

PART III: THE APPLICABLE LAW

Introduction

1. The *Terms of Reference*¹ state the Tribunal's mandate as follows:

ARTICLE THREE THE MANDATE OF THE TRIBUNAL

3.1 Applying the principles of international law governing maritime boundary delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.

2. This Part examines the "principles of international law governing maritime boundary delimitation" relevant in this phase of the arbitration, that is, relevant to the exercise of delimiting the parties' respective offshore areas. Section A addresses the conventional law of maritime boundary delimitation, which, it is submitted, is of limited utility in the present case. Section B considers the customary international law of maritime boundary delimitation as it has been articulated in the jurisprudence of the International Court of Justice and other international tribunals.²

A. The Conventional Law Is Of Limited Utility In This Arbitration

3. The conventional law of maritime boundary delimitation is potentially relevant to this case in two contexts: first, conventions binding upon the parties may create specific obligations upon them with respect to delimitation; and, second, rules found in multilateral conventions may be of relevance to the extent that they reflect customary law, even if the parties have not ratified the conventions. Two

¹ *Terms of Reference*, Article 3.1.

² State practice has not been analyzed in this Part, given the particularly unique circumstances of this arbitration. Moreover, as has been recognized by maritime boundary scholars, few patterns have emerged from these political settlements and such practice has not provided much guidance to the International Court of Justice or to other courts or tribunals in adjudicating boundary cases. See, for example, Annex 184: J.I. Charney, "Progress in International Maritime Boundary Delimitation Law" (1994) 88 A.J.I.L. (No. 2) 227 at 228, 253-254.

ARTICLE THREE

THE MANDATE OF THE TRIBUNAL

- 3.1 Applying the principles of international law governing maritime boundary delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.
- 3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.
- (i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.
 - (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.

conventions require consideration – the 1958 Geneva *Convention on the Continental Shelf*,³ (hereinafter "GCCS") and the 1982 *United Nations Convention on the Law of the Sea* (hereinafter "LOS 1982")⁴.

i. **The 1958 Geneva Convention On The Continental Shelf Governs A Zone That Differs Significantly From The Area To Be Delimited**

4. The first expression in conventional law of principles governing continental shelf delimitation is found in Article 6 of the *GCCS*. Canada is party to the *GCCS*⁵ and, by virtue of Article 3.1 of the *Terms of Reference*, which transposes to the parties to this dispute Canada's international legal rights and obligations, Nova Scotia and Newfoundland and Labrador are deemed to be parties to the *GCCS* for the purpose of this arbitration. It is submitted, however, that the *GCCS* is of limited utility in this case.

5. Article 6 of the *GCCS* provides, in relevant part:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

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

³ Annex 185: April 29, 1958, 499 U.N.T.S. 311, 1970 C.T.S. 4 (entered into force June 10, 1964).

⁴ Annex 186: December 10, 1982, UN Doc. A/CONF. 62/122 (entered into force November 16, 1994).

⁵ The *GCCS* was ratified by Canada on February 2, 1970.

6. The delimitation provisions in the *GCCS* are not directly applicable in this arbitration, however, because the continental shelf regime to which the *GCCS* applies is inherently different from the regime of joint management and revenue sharing that is the object of this arbitration. Article 2 of the *GCCS* defines a State's rights over the continental shelf in the following terms:⁶

1. The coastal State exercises over the continental shelf **sovereign rights** for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are **exclusive** in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

...

4. The natural resources referred to in these articles consist of the **mineral and other non-living resources** of the seabed and subsoil together with **living organisms** belonging to sedentary species ...

(emphasis added)

7. The *Terms of Reference* are explicit as regards the scope of the Tribunal's mandate. As noted above, the Tribunal is to determine "the line dividing the respective offshore areas of [the parties]". The *Terms of Reference* further define the specific dispute that the Tribunal is mandated to resolve as:⁷

a dispute ... concerning portions of the limits of [the Parties'] respective offshore areas ("offshore areas") as defined in the *Canada-Newfoundland Atlantic Accord Implementation Act* ... and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*

...

8. The result of the determination to be made by the Tribunal will be to delimit one "offshore area" from another. The sole effect of that delimitation will be to

⁶ Annex 185: *Supra* note 3.

⁷ *Supra* note 1, Preamble.

clarify **which Accord Act applies where;**⁸ no other rights or entitlements are at issue.

9. Although the geographic scope of the term “offshore area” is defined differently in the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* (the “*Canada-Nova Scotia Accord Act*”) and the *Canada-Newfoundland Atlantic Accord Implementation Act* (the “*Canada-Newfoundland Accord Act*”), the substance of the term is identical in both statutes:⁹ an area within which Nova Scotia, on the one hand, and Newfoundland and Labrador, on the other, share certain limited rights with the Government of Canada in respect of hydrocarbon mineral resources.
10. As indicated, the *Terms of Reference* refer to the parties’ “respective offshore areas”¹⁰ and to “the respective offshore areas of [the provinces].”¹¹ The *Accord Acts* themselves, however, do not contain any such mention of “the offshore area of the Province of Nova Scotia” or to “Newfoundland and Labrador’s offshore area”. No right to any area in the offshore is conveyed to either province by operation of these *Acts*, nor is any direct entitlement or right to the resources found in such areas granted to them or otherwise recognized.¹²
11. The *Accord Acts* merely implement a negotiated regime of shared management and revenue sharing, under which certain management tasks relating to certain resources in certain defined areas are assigned not to the provinces, but to the two Offshore Boards.¹³ Under the “offshore areas” regime, the provinces acquire no jurisdiction – none of the exclusive “sovereign rights” to explore and exploit the

⁸ The title of the *Terms of Reference* also underscores that the dispute concerns the areas defined in the *Accord Acts*, *infra* note 9.

⁹ See Annex 2 : *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28, s. 2 and Sch. I; Annex 1 : *Canada-Newfoundland Accord Implementation Act*, S.C. 1987, c. 3, s. 2 (hereinafter *Accord Acts*). There is a difference in the definition of each area. This is discussed in Part IV, below.

¹⁰ *Terms of Reference*, *supra* note 1, Preamble.

¹¹ *Ibid.*, Art. 3.1.

¹² Nova Scotia’s possible claim to the offshore has never been litigated in the Canadian courts.

¹³ Annexes 1 and 2 : *Supra* note 9 at s. 9.

resources of the seabed that are at the heart of the continental shelf regime.¹⁴ What limited, shared entitlements do exist in the “offshore areas” arise exclusively by virtue of the *Accords* and their implementing legislation.

12. It is clear that the rights enjoyed by the parties to this dispute are fundamentally at odds, as regards both their nature and scope, with the “exclusive” and “sovereign” rights to explore and exploit the natural resources of the continental shelf recognized in the *GCCS*.¹⁵ Furthermore, the substantive scope of the interests is different, in that the offshore areas regime does not apply to sedentary species or non-hydrocarbon minerals, nor to regulation of other seabed activities, such as foreign pipelines.¹⁶
13. Finally, not even the geographic areas covered by the *GCCS* and the *Accord Acts* coincide. Article 1 of the *GCCS* defines the continental shelf as follows:¹⁷

For the purpose of these articles, the term “continental shelf” is used as referring ... to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ...

14. The “offshore areas” as defined in the *Accord* legislation encompass an area that begins at the low water mark of the coasts in most locations, and not at the limit of the territorial sea, as is the case for the continental shelf.¹⁸ Moreover, the seaward extent of the zone in question is defined by reference to “the continental margin”, which is itself defined in the *Oceans Act*¹⁹ prescribing the limits of

¹⁴ Annexes 1 and 2 : The *Accord Acts*, *supra* note 9 at s. 3, do not purport to affect jurisdictional claims, and it is clear from the *Hibernia Reference*, Annex 182: *supra* Part II note 59 that the Newfoundland offshore is under federal jurisdiction. Nova Scotia’s possible claim has never been litigated in the Canadian courts, but the structure of the *Canada-Nova Scotia Accord Act* does not challenge federal jurisdiction over the shelf, which continues to be exercised subject to the limited delegation of powers under the *Accord* itself.

¹⁵ Annex 185: *Supra* note 3, Arts. 2(1), 2(2).

¹⁶ The *Canada-Newfoundland Accord Act* does not currently, but could, apply to other minerals.

¹⁷ Annex 185: *Supra* note 3, Art. 1.

¹⁸ Annexes 1 and 2 : *Supra* note 9.

¹⁹ Annex 113 : S.C. 1996, c. 31, s.17.

Canadian jurisdiction in terms borrowed from Article 76 of the *LOS 1982*, rather than the *GCCS*:²⁰

The continental shelf of Canada is the seabed and subsoil of the submarine areas ... that extend ... throughout the natural prolongation of the land territory of Canada ... to the outer edge of the continental margin, determined in the manner under international law that results in the maximum extent of the continental shelf of Canada, the outer edge of the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise ...

15. In sum, the *Accord Acts* do not address the same rights, the same resources or the same uses envisaged in the *GCCS*, nor do they apply to the same area of the seabed. The delimitation principles found in Article 6 of the *GCCS* are thus not directly applicable to the present case.²¹ They may nonetheless be useful, if only because the *GCCS*, like the *Accord Acts*, does address, *inter alia*, the question of rights over hydrocarbons in the seabed.

ii. **The 1982 Convention On The Law Of The Sea Is Not Directly Applicable To This Arbitration**

16. Canada is not a party to the *LOS 1982*. However, it is generally agreed that many of the Convention's provisions, including those dealing with the delimitation of the continental shelf, reflect customary international law to a substantial degree.²² As such, those provisions are potentially relevant to the present arbitration.

²⁰ Although Canada is not party to the *LOS 1982*, it has adopted this approach in its legislation. This is addressed further in Part IV, below.

²¹ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 301. This reasoning is supported by the refusal of the Chamber in the case *Gulf of Maine*, to apply Article 6 to a delimitation that included both the shelf and the water column, despite the *GCCS* being in force between the parties.

²² Annex 174: In *Gulf of Maine*, *ibid.* at 294, the Chamber made it clear that the provisions of the *LOS 1982* were consistent with customary law: "In the Chamber's opinion, these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question."

17. The delimitation of the continental shelf is dealt with in Article 83 of the *LOS 1982*, which provides, in relevant part:²³

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

18. Like the *GCCS*, the *LOS 1982* is not directly applicable in this arbitration, because the rights of the coastal State over the continental shelf in the *LOS 1982* are substantively the same as those found in Article 2 of *GCCS*, referred to above, and hence are fundamentally different from the rights of the parties over the offshore areas.²⁴ However, as will be shown below, the requirement in Article 83 that a delimitation is to be effected “in order to achieve an equitable solution” reflects the decisions of international courts and tribunals as they have articulated the principles governing maritime boundary delimitation.

B. The Customary Law Of Maritime Boundary Delimitation Defines The Fundamental Norm

i. The Fundamental Norm Of Maritime Delimitation Requires The Application of Equitable Principles Taking Into Account Relevant Circumstances To Achieve An Equitable Result

19. The fundamental norm governing maritime boundary delimitation at customary international law, whether carried out through agreement or by third party adjudication, requires that delimitation be effected by the application of equitable

²³ Annex 186: *Supra* note 4, Art. 83 (1). It is significant that Article 74 of the *LOS 1982*, dealing with delimitation of the exclusive economic zone, uses exactly the same wording, conforming the general applicability of the “equitable solution” approach.

²⁴ As mentioned above, however, the seaward extent of the continental shelf defined in Article 76 of the *LOS 1982* is consistent with that provided for in the *Oceans Act* and in the *Accord Acts*.

principles, taking into account all the relevant circumstances, in order to achieve an equitable result.²⁵

20. The first articulation of this principle by the International Court of Justice (ICJ) came in 1969 in the context of a continental shelf delimitation in the *North Sea Continental Shelf Cases*, which involved the Federal Republic of Germany, Denmark and The Netherlands. Having determined that Article 6 of the *GCCS* was not applicable because Germany was not a party to that Convention and the *GCCS* was not part of customary international law, the Court enunciated the following principle of maritime boundary delimitation:²⁶

[D]elimitation 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 ...

21. In the 1977 *Anglo-French Continental Shelf Award*, in which the *GCCS* was applicable, the Court of Arbitration found that the more specific rule found in Article 6 of the *GCCS* was in fact reconcilable with the general rule stated in the *North Sea Cases*:²⁷

... the equidistance – special circumstances rule [found in Article 6 of the *GCCS*] and the rules of customary law have the same object – the delimitation of the boundary in accordance with equitable principles.

22. In the *Tunisia/Libya* case in 1982, the ICJ dealt with a continental shelf delimitation in which the parties (non-parties to *GCCS*) had provided in their Special Agreement that the Court should “take its decision according to equitable

²⁵ See **Annex 174: *Gulf of Maine***, *supra* Part I, note 3; **Annex 187: *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)***, [1985] I.C.J. Rep. 13 (hereinafter *Libya/Malta*); **Annex 188: *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)***, [1969] I.C.J. Rep. 3 (hereinafter *North Sea Cases*); **Annex 189: *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)***, [1982] I.C.J. Rep. 4 (hereinafter *Tunisia/Libya*).

²⁶ **Annex 188: *North Sea Cases***, *ibid.* at 53.

²⁷ **Annex 190: *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf***, (1977), 54 I.L.R. 6 at 57 (hereinafter *Anglo-French Award*). See also **Annex 184: *Chamey***, *supra* note 2 at 244.

principles, and the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea.”²⁸ With respect to equitable principles and relevant circumstances, the Court was explicit in finding that they would in any event have applied these factors, in accordance with the law as stated in the *North Sea Cases*, because they were²⁹:

...in complete harmony with the jurisprudence of the Court, as appears from its Judgment in the *North Sea Continental Shelf* cases, in which it held that international law required delimitation to be effected “in accordance with equitable principles, and taking account of all the relevant circumstances”. [footnote omitted]

23. The principle was confirmed by the ICJ in decisive terms in the *Libya/Malta* case in 1985, another continental shelf delimitation:³⁰

Judicial decisions are at one ... in holding that delimitation of a continental shelf boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result.

24. In the *Gulf of Maine* case in 1984, a Chamber of the ICJ re-stated what it identified as the fundamental norm governing maritime boundary delimitation:³¹

- 1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.
- 2) In either case, 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.

25. The Chamber in *Gulf of Maine* made it clear that this fundamental norm was to apply not just to the continental shelf, but to any delimitation, including the single

²⁸ Annex 189: *Tunisia/Libya*, *supra* note 25 at 23, 37. There were conflicting translations of the Special Agreement filed by the parties. This is the Libyan version, which was used by the Court.

²⁹ Annex 189: *Ibid.* at 37.

³⁰ Annex 187: *Libya/Malta*, *supra* note 25 at 37.

³¹ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 299-300.

- maritime boundary, encompassing the seabed **and** the water column, that was at issue in that case. The norm as stated was seen as reflecting “[w]hat general international law prescribes in every maritime delimitation between neighbouring States..”.³²
26. The jurisprudence, then, has been consistent in requiring reliance upon equitable **principles** in all the **relevant circumstances**, with a view to arriving at an **equitable result**. The ICJ and other international tribunals have also been consistent in rejecting any notion of a rule giving precedence to or requiring the use of a single, specific method of delimitation applicable in all cases.³³ Indeed, any principle that purported to lay out a suite of criteria or methodologies, mandatory in all instances, would most likely run afoul of the particularities of the legal, geographical and other circumstances that are relevant in any given dispute. The essence of the rule based on equitable principles, relevant circumstances and equitable result, by contrast, is its flexibility and adaptability. Its very generality assures its universality, so that it may respond to the peculiar issues presented by the inherently unique nature of any delimitation. This is particularly the case where, as here, the zone in question, the offshore area, is itself *sui generis*.
- ii. **The Essential Characteristics Of The Fundamental Norm Recognize That Each Delimitation Is Unique**
27. Prior to addressing the process by which the fundamental norm is applied to specific cases, it is useful to consider in greater detail certain essential characteristics of the norm as developed in decisions of the ICJ and other international tribunals.

³² Annex 174: *Ibid.* at 299.

³³ Annex 187: *Lybia/Malta*, *supra* note 25 at 47; Annex 191: *Guinea–Guinea-Bissau Maritime Delimitation Case*, Award of February 14, 1985 (1988) 77 I.L.R. 636 at 681 (hereinafter *Guinea-Guinea-Bissau*); see also Annex 192: L.A. Willis, “*From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries*” (1986) Can. Y.B. (Int’l) L. 3 at 48.

a) Equitable Principles Are Applied Within A Legal Framework

28. Although it has been criticized for its open-ended nature,³⁴ this fundamental norm is not devoid of legal structure. The jurisprudence has been consistent in emphasizing that, while equity is the dominant concern in delimitation, both in defining the substantive factors to be considered and in determining the process to be followed in their application, equity must be seen as operating within a framework of legal principles. According to the ICJ, the requirement that equitable principles be applied in a delimitation is itself a rule of law:³⁵

[W]hen mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.

29. In other words, a delimitation effected by a tribunal in accordance with the principles of international law is to be distinguished from an award *ex aequo et bono*, in which a tribunal would exercise almost unfettered discretion.³⁶ Although tribunals enjoy a measure of discretion at virtually every stage of the delimitation process, that discretion is constrained and guided throughout by legal principles.³⁷ As the Court held in the *Tunisia/Libya* case:³⁸

Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. ... The Task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise in discretion or conciliation; nor is it an operation of distributive justice.

30. There are two particular characteristics of the norm that provide a legal framework to the equitable principles. First, the choice of equitable principles or

³⁴ See Annex 184: Chamey, *supra* note 2 at 230. See also Annex 189: *Tunisia/Libya*, *supra* note 25 at 157, dissenting opinion of Judge Oda where he refers to "the principle of non-principle."

³⁵ See Annex 188: *North Sea Cases*, *supra* note 25 at 48.

³⁶ *Ibid.* See also Annex 184: Chamey, *supra* note 2 at 233.

³⁷ See Annex 192: Willis, *supra* note 33 at 5.

³⁸ Annex 189: *Tunisia/Libya*, *supra* note 25 at 60.

criteria that will govern a particular decision are made within a process that requires explicit consideration of and connection to the relevant circumstances of a given case. A tribunal cannot simply proceed to the decision that it views as “just” in the broad sense – it must do so through the application of principles and practical methods which are derived from relevant circumstances on the facts of the case.

31. Second, as discussed more fully below, both the relevant circumstances that influence the choice of equitable principles, and the principles themselves, must reflect the legal basis of title to a zone. The Court in the *Libya/Malta* case stressed that the legal nature of the zone in question was a significant constraint on the potentially unlimited range of equitable considerations:³⁹

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.

32. The implications of this approach in the present arbitration are clear – tying the selection of equitable principles at least in part to the substantive legal basis of title to the zone in question is an important element in ensuring that delimitations are made within a clear legal framework, and not as a matter of pure discretion.
33. One final point must be noted with respect to the role of equity in boundary delimitation. Equity is not employed merely as a corrective to the harshness that may be perceived to result from application of a legal norm. It is, rather, the essence of the legal norm itself and is employed from the outset and throughout the process. This has important practical consequences for the entire delimitation process in that there is no initial obligation to apply any particular method and

³⁹ Annex 187: *Libya/Malta*, *supra* note 25 at 40.

demonstrate its inequity before turning to equitable principles – an equitable solution is the goal from the outset.⁴⁰

b) There Are No Mandatory Relevant Circumstances, Equitable Principles Or Practical Methods Of Delimitation

34. The factual circumstances which may be relevant to a delimitation are theoretically unlimited⁴¹ but, as will be seen below, there have been constraints placed on the effective range of choices available. Relevant circumstances considered in previous cases have included the following:

- Geographic factors;⁴²
- The conduct of the parties;⁴³
- The location and division of relevant resources;⁴⁴
- Economic dependence on resources in the disputed zone;⁴⁵
- Third party interests, and the impact of other delimitations in the region;⁴⁶
- Considerations of geology and geomorphology;⁴⁷
- Historic rights.⁴⁸

⁴⁰ The implications of this point are considered below, in particular as regards the lack of any presumptive or mandatory criteria or methods.

⁴¹ Annex 188: *North Sea Cases*, *supra* note 25 at 50.

⁴² See Annex 174: *Gulf of Maine*, *supra* Part I, note 3 and Annex 189: *Tunisia/Libya*, *supra* note 25.

⁴³ See Annex 189: *Tunisia/Libya*, *ibid.* at 83-84.

⁴⁴ See Annex 188: *North Sea Cases*, *supra* note 25.

⁴⁵ See Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 342 and Annex 193: *Case Concerning Continental Shelf Area Between Iceland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Rep. 38 (hereinafter *Denmark/Norway*).

⁴⁶ See Annex 187: *Libya/Malta*, *supra* note 25 at 26, 28, 55; Annex 191: *Guinea – Guinea-Bissau*, *supra* note 33 at 684.

⁴⁷ See Annex 188: *North Sea Cases*, *supra* note 25.

⁴⁸ See Annex 189: *Tunisia/Libya*, *supra* note 25 at 71-77 and Annex 194: *Case Concerning Delimitation of Maritime Areas between Canada and The French Republic* (1992), 31 I.L.M. 1145 at 1166, 1173-1174 (hereinafter *St-Pierre and Miquelon Award*).

35. The potential range of applicable equitable principles is also unrestricted in theory, but limited in practice. Equitable principles, or considerations, which have been identified in previous cases include:
- Equal division of overlapping areas of entitlement;⁴⁹
 - Avoidance of cut-off, and “non-encroachment”;⁵⁰
 - Conduct as an indicator of what the parties themselves have considered to be equitable;⁵¹
 - Proportionality of relevant coastal lengths to maritime areas.⁵²
36. Similarly, certain practical methods of delimitation, the application of which depends on the circumstances of the case, have become familiar. These include the use of modified equidistance or median lines, and bisectors of coastal directions.
37. The essential point is that the list is neither closed nor of automatic application.⁵³ The mere fact that a particular principle or method was utilized or rejected in a previous case does not permit the presumption that the same should occur when new facts are under consideration. There is a fundamental distinction to be drawn between a mandatory legal rule and considerations that might be used in the application of that rule.
38. This point is reflected in the *Gulf of Maine* case, in which the Chamber stated that it preferred to use the term “equitable criteria”, as opposed to “equitable principles”, (although both expressions are found in the award) precisely in order

⁴⁹ See Annex 174: *Gulf of Maine*, *supra* Part I, note 3.

⁵⁰ See Annex 188: *North Sea Cases*, *supra* note 25 at 53.

⁵¹ See Annex 174: *Gulf of Maine*, *supra* Part I, note 3, Annex 187: *Libya/Malta*, *supra* note 25 at 28-29, and Annex 189: *Tunisia/Libya*, *supra* note 25 at 83-84.

⁵² See Annex 174: *Gulf of Maine*, *supra* Part I, note 3 and Annex 188: *North Sea Cases*, *supra* note 25.

⁵³ See Annex 188: *North Sea Cases*, *supra* note 25 at 50. See also Annex 184: *Charney*, *supra* note 2 at 230.

to distinguish such equitable considerations from true principles of law. The Chamber described the law as requiring:⁵⁴

[T]he application of equitable criteria, namely criteria derived from equity which – whether they be designated “principles” or “criteria”, the latter term being preferred by the Chamber for reasons of clarity – are not in themselves principles and rules of international law.

39. The particular equitable principles that are identified and applied in the cases are not, therefore, rules of law. They are, rather, considerations whose application depends entirely on their appropriateness to a particular factual situation. The Chamber in *Gulf of Maine* was explicit in this regard, finding that even the most familiar and commonly-used equitable criteria do not rise to the level of principles of law:⁵⁵

The error lies precisely in searching general international law for, as it were, a set of rules which are not there. This observation applies particularly to certain “principles” advanced by the Parties as constituting well-established rules of law ... One could add to these the ideas of “non-encroachment” upon the coasts of another State or of “no cutting-off” of the seaward projection of the coasts of another State ... which may in given circumstances constitute equitable criteria, provided, however, that no attempt is made to raise them to the status of established rules endorsed by customary international law.

40. The same argument applies, *a fortiori*, to the various practical methods by which a tribunal might give effect to identified equitable criteria. Courts and tribunals have been consistent, since 1969, in rejecting the notion that a particular method, no matter how useful in certain circumstances, has acquired the status of a rule or principle of law.⁵⁶ In the *Libya/Malta* case, for example, in which a provisional median line was applied as a first step in the drawing of the line, the Court stated explicitly that it had done so, not because the method had any mandatory or

⁵⁴ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 292. It is perhaps for this reason that the term “considerations” is occasionally used to describe those factors that define what the Court in the *North Sea Cases* referred to as “...the means whereby the delimitation can be carried out in such a way as to be recognised as equitable”: Annex 188: *North Sea Cases*, *supra* note 25 at 50.

⁵⁵ Annex 174: *Gulf of Maine* *ibid.* at 298-299, supported by: Annex 189: *Tunisia/Libya*, *supra* note 25 and Annex 187: *Libya/Malta*, *supra* note 25 at 39.

⁵⁶ Annex 188: *North Sea Cases*, *supra* note 25; Annex 189: *Tunisia/Libya*, *supra* note 25 at 79-80; Annex 174: *Gulf of Maine*, *supra* Part I, note 3; Annex 187: *Libya/Malta*, *supra* note 25. See also Annex 192: Willis, *supra* note 33 at 37.

presumptive status (even in the context of opposite coasts), but rather as an application of equitable principles in the circumstances of the case.⁵⁷ The Court was especially careful to deny any broader significance to its use of a median line.⁵⁸

The median line drawn in this way is thus only provisional. Were the Court to treat it as final, it would be conferring on the equidistance method the status of being the only method the use of which is compulsory in the case of opposite coasts. As already pointed out, existing international law cannot be interpreted in this sense; the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour.

41. A similar result obtained in the *Denmark/Norway* case.⁵⁹ As in *Libya/Malta*, a provisional median line was applied in the light of the geographic circumstance of oppositeness, and the general (but not universal) equitableness of that method in that circumstance. In other words, the method was applied not because it was required, but because it led to an equitable result in the circumstances of the case.
42. In sum, there is no predetermined equitable criterion or set of criteria, nor any single practical method or group of methods, that constitute rules of international law. Every delimitation is unique, or “monotypic”, to use the terminology of the Chamber in the *Gulf of Maine* decision.⁶⁰

c) The Equitableness Of The Result Is The Predominant Consideration

43. The jurisprudence states clearly that, although equitable considerations influence all stages of a delimitation, it is ultimately the equitable nature of the result that must be the dominant concern. This means that the selection of the principles to be applied in a delimitation is to be carried out, not in the abstract, but with a view

⁵⁷ Annex 187: *Libya/Malta*, *supra* note 25 at 46. The circumstances considered by the Court included the geographic relationship of oppositeness and the legal basis of title to the shelf.

⁵⁸ Annex 187: *Ibid.* at 47.

⁵⁹ Annex 193: *Denmark/Norway*, *supra* note 45 at 59-61, supported by: Annex 187: *Libya/Malta*, *supra* note 25 at 47.

⁶⁰ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 290.

to attaining a concrete “equitable result” in the particular circumstances of the dispute.⁶¹ This point is fundamental, and was confirmed by the Court in *Tunisia/Libya* as follows:⁶²

The result of the application of equitable principles must be equitable ...
It is ... 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.

44. The selection of equitable criteria based on their “usefulness for the purpose of arriving at an equitable result” is at the heart of boundary delimitation law. Similarly, the practical method or methods must be subordinated to the goal of achieving an equitable result, as is demonstrated by the fact that one equitable criterion might require the application of more than one practical method, depending upon the relevant circumstances in different segments of the same line. In the *Gulf of Maine* case, for example, the criterion of equal division of overlapping areas required different practical methods in different sectors, in response to changing geographic circumstances.⁶³

iii. The Jurisprudence Provides Guidance On The Process For Applying The Fundamental Norm

45. A review of the jurisprudence suggests in general terms the process by which the fundamental norm of maritime delimitation is to be applied in particular cases. The parameters of that process include the following:

⁶¹ This is closer to what the Court said in the *North Sea Cases*, Annex 188: *supra* note 25 at 50, in the passage that gave rise to the notion that the result must be given precedence: “[I]t is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognised as equitable.”

⁶² Annex 189: *Tunisia/Libya*, *supra* note 25 at 59.

⁶³ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 327-329. The boundary line was composed of a bisector of intersecting coastal directions in an inner, adjacent-coast segment, and an adjusted median line in an outer segment in which the parties’ coasts were found to be opposite. See also Annex 192: Willis, *supra* note 33 at 49.

- the applicable equitable principles (or “criteria”) are determined in the light of the relevant circumstances of the case.⁶⁴ This may include designation of “primary” and “auxiliary” criteria, the former contributing more directly to the selection of methods, and the latter of greater weight in testing the result (see below);⁶⁵
- a practical method (or methods) for drawing the boundary is selected, one that can give effect to the equitable criteria previously identified. In the words of the *Gulf of Maine* Chamber, “[m]ethods must be chosen which are instruments suitable for giving effect to those criteria and not other criteria of a fundamentally different kind.”⁶⁶ The choice of method may also be influenced by the presence of relevant circumstances of a more specific nature, such as a distorting geographic feature;
- the choice of a method may be motivated primarily by a particular equitable criterion, but in many instances it will be necessary to engage in a “balancing up” of various equitable considerations in order to determine the delimitation method or methods that will best produce an equitable result;⁶⁷

⁶⁴ In essence, this means that the equitable principles are selected by reference to the facts of the case, and are then applied to those same facts in effecting the delimitation. See Annex 195: L.H. Legault & B. Hankey, “From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case” (1985) 79 A.J.I.L. 961 at 967. In *Tunisia/Libya*, Annex 189: *supra* note 25, for example, equitable principles almost merged with relevant circumstances at times. This may be inevitable in some cases, as the principle is a close reflection of the circumstance.

⁶⁵ See Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 328.

⁶⁶ Annex 174: *Ibid.* at 329.

⁶⁷ This fact, and the need for weighing various criteria, was acknowledged at the outset, in the *North Sea Cases*, Annex 188: *supra* note 25 at 50: “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, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.”

- the line as provisionally drawn may be “tested” for the equitableness of the result (e.g., by consideration of the proportionality of coastal length to maritime area⁶⁸), although this step has not been universally or systematically applied.⁶⁹

iv. **The Legal Basis Of Title Is Of Critical Importance**

46. The foregoing review of the central characteristics of the fundamental norm indicates that judges and arbitrators enjoy broad, though not unlimited, discretion in maritime boundary decision-making – whether in defining coasts as “relevant”, selecting equitable criteria, or choosing practical methods that “best” give effect to those criteria. Indeed, it might be tempting to conclude that one is dealing with a version of equity that, if not founded on the length of the Chancellor’s foot, is “measured by the judge’s eye.”⁷⁰
47. There is, however, one critical factor that is emphasized repeatedly in the jurisprudence, and that serves at every stage of the delimitation exercise to direct and constrain the discretion inherent in a tribunal’s tasks, namely, the legal basis of a State’s claim to entitlement to a particular maritime zone.⁷¹
48. The significance of this issue has already been addressed briefly, above, as one of several factors that assist in ensuring that the delimitation is carried out not as an exercise in decision-making *ex aequo et bono*, but within a clear legal framework pertinent to the case at hand. As discussed, it is difficult to imagine how a delimitation could be effected equitably – let alone legally – otherwise than within a framework of legal principles that is directly tied to the very basis upon which

⁶⁸ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 323. But see also Annex 187: *Libya/Malta*, *supra* note 25 at 49, where the dual role of proportionality is discussed. In that case, the Court referred to the operation as a test, but also to “tak[ing] note, in the course of the delimitation process, of the existence of a very marked difference in coastal lengths, and to attribute the appropriate significance to that coastal relationship, without seeking to define it in quantitative terms which are only suited to the *ex post* assessment of relationships of coast to area.” In this case, there is no such “marked difference” in coastal lengths. This is discussed further in Part IV, below. See also Annex 192: Willis, *supra* note 33 at 44-45.

⁶⁹ See Annex 174: *Gulf of Maine*, *supra* Part I, note 3.

⁷⁰ See Annex 174: *Gulf of Maine*, *ibid.* at 386, Dissenting Opinion of Judge Gros.

⁷¹ See Annex 192: Willis, *supra* note 33 at 39-40, 57.

the parties' legal rights are asserted. The Court in *Libya/Malta* underscored the centrality of the legal basis of title to the delimitation process in the following terms:⁷²

That the questions of entitlement and of definition of continental shelf, on the one hand, and of the delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.

49. The importance of legal title, and its predominance as a factor to be given special weight in the delimitation exercise, cannot be overstated. Consideration of the legal basis of entitlement has been found to have direct significance in three contexts: the determination of relevant circumstances; the choice of equitable criteria; and the definition of relevant area.

a) Legal Title Is A Circumstance of Special Relevance

50. While every delimitation is unique, and the circumstances relevant to different cases vary accordingly, the juridical nature and origin of the zone to be delimited is a factor of fundamental significance requiring special consideration. As was stated by the Court in *Libya/Malta* (and as noted above), it serves as the primary constraint on what is theoretically an unlimited array of relevant circumstances and principles:⁷³

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.

(emphasis added)

⁷² Annex 187: *Libya/Malta*, *supra* note 25 at 30. See also Annex 192: Willis, *supra* note 33 at 53.

⁷³ Annex 187: *Libya/Malta*, *supra* note 25 at 40.

51. The significance of legal title was also recognized in the *Gulf of Maine* case, in which the Chamber held that the fact that the object of the delimitation was not just the continental shelf, but a zone that would encompass both seabed and water column, was:⁷⁴

... a special aspect of the case which must be taken into consideration even before proceeding to examine the possible influence of other circumstances on the choice of applicable criteria.

b) Legal Title Affects The Choice Of Equitable Criteria

52. This passage from the *Gulf of Maine* case also notes the intrinsic connection between the nature and origin of title claimed and the choice of the dominant equitable criteria to be applied in a delimitation. Indeed, the cases have consistently demonstrated such a connection. In the *North Sea Cases*, for example, the Court's reasoning proceeded from:⁷⁵

... the most fundamental of all the rules of law relating to the continental shelf ... namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.

53. It was this finding regarding the juridical character of the continental shelf – an extension seaward of land territory over which a State may exercise sovereign rights “by virtue of its sovereignty over the land” – that led to the now-familiar maxim: “The land dominates the sea.”⁷⁶ This in turn justified the central requirement in shelf cases to “examine closely the geographical configuration of the coastlines.”⁷⁷ Similarly, the adoption of the equitable principle of “non-

⁷⁴ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 326; see also Annex 195: Legault & Hankey, *supra* note 64 at 962 : “... The concept of a ‘single maritime boundary’ had a critical influence on the decision of the Chamber.”

⁷⁵ Annex 188: *North Sea Cases*, *supra* note 25 at 22.

⁷⁶ Annex 188: *North Sea Cases*, *supra* note 25 at 51.

⁷⁷ Annex 188: *North Sea Cases*, *supra* note 25.

encroachment” in the *North Sea Cases* arose directly from the Court’s definition of the shelf as the “natural prolongation” of the landmass.⁷⁸

54. So, too, in *Libya/Malta* the juridical status of the zone in question – more specifically, a change in that status resulting from the development of an entitlement to an Exclusive Economic Zone extending 200 nautical miles from shore⁷⁹ – influenced the Court’s adoption of a provisional median line approach. The implications of that change in juridical status, with respect to both the assertion of jurisdiction and the delimitation, were stated clearly by the Court:⁸⁰

It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone. ... The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf. As the Court has observed, the legal basis of that which is to be delimited cannot be other than pertinent to the delimitation ...; the Court is thus unable to accept the Libyan contention that distance from the coast is not a relevant element for the decision of the present case.

55. Although courts and tribunals look beyond geography in the identification of relevant circumstances, it is nonetheless true that geographical factors, where based on coastal configuration or distance, have tended to dominate the selection of equitable criteria in the cases. It is clear from the cases, however, that this dominance resulted, not from any mandatory requirement, but from the nature of the title itself. Thus, “geographic configuration” of the coastlines was essential in the *North Sea Cases*, where the title emanated from those coasts. Similarly, distance became more important in *Libya/Malta*, where the area in dispute was encompassed by the Exclusive Economic Zone, which is defined in customary law by reference to distance from the coast.

⁷⁸ Annex 188: *North Sea Cases*, *supra* note 25 at 53. See also Annex 190: *Anglo-French Award*, *supra* note 27 at 93-94, for an application of the same reasoning in the context of a “cut-off” of a coast by an island belonging to another State.

⁷⁹ Annex 186: *LOS 1982*, *supra* note 4, Art. 57.

⁸⁰ Annex 187: *Libya/Malta*, *supra* note 25 at 33-34.

c) Legal Title Is Critical To Determining The Relevant Area And To Proportionality

56. The legal basis of a State's entitlement to a zone is also critical to one of the most difficult and controversial aspects of maritime delimitation, namely, the definition of the area relevant to the delimitation.⁸¹ The Court in *Tunisia/Libya* noted, applying the finding in the *North Sea Cases*, that the "geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title."⁸² This understanding regarding the basis of legal entitlement to the area in question in that case was the starting point from which the Court went on to conclude:⁸³

The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position. The only areas which can be relevant for the determination of the claims ... are those which can be considered as lying either off the Tunisian or off the Libyan coast. These areas form together the area which is relevant to the decision of the dispute.

57. The legal nature and status of a zone, therefore, will determine the possible seaward limits of a State's claim – the area of potential legal entitlement. As will be shown in Part IV, below, it is the area of overlap between the competing legal entitlements of two States that forms the area of direct relevance to a delimitation.

58. From the foregoing, it is also evident that legal title is central to any analysis of proportionality of coastline to relevant maritime area, whether undertaken as an independent consideration in a delimitation, or as a test of the equitableness of a result.⁸⁴ Any analysis of proportionality obviously depends entirely upon the definition of the relevant coasts and maritime areas, and the relevant maritime areas are, as shown above, defined by reference to the legal entitlement.

⁸¹ See Annex 184: *Charney, supra* note 2 at 241. See also Annex 194: *St-Pierre and Miquelon Award, supra* note 48, Dissenting Opinion of Prosper Weil at 1206-1207.

⁸² See Annex 189: *Tunisia/Libya, supra* note 25 at 61. See also Annex 192: *Willis, supra* note 33 at 39-40.

⁸³ Annex 189: *Tunisia/Libya, supra* note 25 at 61.

⁸⁴ See Annex 187: *Libya/Malta, supra* note 25 at 49.

d) Summary

59. In sum, the legal nature of the zone or of entitlement to the zone is central to the process of equitable delimitation in at least three ways. First, the juridical character and origin of entitlement will assist in determining which other circumstances are truly relevant to the choice of equitable criteria. Second, the nature of the entitlement constitutes a particularly relevant circumstance that may, on its own, motivate the choice of a particular criterion in a given case. Finally, the origin of the entitlement is directly connected to the critical definition of the seaward limits of a State's legal entitlement and, thus, the areas relevant to a delimitation.
60. The legal nature of a zone and the basis of entitlement to it are, of course, not the sole considerations in a delimitation.⁸⁵ Nor does the special relevance attached to the legal character of a zone subject to delimitation preclude, *ipso facto*, the application of criteria employed in the delimitation of other types of zones.⁸⁶ However, the significance of the juridical nature of the zone is such that it affects all aspects of a delimitation, from the identification of relevant circumstances to an assessment of the equitableness of the result. Indeed, it constitutes, in effect, the starting point for the application of the fundamental norm of maritime delimitation in any given case.
61. The application of the fundamental norm to the present case, beginning with the identification of relevant circumstances and proceeding to an assessment of the appropriate criteria and methods to be employed and, ultimately, a consideration

⁸⁵ See, for example, the refusal of the Court in Annex 187: *Libya/Malta*, *ibid.* at 37, to move automatically from recognition of a distance-based entitlement to a mandatory application of equidistance.

⁸⁶ See Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 326: "To note this fact [that a single line was required] does not of course in any way imply that the criteria applied in those [shelf] decisions must *ipso facto* be held inapplicable to the present case; all that is meant is that the fact that the criteria in question were then found equitable and appropriate for the delimitation of the continental shelf does not imply that they must automatically possess the same properties in relation to ... [a single maritime boundary]".

of the equitableness of the result obtained, are dealt with in the following Parts of this Memorial.

Conclusion

62. The conventional law of maritime boundary delimitation, including the *GCCS* and the *LOS 1982*, is of limited utility in this arbitration, primarily because it governs zones that differ significantly from the area to be delimited in this case. The *Terms of Reference* confine the dispute to one concerning portions of the limits of the parties' respective offshore areas as defined in the *Accord Acts*. The *GCCS* deals with different rights, different resources, different uses and different areas of the seabed than those contemplated in the *Accord Acts*. The *LOS 1982* also covers rights of a different legal order than those in dispute in this arbitration. Therefore, it is to the customary law of maritime boundary delimitation, as articulated in the jurisprudence of the ICJ and other tribunals, that the Tribunal must turn to determine the line dividing the respective offshore areas of the parties.
63. The fundamental norm governing maritime boundary delimitation requires the application of equitable principles, taking into account all the relevant circumstances, in order to achieve an equitable result. In applying that norm, the Court and other tribunals have emphasized the critical importance of the legal basis of title, which affects the determination of the relevant circumstances, the choice of equitable criteria, and the definition of the relevant area. The ultimate goal of a maritime boundary delimitation is to achieve an equitable result.

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