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Review of the Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen in 1993

TANAKA Yoshifumi

Introduction

A. The Nature of the Problem

The diversification of maritime space, with the emergence of the concepts of the continental shelf, the fishery zone (FZ) and the exclusive economic zone (EEZ), has raised a new problem in the law of maritime delimitation: What is the relationship between the maritime boundaries for the continental shelf and the EEZ/FZ? In fact, two separate boundaries for these two zones would create a situation in which part of the EEZ belonging to one State overlaps with part of the other State's continental shelf, giving rise to complex problems regarding the exercise of jurisdiction.¹

In order to avoid this difficulty, two new types of maritime boundaries have appeared in the law of maritime delimitation. The first is the single maritime boundary, which delimits the continental shelf and the EEZ/FZ by one and the same line. The second is the coincident maritime boundary, where two separate lines, one for the continental shelf and another for the EEZ/FZ coincide. Although both single and coincident maritime boundaries divide the continental shelf and the EEZ/FZ by one line, conceptually these two types of maritime boundaries should be distinguished. While the former case presents itself when two coastal States agree a priori to establish or to request a third party to draw one single delimitation line for both the continental shelf and for the EEZ/FZ, the latter occurs when the parties request
a third party to draw two lines, one for the continental shelf and the other for the EEZ/FZ, which then coincide.\(^3\)

Where a maritime delimitation is established by an agreement between the States concerned, the question of drawing a single maritime boundary, different boundaries or a coincident maritime boundary depends on this agreement. Furthermore, where two coastal States request a third party, such as the I. C. J. or an arbitral tribunal, to determine the course of a single maritime boundary, the courts are empowered to establish such a single maritime boundary. In fact, single maritime boundaries for continental shelf and EEZ/FZ were established, based on the request of the parties in the *Gulf of Maine*, *the Guinea/Guinea-Bissau*, and the *St. Pierre and Miquelon* cases.\(^3\) The real problem however arises where there is no such agreement and where a third party is asked to determine the course of a maritime boundary with respect not only to the continental shelf but also to the FZ/EEZ. Should these two delimitation lines coincide? If so, what is the law applicable to the determination of such a boundary? This was the problem with which the Court was to wrestle in the *Greenland/Jan Mayen* case. With respect to the law applicable to the continental shelf and the EEZ delimitations, Articles 74 (1) and 83 (1) of the UN Convention on the Law of the Sea state identical rules: “The delimitation of the exclusive economic zone [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.” Nevertheless, even though the same law is applicable to both, the two boundaries resulting from its application do not necessarily coincide. Considering that the relevant circumstances may be different for the seabed and superjacent waters, it is conceivable that the line drawn for a continental shelf and an EEZ would be different.\(^4\) In addition, it is worth noting that similar problems could arise even if only the delimitation of an EEZ is at issue.\(^5\) The same problem arises in customary law.
The Greenland/Jan Mayen dispute, which shall be examined in this paper, is the first case in which the full Court was to deal with the problem of whether the two delimitation lines for the continental shelf and the EEZ/FZ should coincide where there is no agreement for a single maritime boundary. This paper thus attempts to examine the problem of the coincident maritime boundary for the continental shelf and for the EEZ/FZ by analysing the Greenland/Jan Mayen case of 1993. After briefly mentioning the facts, two principal issues shall be considered: the law applicable to the coincident maritime delimitation (I), and the process of establishing such a maritime boundary in the present case (II). Based on these considerations, the significance and problems of the present case will be analysed from the viewpoints of the predictability and the flexibility of the law of maritime delimitation (III). Finally, a brief summary and conclusion will be attempted.

B. The Facts

Greenland is a large island which belongs to Denmark. Its total population is approximately 55,000. The Norwegian island of Jan Mayen, about 53 km long and with a maximum width of 16 km, has no settled population and is located approximately 550 n.m. west of northern Norway and 300 n.m. north-east of Iceland. The distance between Jan Mayen and the east coast of Greenland is some 250 n.m. Hence, were a 200 n.m. FZ to be established (as it was claimed) around Jan Mayen, Greenland and Iceland, there would be overlaps of the maritime zones of Greenland and Jan Mayen, and between Jan Mayen and Iceland. As for the latter situation, on 28 May 1980, Norway signed an Agreement with Iceland accepting Iceland's 200 n.m. EEZ. Furthermore, following the report of a conciliation commission in 1980, Iceland and Norway agreed that the economic/fishery zone boundary established by the 1980 Agreement was also applicable to the continental shelf boundary between these two States. Regarding Jan Mayen and
Greenland, however, the problem of the overlapping maritime zones remained to be solved.

On 17 December 1976, Denmark enacted legislation authorising the establishment of a 200-miles FZ measured from the relevant baselines, brought into force on 1 January 1977. Under this legislation, the Danish FZ only extended as far as 67°N off the east coast of Greenland which is opposite to Jan Mayen. Subsequently, by an Executive Order of 14 May 1980, effective from 1 June 1980, Denmark extended its 200 miles FZ to the east coast of Greenland north of 67°N. But fishery jurisdiction would not be exercised beyond the median line. On the other hand, by a Royal Decree of 23 May 1980, put into force on 29 May 1980, Norway established a 200 miles FZ around Jan Mayen. This Decree provided, however, that the zone should not extend beyond the median line between Jan Mayen and Greenland. At this stage, therefore, the median line was the \textit{de facto} delimitation line for the FZs of Greenland and Jan Mayen. On 31 August 1981, however, Danish jurisdiction was extended to the full 200 miles. Thus the problem of overlap between the FZs of Greenland and Jan Mayen came into existence.

On 16 August 1988, because of the lack of progress in the negotiations, Denmark instituted proceedings against Norway before the I.C.J. Unlike the preceding cases regarding continental shelf and single maritime boundary delimitations, the Application in the present case relied, for the first time, on Article 36, paragraph 2, of the Statute of the Court. In addition, both Parties had ratified the Geneva Convention on the Continental Shelf. In its application, Denmark asked the Court to declare and adjudge that: (1) Greenland was entitled to a full 200-mile fishery zone and continental shelf area \textit{vis-à-vis} the island of Jan Mayen; and, consequently, (2) to draw a single line of delimitation of the fishery zone and continental shelf area of Greenland between Greenland and Jan Mayen at a distance of 200 mile measured from Greenland’s baseline. Norway, on the other hand, submitted that the median line constituted the boundary for both the continental shelf and for the fishery zones in the region between Jan Mayen and
Greenland. In Norway’s view, the two lines would coincide but conceptually remain distinct. The Parties thus differed on the question of whether one delimitation line or two were required. In this respect, the situation is quite different from the Gulf of Maine, the Guinea/Guinea-Bissau, and the St. Pierre and Miquelon cases, where a single maritime boundary was requested.

The Court rejected the Norwegian argument according to which a delimitation line had already been established by the median line. It also rejected the request of Denmark to draw a single maritime boundary, since there was no agreement between the Parties to that effect. The Court thus turned to the examination of the law applicable to the continental shelf and FZ delimitations, respectively.

I. The Law Applicable to the Maritime Delimitation

A. The Law Applicable to the Continental Shelf

The first point to bear in mind is that, since there was no joint request for a single maritime boundary, the Geneva Convention on the Continental Shelf, which both Parties had ratified, was applicable to the delimitation of the continental shelf between Greenland and Jan Mayen. In this respect, the decision in the Greenland/Jan Mayen case differs from the Gulf of Maine and the St. Pierre and Miquelon judgments, which both refused the applicability of the 1958 Convention ratified by the Parties. Yet the Court did not apply Article 6 of that Convention solely as treaty law. In the Court’s view, “the fact that it is the 1958 Convention which applies to the continental shelf delimitation in this case does not mean that Article 6 thereof can be interpreted and applied either without reference to customary law on the subject, or wholly independently of the fact that a fishery zone boundary is also in question in these waters.” Quoting a passage of the 1977 award of an Anglo-French Court of Arbitration, the Court further
noted that: "If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference-- at any rate in regard to delimitation between opposite coasts-- between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles."

Since Article 6 of the 1958 Convention is applicable to a continental shelf delimitation between opposite coasts, it is appropriate to begin by taking provisionally the median line between the territorial sea baseline, and then to inquire whether “special circumstances” require “another boundary line.” Based on the Gulf of Maine and the Libya/Malta cases, the Court ruled that the process is the same when customary law is applied to a continental shelf delimitation. Consequently, the Court concluded that: “Thus, in respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord with precedents to begin with the median line as a provisional line and then to ask whether ‘special circumstances’ require any adjustment or shifting of the line.” Thus, at least where delimitation between opposite coasts is concerned, the Court assimilated Article 6 of the relevant Geneva Convention with customary law based on equitable principles (first assimilation). Since the Court had rejected Article 6 as customary law since the North Sea Continental Shelf cases, this represents a turning point in the case-law.

However, the Court’s reasoning cannot escape criticism. The first problem is whether it is possible to assimilate Article 6 of the Geneva Convention on the Continental Shelf with customary law merely on the basis of the Gulf of Maine and the Libya/Malta cases. It is true that these judgments did use the equidistant line as a provisional one. Nevertheless, they rejected explicitly the compulsory character of the equidistance method even as a provisional step. Accordingly, it is difficult to rely on only one aspect
of these judgments as a legal basis for accepting the equidistance method in customary law. Furthermore, since the object of the Gulf of Maine case was the drawing of a single maritime boundary, it is irrelevant to quote it in the context of continental shelf delimitation. Moreover, the Court's understanding of this assimilation is based on the interpretation of "equidistance-special circumstances" as a single combined rule defined in the Anglo-French continental shelf award of 1977. If the Court adopts this interpretation and modifies its former view, it should explain why. It failed to do so, however, and merely relied on the award of 1977. In addition, neither State practice nor opinio juris regarding the equidistance method was examined by the Court. Since it had been emphasising the importance of State practice and opinio juris as two elements of customary law, the Court should have examined them regarding the continental shelf delimitation.

B. The Law Applicable to the FZ

As the Court observed, no international tribunal has ever rendered a decision exclusively concerning an FZ. The Court, however, took note that the Parties had no objection to the boundary of that zone being determined by the law governing the delimitation of the EEZ, that is to say, by customary law. Based on the agreement of the Parties, the Court equated the customary law applicable to the FZ with that for the EEZ (second assimilation). Subsequently, the Court referred to the words "an equitable solution" in Article 74, paragraph 1, and Article 83, paragraph 1 of the UN Convention on the Law of the Sea and said: "That statement of 'an equitable solution' as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones." This is the first step towards assimilation of the law applicable to the continental shelf to the law applicable to the FZ at the customary law level. Furthermore, based on the delimitation process of the
*Gulf of Maine* and the *Libya/Malta* cases, the Court ruled that “both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.” Moreover, quoting the *Anglo-French* arbitral award, the Court pointed out that “special circumstances” in the Geneva Convention and "relevant circumstances" in customary law play the same role, which is to bring about an equitable result. Consequently, an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts regarding a delimitation of a continental shelf, of a fishery zone, or an all-purpose single boundary. The Court, thus, assimilated the law of continental shelf delimitation with that of the FZ at the customary law level (third assimilation). This is significant for unifying the law of maritime delimitation under the triple rule of “agreement-equidistance-special/relevant circumstances.”

It should be noted, however, that the Court’s reasoning regarding the law applicable to the FZ raises several questions. In order to achieve the second and third assimilations, the Court equated the customary law for FZ delimitation with that for EEZ delimitation on the mere basis of the agreement of the Parties and without examining State practice and *opinio juris*. The same criticism can be made regarding the EEZ delimitation. The Court assimilated the customary law of the EEZ/FZ with that of the continental shelf only on the basis of the *Gulf of Maine* and the *Libya/Malta* cases, neither of which, however, would seem directly relevant. The *Gulf of Maine* case was concerned with a single maritime boundary, and the *Libya/Malta* case related to a continental shelf boundary. It is therefore impossible to justify this third assimilation based on the *Gulf of Maine* and *Libya/Malta* cases.

In short, in this case, the Court attempted to achieve assimilation at three levels: first, assimilation of Article 6 of the Convention on the Continental Shelf to customary law; second, assimilation of the law
applicable to the EEZ to that on the FZ in customary law; and third, assimilation of the customary law for the continental shelf to that for the EEZ/FZ. The essential ideas of the Court are the assimilation of customary and treaty laws, and assimilation between the law on the sea-bed and the law applicable to the water column. Even if the same law can be applied, however, this does not mean that the two delimitation lines will necessarily coincide. That depends on the existence of special or relevant circumstances.

II. The Establishment of the Coincident Maritime Boundary between the Continental Shelf and the FZ

A. Considerations of the Special/Relevant Circumstances

1. Special/Relevant Circumstances Taken into Account
   (a) Proportionality: Regarding proportionality, the view of the two Parties presented a sharp contrast. Contending for a 200 n.m. maritime zone, Denmark requested the Court to take into account the ratio of the two relevant coastal lengths, which is 9.2 to 1 in favor of Greenland. For Denmark, proportionality should play a double role: as relevant circumstances in the adoption of an appropriate method and as a test of equity. Norway, however, rejected this view by advocating a median line. Considering the disparity or disproportion between the lengths of the relevant coasts, the Court held that “the differences in length of the respective coasts of the Parties are so significant that this feature must be taken into consideration during the delimitation operation.” It thus concluded that the disparity between the lengths of the coasts constituted, for a continental shelf delimitation, a “special circumstance” under Article 6 of the Geneva Convention on the Continental Shelf and, for a delimitation of an FZ, a “relevant circumstance” under customary law. In the light of the consideration of proportionality, the Court was to adjust the median line in the two northern zones in such a way as to effect a delimitation closer to the
coast of Jan Mayen.

Compared with precedent cases concerning continental shelf/single maritime boundary delimitations, the features of the present case regarding proportionality can be summarised as follows. First, in establishing the coincident maritime boundary, the Court took proportionality into account during the delimitation process. In this respect, the Court adopted the same position as in the Libya/Malta and the Gulf of Maine cases in which the Court took proportionality into account ex ante during the delimitation process. Second, as with the Gulf of Maine case, proportionality was considered as the common element for correcting a median line for both the continental shelf and for the FZ. It is conceivable that proportionality as the common element could contribute to making two delimitation lines coincide by shifting the median line provisionally drawn in the same direction. The third point to bear in mind is the method of selecting the relevant coasts. Considering proportionality, it is necessary to define the relevant coasts and areas and to calculate their lengths and surfaces. In reality, however, the relevant coasts are difficult to define objectively. In the present case, combining proportionality with the equidistance method, the relevant coasts were defined objectively by the extreme points which generate the equidistance line.

On the other hand, it is undeniable that there remain, at least, two problems. First, the Court took proportionality into account in the delimitation process, since the disparity of the lengths is "so significant". Yet, the term "so significant" is so ambiguous as to be devoid of objective content. The Court based its decision on the Gulf of Maine case, which considered a ratio of 1 to 1.38 as sufficient to justify a "correction" of a median-line delimitation. This cannot be an objective criterion to decide the disparity of coastal lengths. Second, according to figures given by Denmark, the proportion of the lengths of the coastal fronts of Greenland and Jan Mayen, defined as straight lines between points G and H, points E and F, was approximately 9 to 1. This was not disputed by Norway. In
considering proportionality, the Court divided zone 2 between points N and O in such a way as to give Norway two thirds of the distance I-K, and zone 3 was divided by a line drawn from O to A. Yet it is difficult to understand how the ratio of the coastal lengths is reflected in the division of zones 2 and 3. It is true, as the Court mentioned, that “taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen.” Even considering this point, the extent of the adjustment made in the present case is very subjective.

In short, this judgment reveals the double subjectivity of the theory of proportionality. First, the question whether there was a disproportionality of the respective coastlines was decided by the judges without objective criteria. Second, the extent of the adjustment of the provisional line was also subjective, and the relation between the disparity of the coastlines and the extent of maritime spaces remained obscure.

(b) Equitable access to fisheries: Both Parties emphasised the importance of their respective interests in fishing the capelin. The Court thus examined, regarding the FZ boundary, whether any shifting or adjustment of the median line would be required to ensure equitable access to the capelin fishery resources. In the Court’s view, the median line would have been too far to the west for Denmark to be assured of an equitable access to the capelin stock, so that the median line had to be adjusted or shifted eastwards. Accordingly, the southernmost zone 1, which corresponds essentially to the principal fishing area, was divided into two parts of equal surface, so as to allow the two Parties to enjoy equitable access. Thus, the full Court, for the first time in case-law, considered fishery resources at the stage of delimitation. Before the present case, in both continental shelf delimitation and in single maritime boundary delimitation, the consideration of economic factors, including fishing, had been excluded. By considering fishing during the delimitation process, the present judgment presents a new direction, that is giving economic factors a more important role.
Nevertheless, the logic of the Court creates at least two problems. The first question is what is meant by “equitable” access. In fact, it is questionable whether the area’s equal division guarantees equitable “access.” The former does not necessarily entail the latter. Second, the division into two equal parts is nothing but so-called “distributive justice,” which had been rejected by the Court ever since the North Sea Continental Shelf cases. In this respect, the Court’s approach in the present case shows a clear contrast with the earlier cases.

2. Special/Relevant Circumstances Rejected

(a) Presence of ice: The problem of the presence of ice is at issue in relation to access to marine resources. The Parties agreed that a 40 per cent cover of drift ice renders ordinary navigation and all fishing activity impossible. Denmark thus argued that the median line proposed by Norway would in effect leave Denmark only 10 per cent of the waters available for fishing. Yet, when the ice cover is most extensive, there is no capelin nor any other fishable species. The Court thus considered that the presence of ice does not materially affect access to migratory fishery resources in the southern part of the area of overlapping claims. This implies that, where the presence of ice does affect the access to marine resources, this factor should be taken into account as a special/relevant circumstance.

(b) Population and socio-economic factors: Denmark had requested the Court to consider the differences between Greenland and Jan Mayen in regard to population and socio-economic factors. In the Court’s view, the question to be examined was whether the size and special character of Jan Mayen’s population and the absence of locally based fishing would affect the delimitation. The Court answered negatively, since “there is no reason to consider either the limited nature of the population of Jan Mayen or socio-economic factors as circumstances to be taken into account.”

(c) Security: Norway argued that “the drawing of a boundary closer to one State than to another would imply an inequitable displacement of the
possibility of the former State to protect interests which require protection. The Court discarded Norway's argument since, the boundary to be established was not so near to Jan Mayen's coast as to create a security problem. This does not mean, however, that the Court rejected security considerations as special/relevant circumstances. On the contrary, basing itself on the dictum of the Libya/Malta case, it accepted that security considerations were relevant to the delimitation of all maritime zones. Yet the Court did not indicate at all how to take them into account and merely referred to the Libya/Malta case.

(d) Conduct of the Parties: Denmark contended that the conduct of the Parties was a highly relevant factor in the choice of the appropriate method of delimitation, where such conduct had indicated some particular method as being likely to produce an equitable result. The Court, however, rejected the Danish argument, since the conduct of the Parties will in many cases have no influence on such a delimitation.

* * *

Having concluded that the provisional median line for both the continental shelf and for the FZ (points A and D) must be adjusted or shifted eastwards so as to attribute a larger area of maritime space to Denmark, the Court proceeded to determine the precise position of the delimitation line. In this connection, the Court revealed the necessity of a coincidence of two boundaries: "[T]he delimitation now to be described, whereby the position of the delimitation lines for the two categories of maritime spaces is identical, constitutes, in the circumstances of this case, a proper application both of the law applicable to the continental shelf and of that applicable to the fishery zones." In the light of the above considerations, the Court divided the area into three zones. The southernmost sector, zone 1, which corresponds essentially to the principal fishing area, was divided into two parts of equal surface, so as to allow the two Parties to enjoy equitable access to the fishing resources. In the two northern areas, zones 2 and 3, the special/relevant circumstances to be considered were a marked disparity in
the length of coastlines. Taking into account the equal division of zone 1, the Court then divided zone 2 by a line between point N and point O corresponding to two-thirds of the line I-K. Finally, zone 3 was divided between points O and A, which is the intersection of the median line and the 200 mile limit measured from Greenland. Thus, despite the lack of agreement to establish a single maritime boundary, the Court drew, for the first time, a coincident maritime boundary for the continental shelf and the FZ. Nevertheless, the coincident maritime boundary established is problematic in at least two aspects.

B. Problems with the Coincident Maritime Boundary Established

1. Equitable Nature of the Coincident Maritime Boundary

The first problem is the equitable nature of the coincident maritime boundary. The Court failed to explain convincingly why the two delimitation lines coincided. It merely pointed out that the assimilation of the two delimitation lines constituted, in the circumstances of this case, a proper application of the law applicable to both the continental shelf and the FZ. At least theoretically, two different lines were conceivable, particularly in the southernmost area (zone 1), where the equitable access to fishery resources was at the core of the issue, since the access in question cannot be relevant to the continental shelf delimitation. The Court may have taken into account the fact that, despite different legal bases, both Parties had requested a coincident line. Nevertheless, it is important to underline the lack of agreement for a single maritime boundary, for if such an agreement had existed, the process followed by the Court in this case would not have been fully justified. In fact, if there had been an agreement for drawing a single maritime boundary, the weight of the issue of access to fishery resources would have been reduced by the application of neutral criteria based on purely geographical factors. In view of the absence of agreement between the Parties to establish a single maritime boundary, the Court
Map
Source: I. C. J. Reports 1993, p. 80 (some explanations added).
should have discussed in detail the reasons why a coincident maritime boundary was equitable.

2. Difference of Special/Relevant Circumstances for the Continental Shelf and the FZ

Second, the most important point to be discussed is the difficulty of making the delimitation line for the continental shelf coincide with that for the FZ if the special/relevant circumstances are different for the two zones. In the present case, the only special/relevant circumstance concerning the continental shelf was the disparity of the length of coastlines. On the other hand, relevant circumstances for the fishery zones were the disproportionality of these lines and equitable access. The problem lies in interpreting the relation between the disproportionality of the coastlines as a common special/relevant circumstance and the equitable access to fishery resources as a relevant circumstance for fishery zones only. Nevertheless, the Court divided zone 1 into two equal parts in order to achieve equitable access to the fishery resources of that zone, without considering the above-mentioned question. The only explanation may be that a specific adjustment to satisfy fishery considerations was made so that this shift would coincide with the consideration of proportionality. Moreover, the difference in the special/relevant circumstances for the continental shelf and the FZ delimitations presents a difficult theoretical problem, if the directions of the shift for the continental shelf and the FZ are different. If the special/relevant circumstances for the continental shelf were to pull in one direction and those for the FZ, in the other, would it be possible to establish a coincident maritime boundary? In the present case, the special/relevant circumstances for both the continental shelf delimitation and the FZ delimitation required, by sheer chance, an eastward adjustment of the median line. Yet this cannot be true in all cases. Therefore, the solution adopted by the Court in the present case cannot be universally applicable.
III. Analysis: Predictability and Flexibility of the Law of Maritime Delimitation

So far two of the principal issues of the Greenland/Jan Mayen case have been studied. Based on these considerations, it is now necessary to analyse the significance and problems of this case from the viewpoints of predictability and flexibility, which constitute essential requirements of the law of maritime delimitation.\(^6\)

A. Requirement of Predictability

Regarding the requirement of predictability, the central issue to be examined is the applicability of the equidistance method, which ensures predictability of the law of maritime delimitation. On this point, there are two contrasting approaches in case-law.

1. Result-Oriented Equity Approach

Since the North Sea Continental Shelf cases, it is well known that the compulsory character of the equidistance method has been rejected in the case-law on maritime delimitation. The rejection of the equidistance method is closely linked to the question of how to consider the concept of equity in the law of maritime delimitation. On this point the Court, in the Tunisia/Libya case, ruled that “[t]he result of the application of equitable principles must be equitable. (...) It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.”\(^6\) Because of the emphasis on the result, this approach can be called “result-oriented equity.” According to this approach, equitable principles are to be directly applied to the continental shelf delimitation. It follows that equitable principles are broken down into a complex of historical and geographical circumstances in individual situations. All
that remains is an "equitable result" in such specific situations. In addition, equitable principles are applied as a starting point for seeking, *ex ante*, an equitable result based on the balance of all the relevant circumstances of each case. Therefore, in the result-oriented equity approach, no method, including equidistance, can be considered as being compulsory in character. This result-oriented equity approach appears to be echoed in the single-maritime-boundary cases. In fact, in the *Gulf of Maine* case, the Chamber refused any systematic definition of equitable criteria because of their highly variable adaptability to different concrete situations. According to the Chamber, the law defines neither the equitable criteria nor the practical method applicable, simply advancing the idea of "an equitable result."  

Nevertheless, with respect to result-oriented equity approach, three problems should be noted. The first and the most important is its excessive subjectivity. Because of its low level of normativity, the result-oriented equity approach runs the risk of turning into legal impressionism. This makes the distinction between a decision based on the equitable principle and a decision *ex aequo et bono* highly delicate and, perhaps, artificial. It is true that the Court emphasised this distinction. Yet the essential problem is what exactly does constitute the difference between a decision according to equitable principles and a decision *ex aequo et bono*. The Court's subjective appreciation of equity would lead not only to a fragmentation of the law of maritime delimitation, but also equate the delimitation with a decision *ex aequo et bono*. The second problem is unpredictability. According to the result-oriented equity approach, it is a specific factor in any given individual situation which defines the equitable result. Consequently, the appreciation of equity is governed by different factors in any given case, which makes it difficult to form predictable rules of maritime delimitation. This is contrary to an essential requirement of the law: certainty and predictability. As an essential condition, the law of maritime delimitation should have a degree of predictability beyond the reliance on the particular circumstances of each case. Over-individualisation prevents this by undermining
certainty and predictability. On this point, it is noteworthy that, in the *Libya/Malta* case, the full Court emphasised "consistency and a degree of predictability." Third, the essence of the result-oriented approach, *i.e.* what "the result of application of equitable principles must be equitable", is nothing but a truism. As Judge Oda stated in the *Tunisia/Libya* case, it simply suggests "the principle of non-principle." In fact, the very point disputed between the Parties is the concrete method to be applied for maritime delimitations. Yet, according to the result-oriented equity approach, such a concrete method is considered to be outside the domain of law. In short, because of these three problems, the result-oriented equity approach reduces the normative density of the law of maritime delimitation to a minimum. Afterwards, however, the Court's approach was to change into that of corrective equity in the *Greenland/Jan Mayen* case.

2. Corrective-Equity Approach

In the *Greenland/Jan Mayen* case relating to maritime delimitation of opposite coasts, the Court put forward the two-phase method as *customary law* by beginning with the equidistant (median) line as a provisional one for both the continental shelf and the EEZ/FZ delimitations and then shift the median line next. This marks a change in the case-law. The two-phase method used in the *Greenland/Jan Mayen* case appears to be based on an idea of equitable principles different from result-oriented equity: the corrective-equity approach, according to which equity is resorted to at a second stage, in order to correct or mitigate any inappropriate results brought about by resort to the rule of law. Applying a predictable method, *i.e.* equidistance at the first stage, the corrective-equity approach has a certain degree of predictability since it supports and completes the rule of law by mitigating inappropriate results. In other words, equity is applied only if the equidistant line provisionally drawn will cause inappropriate results. To this extent, the corrective-equity approach makes it possible to reduce the subjectivity and unpredictability of equitable principles. The problem is,
however, on what legal grounds an equidistant line should be drawn in the first place. The Court failed to examine this issue. The issue must therefore be considered from other viewpoints: the relation between the legal title and the applicable method.

First, we shall examine the legal title over the continental shelf and the FZ/EEZ, respectively. With respect to the continental shelf, Article 76 (1) of the UN Convention on the Law of the Sea mentions two criteria: the natural prolongation of land territory, and the distance of 200 miles from the baselines of the territorial sea. The former is the traditional legal title recognised in the North Sea Continental Shelf cases, while the latter is a new title, which appears in the UN Convention. At present, as had been ruled in the Libya/Malta case, it is conceivable that the distance criterion has become customary law. On the other hand, regarding the EEZ, the legal title can be considered to vest in the distance of 200 miles from the baseline of the territorial sea (Article 57 of the UN Convention on the Law of the Sea), which has also become customary law, as asserted by the Court in the Libya/Malta case. Therefore, at the present stage, it is clear that the distance principle constitutes the common legal title for both the continental shelf and the EEZ/FZ within 200 miles.

The next question is the relation between legal title and a delimitation method. On this point, it is worth noting the view expressed by the Court in the Libya/Malta case. The full Court emphasised the link between legal title and the delimitation rule by saying that: “The criterion is linked with the law relating to a State’s legal title to the continental shelf. (...) It therefore seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in a manner consistent with the concepts underlying the attribution of legal title.” Although the Libya/Malta case relates solely to a continental shelf delimitation, the same logic is applicable to the FZ/EEZ. Therefore, according to the logic followed by the Court itself, the delimitation method should also reflect the distance principle as legal title.
Equidistance is the only method which does so. Considering that the legal title over the overlapping areas depends on the distance from the coasts, it is appropriate to divide these areas by a method based on distance. Thus, where a delimitation method is linked with legal title, the equidistance method must be applied during the first phase of the drawing of both the continental shelf and the FZ/EEZ delimitation lines.

Once the base-points are fixed, the delimitation line is automatically decided. The equidistance method thus is capable of ensuring predictability in its true sense. The application of the equidistance method as customary law does not, however, consecrate the equidistant line as an end product. Since it yields a provisional line to be corrected, its equitable character needs to be examined next. The requirement of flexibility for considering special/relevant circumstances thus comes into play.

B. Requirement of Flexibility

1. The Identification of Special/Relevant Circumstances

With respect to special/relevant circumstances, two problems should be noted. The first issue is the identification of special/relevant circumstances. It is possible to identify two hypotheses regarding this question. Concerning the first hypothesis, Judge Oda, in the present case, took the following view: "In my concept of equity, it is not merely the simple disparity of opposite coastlines which must be taken into account but also disparity of geographical (natural or socio-economic) situations, for example, population, socio-economic activity, existence of communities behind the coastline and the distance of an uninhabited island from the nearest community of the mainland or main territory." This view appears to parallel the dictum of 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 (...)." Yet, it should be noted that, in 1969, the Court was addressing States involved in a
negotiation process. If the dictum of the Court is relevant for negotiations, it is not for judgments establishing the delimitation line. In the latter, such an enlarged concept of relevant circumstances carries the risk of bringing the judgment close to a conciliation procedure on account of an anarchic proliferation of special/relevant circumstances.\footnote{22}

Under a second hypothesis, it is necessary to limit the extent of the special/relevant circumstances. In this respect, one should note the Court's view expressed in the Libya/Malta case: “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).\footnote{23} In other words, in the Court's view, certain factors can be regarded as relevant circumstances in so far as they are pertinent to the establishment of the maritime space in question. The same would be true for the EEZ/FZ. In the present case, while accepting that proportionality, access to fishing resources, presence of ice, and security could be relevant circumstances, the Court rejected population, socio-economic factors and the conduct of the Parties. Its view in the present case is thus narrower than the enlarged concept of special/relevant circumstances. Yet it remains true that the Court failed to discuss the criteria for selecting special/relevant circumstances.\footnote{24}

2. Balancing Special/Relevant Circumstances

The second problem to be examined is, where there are more than two special/relevant circumstances, how are they to be balanced? This question is particularly serious when establishing coincident maritime boundaries. In the Greenland/Jan Mayen case, the Court took into account two factors in the delimitation process, i.e. proportionality and equitable access to fishing resources. Nevertheless, it is unclear how the Court saw the relation
between these two factors.

Furthermore, where the special/relevant circumstances of the continental shelf and the EEZ/FZ are so different as to pull the equidistance line provisionally drawn in opposite directions, how is it possible to balance these two types of factors? The diversity of factors makes it difficult to bring about a convergence of the lines for each zone. Here a dilemma regarding coincident maritime boundaries does arise: the necessity of considering diverse factors for achieving equitable solutions, and the need to make delimitation lines converge. In reality, it is difficult to draw a coincident maritime boundary without deciding which particular circumstance ought to predominate. In short, the problems both of the identification and of the balancing special/relevant circumstances remain unclear. On this point, there is a danger that the Court’s discretion will arbitrarily extend, not only to the identification of relevant circumstances, but also to their proper balancing.

Conclusion

The Greenland/Jan Mayen case is a landmark in the development of the case-law on maritime boundaries in two aspects: the unification of the law applicable to maritime delimitations and the establishment of coincident maritime boundaries. (1) With respect to the first point, the I.C.J., for the first time, equated Article 6 of the Geneva Convention on the Continental Shelf with customary law. Furthermore, it assimilated the law applicable to the continental shelf to that governing the EEZ/FZ. Consequently, as far as opposite coasts are concerned, the same unified customary law is applicable to both the continental shelf and the FZ/EEZ delimitations: agreement-equidistance-relevant circumstances. However, the reasoning of the Court is problematical, as it proceeds from neither State practice nor opinio juris, merely basing itself on irrelevant precedents. (2) Regarding the second point, despite the lack of an agreement to establish a single maritime boundary, the Court, for the first time, established a coincident maritime
boundary for the continental shelf and the FZ. Yet, considering that the special/relevant circumstances for the continental shelf and for the FZ delimitation do not necessarily require adjustment in the same direction, it is questionable whether the Court’s approach in the present case is of universal application.

Furthermore, with respect to the predictability and flexibility of the law of maritime delimitation, two points should be noted. (1) Regarding predictability, the change of the I.C.J. from a result-oriented equity approach to a corrective-equity approach should be noted. This shift makes it possible to reduce the subjectivism and unpredictability of the result-oriented equity approach by applying the equidistance method at the first stage. (2) With respect to flexibility, i.e. the consideration of special/relevant circumstances, two problems arise: the identification of the special/relevant circumstances, and the proper balance between them. To resolve them, it is necessary to clarify the concept of special/relevant circumstances, which can be done only by the accumulation of case-law and State practice.

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2 If a boundary is established by agreement between the Parties, the distinction between a single and a coincident maritime boundary becomes artificial since, once the coincident line is agreed on, it is a single line. Thus it is only where a third party has been asked to draw independent boundaries but finds it possible to make them coincide, then a coincident maritime boundary can come into existence.

3 In this sense, another important problem arises: what is the law applicable to the single maritime boundary? Regarding the analysis of the single maritime boundary in general including this question, see Ode, S., “Delimitation of a Single Maritime Boundary: The Contribution of


It is necessary to emphasise that the concept of the EEZ comprises the seabed, the superjacent waters, and the air space above the water. This is clear under Article 56 (1) and Article 58 (1) of the UN Convention on the Law of the Sea. Moreover, it should be pointed out that where the limit of the continental shelf extends beyond 200 miles (Article 76 (4)-(7)), the delimitations for the continental shelf and for the EEZ are automatically different.


12 Ibid., paragraph 2 of the Decree.


15 Ibid., p. 43, para. 9. See also Counter-Memorial submitted by Norway, pp. 3-4, para. 11-13.


17 Ibid., p. 57, para. 43. See also the separate opinion of Judge Shahabuddeen, ibid., p. 200.

18 It should be noted that the sea area in dispute was not the “continental shelf” within the meaning of Article 1 of the Geneva Convention on the Continental Shelf based on the 200 meters isobath and a possibility of the exploitation of natural resources. The contested area between Greenland and Jan Mayen is the continental shelf referred to in Article 76 of the 1982 United Nations Convention on the Law of the Sea or in the customary international law which may now be reflected in that Convention defined mainly by the distance of 200 miles. In this respect, the definition of the continental shelf in Article 1 of the Geneva Convention in question, which had been by itself considered as a codification of customary law, was replaced by subsequent customary law.

Separate opinion of Judge Oda in the Greenland/Jan Mayen case, ibid., pp. 105-106, para. 61.; see also ibid., p. 99, para. 38.

19 Judgment, ibid., p. 58, para. 46.

20 Ibid.

21 Ibid., p. 60, para. 49.

22 Ibid., p. 60, para. 50.

23 Ibid., p. 61, para. 51.

24 In the Gulf of Maine case, the Chamber began its consideration of the
second sector of delimitation by starting from the median line. I.C.J. Reports 1984, p. 334, para. 216. In the Libya/Malta case, the Court, as a first step, drew a median line in view of the existing opposite-coasts situation. I.C.J. Reports 1985, p. 47, para. 62.


The North Sea Continental Shelf cases, I.C.J. Reports 1969, pp. 42-44, para. 73-77.; the Libya/Malta case, p. 29, para. 27.


Ibid., p. 59, para. 48.

Ibid., p. 62, para. 53.

Ibid., p. 62, para. 56.

Ibid.

Chirchill, op. cit. note 6, p. 17.


Regarding Norway’s criticism against proportionality considerations, see Brownlie, Oral Pleadings, CR 93/11, p. 44.; Weil, Oral Pleadings, CR 93/9, pp. 8-31.


Ibid., pp. 68-69, para. 68.

Ibid.

On the other hand, the Chamber reaffirmed that proportionality does not in itself constitute either a criterion serving as a direct basis for a delimitation or method that can be used to implement such a delimitation. The Gulf of Maine case, I.C.J. Reports 1984, p. 323, para. 185. The Libya/Malta case, I.C.J. Reports 1985, p. 50, para. 68. See also p. 52, para. 73. On the contrary, in the Tunisia/ Libya case, the I.C.J. applied proportionality as a test of the equitableness. The same is true for three arbitral awards, i.e., the Anglo-French Continental Shelf, the Guinea/Guinea-Bissau and the St. Pierre and Miquelon cases.

Ibid. See also the Gulf of Maine case, I.C.J. Reports 1984, p. 336, para. 221-222.

This is not a problem only in the present case. In the Libya/Malta case too, the criterion of the Court was unclear. The Libya/Malta case, I.C.J. Reports 1985, p. 50, para. 68.


Regarding the extent of the shift of the median line based on
proportionality, the view of the judges presented a wide contrast. On the one hand, Judge Aguiar considered that Greenland should have received a larger portion of the disputed area. Declaration of Judge Aguiar Mawdsley, *ibid.*, p. 86. Further more, based on his own calculations, Mr. Fischer, Judge *ad hoc* appointed by Denmark, contested that the ratio of the maritime space between Greenland and Jan Mayen (3 to 1) differed greatly from the ratio of the relevant coastlines (9 to 1). Dissenting opinion of judge *ad hoc* Fischer, *ibid.*, p. 309, para. 14. On the contrary, Judge Schwebel was negative concerning the role to be played by proportionality, since, given the vast differences in the coastal-length-proportionate effect, relatively minute islands would have no continental shelves or fishing zones at all. Separate opinion of Judge Schwebel, *ibid.*, p. 125.


"The *Greenland/Jan Mayen* case, I.C.J. Reports 1993, p. 70, para. 73.

"*Ibid.*, p. 72, para. 76.


"The *North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 22, para. 18.; The same is true in the *Tunisia/ Libya* and in the *Libya/Malta* cases. The *Tunisia/ Libya* case, I.C.J. Reports 1982, p. 60, para. 71.; The *Libya/ Malta* case, I.C.J. Reports 1985, p. 40, para. 46. Yet, in the present case, the Court affirmed the view expressed in the *North Sea Continental Shelf* cases. The *Greenland/Jan Mayen* case, I.C.J. Reports 1993, pp. 66-67, para. 64.

"See separate opinion of Judge Schwebel in the present case. *Ibid.*, p. 120. On the other hand, it could be said that the consideration of proportionality itself had already introduced the idea of the sharing of maritime zones. In fact, as Thirlway points out, the very idea of rations necessarily entails that of


52 The *Greenland/Jan Mayen* case, I.C.J. Reports 1993, p. 73, para. 78.


56 The *Greenland/Jan Mayen* case, pp. 74-75, para. 81.


60 I.C.J. Reports 1993, p. 77, para. 86.

61 *Ibid.*, p. 79, para. 90. In addition, the line between points A and B is Greenland’s 200 n. m line.


67 Thirlway, *op. cit.* note 44, p. 76.


71 The *Gulf of Maine* case, I.C.J. Reports 1984, p. 312, para. 157.; See also *ibid.*, p. 290, para. 81.

72 This approach can also be found in two arbitral awards, *i.e.* the Guinea/


Ibid., p. 60, para. 71.; the Gulf of Maine case, p. 278, para. 59.; See also the North Sea Continental Shelf cases, I.C.J. Reports 1969, p. 49, para. 88.


In fact, judge Oda appears to equate judgments of maritime delimitation with decisions of ex aequo et bono. Separate opinion of judge Oda in the Greenland/Jan Mayen case, I.C.J. Reports 1993, p. 113, para. 85. See also, ibid., p. 114, para. 88.


Ibid., p. 33, para. 34.


The Libya/Malta case, I.C.J. Reports 1985, pp. 46-47, para. 61. See also,
The relation between special and relevant circumstances is still unclear and controversial. Separate opinion of Judge Shahabuddeen, I.C.J. Reports 1993, pp. 147-149 and 154.; separate opinion of Judge Schwebel, *ibid.*, p. 121. Yet, since the problems addressed in this section are raised with respect both to special and relevant circumstances, the term “special/relevant circumstances” shall be used. For special/relevant circumstances in general, see Evans, M. D., *Relevant Circumstances and Maritime Delimitation*, Oxford, Clarendon Press, 1989.


The *North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 50, para. 93.


Declaration of Judge Ranjeva, *ibid.*

This is not only a problem in the *Greenland/Jan Mayen* case. In other cases, too, the I.C.J. and the Courts of Arbitration fail to explain convincingly how the relevant circumstances were balanced.
