6

Maritime Disputes

> The Court, in assessing the extent of the lateral maritime boundary (. . .) is aware of the importance that fishing has had for the coastal populations of both Parties.[1]

When maritime entitlements between neighbouring coastal states overlap in the Exclusive Economic Zone (EEZ) or the continental shelf, Articles 74 and 83 of the United Nations Convention on the Law of the Sea (UNCLOS) provide that such issues shall be resolved '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'.[2] The International Court of Justice (ICJ, the Court) is one of the institutions available to UNCLOS parties to resolve their disputes, pursuant to UNCLOS's Article 287. The Court has developed extensive practice in maritime boundary disputes, definitively delimiting overlapping maritime claims to identify the maritime areas in which coastal states may exercise sovereign rights. In some boundary disputes, the Court has delimited (i.e. drawn) maritime boundaries, while in others, it has simply ascertained if a state has sovereignty over a disputed maritime zone, without necessarily delimiting a boundary.[3] This chapter considers both approaches.

Maritime boundary disputes may carry repercussions for the livelihoods of coastal populations requiring access to the fishing resources of certain waters. There are two main types of fishing activities of benefit to coastal populations: industrial and traditional (or artisanal) fishing. Industrial fishing is typically carried out by vessels catching tonnes of

[1] *Maritime Dispute (Peru v. Chile)* (Judgment) [2014] ICJ Rep 3, 45 [109].
[2] See United Nations Convention on the Law of the Sea, 1833 UNTS 3, Articles 74 and 83.
[3] E.g., *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment) [2009] ICJ Rep 61; *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Merits) (Judgment) [1974] ICJ Rep 3.

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fish for the state. Traditional fishing is smaller in scale, carried out by communities of coastal inhabitants for their livelihood.[4] While industrial fishing activities may be considered, this chapter mainly focuses on traditional fishing. Maritime boundary disputes yield significant disruption for traditional fishing activities, which are of social and cultural importance to coastal populations.[5] It may also result in the internal displacement of coastal populations to sustain their livelihoods.

Despite these potential repercussions on coastal populations, such considerations are seldom reflected in the Court's judicial reasoning. This chapter questions whether the Court's approach aligns with the object and purpose of the UNCLOS to 'promote the *economic and social advancement* of all *peoples* of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter'.[6] In other words, is it effectively supporting the UN regime? (Section I.1.1) Furthermore, is it upholding outcome legitimacy by making just decisions for coastal populations? (Section 1.1.2). In this chapter, I identify the distinct contexts in maritime disputes where concerns for local populations are raised in states' arguments but ultimately dismissed by the Court. I observe that the overarching reason underpinning the Court's approach is its adherence to formalism (Section 6.1). I first argue that this approach is appropriate when determining the pre-existence of a maritime boundary before proceeding with delimitation (Section 6.2). However, when adjusting a provisional line in maritime boundary delimitation, I argue that the principle of equity can play a greater role in promoting a fuller consideration of the needs of local populations (Section 6.3). The approach of dismissing concerns for local populations – and more specifically, their historic fishing rights – has also taken place beyond the delimitation process, when attributing sovereignty to a maritime zone (Section 6.4). In this context, I argue that reframing the understanding of stability can allow for historic fishing rights to be

[4] FAO, 'Guidelines for the Routine Collection of Capture Fishery Data' in FAO Fisheries Technical Paper No. 382 prepared at the FAO/DANIDA Expert Consultation (Bangkok 1998) (FAO, Rome 1999) 1, 105; *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation) (Eritrea/Yemen)* (Award) (1999) XXII RIAA 335, 360 [106]; Polite Dyspriani, 'Traditional Fishing Rights: Analysis of State Practice' (2011) United Nations Office of Legal Affairs Division for Ocean Affairs and the Law of the Sea.

[5] Vandick S. Batista, Nidia N. Fabré, Ana C. M. Malhado and Richard J. Ladle, 'Tropical Artisanal Coastal Fisheries: Challenges and Future Directions' (2014) 22(1) *Reviews in Fisheries Science & Aquaculture* 1, 3.

[6] UNCLOS, preamble cl 7 (emphasis added).

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upheld and therefore for the needs of local populations to be considered. I then conclude (Section 6.5).

6.1 Formalism and the World Court

The Court's approach to maritime boundary disputes is largely anchored in formalism, a normative theory that dictates how international law should be applied. In this section, I explain some relevant features of formalism to understand the Court's approach to maritime boundary disputes developed in the remaining sections of this chapter.

First, formalism pleads for an exclusive application of law without consideration for non-juridical elements. It thereby distinguishes law from non-law, insisting that judges must only refer to the law to make their decisions.[7] This perspective assumes that the law, on one hand, and all other considerations, on the other, are autonomous and mutually exclusive. Accordingly, extra-legal considerations such as morality, substantive values, politics or humanitarian, or social or economic factors are outside of the scope of judicial activities and thus immaterial. According to formalism, amalgamating law with such elements would rob it of its objectivity, neutrality, and credibility.[8] Closely related is the distinction between *lex lata* and *lex ferenda*: any approach other than a strict reading of the black-letter law will result in what the law ought to be, as opposed to what it is.[9] This position was well expressed by the Court in *South West Africa (Liberia v. South Africa; Ethiopia v. South Africa)*:

> Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only insofar as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.[10]

[7] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 24.

[8] Ibid 27.

[9] Ibid 26.

[10] *South West Africa (Liberia v. South Africa; Ethiopia v. South Africa)* (Second Phase) (Judgment) [1966] ICJ Rep 6, 34 [49]. See also *South West Africa (Liberia v. South Africa; Ethiopia v. South Africa)* (Preliminary Objections) (Judgment) [1962] ICJ Rep 319, 466 (Joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice). The Court has

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It is demonstrated in this chapter (Sections 6.2 and 6.3) that the Court rejects the consideration of coastal populations to adjust its delimited maritime boundary due to its reticence to apply what it considers to be 'non-law'.

The second relevant feature of formalism is its objective to 'provide predictability in the behaviour of law-making authorities', such as the ICJ.[11] It therefore implies that international judges have little choice in law application; their task is to apply jurisprudence to fortify an international legal system of norms.[12] In the context of maritime disputes, the desire for predictability has led to the development of the principle of stability of boundaries. The Court has placed great emphasis on this principle, refusing to consider other elements that could somehow jeopardise it.[13] It has clearly stated that 'Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances'.[14] Stability was reportedly the underlying objective behind outsourcing delimitation to international courts and tribunals; the International Tribunal for the Law of the Sea (ITLOS) explained in *Bangladesh/Myanmar* that international courts and tribunals were tasked with maritime delimitation to develop 'a body of case law (. . .) which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries (. . .)'.[15]

Thus, in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Tunisia claimed that fishing resources must be taken into account as supplementing its national economy in eking out its survival as a country.[16] The Court carefully explained that it was unable to take such factors into

also said elsewhere that it does not decide on matters of policy: *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, 254 [69].

[11] Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 18–19.

[12] Ibid 19.

[13] This is also the case in territorial disputes (see Chapter 7). See *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) (Judgment) [1962] ICJ Rep 6, 34; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, 37 [72]–[73].

[14] *Aegean Sea Continental Shelf (Greece v. Turkey)* (Judgment) [1978] ICJ Rep 3, 35–36 [85].

[15] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2012] ITLOS Rep 4, 64 [226].

[16] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18, 77 [106].

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account to delimit the continental shelf areas because '[t]hey are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource'.[17] It has explained in other judgments that resource-related criteria are treated cautiously and not considered to be relevant circumstances in maritime delimitation.[18] Fishing activities fall under the same category, in the view of the Court.

It is observed in this chapter that the Court's refusal to apply 'non-law' and its concern for predictability prohibit it from adjusting a provisional line in maritime boundary delimitation (Section 6.3). When determining sovereignty over a disputed maritime zone (without necessarily delimiting a boundary), the Court also prioritises stability by not upholding arguments related to historic fishing rights in maritime zones (Section 6.4). These reflect its broad formalist approach to international law, which is challenged in this chapter. This is because this approach can lead to unjust outcomes for coastal populations. From the perspective of social idealism, this can impact the legitimacy of the decision (Section I.1.2). An approach that does not consider such populations can also call the effectiveness of the Court into question (Section I.1.1). However, while the Court adopts a similar approach when determining the pre-existence of a boundary before exercising delimitation, I argue that this is appropriate in this context (Section 6.2).

6.2 Determining a Pre-existing Boundary

Before delimiting a maritime boundary, the Court may first seek to determine whether the parties have already agreed on a boundary. If no such agreement exists, the Court will then proceed to delimit the maritime boundary itself. It is observed in this section that while the Court may support state litigants factoring in their coastal populations when drawing a straight baseline, for example, it will not make the same consideration when deciding whether parties have already agreed on a boundary and when determining the extent of that boundary. This, I argue, is appropriate given the objectivity of the latter exercise.

[17] Ibid 77–78 [107].
[18] *Black Sea* (n. 3) 125–26 [198]; *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep 624, 706 [223].

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In the 2014 *Maritime Dispute (Peru v. Chile)* judgment, the Court had to delimit the boundary between the two states' maritime zones in the Pacific Ocean. The applicant Peru argued that access to the waters off the coast of Southern Peru was of critical importance to the local population and the country.[19] It requested the Court to recognise a maritime zone lying within 200 nautical miles of Peru's coast and thus appertaining to Peru. Chile, on the other hand, considered this maritime zone to be part of the high seas. Peru's main argument was that, in order to avoid friction and incidents with Chile due to the absence of a delimited maritime boundary, Peruvian fishermen's activities had been limited on a provisional basis to the line of latitude and the zone of tolerance established in the 1954 Agreement on a Special Zone.[20] Peru has therefore 'exhibited considerable self-restraint',[21] but now crucially needed definitive delimitation to provide its coastal population with an equitable access to the maritime resources of the disputed area.[22]

The Court, therefore, had to determine whether Peru did, in fact, own the said maritime zone lying within 200 nautical miles of its coast. Through analysing evidence, it first found that the parties had tacitly acknowledged the existence of an all-purpose pre-existing maritime boundary.[23] Then, to determine the extent of this boundary – and more specifically, whether the boundary extended to the 200-nautical mile limit – it analysed the relevant practice of the parties in the early and mid-1950s.[24]

At the time, the state parties contended that the areas lying off their coasts were rich in marine resources, and expressed the fear that 'large foreign fishing fleets exhausting resources necessary for the livelihood of coastal populations', which the Chilean diplomat considered 'tragic'.[25] The Court also took note of the location of the most important fishing ports at the time for both parties – Ilo for Peru and Arica for Chile (120 km north-west and 15 km south of the seaward terminus of the land boundary, respectively).[26] Ultimately, however, it concluded that the extent of the resources that would be important for fishing out to

[19] Memorial of Peru (20 March 2009) 59–60 [2.31].
[20] Ibid.
[21] Ibid.
[22] Ibid 60 [2.32].
[23] *Maritime Dispute* (*Peru v. Chile)* (n. 1) 41 [100]–[102].
[24] Ibid 44 [108].
[25] Ibid 42 [105]–[106].
[26] Ibid 44 [108].

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200 nautical miles '[was] not see[n] as of great significance'.[27] What it *did* consider significant was that such boats would not cross the parallel beyond a point approximately 57 nautical miles from the starting point of the maritime boundary.[28] It therefore considered that fishing for coastal populations, while important, was not relevant in its assessment. The movement of the boats was what provided evidence to the Court to conclude that the boundary did not extend beyond 80 nautical miles from the coast.[29]

Indeed, 'at the time when they acknowledged the existence of an agreed maritime boundary between them, [Peru and Chile] were unlikely to have considered that it extended all the way to the 200-nautical-mile limit'.[30] This serves as indication that, regardless of the protests or concerns that state parties may raise with respect to the needs of their coastal populations, the process of establishing a pre-existing maritime boundary remains fact-based and evidence-driven. Akin to my assessment in Chapter 7 on effective control in territorial disputes, peoples' actions are only considered as evidence for a specific task, if relevant, without considerations for their needs.

Elsewhere, the Court has demonstrated support for state litigants who, themselves, factor in the needs of their coastal populations when tasked with a drawing exercise. In the 1951 *Anglo-Norwegian Fisheries* case, Norway unilaterally enacted a 1935 decree delimiting its northern coast using straight baselines. The objective of the decree was to reserve certain fishing grounds situated off its northern coast for the exclusive use of its own fishermen. In defence of its decree, Norway argued that Norwegian fishermen living along the northern coast (the Lopphavet basin) had exclusively fished there throughout history. It therefore advocated for the traditional fishing rights of the communities living at the coast and the requirement to protect their interests. According to Norway, the fishing zone as delimited was necessary to safeguard the interests of these communities.[31] The Court recognised that these '[fishing] grounds were known to Norwegian fishermen and exploited by them from time immemorial'[32] and decided that 'Such rights, founded on the vital needs of the

[27] Ibid 44 [109].
[28] Ibid 44 [108].
[29] Ibid 71 [196]–[197].
[30] Ibid 45 [111].
[31] *Fisheries Case (United Kingdom v. Norway)* (Judgment) [1951] ICJ Rep 116, 127 and 142.
[32] Ibid 142.

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population and attested by very ancient and peaceful usage, *may legitimately be taken into account in drawing a line* which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable'.[33]

The focus of this case was on the lawfulness of straight baselines, which states can draw of their own accord, as opposed to the determination of a pre-existing maritime boundary, which cannot be drawn by a state unilaterally. Nonetheless, this case shows the Court's approval for the state litigant's consideration of local fishermen's needs. Where the Court engages in a similar drawing exercise (to determine the pre-existence of a maritime boundary), however, it is more mindful of the objectivity required by the task at hand. In my view, this is the correct approach for this particular task. While states may wish to exercise their sovereignty by considering fishing when unilaterally drawing their own lines, the Court's foundational drawing tasks should be an objective fact-based – and not need-based – process.

In *Maritime Dispute (Peru v. Chile)*, the Court first reached the conclusion that the pre-existing boundary spanned 80 nautical miles and then delimited the maritime boundary to determine its course from that point on.[34] To reach the conclusion that the pre-existing boundary spanned 80 nautical miles, the Court could only rely on existing relevant evidence indicating what that boundary looked like. Similarly, delimiting the rest of its course beyond 80 nautical miles was the act of drawing the provisional line, which is the first stage of the maritime boundary delimitation process.

Indeed, when delimiting a maritime boundary, the Court has developed a general methodology in its jurisprudence. The first stage is usually the delimitation of a provisional line. The second stage of maritime delimitation requires the Court to consider whether certain factors – referred to as 'relevant circumstances' – necessitate adjusting the provisional line to achieve an equitable result.[35] The final stage, in Exclusive Economic Zone (EEZ) and continental shelf delimitation, is to verify that this line does not lead to an inequitable result (disproportionality test).[36]

[33] Ibid 127.
[34] *Maritime Dispute (Peru v. Chile)* (n. 1) 71–73 [198].
[35] The term "relevant circumstances" is used in EEZ and continental shelf delimitation. In the territorial sea, they are called "special circumstances" (see UNCLOS, Article 15).
[36] *Black Sea* (n. 3) 101–3 [116]–[122].

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Massimo Lando observes that '[E]stablishing a provisional equidistance line[] should be approached as [an] objective exercise[]. Conversely, adjusting the provisional equidistance line and the assessment of disproportionality ensure that the boundary achieves an equitable solution'.[37] The judicial process of the Court has distinguished between drawing lines and adjusting them. The Court may therefore draw provisional line in maritime delimitation (stage one), and then adjust the latter in light of needs of local populations, for example (stage two). In the delimitation exercise, there was an opportunity to raise concerns related to local populations as a relevant circumstance.[38] The adjustment of the provisional line for relevant circumstances in maritime boundary delimitation, examined in further detail below, is where consideration of local populations is more appropriate and has more potential.

6.3 Maritime Boundary Delimitation

The Court can consider coastal populations as a relevant circumstance in stage two of the maritime delimitation process, necessitating the adjustment of the provisional line to achieve an equitable result. The Court can also consider coastal populations as a factor in stage three, when assessing the overall test for the equitableness of the boundary (disproportionality test). This involves conducting a final check that there is 'no great disproportionality of maritime areas (. . .) by comparison to the ratio of coastal lengths'.[39]

Arguments relating to the fishing activities of coastal populations have come before the Court in different forms. First, states have indicated the importance of natural resources, the access to which provides food and energy and is therefore an important source of wealth for both governments and local populations. This was raised and rejected in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, for example.[40]

A second argument is that fishing activities should be considered as evidence of the state's conduct or effective control (*effectivités*) over a certain contested maritime zone, which should be factored into the delimitation of a contested boundary (Section 7.2). For instance, in *Black Sea*, Ukraine argued that its behaviour (providing licences for

[37] Massimo Lando, *Maritime Delimitation as a Judicial Process* (CUP 2019) 30.
[38] Ibid 65–66 [181]–[182].
[39] Ibid 103 [122].
[40] *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n. 18) 706 [223].

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fishing practices and intercepting illegal fishing boats) constituted maritime *effectivités* and proved its sovereignty over the fishing zone extending up to the disputed line.[41] The *acte à titre de souverain* ('act as the sovereign') with respect to fishing should therefore be considered as a relevant circumstance.[42] The Court, echoing the findings of an arbitral tribunal that 'resource-related criteria have been treated more cautiously' in international adjudication, stated in this case that it '[did] not see (. . .) any particular role for the State activities invoked (. . .)'.[43]

Both arguments place more emphasis on the state's interests: natural resources benefit states more generally, while fishing activities are raised as a conduct of states and evidence of their sovereignty. A third argument, which will be the focus of this section, squarely addresses the needs of local populations. In several instances, state litigants have argued that coastal populations' ability to fish and acquire resources necessary for their livelihood should be a relevant circumstance, warranting the adjustment of the provisional line drawn in the first stage of the maritime delimitation process. However, the Court has only upheld this argument and adjusted the provisional line accordingly in one instance. This is because of its formalistic approach (Section 6.1) and a concern for the stability of boundaries.

I argue in this section that the principle of equity can play a greater role in promoting a fuller consideration of the needs of coastal populations. I first explain the principle of equity (Section 6.3.1). I then observe how the Court developed its jurisprudence consistently dismissing state litigants' claims related to their populations (Section 6.3.2). Finally, I reflect on the appropriateness of this approach in light of the principle of equity (Section 6.3.3).

6.3.1 *The Principle of Equity*

Equity is the concept of fairness and reasonableness in the administration of justice.[44] As the Court described, 'Equity as a legal concept is a direct emanation of the idea of justice'[45] offering a 'bridge to justice where the

[41] Counter-Memorial of Ukraine (19 May 2006) 216–19 [8.58]–[8.65].
[42] *Black Sea* (n. 3) 124 [193].
[43] Ibid 125–26 [198].
[44] Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications 1991) 117–52.
[45] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n. 16) 60 [71].

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law itself is not able to adequately respond'.[46] It has been applied to maritime boundary disputes as early as 1909. Indeed, in *Award on the Grisbådarna*, a dispute over the maritime boundary in the Grisbådarna fisheries zone between Norway and Sweden, an arbitral tribunal considered traditional fishing activities in its delimitation task. The arbitral tribunal stated that the demarcation assigning the Grisbådarna to Sweden was carried out in light of the following circumstances: the fact that lobster fishing had been carried out for a much longer time, to a much larger extent, and by a much greater number of Swedish fishermen than Norwegian ones; that lobster fishing was the most important fishing and what gives the banks their value as a fishing area; Swedes were the first to fish for lobsters; and fishing was more important to the inhabitants of Koster (Sweden) than Hvaler (Norway).[47] In so doing, the arbitral tribunal applied the principle of equity to directly respond to the real interest of the parties on the rich lobster fisheries of the Grisbådarna Banks.[48]

In contemporary international adjudication, equity has been approached with caution mainly due to its conflation with adjudication *ex aequo et bono*. Equity and adjudication *ex aequo et bono* are often confused in practice, and it is unhelpful that the terms are sometimes used interchangeably. Some distinctions may be drawn between them.[49] There are several ways to implement the principle of equity, largely depending on the type of equity being discussed: equity may denote a means for filling the gaps in international law (equity *praeter legem*), be considered as an intrinsic attribute of the rules of law (equity *infra legem*), or be used in derogation from the law, to remedy its social inadequacies (equity *contra legem*).[50] Only the latter type of equity, *contra legem*, is tantamount to adjudication *ex aequo et bono*.[51] This type of adjudication allows the Court to base its

[46] Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (CUP 2015) 8. See also Masahiro Miyoshi, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes*, vol 2 (Martinus Nijhoff Publishers 1993) 11–13.

[47] *The Grisbådarna case (Norway/Sweden)* (1909) (Award) PCA XI RIAA 147, 161.

[48] Robert Kolb, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries*, vol 38 (Martinus Nijhoff Publishers 2003) 8. See also René Waultrin, 'Un conflit de limites maritimes entre la Norvège et la Suède: L'affaire des Grisbådarna' (1910) 17 *Revue générale de droit international public* 77.

[49] See also Miyoshi (n. 46) 14–16.

[50] Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 874.

[51] Ibid 794 and 797.

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decisions on considerations which are not necessarily legal in character.[52] When adjudicating *ex aequo et bono*, the Court would not apply international law but would take other considerations into account instead of the law, in the pursuit of fairness or justice.[53]

It is unclear whether, and to what extent, an *ex aequo et bono* decision would differ from a decision based on equity *contra legem* in practice, apart from the procedural requirement that *ex aequo et bono* can only be exercised with the explicit agreement of the parties, as stipulated by Article 38(2) of the Statute.[54] However, from a conceptual standpoint, the notions of equity *contra legem* and adjudication *ex aequo et bono* are essentially the same, although the Court has never used the term 'equity *contra legem*' in its jurisprudence. One can understand, however, that when it refers to adjudication *ex aequo et bono*, the term may effectively be substituted for equity *contra legem*.

While the Court has explicitly shown disapproval for adjudication *ex aequo et bono*, it has applied the principle of equity in some instances. When doing so, it has been careful to clarify that it is not deciding *ex aequo et bono*[55] – the difference being that equity is applicable as an element of law and does not require the parties' consent.[56] The Court, in other words, is clarifying that it is not applying the principle of equity *contra legem*. This reasoning suggests that the Court refers to equity that is in conformity with the law; in other words, *praeter legem* (for filling the gaps in international law) or equity *infra legem* (as an intrinsic attribute of the rules of law).[57]

Despite the claim that the Court has never decided *ex aequo et bono*,[58] it is unclear what type of equity is being applied in most cases. *North Sea*

[52] For this reason, it has been called "the model of juridical vacuum" by one author. See Cottier (n. 46) 205.

[53] Markus Kotzur, 'Ex aequo et bono' in *Max Planck Encyclopedia of Public International Law* (OUP 2009).

[54] *Case of Free Zones of Upper Savoy and the District of Gex* (Order) [1930] PCIJ Series A, 10; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n. 16) [71]; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) [1984] ICJ Rep 246, 278 [59]; *Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 554, 567–68 [28].

[55] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n. 16) 60 [71]; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (*Judgment) [1969] ICJ Rep 3, 48–49 [88]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13, 38–39 [45].

[56] *Frontier Dispute (Burkina Faso/Mali)* (n. 54) 575–76 [42].

[57] Miyoshi (n. 46) 117–42 (equity *infra legem*), 146–71 (equity *praeter legem*).

[58] Zimmermann (n. 50) 882.

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Continental Shelf, for example, was notable for explicitly introducing equity in maritime delimitation.[59] However, the judgment only refers to the general principle of equity without specifying which type had been employed.[60] Judge Ammoun gave assurances in his separate opinion that equity *praeter legem* (for filling the gaps in international law) had been applied.[61] Yet in a 1978 letter to Elihu Lauterpacht, Sir Gerald Fitzmaurice, another judge involved in the North Sea Continental Shelf cases, stated that, in the context of discussing the cases, 'a Tribunal is precluded by its Statute (. . .) from deciding *ex aequo et bono*, *but is in fact doing just that*, it cannot avow it, and has to take refuge in silence'.[62] This suggests that *ex aequo et bono* may have in fact been applied in *North Sea Continental Shelf*.

The Court's reticence to adjudicate *ex aequo et bono* (equity *contra legem*) reflects the underlying approach of formalism and the fear of inviting consideration for extra-legal factors. I will demonstrate in Section 6.3.3 that in the context of maritime boundary delimitation, the proposed application of equity to consider coastal populations is not an *ex aequo et bono* exercise (equity *contra legem*) – rather, it is part and parcel of the legal process. Before doing so, it is important to understand how the Court's position with respect to local populations emerged in its jurisprudence (Section 6.3.2).

6.3.2 The 'Catastrophic Repercussions' Threshold

It is important to understand how the Court developed its jurisprudence dismissing state litigants' claims related to their populations. The Court established its position in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (1984). In this case, Canada and the United States of America (US) requested a Chamber of the Court to delimit the maritime boundary dividing their continental shelf and fisheries zones in the Gulf of Maine on the East Coast of North America.[63] Once it drew the provisional boundary line (stage one), the Chamber had to decide

[59] Catharine Titi, *The Function of Equity in International Law* (OUP 2021) 41.
[60] See, e.g., *North Sea Continental Shelf* (n. 55) 46–47 [85], 48–49 [88].
[61] Ibid 151–52 [56] (Separate opinion Ammoun).
[62] Lauterpacht (n. 44) 125 n. 19.
[63] The precise delimited area is described by the Court in its judgment: *Gulf of Maine* (n. 54) 268 [29].

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whether this line was equitable in light of relevant circumstances, and if anything could justify its adjustment. Both Canada and the US had placed significant emphasis on the importance of fishing activities, '*in extenso*'.[64] The Chamber acknowledged that they 'exchanged a lengthy argument' on various matters related to fishing, for instance, the nationality of the first fishermen in this area had, the importance of fisheries for various economic industries in the region, the dependence of their populations on such fisheries, and the negative impacts of an unfavourable delimitation on the nations' economies.[65]

The US also emphasised that its historic fishing presence in the area (see Section 6.4) should be considered as a relevant circumstance in the maritime boundary delimitation.[66] Canada, on the other hand, emphasised socio-economic arguments also largely connected to fishing practices, insisting that 'any single maritime boundary should ensure the maintenance of the existing fishing patterns that are in its view vital to the coastal communities of the region in question'.[67] Fishing was clearly the central part of this dispute.

The Chamber, however, held that the 'crux of the matter lies elsewhere' and that while fishing considerations require the examination of political and economic considerations, the Chamber must achieve a result on the basis of law; not *ex aequo et bono* ('from equity and conscience').[68]

In this assessment, the Chamber proceeded to reject both parties' arguments regarding fishing activities. However, the Chamber then penned down a reservation, which would come to be known as the 'catastrophic repercussions' doctrine:

> What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail *catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned.*[69]

[64] Ibid 277–278 [58].
[65] Ibid.
[66] Ibid 340–41 [233]. See also Memorial of the United States of America (27 September 1982) 5 [8], 6 [12], 7 [18], 57 [157].
[67] *Gulf of Maine* (n. 54) 341 [234].
[68] Ibid 278 [59].
[69] Ibid 342 [237] (emphasis added).

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In the view of the Court, this was not the situation in the present case,[70] despite its acknowledgement that the 'obvious' socio-economic impact of Canada's fisheries on the communities inhabiting in certain counties of Nova Scotia was 'undeniable'.[71] However, the decision to discard arguments related to fishing activities proved problematic, causing significant disruption to historic fishing patterns in the boundary area.[72] For example, the incompatible views between the US and Canada on fisheries management on either side of the boundary caused major obstacles to subsequent reciprocal access arrangements.[73] This was to be expected, given the important fishery interests of these countries,[74] demonstrated, for instance, through their joint proposal at the Second United Nations Conference on the Law of the Sea in 1960 of a six-mile territorial sea and a six-mile fishing zone with protection of traditional fishing rights for ten years.[75] The parties made several attempts to negotiate the question of fisheries access in the region, only bringing it to The Hague after impasse.[76] Overall the judgment 'drew heavy criticisms from both Canada and the United States'.[77] Local populations were not considered a factor when assessing the overall equitableness of the boundary due to the Chamber's concerns to produce a decision grounded in law rather than equity.

The Chamber's approach in *Gulf of Maine* can be compared with the 1993 *Jan Mayen* case; both applied the 'catastrophic repercussions' threshold, but only in the latter was it met. In *Jan Mayen*, Denmark and Norway were in dispute over the delimitation of their fishing zones and continental shelf areas between Greenland (a country within the Kingdom of Denmark) and the Norwegian island of Jan Mayen, in the northern Atlantic Ocean. The dispute boiled down to a conflict over access to fishery resources.[78] Both parties placed emphasis on this in their

[70] Ibid 343 [238].
[71] Ibid 342 [236].
[72] Glen J. Herbert, 'Fisheries Relations in the Gulf of Maine Implications of an Arbitrated Maritime Boundary' (1995) 19(4) *Marine Policy* 301, 303.
[73] Ibid 303.
[74] Douglas M. Johnston, *Canada and the New International Law of the Sea*, vol 54 (University of Toronto Press 1985) 5.
[75] S. P. Jagota, *Maritime Boundary*, vol 9 (Martinus Nijhoff Publishers 1985) 25.
[76] Herbert (n. 72) 308.
[77] Leonardo Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation' (Presented at the Tenth LOSI Conference, Seoul, May, 2012) 1, 13–14.
[78] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (Judgment) [1993] ICJ Rep 38, 71–72 [75].

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pleadings: Denmark argued that the Inuit population of Greenland depended on sealing and whaling on the Greenland east coast, while Norway contended that the disputed waters between Greenland and Jan Mayen have been the scene of whaling, sealing and fishing by Norwegian coastal communities.[79] The Court acknowledged the parties' emphasis on the 'traditional character of the different types of fishing carried out by the populations concerned'[80] and the importance of fishing for their respective economies.[81]

After drawing the provisional line, the Court had to consider whether any relevant circumstances justified an adjustment. It made reference to the 'catastrophic repercussions' doctrine established in the *Gulf of Maine* case but reached a different conclusion.[82] In its view, the provisional line was too far to the west for Denmark (i.e. Greenland) to be assured of equitable access to the only fish commercially exploited in the area: the capelin stock (a migratory type of fish found in the autumn and summer south of the disputed areas).[83] Greenland fishermen would therefore not have been able to access capelin stocks in certain months of the year due to drifting ice – unless the boundary had been shifted to the east. It therefore adjusted the median line eastwards to ensure equitable access to the capelin fishery resources 'for the vulnerable fishing communities concerned'.[84] This conclusion has been described as 'unique in modern maritime boundary delimitation'.[85]

One may question why the argument of 'catastrophic repercussions' was upheld in this case but discarded in *Gulf of Maine*. In my view, the Court regarded the circumstances in *Jan Mayen* as exceptional and more grave compared to those in the *Gulf of Maine* case.

First, the coastal communities of Greenland were heavily dependent on fishing the seasonal capelin fish, in sharp contrast to Jan Mayen, which had no permanent fishing community.[86] Second, the lack of any other known form of resource exploitation, such as hydrocarbon, made

[79] Ibid 46 [15] and 71 [74].
[80] Ibid 71–72 [75].
[81] Ibid.
[82] Ibid.
[83] The capelin stock is defined in: *Jan Mayen* (n. 78) 72 [76]. The Court's conclusion is found in 46 [14] and 70 [73].
[84] Ibid 71–72 [75]–[76]. See also Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016) 86.
[85] Fietta and Cleverly (n. 84) 342.
[86] Fietta and Cleverly (n. 84) 342.

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fishing the only valuable natural resource in the disputed area.[87] By contrast, in *Gulf of Maine*, fisheries were not the only natural resource of concern in the disputed area, as hydrocarbon exploration had also been undertaken in the past.[88] In fact, other factors had been raised – such as hydrocarbons, defence, navigation,[89] or the water column reposing on the seabed of the delimitation area[90] – in contrast to the *Jan Mayen* case where fishing activities were the central issue of the dispute. Therefore, while both disputes were centred on fisheries, it appears that the US and Canada's dependence on fisheries was less critical, urgent, and all-encompassing than in the *Jan Mayen* case. The relevant circumstances in the latter case warranted application of the 'catastrophic repercussions' doctrine established in the *Gulf of Maine* case.[91]

The severity of the situation was apparent in *Jan Mayen* as the Court was unreceptive to all proposed extra-legal considerations, categorically stating its refusal to consider population-related and socio-economic factors in the adjustment of the provisional line. Denmark claimed that Jan Mayen had no settled population, contrary to Greenland's population of 55,000, six percent of which live in the region abutting the delimitation area.[92] It also contended that Greenland's principle economic activity was fishing and that Jan Mayen's fishing interests are in fact Norway's, as there are no fishermen in Jan Mayen.[93] Finally, Denmark also asked the Court to consider a cultural factor: the attachment of the people in Greenland to their land and the surrounding sea would make it difficult for them to accept its cutback.[94] In response to these concerns, the Court stated,

> The question is whether the size and special character of Jan Mayen's population, and the absence of locally based fishing, are circumstances which affect the delimitation. The Court would observe that the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, *is a legal process based solely on the possession by the territory concerned of a coastline*.[95]

[87] Ibid 85.
[88] *Gulf of Maine* (n. 54) 279 [61] and 343 [239].
[89] Fietta and Cleverly (n. 84) 247.
[90] *Gulf of Maine* (n. 54) 275 [49].
[91] *Jan Mayen* (n. 78) 71–72 [75].
[92] Ibid 73 [79].
[93] Ibid.
[94] Ibid [79].
[95] Ibid 73–74 [80] (emphasis added).

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Referring to *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, where it concluded that relative economic positions of states are irrelevant in maritime delimitation,[96] the Court concluded that there was no reason to consider either the limited nature of the population of Jan Mayen, or socio-economic factors.[97] The shifting of the median line to accommodate local populations therefore indicates the perceived severity of this situation.

The *Gulf of Maine* and *Jan Mayen* judgments therefore indicate that, in strict circumstances, local populations may be considered as relevant circumstances to adjust the provisional line in maritime boundary delimitation. It is worth mentioning that it can be debated whether such adjustments were considered in stage two or in stage three of the process.[98] In *Gulf of Maine*, it could be interpreted that the Chamber considered geographical features as relevant circumstances (stage two) but resource-related factors (including fishing considerations) in stage three of the maritime boundary delimitation process: to test the boundary's overall equitableness. This is because it clarified that delimitation is first and foremost to be determined in relation to geographical features in the area, after which 'other criteria' may be considered in order for the boundary to be equitable.[99] One scholar considers that the Chamber only turned to fishing concerns *after* considering relevant circumstances, although the reasons for this distinction are not clear.[100] Similarly, in *Jan Mayen*, it could be argued that local populations were considered not in stage two but rather to assess disproportionality of the provisional line and its overall equitableness (stage three).[101]

Regardless, subsequent case law has shed more light on the requirements of the 'catastrophic repercussions' doctrine. First, Kenya argued in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* that the livelihood and economic well-being of its fisherfolk would suffer greatly if the relevant equidistance line were not adjusted.[102] One of the reasons given by the Court in dismissing this argument was that it was required to '[c]onsider the well-being of the populations on both sides of the

[96] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (n. 55) 41 [50].
[97] *Jan Mayen* (n. 78) 73–74 [80].
[98] Lando (n. 37) 246.
[99] Ibid 278 [59].
[100] Ibid 198.
[101] *Jan Mayen* (n. 78) 67 [65].
[102] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgment) [2021] ICJ Rep 206, 262 [153].

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delimitation line'.[103] This indicates that unless one side is significantly disadvantaged, the Court will not feel compelled to consider the well-being of one state's populations over that of the other.

Second, the Court's assessment also appears to rely on how many people would be affected. In *Somalia v. Kenya*, it also rejected Kenya's argument as '17 out of 19 fish landing sites are located near or at the Lamu Archipelago and would therefore be unaffected by an equidistance line. Only two landing sites are close to the land boundary terminus'.[104] In contrast, Greenland had a population of 55,000 in *Jan Mayen*.[105] This perhaps indicates that a more significant number of people must be affected by the delimitation for the Court to consider it a relevant circumstance.

Third, the doctrine demands that a high level of evidence be provided by the relevant state litigant. The Court observed in *Black Sea* that Ukraine had not submitted evidence that any delimitation line other than that claimed by it would entail catastrophic repercussions.[106] A series of arbitral awards rendered since *Gulf of Maine* have confirmed that the burden of proof rests with the state invoking local populations as a relevant circumstance. In *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen* (1999), fishing activities and concerns for their local populations comprised an enormous part of the parties' arguments in the Phase II Award. The tribunal came to the conclusion that the threshold had not been met due to a lack of evidence.[107]

Similarly, in the *Barbados/Trinidad and Tobago* arbitration (2006), Barbados requested that fishing activities should be taken into account in the delimitation of the boundary due to its great importance for Barbadian fisherfolk and the country's economy.[108] The arbitral tribunal, however, decided that not enough conclusive evidence had been submitted by Barbados for it to uphold its claim that any denial of access to Tobago would entail 'catastrophic repercussions'.[109] It stated that 'determining an international maritime boundary between two states on the basis of traditional fishing on the high seas by nationals of one of those

[103] Ibid 263–64 [159].
[104] Ibid.
[105] *Jan Mayen* (n. 78) 46 [14].
[106] *Black Sea* (n. 3) 125–26 [198].
[107] *Second stage of the proceedings between Eritrea and Yemen* (n. 4) 346 [48] and 352 [72]–[73].
[108] *Barbados v. Trinidad and Tobago* (2006) (Award) XXVII RIAA 147, 216–17 [247].
[109] Ibid 82–83 [264]–[266]. See also Igor V. Karaman, *Dispute Resolution in the Law of the Sea*, vol 72 (Martinus Nijhoff Publishers 2012) 224–29.

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States is altogether exceptional'.[110] Finally, in *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (2014), the arbitral tribunal decided that Bangladesh, arguing about the importance of fishing in the Bay of Bengal for its population, did not provide sufficient evidence that this would warrant the adjustment of the provisional delimitation line.[111] In brief, in a series of subsequent arbitral awards, the lack of evidence has been stated as a principal reason for its rejection as a relevant circumstance.

In sum, the absence of extreme circumstances such as those in *Jan Mayen* has resulted in arbitral tribunals rejecting access to fishing resources as a relevant circumstance (or as a factor when assessing the overall test for the equitableness of the boundary) meeting the 'catastrophic repercussions' threshold and thus, meriting the adjustment of a maritime boundary.[112]

6.3.3 *The Appropriateness of This Approach in Light of the Principle of Equity*

The Court's restrictive approach can be explained by its adherence to formalism, explained earlier (Section 6.1). It believes that consideration for local populations somewhat derogates from the legal process. Indeed, the Court stated in *Gulf of Maine* above that the consideration of local populations in maritime delimitation would steer the Court away from achieving a result 'on the basis of law' and qualify as *ex aequo et bono*.[113] The Court appears to make a strict separation between law and 'other considerations', stating that maritime delimitation 'is a *legal process* based solely on the possession by the territory concerned of a coastline',[114] which would exclude considerations linked to society, the economy, or culture for example. Conversely, it considers that geographical circumstances do not fall under adjudication *ex aequo et bono*. In this section, I first argue that consideration of local populations in maritime delimitation would be an application of the principle of equity – which forms an integral part of the maritime boundary delimitation process. I then

[110] Ibid 80 [269].
[111] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v. India)* (2014) (Award) XXXII RIAA 1, 126 [424].
[112] Fietta and Cleverly (n. 84) 342.
[113] *Gulf of Maine* (n. 54) 278 [59].
[114] *Jan Mayen* (n. 78) 73–74 [80] (emphasis added).

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submit that geographical circumstances – prioritised by the Court – can lead to overly superficial and occasionally insufficient outcomes and are just as contrary to formalism as other considerations.

First, the consideration of local populations in maritime delimitation would be an application of the principle of equity – which forms an integral part of the maritime boundary delimitation process – and not *ex aequo et bono*. The consideration of local populations and the potential injustice caused to them by depriving them of access to fishing resources necessary for their livelihoods, infringing on their cultural and traditional practices, or even possibly causing them to relocate is a matter of justice falling under the ambit of equity. Indeed, as explained before, equity can function as individualised justice, making adjustments 'with a care for the specific case' in a way that would achieve fairness.[115]

The type of equity to be applied is equity in conformity with the law. If maritime boundary delimitation is described as 'a legal process',[116] equity is inherently part of this process, integrating equitable considerations such as the needs of local populations into the legal framework rather than opposing it. Equity is 'the very content of the applicable rules' in maritime delimitation.[117] The second and third stages in the maritime delimitation process emphasise its significance. The Court stated in the *North Sea Continental Shelf* cases that delimitation was 'not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles'.[118] Equity is therefore not only perceived as a rule of law[119] but is enshrined in Articles 74 and 83 of UNCLOS (presented at the opening of this chapter) as the objective of maritime delimitation ('in order to achieve an equitable solution'[120]). The Court itself noted in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* that 'it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances in the area'.[121]

[115] Titi (n. 59) 71.
[116] *Jan Mayen* (n. 78) 73–74 [80] (emphasis added).
[117] *Fisheries Jurisdiction (United Kingdom v. Iceland)* (n. 3) 33 [78]; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* (Merits) (Judgment) [1974] ICJ Rep 175, 202 [69].
[118] *North Sea Continental Shelf* (n. 55) 46–47 [85].
[119] Joseph Charles Witenberg and Jacques Desrioux, *L'organisation judiciaire, la procédure et la sentence internationales: Traité pratique* (Pedone 1937) 304.
[120] See UNCLOS, Articles 74 and 83; Fietta and Cleverly (n. 84) 53.
[121] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n. 16) 60–61 [71]–[72].

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As equity is an inherent part of the legal delimitation process, the equitable consideration of local populations is the mere application of equity in conformity with the law and not a *contra legem* exercise. A certain regard beyond black-letter and into the repercussions of the law's application for the affected people is an exercise that is part and parcel of the law itself. In other words, considering such relevant circumstances is part of – and not in derogation of – the legal exercise. One author has commented that maritime boundary delimitation is therefore 'the main legal test as to whether and to what extent public international law is, in a given and difficult context, able to discharge distributive justice' and 'bring about the fair distribution of resources under the inequitable foundations of maritime zones and among unequal nations'.[122] Equity is a strong component underpinning and guiding the process, as indicated by stages two and three. This should be given due regard.

Second, while the Court views consideration for local populations as somewhat deviating from the legal process, resembling adjudication *ex aequo et bono*, it nonetheless accepts relevant circumstances of a geographical nature to adjust the provisional line. I submit that geographical circumstances can lead to overly superficial and occasionally insufficient outcomes and are just as contrary to formalism as other considerations.

'Relevant circumstances' generally fall into two categories: geographic (disparity in relevant coastal lengths,[123] distorting effects of islands, rocks, promontories, and other small features,[124] the presence of enclaves and semi-enclaves,[125] *inter alia*[126]), and non-geographic circumstances (conduct of the parties,[127] exploration and exploitation activities,[128] security considerations,[129] navigational interests,[130] natural resources,

[122] See Cottier (n. 46) 4–5. For more about equity as law, see Lauterpacht (n. 44) 120–36.
[123] Fietta and Cleverly (n. 84) 72.
[124] Ibid 73.
[125] Ibid 81.
[126] See ibid 68.
[127] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n. 16) 83–86 [117]–[121]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (n. 55) 28–29 [24]–[25]; *Gulf of Maine* (n. 54) 303–12 [126]–[154]; *Jan Mayen* (n. 78) 75–77 [82]–[86]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 447–48 [304]; *Black Sea* (n. 3) 123–26 [189]–[198].
[128] *Gulf of Maine* (n. 54) 342 [237]; *Jan Mayen* (n. 78) 71–72 [75]–[76].
[129] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (n. 55) 42 [51]; *Jan Mayen* (n. 78) 74–75 [81]; *Black Sea* (n. 3) 127–28 [202]–[204].
[130] *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname* (2007) (Award) XXX RIAA 1, 84–86 [303]–[307].

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hydrocarbon resources and exploitation, or fishing resources). The unlimited potential for relevant circumstances[131] and their expansion over the years has resulted in international courts and tribunals seemingly weighing them against each other in a way that has not only 'distance[d] relevant circumstances from the delimitation process'[132] according to Professor Malcolm Evans, but has possibly disadvantaged the consideration of local populations.

The geographical configuration of coasts is 'not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation'.[133] For this reason, it is considered to be more of a stable and permanent factor to consider. Prioritising geographical considerations is also perceived by the Court to be of a 'more neutral character'.[134] Therefore, geographical features are considered to be a part of the legal process, while non-geographical features, such as fishing resources for local populations, fall within the scope of adjudication *ex aequo et bono*. The Court seldom considers local populations in maritime disputes, as it views such considerations as conflicting with the principle of boundary stability. This emphasis on stability has effectively transformed maritime boundary delimitation into a predominantly geographical process.

However, such an approach might render the process overly superficial. The three-pronged delimitation process, which incorporates considerations to ensure equity, suggests that geographical circumstances alone may not always suffice to achieve an equitable outcome. The real-life effects of delimiting a boundary purely on the basis of geographical circumstances may occasionally lead to an inequitable outcome. The Chamber of *Gulf of Maine*, for instance, did acknowledge that delimitation purely on the basis of geographical considerations may lead to catastrophic repercussions. As Cottier has observed,

> [T]he Chamber agrees that delimitation on the basis of surface-related, geographical principles and circumstances may well affect related industries and even create catastrophic repercussions for the livelihood of industries and populations. The ex post test indicates the importance of

[131] *North Sea Continental Shelf* (n. 55) 50 [93].
[132] See Malcolm D. Evans, 'Maritime Delimitation and Expanding Categories of Relevant Circumstances' (1991) 40(1) *The International and Comparative Law Quarterly* 1, 33.
[133] *Cameroon/Nigeria* (n. 127) 443–45 [295].
[134] *Gulf of Maine* (n. 54) 327 [194].

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> socio-economic aspects as an overriding final test, against which a geographical delimitation has to stand in order to qualify as an equitable result. It implies that geographic equity can turn out to neglect such interests and therefore can be inequitable. In other words, geographic principles are not sufficiently reliable per se.[135]

Sole regard for geographical circumstances is considered to suffice to ensure long-lasting peace between states. However, the *Jan Mayen* case indicates that such peace and stability extend beyond the satisfaction of states to the people facing repercussions of judicial decisions. A court cannot be said to achieve this if human security and protection have been jeopardised. This is why equity plays a significant role in maritime delimitation, and so it should. In certain circumstances, it can serve as a 'corrective force, seeking to reconcile the geometric constructions with the human realities'.[136] For these reasons, I submit that concerns for stability must be balanced with equity where the latter can ensure greater stability, permanence, and peace in the specific context.

Finally, neither geographical nor non-geographical considerations are legal *per se*. In the second stage of the maritime delimitation process, geographical features are classified as relevant circumstances—extralegal factors that justify adjusting the line to achieve equity. In this sense, they are no more legal than non-geographical features, or any other relevant circumstance. Relevant circumstances, by their very nature, steer away from formalism as they invite extra-legal factors – whether geographical or non-geographical – to be considered. The mere existence of relevant circumstances acknowledges that the process is not meant to be purely legal by default.

At the very least, the Court can draw from its practice in territorial disputes (Chapter 7) and the practice of arbitral tribunals to uphold and protect fishing activities *post scriptum*, despite its decision in the maritime boundary dispute.[137] *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen* (1999) provides an example of such a practice. Indeed, despite the arbitral tribunal refusing to apply the 'catastrophic repercussions' doctrine in that case, it acknowledged, in the first stage of the Award focused on territorial sovereignty, that its findings entailed 'the perpetuation of the traditional fishing regime in the region' and therefore required Yemen to 'ensure that the

[135] Cottier (n. 46) 586.
[136] Kolb (n. 48) 16.
[137] Fietta and Cleverly (n. 84) 87.

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traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men'.[138]

It then reaffirmed, in stage two of proceedings on the maritime delimitation, that the traditional fishing regime recognises certain associated rights (such as free passage for fishermen through waters, including to enter relevant ports and sell and market fish) and exists 'for the benefit of the fishermen of both countries throughout the region'.[139] Accordingly, the traditional fishing regime '[did] not depend, either for its existence or for its protection, upon the drawing of an international boundary' by the Arbitral Tribunal.[140] Similar conclusions were drawn in the *Abyei arbitration (Government of Sudan / The Sudan People's Liberation Movement/Army)*, where the tribunal reaffirmed that 'traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation'.[141] In *Eritrea/Yemen*, traditional fishing rights were extended through the EEZs of both states, with no limitations imposed by maritime boundary rules. This was made possible as, in that case, the arbitral tribunal was empowered to take into account other pertinent factors aside from UNCLOS, therefore allowing it to go beyond traditional fishing as it would exist therein.[142] Notwithstanding instructions in Special Agreements, the judges on the bench of the World Court often have the possibility to take into account other pertinent factors in their deliberations. In the spirit of this arbitral award, mention can therefore be made of the need of the parties to preserve the traditional fishing regime, so as to ensure free access and enjoyment for all fishermen.

6.4 Historic Fishing Rights

Contrary to Section 6.3 addressing the stages of maritime boundary delimitation, this section focuses on disputes where the Court ascertains

[138] *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (1998) (Award) XXII RIAA 209, 329–30 [526].
[139] *Second stage of the proceedings between Eritrea and Yemen* (n. 4) 361 [109].
[140] Ibid 361 [110].
[141] *Arbitration regarding the Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Movement/Army* (2009) (Award) XXX RIAA 145, 408–10 [753]–[760] and 412 [766].
[142] *Second stage of the proceedings between Eritrea and Yemen* (n. 4) Annex 1, Article 2(3).

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if a state has sovereignty over a maritime zone without drawing a maritime boundary. In this context, another scenario allowing for the consideration of fishing activities and their importance for local populations is when such activities are argued to be historic fishing rights. In this section, I identify the reasons for the Court's reticence to uphold historic fishing rights in this context, including a concern for stability. I argue that reframing the understanding of stability can allow for a greater balance to be struck and, therefore, for the needs of coastal populations to be considered.

Given that traditional fishing has, by definition, been practised by coastal populations for generations, it qualifies as their historic right. The basic concept of historic fishing rights holds that nationals of one state have the right to traditionally fish in another state's jurisdiction due to the historic longevity of this practice. Traditional fishing rights are private rights by nature and are acquired by use and time. However, 'the interest of the State in the fisheries enjoyed by its nationals, and the protection which it provides them with, provide such private activities with a public underpinning and make possible the establishment of a mixed (private/public) prescriptive title'.[143]

State litigants have invoked their populations' traditional fishing as a historic right to be considered in the Court's assessment of the sovereignty over a contested maritime zone. As clarified by the arbitral tribunal in the *South China Sea* arbitration, historic rights 'may [be a claim to] sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty'.[144] States typically make such claims to sovereign rights in the other state's EEZ or to invoke the alleged right of a state and its nationals to access and exploit living resources in another state's EEZ.[145]

In this section, I observe that while the Court has stated that '[h]istoric titles must enjoy respect and be preserved as they have always been by long usage',[146] it has yet to uphold a claim to sovereignty nor has it found that one state's population has a right to fish in the maritime zones of

[143] Kolb (n. 48) 17.
[144] *South China Sea Arbitration (Philippines v. China)* (2016) (Award) XXXIII RIAA 153, 271 [225] (emphasis added).
[145] This, however, is subject to certain conditions determined by the coastal State, pursuant to UNCLOS, Article 61(1).
[146] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n. 16) 73 [100].

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another state. I reflect on the reasons for this here, which include a concern for stability.

First, historic fishing rights are rarely upheld by the Court because opportunities to do so have been few and far between. Indeed, historic fishing rights are challenging for state litigants to invoke due to the burden of proof. This was seen in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (2022), where the Court rejected Colombia's third counterclaim that Nicaragua failed to respect the traditional and historic fishing rights of the inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, in the waters in which they were allegedly entitled to exercise said rights.[147] To reach this conclusion, the Court considered whether there was a customary rule of international law under which the Raizales were entitled to fish in the relevant maritime zones. Colombia had provided eleven affidavits to prove the existence of this long-standing fishing practice. Although the Court acknowledged the need for 'some flexibility' in considering their probative value,[148] it expressed caution in giving weight to affidavit evidence and ultimately judged that the eleven affidavits did not sufficiently establish its claim.

Judge *ad hoc* McRae argued in his dissenting opinion that the Raizales are indigenous fishermen and their claimed rights were therefore indigenous rights, which warranted special attention.[149] He also argued that the standard the Court set for establishing traditional fishing rights was essentially one that could never be reached.[150] Although Judge Xue made a declaration emphasising the importance of traditional fishing rights, and particularly their recognition and protection under customary international law,[151] she ultimately agreed with the decision to reject the counterclaim. The majority view of the judges to reject it indicates the bench's reluctance to uphold traditional historic fishing rights in assessing the sovereignty of a maritime zone.

Second, historic fishing rights have also yet to be upheld because their importance decreased with the emergence of the EEZ. Traditional fishing rights have been addressed by the international community

[147] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Counter-Claims) (Order) [2017] ICJ Rep 289, 302 [40].
[148] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Judgment) [2022] ICJ Rep 266, 350 [221].
[149] Ibid 450–53 [55]–[64] (Dissenting opinion of Judge McRae).
[150] Ibid 453 [65].
[151] Ibid (Declaration of Judge Xue), especially 404 [2], 407 [9], 408 [12].

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since before the adoption of UNCLOS in 1982. In 1958, the First Law of the Sea Conference (UNCLOS II) adopted a resolution recognising the preferential requirements of a state whose people are overwhelmingly dependent on coastal fisheries for their livelihood or economic development, or who engage in local fishing in small boats and are dependent on coastal fisheries for the animal protein in their diet.[152] The *travaux préparatoires* of Article 6 of the 1958 Convention on the Continental Shelf (one of the four conventions adopted at UNCLOS II) indicate that such fishing rights were 'special circumstances' influencing the delimitation of the continental shelf.[153] However, with the steady emergence of the concept of the EEZ regime, traditional fishing activities were gradually marginalised by states.[154]

The Court seems to have followed this approach of minimising the importance of historic fishing rights. In *Gulf of Maine*, discussed earlier, the Chamber noted the US's emphasis that its historic fishing presence in the area – which the Chamber described as 'somewhat akin to the invocation of historic rights, though that expression has not been used'[155] – should be a considered circumstance in the maritime boundary delimitation.[156] The Chamber explained that while the US, as the coastal state, may have been able to achieve an actual *de facto* predominance for its fisheries at certain places and times, the situation radically altered after the coastal states set up EEZs. Such *de facto* predominance could no longer constitute a valid ground for its claiming of the incorporation into its own exclusive fishery zone of an area which had legally become Canada's.[157]

Third, despite their decreased importance, any number of states may make historic fishing claims on the same disputed waters, and no single state can claim an exclusive fishing right. In the recent *South China Sea* arbitration, for instance, both China and the Philippines claimed historic

[152] Jagota (n. 75) 25; Arthur H. Dean, 'The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas' (1960) 54(4) *The American Journal of International Law* 751; D. W. Bowett, 'The Second United Nations Conference on the Law of the Sea' (1960) 9(3) *International and Comparative Law Quarterly* 415.

[153] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n. 16) 122–24 [79]–[84] (Separate opinion of Judge Eduardo Jiménez de Aréchaga).

[154] Huan-Sheng Tseng and Ching-HsiewnOu, 'The Evolution and Trend of the Traditional Fishing Rights' (2010) 53 *Ocean & Coastal Management* 270, 275.

[155] *Gulf of Maine* (n. 54) 340–41 [233].

[156] Ibid. See also Memorial of the United States of America (27 September 1982) 5 [8], 6 [12], 7 [18], 57 [157].

[157] *Gulf of Maine* (n. 54) 341–42 [235].

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fishing rights in the same fishing grounds.[158] This would put the Court in a difficult position to decide between competing claims. While this has yet to occur, in the *Fisheries Jurisdiction* cases the Court dealt with competing claims between historic fishing rights, on the one hand, and other similar rights protecting local populations, on the other hand. There, the Court did not prioritise historic fishing rights either.

Indeed, the *Fisheries Jurisdiction* cases suggest that historic fishing rights do not automatically supersede all other considerations and are not absolute rights. While these were not maritime boundary delimitation disputes, the conclusions reached about historic fishing rights could also apply to such disputes. In these cases, the UK and Germany challenged Iceland's assertion of an exclusive fishing zone extending 50 nautical miles.[159] This assertion directly impacted the rights of British and German nationals who had historically fished in these waters. Iceland, however, justified its preferential rights on the grounds of its local populations as well. It claimed that its economy depended almost entirely on fishing in the vicinity of its coasts, and for this reason, 'the population of Iceland has followed the progressive impoverishment of fishing grounds with anxiety'.[160] Given that fishing equipment was much less efficient than it is today, Iceland advocated that measures to protect fisheries ought to be extended in proportion to the growing efficiency of fishing equipment.[161]

The Court recognised that Iceland did have 'preferential fishing rights' in the maritime areas adjacent to its fishing zone but also that the UK and Germany had 'traditional fishing rights' in the same maritime areas.[162] The Court explained that neither right is absolute:

> [T]he preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own

[158] Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing 2014) 48.

[159] *Fisheries Jurisdiction (United Kingdom v. Iceland)* (n. 3) 7–8 [11]. See also Knut Reese, 'The Making of a Case for the International Court of Justice – Icelandic Fishing Rights' (1973) 6(3) *Comparative and International Law Journal of Southern Africa* 394.

[160] *Fisheries Jurisdiction (United Kingdom v. Iceland)* (n. 3) 10–11 [20].

[161] Ibid 10–11 [20].

[162] Ibid 29–30 [67]–[69].

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> obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.[163]

Accordingly, the Court concluded that both states had an obligation to recognise the other's rights and that '[t]he most appropriate method for the solution of the dispute is clearly that of negotiation'.[164] The parties were thus under mutual obligation to undertake negotiations to find an equitable solution in good faith. This demonstrates that historic fishing rights are in no way absolute. The Court's judgment required Iceland to respect the historic fishing rights of the citizens of Germany and the UK and thus reaffirmed the importance of traditional fishing rights of third states. However, Iceland's preferential rights also had to be respected by Germany and the UK.

The non-absolute nature of historic fishing rights was also indicated in *Gulf of Maine*, examined earlier, where the US claimed historic fishing rights and the Court did not give it any more consideration than it did to Canada's socio-economic arguments relating to fishing activities.[165] Indeed, there is no hierarchy between one type of fishing right and the other. The non-absolute nature of historic fishing rights is perhaps not too surprising if we consider that during the UNCLOS II negotiations, a proposal of a six-nautical mile fishing zone subject to traditional fishing rights for ten years was not adopted by the plenary.[166]

The fourth reason why the Court has yet to uphold historic fishing rights when assessing the sovereignty of a maritime zone is because they are exceptional in nature and cannot contravene the UNCLOS. Indeed, historic fishing rights often serve as an exception to the rules laid down in the UNCLOS in practice, most commonly because those rights existed before its adoption.[167] For instance, Article 15 of the UNCLOS provides that the delimitation rule for the territorial sea does not apply 'where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith',[168] and the heated negotiations about fishery limits in light of

[163] Ibid 30–31 [71].
[164] Ibid 31–32 [73].
[165] *Gulf of Maine* (n. 54) 278 [59], 340–41 [233], 341–42 [235].
[166] Jagota (n. 75) 27.
[167] Dyspriani (n. 4) 2.
[168] UNCLOS, Article 15.

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the breadth of the territorial sea during UNCLOS II indicate that fishing rights were targeted in these provisions.[169]

Further to this, historic fishing rights cannot supersede UNCLOS in cases of incompatibility, as indicated in the *South China Sea* arbitration. This means that the Court would not be able to uphold historic fishing rights if they contravened any clause in UNCLOS. Indeed, the arbitral tribunal did not doubt that China had historic rights giving it certain privileges in such waters, but explained that China's adherence to UNCLOS had changed this situation and meant that it accepted to relinquish 'the rights it may have held in the waters allocated by the Convention to the exclusive economic zones of other States'.[170] This reasoning was inspired by the Court's response to the US's arguments about its historic fishing presence in the area, in *Gulf of Maine*.[171] The Tribunal explained that the *South China Sea* arbitration differed from the *Fisheries Jurisdiction* cases as the latter involved the UK and Germany asserting a right of access to Icelandic waters, rather than disputing Iceland's EEZ rights, as China did.[172] Historic fishing rights are therefore interpreted within the framework and limitations imposed by UNCLOS, which 'supersedes earlier rights and agreements to the extent of any incompatibility'.[173] China's historic rights were 'contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention'.[174]

A final and most relevant reason why the Court has not upheld historic fishing rights may be a concern for stability. Historic fishing reflects an activity carried out by a coastal population whose presence could change or evolve over time. In this sense, they could represent less permanence than geographical features in maritime disputes. Therefore, following a similar logic to that applied to territorial disputes (Chapter 7), the Court may be reluctant to draw conclusions based on possibly migrating populations in inter-state disputes. However, international law recognises stability as a characteristic of historic fishing. As the arbitral tribunal stated in the *South China Sea* award,

[169] Jagota (n. 75) 25–27.
[170] *South China Sea Arbitration* (n. 144) 285 [257].
[171] *Gulf of Maine* (n. 54) 341–42 [235].
[172] *South China Sea Arbitration* (n. 144) 285–86 [258].
[173] Ibid 278–79 [246].
[174] Ibid 612–13 [1203 B(2)].

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> The legal basis for protecting artisanal fishing stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears. Thus, traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of the community, in other words to 'those entitlements that all fishermen have exercised continuously through the ages.' [. . .][175]

More broadly, with respect to vested rights referred to in this passage, international law has long recognised the stability of private rights such as historic fishing rights. Indeed, as the Permanent Court of International Justice (PCIJ) made clear, 'Private rights acquired under the existing law do not cease on a change of sovereignty'.[176] Therefore, historic fishing rights are characterised by their stability due to the longevity of this practice. They therefore reflect stability that aligns with the Court's approach in such disputes and should be considered where appropriate.

To conclude, given the difficulties that arise when states invoke such rights as arguments in their pleadings, and the challenging characteristics of such historic fishing rights, they have yet to be upheld by the Court in its assessment of sovereignty over a disputed maritime zone.[177] However, the arbitral tribunal stated in *Grisbådarna* as early as 1909, in reference to Sweden's historic fishing rights, that 'it is a well-established principle of the law of nations that the state of things that actually exists and has existed for a long time should be changed as little as possible'.[178] It would therefore be advisable for the Court, a proponent for the principle of stability, to embrace historic fishing rights in all of their permanence where relevant.

6.5 Conclusion

Local populations are rarely factored into the legal reasoning of the Court in maritime disputes. The Court has dismissed states litigants' arguments regarding the concerns for their fishing populations to influence the determination of a pre-existing boundary (Section 6.2). The desires or needs of local populations have always been rejected as relevant

[175] Ibid 467 [798].
[176] *German Settlers in Poland* (Advisory Opinion) [1923] PCIJ Series B 36.
[177] Cottier (n. 46) 485.
[178] *The Grisbådarna case* (n. 47) 161.

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circumstances (or as a factor when assessing the overall test for the equitableness of the boundary) save in *Jan Mayen*, due to the exceptional severity of the situation (Section 6.3). The Court, although acknowledging the general value of historic fishing rights, has yet to uphold them as an argument in a maritime dispute (Section 6.4). From the perspective of social idealism, concerned with a greater balance between states and individuals, such outcomes can be considered unjust, calling into question the legitimacy of the decision (Section I.1.2).

The overarching explanation for the approach observed in this chapter is the Court's application of formalism (Section 6.1). While I have argued that such an approach is appropriate when determining the pre-existence of a boundary (Section 6.2), the principle of equity could find application when adjusting the provisional line in maritime delimitation, to consider local populations impacted by this process (Section 6.3). While formalism and concerns for stability have hindered this, I have noted that equity is integral to the legal process. Moreover, the prioritisation of geographical circumstances is no less contrary to legal formalism than other relevant circumstances, may sometimes yield superficial outcomes, and may occasionally fall short in to adequately resolving the relevant dispute. Finally, I have identified and challenged the Court's reluctance to uphold arguments related to historic fishing rights, as they reflect the stability and permanence valued by the Court (Section 6.4).

Debates on the nature of law—whether as predictable and constant or as equitable and just—both within and beyond the context of maritime boundary disputes, reflect the broader intellectual tension between stability and change that has shaped international legal discourse since time immemorial.[179] Resolving such tensions and striking a satisfactory balance is a delicate, case-by-case task. However, while law must be stable, it 'cannot stand still'.[180] In this chapter, I have proposed ways to reconcile the need for change with the need for stability in maritime boundary disputes to better serve the local populations impacted by such judgments of the World Court.

[179] Titi (n. 59) 74.
[180] Roscoe Pound, *Interpretations of Legal History* (CUP 1923) 1.

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