

The Wang Tieya Lecture in Public International Law

Maritime Delimitation in the Jurisprudence of the International Court of Justice*

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Abstract

Primarily using *Qatar v. Bahrain* as an illustration, this Wang Tieya Lecture provides an overview and analysis of the case law of the International Court of Justice on maritime delimitation. The issues covered include: maritime zones recognized under UNCLOS, the development of the law of maritime delimitation, identification of relevant coasts and baselines, pre-existing agreement, delimitation of the territorial sea, delimitation of the continental shelf and the EEZ, and the starting point and end point of delimitation.

1. I feel greatly honoured to be invited here today to deliver a lecture on the law of maritime delimitation, and I will focus in particular on the significant role that the International Court of Justice has played in developing this area of international law.

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** Judge (1994-2010), Vice-President (2001-2003), President (2003-2006) of the International Court of Justice. I thank Ms. Robyn Briese for her valuable research assistance in the preparation of this Lecture, completed on 11 March 2010.

The Court has been seized of a total of 14 cases in this field involving maritime areas off Western and Eastern Europe, North and South America (including the Caribbean), the Middle East and Africa. At present, there are only two of these cases still remaining on the Court's General List, one between Nicaragua and Colombia, the other between Peru and Chile. Here, I have to point out that numerous decisions by various arbitral tribunals set up by parties to maritime delimitation disputes have also made significant contributions to the development of this area of law.

2. The present lecture is primarily designed to give university students and the interested general public a basic knowledge of the law. I will try to outline the current approach of the International Court of Justice when it is confronted with the task of delimiting a maritime area disputed by States. In analysing the Court's jurisprudence, I will mainly use as an example the case of the maritime delimitation dispute between Qatar and Bahrain. The Court handed down its Judgment in the case in March 2001. While this is not the Court's most recent maritime delimitation decision, it was a case that raised most of the issues that the International Court of Justice and arbitral tribunals may be requested to address when confronted with a dispute relating to maritime delimitation. Moreover, the maritime delimitation line adopted by the Court in that case is more reflective of the Court's current standard approach to delimitation.

3. However, for those of you who may not yet be very familiar with the law of maritime delimitation, perhaps it would be appropriate for me to introduce the subject by briefly outlining firstly the maritime zones recognized by the United Nations Convention on the Law of the Sea of 1982 (i.e., UNCLOS) and their extent, and secondly the history of the development of the law of maritime delimitation.

I. Maritime zones recognized under UNCLOS

4. There are four maritime zones recognized under UNCLOS, i.e.:

- The territorial sea which is a belt of sea of 12 nm in breadth adjacent to the territory of a coastal State, including land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters; the sovereignty of a coastal State extends to its territorial sea.
- The contiguous zone which is an area extending up to 24 nm from the territorial sea baseline, where a coastal State may exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. UNCLOS does not provide for delimitation of the contiguous zone and so I will not discuss this zone further in this lecture.
- The continental shelf, which comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea to a distance of up to

350 nm where the natural prolongation of the land territory extends up to or beyond that distance, or to 200 nm where the natural prolongation of the land territory does not extend to that distance. A coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. A coastal State's rights over its continental shelf exist *ipso facto* and *ab initio* without there being any question of having to make a good claim to the areas concerned. Claims to a continental shelf beyond 200 nm are to be submitted to, and considered by, the Commission on the Limits of the Continental Shelf set up under Art. 76(8) of UNCLOS. To date, however, the jurisprudence of the Court has been limited to delimitation claims up to 200 nm.

- The exclusive economic zone or EEZ, which is an area beyond and adjacent to the territorial sea but may not extend beyond 200 nm from the territorial sea baselines. In the EEZ, a State has sovereign rights to explore, exploit, conserve and manage the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil; sovereign rights with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and jurisdiction over artificial islands, installations and structures.

5. Beyond the EEZ/continental shelf lie the high seas which are open for use by all States, except in respect of resources of the seabed of the ocean floor and subsoil thereof, exploitation of which is to be managed by the International Seabed Authority, set up under UNCLOS for the common benefit of mankind.

6. While many areas of ocean will fall within the maritime zones of one State and one State only, there are also significant areas of ocean where the rights of States overlap when a pure distance criterion is set aside. It is in such situations that States need to agree on a maritime delimitation. Failing such agreement, they often submit disputes to the International Court of Justice or an arbitral tribunal.

II. Brief history of the development of the law of maritime delimitation

7. The law of maritime delimitation can be said to have developed in three phases:

- *A first phase prior to 1958 when the rules of international law governing the delimitation of maritime spaces were not codified.* Customary international law only recognized the sovereignty of a coastal State over the waters immediately adjacent to its coast (generally to a distance of 3 nm) – the territorial sea. Some States have also claimed a zone of high seas contiguous to the territorial sea (or a contiguous zone) for purposes of preventing and punishing infringement

of their customs, immigration, fiscal and sanitary laws and regulations. At the time, no customary law existed with respect to a general right to exercise sovereignty in maritime areas beyond the territorial sea.

- *A second phase between 1958 and 1982 when the law of maritime delimitation was governed by the 1958 Geneva Conventions* (viz. the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas and the Convention on Fishing and Conservation of the Living Resources of the High Seas). During that phase, a territorial sea of 12 nm in breadth was increasingly recognized by States, as were the rights of States to a continental shelf.
- *A third phase subsequent to 1982*, which will be the focus of this lecture, when the conclusion of UNCLOS added to the territorial sea, contiguous zone and continental shelf a fourth maritime area where States were entitled to exercise sovereign rights – the exclusive economic zone or EEZ.

8. Throughout the development of the law of maritime delimitation, there has been some degree of tension between two distinct delimitation methods. Under the “equidistance line” method the maritime boundary between States must follow “the median line every point of which is equidistant from the nearest points” on the coasts. The other method attempts to remedy inequities that can arise in delimitation based on equidistance (particularly in the case of adjacent, as opposed to opposite, coasts) and posits a delimitation based simply on equitable principles or producing equitable results. The approach adopted under customary international law and UNCLOS, and applied by the Court, can be said to be a combination of these two methods.

III. The International Court of Justice and maritime delimitation

9. The process that the Court undertook in the *Qatar v. Bahrain* case can be divided into four main steps:

- Identifying the relevant coasts and baselines;
- Ascertaining whether there is any pre-existing agreement relating to the delimitation of the maritime areas;
- Delimiting the territorial sea (where requested) by applying the equidistance-special circumstances rule;
- Delimiting the continental shelf/EEZ applying the equitable principle-relevant circumstances rule.

10. The first task for the Court in any maritime delimitation exercise is to determine the relevant coasts to be taken into account in the delimitation. However, the case law of the Court unequivocally affirms that it is a principle of international law that

“the land dominates the sea”, which means that maritime rights derive from the coastal State’s sovereignty over land. Thus, many maritime delimitation cases require the Court to decide, as a preliminary step, questions of sovereignty over disputed islands or certain coastal regions of land territory. In accordance with Article 121, paragraph 2, of UNCLOS, which reflects customary international law, islands, regardless of their size, enjoy the same status as other land territory, and therefore generate the same maritime rights. In the *Qatar v. Bahrain* case, sovereignty over the Hawar Islands, Janan Island including Hadd Janan, Qit’at Jaradah and the coastal Zubarah region of mainland territory was disputed. I will not go into any detail about this aspect of the Court’s decision, as it relates to the law relating to title over territory rather than the law of maritime delimitation. I need only point out that in this case, the Court’s decision was largely based upon the history of the area, and in particular, the fact of both Qatar and Bahrain having been British protected States before their full independence in 1971, and Great Britain’s interpretations of the territorial boundaries in the area, as evidenced by certain draft treaties, correspondence and official decisions. The Court concluded that sovereignty over the Zubarah region and Janan Island including Hadd Janan lay with Qatar and that sovereignty over the Hawar Islands and Qit’at Jaradah lay with Bahrain.

11. Having determined sovereignty over the disputed territory, including islands, the Court then turned to the matter of delimitation proper.

IV. Identifying relevant coasts and baselines

12. Because a State’s entitlement to maritime areas is measured by reference to its coastline, it is necessary in any case of maritime delimitation for the Court to determine the coastline of each party that generates overlapping claims; this is called the relevant coast and will include the mainland, and any islands and islets. It is clear that the concept of relevant coast excludes the portions of the coast that, because they do not face the area to be delimited, give rise to no overlapping marine entitlements. Thus, in the *Tunisia/Libya* case, the Court held that:

“for the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; 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.” (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Judgment*, *I.C.J. Reports 1982*, p. 61, para. 75.)

13. Further, in *Cameroon v. Nigeria*, the Court did not include in the relevant coast part of the coast of Cameroon which faced Equatorial Guinea’s Bioko Island and was thus relevant to a delimitation between Cameroon and Equatorial Guinea

rather than Cameroon and Nigeria (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, pp. 442-443, para. 291). Indeed, in its jurisprudence, the Court has always emphasized the need to “be faithful to the actual geographical situation” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p.45, para. 57) in defining the relevant coast and to avoid “completely refashioning nature” (*North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 49, para. 91).

14. Once the Court has established the relevant coast, baselines need to be identified. Baselines are the starting point from which each maritime zone is to be determined. In cases where States either do not agree on the relevant baselines along the relevant coast or have not mapped out baselines, the Court will also be called upon to determine the baselines. In the *Qatar v. Bahrain* case, the Court had to determine base points and baselines and discussed a number of the issues that can arise in that context.

15. Normally, the baseline used for measuring the breadth of maritime zones is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

(a) Straight baselines

16. However, the Court in the 1951 *Anglo-Norwegian Fisheries* Judgment of 18 December 1951, applied another method of establishing baselines which has since received recognition in Articles 7, 9 and 10 of UNCLOS, that of straight baselines. Straight baselines may be drawn across river mouths and bays and where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. Straight baselines must not depart to any appreciable extent from the general direction of the coast.

17. In the *Qatar v. Bahrain* case, Bahrain contended that the various maritime features lying off the eastern coast of its main islands “may be assimilated to a fringe of islands which constitute a whole with the mainland” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p.103, para.213) and that it was entitled to draw straight baselines connecting these features. The Court did not agree with Bahrain on this point. While it recognized that the maritime features in question were part of Bahrain’s overall geographic configuration, it observed that they were not part of a “deeply indented” coast, that they could not be characterized as a “fringe of islands” and that the situation was therefore different from the one analysed in the case of Norway and described in UNCLOS. The Court noted that Bahrain also contended that as it was a *de facto* archipelagic State, though not formally declared as such, it was entitled to draw “straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago” (*ibid.*, p. 96, para. 181)

under the Article 47 of UNCLOS. However, the Court observed that as Bahrain had not made this claim one of its formal submissions in the case, the Court could not take a position on this issue. The normal baselines were therefore used in this case.

(b) Low-tide elevations

18. The Court was also faced with a second difficulty in determining the applicable baselines in this case as a result of the presence in the area of low-tide elevations. Under Article 13 of UNCLOS, low-tide elevations, i.e., naturally formed areas of land which are surrounded by and above water at low tide but submerged at high tide, may be used as baselines when situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island.

19. However, in the case between Qatar and Bahrain, certain low-tide elevations were situated in the area where the territorial seas of the two States overlapped, since each of the two States claimed a territorial sea of 12 nm and the distance between the coasts of the mainland of Bahrain and the coast of the Qatar peninsula were nowhere more than 24 nm. In principle, therefore, each of them had a right to use the low-water line of these low-tide elevations for measuring the breadth of the territorial sea. For purposes of delimitation the competing rights of State derived from the relevant provisions of UNCLOS would by necessity seem to neutralize each other (*I.C.J. Reports 2001*, p. 101, para. 202).

20. Bahrain, however, contended that it had submitted sufficient evidence of sovereign authority over all of these low-tide elevations and that it alone was entitled to take them into account for purposes of fixing the equidistance line.

21. The Court rejected this argument of Bahrain and held that a State could not acquire sovereignty by appropriation over a low-tide elevation situated within the limits of its territorial sea where the same low-tide elevation was also situated within the limits of the territorial sea of another State. It concluded that these low-tide elevations could not be used as part of the baseline. (*I.C.J. Reports 2001*, p. 101-103, para. 204-209.)

V. Pre-existing agreement

22. UNCLOS envisages that States should first attempt to agree on maritime delimitation prior to coming before the Court or any other international tribunal. When asked to undertake a maritime delimitation, the Court will therefore first need to determine whether there is any existing agreement, formal or tacit, providing for the delimitation of the maritime areas in question, or for the method to be applied to draw the delimitation line. Where there is partial agreement (e.g. as to the starting point or end point of a delimitation or initial relevant base points or baselines), the Court will take that agreement as the basis for the delimitation.

23. The question of whether a maritime boundary was settled by prior formal agreement has been of considerable importance in a number of cases. For example, in the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening, Judgment, I.C.J. Reports 2002)*, Nigeria disputed the validity of a number of treaties and agreements that would otherwise have affected the delimitation. Another example is the *Greenland and Jan Mayen* case, where the question of whether a 1958 maritime delimitation treaty applied to the area in question was disputed (*I.C.J. Reports 1993*, pp. 50-51). The Court was called upon to interpret the treaties in question and reach a decision as to their applicability.

24. In the *Qatar/Bahrain* case, although there existed a decision in a 1947 letter from the British Political Agent to the Rulers of Bahrain and Qatar with respect to the division of the sea-bed, neither Party accepted that this decision was binding and therefore the Court did not consider whether it amounted to a prior formal agreement delimiting the disputed maritime areas.

25. The Court must not only look at formal agreements, but also consider whether there is any tacit agreement between the parties. Indeed, in the view of the Court, there is a possibility that State practice (such as oil concession practice in the *Cameroon v. Nigeria* case, or the regulation of fisheries in the *Continental Shelf (Tunisia/Libya Arab Jamahiriya)* case) may evidence a tacit agreement or acquiescence to a particular maritime delimitation or delimitation method for the territorial sea, continental shelf and/or EEZ.

26. The Court admitted, however, that evidence for such a tacit agreement must be compelling and of long standing. But to date tacit agreement has not been established in any of the cases decided by the Court.

27. In the *Qatar v. Bahrain* case, no argument was made relating to tacit agreement. The Court was thus required to undertake the entire maritime delimitation by itself.

28. The delimitation requested by the Parties is a single maritime boundary. In the southern sector of the delimitation area, the coasts of Bahrain and Qatar are opposite to each other and the distance between the respective coasts is nowhere more than 24 nm. Actually, the single maritime line in the southern sector is no more than the delimitation of the territorial seas of the Parties, i.e., the delimitation of a maritime area over which the parties enjoy territorial sovereignty. In the northern sector, the coasts of the Parties are comparable to adjacent coasts; the Court is required to delimit the continental shelf and exclusive economic zone belonging to each of the Parties, over which States have only sovereign rights and functional jurisdiction. I will first consider the Court's approach to the delimitation of the territorial sea.

VI. Delimitation of the territorial sea

29. Part II, Section 2 of UNCLOS sets out the rules applicable to the territorial sea; Article 15 provides:

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

30. This rule has been called the “equidistance-special circumstances” rule and in the *Qatar v. Bahrain* case was held to have a customary character. The Court further held that in applying the rule:

“The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p.94, para.176.)

31. The Court subsequently adopted that approach by drawing a provisional equidistance line and then turning to consider whether special circumstances existed that required adjustment of the provisional equidistance line.

(a) Special circumstances—small islands

32. Special circumstances are those circumstances which might modify the results produced by an unqualified application of the equidistance principles. The Court found that the Bahraini island of Qir’at Jaradah, a small island of 12 by 4 metres uninhabited and devoid of vegetation, and located midway between the mainland of Qatar and that of Bahrain, constituted a special circumstance and should not be given any effect in the delimitation. It therefore adjusted the provisional equidistance line in such a manner that the line passed immediately to the east of the island. By contrast, Qatar’s slightly larger island of Janan, located only 2.9 miles from the Qatar coast, was not considered to be a special circumstance and was given full effect.

33. The Court further found that the maritime feature of Fasht al Azm, which Bahrain claimed as part of the Bahraini island of Sitrah and which, according to Qatar, was a separate low-tide elevation, was a special circumstance. The Court stated that:

“if Fasht al Azm were to be regarded as part of the island of Sitrah, it would not be appropriate to take the equidistance line as the maritime boundary since, in view of the fact that less than 20 per cent of the surface of this island is permanently above water, this would place the boundary disproportionately close to Qatar’s mainland coast. . . . If, on the other hand, Fasht al Azm were to be regarded as a low-tide elevation, the equidistance line would brush Fasht al Azm, and for this reason would also be an inappropriate delimitation line. . . . The Court considers that, on either hypothesis, there are thus special circumstances which justify choosing a delimitation line passing between Fasht al Azm and Qit’at ash Shajah.” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 104, para. 218.)

34. Small islands and maritime features are arguably the archetypical special circumstances as much in the delimitation of the territorial sea as in the delimitation of the continental shelf/EEZ. The Court has recognized in numerous cases, including the *North Sea Continental Shelf*, *Tunisia/Libya*, *Libya/Malta* and *Qatar v. Bahrain* cases that the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain islets, rocks and minor coastal projections.

35. It is difficult to state from the Court’s decisions any simple rule on how the disproportionate effect of such features is to be eliminated. Indeed, much depends on the circumstances of the case. The effect that a small island has on the equidistance line will vary depending on whether the island is located far from, or close to, the coast and on whether the coastlines of the parties are adjacent or opposite. In light of this the Court has adopted a variety of ways of addressing any disproportionate effect.

36. In most cases, however, the Court will give the maritime feature a partial effect on the delimitation line (for example by adjusting the equidistance line as if the island were located closer to the coast of the State which has sovereignty over it, as occurred in the *Gulf of Maine* case in respect of Canada’s Seal Island) – generally the further out to sea an island is located, the more partial will be the effect given because of the greater potential for distortion of the boundary. In some cases, such as the *Qatar v. Bahrain* case, the island will be given almost no effect.

(b) Special circumstances – geography of coastline

37. When engaged in the task of delimiting the territorial sea, the Court will generally seek to remove any inequitable effect of special circumstances by modifying the equidistance line. However, in some cases, modification of the provisional equidistance line will not be sufficient to achieve an equitable result. Thus in the *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in*

the *Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007), the Court, while maintaining that equidistance remains the general rule in delimiting the territorial sea, formed the opinion that it would not be sufficient simply to adjust the provisional equidistance line but that special circumstances required the use of a different method of delimitation known as the bisector method (i.e., the line formed by bisecting the angle created by a linear approximation of coast-lines). In the view of the Court, the bisector method, like equidistance, is a geometrical approach that can be used to give effect to

“[the] criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States . . . converge and overlap” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 327, para. 195).

38. The special circumstances in the above-mentioned *Nicaragua v. Honduras* case related to the geography of the coastline. The land boundary between Nicaragua and Honduras ends at Cape Gracias a Dios which is a sharply convex territorial projection abutting upon a concave coastline on either side to the north and southwest. This meant that the pair of base points to be identified on either bank of the boundary River Coco would assume a considerable dominance in constructing the equidistance line. The Court stated, “Given the close proximity of these base points to each other any variation or error in situating them would become disproportionately magnified in the resulting equidistance line” (*I.C.J. Reports 2007*, p. 742, para. 277). Moreover, continued sedimental accretion at sea brought about by River Coco caused its delta to exhibit a very active morpho-dynamism, especially as it travels out from the coast. Under the circumstances, the Court considered that these factors taken together had the result that any equidistance line constructed today could become arbitrary and unreasonable in the near future. (*Ibid.*)

39. I now turn to the delimitation of the continental shelf and EEZ.

VII. Delimitation of the continental shelf and EEZ

40. In cases coming before the Court, States have increasingly requested the Court to delimit a single maritime boundary for the continental shelf and the EEZ. This occurred in the *Qatar v. Bahrain* case. The advantage of such a line is regulatory simplicity. Neither the 1958 Geneva Conventions, nor UNCLOS refer to the concept of a single maritime boundary. In fact, the Court observed in the *Qatar v. Bahrain* case that:

“the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and . . . 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. In the case of coincident jurisdictional zones, the determination of a single boundary for the different objects of delimitation

‘can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these... objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them’,

as was stated by the Chamber of the Court in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p.327, para. 194). In that case, the Chamber was asked to draw a single line which would delimit both the continental shelf and the superjacent water column.” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 93 para. 173.)

41. Further, in the *Gulf of Maine* case, the Chamber observed that:

“What general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows:

[...]

delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 299-300, para. 112.)

42. In fact, the rules set out in UNCLOS Article 74(1) and Article 83(1) for the delimitation of the EEZ and continental shelf provide that:

“The delimitation of the continental shelf/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.”

43. In other words, the same “equitable principles and relevant circumstances” rule applies to delimitation of a single maritime boundary as is applicable to the separate delimitation of the continental shelf and the EEZ.

(a) Equidistance versus equitable principles

44. Historically, the jurisprudence of the Court, such as the *North Sea Continental Shelf* cases and the *Gulf of Maine, Tunisia/Libya* and *Libya/Malta* delimitations, suggests that the rule of equidistance and that of equitable principles are different in that the equitable principles rule gave no primacy to equidistance as a method of delimitation. Thus, in the *North Sea Continental Shelf* case, the Court rejected

the argument that customary international law required delimitation using the equidistance-special circumstances rule and held that under customary international law,

“delimitation [of the continental shelf] is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.” (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 53, para. 101.)

45. This position was restated in the *Tunisia/Libya* case, where the Court emphasized that:

“Nor does the Court consider that it is in the present case required, as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the results of an equidistance line to be inequitable. A finding by the Court in favour of a delimitation by an equidistance line could only be based on considerations derived from an evaluation and balancing up of all the relevant circumstances, since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods.” (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 79, para. 110.)

46. It can be seen that in the early jurisprudence of the Court, under the “equitable principles – relevant circumstances approach” regard must be had to the relevant circumstances and equitable principles simultaneously at a first stage, in order to decide which method of delimitation to apply.

47. However, the recent jurisprudence of the Court has tended to minimize the difference between the two rules. In the *Qatar v. Bahrain* case, the Court noted that:

“the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 111, para. 231.)

48. Further, in the *Cameroon v. Nigeria* case, the Court, speaking of the equitable principle/relevant circumstances method, stated that:

“This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’.” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports* 2002, pp. 441, para. 228.)

49. Thus, in delimiting the continental shelf and the EEZ of both adjacent and opposite coasts, the Court will generally now first provisionally draw an equidistance line, or at least consider the appropriateness of such an equidistance line, and then consider whether there are circumstances which must lead to an adjustment of that line, or indeed, in extreme cases, to the use of another delimitation technique in order to achieve an equitable solution. This approach was adopted in *Qatar v. Bahrain* as well as in the *Greenland/Jan Mayen* and *Cameroon v. Nigeria* cases where the final delimitations were modified equidistance lines, and in the *Nicaragua v. Honduras* case where the Court ultimately concluded that an equidistance line could not produce an equitable outcome in light of the particular circumstances of the case, and applied the bisector method. I would like to add that in the most recent case of *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, the Court, after a careful consideration of the various relevant circumstances in the dispute between the Parties, decided that there was no need to adjust the provisional equidistance line drawn by the Court.

(b) Special versus relevant circumstances

50. Further, while the rule pertaining to the territorial sea refers to special circumstances and the rule pertaining to the EEZ and continental shelf refers to relevant circumstances, the Court recognized in the *Greenland/Jan Mayen* delimitation that these are one and the same. The Court stated:

“Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this is only because they both are intended to enable the achievement of an equitable result. This must be especially true in the case of opposite coasts where, as has been seen, the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading *prima facie* to an equitable result. It cannot be surprising if an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary.”

(*Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p.62, para. 56.)

51. In respect of what can constitute a special/relevant circumstance, the Court stated in the *North Sea Continental Shelf* cases:

“In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures . . .” (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 50, para. 93.)

52. However, in the *Libya/Malta* case the Court added the following caveat:

“For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature.” (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 40, para. 48.)

53. This holds equally true for the other maritime zones. Thus while ecological characteristics constitute potentially relevant circumstances in the context of delimiting the EEZ, they will not be so relevant in the context of the continental shelf. Similarly, geological characteristics, while relevant to the continental shelf, could not be determinative for delimitation of the EEZ.

54. In the *Gulf of Maine* case, however, the Court noted that coastal geography will be equally relevant to the delimitation of the EEZ and continental shelf. This is important in the context of the delimitation of a single-maritime boundary because in such cases the Court’s position is that preference should be given to the criteria that, because of their neutral character, are best suited for use in a multi-purpose delimitation.

(c) Relevant circumstances—coastal geography

55. In *Qatar v. Bahrain*, the Court, following its jurisprudence, first drew a provisional equidistance line for the continental shelf and EEZ. It then turned to consider whether a number of the relevant circumstances raised by the Parties warranted the adjustment of this provisional equidistance line.

56. The Parties raised two arguments relating to coastal geography. Circumstances relating to coastal geography, including the configuration and length of the coast and the presence of any special or unusual maritime features, are undoubtedly the special circumstances most likely to lead to an adjustment of the provisional equidistance line.

57. One crucial concept in maritime delimitation relevant to coastal geography is the concept of proportionality. Proportionality is based upon the relationship

between the relative lengths of the coasts of the Parties abutting the maritime area to be delimited, and the relative areas of maritime space allocated to each of the Parties by means of delimitation. In the *North Sea Continental Shelf* cases, the Court described proportionality as follows:

“the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, – these being measured according to their general direction . . .” (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 52, para. 98.)

58. In a number of cases, such as the *Gulf of Maine* case, and the *Greenland/Jan Mayen* and *Libya/Malta* delimitations, the Court has considered the equitableness of a provisional equidistance line by comparing the ratio between the lengths of each Party’s coast and the maritime areas allocated to that Party by the provisional line. Where one Party has a significantly longer coastline than the other, but the maritime area allocated by the provisional line does not reflect the disparity in coastal length, the Court has, without requiring precise mathematical proportionality, modified the provisional line in order to achieve a more equitable ratio. However, the Court pointed out that “[t]his is not to suggest that these respective areas should be proportionate to coastal lengths – as the Court has said ‘the sharing-out of the area is therefore the consequence of the delimitation, not vice versa’”. *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway, Judgment, I.C.J. Reports 1993*, p.67, para. 64).” (*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009*, p. 39, para. 122).

59. The concept of proportionality is also employed as an *ex post facto* verification of the equitableness of a maritime delimitation, i.e. a disproportionality test.

60. In the *Qatar v. Bahrain* case, Qatar argued that its significantly longer coastline required such an adjustment to be made to the provisional equidistance line. The Court disagreed in the light of its finding that the Hawar Islands belonged to Bahrain; it did not consider that there was a significant disparity between the lengths of the relevant coasts of each Party.

61. Another crucial aspect of coastal geography is the configuration of the coastline. For instance, in the *North Sea Continental Shelf* cases, the concave nature of the coasts of Germany, sandwiched between The Netherlands and Denmark was held to be a relevant circumstance because:

“where two such [equidistance] lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose, to take the form approximately of a triangle with its apex to seaward

and, as it was put on behalf of the Federal Republic, ‘cutting off’ the coastal State from the further areas of the continental shelf outside of and beyond this triangle.” (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 17, para. 8.)

62. The Court considered that a failure to take this into account would lead to inequity in a situation where each of the Parties’ coastlines was of similar length.

63. The configuration of the coastline was also held to be a relevant circumstance in the *Qatar v. Bahrain* case. There, the Court considered that Fasht al Jarim, a remote projection of Bahrain’s coastline which was also predominantly submerged at high tide and located in an area where Bahrain’s and Qatar’s coasts were otherwise adjacent and similar in character, would, if given full effect, “distort the boundary and have disproportionate effects”. The Court stated that:

“such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord with all other relevant factors referred to above. In the circumstances of the case considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line in the northern sector.” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 115, para. 248.)

(d) Relevant circumstances – geomorphology of the delimitation area

64. In the *North Sea Continental Shelf, Tunisia/Libya* and *Gulf of Maine* cases, the Court in each instance considered the geomorphology of the area to be delimited, in particular to establish whether there were any features interrupting the continuity of the continental shelf. In those cases, the Court clearly considered that any such discontinuities may be relevant to the delimitation of the continental shelf/single maritime boundary ultimately adopted, although no such discontinuities were found in those cases.

65. However, the Court reserved this position in the *Libya/Malta* case. In that case, Libya argued that a sub-sea rift zone, located considerably closer to the Maltese coast than the Libyan coast, should be used as the boundary line between the Libyan and Maltese continental shelves. Notwithstanding, the Court held that:

“since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the

validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial. It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the 'rift zone' cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary." (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports 1985*, p. 35, para. 39.)

"40. Neither is there any reason why a factor which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purposes of delimitation. It is true that in the past the Court has recognized the relevance of the geophysical characteristics of the area of delimitation if they assist in identifying a line of separation between the continental shelves of the Parties. In the *North Sea Continental Shelf* cases the Court said:

'it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong' (*I.C.J. Reports 1969*, p. 51, para. 95).

Again, in the *Tunisa/Libya* case of 1982, the Court recognized that:

'identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation, in view of its significance as the justification of continental shelf rights in some cases' (*I.C.J. Reports 1982*, p. 47, para. 44),

and the Court remarked also that 'a marked disruption or discontinuance of the sea-bed' may constitute 'an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations' (*ibid.*, p.57, para. 66). However to rely on this jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in a régime of the title itself which used to allot those factors a place which now belongs to the past, in so far as sea-bed areas less than 200 miles from the coast are concerned." (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports 1985*, p. 36, para. 40.)

(e) Other relevant circumstances

66. In *Qatar v. Bahrain*, Bahrain argued that it had historic title to certain pearling banks otherwise falling on the Qatari side of the provisional equidistance line drawn for the EEZ/continental shelf. The Court refused to take this into account as a special circumstance primarily because the evidence suggested that pearl diving was traditionally considered to be a right common to the coastal population, rather than subject to sovereign control and because the pearling industry had ceased to exist over half a century earlier.

67. While an argument based on historic rights has not yet resulted in an adjustment of the provisional delimitation line before the Court, historic rights are a recognized special circumstance and receive a special mention in UNCLOS in respect of delimitation of the territorial sea. It is, however, debatable as to whether they can exist in the continental shelf/EEZ which until the 1950s were considered to be high seas. However, “the traditional character of the different types of fishing carried out by the populations concerned” was given some weight in arriving at the final delimitation line in the *Greenland/Jan Mayen (Denmark v. Norway)* case (*I.C.J. Reports 1993*, pp. 71-73, para. 76-78).

68. In maritime delimitation cases before the Court, States have raised a broad range of other relevant circumstances. I do not have the time to go into each of them in any detail in this lecture, but they warrant a brief mention:

- Fisheries: In the *Greenland/Jan Mayen* case, in the context of delimiting the fisheries zone (now known as the EEZ), the Court adjusted the provisional equidistance line to ensure that each Party had equitable access to capelin stocks.
- Oil deposits/oil concessions and oil wells: In contrast to the approach in relation to fisheries, in the *Cameroon v. Nigeria* case the Court stated that “oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line.” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, pp. 447-448, para. 304.)
- Socio-economic factors: The Court will only take socio-economic factors into account as a relevant circumstance where a delimitation would otherwise have catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned, as in the *Gulf of Maine* case. In other cases, the Court has taken the position that delimitation should not be influenced by the relative economic position of the two States in question, e.g., the *Libya/Malta* case.
- Security: In *Greenland/Jan Mayen* and *Libya/Malta*, the Court recognized that, in certain cases, security may be a relevant consideration, but only in a situation where a delimitation line passes very close to the coast of one State.

VIII. Starting point and end point of delimitation

69. The starting point of a maritime delimitation between adjacent coasts will normally be the land boundary between the two States at the low-water mark. However, in cases where there is an uncertain land terminus, the Court has established a starting point for the maritime delimitation at a short distance out to sea (see *Nicaragua v. Honduras, Judgment*, para. 310) leaving a decision on the land terminus for diplomatic resolution by the States concerned.

70. Delimitation between opposite coasts is better characterized as having two end points. With respect to end points, the predominant practice of the Court is to delimit the single maritime boundary, EEZ or continental shelf up to 200 nm or until it reaches a point where the rights of third States may be affected.

71. With respect to the point where the rights of third States may be affected, two different approaches are apparent in the jurisprudence of the Court. The first approach is to leave the terminal point of the delimitation open and simply indicate the direction in which the line is to extend until it reaches the point where a third State's rights are affected (see *Qatar v. Bahrain case, I.C.J. Reports, 2001*, paras. 222-223, *Nicaragua v. Honduras, Judgment 2007*, paras. 319-320). The benefit of this approach is that it ensures that when an agreement is reached with the third State, there will be a completed delimitation in the area and the rights of the third State are not prejudged by the Court.

72. The second approach is to cut off the line at the limit of claims put forward by third States (see *Libya/Malta, I.C.J. Reports 1985*, pp.26-27, para. 22). A shortcoming of this approach is that it may lead to a dangerous situation where the determination of the Court's jurisdiction is placed in the hands of a third State and depends on that State's claims (see Y. Tanaka, "Predictability and Flexibility in the Law of Maritime Delimitation", 2006, p. 244).

IX. Conclusion

73. In conclusion, the jurisprudence of the Court has evolved. It now establishes a set of unified principal steps for maritime delimitation, whether relating to the territorial sea, the continental shelf, the EEZ or a single maritime boundary. These steps are as follows:

- Normally, the Court must first consider whether any part of the maritime delimitation is already the subject of formal or tacit agreement between the parties – if so, the Court must not disturb that aspect of the delimitation.
- The Court must then determine the relevant coasts for the delimitation and determine which base points are to be used for the construction of a provisional equidistance line. The choice of base points is to be made on a purely legal basis with any inequities arising from such a choice to be dealt with at a later stage.

- In most cases, the Court will then proceed to draw a provisional equidistance line (unless the special/relevant circumstances are such as to warrant the application of an entirely different method).
- The Court will then consider whether the provisional equidistance line (or other line chosen) needs to be modified to achieve an equitable solution, having regard to a number of special/relevant circumstances. Circumstances related to coastal geography (in particular length of the coastline, shape of the coastline and presence of islands) are the most relevant in this context. However, the Court may also have regard to a range of other circumstances such as historic title, socio-economic considerations, distribution of natural resources, security and conduct of the Parties.
- The Court may apply an *ex post facto* disproportionality test to verify whether the delimitation line as modified is equitable and if it is not, make any further necessary modifications.
- Finally, the Court will also need to specify starting and end points to the delimitation and will need to avoid encroaching on the rights of third States.