

THE ADEQUACY OF THE LEGAL FRAMEWORK ON JOINT DEVELOPMENT AND BOUNDARY DELIMITATION AMONG OIL PRODUCING COASTAL STATES*

Abstract

Between 1968 and 1992, international courts and tribunals basically took the result-oriented equity approach. In this paper, we outline the principal relevant circumstances for boundary delimitation in a joint development zone of hydrocarbon deposits between coastal states. The relevant circumstances are geographical factors, the configuration of coasts, proportionality, geological and geomorphological factors, presence of the third state, presence of islands baselines, economic factors, and conduct of parties. This paper further highlights relevant circumstances that affect boundary delimitation of joint development of hydrocarbon deposits between two or more coastal states.

Keywords: UN Law of the Sea; boundary delimitation; oil producing coastal states; joint development; maritime zones; economic zones

1. Introduction

Technological advancements that lead to extensive exploration and exploitation of resources at depths that until, a few years ago, were unreachable to mankind, have resulted in corresponding increase in claims by coastal states to extend jurisdiction over adjacent maritime areas.¹ State's aspiration to secure and control access to mineral resources has resulted on, many occasions, in the conflict between different coastal states regarding the delimitation of maritime boundaries.² The concept of joint development is not regulated in UNCLOS or in related international legal instruments, or for that matter, in the Geneva Convention on the law of the sea.³ The Geneva Convention on Territorial Sea and contiguous zone, continental shelf, High Sea and the United Nations Convention on the Law of the Sea which was adopted on 29 April, 1958, and 10 December, 1982 respectively, were recognized as Universal Legal Documents on the seas.⁴ In this study, the effects of international law and the legal aspects of how disputes stand vis-à-vis each other are discussed, as well as in other instances obstructing the settlement of maritime disputes between states. The question is which of these will depend on the context of the boundary itself as regards international law and other boundaries of the disputing states.

2. Basic Concepts of Maritime Delimitation

'Maritime delimitation may be defined as the process of establishing lines separating the spatial ambit of coastal state jurisdiction over maritime space, where the legal title overlaps with that of another state.'⁵ This observes that this definition calls for three comments:

- i. A distinction must be made between maritime limits and maritime delimitation.⁶ The establishment of maritime limits consists of drawing lines that define the maritime spaces of a single coastal state, that is to say, spaces that are not in contact with those of another coastal state. The establishment of 'limits' is by its nature a unilateral act. On the other hand, maritime delimitation is an operation to be effected between two or more states because its object is to separate overlapping areas.⁷
- ii. Maritime delimitation is not a unilateral act but must be effected by agreement between relevant states. The chamber of International Court of Justice ICJ in the Gulf of Maine case affirmed this point by

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¹VASCO BECKER –WEINBERG, Joint Development of Hydrocarbon Deposits in the Law of the sea (2014) Hamburg Studies on Marine Affairs 30, DOI 10:1007/978-3-662-43570-0.1

²United Nations Convention on law of the Sea, done at Montego bay on 10 December 1982 and entered into force on 16 November 1994, Published at 1833 U. N. T. S. 3 [UNCLOS]

³Convention on the high sea, done at Geneva on 29 April 1958 and entered into force on 30 September, 1962, published at 450 U.N.T.S 11[1958 Convention on the High Sea], convention on the continental shelf, done at Geneva 29 April, 1958 and entered into force on 10 June 1964, Published at 499 U.N.T.A 31 [1958 convention of the continental shelf and etc]

⁴Geneva convention on Territorial Sea and contiguous zone, continental shelf and High Sea of 29 April 1958 and United Nations Convention on law of the Sea of December, 1982.

⁵SURYA SHARMA, The Single maritime Boundary Regime and the Relationship between the Continental Shelf and the Exclusive Economic Zone (187) Vol. 2, International Journal of Estuarine and Coastal law, p 203. Also PROSPER WEIL, opp. cit p. 118

⁶LUCIUS CAFLISCH, The Delimitation of Marine Space BETWEEN STATES WITH OPPOSITE AND ADJACENT COASTS, IN R. U. DUPUY and D. Vignes (eds). A Handbook in the New law of the Sea (1991) (Dordrecht, Martinus Nijhoff Publishers) pp 426-427.

⁷Ibid at 430

stating that; no maritime delimitation between states with opposite or adjacent coasts may be effected unilaterally by one of those states.⁸ Hence maritime delimitation is international in nature.

- iii. Based on the definition, the phenomenon of maritime delimitation is restricted to the concerned states. Accordingly, delimitation issues among the members of federations fall outside the scope of this seminar and research work. For the same reason, international organizations among others, the international seabed Authority are not subject to maritime delimitation.

3. Classification of Maritime Delimitation

Under the 1958 convention and the 1982 convention on the law of the sea, four types of maritime delimitation can be identified: i) Delimitation of the territorial sea⁹, ii) Delimitation of the contiguous zone¹⁰, iii) Delimitation of the continental shelf¹¹, and iv) Delimitation of Exclusive Economic Zone¹². These conventions contain no provisions with regard to the delimitation of internal waters, although problems may ensue. In addition to this, the single maritime boundary, which would delimit the continental shelf and the EEZ by one line, is at issue. Based on the fact that the factors to be taken into account may be different for the seabed and superjacent waters, it seems conceivable that there would be difference between the line of delimitation of a continental shelf and an EEZ.¹³ A divergence of factors relevant to the seabed and the superjacent water may entail the risk of creating two competing lines dividing the coincident area. Such a situation will give rise to complex problems relating to jurisdiction. The same problem arises in the application of customary law with few exceptions in practice.¹⁴ There is a clear trend that states draw a single maritime boundary for the continental shelf and EEZ.

4. Treaty Laws Concerning Maritime Delimitation

There are existing debates and opinions as to whether treaties of joint development of coastal oil and gas producing areas should be viewed as a source of international law or merely a source of obligation, much like a contract.¹⁵ In case it is viewed as a source of International Law, treaties would set a legal precedent. These treaties reflect current world views on the subject matter of Transboundary hydrocarbon resources, and it will be consistent to view the doctrines embodied in these treaties as emerging international law. Common issues consistently arise despite the fact that treaties governing transboundary resources describe unique situations between coastal oil and gas producing states.¹⁶ When these common issues are relatively treated by the coastal states in the same manner, the solutions should and would be considered to be emerging principles of international law. It is worthy of note that issues of transboundary hydrocarbon deposits between coastal states are resolved and each coastal state having its particular socioeconomic interest in mind. The solution to these problems may not likely emerge as law but, rather, the guiding principles used in arriving at specific solutions appear to be the substance of the emerging law.¹⁷ It is also of note that treaties are formally sources of obligation¹⁸ but, they may not always be statements of law. Treaty obligations must be carried out contractually, but the obligations may or may not constitute law.¹⁹ In view of these principles, strictly as an international

⁸The Gulf of Maine case, ICJ report of 1984, p 299, Para 112.

⁹Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (hereafter the TSC), Article 15 of LOSC.

¹⁰TSC, Article 24 of UNCLOS 1982

¹¹Article 6 of the Geneva Convention on the Continental Shelf; Article 83 of the LOSC 1982

¹²Article 74 of UNCLOS 1982

¹³Article 56 (1) of UNCLOS 1982, The Institution of the EEZ Comprises the seabed where the EEZ is established.

Accordingly, the seabed is no longer the continental shelf, but the seabed of the EEZ. Thus theoretically, such a single Maritime boundary becomes simply the boundary of the EEZ strictly speaking, the expression of single maritime boundary between the continental shelf and the EEZ might be questioned. At present, however, many writers often use the expression

¹⁴There are at least three agreement drawing separate maritime boundaries for the seabed and the superjacent waters, namely the 1978 Torres Strait Treaty between Australia and Papua New Guinea, The 1977 Perth Treaty between Australia and Indonesia on the Timor and Arafura Sea, and the 1970 agreement between Indonesia and Malaysia, Tanaka, Predictability and Flexibility pp, 338-344

¹⁵PAUL MACHUGH, International Law-Delimitation of maritime Boundaries (1984) 25 (Natural Resources Journal) p 1025

¹⁶ALBERTO SZEKELY et al, Transboundary Hydrocarbon Resources; The Puerto Vallarta Draft Treaty, (1991) 3 (NAT RESOURCES Journal) p 609, 613

¹⁷Ibid

¹⁸KAI RAUSTIALA, Form and substance in International Agreement; (2005) 19 (American Journal of International Law) 581 and CHRISTINE CHINKIN, The Challenge of Soft Law: Development and change in International law (1989) 38 (International and Comparative law Quarterly) pp 850-851

¹⁹GERALD FITZMAURICE, Some problems regarding the Formal Source of International Law, in Sources of International Law (2000) (Marti Koskeniemi eds) 57, 157-164. It is Pertinent to face the reality of professor Raustiala who argues that there is no such thing as "soft law" with respect to international Agreements. The concept of "soft law" refers to the spectrum of legality-something between binding law and no law. The critique of "soft law" according to Prof. Raustiala Applies to two types of International agreements (1) those that are normally not binding such as "consensus documents"

convention, UNCLOS is only binding upon state parties, defined as 'states which have consented to be bound by this convention and for which this convention is in force.'²⁰

Geneva Convention 1958

Regarding the delimitation of the territorial seas, Article 12(1) of the Geneva Convention of 1958 provides the triple rule of agreement equidistance (median line-special circumstances):

Where the coast 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 point on the baselines from which the breadth of the territorial sea 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 these provisions.²¹

The triple rule is provided in Article 6 of the 1958 Geneva Convention on the continental shelf which is stated as follows;

- i. 'Where the same continental shelf is adjacent to the territories of two or more states whose coast are opposite each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement and unless another boundary line is justified by special circumstance, the boundary is the median line every point of it is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each state is measured.'
- ii. 'Where the same continental shelf is adjacent to the territories of two adjacent states, the boundaries 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 the baselines from which the breadth of the territorial sea of each state is measured.'²²

Having read the triple rule of Article 6 of the Geneva Convention on the territorial sea and contiguous zone, it is important to comment on the triple rule as follows;

- One may wonder whether the reference to 'agreement' could have been omitted as self-evident. As explained earlier, however, maritime delimitation is not a unilateral Act. Accordingly, the reference to 'agreement' may be useful to highlight the international character of maritime delimitation.
- Another question arises with regards to the relationship between the elements of 'equidistance' and that of 'special circumstance,' provided that there is a hierarchy between these two elements, it may be possible to interpret equidistance as a principle and special circumstances as an exception, should there be no hierarchy in those elements, equidistance and as one combined rule. As will be seen, the Court of Arbitration in the 1977 Anglo-French continental shelf case adopted this interpretation. It is challenging to find an authoritative answer in the framework of the Geneva Convention.²³
- This concerns the concept of special circumstances. The concept of special circumstance is intended to avoid inequitable results from a mechanical application of the equidistance method. Nonetheless, the Geneva Convention does not give a clear meaning for special circumstances. Hence the specific of special circumstances must be clarified through the development of jurisprudence and state practice in the field of maritime delimitation. With regard to the delimitation of the contiguous zone; Article 24(3)²⁴ of the TSC provides a conflicting delimitation rule; different from the one that governs the territorial sea and the continental shelf;

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 contiguous zone beyond the median line, every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial sea of the two states is measured.

It, therefore, follows that the pure equidistance method of applicable to the delimitation of contiguous zone.²⁵ A plausible explanation to the possible omission of reference(s) to special circumstances is the limited powers

coming out of the 1990's UN Sponsored summits (2) those that are normally binding but are of soft legal quality because of deficiencies of the accord or in the enforcement framework.

²⁰United Nation Convention on the Law of the Sea. Dec. 10, 1982, Article 1(2)(1), 1833 U.N.T.S 377 (hereinafter UNCLOS).

²¹Article 12(1) TSC of the 1958 Geneva Convention

²²Article 6 of 1958 Geneva Convention (TSC)

²³Anglo-French Continental shelf case of 1977 (Court of Arbitration)

²⁴Article 24(3) of TSC (Geneva Convention 1958)

²⁵CAFLISCH opp. cit p. 443

accorded to coastal states in such zones. However, the TSC contains no rule relating to the delimitation of internal waters and considering that the coastal state poses even more extensive powers in their internal waters than their territorial sea.²⁶

United Nations Law of the Sea Convention of 1982

This convention differs from the 1958 Geneva Convention in three aspects;

- i. The law applicable to the continental shelf was separated from that of the territorial sea delimitation, while under Article 15 of the LOSC, the delimitation of the territorial sea is governed by the traditional triple rule; the delimitation of the continental shelf follows a different rule.
- ii. The delimitation of the contiguous zone is no longer mentioned in the text of the law of the sea convention (LOSC). Consequently, the rule applicable to the contiguous zone became unclear.
- iii. Articles 74(1) and 83(1) of the LOSC formulated identical rules for the delimitation of the continental shelf and of the EEZ.²⁷

It is worthy of note that before the adoption of the LOSC, no agreement was reached with respect to the rule applicable to the delimitation of the EEZ and to the continental shelf, however on the 28th August 1981, there was a compromise that was incorporated into the draft convention approved by the plenary conference on 24th September 1982, the text became finally Article 74(1) and 83(1) of the LOSC.²⁸ This provision requires four observations.

- i. Articles 74(1) and 83(1) of UNCLOS neglected reference to the method of delimitation. In the absence of such method, these provisions are likely to remain redundant. The interpretation of Articles 74(1) and 83(1) has changed through the development of jurisprudence relating to maritime delimitation.²⁹ Currently, international courts and tribunals take the view that the equidistance method is incorporated into these provisions.
- ii. The concept of the equitable solution is highly obscure. Hence this reference may be too vague to be very useful.
- iii. It appears that the reference to Article 38 of the statute of the ICJ as a whole is not of much use in determining the applicable law because Article 38 simply enumerates the sources of International Law. Also, decisions *ex aequo et buno* i.e. extra-legal considerations set out in Article 38, seem to be less relevant. There is scope to argue that references in Articles 74 and 83 should have been limited to Article 38(1).³⁰
- iv. Article 311(1) of the LOSC stipulates that it shall prevail, as between state parties, over the 1958 Geneva Convention. Article 311(5) further provides that this Article does not affect international agreements expressly permitted or preserved by other Article of this convention. This provision is applicable to Article 6 of the Geneva Convention on the continental shelf since Article 83 of the LOSC refers to Article 38 of the ICJ statute. It would follow that Article 6 of the Geneva Convention applies between parties to both the Geneva Convention and the LOSC.³¹

5. Two Contrasting Approaches to the Development of Case Law Relating to Maritime Delimitation

A remarkable feature of the law of maritime delimitation is that the law has been developed through International Court and Tribunals. Two distinct phases may be identified in the development of jurisprudence in this field of Joint development by the Coastal States.

Case Laws of 1969-1992

The development of modern jurisprudence in the field of maritime delimitation commenced with the 1969 North Sea continental shelf judgement.³² In this judgement, ICJ held that 'Delimitation' must be the object of an agreement between the states concern and that such agreement must be arrived at in accordance with equitable principle.³³ After the judgement, equitable principles as customary law came to be at the heart of the law of

²⁶Ibid 442, LAURENT LUCCHINI and MICHAEL VOEKAL, *Droit de mer*, tome 2; Delimitation, Navigation et Pêche, Vol. 1, Delimitation (1996) (Paris, Pedone) pp 63-64

²⁷Article 15 of UNCLOS 1982

²⁸United Nations Law of the Sea of 1982

²⁹DOC.A/CONF.63/1.78

³⁰CAFLISCH, *The Delimitation of Maritime Space*, p 485.

³¹CAFLISCH, *The Delimitation of Maritime Space between States with opposite and adjacent coasts*, (1991), in R. J. Dupuy and D. Vignes (eds) *A handbook of the New law of the Sea* (Dordrecht, Martinus Nijhoff) p 479

³²It is not suggested that prior to 1969, there was no decision with regards to maritime delimitation eg the 1909 Grishodarma case between Norway and Sweden, may provide an important case concerning the delimitation of the territorial sea

³³ICJ Report 1969, p 46, Para 86, See also p 53 Para 101

maritime delimitation. However, the court rejected the existence of an obligatory method of continental shelf delimitation. According to the court, there is no other single method of delimitation, the use of which in all circumstances obligatory.³⁴ The court continued that it is necessary to seek not one method of delimitation but one goal.³⁵ In the court's view, it is the goal that should be emphasised, and the maritime delimitation law should be defined only by such goal. In this sense, one could speak of a 'result-oriented equity approach.'³⁶ This approach allows international courts to decide case-by-case on the equitable results to be achieved without being bound by any method of maritime delimitation. Thus the result-oriented equity approaches emphasizes maximum flexibility of the law of maritime delimitation.

The Arbitral Tribunal in the Anglo-French 1977 continental shelf case followed a line of argument dissimilar to the one that was adopted in the North Sea continental shelf judgement. Unlike the ICJ in the North Sea continental shelf judgement, the arbitration Tribunal equated Article 6 of the 1958 Geneva Convention on the continental shelf as single combined equidistance-special circumstances rule with the customary law of equitable principle.³⁷ On the basis of this interpretation, the court of Arbitration applied the equidistance method with modification in the Atlantic region. In this regard, the Court of Arbitration made an important pronouncement;

The court, notes that, in a large proportion of the delimitation known to it, where a particular geographical features has influenced the course of the continental shelf boundary, the method of delimitation adopted has been same modification or variant of the equidistant principle rather than its total rejection... It seems to the court to be in accord not only with the legal rules governing the continental shelf but also with state practice to seek the solution in a method modifying or varying the equidistant method rather than to have recourse to a wholly different criteria of delimitations.³⁸

The Court of Arbitration thus accepted the applicability of the equidistance method as a statutory point, even where a particular geographical element exists in a situation of lateral delimitation. In so doing, the Court of Arbitration considered equity to be a corrective element. In this sense, this seminar may call this methodology the corrective equity approach.³⁹ According to this approach, the equidistance method is applied at the first stage of delimitation, and then a shift of the equidistance line may be envisaged if relevant circumstances warrant it. Equidistance is the only predictable method for ensuring predictability of results in the sense that once the base point are fixed, the delimitation line is mathematically determined. The corrective-equity approach thus highlights predictability in the law of maritime delimitation. In summary, two contrasting approaches appeared in the 1969 and 1977 decisions on the basis of equitable principles.

In the 1982 *Tunisia v Libya* case⁴⁰ concerning continental shelf determination, the ICJ further promoted the result-oriented equity approach. The court pronounced that; 'The result of the application of equitable principle must be equitable. This 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'. In this case, the court accepted neither the mandatory character of equidistance nor some privileged status of equidistance in relation to other methods.⁴¹ According to the court's approach, the application of equitable principles would be broken down into relevant circumstances in specific situations, ruling out any predetermined method.⁴² In the 1984 *Gulf of Maine* case relating to the delimitation of a single maritime boundary, the chamber of the ICJ also echoed the result-oriented equity approach. In this case, the chamber pronounced a 'fundamental norm' applicable to every maritime delimitation between neighboring states. The first part of the norm is that maritime delimitation must be sought and effected by means of an agreement in good faith. The second part of the norm is; 'In either case, delimitation is to be affected by the

³⁴ICJ reports 1969, p 53, Para 101 (B) See also p 53 Para 90

³⁵Ibid, p 50, Para 92

³⁶The Result – oriented equity approach is a concept of analysis. basically, this approach corresponds to the concept of autonomous equity presented by Weil R Weil *Perspective dis drior de la delimitation maritime* (Paris, Pendone (1988) 179-183, 203-212

³⁷Arbitration, 18 reports of International Arbitration Awards p. 45, Para 70

³⁸Empasis added, Ibid, p. 116, Para 249. The Court took into account, the fact that, in the Atlantic Region, Article 6 was applicable. As Article 6 is the Particular expressions of Customary Law of Equitable Principles, the result would be the same, if Customary Law had been applied.

³⁹The Corrective-Equity Approach is a concept for analysis "Weil" call this approach "equite corrective", Weil, *Perspective*, p. 179

⁴⁰ICJ Reports 1982, p 59, Para 70

⁴¹Ibid p 79, Para 110

⁴²Judge Jimenez de Arechaga Clearly advocated this view, *Separate Opinion of the judge*, Ibid, p. 106 Para 26

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'.⁴³ In this formulation, this study is of the opinion that 'an equitable result' should be achieved by resort to equitable-criteria and a practical method. According to the chamber, there exists no systematic definition of equitable-criteria as a result of their highly variable adaptability to the different concrete situations. Thus equitable-criteria are excluded from the legal domain.⁴⁴ The same is true regarding the practical method since the latter would be selected on a case-by-case basis, relying on the actual situation.⁴⁵ In view of this, the law defines neither the equitable-criteria nor the practical method, simply advancing the idea of 'an equitable result.'

In the *Libya/Malta case* of 1985, the full court stressed the result to be achieved, nor the means to be applied.⁴⁶ As a first provisional step, the court applied the equidistance method at the stage of establishing the continental shelf boundary. However, the equidistance line was adjusted in a second stage on account of relevant circumstances.⁴⁷ In so doing, the court adopted the corrective-equity approach for the delimitation of the continental shelf between opposite coasts at the operational stage. It may be said that the *Libya/Malta* judgment has a hybrid character in the sense that two approaches were used. The result-oriented approach was echoed by the *Guinea/Guinea Bissau case* of 1985.⁴⁸ Overall, this seminar observed that between 1968 and 1992, international courts and Tribunals basically took the result-oriented equity approach.

Case Laws of 1993 to Present Date

The law of maritime delimitation was to change towards the corrective-equity approach. The *Greenland/Jan Mayen case* of 1993 was the terming point. This case involved a maritime delimitation between the continental shelf and the EEZ/FZ. In this case, there was no agreement on a single maritime boundary, and thus the law that applies to the continental shelf and to the EEZ/FZ had to be examined separately. Both parties had ratified the concentration on the continental shelf. In this case, the court attempted to achieve assimilation at three levels;

- The court equated Article 6 of the Geneva Convention on the continental shelf with customary law by relying on a passage of the 1977 award of the Court of Arbitration in the *Anglo-French Continental shelf case*.⁴⁹

In that case, the court ruled that;

In respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Geneva Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in record with precedents to begin with the median line as a provisional line and then to ask whether 'special circumstances' require any adjustment or shifting of that line.⁵⁰

- With respect to the law applicable to the Fisheries Zone (FZ), the court equated the customary law applicable to FZ with that governing the EEZ on the basis of the agreement of the parties.⁵¹
- In line with the *Anglo-French Arbitral Award*, the court assimilated the law of the continental shelf delimitation with that of the Fisheries Zone (FZ) at the customary law level. In this regard, the court took the view that it does appear that, both for the continental shelf and the Fisheries Zone (FZ) is proper to begin the process of delimitation by a median line provisionally drawn.⁵² Further, the court held that;

It cannot be surprising if an equidistance special circumstances rule produces much the same result as an equitable principle-relevant circumstances rule is the case of opposite coasts, whether in the case of a delimitation of continental shelf of Fishery Zone (FZ) or of an all-purpose single boundary.⁵³

⁴³ICJ Report 1984, p 300, Para 112

⁴⁴ Ibid, p 312-313 Paras 157-158

⁴⁵ Ibid, p 315 Paras 162-163

⁴⁶ ICJ reports 1985, pp 38=39, Para 45

⁴⁷ Ibid, pp 52-53, Para 73

⁴⁸Arbitration (1986) 25 ILM pp 289-290, Para 89. Award of 14 February 1985 (1985) 89 RGDIP, p 484 et Sea. The *Guinea/Guinea Bissau* award will be quoted from the English translation to enhance comprehension and the 1992, *St Pierre and Miquelon arbitration* (1992) 11 ILM, p 1163, Para 38

⁴⁹The *Greenland/Jam Mayen Case*, ICJ Reports 1993, p 58, Para 46.

⁵⁰Ibid, p 61, Para 51

⁵¹Ibid p. 58, Para 47

⁵²Ibid, p 62, Para 53

⁵³Ibid, Para 56

For the first time in the case-law of the ICJ, the court applied the corrective-equity approach as customary law. It should be noted that under this approach, the equidistance method is incorporated into the domain of customary law. Basically, the corrective-equity approach was echoed by jurisprudence relating to maritime delimitation. In the 1999 Eritrea/Yemen arbitration (second phase), the Arbitral Tribunal applied the corrective-equity approach under Articles 74 and 83 of the LOSC.⁵⁴ In the 2000 Qatar/Bahrain case, the delimitation between states with adjacent coasts, the ICJ accepted the applicability of the corrective-equity approach as customary law.⁵⁵ Also, the ICJ in the 2002 Nigeria/Cameroon case broke new ground by applying the corrective-equity approach under Articles 74 and 83 of the LOSC.⁵⁶ According to the court's interpretation of a specific method, i.e., the equidistance method should be incorporated into Articles 74 and 83, considering that any reference to a specific delimitation method was omitted in drafting those provisions. It may be said that this is a corrective interpretation by the court.

In the Arbitral Tribunal in Barbados/Trinidad and Tobago case of 2006, the court did not admit a mandatory character of any delimitation method. Nevertheless, the Arbitral Tribunal took the view that the need to avoid subjective determination requires that the method used starts with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified.⁵⁷ The text of the award can be found on the web page of the Permanent Court of Arbitration.⁵⁸ Thus, the Arbitral Tribunal applied the corrective-equity approach in the operation of maritime delimitation under Articles 74 and 83 of the LOSC.⁵⁹ The Arbitral Tribunal in the 2007 Guyana/Suriname arbitration applied the corrective-Equity approach more clearly under Articles 74 and 83 of the UNCLOS. The view of the Arbitral Tribunal is stated below

The case law of International Court of Justice and Arbitral Jurisprudence as well as state practice one at one in holding that, the delimitation process should, in appropriate cases begin in positing a provisional equidistance line which may be adjusted in the light of the relevant circumstances in order to achieve an equitable solution. The Tribunal will follow this method in the present case.⁶⁰

In the Nicaragua/Honduras case of 2007, the ICT was of the view that it was not obligatory to apply the equidistance method at the first stage of maritime delimitation. Owing to the very active morphodynamism of the relevant area, the court found itself that, it could not apply the equidistance line in this case. Accordingly, the court established a single maritime boundary by applying the bisector method that 'equidistance remains the general rule.'⁶¹ It is arguable that the departure from the previous jurisprudence is only partial.⁶² In the Romania/Ukraine case of 2009, the ICT applied the corrective-equity approach to the delimitation of a single maritime boundary. According to the court, the process of maritime delimitation will be divided into three stages. The jurist stage is to establish the provisional equidistance line. In the second stage, the court will examine whether there are relevant circumstances calling for the adjustment of the provisional equidistance line in order to achieve an equitable result. At the third stage, the court will verify whether the delimitation line does not lead to an inequitable result by applying the test of disproportionality.⁶³ Considering the disproportionality aims to check for an equitable outcome to maritime delimitation. It may be argued that the three-stage approach in Romania/Ukraine case can be regarded as a variation of the corrective-equity approach, developed through judicial practice in the field of maritime delimitation.⁶⁴

⁵⁴Eritrea/Yemen Arbitration (Second Phase) p 1005, Paras 131-132

⁵⁵ICJ Reports 2001, p. 91, Para 167 and p. 111, Para 230

⁵⁶ICJ Reports 2002, pp 441-442, Para 288-290

⁵⁷The Barbados/Trinidad and Tobago Arbitration p 94, Para 305

⁵⁸ www.pea-cpa.org

⁵⁹Ibid p. 73, Para 242

⁶⁰The Guyana/Suriname Arbitration, p 110, Para 342, see also pp 108-109, Para 335. The Text of the award is available at www.pea-cpa.org

⁶¹ICJ REPORTS 2007, p 745, Para 281, Infact with respect to the delimitation around the Islands in the Disputed areas, the court applied, without any problem, the corrective-equity Approach by referring to the Qatar/Bahrain case: Ibid pp 751-752, Paras 303-304

⁶²Y. Tanaka, case Concerning the Territorial and maritime Dispute between Nacaragua/Honduras in the Carrebean Sea of 9 October 2007, 23 IJMCL pp 342-343, R. Churchill, Dispute Settlement under the UN Convention on the law of the Sea, Survey for 2007 (2008) 23 IJMCL, pp 622-624, also Y. Tanaka, Reflection on Maritime Delimitation in Nacaragua/Honduras case (2008) 68 206 RV, pp 903-937

⁶³ICJ reports (2009) pp 101-103 Paras 115-122.

⁶⁴Y. Tanaka, Reflection on Maritime Delimitation in the Romanies/xxxxxxx Case, (ICJ 2009) 56 NILB pp 419-420

6. Provisions of UNCLOS on Boundary Delimitation and Arrangements

There are provisions on boundary delimitation within the coastal oil and gas producing states of overlapping territorial sea⁶⁵ EEZ⁶⁶ and the continental shelf claims⁶⁷ in UNCLOS. For the interest of this seminar, the provisions on the delimitation of the continental shelf and EEZ are the most salient. These provisions are identical, and they are Article 74(1) and 83(1) of UNCLOS, which states thus; ‘The delimitation of the continentals shelf/EEZ 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’. Subsequently, international tribunals and courts tried to articulate the method by which delimitation of coastal boundaries should be determined in order to arrive at an equitable solution. The methods for boundary delimitation as provided in UNCLOS, Article 73 and 84 is described by the International Court of Justice and the Arbitration Tribunal as the ‘equitable principles relevant circumstances method.’⁶⁸ In the *Romani/Ukraine case* (Black sea case) of 2009, the ICT introduced a three-stage approach to maritime delimitation;

- Establish a provisional equidistance line
- Consider whether there are factors that call for an adjustment of the equidistance line to reach an equitable result; and
- Verify that that line does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coast lengths and the ratio between the relevant maritime area of each state by reference to the delimitation line.⁶⁹

This approach was also confirmed by the International Tribunal for Law of the Sea (ITLOS) as the preferred method for boundary delimitation of the EEZ and continental shelf in the recent decision regarding delimitation of EEZ and outer continental shelf between Bangladesh and Myanmar.⁷⁰ In the *Qatar/Bahrain case*, the ICT judgement stated for the boundary delimitation of maritime zones beyond 12 miles, and it would first draw a provisional equidistance line before considering whether there are circumstances that require an adjustment of that line.⁷¹ Also, in the case of Libya/Malta, the ICT is of the opinion that the equidistance method may be applied if it leads to an equitable solution.⁷² The coastal states’ inherent sovereign rights⁷³ on the continental shelf claims are presumably valid due to the inherent nature of the sovereign rights of the coastal states over their continental shelf, which adds to the problems of delimitating areas of overlapping claims.⁷⁴ Therefore, coastal oil and gas producing states have a choice between settling the boundary, which may require long negotiations, during which time the resources of the disputed area are not exploited, and cooperating to jointly develop the resources while setting aside the boundary dispute.⁷⁵

Consideration of Relevant Circumstance

It is necessary to identify the relevant circumstances for the delimitation of coastal states boundaries under the corrective-equity approach for their legal effect on the modification of the provisional equidistance line. Thus, this seminar seeks to outline the principal relevant circumstances for boundary delimitation in a joint development zone of hydrocarbon deposits between coastal states. The relevant circumstances are geographical factors, the configuration of coasts, proportionality, geological and geomorphological factors, presence of the third state, presence of islands baselines, economic factors, and conduct of parties. This seminar will adumbrate some of the relevant circumstances that affect boundary delimitation of joint development of hydrocarbon deposits between two or more coastal states.

⁶⁵Article 15 of UNCLOS, 1982

⁶⁶Article 74 of UNCLOS, 1982

⁶⁷Article 83 of UNCLOS, 1982

⁶⁸Cameroon v Nigeria; Equatorial Guinea Intervening (2002) ICJ report 303 at Para 288

⁶⁹Maritime Delimitation in the Black Sea (Romania V Ukraine (2009) ICJ Reports 60, at Paras 116-122

⁷⁰Dispute Concerning the delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (2002) Judgement ITLOS case No. 6 Para 455 available at <http://www.itlos.org/filadmin/itlos/documents/press-release-english/PR140-Epdf>.

⁷¹Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgement (2001) ICJ Reports 40 Para 176.

⁷²Continental Shelf (Tunisia/Libya Arab Jamakiriya (1982) ICJ reports at Para 62.

⁷³PETER REID, Petroleum Development in Areas of International Seabed Boundary Disputes; Means for Resolution, (1984-85) (Oil and Gas Law and Taxation Review) pp 214-215

⁷⁴PROSPER WEIL, The law of Maritime Delimitation, Reflections (1989) p 9-14.

⁷⁵FOX et al, Joint Development of Offshore Oil and gas: A model Agreement for states with Explanatory Commentary (1989) 39.

Proportionality

The concept of proportionality in maritime delimitation was originally formulated by the Federal Republic of Germany in the North Sea continental shelf case.⁷⁶ The proportionality concept has been taken into account in almost all the judgement of maritime delimitation. By virtue of this concept, delimitation of maritime boundaries of coastal state should be effected by taking into consideration the ratio between the maritime space attributed to each party and the lengths of their coastlines. It is of note that in the above-mentioned case, the Federal Republic of Germany contended that each state concern should receive a just and equitable share of the available continental shelf, proportionate to the length of its coastline or sea frontage.⁷⁷ Despite the rejection of ICJ of the idea of just and equitable share, it accepted the proportionality concept as a final factor to be taken into account. This way, it is certain that the court regarded proportionality not as a distinct principle of maritime delimitation but as one of the factors ensuring delimitation in accordance with equitable principles. In 1969, when the court took this decision, in the light of the geographical limitations and the least miner position of proportionality, it is not believable whether the court was of the view that the theory of proportionality would be universally applicable to maritime delimitation and that proportionality will remain a final factor in the delimitation of boundaries of a coastal state.⁷⁸

The ICJ in subsequent cases relied on proportionality in the boundary delimitation of maritime coastal states in accordance with the principles or rules of Joint development, if any. The international courts and tribunals resorted to proportionality in completely different geographical situations. In the case of Libya/Tunisia, the ICJ relied on proportionality when delimiting between adjacent coasts, although there was no situation of concavity or convexity.⁷⁹ In Romania/Ukraine case, ICJ considered the concept of proportionality as the third stage of maritime delimitation, distinguishing it from other relevant circumstances.⁸⁰ In the Gulf of Maine Case (second segment), the court used proportionality as a factor for shifting provisionally drawn equidistance lines. In summary, international courts and Arbitration Tribunals have enlarged the scope of the application of proportionality, geographically and functionally, howbeit, the enlargement is not free from controversy. This study is of the opinion that international courts and tribunals have failed to come up with an objective criterion, nor is there any criterion for calculating the lengths of the relevant coasts. It must also be noted that since the number of lines capable of producing the same proportion is limitless, proportionality will not determine any concrete delimitation line.⁸¹

- **Geological and Geomorphologic Factors**

This is irrelevant in the process of boundary delimitation of maritime coastal states because coastal states currently may claim the continental shelf and the EEZ/FZ of 200 nautical miles, without regards to the geomorphological and geological characteristics of the area. International courts also attribute less importance to these factors. The application of neutral criteria and geometrical methods to single maritime boundaries will also contribute to disregarding these factors state practice also disregard these factors, even when these factors are considered, they usually play a second a secondary role, either for fixing terminal point of the boundary or together with other elements including economic and navigational interest.⁸²

- **Economic Factors**

In international adjudication, coastal states often involve two types of economic factors, that is oil and gas and socioeconomic factors. The influence of economic factors remains modest in jurisprudence relating to maritime delimitation. In the Nigeria/Cameroon case of 2002, the ICJ stated that,

It follow from the jurisprudence, although the existence of an express or tacit agreement between the parties on the sitting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstance, justifying the adjustment or shifting of the provisional delimitation line., only they are based on express or tacit agreement between the parties, may they be taken into account.⁸³

⁷⁶It is to be noted that as early as 1946 Sir Francis Vailat Suggested an idea of Proportionality in the context of a bay The Continental shelf (1946) 23 BYIL p 336

⁷⁷Emphasis added, ICJ Reports 1969, p 20, Para 15

⁷⁸ICJ Report 1985, p 56, Para 581, pp 53-55, Paras 74-75

⁷⁹ICJ Report 1984, p 323, Para 184, pp 334-337, Paras 218-222

⁸⁰ICJ Report (2008), p 103, Para 122

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⁸²K. Highet, The use of Geophysical factors in the Delimitation of maritime boundaries, in International maritime Boundaries, vol. 1, p. 195

⁸³ICJ report 2002, p 447, Para 304

It is only in Greenland/Jan Mayen Case⁸⁴ that judgement concerning the delimitation of the continental shelf or single maritime boundaries has taken the precedence of natural resources into account, at least at the operational stage. The practical state practice shows that economic factors have not directly affected the location of boundaries of either continental shelf or single maritime boundaries; rather, coastal states resolve economic problems flexibly by inserting some clauses in the agreement or by establishing a regime of joint development.

- **Presence of Third States**

This creates a difficult situation as far as the principle of *res inter alios acta* is concerned. There are two possible approaches that case law can identify for these issues. The first one is that international courts draw a delimitation line in an area where the legal title of third states may be involved. This approach was taken by the court of Arbitration in the Anglo-French continental shelf case, where a question was raised with regards to a possible meeting of the continental shelf boundary between the parties with the boundary between Iceland and the United Kingdom, the Court of Arbitration, did not admit United Kingdom contention in this case⁸⁵ hence this approach did not see the light in subsequent cases. In another approach, the third state may be involved from the scope of the jurisdiction of the judgment. In this approach, International Courts simply stop the delimitation line at the point where a third state might become involved, such as in the cases of Tunisia/Libya, Libya/Malta, Eritrea/Yemen, Qatar/Bahrain, Cameroon/Nigeria, etc. In the case of Libya/Malta, the ICJ limited the scope of its judgement so as to avoid infringing on the rights of the third state in the region (Italy). This approach by the court appears controversial. The question associated with the legal rights of third states is concerned with the legal effect of Article 59 of the statute of ICJ in the Cameroon/Nigeria Case (Merits) made an important judgment. It is reality, and it is undeniable that the delimitation line drawn by the court might affect the legal rights and interest of third states, creating a presumption of the finality of the boundary regardless of the formalistic protection of Article 59.⁸⁶ In this sense, it seems that, as the court stated, Article 59 is insufficient to protect the rights of third states in maritime delimitation.

- **Presence of Islands**

The region of Islands consists solely in Article 121 in part VIII of UNCLOS, which provides that rocks that cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. It is also certain that the presence of Islands may constitute a relevant circumstance in maritime delimitation. It is also of note that state practice is so diverse that it is difficult to specify a general rule with respect to the legal effect given to islands within the framework of equitable principles. Case law can identify four modes of effect given to Islands. The first mode is to give full effect to an Island, as seen in the case of Qatar/Bahrain, where the ICJ gave full effect to the Hawaii Island and Janan Island when drawing an equidistance boundary line.⁸⁷ Also, in the Arbitral Tribunal in the case of Eritrea/Yemen (second phase), an integrity test⁸⁸ was presented as a criterion for determining the effect given to Islands, full effect was given to those Islands because relevant islands constituted an integral part of the mainland coast. The second mode is in the case of Tunisia/Libya, where ICT gave no effect to the Island as identified the mainland by a very narrow strait in drawing a boundary.⁸⁹ The third mode is the enclave solution which was adopted in the Anglo-French case by the Arbitration Tribunal with regard to the Channel Islands. This court was of the view that giving full effect to the Channel Islands would entail inequity.⁹⁰ The court, therefore, drew a median line between the mainland of the two states, secondary the court created a twelve-mile enclave to the north and west of the channel Island.⁹¹ It is true that the precedent of the enclave solution could be found in the delimitation of lakes.⁹¹ It is of note that there was no precedent in the context of maritime delimitation before this award. It contains without reservation that the enclave solution is a novel creation of the

⁸⁴In the Greenland/Jan Mayen case, The ICJ Divided Southern most zone into two parts of equal extent so as to allow both parties to enjoy equitable access to the capelin stock, ICJ report (1993) pp. 79-89, Para 92

⁸⁵The Anglo-French Continental Shelf case, p 21, Para 28

⁸⁶Agreement by Professor George Abi-Saab, Counsel of Nigeria, Verbatim Record, CR 2002/23, p 18, paras 3-4

⁸⁷ICJ reports 2001, p 109, Para 222

⁸⁸ICJ reports 1982, p 85, Para 120

⁸⁹Anglo-French Continental Shelf Case P 93, Para 196

⁹⁰Ibid, p 94-95, Paras 201-262

⁹¹HIRAN JAYEWARDENE, *The regime of Islands in International Law* (1990) Dordrecht, Martinus Nijhoff Publications) pp 245-247

court of Arbitration in maritime delimitation.⁹² The fourth mode only gives partial effect, such as half effect to Islands in drawing a maritime boundary. The court of Arbitration in the Anglo-French continental shelf case was of the view that the projection westwards of the Scilly Isles constituted a special circumstance.⁹³ Because of the controversies in the half-effect determination of Maritimes delimitation in the coastal Islands, it will be necessary for international courts and Tribunals to search for more equitable half-effect techniques.

7. Viability Joint Development and Contractual Framework in Maritime Boundary Delimitation

The court of the Joint Development Zone (JDZ) is in line with the spirit of UNCLOS. It is of immense certainty that state parties are encouraged by Article 59 of UNCLOS to resolve their continental shelf disputes by agreement taking into account both of the international community and national interest.⁹⁴ Article 74 and 83 of UNCLOS provide that the delimitation of the continental shelf/EEZ shall be effected by agreement, and the states concerned, in a spirit of understanding and cooperation, shall make every effort into provisional arrangements of a practical nature.⁹⁵ The provisions of Articles 59, 74, and 83 form the legal basis for JDZ negotiation under UNCLOS. The problem is that it obligates the disputing parties to resolve the delimitation of the continental shelf/EEZ, the convention only encourages a provisional arrangement, and in the case of an enclosed or semi-enclosed sea, the convention does not mandate joint development of hydrocarbon deposits⁹⁶. The JDZ negotiation may break down because of emotional nationalism and hence may rapture into open hostilities that might otherwise remain dormant. Negotiating the economic terms of a JDZ may go on endlessly, while the nationalistic fervor may escalate. Furthermore, JDZ may uproot existing contractual terms between a host government and its petroleum contractor, making concession of economic terms with additional parties even more difficult to achieve- the negotiating parties must determine percentages of profit control mechanism for interest holders, and a consensual legal and administration system to accommodate every participating coastal nation.

8. Observations

It was also quoted in this seminar that there are some inherent difficulties in delimiting maritime boundaries between coastal states of the continental shelf and the EEZ.

- The process of delimitation has political undertones, involving a number of political decisions
- The unresolved dilemma between the principle of equity and the principle of equidistance is also an important convention that is the result of a compromise between the two opposing schools and thus simply contains a reference to international law, and an equitable solution would not be helpful in masking the delimitation Maritime law clearer
- It was further pointed out that policy-making tends to be cautious in negotiating Maritime boundaries largely because of the stability of maritime boundaries and the possibility of most solidity in the future.
- Where there are sovereignty disputes over Islands, maritime delimitation has another hurdle to surmount before it can ever take place. The dispute settlements procedure in the LOSC on maritime boundaries would not play ignored precedent.

As summarised above, Article 38(1) (d) of the judicial decisions, subject to the provisions of Article 59 as a subsidiary means' for the determination of rules of law.⁹⁷ It uses precedent as a persuasive argument rather than a binding one. From a practical; standpoint, if the court does not follow previous case precedent in rendering a decision, then those prior cases are likely to be distinguished from the case currently before the court.⁹⁸

9. Conclusions

Maritime boundary delimitation relates to international law and is sensitive and should be handled carefully with an understanding of the opposite viewpoints, not minding the serious and meaningful negotiations. In case difficulties and disputes arise, the parties may resort to third-party settlement procedures. Despite all the efforts of the courts and international communities, as well as the state practice from the foregoing, it has been difficult to produce a universally acceptable principle to be applied in all maritime delimitation processes. Absolutely nothing about the principles and the procedures or methods for the achievement of equitable result is captured in

⁹²DEREK BOWETT, *The Arbitration between the United Kingdom and France Concerning the Continental shelf Boundary in English Channel and southwestern Approaches* (1978) 44 BYIL p 8

⁹³The Anglo-French Continental Shelf case p. 114 Para 244

⁹⁴UN Convention on the Law of the sea, December 10, 1982, 1833 U.N.T.S 397 and Article 59 of UNCLOS

⁹⁵Article 74 and 83 of UNCLOS 1982

⁹⁶Article 74, 83 and 123 of UNCLOS 1982

⁹⁷Ibid, Article 38(1) (d)

⁹⁸Paul Mchugh, p 1025

any of the provisions of United Nations Law of the Sea 1982 but rather discussed the goals to achieve delimitation of coastal states maritime boundaries.

Customary law also plays an important role in the maritime delimitation process and recognizes that maritime coastal states' delimitation must be in accordance with equitable principles within the relevant circumstances. No obligations are put down by the equitable principles, rather the guidelines are clarified for achieving an equitable result in the maritime delimitation process, and a particular case is made for relevant circumstances. In this study, it is established that case law and state practice makes the geological and geomorphological factors irrelevant for maritime delimitation up to 200 nautical miles. Also, no Islands' oil, gas, or other hydrocarbon deposits which may constitute relevant circumstances for maritime delimitation are found not to be relevant. Third states in the maritime delimitation zone are also irrelevant or excluded. After a careful investigation and analysis of the complexities as well as the controversies associated with the delimitation of maritime coastal states for a joint development of natural resources that overlaps the transboundary areas, this seminar opines that there should be an urgent international convention to adumbrate and foreclose all the lacuna associated with disputes in delimitation process and arrived at a lasting solution.