterson, *Jurisdiction in Marginal Seas* (New York: The Macmillan Company, 1929) at 6.

⁵⁹³ *The Coquitlam. Earle et al. v United States*, 77 F 744 (9th Cir 1896).

⁵⁹⁴ Masterson, *supra* note 592 at 203.

distinguish between a claim to *territorial* waters and a claim to jurisdiction or control for certain purposes on the high seas.”⁵⁹⁵

B. Submission to Arbitration

After the 1867 Alaska purchase transferred to them all rights to Russian possessions in North America, the United States somewhat neglected the newly purchased territory. The purchase was indeed viewed by many as a bad deal and there was reluctance to invest any money in the remote area. Civilian institutions and administration of the territory was not immediately established. Canada became part of the boundary dispute in the north in 1870 when Britain transferred its northern territory to Canada,⁵⁹⁶ and in the west in 1871, when British Columbia joined Confederation. In the following years, the Canadian Government attempted to engage the United States in addressing the issue of the boundary. US President Grant recognised, as early as 1872, that it would be better to settle the border expeditiously. He thus recommended the appointment of a joint Commission to look into the issue. However, Congress refused to act on the recommendation.⁵⁹⁷ In the mid 1880s, with the discovery of gold in the region, the issue of the border became more pressing and the United States requested from Canada copies of the map clearly showing where the boundaries lay. The Canadian government, however, in replying to the Americans, was concerned not to give the impression

⁵⁹⁵ Jessup, *supra* note 37 at 49.

⁵⁹⁶ *Rupert's Land Act*, 1868 (UK), 31 & 32 Vict, c 105.

⁵⁹⁷ In his 1872 annual Message to Congress, President Grant stated: “The region is now so sparsely occupied that no conflicting interest of individuals or of jurisdiction are likely to interfere to the delay or embarrassment of the actual location of the line. If deferred until population shall enter and occupy the territory, some trivial contest of neighbours may again array the two Government in antagonism.” Quoted in Despatch from US Department of State, Mr. Bayard to Mr Phelps, 20 November 1885 reprinted in Cameron Report, *supra* note 526 at 74.

that it considered the map issued by the Geological Survey of Canada to be an accurate description of the border. In a Report of the Committee of the Privy Council for Canada, included in a Governor General's dispatch to the Colonial Office, the position of the Canadian government is described:

(...) but no steps have yet been taken by the Canadian Government to verify what degree of accuracy may be attached to the boundary thus laid down. (...) The Committee respectfully recommend that your Excellency be moved to forward a despatch to Earl Granville distinctly disavowing the recognition of the correctness of the line shown on the edition of the Map in question, forwarded herewith, as the boundary-line between the Province of British Columbia and Alaska.⁵⁹⁸

The correspondence on the issue in the mid-1880's shows that the main concerns of the Canadian Government regarding the boundary were 1) the location of the Portland Channel; and 2) the heads of inlet, especially Lynn Canal in order to have access to the Pacific. The location of the Portland Channel was deemed important because of the control of approaches from the sea:

In a Report which I had the honour to make to the Government several years ago, and which was embraced in the Minutes of Council at that time adopted, I remarked (see Sessional Papers, 1885, p.453) that, 'in view of any ulterior extension of the Canadian Pacific Railway or its branches to an ocean terminus at Port Simpson, the settlement of this boundary is important, both in a strategic point of view, as affecting the sea approaches to the port, and in an economical point of view, as affecting the collection of revenue.'⁵⁹⁹

⁵⁹⁸ *Report of the Committee of the Honourable the Privy Council for Canada*, approved by his Excellency the Governor-General in Council on the 5th June, 1886, signed John J. McGee, Clerk, Privy Council, Inclosure to John Bramston to Sir P. Currie, 27 July 1886 in *Correspondence respecting the Boundary between the British Possessions in North America and the Territory of Alaska*, Ottawa, University of Ottawa (CIHM 16531).

⁵⁹⁹ Mr J. Hamilton Gray to Mr Robson, Clerk of the Executive Council of British Columbia, Victoria, 23 July 1888, inclosure to Colonial Office to Foreign Office, 8 November 1888 in *Further Correspondence respecting the Boundary between the British Possessions in North America and the Territory of Alaska*, Part III, Ottawa, University of Ottawa (CIHM 16533) at 18.

The concern over the strategic approaches to the mainland suggests that it was widely considered that the sea up to that point was high seas and not territorial waters. Indeed, in all the correspondence from the era regarding the boundary, there is no discussion regarding the status of Dixon Entrance.

In 1886, an Agreement was reached by the two Governments for a joint survey of the boundary, although the execution of it was delayed until 1888 when the US Congress finally approved the requisite appropriation.⁶⁰⁰

The purpose of the joint survey, however, was originally viewed differently by the United States and by Great Britain. Great Britain considered that the boundary was determined by the 1825 Anglo-Russian Treaty and only needed to be ascertained more precisely:

The object of the proposed party is further stated to be 'the survey of the locality of the line in question,' the boundary-line, 'and the ascertainment of the facts and data necessary to its delimitation in accordance with the spirit of the existing Treaties in regard to it between Great Britain and Russia, and between the United States and Russia.'⁶⁰¹

The United States, however, had long maintained that the previous treaties were based on flawed geography and could not be implemented:

The Minister of the Interior, to whom the matter was referred, observes that throughout the correspondence which accompanies the despatch of the Colonial Secretary, as well as in a letter upon the subject dated the 14th December, 1888, addressed directly to the Minister of the Interior by the Superintendent of the United States' Coast and Geodetic Survey, it is assumed that the boundary-line

⁶⁰⁰ Mr Phelps (US Ambassador) to the Marquis of Salisbury, London, 6 December 1888 in *Further Correspondence*, Part III, *supra* note 599 at 21.

⁶⁰¹ *Draft Minute of Council*, inclosure to Lord Stanley of Preston (Governor General of Canada) to Lord Knutsford (Colonial Office), New Richmond, 24 July 1890 in *Further Correspondence respecting the Boundary between the British Possessions in North America and the Territory of Alaska*, Part IV, Ottawa, University of Ottawa (CIHM 16534) at 10.

prescribed by the Anglo-Russian Convention of 1825 is impracticable, and the object of the expedition and survey proposed by the United States is therefore clearly not the ascertainment of the facts and data necessary to the delimitation of the boundary already provided for by international agreement, but to 'afford the geographical information requisite to the proper negotiation' of a new Treaty between the United States and Great Britain, to be substituted for the Treaty of 1825 between Great Britain and Russia.⁶⁰²

However, this appears to be contradicted by then US President Roosevelt who was apparently so confident in the US position that he did not view the issue as being in need of arbitration, save for that of the four islands at the mouth of the Portland Canal.⁶⁰³

In January 1903, Canada and the United States agreed to submit the issue of the Alaska boundary to arbitration.⁶⁰⁴ It appears, from the preamble of the arbitration treaty, that both Parties agreed that the boundary had been delimited, albeit in a rather unclear fashion, by the 1825 Anglo-Russian Treaty and that the Tribunal's purpose was to clarify what the treaty said:

His Majesty the King of the United Kingdom of Great Britain and Ireland and the British Dominions beyond the Seas, Emperor of India, and the United States of America, equally desirous for the friendly and final adjustment of the differences which exist between them in respect of the true meaning and application of certain clauses of the Convention between Great Britain and Russia, signed under date of the 28th (16th) February, A.D. 1825, which clauses relate to the delimitation of the boundary-line between the territory of Alaska, now a possession of the United States, and the British possessions in North America, have resolved to provide for the submissions of the questions as hereinafter stated to a Tribunal (...)

⁶⁰² *Ibid.*

⁶⁰³ Thomas A Bailey, "Theodore Roosevelt and the Alaska Boundary Settlement" (1937) 18:2 Canadian Historical Review 123 at 124-125.

⁶⁰⁴ *Convention between Great Britain and the United States of America for the Adjustment of the Boundary between the Dominion of Canada and the Territory of Alaska*, 24 January 1903, [1903] UKTS 4 [*Alaska Boundary Adjustment Convention*].

In Article III, the parties specify that the Tribunal “shall consider” the two pertinent treaties, i.e., the 1825 *Anglo-Russian Treaty* and the 1867 *Alaska Purchase Treaty*, including the actions of the Governments showing the understanding of the Parties with regards to the delimitation of the territories by virtue of those treaties. Although the use of the term “consider” could lead one to conclude that the said treaties were but one of many factors to be considered, there is no discussion of other factors, documents or considerations. Since the Tribunal did not have a clear negotiating mandate to determine the boundary, we have to conclude that there was no intention by the respective Governments to give any sort of mandate to its representative Tribunal members, who were, in any case, to be “impartial,” thus not empowered to advance the interests of one or the other Party.

The issue of interpretation of boundary location contained in treaties between Canada and the United States (or their antecedents) had multiple precedents. Notably, with the *Jay Treaty* of 1794, commissioners were appointed to determine “what river was truly intended under the name of the river St.Croix” mentioned in the treaty of peace of 1783.⁶⁰⁵ Indeed, the imprecise descriptions of geography in boundary treaties were a recurring issue.

Further evidence that the Tribunal was intended to be one of interpretation of a previous treaty as opposed to one proposing a mediated or third party settlement, Article 1 specifies that the impartial jurists of repute appointed as the Tribunal shall “consider judicially the questions submitted to them.”⁶⁰⁶ To consider “judicially,” i.e. as a judge, is to render a judgment based on

⁶⁰⁵ *Jay Treaty*, *supra* note 170, art 5.

⁶⁰⁶ *Alaska Boundary Adjustment Convention*, *supra* note 604, art 1.

the evidence presented and not to suggest some sort of compromise position or negotiated settlement. Indeed, in his dissent, Tribunal member, Sir Louis Jetté, charged that the majority, in rendering its decision, had done exactly that, and had thus acted beyond the jurisdiction attributed by the Treaty:

Thus, the character of the functions which had been confided to us is clearly defined. We have not been entrusted with the power of making a new Treaty, and it was not in our province to make concessions for the sake of an agreement; we had simply to give a judicial interpretation of the Articles of that Treaty which were submitted to us. And this position, as I take it, was rendered still more clear by the fact that, if a majority could not be found to agree, no harm was done, the way being then still left open for the Governments of both countries to do what would, unquestionably, be in their power, that is, to settle the difficulty by mutual concessions if they found it advantageous to each other.⁶⁰⁷

The other dissenting member, Mr (later Sir) Allan Aylesworth, also suggested that the majority of the Tribunal, when splitting the four islands at the mouth of the Portland Channel, failed to act judicially: “It is no decision upon judicial principles; it is a mere compromise dividing the field between the two contestants.”⁶⁰⁸

By accepting the conclusions of the Tribunal, the Parties would have thus accepted either an interpretation of a pre-existing boundary or a totally new boundary. Our question remains, however: in either case, did the Tribunal consider and determine a boundary in the maritime area? The answer must be negative in both.

⁶⁰⁷ *Alaska Boundary Case*, *supra* note 171, opinion of Sir Louis Jetté at 509.

⁶⁰⁸ *Ibid*, opinion of Mr Aylesworth at 501.

That question was later to plague the International Boundary Commission, whose task, since 1908, had been to survey and mark the boundary between Canada and the United States.⁶⁰⁹ Although the Commission had met its obligation as early as 1920 with regards to the land border, the issue of the status of Dixon Entrance, and thus the kind of boundary to be marked, would postpone the final report until 1951, when a compromise marking was used.⁶¹⁰ Since the 1903 award tribunal makes no mention of the nature of the AB line, in 1932, the then Canadian Boundary Commissioner, Noel Ogilvie, queried the only surviving member of the tribunal, Sir Allan Aylesworth, who was, at the time, a senator:

The question is –was the line AB , from the point of commencement at Cape Muzon to the entrance to Portland Channel, as defined in the Award of the Tribunal, intended to be a line of ordinary territorial demarcation with territorial waters immediately adjacent to it on either side throughout its length, or was it intended to be interpreted solely as a line of allocation, meaning thereby that all islands to the south belong to Canada and all islands to the north to the United States, but that as far as the waters adjacent to is are concerned the line has no boundary significance?⁶¹¹

Sir Allan, in his reply, although mentioning that 28 years had passed since the Award, shows a remarkable understanding of the issue:

The mandate of the 1903 Tribunal was simply to answer certain questions submitted-not to make any declaration, one way or another, as to what waters were territorial or were open sea, and (so far as my memory goes, after the passing of more than twenty-eight years,) the question of whether the waters of Dixon Entrance ought to be deemed territorial, or not territorial, was never mentioned in

⁶⁰⁹ *Canadian International Boundary*, United States and Great Britain, 14 April 1908, UST 497.

⁶¹⁰ The 1951 report itself avoids the issue using point B of the Alaska Boundary Award as a starting point : International Boundary Commission, *Joint Report upon the Survey and Demarcation of the Boundary between Canada and the United States from Tongass Passage to Mount St-Elias*, Ottawa, Department of Mines and Technical Survey, 1952.

⁶¹¹ Noel J. Ogilvie, His Britannic Majesty's Commissioner to the Honorable Sir Allan B. Aylesworth, 22 January 1932, Ottawa, National Archives of Canada (RG 25 series A 3-b, vol 2680, file 10471-40).

discussion among members of the Tribunal, nor were any opinions on the subject expressed by anybody. My own view would have been that the Tribunal had nothing to do with any question of that character. The sole purpose for which the Tribunal was constituted was to give interpretation in certain named respects to the Treaty of 1825, according to its true intent and meaning –whether the waters adjacent to the boundary line as determined by the Award, are territorial or not territorial, depends, I should think, not at all upon the Award, or upon any intentions members of the Tribunal may have had, but upon nothing else than upon the legal effect of the language used in the treaty of 1825.

I should therefore be of opinion that in marking on the map the line AB spoken of in the Award, the members of the Tribunal, knowing that such line AB would necessarily fall within less than three miles of Cape Chacon, did not have any intentions –or, probably, any thought –one way or another- that all waters south of it were being declared by their Award to be territorially part of Canada – and, anyhow, if any such waters south of the line AB are now territorial waters of Canada, it is the Treaty of 1825 – not the Award of 1903 – which makes them so.⁶¹²

Lest it be suggested that Mr Aylesworth, being a dissenter in the Award, was not aware of the intent and purpose of the majority in granting the Award, he does declare in the same letter that, had the Award declared the entrance to Portland Channel to be to the north of Kanagut and Sitkland islands instead of to the south, he would have concurred.

In a memorandum, written in reply to an article on the issue of the two islands by Mr Aylesworth in the London Times shortly after the Award, Lord Alverston defends the decision as judicial. His argument was that there were some doubts as to the meaning of Vancouver's narrative, that he thought probable that the negotiators of the 1825 treaty may have considered the broader outlet on the map to be Portland Channel and that he was influenced by a consideration that the islands were of no importance to Great Britain.⁶¹³

⁶¹² A.B. Aylesworth to Mr Noel J. Ogilvie, 27 January 1932, Ottawa, National Archives of Canada (RG 25 series A 3-b, vol 2680, file 10471-40).

⁶¹³ Memorandum by Lord Alverstone, 24 October 1903, enclosure to Secretary of State's confidential dispatch No. 366 of 24 September 1934.

It appears thus that the members of the Tribunal understood and considered that they were acting judicially. However, did the Parties understand that, in agreeing to the Award, they were reaching a new agreement that would transform what was until then open sea into territorial waters?

1.2.5 Conclusion

We have already seen that, around 1909, the Canadian Government had started to make a claim that the AB line was a boundary delimiting territorial waters. That position, reached apparently more out of spite than any rational argument would ever really be implemented with any enforcement action. It is hardly credible that the Government could have concluded that a Tribunal, who had no explicit instruction to delimit the maritime area, and who made no explicit pronouncement as to this aspect of the case, would have nonetheless made such an Award. The conduct of the Parties, at the time of the Award, suggests that they were well aware of the state of international law regarding maritime boundaries and maritime areas at the time and that they understood the difference between maritime boundaries and territorial boundaries. Indeed, during the same period, the Canadian Government entered into agreements with the United States to specifically settle certain issues regarding maritime boundaries in Passamaquoddy Bay and Grand Manan Channel.⁶¹⁴ This shows that the Canadian authority understood that maritime boundaries are set explicitly by the parties and not as a presumed consequence to be deduced from an agreement on another issue.

⁶¹⁴ *Passamaquoddy Bay Treaty*, *supra* note 4. This new treaty was required following the expansion of territorial sea from three to six miles. The new boundary extended the previous one down the channel up to a point that was wider than 12 miles.

Both the International Court of Justice and the International Tribunal for the Law of the Sea agree that "[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily presumed."⁶¹⁵

In the maritime delimitation case between Guinea and Guinea-Bissau, an arbitral tribunal had to decide whether an 1886 boundary treaty between France and Portugal established the maritime boundaries between the States. The tribunal reviewed the object and purpose of the treaty and the words used:

Le Tribunal considère que l'usage fréquent des termes possessions et territoire dans le texte de la convention prouve que celle-ci avait bien pour objet les possessions coloniales de la France et du Portugal en Afrique de l'Ouest, mais que l'absence totale des mots *eaux, mer, maritime* ou *mer territoriale* constitue un indice sérieux de ce qu'il était essentiellement question de possessions terrestres. Par ailleurs, il lui apparaît que la convention avait surtout pour but la répartition, la cession (art.VI), l'échange ou l'occupation éventuelle (art. IV) de territoires et que la délimitation n'apparaissait que comme un aspect ou un moyen de la répartition de territoires dont rien ne précisait qu'ils puissent être maritimes.⁶¹⁶

The terms used in that treaty are very similar to those used in the 1825 treaty between Great Britain and Russia. Indeed, the 1825 treaty refers to "limites de leurs Possessions respectives"⁶¹⁷ and "La ligne de démarcation entre les Possessions des Hautes Parties Contractantes."⁶¹⁸ When the 1825 treaty refers to "ocean" or "mer", it is in the context of ensuring that freedom of navigation and of fisheries are maintained, not to refer to any kind of maritime delimitation.⁶¹⁹

⁶¹⁵ *Bangladesh v Myanmar*, *supra* note 231 at para 95 and *Nicaragua v Honduras*, *supra* note 7 at para 253.

⁶¹⁶ *Guinea v Guinea-Bissau*, *supra* note 103 at para 56.

⁶¹⁷ *Supra* note 19, preamble.

⁶¹⁸ *Ibid*, art 3.

⁶¹⁹ *Ibid*, art 6-7.

The *Guinea\Guinea-Bissau* decision refers to the United States-Russian treaty of 1867 and the United States-Great Britain treaty of 1783 as examples of boundaries drawn in the water that were meant to delimit territories only and which illustrate a common practice of the 19th century.⁶²⁰ The decision also highlights the use of words such as "territory" and "possessions," the absence of references to the territorial sea, as well as the object and purpose of the treaty as indications that the Parties did not intend to delimit their maritime boundaries.⁶²¹ The Court particularly mentions that the Travaux Préparatoires for the 1886 treaty makes reference to certain propositions made with regard to territorial sea, that were abandoned during the negotiations.⁶²² As we have seen above, there were also some discussions amongst British negotiators regarding potential propositions for maritime delimitation, however, those were later abandoned. Considering the similarities between the 1825 treaty and the 1886 treaty, it is very likely that the case would have strong precedential value.

In the *Territorial and Maritime Dispute between Nicaragua and Colombia*, the International Court of Justice also had to examine whether a previous treaty had established a maritime boundary between the Parties.⁶²³ This treaty, concluded in 1928, followed by a Protocol concluded in 1930, established that Colombia had sovereignty over San Andres Archipelago and the Protocol specified that the Archipelago "does not extend west of 82nd

⁶²⁰ *Guinea v Guinea-Bissau*, *supra* note 103 at para 81.

⁶²¹ *Ibid* at para 56.

⁶²² *Ibid* at para 79.

⁶²³ The decision was rendered following preliminary objections: *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Preliminary Objections, [2007] ICJ Rep 832.

degree of longitude west of Greenwich."⁶²⁴ Colombia argued that the 1930 Protocol had thus established the maritime boundary between Colombia and Nicaragua along the 82nd meridian. Nicaragua disputed this claim. The Court found that the ordinary meaning of the words could not lead to the conclusion that a maritime boundary was the object of the treaty. Furthermore the Court, after reviewing pre-ratification discussions between the Parties, concluded that "neither Party assumed at the time that the Treaty and Protocol were designed to effect a general delimitation of the maritime spaces between Colombia and Nicaragua."⁶²⁵ This is likely to also be the conclusion of a tribunal concerning the reference to the 141st meridian line included in the 1825 treaty. As we have seen in the introductory chapter, when reviewing the negotiating history, there is nothing to suggest that the Parties intended to delimit the maritime spaces between them.

1.3 Extension of Existing Boundary

In the unlikely event that a tribunal were to find that the 141st meridian was indeed the maritime boundary established by the Parties in 1825, would that boundary be valid for the territorial sea, the continental shelf and the EEZ?

In the case between Guyana and Suriname, the arbitral tribunal found that an agreement existed between the parties to the effect that the territorial sea delimitation followed a 10 degree line from the land-based starting point. Whereas Guyana argued that the

⁶²⁴ *Ibid* at para 20.

⁶²⁵ *Ibid* at paras 115-116.

boundary only went as far as three nautical miles, which was the recognized breadth of the territorial sea at the time, Suriname argued that the 10 degree line should be automatically extended to twelve nautical miles, the extent of both Parties territorial sea at the time of the decision. Suriname argued that the reasons behind the choice of the 10 degree line, i.e. the navigational situation of the area, were as valid for twelve miles as they were for three, and thus consistent with the object and purpose of the original agreement. It also raised the principle of inter-temporal law interpretation in that if the Parties intended to delimit their territorial sea, then they would have used twelve miles if this had been the limit at the time. The reasoning of the tribunal is a bit hard to follow but appears to refuse to extend the line from three to twelve miles along the 10 degree line because of the special circumstance created by the unusual nature of the arrangement that had set the 10 degree line in the first place, and the need to join that line to the starting point of the continental shelf and EEZ line.⁶²⁶ Even if the tribunal did not directly address the issue of the inter-temporal law interpretation and whether a three mile agreement could automatically be extended to twelve miles following each Party's current domestic claim, the effect of the rejection of Suriname's claim is the same. It would be difficult to argue that an agreed territorial sea boundary, whatever the width, could be extended to a line extending more than 200 miles through the operation of inter-temporal law interpretation. Consequently, if a tribunal were to find that the 1825 Anglo-Russian treaty delimited any maritime area at all between Canada and the US, it is likely that it would find that the agreement applies only to the territorial sea, as this was the only concept known at the time. In

⁶²⁶ *Guyana v Suriname*, *supra* note 124 at para 323.

its decision in the boundary delimitation case between Ukraine and Romania, the ICJ did specify that the agreement referred to in paragraph 4 of both article 74 and article 83 of *UNCLOS*, is a specific agreement on the EEZ and the continental shelf respectively. It further stated that: "(...) if States intend that their territorial sea boundary limit agreed earlier should later serve also as the delimitation of the continental shelf and/or the exclusive economic zones, they would be expected to conclude a new agreement for this purpose."⁶²⁷

Consequently, if the Court were to follow these precedents, even after finding that a territorial sea had been the subject of an agreement between Canada and the United States, it would likely interpret this finding narrowly by stating that the boundary that follows the 141st meridian goes as far as three miles from the coast only, the customary limit at the time of the conclusion of the agreement. The Court could then determine a line for the EEZ and the continental shelf starting at twelve miles from the coast going seaward. It could then, as in *Guyana/Suriname*, simply join the two lines between three and twelve miles from the coast. Alternatively, the Court could, by the application of inter-temporal law principles, find that the territorial sea boundary extends to twelve miles. However, the difference between the two findings would be negligible.

⁶²⁷ *Black Sea*, *supra* note 125 at para 69.

1.3 Tacit Agreement or Estoppel

As we have seen previously, the Courts will be reluctant to conclude that an agreement exists between Parties without a clear indication that they intended to conclude such an agreement. This is why it is very difficult to make the case that there exists a tacit agreement between the parties. A tacit agreement is different than a provisional line. Even before *UNCLOS*, which provides encouragement for parties to agree to provisional lines in a "spirit of understanding and co-operation,"⁶²⁸ courts were reticent to recognize de facto boundaries as they did not wish to prevent states from reaching provisional arrangements or sharing resources. In the case of the Canada-US boundary in the Beaufort Sea, there is no provisional line agreed to by the Parties and there is no evidence of a tacit agreement. On the contrary, as we have seen in the previous section, the United States has consistently denied Canada's claim that the maritime boundary follows the 141st meridian. In the case of *Bangladesh/Myanmar*, Bangladesh submitted, in support of their assertion that there existed a tacit agreement, affidavits from fishermen as to how the rules were enforced on the sea. This is reminiscent of the same type of evidence that had been gathered by the then Secretary of State for Foreign Affairs of Canada, M. Joseph Pope, in support of his claim that the US considered the AB-line in Dixon Entrance as a maritime boundary. The Tribunal, in this case, did not assign much probative value to this kind of evidence:

The tribunal considers that the affidavits from fishermen submitted by Bangladesh do not constitute evidence as to the existence of an agreed boundary in the territorial sea. The affidavits merely represent the opinions of private individuals regarding certain events.⁶²⁹

⁶²⁸ *UNCLOS*, *supra* note 27, arts 83(3), 74(3).

⁶²⁹ *Bangladesh v Myanmar*, *supra* note 231 at para 113.

The elements of estoppel are also absent as there has been no clear and unequivocal conduct on which Canada would have relied in good faith to its detriment. In a few cases, the Courts have found that the conduct of the Parties could be considered a special circumstance but, again, they have required, such as in the case of *Guyana/Suriname* a clear indication that the parties, by their conduct, had reflected their understanding that there existed such agreement, such as when allocating oil concessions.⁶³⁰ This was also the case in the *Tunisia/Libya* case. In the Beaufort Sea, there is no indication that parties have had an understanding as to the location of the boundary. Baker and Byers have recently suggested that Canada could argue that the failure of the United States to protest the issuance of oil and gas exploration licenses in the disputed area in the 1960s could be viewed as acquiescence.⁶³¹ However, they further state that unless such behaviour can be shown to produce evidence of a *modus vivendi*, it would likely not be found relevant.⁶³² This was confirmed in the recent case between Nicaragua and Colombia. Even though the Court had ruled that the 82nd meridian was not the boundary and that there were no tacit agreement, Colombia argued that the conduct of the parties with regards to this meridian constituted a relevant circumstance.⁶³³

Another recent decision with regards to maritime boundaries is the case between Myanmar and Bangladesh,⁶³⁴ the first boundary decision by the International Tribunal for the

⁶³⁰ *Guyana v Suriname*, *supra* note 124 at para 291.

⁶³¹ Baker & Byers, *supra* note 507 at 75. The US eventually protested following the enactment of the Arctic Waters Pollution Prevention Act in 1970.

⁶³² *Ibid.*

⁶³³ Discussed above at 90.

⁶³⁴ *Bangladesh v Myanmar*, *supra* note 231.

Law of the Sea. In that decision, after having found that an agreement as per article 15 of *UNCLOS* did not exist between the Parties, that there was no tacit agreement or de facto agreement and that the requirements of estoppel were not met, the Court proceeded to delimit the territorial sea, and then the other maritime areas.

Chapter 2 -Delimitation Process

As we have just seen, a third-party adjudication process is likely to find that the maritime boundary, including the continental shelf, has not been determined between Canada and the United States in the Beaufort Sea. In accordance with the current state of jurisprudence, the tribunal would then proceed by first drawing a provisional equidistance line. Canada is party to *UNCLOS* but not the United States. This was the situation in the most recent court decision on maritime boundary delimitation, that between Nicaragua and Colombia, where Colombia was not a party to the treaty. The parties agreed that several important provisions of *UNCLOS* reflected customary law, in particular articles 74, 83 and 121.⁶³⁵ The Court also recognised this.⁶³⁶ Consequently, a tribunal would likely proceed as per its precedents. After reviewing various factors, it would then determine whether special circumstances exist that warrant an adjustment to the line to achieve an equitable result. After proceeding with an adjustment, if required, the tribunal would verify the equity of the result by assessing whether there is a disproportion between the length of coastline of each party and the allocated portion of the overlapping area.

⁶³⁵ *Nicaragua v Colombia*, *supra* note 126 at paras 137-138.

⁶³⁶ *Ibid* at para 139.

2.1 Drawing the Provisional Line

The first step in drawing the provisional equidistance line is the determination of appropriate base points. If the Parties have similar practices, such as in the recent case of Myanmar and Bangladesh where both parties use the low-water line, then the Court will likely find no reason to depart from the practice of the States.⁶³⁷ However, even if both parties use straight baselines and basepoints, the Court could decide to use only some of them, for one party or both as was the case between Nicaragua and Colombia. Canada and the United States use different systems to establish their baselines. The United States uses the low-water line as a baseline to delimit its maritime zones,⁶³⁸ whereas Canada has drawn straight baselines around most of its coast. The basepoints used to draw those baselines are found in the regulations under the Oceans Act.⁶³⁹ Those for the area of the Beaufort Sea, from the end of the land border between Canada and the United States, are found in the *Territorial Sea Geographical Coordinates (Area 7) Order*.⁶⁴⁰ Because of the configuration of the coast in the boundary area, most Canadian basepoints fall on mainland features, with only a few on islands. Since the islands used as basepoints are very near the coast, it is unlikely that the Court would refrain from using them. Considering that the coast on the Canadian side is slightly concave, the use of island basepoints, especially on Herschel Island and Pelly Island would provide some compensation. The United States does not use basepoints but, considering that the coast is almost straight and the islands fringing it are close to the shore, basepoints could easily be

⁶³⁷ *Bangladesh v Myanmar*, *supra* note 231 at para 156.

⁶³⁸ US, Office of Coast Survey, Maritime Limits and Boundaries, online: NOAA <<http://www.nauticalcharts.noaa.gov/csdl/mbound.htm>>.

⁶³⁹ *Oceans Act*, SC 1996, c 31.

⁶⁴⁰ *Territorial Sea Geographical Coordinates (Area 7) Order*, SOR/85-872.

identified. In the recent *Nicaragua/Colombia* case, the Court did exactly that. Since Nicaragua had not determined basepoints, the Court decided to identify basepoints on the islands fringing the coast.⁶⁴¹

The drawing of the equidistance line up to the 200-mile limit would involve mostly mainland basepoints or those on fringing islands. However, the line regarding the continental shelf beyond 200 n.m. would need to use basepoints located on arctic islands, which are more distant from one another. The gaps have been closed by straight baselines which have been contested by the United States as being too long. Banks Island, the main coast projecting on the area to be delimited for the extended continental shelf, is itself fringed by small islands, many of which are identified as basepoints in Canadian legislation.⁶⁴² There might be an argument that basepoints on islands fringing an island itself fringing a coast could not be used. However, because of the archipelagic nature of the Canadian arctic, the fact that most basepoints are situated mostly on one island, that is Banks Island, a very large island, close to the mainland, there is unlikely to be much reticence over the use of the basepoints identified in the Canadian regulations. Banks Island could hardly be considered a distorting factor and would, in any case, be entitled to its own continental shelf.

⁶⁴¹ *Nicaragua v Colombia*, *supra* note 126 at para 201.

⁶⁴² The Territorial Sea Geographical Coordinates identifies basepoints on Bernard Island, Norway Island, Robillard Island, Phillips Island and Gore Island : *Supra* note 640, schedule I.

2.2 Relevant Circumstances

2.2.1 Historic Title

The issue of historic title could arise with regard to the delimitation of the territorial sea in accordance with article 15 of *UNCLOS*. The meaning of what would constitute an historic title has not clearly been determined judicially in terms of maritime boundaries. Arguments have generally been that historic titles are really ancient titles.⁶⁴³ In the *Fisheries Case* between Great Britain and Norway, Norway claimed historic title to fjords and other area enclosed by baselines.⁶⁴⁴ However, no decision was made on the historical nature of the waters or whether Norway was entitled to draw baselines because of it.⁶⁴⁵ In the years following the decision, the International Law Commission studied the issue. However, their work mainly considered the concept of “historic bays” which is not the issue here.⁶⁴⁶ Professor Kozlowski argues that there is no reason that historic title not be applied in the same way for maritime territory as for other territories.⁶⁴⁷ The arbitral tribunal in the territorial sovereignty case between Yemen and Eritrea also appears to consider that historic title can be applied equally to bays as to territory.⁶⁴⁸ It mentions that historic title can be an “ancient title” and also a title acquired or consolidated

⁶⁴³ This was the case in many territorial sovereignty cases, such as that between Eritria and Yemen, Malaysia and Singapore or Qatar and Bahrain

⁶⁴⁴ Although both parties agreed that Norway could make this claim, Great Britain argued that this was as an exception to the normal applicable rules of international law whereas Norway argued that it was as per its understanding of international law itself. The Court did not address this issue in its ruling.

⁶⁴⁵ The decision was rendered on other grounds, mainly that the method employed by Norway to draw baselines was not contrary to international law. In that case, Great Britain agreed that some waters could be considered as internal on historic grounds whereas they would be normally be considered international waters under customary law. This issue is not pertinent in our case since this is not the basis of Canada’s claim.

⁶⁴⁶ “Juridical Regime of Historic Waters, including Historic Bays: Study Prepared by the Secretariat” (UN Doc A/CN.4/143) in Yearbook of the International Law Commission 1962, vol 2 (New York:UN, 1964) at 1.

⁶⁴⁷ Artur Kozlowski, “The Legal Construct of Historic Title to Territory in International Law –An Overview” (2010) 30 Polish YB Int’l L 61 at 71. Although in the case of maritime areas, it is not clear how sovereignty would be acquired since it is dependent on the land and could not be independently acquired.

⁶⁴⁸ *Territorial Sovereignty and Scope of the Dispute (Eritrea v Yemen)* (1998), 22 RIAA 209 at para 105.

through a process of prescription or acquiescence or, “by possession so long continued as to have become accepted by the law as a title.”⁶⁴⁹ In the case of the Beaufort Sea, it is not clear how Canada’s claim to the 141st meridian could be considered an historic title. It is not merely because a unilateral claim lasts many years that it becomes a historic title, in the absence of a legal or tacit agreement between the neighbours. Any historic claim that Canada would have to the waters of the Beaufort Sea itself would no doubt be shared by the United States who, by virtue of their succeeding Russia in Alaska, can support a claim of historical presence in the region.

As with the issue of estoppel, Courts would likely be reluctant to find that such title exists. In the case of Guyana and Suriname, a Boundary Commission had made a recommendation as to a maritime boundary that had been accepted by both countries and which, by all accounts, was considered as such. However, a formal treaty was never signed. Rather than considering the tentative agreement as an historic title, the Court considered it as a special circumstance.

At best, since the notion of historic title only appears in *UNCLOS* with regard to territorial sea delimitation, Canada’s historic title, i.e. the 141st meridian as a boundary, would likely be limited to either three or twelve miles from the shore, and not extended the full length of the boundary. That decision would be consistent with the principle that, even where

⁶⁴⁹ *Ibid* at para 106.

territorial sea boundaries are delimited, those are not automatically extended to the EEZ and the continental shelf.

2.2.2 Geographical Factors

A.Coastline

For the purpose of delimitation, the relevant coastlines are the ones used to establish the provisional equidistance line, facing the area to be delimited whose projection overlap.⁶⁵⁰ On the Canadian side, the relevant coast would be the northern Yukon and North-west Territory coast up to Observation Point, the western coast of Banks Island and the South-west corner of Prince Patrick Island. The inside of the Mackenzie River delta would not be considered relevant as it does not project on the area to be delimited. On the United States side, the entire northern coast, facing the Beaufort Sea, up to Port Moore, would be relevant. The northern Yukon coast presents a south-easterly direction with a slight concavity on the Canadian side. The concavity, formed by the Mackenzie River delta, causes the equidistance line to have a slight cut-off effect from the Canadian coast's projection. Although the earlier jurisprudence viewed such encroachment as requiring some compensation in order to protect a States' natural prolongation, recent decisions will consider encroachment to require adjustment only if the cut-off effect is disproportional. In the *Nicaragua/Colombia* case, the cut-off effect, which was produced by a few small islands which were many nautical miles apart, was found to be a relevant circumstance. However, in Canada's case, the cut-off effect would likely not be

⁶⁵⁰ This principle was reiterated in the recent *Nicaragua/Colombia* decision where the ICJ referred to the *Romania/Ukraine (Black Sea)* case: *Nicaragua v Colombia*, *supra* note 126 at para 150.

considered a relevant circumstance because of the overall equity of an equidistance line. In fact, this effect would be partly compensated if the basepoints used by Canada in drawing straight baselines were used to draw a simplified equidistance line. Another way to calculate the compensation for the concavity of the coastline would be to close the mouth of the Mackenzie delta by a straight baseline, as is done by Canada in calculating the extent of its territorial sea. For the extended continental shelf, beyond 200 nautical miles, the relevant coastline becomes the Arctic Archipelago on the Canadian side, especially Banks Island. On the United States' side, the coast remains the same but the relation between the coastlines changes from being adjacent to facing each other at a 90 degree angle. The coastlines themselves do not present particular features that would likely be considered special circumstances. If no factors are found that would warrant an adjustment of the equidistant line, the provisional line would separate the overlapping area more or less in half at a 45 degree angle.

B. Islands

As we have seen previously, islands are often factors in boundary determination. They are assigned various weight, depending on their size, location and impact on the delimitation line. Islands also play a role in the determination of the boundary line when they are used as basepoints. In that case, there is no issue with their consideration since they are given full weight through that use. The islands on the Canadian side, notably Hershell Island, are all close enough to shore that they can be considered part of the shoreline and used as basepoints. As for Banks Island, the main island in the Arctic Archipelago fronting the area to be delimited, it is

entitled to its own maritime zones, including continental shelf. Considering its size, the length of its coast projecting onto the area to be delimited, and its relation to the mainland and the rest of the archipelago, it would be unlikely to be considered a distorting factor. The same could be said of Prince Patrick Island. It is a large island, close to other islands of the Arctic archipelago, thus not an anomaly in the geography that would create such a distortion of the line that it should not be considered and given full weight.

C. Geomorphological Factors

As seen previously, geomorphological and geological features are not usually considered pertinent to the delimitation of the EEZ and the continental shelf within the 200-mile zones. In the recent case between Nicaragua and Colombia, the Court reiterated that geological and geomorphological considerations were not relevant to the delimitation of overlapping entitlements within 200 n.m of the coasts.⁶⁵¹ In the case of the Beaufort Sea, it would be difficult for either party to make the case that there exist separate natural prolongations or that geological factors exist to an extent that they could constitute special circumstances. Neither Canada nor the United States have yet used the argument of separate continental shelves in the area. It is unlikely, considering the recent mapping done jointly by both, that they will find evidence to suggest that the continental shelf formed by the natural prolongation of both countries is anything other than one and the same. As early as 1985, the jurisprudence found, in the case of *Guinea/Guinea-Bissau*, that even if there were some physical

⁶⁵¹ *Ibid* at para 214.

differences in the continental shelf, they were of secondary nature and not sufficient to be taken as belonging to two separate continental shelves.⁶⁵² However, for the extended shelf, because of the *UNCLOS* definition itself, these factors could be pertinent. The issue of the Outer Continental Shelf is examined below in section 2.2.4.

2.2.3 Non-geographic Factors

A. Socio-economic

As seen previously, socio-economic factors are at the centre of maritime disputes. States usually submit extensive argumentation as to the economic impact of the boundary on both the local population and on the country as a whole. One of the factors that could be raised by the Parties in the Beaufort Sea dispute is the socio-economic impact of the boundary on the local population. Both countries are home to an important aboriginal population in the area, which has traditionally lived off the land but which is now more involved in natural resource exploitation. Both countries also have strong environmental lobbies which contribute to make environmental issues very prominent in the region. On the Canadian side, Baker and Byers specifically raise the Inuvialuit Final Agreement as a potential special circumstance that could have an effect on the equidistance line, since the federal government used the 141st meridian to define the territory covered by the agreement.⁶⁵³ The agreement, however, specifically includes a clause stating that the description is without prejudice to any negotiations or positions of the

⁶⁵² *Guinea v Guinea-Bissau*, *supra* note 103 at para 116.

⁶⁵³ Baker & Byers, *supra* note 507 at 79. They argue that the Federal government would at least have an obligation to consult with the Inuvialuit since a different boundary would be an infringement of their rights.

government respecting the limits of maritime jurisdiction in the area.⁶⁵⁴ In any case, it would be difficult to argue that a domestic agreement could be opposable to a third party, the United States in this case, even only as a special circumstance. Baker and Byers also raise the long-standing tradition of hunting and fishing in the Beaufort Sea waters by the Inuvialut.⁶⁵⁵ Historic fishing rights have been raised in a few cases as a socio-economic factor, notably by the United States in the *Gulf of Maine* case and by Barbados in its boundary arbitration case against Trinidad and Tobago. To support its request for an adjustment of the equidistant line, Barbados had claimed that its fisher folk had a “centuries-old history of artisanal fishing in the waters off the northwest, north and northeast coasts of the island of Tobago (...).”⁶⁵⁶ The ICJ, in the *Gulf of Maine* case, did assert that access to fisheries could constitute special circumstances. The special circumstance, however, would stem from the repercussion of the boundary cutting off traditional fishing rather than from the historic right itself. The Court said that unless the result of a boundary determination proved catastrophic for a population, the economic impact of a boundary is not a relevant factor. In the case of Barbados, the tribunal did not address the historic issue, stating that the evidence was lacking, but reiterated the catastrophic repercussion test,⁶⁵⁷ and went as far as stating that:

Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of

⁶⁵⁴ *Inuvialuit Final Agreement* (Inuvik, Inuvialuit Regional Corporation, 1987), online: <http://www.inuvialuitland.com/resources/Inuvialuit_Final_Agreement.pdf> at 82, Annex A-1.

⁶⁵⁵ Baker & Byers, *supra* note 507 at 79.

⁶⁵⁶ *Barbados v Trinidad and Tobago*, *supra* note 123 at para 125.

⁶⁵⁷ *Ibid* at paras 266-267.

the judgment of the International Court of Justice in the *Jan Mayen* case (I.C.J. Reports 1993, p. 38). That is insufficient to establish a rule of international law.⁶⁵⁸

Socio-economic factors have very rarely been accepted as relevant for a maritime boundary. Furthermore, none of the decisions that have considered them have been recent decisions. Even if this were a factor to be considered, it would be difficult to determine what effect it could have on a line since aboriginal groups from both sides of the boundary have been hunting and fishing in the same area for centuries. A definite boundary would have no greater impact for one group on one side of it than for the group on the other side. A third party decision-maker would likely find that economic issues, such as fishing, are best dealt with by countries through separate agreements and in accordance with obligations found elsewhere in *UNCLOS*, such as in article 63(1) with regards to transboundary stock.

B. Resources

The resource question concerns mainly hydrocarbon exploration and exploitation. The United States has been exploiting offshore oil and gas in the Beaufort Sea area since 1968, when the discovery at Prudhoe Bay was announced.⁶⁵⁹ The offshore exploitation is concentrated in the Prudhoe Bay area. Maps of permit area of coverage of exploration and exploitation leases show no activity in the disputed zone.⁶⁶⁰ On the Canadian side, the discovery at Prudhoe Bay

⁶⁵⁸ *Ibid* at para 269.

⁶⁵⁹ US, Bureau of Land Management-Alaska, "Oil and Gas Development on Alaska's North Slope: Past Results and Future Prospects" by Arthur C. Banet, Open File Report 34 (Alaska: Department of the Interior, March 1991) at 6.

⁶⁶⁰ Alaska Department of Natural Resources, Division of Oil & Gas, *Lease Sale Results for Beaufort Sea (2012-2006)*, online: <<http://dog.dnr.alaska.gov/Leasing/SaleResults.htm#bsea>>.

spurred increase exploration in the offshore area of the Beaufort Sea and Mackenzie Delta. The map of existing wells shows that the exploration is concentrated in the Mackenzie Delta area while none are shown in the disputed area.⁶⁶¹ Leases have been allocated in the disputed area but are subject to work prohibition.⁶⁶² In the past 22 years, only one well was drilled in the Beaufort Sea area and, despite billions of dollars invested in oil and gas exploration, there has been no significant commercial production.⁶⁶³ In the 2002 decision on the boundary between Nigeria and Cameroon, the Court argued that the pattern of oil concessions reflected the understanding of the parties as to where the boundary lay and was consistent with other evidence of the understanding of the Parties.⁶⁶⁴ There has never been a *modus vivendi* between Canada and the United States with regard to oil concessions in the disputed area, such as was the case between Nigeria and Cameroon. It is therefore unlikely that the pattern of oil concession or some other resource-related criteria would be considered as a relevant circumstance. More likely a court would follow the decision in the Romania and Ukraine delimitation, where the Court considered that there was no particular role for State activities in the boundary delimitation.⁶⁶⁵

⁶⁶¹ Aboriginal Affairs and Northern Development Canada, *Oil and Gas Exploration & Development Activity Forecast: Canadian Beaufort Sea 2012–2027* (Beaufort Regional Environmental Assessment), online: <<http://www.beaufortrea.ca/wp-content/uploads/2012/04/Beaufort-Sea-OG-activity-forecast-2012-2017.pdf>>.

⁶⁶² *Ibid* at 28-29.

⁶⁶³ *Ibid* at 13-14.

⁶⁶⁴ *Cameroon v Nigeria*, *supra* note 118 at para 215.

⁶⁶⁵ *Black Sea*, *supra* note 125 at para 198. The Court refers to the *Barbados\Trinidad and Tobago* decision on the same issue, quoting from the decision: “[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance.” *Supra* note 123 at para 241.

The State activities referred to in the *Romania/Ukraine* decision also included fisheries and the Court found that no evidence had been presented as to what catastrophic effect would be produced should the boundary proposed by Ukraine not be retained. In the Beaufort Sea, the living resources exploitation in the area is limited to traditional fishing and hunting. As stated above, because of the fact that the exploitation of the resource is undertaken by aboriginal groups from both countries, within the disputed area, it is difficult to assess how this factor could potentially alter the equidistant line. One side would have to demonstrate conclusively that most of the resources exploited by both sides are found on only one side of the preliminary line and that the exclusion of one population would likely have catastrophic repercussions on its livelihood. It is more likely that the Court would encourage the parties to cooperate in reaching an agreement after the boundary has been determined, such as was the case in the recent *Bangladesh/Myanmar* decision.⁶⁶⁶

2.2.4 Outer Continental Shelf

Article 76(10) of *UNCLOS* indicates that the provisions concerning the extent of the continental shelf are without prejudice to the delimitation of boundaries between States. This means that Canada's submission to the Commission on the Limits of the Continental Shelf, due in 2013, is not relevant to the dispute between Canada and the United States. Baker and Byers suggest that Canada nevertheless seeks a "no objection" note from the United States in order to

⁶⁶⁶ *Bangladesh v Myanmar*, *supra* note 231 at para 476.

allow the Commission to evaluate the maximum claim, which would eventually be to both countries' benefit.⁶⁶⁷

In the *Bangladesh/Myanmar* case, the only case where a tribunal has specifically pronounced on the issue of bilateral delimitation between States with regards to adjacent outer continental shelves, the ITLOS has stated that article 83 of *UNCLOS* applied equally to the delimitation of the continental shelf within and beyond 200 n.m.⁶⁶⁸ In that case, the tribunal considered that the same factors applied to the outer-shelf as it did for the zone within 200 miles. It was therefore the concavity of the coastline, i.e. the geographical factor that was the main modifier of the equidistance line. In that case, Bangladesh presented extensive evidence regarding the nature and origins of the sediments of the sea floor to argue that the shelf was a natural prolongation of its territory. The ITLOS, however, rejected the geological evidence stating that Article 76 did not support the view that the geographic origin of the sedimentary rocks is of relevance to the entitlement to the continental shelf.⁶⁶⁹ In that case, no morphological factors were argued and the tribunal found that the shelf was common to both parties. In his review of the few negotiated agreements between States' outer continental shelves, David Colson finds that the practice of States is equally to extend their boundaries using the same method as the one used to determine the boundary within 200 n.m. and finds no consideration given to geomorphological or geological factors.⁶⁷⁰ In its recent Court case with Colombia, Nicaragua requested a decision on splitting the overlapping claim between its

⁶⁶⁷ Baker & Byers, *supra* note 507 at 85.

⁶⁶⁸ *Bangladesh v Myanmar*, *supra* note 231 at para 454.

⁶⁶⁹ *Ibid* at para 447.

⁶⁷⁰ Colson, *supra* note 370 at 96.

extended continental shelf and Colombia's 200 mile continental shelf. In that case, Nicaragua based its argument on a geological factor, stating that the Nicaragua Rise constituted a natural prolongation of its territory.⁶⁷¹ The Court, however, refused to rule on that issue, stating simply that Nicaragua had not established that it had a continental margin that extended far enough to overlap with Colombia's mainland coast.⁶⁷²

In the case between Canada and the US, there is little evidence that the continental shelf, in the area to be delimited, would not be viewed as a common shelf. The published maps from both Canada and the US⁶⁷³ show that the overlapping area appears devoid of any geomorphological features that would warrant a departure from the line otherwise determined for the rest of the continental shelf. Surprisingly, although Canada has not publicly changed its position as to the use of the 141st meridian as the lateral boundary with the United States, the map pictured in the Canadian Polar Commission newsletter extends west of that meridian. Officially, however, neither Canada nor the United States has made specific claims with regard to the extended continental shelf boundary between them, that is, they have not made claims that differ from their position on the general boundary. Consequently, in the absence of important geomorphological or geological features, a court or tribunal would likely, as in the case of

⁶⁷¹ *Nicaragua v Colombia*, *supra* note 126 at para 121.

⁶⁷² *Ibid* at para 129.

⁶⁷³ A map of what the extended shelf could look like is included in: Jacob Verhoef & Julian Goodyear, "Defining Canada's Extended Continental Shelf in the Arctic", Canadian Polar Commission Meridian Newsletter (Spring-summer 2011). Online: <<http://www.polarcom.gc.ca/uploads/Publications/Meridian%20Newsletter/Meridian%20Spring%20Summer%202011%20English.pdf>>. The United States map is found at: US Extended Continental Shelf Project, online: <<http://continentalsshelf.gov/missions/10arctic/welcome.html>>.

Bangladesh and Myanmar, extend the line following the same principles as it would have used for the rest of the boundary.

2.2.5 Proportionality

The third step in establishing a judicial boundary is the ex-post facto one of determining whether the adjusted equidistant line is proportional to the lengths of the coasts. As seen previously, the proportionality between the respective maritime areas allocated and the lengths of coasts does not have to be exactly proportional but the proportionality must reflect the equitability of the result. In the Romania and Ukraine case, the court excluded any coastal length that did not project directly unto the area to be delimited and stated that:

The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.⁶⁷⁴

In the recent case between Colombia and Nicaragua, the Court reiterated that it would only be where the disparities of coastal lengths are “substantial” that an adjustment would be warranted.⁶⁷⁵ Considering that there is not a wide difference between the respective lengths of coastlines of the United States and Canada, it is unlikely that a court would find the resulting line to be so disproportionate as to constitute an inequitable determination.

⁶⁷⁴ *Black Sea*, *supra* note 125 at para 110.

⁶⁷⁵ *Nicaragua v Colombia*, *supra* note 126 at para 201.

2.2.6 Conclusion

Since the decision in the *Gulf of Maine* case, between Canada and the United States, the state of jurisprudence has changed a lot. Recent decisions have been more consistent and have followed an established method. The Courts have determined that geographical factors are really the only factors to be considered and that only very exceptional circumstances will have an impact on an equidistant line. Even for the extended continental shelf, where it was thought that geological and geomorphological factors could weigh more heavily, this has not turned out to be the case to date. Consequently, after reviewing all the factors present, the likely result of a third party arbitration of the boundary dispute in the Beaufort Sea is likely to be the finding that 1-no agreement exists between the parties, and 2- that an equidistant boundary is equitable for all maritime delimitations. This would be in keeping with the most recent jurisprudence that has shown great circumspection in altering an equidistant line that is otherwise proportional to the lengths of the relevant coastlines.

Chapter 3 –Negotiated Agreement

Considering that boundaries are established preferably by agreement, Parties have a consequent obligation to negotiate in good faith. We will be reviewing in this chapter the history of negotiations between Canada and the United States and the current state of the relationship with regard to the Arctic. In the *Gulf of Maine* dispute, the parties were unable to reach an agreement and referred to matter to the ICJ. The decision, however, was criticised by both sides and both sides felt victimised. The ability of the parties to then work cooperatively in

order to manage the fisheries was compromised, to the detriment of the stocks and of the coastal populations. Considering, as we have seen earlier, the tendency of countries to view equity principles in terms of distributive justice, we will be reviewing ways by which Canada and the United States can agree to either a boundary, or to some other arrangement, while ensuring that their individual interests as well as their common interest are protected.

3.1 History of Negotiations

3.1.1 Current Situation

Over the years, many discussions have taken place between Canadian and American authorities over maritime boundaries and related matters, with one serious attempt made to solve the disputes. However, since the collapse of negotiations that preceded the Gulf of Maine decision, no serious negotiation has taken place. In 2009, the Government of Canada published its Northern Strategy. The first pillar of that Strategy is the exercise of sovereignty in the Arctic.⁶⁷⁶ In August 2010, the then Minister of Foreign Affairs launched the government's Statement on Canada's Arctic Foreign Policy which states that "Canada will continue to manage these discrete boundary issues and will also, as a priority, seek to work with our neighbours to explore the possibility of resolving them in accordance with international law."⁶⁷⁷ Since then, there has been very little public communication as to what steps have been taken to effectively

⁶⁷⁶ Department of Indian Affairs and Northern Development, *Canada's Northern Strategy: Our North, Our Heritage, Our Future* (Ottawa, Public Works and Government Services, 2009).

⁶⁷⁷ Statement on Canada's Arctic Foreign Policy, *Exercising Sovereignty and Promoting Canada's NORTHERN STRATEGY Abroad*, online: <http://www.international.gc.ca/polar-polaire/canada_arctic_foreign_policy_booklet-la_politique_etrangere_du_canada_pour_arctique_livret.aspx?lang=eng&view=d> at 7.

resolve the issues. The United States' Arctic Region Policy was published in January 2009. It mentions the dispute with Canada over the Beaufort Sea boundary but makes no special commitment to settle this dispute.⁶⁷⁸ However, there are numerous commitments to working with other Arctic nations on a range of issues, from fisheries to hydrocarbon development and environmental protection. Considering that both nations recognise the growing importance of the Arctic, and the need to work cooperatively on a wide range of issues, there should be strong impetus for a negotiated settlement that avoids the obstacles of past negotiations. At the very least, Parties are under an obligation to make "every effort to enter into provisional arrangements of a practical nature (...)." ⁶⁷⁹ Those arrangements can be *ad hoc*, like the current moratorium on hydrocarbon exploitation in the disputed zone; however, this leaves the resource unexploited. Furthermore, with advance technology, as the resources in the Beaufort Sea and beyond become exploitable, the stakes will increase. This will make negotiations that much more difficult, as was experienced with the land boundary in the same area after the Gold Rush. It is therefore in both countries' interest to settle the issue so that exploitation can proceed in a sustainable way and to the benefit of the local populations.

3.1.2 Pre-war Negotiations

From the 1920s to the late 1940s, extensive discussions took place with regards to settling the boundary in Dixon Entrance. This was spurred by the requirement of the International Boundary Commission to map the entire Canada-US boundary. In 1939, it appears that the

⁶⁷⁸ US, Arctic Region Policy, National Security Presidential Directive/Nspd – 66, Homeland Security Presidential Directive/Hspd – 25, 9 January 2009, online:<<http://www.fas.org/irp/offdocs/nspd/nspd-66.htm>>.

⁶⁷⁹ UNCLOS, *supra* note 27, art 83(3).

United States put forward, as a basis for discussion, various principles contained in a “draft note” shared with the Canadian authorities.⁶⁸⁰ On the delimitation of territorial waters in the Beaufort Sea, the United States proposed using the method of a perpendicular from the general direction of the coast:

It is to be noted that no allocation of land is under discussion, but the problem is to find a way by which Canadian and United States territorial waters may be defined: The United States note proposes the application of the Boggs Theory. The point of departure of the line would be in this case the point where the 141st meridian meets the sea. The line would then follow the direction at right angles to a base line representing the general line of the coast.⁶⁸¹

The same principle was suggested for the Juan de Fuca Strait. The main issue, however, remained Dixon Entrance and the nature of the waters around the AB line. There appears to have been very little discussion as to the management of resources, save for a proposal to have free access to the boundary area by fishermen from both nations. In the end, the negotiations collapsed in the face of strong opposition from British Columbia. In a letter to the Secretary of State for External Affairs, the Attorney-General of British Columbia stated:

British Columbia objects in the strongest possible terms to any such settlement. British Columbia submits that any proposal for a new line of demarcation, as is proposed in the revised draft note must include an undertaking on the part of the United States to recognize Canada’s claim to the whole of the waters of Hecate Strait and to the whole of the waters of Dixon Entrance, south of the line of demarcation, including the exclusive right of Canadian nationals to fish therein. (underlined in the original)⁶⁸²

⁶⁸⁰ The note itself was not found in the archives but was discussed in *Memorandum on Boundary Questions on the Pacific Coast and in the Arctic Ocean*, 23 August 1941, Ottawa, National Archives of Canada (RG 25, series A 3-b, vol 2680, file 10600-40) at 2-4.

⁶⁸¹ *Ibid* at 4.

⁶⁸² G.S. Wismer, Attorney-General of British Columbia to the Right Hon. L. St. Laurent, P.C., Secretary of State for External Affairs, 21 February 1947, Ottawa, National Archives of Canada (RG 25, series A 3-b, vol 2680, file 10600-40) at 4.

Of course, besides the status of the waters of Dixon Entrance, the negotiations at the time only pertained to the delimitation of the territorial sea. The impact on the resources would have therefore been negligible. It was only with the massive expansion of maritime areas in the post-war era, especially the continental shelf and the fishing zones, and after important oil and gas discoveries were made in the area, that the two countries felt the need to settle their dispute with a new sense of urgency.

3.1.3 Post-war Negotiations

Following unsuccessful discussions between Canada and the United States on the issue of maritime boundary delimitation in 1970 and in 1975-76, the Prime Minister of Canada and the President of the United States appointed special negotiators “to conduct intensive efforts to try to reach a comprehensive settlement of the bilateral boundaries and related resources issues.”⁶⁸³ The extension of fisheries jurisdiction of both countries in 1977 created a sense of urgency which was added to “existing pressures from interested provinces and fisheries and oil and gas industries to work out precise maritime boundaries (...).”⁶⁸⁴

The first phase of the negotiations was to address the “basic principles of long-term resource arrangements for fisheries and hydrocarbons as a basis for reaching detailed

⁶⁸³ *Minutes of Proceedings and Evidence of the Standing Committee on Fisheries and Forestry*, House of Commons, 30th Parl, 3rd Session, no 15 (11 April 1978) at 6 [*Minutes of Proceedings*].

⁶⁸⁴ *Ibid.*

agreement on these issues (...).”⁶⁸⁵ It was only after such an agreement was obtained that boundaries would be delimited, in phase two of the negotiation process.

During a session of the Standing Committee on Fisheries and Forestry in April 1978, the committee reviewed the Joint Report of the negotiators. In reply to a question on Canada’s legal position with regard to boundary determinations along a particular line, Canada’s Deputy Negotiator for Maritime Boundaries made it clear that the main issue was not the line *per se*. He explained that the negotiators had sought to minimise the impact of a particular line by focussing on the resource issue:

So what we have done is to look at why and what is the reason that the industry on the West Coast and the Government of British Columbia is in favour of having a canyon line. It is not just because they are very keen to draw a line on the map which gives British Columbia or Canada a little extra territory. We think that we have progressed beyond that point. In some quarters maybe we have not, but why did we want the canyon line and what was the interest? It was the resource question and we set out to try to preserve and protect that resource for Canada.⁶⁸⁶

The resource issue was divided into two separate agreements, one on fisheries and one on hydrocarbons. The fisheries agreement called for a Joint Fisheries Commission to be established. The Commission would oversee integrated management at three different levels, depending on the various fish stocks: full joint management, joint management based on proposals from the state with the greater interest, and, coastal state management with only a

⁶⁸⁵ *Joint Report of Ambassador Cadieux and Ambassador Cutler to the Governments of Canada and the United States : Negotiations on Maritime Boundaries and Related Resource Issues*, 21 October 1977 in *Minutes of Proceedings*, *supra* note 683, Appendix FF-10 at para 4 [*Joint Report*].

⁶⁸⁶ *Minutes of Proceedings*, *supra* note 683 at 30. Although the statement concerns the boundary between British-Columbia and Washington State seaward of the Strait of Juan de Fuca, it is meant to illustrate the approach taken by the negotiating team.

consultative requirement for the other state. Each side would grant access to fishermen from the other side.⁶⁸⁷

On hydrocarbons, the agreement called for the establishment of Shared Access Zones where each country would be entitled to half the volume of production. Each country would benefit from a time-table for hydrocarbon development in each zone. However, if, at the end of the year, one country has more production than the other, this would be compensated in the following year by allowing the other country to buy an amount of hydrocarbon equivalent to half the excedent.⁶⁸⁸ The comments of the Deputy Negotiator for Canada to the Standing Committee show that economic issues and the distribution of the resources were the main consideration of the negotiators and not the precise tracing of the boundary:

In the Beaufort Sea the Canadian position is flexible in the context of an overall agreement, provided that balanced United States concessions are forthcoming elsewhere. With regard to the hydrocarbon shared-access zone, Canada would be willing to accept an access zone in the Gulf of Maine which would be principally on the Canadian side of any agreed boundary if the United States can agree to an access zone in the Beaufort Sea principally on the U.S. side of the eventual boundary (...).⁶⁸⁹

By focussing on the management of the resources instead of the boundary demarcation, the negotiators were very much following the trend of the time with regard to considering aspects of distributive justice as part of equitable principles in the determination of maritime boundaries. The Beaufort Sea was not a main issue at the time. The Gulf of Maine was the main area of dispute because of economic interests linked to the fishery. Since the agreement was

⁶⁸⁷ *Joint Report, supra* note 685, attachment I.

⁶⁸⁸ *Ibid*, attachment II.

⁶⁸⁹ Comments of Mr Lorne Clark, Deputy negotiator for Maritime Boundaries Canada\U.S.A, in *Minutes of Proceedings, supra* note 683 at 8.

meant as a comprehensive package, the lack of movement over the Gulf of Maine led to the overall collapse of the negotiations. Although the American position was that each boundary be determined separately, Canada was willing to compromise its position in the Beaufort Sea only in order to obtain concessions in the Gulf of Maine.⁶⁹⁰ Subsequently, Canada would abandon the idea of an overall agreement and choose to approach each boundary with its own strategy. This, of course, in a federal context, is more politically viable in that it does not appear to be pitting one province against another.

3.2 Boundary Treaty

The previous negotiations collapsed over the Gulf of Maine boundary. That boundary has now been determined, since 1984, by the decision of the International Court of Justice. Canada had apparently been willing to be flexible concerning its position on the Beaufort Sea, especially if some sort of shared resources agreement were part of the negotiations. Canada advocated equidistance in the Gulf of Maine, whereas the United States considered that circumstances were such that equidistance was inappropriate. The parties take the opposite position in the Beaufort Sea. Without the possibility of trade-offs between various boundaries, the parties will have to concentrate on their northern interests exclusively when negotiating the Beaufort Sea boundary. In the years since the last round of negotiations, a strong political accent was put on

⁶⁹⁰ Christopher Kirkey, "Delineating Maritime Boundaries: The 1977-78 Canada-U.S. Beaufort Sea Continental Shelf Delimitation Boundary Negotiations", (1995) 25:2 *Canadian Review of American Studies* 49 (EBSCOhost) part 5, para 6.

Canada's sovereignty in the Arctic,⁶⁹¹ which will make it difficult for the Government to move from its position without risking political capital. Contrary to the state of jurisprudence at the time of the Gulf of Maine decision, the current jurisprudence has been consistent and the principles are now established. The jurisprudence clearly favours the American position, i.e. equidistance. However, the situation in the Arctic has also changed and is now the focus of much more attention, both for its resources and for its delicate environment. Canada and the United States say that they are committed to solving their dispute in the North as well as cooperating, together and with other Arctic neighbours, in order to manage the various challenges of a fast changing area. These challenges cover strategic, economic and environmental interests. The negotiators of the 1970s had seen rightly that it was preferable to negotiate on the basis of the interests first rather than from a particular line's point of view. This approach should still be the preferred one for both sides. Without addressing potential trans-boundary issues at the same time, it is unlikely that they will be able to reach an agreement. Below, we will review the options for the demarcation line as well as the other issues that need to be part of the negotiations. We will also review the options should the parties agree to cooperate without determining the boundary.

3.2.1 The Demarcation Line

Should the Parties wish to definitely settle the boundary, a few options are available. In the 1990 agreement between Russia and the United States, the Parties accepted the line

⁶⁹¹ Canada's foreign policy priorities include "Implement Canada's Arctic foreign policy to exercise sovereignty in the Arctic, in support of the Northern Strategy" in Department of Foreign Affairs, Trade and Development, Priorities for 2013-2014, online : < http://www.international.gc.ca/about-a_propos/priorities-priorites.aspx>.

described in the 1867 *Alaska Purchase Agreement* and made it their maritime boundary. This created a few pockets of sea where the line was less than 200 miles from one country but more than 200 miles from the other. The Parties agreed to trade their rights within each zone to the other when this was the case.⁶⁹² If Canada and the United States agreed to use the 141st meridian as the boundary, a small wedge would be created that would be more than 200 miles from Canada but less than 200 miles from the United States. This would only affect the EEZ and, in the event of a fisheries agreement, the impact would be nullified. Without a fisheries agreement, the United States could transfer their sovereign rights to Canada, as they did with Russia. The advantage to Canada of having the 141st meridian as the boundary would be political consistency. Since this has always been Canada's position, it could well argue that no "territory" was "lost" in the negotiation. It would also avoid potentially having to reopen discussions between the Federal government and the First Nations involved in the Inuvialuit Final Agreement⁶⁹³ or to revisit oil and gas concessions. For the United States, although it would mean giving up an area of continental shelf and EEZ in the Beaufort Sea, it would also mean a gain of a much larger area within the extended continental shelf. The downside, however, is that the resources of the extended shelf are not as well known as those from the area closer to the coast. Their exploitation would also be more difficult. Again, this factor could be alleviated by the inclusion of some sort of cooperative or sharing agreement between the parties.

⁶⁹² *US/USSR Boundary Agreement*, *supra* note 133, art 3.

⁶⁹³ *Inuvialuit Final Agreement*, *supra* note 654. Annex A-1 is a description of the settlement region that includes the area right up to the 141st meridian « without prejudice, however, to any negotiations or to any positions that have been or may be adopted by Canada respecting the limits of maritime jurisdiction in this area. »

The other possible option for a negotiated boundary would be along a modified equidistance line. Professor Pharand saw the slight concavity of the Canadian coast, a concavity that was being accentuated by a receding shoreline, as a relevant circumstance that would justify a modification of the equidistance line.⁶⁹⁴ This was, however, before the establishment of the Arctic baselines. The use of the baselines to establish the equidistance line would de facto compensate for the concavity of the area around the Mackenzie River delta. Since the United States has no baselines, artificial “construction lines” could be drawn as in the *US\Cuba* agreement. Such a negotiated result, based on equidistance, would have the advantage of being consistent with current State practice as well as general international law. Canada would balance the loss of EEZ with gain of an important area in the extended continental shelf. In the absence of a better knowledge of what lies under the extended shelf, or a sharing agreement, it would be difficult for Canada to agree to such a compromise.

3.2.2 Unitization

Some form of unitization provision has been part of most boundary delimitation treaties in the past half-century. Considering the importance of resources to the boundary area in the Beaufort Sea and the Arctic continental shelf, it would be unthinkable not to have provisions for transboundary resources management as part of a boundary treaty. The most basic provision is that contained in the *Canada\Denmark Agreement* or the *UK\Norway Agreement*. It is merely a statement of principles that calls for further agreement should straddling resources be

⁶⁹⁴ Donat Pharand, “Canada’s Arctic Jurisdiction in International Law” (1982-1983) 7 Dal LJ 315 at 322.

discovered. This type of provision is mainly used for areas that remain largely unexplored. As this is partly the case here, this provision could be sufficient. As in the *UK\Norway* case, particular arrangements could then be tailored to each particular field or deposit as it becomes exploitable and exploited. This would have the advantage of not holding up the entire boundary determination treaty while the details of the management of the resources were being negotiated. No area would need to be specified in the agreement since the provisions refer to the “geological structure” itself, either straddling the boundary or being exploitable from one side of the boundary while lying on the other side, as the trigger for the obligation to seek an agreement. This option would also allow the parties to adapt various management regimes to various areas, since conditions in the Beaufort Sea are likely different than those on the remote continental shelf. Furthermore, considering that payments are required for the exploitation of the continental shelf beyond 200 miles, in accordance with *UNCLOS* article 82, special provisions would have to be made within that particular management regime to meet this obligation.⁶⁹⁵

Another type of unitization agreement, more reflective of recent trends, is exemplified by the agreement between Norway and Russia. The provisions of that agreement were more explicit than the previous basic one between Norway and UK, with an Annex detailing some of the obligations on both parties, as well as a dispute resolution mechanism.⁶⁹⁶ Although this model would likely delay a boundary agreement, in view of the more explicit provisions, it offers

⁶⁹⁵ The fact that the United States is not a party to *UNCLOS* is not of much relevance since at least Canada would be bound by the requirement. In any case, it seems unlikely that the United States would refuse to comply.

⁶⁹⁶ *The Barents Sea Treaty*, *supra* note 134 at annex II.

more certainty with regard to the exploitation itself, while leaving certain decisions, like the apportionment of a particular deposit, to each particular sub-agreement.

In their report of 1977, the Canada-US negotiators for maritime boundaries proposed the establishment of “shared access zones” in boundary areas. This proposal was based on equal sharing of the production of the zone. Each party would exploit its part of the zone, after consultation with the other as to exploration and exploitation. At the end of the year, the party with the most production would sell to the other a portion necessary to balance the results. This model is not very common and there is no explanation as to why such a model was proposed in this case. Considering that the negotiations took place during an oil crisis, a possible explanation could be that both countries were concerned about meeting domestic requirements and ensuring a secure supply of oil. While it is unlikely that the parties would wish, at this time, to reconsider the model proposed in 1977, it is interesting to note that an equal distribution of the resource in the boundary area was the foundation of the agreement.

Another model that could be used is the “Puerto Vallarta” model. In 1991, a group of scholars and practitioners developed a model treaty for the management of transboundary hydrocarbon resources.⁶⁹⁷ This draft treaty covers all the main principles of unitization, and allows for accommodation of different regimes. This could be an interesting model, especially

⁶⁹⁷ Alberto Szekely et al., «Transboundary Hydrocarbon Resources : The Puerto Vallarta Draft Treaty » (1991) 31:3 Nat Resources J 609.

with regard to the creation of a Permanent Coordinating Commission and Bilateral Coordination Schemes.⁶⁹⁸

Whatever model is used, it is important that resource management be negotiated at the same time as boundaries as they are intimately connected. It is better to have a resource agreement without a boundary than the other way around. The experience between Canada and France is very telling. It took more than 10 years after the *Canada\France* arbitration of the maritime boundaries around St-Pierre and Miquelon for the parties to sign an agreement on the exploration and exploitation of transboundary hydrocarbon fields.⁶⁹⁹ This agreement is still not in force and reminds us of the importance of incorporating provisions on resources exploration and exploitation within the boundary treaty itself.

3.2.3 Fisheries

With regard to fisheries, the UN Fish Stocks Agreement,⁷⁰⁰ is a complement to *UNCLOS* and contains important obligations with regards to straddling and migratory stocks. Even if the United States is not party to this agreement, it has specifically supported the application in the Arctic region of the general principles contained therein.⁷⁰¹ Fisheries have been a subject of sometimes violent disputes between the two countries, especially in the Gulf of Maine area.

⁶⁹⁸ *Ibid* at 638-644 (Arts 4 and 5 of the Model Treaty).

⁶⁹⁹ *Agreement between the Government of Canada and the Government of the French Republic relating to the Exploration and Exploitation of Transboundary Hydrocarbon Fields*, 17 May 2005, not published (not yet in force).

⁷⁰⁰ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 August 1995, 2167 UNTS 3.

⁷⁰¹ US Arctic Region Policy, *supra* note 678, art III.H.4.

However, they have mostly been managed very cooperatively, as seen by the numerous agreements, like the Northern Pacific Halibut Treaty, the Pacific Albacore Tuna Treaty or the Pacific Salmon Treaty. The fisheries situation in the Beaufort Sea is not as contentious as that of the Gulf of Maine and there is probably not a requirement to incorporate a detailed fisheries arrangement like the one that was part of the previous recommendation from the boundary negotiators, which sought to target all the fisheries. Canada and the United States could consider the recent *Norway\Russia* maritime boundary agreement as a good model. Article 4 states that the Parties “shall pursue close cooperation in the sphere of fisheries,”⁷⁰² and that the precautionary approach will be applied to conservation, management and exploitation of shared fish stocks.⁷⁰³ Furthermore, the article provides that “nothing in this Treaty shall affect the application of agreements on fisheries cooperation between the Parties.”⁷⁰⁴ There would likely have to be provisions, as seen in many boundary treaties, for traditional cross-border fisheries to accommodate First Nations traditional fishing and hunting. Considering that such agreement already exists for hunting across the land boundary, this should not create much debate.

3.2.4 Environmental Protection

Considering the inclusion in *UNCLOS* of a special article on the protection of ice-covered areas,⁷⁰⁵ -at the request of Canada- as well as the heightened sensitivity to the environment

⁷⁰² *The Barents Sea Treaty*, *supra* note 134 at art 4(2).

⁷⁰³ *Ibid*, art 4(3).

⁷⁰⁴ *Ibid*, art. 4(4).

⁷⁰⁵ *UNCLOS*, *supra* note 27, art 234.

within the population,⁷⁰⁶ some sort of provision on cooperation in environmental protection and navigation regulation would likely be part of a boundary treaty. Ten years after having signed their *Maritime Boundary Treaty*, Canada and Denmark signed a marine environmental protection agreement for the boundary area.⁷⁰⁷ This treaty was mostly meant to cover incidents linked to hydrocarbon exploration and exploitation. This was found to be required since the boundary treaty did not contain provisions for environmental protection. The United States and Russia also have an agreement on environmental protection that covers the Arctic.⁷⁰⁸ Canada and the United States share one of the closest relationships in the world across its long borders and boundaries. Both countries are committed to environmental protection in the Arctic. Canada already has comprehensive legislation to address the particular environmental challenges of the Arctic,⁷⁰⁹ while the United States, although it does not have specific Arctic-related oceans legislation, has referred to the particular conditions of the Arctic environment in its Arctic Region Policy and committed to cooperating with other nations to respond effectively to the challenges.⁷¹⁰ Both countries are active in the Arctic Council, whose primary original goal

⁷⁰⁶ In 2012, Shell's Beaufort Sea operations were suspended because of concerns over the environmental impact preparedness of its operation. A report commissioned by the Department of Interior highlights the sensitivity of the area: "As Shell's 2012 experience has made absolutely clear, the Arctic OCS presents unique challenges associated with environmental and weather conditions, geographical remoteness, social and cultural considerations, and the absence of fixed infrastructure to support oil and gas activity, including resources necessary to respond in the event of an emergency" in US, Department of the Interior, "Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program," 2013, online:

<<http://www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf>> at 6.

⁷⁰⁷ *Agreement between the Government of the Kingdom of Denmark and the Government of Canada for Cooperation Relating to the Marine Environment*, 26 August 1983, (1984) 23:2 ILM 269.

⁷⁰⁸ *Agreement between the Government of the United States and the Government of the Russian Federation on Cooperation in the Field of Protection of the Environment and Natural Resources*, 23 June 1994, 23 UST 845. This agreement updates a previous agreement of 1972.

⁷⁰⁹ *Arctic Waters Pollution Prevention Act*, RSC 1985, c A-12.

⁷¹⁰ US Arctic Region Policy, *supra* note 678, art III.H.6.

was to address Arctic-wide environmental issues.⁷¹¹ Cooperation across the Arctic Region on environmental issues has long been identified as a priority by all coastal States. Consequently, although environmental and navigational issues will need to be addressed in a potential boundary treaty between Canada and the United States, a comprehensive agreement like that between Canada and Denmark might not be required. The issues might be addressed more effectively through a regional approach. A draft treaty was developed in 1996 for the North American Free Trade Agreement (NAFTA) partners that was meant as a comprehensive environmental protection as well as natural resources exploitation management scheme.⁷¹² Such a treaty could well accompany a boundary agreement or even be incorporated as an Annex.

3.2.5 Indigenous Communities and Local Governments

Both Canada and the United States recognise the challenges that come with Arctic development and that this particularly affect indigenous communities. Although some reference might be made to traditional fisheries within a boundary treaty, as suggested above, the implications for those communities are much wider. Any agreement would have to include some form of provision for both traditional way of life of the indigenous communities as well as a focus on sustainable economic development. It is very likely that multiple stakeholders would be involved in boundary negotiations and various concerns would need to be addressed. This is particularly true for State/territorial governments as many of the issues raised, such as

⁷¹¹ Evan T Bloom, "Establishment of the Arctic Council" (1999) 93 AJIL 712 at 712.

⁷¹² Alberto Szekely, J Alan Beesley & Albert E Utton, "Cuixmala Model Draft Treaty for the Protection of the Environment and the Natural Resources of North America" (1996) 36 Nat Resources J 591.

economic development, would be of local jurisdiction. The State of Alaska and the Territory of the Yukon already have a close working relationship and have recently signed an Intergovernmental Relations Accord committing to a close working relation in recognition of the kinship ties and common interests.⁷¹³ It would therefore be in the interest of both States to build on that relationship in order to develop a more cooperative approach to border resources management. A broad attention to local and indigenous issues, and their protection, in a potential treaty will go a long way to facilitate negotiations over a boundary.

3.3 Joint Development

While settling the boundary has been the stated goal of Canada, other options could also be considered, either for the short term or the longer term. As stated above, Parties have an obligation to make provisional arrangements while trying to settle their dispute. Also as stated above, many countries have opted to jointly develop the disputed area either as they pursue negotiations or, more often, as they bypass negotiations altogether. One of the key factors in the successful negotiation of a Joint Development Agreement is whether the two parties wish to focus on economic development instead of disputing over sovereignty issues.⁷¹⁴ Since economic development is at the core of both Canada and the United States' strategy for the North, this option would appear to be one that would be favoured by both.

⁷¹³ *Alaska-Yukon Intergovernmental Relations Accord*, 4 June 2012, online: < http://www.eco.gov.yk.ca/pdf/Yukon-Alaska_Intergovernmental_Accord_4June2012.pdf>.

⁷¹⁴ For example, in 1965, Saudi Arabia and Kuwait decided to split evenly a territory that had been shared since 1922. Although they agreed to set a boundary along the territorial sea, they chose to consider the area beyond the territorial sea as if no partition had occurred and share exploitation and equal rights in that area: *Kuwait-Saudi Arabia Agreement*, *supra* note 477, art 8.

Already in 1988, Professor Rothwell was of the opinion that joint development would become the only viable option that would allow Canada and the United States to proceed with exploration and exploitation of the region's resources.⁷¹⁵

Canada and the United States appear well suited to the setting up a Joint Development Zone (JDZ). It is first and foremost in their mutual interest: It would avoid a costly and lengthy arbitration that would delay exploration and exploitation of the resources and it would at the same time minimise the political fall-out of settling a precise boundary that would be less than what had been claimed for years. The experience of the *Gulf of Maine*, the acrimony that preceded and followed the decision, and the fact that many issues remain unresolved after so many years, would suggest that the exploration of alternative solutions would be welcome.

Considering the estimated resource potential of the area, any negotiated settlement that would involve a compromise would be interpreted as something close to treason by each side. Besides the international political considerations linked to the notion of sovereignty, there would be domestic considerations for each country. The State of Alaska and the Territory of Yukon are likely to be opposed to any form of settlement that would be seen as giving away some of their own resources. In Canada, there is the additional issue with regards to land-claims agreements involving some of the areas in dispute.

⁷¹⁵ Rothwell, *supra* note 507 at 46.

On the positive side, a JDZ would allow for shared expertise and coordinated regulations. It would especially be beneficial for the protection of the environment in a particularly fragile area. Considering that Canada was the instigator of the special protection afforded ice-covered areas in *UNCLOS* (art.234), it would be particularly important to ensure that appropriate environmental protection be guaranteed.

Canada and the US share a similar system of government and have a long history of collaboration in transboundary and shared resources, most notably at the International Joint Commission and with various fisheries agreements.⁷¹⁶ Even currently, in the Arctic, Canada and the United States are proceeding jointly with the mapping of the continental shelf's seabed in the extended continental shelf area.⁷¹⁷ As North American Free Trade partners, they also have a wide experience in managing issues and solving disputes. Indeed, there appear to be few areas as well suited to cooperation and joint management as the Arctic.

3.3.1 Determination of the Area

The first requirement in the establishment of a Joint Development agreement is the delimitation of the area in question. In order to avoid hard negotiations as to the delimitation of the area itself, the zone could encompass the entire disputed maritime area. There might be some change in each State's position shortly before negotiations but, in the case of Canada and

⁷¹⁶ Indeed, the first treaty directly signed by Canada with the United States was the Pacific Halibut Treaty, the first treaty aimed at the preservation and management of a joint fish stock.

⁷¹⁷ US-Canada Arctic Ocean Survey Partnership, online: NOAA
<http://www.noaanews.noaa.gov/stories2011/20111215_arctic.html> .

the United States, their position is long-standing and based on principles, making a change of position more difficult to justify. Consequently, it can be considered that an appropriate zone for the joint management regime would include the entire disputed area, i.e. between the 141st meridian and the equidistant line. However, considering the benefits of joint management in the area and the links to environmental as well as scientific issues, a wider zone, encompassing most of the continental shelf beyond 200 miles of both countries, could be beneficial when considered in a more regional framework. A wider zone could thus be integrated into a much wider management plan for the whole Arctic region.⁷¹⁸ The area of continental shelf could thus be considered differently than the EEZ area, however, this is not an unusual occurrence in these types of agreements.

3.3.2 Joint Authority

Once the area has been defined, a management regime needs to be established. There are a few different models that have been used in various treaties. More than twenty-five years ago, Professor Rothwell was already suggesting that “[g]iven that the region is still in the process of being explored for natural resources, a Canada\U.S. ‘Joint Development Authority’ could be the most appropriate entity to coordinate exploration and eventual exploitation of the area within the Authority’s jurisdiction.”⁷¹⁹ However, parties need to decide how this authority will be staffed and what kind of responsibility and independence it will have.

⁷¹⁸ Rothwell, *supra* note 507 at 56.

⁷¹⁹ *Ibid* at 55.

More recently, Byers and Baker have identified three models for the establishment of joint authorities:

Model 1: A system of compulsory joint ventures between the States or their nationals;

Model 2: A joint authority with licensing and regulatory powers manages development of the joint development zone on behalf of the States;

Model 3: One state manages development of the joint zone on behalf of both with the other State's participation confined to revenue sharing and monitoring.⁷²⁰

The third model can be eliminated immediately as it would seem unlikely that either Canada or the United States would find this concept acceptable. The first model has been used for countries that work well together but the scope of those joint-ventures are limited to resource exploitation, like for Japan\South Korea, and where there are few other issues to manage cooperatively. As we noted above, in the Arctic, the issue of resource exploration and exploitation is closely linked to both economic development for the local population as well as environmental protection. Consequently, only an Authority with a broad mandate to manage the resources within that context would be workable on a political level. That means that an agreement more akin to the *Timor Gap Treaty* would be most appropriate. This Agreement would thus have to be comprehensive and include financing, legal aspects (civil, criminal, taxation), security, navigation, environment, scientific cooperation as well as all aspects relating to exploration and exploitation of the resources. Fisheries could also be included in the management of the area; however, because most of the area would be outside of the respective EEZ and into international waters, this aspect would better be served through a regional

⁷²⁰ Baker & Byers, *supra* note 507 at 87-88.

organisation. Finally, such a Joint Authority could easily include Territorial or State representatives as well as those from the indigenous communities. This would ensure not only that their interests were protected, but also that they would buy into the agreement. Consequently, a more comprehensive agreement over a wider area would serve the purpose of bypassing the boundary dispute while ensuring a coherent and multi-purpose approach to northern development.

CONCLUSION

Delimiting boundaries is a fundamental exercise of sovereignty, and one of the most complex issues states face in their relations with their neighbours. Agreement between States is the preferred method of delimitation precisely because of their necessity to protect their sovereign interests. It has been a constant in the Law of the Sea, be it customary or conventional; States have an obligation to negotiate in good faith in order to achieve an equitable solution. This thesis has examined how this notion of equity as applied to boundary determination has been interpreted by international tribunals and how States have used it to negotiate their own agreements. After a period of uncertainty, international courts and tribunals have now settled on a method that considers equity as a mostly geographical concept. This method, while it offers a degree of predictability, leaves most other issues unresolved. These issues: resource sharing, navigation, environmental considerations, etc. are of greater importance to neighbours and can only be resolved through negotiation. Indeed, taking the issue to court has often been an obstacle to transboundary cooperation, to the detriment of each country's interests. When the issue drives the dispute, negotiations are usually a better solution; States avoid taking rigid positions and, instead, negotiate in view of their interests. This explains why the large majority of maritime boundaries in the Persian Gulf, amongst countries that are not usually that friendly, have been resolved through negotiations. However, because of the very nature of the rights being negotiated, agreements are often very difficult to achieve on a political level. David Colson, counsel for the United States in the Gulf of Maine case

describes the dilemma that often arises when politicians cannot be seen to compromise on the national position:

(...) no one ever wishes to be accused of *giving up* the national position when that position is expressed in terms of the nation's sovereign rights. A curious sidelight is that there is often less thinking that goes into the making of a claim than there is when it comes to the consideration of whether it should be compromised in negotiations. Those responsible for approving a compromise, namely politicians, seldom consider that the national claim probably was developed in a foreign ministry legal office as a claim of maximum legal advantage to carry into negotiations as an opening national position.⁷²¹

These factors have played a role, no doubt, in the fact that Canada has not successfully negotiated any of its adjacent maritime boundaries. In referring to the mountain of evidence introduced by both sides during the *Gulf of Maine* case, as well as the astronomical cost of the proceedings, Professor Lewis Alexander noted: "Therefore, we went through what may be 50 million dollars of operations on a case where the two parties probably could have put the boundary in 1981 within 20 miles of where the Court finally put it."⁷²² Therefore, regardless of the cost, and the risk that a judicial decision might be more detrimental to their interest, States often choose to bring their disputes to international tribunals. Indeed, few governments wish to risk political capital on such a fundamental issue of national identity where any compromise is viewed more as an act of treason than one of good faith negotiation in the search for an equitable result. As we have seen, however, the concept of equity applied by international tribunals differs from what States view as equitable in terms of boundary delimitation. In a

⁷²¹ David A Colson, "Litigating Maritime Boundary Disputes at the International Level –One Perspective" in Dallmeyer & DeVorse, *supra* note 108, 75 at 76.

⁷²² Lewis Alexander, "Exploring New Potentials for Maritime Boundary Dispute Settlement" in Dallmeyer & DeVorse, *supra* note 108, 149 at 149.

globalised world where States' interests are now integrated with not only their immediate neighbours but also the whole world, would it still be advisable to refer such an important issue as boundary delimitation to a third party?

Delimiting boundaries nowadays is only one aspect of the management of oceans related issues. Governments must reach agreements that protect the interests of all the populations, as they are all interconnected. As stated by Professor McDorman, now more than 20 years ago:

One of the most difficult future management issues will be to resolve conflicting ocean uses as the pace of offshore activity accelerates. The issue is not just one of resolving particular problems between hydrocarbon, environmental, fishing, and navigational interests. The issue is rather one of integrating offshore hydrocarbon management into a comprehensive oceans management policy.⁷²³

Governments are better placed than the courts to determine their boundaries through the lens of a comprehensive oceans management policy since, as we have seen, they tend to view equitable principles as emanating, at least in part, from distributive justice. Whereas tribunals see equity as more of a geometrical concept, States are better able to consider issues linked to history or to consider the socio-economic development of the local populations. This is particularly true for the Beaufort Sea area where hydrocarbon development is intrinsically linked to not only the development of the local population but also to the entire Arctic region, be it on issues related to the environment, navigation or security. History has shown that Canada and the United States have had difficulty in negotiating boundaries, preferring to defer to international tribunals. This has allowed the governments on both sides, as was the case for the

⁷²³ Ted L McDorman, « Canadian Offshore Oil and Gas : Jurisdiction and Management Issues in the 1980s and Beyond » in Donald McRae & Gordon Munro, eds, *Canadian Oceans Policy: Nations Strategies and the New Law of the Sea* (Vancouver: University of British Columbia Press, 1989) 39 at 60.

Alaska Boundary decision, to benefit politically from the perceived –or claimed- inequity of the result. In the case of the Beaufort Sea, however, such a policy would be to the detriment of both countries as well as the environment as it would delay the establishment of a sustainable development policy and hinder cooperation. The uncertainty of a third party decision could potentially lead to great loss of resources for one side and “(w)hen this is combined with the vital national interests of Canadian Arctic sovereignty and U.S. strategic defence, which are also at issue, it seems improbable that either party would wish to leave the direction of the Beaufort Sea boundary to an adjudication process.”⁷²⁴

Canada and the United States have shown that they can work cooperatively on issues of joint water management, fisheries, security or navigation. It is through the lens of cooperation that they need to focus in boundary negotiation and not through that of adversarial positions. That way, they can reach an agreement that is equitable, based on their shared understanding of equity.

⁷²⁴ Rothwell, *supra* note 507 at 53.

TREATIES AND INTERNATIONAL AGREEMENTS

Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, 30 Jan. 1974, 1225 UNTS 136.

Agreement between Norway and Iceland on Fisheries and Continental Shelf Questions, 2125 UNTS 226 (English translation).

Agreement between Norway and Iceland on the continental shelf between Iceland and Jan Mayen, 22 October 1981, 2124 UNTS 262 (entered into force 2 June 1982).

Agreement between the Government of Canada and the Government of the French Republic relating to the Exploration and Exploitation of Transboundary Hydrocarbon Fields, 17 May 2005, not published (not yet in force).

Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries, 18 May 1971, [1973] ATS 31 (entered into force 8 November 1973).

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