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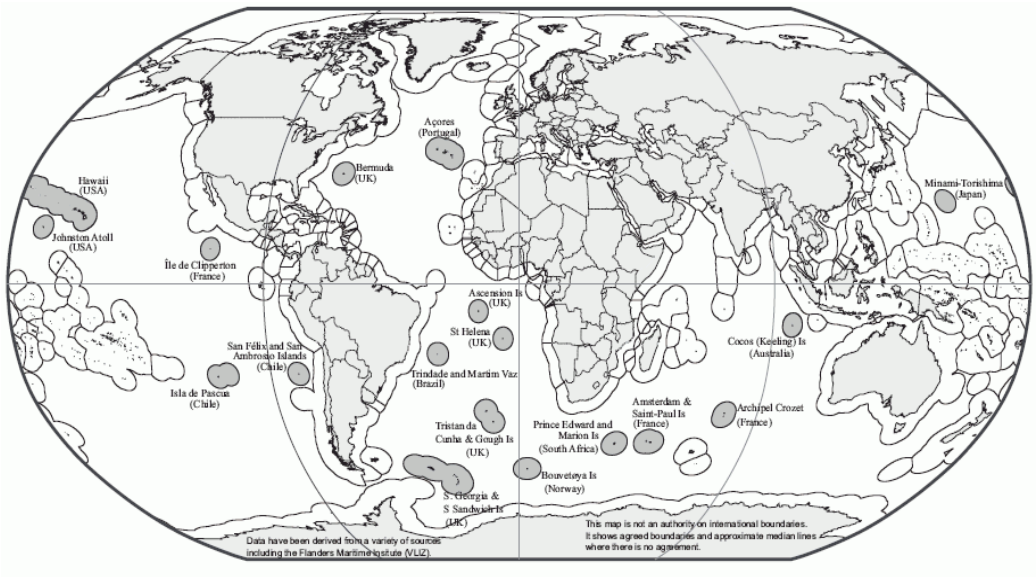
Maritime Boundary Delimitation



'The Role of Private Rights in Maritime Boundary Delimitation: A Proposal for Procedural Reform'

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ABSTRACT

The objective of this thesis is to ultimately conclude that private rights and commercial activity should be afforded an elevated role in maritime delimitation judgments, and then propose a procedural reformation to address this.[1]

In Chapter I, I endeavoured to establish the modern-day delimitation procedure, with an expansive discussion on the pertinent case law and applicable concepts. I will conclude that while the current formulation has the capacity to consider and implement private rights into boundary judgments, in practice this is rarely achieved.

In Chapter II, I will focus upon the treatment of private rights in maritime boundary delimitation, with an analysis of relevant jurisprudence. This will conclude that while disputes often revolve around the operation of maritime commerce, the current procedure does not reflect this in practice. International courts and tribunals strongly favour the consideration of geographic elements in altering provisionally charted boundaries, while commercial factors are often left unaddressed.

In Chapter III, justification will be provided to support an increased role for private rights in procedural delimitation. This will be achieved by examining the consequences that states, their citizens, and the wider international community can be exposed to owing to the non-consideration of commercial operations at sea. This argument will be supported by an analysis of judicial opinion and academic rationale, to ultimately conclude that procedural development is required to address this issue.

In Chapter IV, I will propose a reformation of procedural maritime delimitation to elevate the role of private rights and commercial activity in judicial proceedings. I will conclude that the most viable solution is affording the consideration of non-geographic factors a distinct structural mechanism, and provide commentary justifying this choice.

[1] The source of the title page map depicting global 200nm maritime zones was found in 'Maritime Delimitation and Associated Questions |' <https://lawexplores.com/maritime-delimitation-and-associated-questions/> accessed 24 March 2023. Full credit goes to Dr Robin Cleverly at the UK Hydrographic Office, Taunton.

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TABLE OF ABBREVIATIONS

CS	Continental Shelf
EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	The International Tribunal on the Law of the Sea
TS	Territorial Sea
UNCLOS	United Nations Convention on the Law of the Sea

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DEDICATIONS

I dedicate this thesis to Elodie Migliore, whose strength and character knows no bounds. She has given me invaluable support throughout, for which she has my eternal gratitude. All my love always, you are a constant source of inspiration.

AUTHOR'S DECLARATION

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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Signature:

INTRODUCTION

The judicial delimitation of disputed maritime territory is an extremely significant area of international law. Maritime delimitation dominates proceedings brought before the International Court of Justice (ICJ), so much so that it gives rise to more cases before the Court than any other subject.[2] The ICJ has detailed its task in such cases as 'resolving the overlapping claims by drawing a line of separation between the maritime areas concerned'.[3] This is accurate yet simplistic, with the colossal variation of geographical and non-geographical elements present in the coastal territories across the globe making the task of delimitation often vexing, and far more complex than a straightforward split of 'spatial ambit'.[4] Maritime boundaries are synonymous with the economic prosperity of coastal states, therefore their effective and efficient governance is fundamental to their peaceful utilisation. After all, 'good fences make good neighbours'.[5]

One feature of maritime delimitation that makes it inherently fascinating, is that its development is facilitated by jurisprudence. The 1982 United Nations Convention on the Law of the Sea (herein UNCLOS) omits any express reference to any applicable delimitation concept.[6] As a result, the applicable procedure has been formulated and altered by the judgments of international judicial bodies.[7] This gives maritime delimitation the freedom to continually develop and adapt to emerging issues and features found in modern territory disputes. I will establish that the present development of maritime delimitation, which has been successful in the past in producing tangible steps forward, is now a step behind.

Maritime territory often symbolises commercial opportunity for coastal states. There are numerous ways that a state can financially exploit their waters, from the more obvious examples such as fishing and the granting of oil concessions, to the perhaps lesser considered methods such as scientific research and the installation of telecommunications cables. It is the opportunity for financial gain that I believe to be the principal motivation for states to seek delimitation of their boundaries. The prominent mechanism that states utilise to

[2] M D Evans, Maritime Boundary Delimitation, in Rothwell et al, The Oxford Handbook of the Law of the Sea, (OUP 2015) p.254.
[3] Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment) [2012] ICJ Rep 624, [141].
[4] Y Tanaka, *The International Law of the Sea* (CUP 2012) p.196.
[5] 'Mending Wall', R Frost, North of Boston (David Nutt 1914).
[6] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.
[7] Herein, use of the term 'the judiciary' encapsulates the ICJ, the International Tribunal on the Law of the Sea, and ad hoc arbitral tribunals within the framework of the Law of the Sea Convention's dispute settlement provisions.

facilitate such commercial activity is the creation and granting of private rights in the form of concessions and licenses to non-state actors. Private rights and the associated commercial activities have numerous advantages for states.

The support and promotion of economic prosperity that maritime commerce provides is extremely important for citizens, non-state actors, and the coastal nations themselves. It is therefore logical to presume that private rights and commercial activity should play a role in maritime delimitation, or at the very least that the current delimitation methodology has the capacity for full and consistent judicial consideration during proceedings. In practice, this is not the case. This exposes the numerous parties to a dispute to a range of issues and has the capacity to damage international harmony. To date, it is estimated that there are round four hundred and twenty potential maritime boundaries across the globe.[8] The number of settled boundary agreements is dwarfed by comparison. This shows the real potential for international disputes that can be accelerated and exacerbated by any numbers of factors, from strategic military advantage, tenuous diplomatic relations, and advancing scientific research, to fishing rights and the discovery of valuable oil reserves. The overarching objective of this paper will be to establish that the applicable delimitation formulation found in the *Black Sea* case[9] would benefit from further development, facilitated by jurisprudence in the form of consistent consideration of private rights and commercial activity, and then to derive a procedural solution.

There are several points that must be considered and discussed before this can be achieved. Accordingly, Chapter I will establish how procedural maritime delimitation currently operates and provide commentary on the prominent concepts. This will be achieved by discussing the seminal *Black Sea* judgment, its prominent concepts, and the procedural structure utilised in this case, which represents the modern approach.[10] The establishment of the modern formulation will also play a secondary yet fundamental role, as by discussing this judicial development, it will show that further development is a realistic objective to pursue. In answering the question that this thesis poses, the prominent concepts will be individually explored to a deeper degree, with a particular focus on their capacity for the inclusion of private rights and commercial activity. It will conclude that on paper this is currently possible, yet in practice is seldom achieved, showing that procedural development

[8] The US Dept of State, *Bureau of Oceans and International Environment and Scientific Affairs, Limits in the Seas*, No: 108, 1st Rev (Maritime Boundaries of the World, 1990).
[9] *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*) (Judgment) [2009] ICJ Rep 61.
[10] ibid.

is required to facilitate their consistent consideration and influence upon the judicial establishment of maritime boundaries.

Chapter II will analyse the role that private rights currently perform within the applicable delimitation procedure. Firstly, the legal competence of states to create and govern private rights in maritime territory will be discussed. There is a stark indicator that maritime delimitation requires a procedural shift, in that non-state actor involvement in boundary disputes is increasingly commonplace. A host of examples found in jurisprudence will be touched upon to display this and demonstrate that there is a disproportional influence in which private rights and commercial activity are burdened by in current procedural delimitation. I will then provide detailed commentary on their minimal procedural influence, including an investigation of case law where international courts and tribunals have included private rights and commercial activity in their decisions. Such examples are relatively rare and have been heavily criticised. Existing criticisms are crucial to establish, because the procedural reformation that I will propose will attempt to anticipate such scrutiny and will support a more finessed solution. Ultimately, I will conclude that private rights and commercial activity presently play close to a non-existent role in current maritime delimitation, therefore exhibiting that an alteration to the current procedure is required to expand their influence. Potential lines of reasoning for this judicial trend shall also be discussed throughout the paper.

Establishing the minimal influence that private rights and commercial activity is important to establish before making a proposal for reform. However, it does not adequately provide justification. The consequences of the judicial disregard of private rights are fundamental in justifying why legal development should be sought. Therefore, Chapter III will discuss in detail several impacts that the non-consideration of private rights lead to, for the parties that have a stake in a territorial dispute. Consequences of the current formulation's treatment of private rights and commercial activity, such as the risk of international disharmony, will be discussed with the support of jurisprudence and academic writing. This will provide crucial context and justification for my proposed developments to this area. However, I believe another method of justifying further development can be undertaken by examining leading academic work and prominent judicial opinion, which will provide interesting insight and support for this chapter's goal, as well as gauging the current appetite for such changes to be sought. Marianthi Pappa's discussion of the disparity between land and maritime

delimitation's treatment of private rights[11] and the declaration of Judge Xue in the case between Somalia and Kenya will offer academic and judicial reinforcement in the pursuit of expanding their role.[12]

Finally, Chapter IV will undertake the task of deriving a solution to this issue. The preceding chapters will lead to and support the conclusion that the most effective and realistic method of achieving the consistent consideration of private rights and commercial activity is to dedicate a distinct stage of delimitation for meeting this objective. I believe it is crucial to proceed in two directions. Firstly, it must be fully justified why a distinct stage of delimitation would represent tangible legal progression, and so my rationale for this proposal will be set out in full. Secondly, to display that the adoption of an additional stage is an achievable target, it is fundamental to the argument's survival that I derive how I would foresee this development operating in practice. Alongside an examination of existing jurisprudence to reinforce the notion that this alteration represents progression, I will give a theoretical example in the form of a fictional dispute to clarify exactly how it would operate in practice. As I alluded to before, the anticipation of criticism prior to deriving any legal development will lead to a more polished result. Such criticisms can be found in the rare examples where private rights have had a tangible effect on the final boundary, for example the dissenting opinion of Judge Gros in the dispute between Tunisia and Libya.[13] Accordingly, I will conclude Chapter IV by examining possible scrutiny that could be levied against the proposed developments.

Maritime delimitation is in the unique and greatly beneficial position of being able to adapt to emerging issues. The range of benefits that the full commercial enjoyment of maritime territory can lead to for states, especially those who rely heavily on oceanic exploitation, means that I firmly believe that the protection of such undertakings during judicial maritime proceedings is a worthy and achievable objective. Whether it be the promotion of international harmony or the facilitation of economic prosperity, effective and efficient maritime delimitation is a part of the fabric of coastal states' livelihoods. This results in delimitation being a high-stakes area of international law, a notion that will be revisited throughout. The afforded flexibility afforded by the absence of a codified procedure means that progression can be sought and established to keep pace with the vast issues present in

[11] M Pappa '*Non-State Actors' Rights in Maritime Delimitation: Lessons from Land'* (CUP 2021) p.45-95.
[12] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p.206, (Declaration of Judge Xue).
[13] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* p. 18, (Dissenting Opinion of Judge Gros).

disputed territories. I believe such legal progression should be pursued to ensure that the applicable procedure always reflects the motivations behind states who seek their boundary to be judicially established. The current formulation can be found wanting in this regard.

CHAPTER I: JUDICIAL MARITIME DELIMITATION AND ITS PROCEDURAL FLAWS

In the opening chapter of this thesis, I will establish what the current maritime delimitation procedure entails. The overarching objective is to conclude that the consistent application of private rights in boundary judgments would be advantageous and represent a positive legal development. By initially establishing the current methodology, this will provide essential context for the remainder of the thesis. It will also illustrate that historic legal development has been implemented and proved to be beneficial, which shows further procedural reformation is achievable.

To successfully convey that the current jurisprudence would benefit from further progression, I believe it must be shown that the applicable methodology has fragilities that could lead to unsatisfactory results in diplomatically sensitive circumstances. The high-stakes nature of delimitation means that any perceived opportunity to develop the law should be enacted to ensure an equitable outcome, and to dispel as much post-judgment dissatisfaction as possible. I acknowledge that establishing a maritime boundary will seldom leave all parties satisfied, otherwise most delimitations would be achieved via negotiation and agreement without the need for judicial intervention. The reality is that agreement upon boundaries is 'one of the most difficult disputes for states to resolve'.[14] There are approximately two hundred boundary agreements found across the globe.[15] This seems substantial, however in comparison to the previously noted statistic of potential boundaries, it strongly indicates that judicial delimitation has a key role to play in assisting in the governance of the oceanic territory between states. Almost 40% of maritime boundaries remain unsettled and frequently disputed.[16]

I would now like to take the opportunity to provide some definitions for broader concepts that will be referred to throughout. Firstly, I would like to expand on private rights at sea. Herein, any such reference to private rights will encapsulate any license or concession granted to a non-state actor for the conduct of commercial activity. Common examples of such commercial activity include 'fishing, exploration and extraction of petroleum, minerals, or other resources, the conduct of scientific operations, or permits for the installation of

[14] S Lavrov and J Gahr Støre, "*Canada, Take Note: Here's How to Resolve Maritime Disputes*," The Globe and Mail, 21 September 2010.
[15] The US Dept of State, *Bureau of Oceans and International Environment and Scientific Affairs, Limits in the Seas*, No: 108, 1st Rev (Maritime Boundaries of the World, 1990).
[16] A Østhagen & C Schofield (2021) A*n ocean apart? Maritime boundary agreements and disputes in the Arctic Ocean*, The Polar Journal, 11:2, p.317-341

submarine cables or pipelines.'[17] I would like to align my use of the term private rights and commercial activity with this definition; however, I do not believe this list should be exclusively limited to the examples given. The determinative factors are that such license or concession is for the undertaking of any commercial activity, it is regulated by the states' domestic laws, and such activity is to be exercised within a states' maritime territory.

Secondly, I want to define maritime territory as this will be referred to heavily throughout the paper. Maritime territory comprises the territorial sea (TS), the exclusive economic zone (EEZ), and the continental shelf (CS). The TS, as defined by Yoshifumi Tanaka, 'is a marine space under the territorial sovereignty of the coastal state up to a limit not exceeding twelve nautical miles measured from baselines.'[18] This is enshrined in Article 3 of UNCLOS.[19] The EEZ is an 'area beyond and adjacent to the territorial sea, not extending beyond 200 nautical miles from the baseline of the territorial sea'.[20] The CS of a coastal state comprises 'the seabed and subsoil' of the submarine areas. This extends beyond the TS to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines of the territorial sea in cases where the continental margin does not extend to that distance.[21] Herein, reference to maritime territory comprises these zones, in which states are permitted to undertake commercial activity. The powers that coastal states enjoy over these areas differ, however states are permitted to exercise economic operations within these zones and therefore further discussion on the exact powers afforded to states through their sovereignty over the different zones is not necessary.

Procedural maritime delimitation is a uniquely constituted area of international law, as it remains relatively unshackled by any clear codification that details the principles to be utilised in establishing a boundary at sea. UNCLOS purposefully omits any explicit reference of delimitation principles, which had previously been subject to deeply intense debate between coastal states with opposing views since the introduction of the 1958 Geneva Convention.[22] Article 74 and 83 of UNCLOS prescribe that delimitation of the CS and the EEZ shall be 'effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the ICJ, in order to achieve an equitable solution'.[23] Since there is no

[17] Pappa, *Non-State Actors* (n. 11) p. 22.
[18] Tanaka, *The International Law of the Sea* (n. 4) p. 196.
[19] UNCLOS (n. 6) Article 3.
[20] ibid., Articles 55 & 57.
[21] ibid., Article 76.
[22] Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1969) 499 UNTS 311.
[23] UNCLOS (n. 6) Articles 74(1) and 83(1).

reference to any prescribed methodology, it makes the argument for the prominence of differing concepts natural and very much part of the fabric of this area of law. As such, the applicable procedure is derived and developed by jurisprudence, a 'remarkable feature'[24] that can facilitate further change.

Historically, international boundaries between states have previously been settled by bloody conflict, with the creation of boundaries a product of military supremacy. In the fifteenth and sixteenth centuries, boundaries were very much fluid, overlapping and shifting constantly.[25] International relations were not consolidated by boundaries, it was very much the opposite.[26] In the following centuries, most boundaries were unilaterally imposed, with only a miniscule amount being established by agreement. Forcible means were still the main tool employed to arbitrarily establish boundaries by colonial powers.[27] Boundaries were rudimentary, with maritime territory being a product of how far you could fire a cannonball from your shores, a rule that originated from the Dutch in 1610 at the London Fisheries Conference. They stated, 'no Prince can challenge further into the sea than he can command with a cannon'.[28] This method even though extremely crude, was born from military origins, with control based on the limit of your ability to destroy an intruding ship. Regardless of the utilised method, delimitation's conflicted history shows that international boundaries are essential to harmony with one's neighbour and are part of the fabric of coastal relations. Often, the reward from emerging victorious in a territorial conflict was the establishment of a boundary, albeit one that was constantly subject to alteration.[29] It remains true today that sovereignty over territory can lead to international disputes, and threats relating to the use of force. This makes effective and efficient procedural delimitation crucial to the maintenance of international harmony between coastal neighbours, and as such any opportunity for advantageous development should be acted upon.

1.1 THE CURRENT DELIMITATION METHODOLOGY

The current methodology applied by the judiciary is derived from jurisprudence. The procedure has numerous discernible principles, all of which have played roles of rotational

[24] Tanaka, *International Law of the Sea* (n. 4) p. 201.
[25] M Zacher, '*The Territorial Integrity Norm: International Boundaries and the Use of Force'* (2001) 55 International Organization p.215.
[26] ibid., p.217.
[27] ibid.
[28] T Fulton, '*The sovereignty of the sea: an historical account of the claims of England to the dominion of the British seas, and of the evolution of the territorial waters'* (1911), p.156.
[29] ibid.

importance in the past. The prominence of one principle has often led to the diminishment of others, each with their own unique benefits and downsides. This portion of Chapter I will be dedicated to exploring the prominent principles today, with commentary given on previous methods for the purpose of highlighting the judicial development that has been historically undertaken to produce what can now be deemed as the modern-day formulation, and the freedom the judiciary is afforded to adapt. This is a deeply crucial point to illustrate, as the previous undertaking of procedural development shows that this area of law retains the capacity to progress further and implement the reforms I will propose.

Methodologies adopted prior to the *Black Sea*[30] case used equity as a corrective tool, to alter a provisionally charted equidistant boundary. This was first put into practice by the ICJ in the *Jan Mayen* case.[31] Equity was heralded as the sure-fire check for ensuring that the outcome did not reflect any obvious disproportion. The ICJ took further steps to systematise previous jurisprudence into what can be named 'the three-stage' test, which is now widely adopted and implemented across maritime delimitation.[32] Unsurprisingly, it is dubbed so because delimitation is enacted by a procedure involving three distinct stages. The first step taken is to draw a provisional line using equidistance. This will always be the first task undertaken in delimitation unless it is unfeasible to do so.[33] The 1958 Geneva Convention provides the definition of equidistance; 'the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each of the Two States is measured.'[34] Secondly, the Court will then consider whether there are any factors which exist that call for any adjustment of the provisional equidistance line, to ensure an equitable outcome.[35] It is at this stage that it seems likely that private rights and their associated economic benefits could be considered by the Courts. However as will be expanded upon, it is highly unlikely that the Court will accept and consider the existence of private rights in the disputed territory in their judgment. The possible reasons for this will also be analysed further. Thirdly, the Court shall verify that the line, whether it be unchanged after stage two, or deviated as a result, does not reflect an inequitable result by way of any

[30] *Maritime Delimitation in the Black Sea* (n. 9).
[31] *Maritime Delimitation between Greenland and Jan Mayen (Denmark v. Norway)* (Judgment) [1993] ICJ Rep 38.
[32] Subsequent uniform adoption can be seen by the ICJ in the *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624, [141], the ITLOS in the *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2012] ITLOS Rep 12 [240], and the Arbitral Tribunal in the *Arbitration between Guyana and Suriname* (2007) XXX RIAA 1, [323]-[325].
[33] *Maritime Delimitation in the Black Sea* (n. 9), [116].
[34] Geneva Convention 1958, (n. 22) Article 6.
[35] *Maritime Delimitation in the Black Sea* (n. 9), [120].

obvious disproportion in respect of the coastlines and the ratio of the spatial split.[36] Thus, the 'three-stage' approach. The addition of this third stage can be viewed as the latest procedural development, affording proportionality a function as a distinct concept.[37]

The applicability of proportionality prior to the *Black Sea* case was inconsistent. This has led to academic uncertainty regarding its true purpose in the process, a conclusion drawn by Yoshifumi Tanaka.[38] In the *North Sea Continental Shelf* case, proportionality had a suggestive influence, but was not afforded a distinct structural role. There were calls at the time that proportionality could be used more fruitfully in negotiations between states for the purpose of striking agreement, removing the need for judicial intervention in territory disputes.[39] Conversely, in the *Anglo-French Continental Shelf* Arbitration it was deemed to be a relevant circumstance for the Tribunal's consideration. In the *Black Sea* case, further clarification was rendered on the role of disproportionality, specifying the concept as a distinct stage of the procedure. The formulation struck in *Black Sea* can be concluded as the current approach and is recognised as the product of the third distinct era of judgments. This clearly shows that legal development is achievable and a product of jurisprudence.

The ICJ heralded disproportionality as a distinct concept, boldly separating it from corrective equity insofar that they now formed two structurally autonomous stages in the delimitation procedure but working in synchronisation in achieving the overarching objective of circumventing inequity. The third stage was treated as a final check, to ensure that the product of the first two stages did not reflect a gross disproportionality in the delimited territory. The ICJ established:

> 'at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion'[40]

[36] ibid., [122].
[37] Evans, *The Oxford Handbook of the Law of the Sea* (n. 2), p. 259.
[38] Y Tanaka, The Disproportionality Test in the Law of Maritime Delimitation, in AG Oude Elferink et al *Maritime Boundary Delimitation: The Case Law* (CUP 2018), p. 296.
[39] North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Rep 3.
[40] *Maritime Delimitation in the Black Sea* (n. 9), [101]-[103] [118]-[122].

The ICJ affirmed the structural autonomy of the three procedural phases, establishing: 'when called upon to delimit the continental shelf or [EEZs], or to draw a single delimitation line, the Court proceeds in defined stages.'[41]

It should be noted that there have been subtle changes since the *Black Sea* judgment, with the ICJ backtracking on its insistence to use equidistance provisionally. In 2009, it established that the only circumstance in which equidistance would not be deployed is where it could be deemed infeasible to do so. Since then, softer language has been adopted insofar that the Court requires a 'compelling reason' to deviate from equidistance, quietly lowering the stringent bar set in *Black Sea*.[42] This subtle alteration to the treatment of equidistance establishes that maritime delimitation is constantly subject to procedural development. Regardless, the ITLOS in its *Bangladesh/Myanmar* judgment accepted that it would 'follow the three-stage approach, as developed in the most recent case law'.[43] The ICJ in 2012 re-established the formulation, stating in the *Nicaragua v. Colombia* case that 'the Court has made clear on a number of occasions that the methodology which it will normally employ when called upon to effect a delimitation between overlapping continental shelf and [EEZ] entitlements involves proceeding in three stages'.[44] Similarly, the Arbitral Tribunal followed the ICJ and ITLOS by accepting and applying the three-stage approach in *Bangladesh v. India*.[45] It can be soundly argued that procedural uniformity has been achieved. Judge Wolfrum observes that jurisprudence 'constitutes an *acquis judiciaire*, a source of international law to be read into articles 74 and 83'.[46]

I would like to briefly discuss some observations made regarding the functional effects that the three-stage formulation has produced. Massimo Lando notes that the previous functionality of corrective-equity was inclusive of the concept of disproportionality.[47] I am therefore unconvinced that the three-stage approach would produce a greatly altered outcome than what the previous approach would have concluded. The notion that the three-stage approach therefore improves the equitableness of the final judgment is accordingly dubious, supported by observations in academic writing that *ex post facto* disproportionality

[41] ibid., [101], [115].
[42] *Maritime Dispute (Peru v Chile)*, Judgment of the International Court of Justice, General List No 137 (27 January 2014) [180].
[43] *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*) (Judgment) [2012] ITLOS Rep 4, 65-6 [229]-[233].
[44] *Nicaragua v. Colombia* (n. 3) [190]-[193].
[45] *Bay of Bengal Maritime Boundary Arbitration* (*Bangladesh v. India*) (2014) 167 ILR 1, 112 [337].
[46] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar*) (Judgment) [2012] ITLOS Rep 4, Declaration of Judge Wolfrum.
[47] M Lando, *Maritime Delimitation as a Judicial Process*, (CUP 2019), p.21.

is simply a variant of corrective equity.[48] One striking fact that supports this argument is that to date, no case has conceded that a delimitation boundary has reflected a disproportion, therefore it can be accurately stated that every line that has been equitably corrected by stage two to date, has passed stage three unscathed.[49] While it supports the notion of achievable progression, this particular development has been argued as formalistic.[50]

I will now separately analyse each distinct stage that was established in *Black Sea*. I will do so with an evaluation of each stages' capacity for achieving the objective that I will endeavour to work towards in this thesis. The main argument that will be made is that the judiciary should fully consider private rights and their associated economic benefits in delimiting a disputed territory. Therefore, it is apt to provide commentary on each distinct stage of current procedural delimitation and the capacity for facilitating the consistent consideration of the private rights that exist in the territory subject to the dispute, to conclude that progressive development is required to achieve this.

1.2 DELIMITATION CONCEPTS AND THEIR COMMERCIAL SUITABILITY

Stage I – Equidistance

In modern jurisprudence, the applicability and suitability of equidistance as the enshrined first stage of delimitation remains heavily debated. It is a strictly mathematical principle that provides certainty, predictability, and a high degree of objectivity. However, as previously noted, equidistance post-*Black Sea* has been subtly scaled back, with the judiciary seemingly more comfortable with deviation. Malcolm Evans notes that while *Black Sea* establishes a three-stage approach, proceeding judgments clouds the procedural weight afforded to equidistance.[51] The ICJ and the ITLOS have both subsequently approached equidistance in the three-stage formulation in an unconvincing manner. The ITLOS in the *Bangladesh/Myanmar* case opted to utilise the bisector method to plot the boundary provisionally, fuelling the dubiety of equidistance.[52] The bisector method is similar to equidistance as it is mathematical in nature, but differentiates in method. It plots boundaries

[48] Tanaka, *International Law of the Sea* (n. 4) 206.
[49] Tanaka, *The Disproportionality Test in the Law of Maritime Delimitation*, (n. 38), 315.
[50] ibid., p.317.
[51] Evans, *The Oxford Handbook of the Law of the Sea* (n. 2), p.254-260.
[52] *Bangladesh/ Myanmar* (n. 43) [235].

by determining the direction of each states' coast, and the angle of these lines is then bisected equally to produce a provisional boundary line.[53]

The ICJ in the dispute between Nicaragua and Colombia, produced a delimitation that reflected 'an outcome which bears so little relationship to the 'provisional' equidistance line as to cast doubt on its real place within the delimitation process, other than being a potential point of departure'.[54] The provisional line was altered to such a degree by the proceeding stages, it produced a result almost entirely unrecognisable from an equidistant calculation. The ICJ pointed to the watered-down applicability of equidistance here, stating 'the three-stage process is not, of course to be applied in a mechanical fashion and…it will not be appropriate in every case to begin with a provisional equidistance/median line'.[55] This suggests the influence of the concept has been diluted, and casts doubt on its capacity of producing a line that substantially reflects the outcome.[56]

The ICJ's possible objective here is to ensure that delimitation will be continued to be applied with a degree of flexibility. While delimitation has always been a process subject to change and modification, equity is perhaps reasserting procedural dominance. This has led to the diminishment of equidistance's role; an observation supported by Malcolm Evans.[57] The questionable application in recent jurisprudence, and the history surrounding equidistance dating back to the *North Sea Continental Shelf* case, gives weight to this school of thought. These smaller and more subtle developments to procedural delimitation and the individual concepts are important to note, as it displays what could be concluded as an eagerness from the judiciary to continuously alter and tweak the process.

With the mathematical basis upon which equidistance is founded, here there can be no consideration at all given to private rights, which as will be discussed is the motivation behind a large portion of states wishing to delimit their boundaries. Of course, there must be a starting point which equidistance provides. However, the chances of equidistance solely providing a satisfactory outcome that respects long-standing private rights and economic activity in the area, is unlikely. The next steps of the process allow more breathing room for such considerations. It also should be mentioned that while equidistance is the mandatory first stage of delimitation prescribed by the court in *Black Sea*, there is the possibility of a

[53] ibid.
[54] Evans, *The Oxford Handbook of the Law of the Sea* (n. 2), p.254-260.
[55] *Nicaragua v Colombia* (n. 3) [194].
[56] Evans, *The Oxford Handbook of the Law of the Sea* (n. 2), p.254.
[57] ibid., p.260.

provisional line being identified through an alternate method, considering the relevant circumstances. One example of this was in *Bangladesh/Myanmar*, in which the ITLOS used a 'geodetic line starting at a particular azimuth' due to the coastal configuration in the case.[58] However, this is rarely applied. The alternate methods used have been mathematically based. I would like to affirm that I do not support the diminishment of equidistance or any relevant mathematical method for provisionally plotting a boundary. I believe this affords predictability to the procedure at least at the first stage, allowing states to tailor the factors they wish to invoke at a later stage for the consideration of the Court. If private rights are to play a more prominent role in procedural delimitation, it is obviously unable to do so at the first stage of the current approach.

Stage II – Relevant Circumstances

Historically the formulation of the appropriate methodology was justified upon the appreciation of all relevant circumstances, underscoring the primacy of the concept. The principle of relevant circumstances performed two crucial functions in the delimitation process. 'They ameliorate the strict application of a chosen method, and they indicate what that method is to be'.[59] This is largely how the Court of Arbitration deprived equidistance of its seemingly mandatory procedural inclusion, using the relevant circumstances of the case to provide justification for deviation. The Court held in the *Anglo-French Continental Shelf* Arbitration that:

> 'Even under Article 6 it is the geographical and other circumstances of any given case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation'.[60]

Equidistance would have been strictly applied if relevant circumstances had not dictated otherwise.[61] Therefore, the Court treated the concept as the dominant feature of delimitation, affording equidistance a subsidiary role. Using relevant circumstances as a justification for the chosen method in each specific case was majorly followed after *North Sea Continental Shelf.*

[58] *Bangladesh/Myanmar*, (n. 43) [334].
[59] M D Evans, *Relevant Circumstances and Maritime Delimitation* (OUP 1989) p.87.
[60] *Continental Shelf* (*France/UK*) (1977) XVIII RIAA 3, 45-6 [70].
[61] Lando, *Maritime Delimitation* (n. 47) 18.

In modern day jurisprudence, relevant circumstances play a similar role, it is a mechanical function available to the courts to adjust delimitation lines in the light of any factor that may dictate it so. Firstly, it depends on the application of equidistance in the first place. If equidistance is indeed deemed to be the appropriate method to provisionally plot the boundary, often an amendment will need to be made. The type of relevant circumstances can be geographic or non-geographic and are invoked by states. The former is afforded a far greater significance and weight.[62] It is far more common for non-geographic factors to remain unconsidered, paving the way for geographic factors to justify adjustment, rather than them operating in conjunction. Their impact is often unarticulated, and therefore it is very difficult to gauge their tangible function in the current process. Equidistance is seldom altered - as the Court put it in the Peru and Chile case, 'in this case, the equidistance line avoids any excessive amputation of either State's maritime projection'.[63] The judiciary also utilise a 'catastrophic repercussions' test; in which the altering of an equidistant boundary can be warranted if it is deemed to have the potential to cause such consequences.[64] This is a very strict bar for a fruitful outcome.

The judicial preference of non-geographic relevant circumstances is resolute, even in disputes which revolve around the practice of private rights. The *Ghana/Côte d'Ivoire* award by the ITLOS in 2017 illustrates this. The discovery of a large pool of hydrocarbons in 2007 in the Gulf of Guinea attracted significant interest from foreign investors, which intensified upon the later discovery of three smaller fields in immediate proximity, known as the TEN fields.[65] At the time when maritime delimitation was discussed in bilateral negotiations between the states, exploitation was already underway by a London-based consortium, Tullow Oil. Côte d'Ivoire objected to Ghana's commercial activity in the area, claiming that it was being undertaken in Ivorian waters. Little to no progress was made during diplomatic negotiations, and as such the UNCLOS-ratified states submitted the dispute to the Special Chamber of the ITLOS.[66] Pending judicial delimitation, Côte d'Ivoire requested the prescription of provisional measures to immediately halt any further exploitation of the zone, submitting that Ghanaian activity was hindering their sovereign right to conduct scientific research and access, possess, and control all confidential information relating to the

[62] N A Ioannides, '*A Commentary on the Dispute Concerning the Maritime Delimitation in the Indian Ocean (Somalia v Kenya*)' (EJIL: Talk! 22 October 2021).
[63] *Peru v Chile* (n. 42) [191].
[64] *Jan Mayen* (n. 31) [71–72] [75].
[65] A Ward, 'Tullow Oil to Resume Drilling in Ghana after Resolving Dispute' *Financial Times* (24 September 2017).
[66] *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire*) (Judgment), Judgment of 23 September 2017, [91-99].

exploration of the CS.[67] They additionally contended that Ghana was violating Article 83(3) of UNCLOS, in which they are obliged to 'make every effort to enter into provisional arrangements of a practical nature and … not to jeopardize or hamper the reaching of the final agreement'. The ITLOS struck an order of compromise, not requiring Ghana to financially compensate Côte D'Ivoire for their activity, but they should halt any 'new drilling' and 'take all necessary steps' to prevent their neighbours' detriment. They provided reasoning for such judgment, as abandoning activity that was already underway would risk considerable financial loss for Ghana and its concessionaries.[68] I believe the ITLOS by doing so in its provisional measures, was appreciative of the private rights and commercial context in the disputed territory. The provisional measures ordered in 2015 can therefore be concluded as an acknowledgement that the dispute was inherently commercial. However, this was quickly and subsequently contradicted by the applied procedure to delimit the zone.

The ITLOS applied the three-stage procedure, which had already been 'overwhelmingly' ratified in judicial practice.[69] Despite a provisional acknowledgement and discussion regarding Ghanaian commercial practice, the Tribunal deemed the location of the hydrocarbons and previous operations entirely irrelevant, subsequently denying their capacity to alter the provisional equidistance boundary.[70] For Constantinos Yiallourides and Elizabeth Rose Donnelly, this was a notable endorsement of previous case law, 'underscoring the primacy of criteria associated with coastal geography'.[71] I entirely understand the Tribunal's wish to maintain consistency, it affords crucial procedural predictability. However, I cannot agree with the deemed irrelevance of Ghanaian oil practice, it constituted the *raison d'être* of Côte D'Ivoire in seeking judicial clarification of the territory. Marianthi Pappa believes strongly that the rejection of third-party rights afforded through a coastal states sovereignty over a maritime zone is 'puzzling', and one which is not founded in the law.[72] She believes the rationale behind the strict stance is a devotion to previous case law, which supports the conclusions drawn by Yiallourides and Donnelly.

There is no indication that the judicial trend of prioritising geographical circumstances will come to an end within the current methodology. This opinion is further strengthened by

[67] N Peiris, '*Ghana v. Ivory Coast*' American Journal of International Law 2018, *112*(1), 88-93
[68] ibid., Order of 25 April 2015, para 99.
[69] C Yiallourides, '*Part I: Analysis of Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean'* (*EJIL: Talk!*, 19 October 2017).
[70] *Ghana/Côte d'Ivoire*) (Judgment) (n. 66) [para 287-289].
[71] Yiallourides, '*Ghana and Côte d'Ivoire*' (n. 69).
[72] Pappa, *Non-State Actors* (n. 11) p.75.

looking at the *Libyan Arab Jamahiriya/Malta* case. The judges in this case took a strict position on oil and gas concessions that were present in the disputed zone at the time. Before delimitation took place, the ICJ declared its intention to consider fully all those factors which are 'pertinent to the institution of the continental shelf as it has developed within the law'.[73] However, consequentially for the states involved, the ICJ refused to consider the existing oil concessions that were present in the area. Mere acknowledgement without function is formalistic and it confuses the role of relevant circumstances with a pure geometric exercise. By doing this, the ICJ refused to consider the crucial fact that petroleum was the life source of the dispute itself, and in the eyes of both parties an unsatisfactory boundary was rendered.[74] Nevertheless, the opportunity to incorporate private rights into current procedure lies within stage two. Since this has yet to be uniformly done, I believe that commercial considerations should form a distinct stage of delimitation, which will be expanded upon in Chapter IV.

Stage III – Disproportionality

The ICJ have provided further clarification on the function of disproportionality as an *ex post facto* test. Firstly, the ICJ utilises disproportionality instead of its positive counterpart, heeding disproportion to be the 'relevant criterion'.[75] Secondly, proportion should not directly establish delimitation, its remit is limited to a final *ex post facto* check.[76] Thirdly, disproportionality is a 'means of checking whether the delimitation line arrived at by other means needs adjustment', and does not in itself constitute an applicable methodology.[77] Fourthly, disproportionality cannot be applied with absolute accuracy, with calculation of coastal lengths completed with some leeway. The Court has hinted at the different interpretations of disproportionality; 'various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality'.[78] This fourth point leaves me uncomfortable, as a concept applied with a wide range of interpretation may produce a degree of judicial subjectivity. The terminology used by the Court is also mathematically difficult to ascertain, what exactly

[73] *Continental Shelf (Libya/Malta)* (Judgment) [1985] ICJ Rep 13, [48].
[74] Pappa, *Non-State Actors* (n. 11) p.75.
[75] *Maritime Delimitation in the Black Sea* (n. 9) [210].
[76] ibid., [211].
[77] ibid., [101].
[78] ibid., [213].

constitutes a 'significant' disproportion? Regardless, the test is applied to ensure an equitable 'feel' to the final boundary.[79]

The application of disproportionality seems to be judicially subjective. In some cases, the ICJ have not mathematically calculated the coastal lengths and delimited space afforded to each state. I cannot establish any objective criterion that can be utilised in determining a disproportions existence.[80] I do commend the Court's transparency on the concept, but their clarifications seem to conclude that precise and consistent application cannot be achieved, and the concept remains largely unquantifiable. Yoshifumi Tanaka also shares some concerns about disproportionality's uniform introduction to procedural delimitation as the calculated ratios in each case illustrate an 'alarming amount of difference'.[81] Unfortunately, to objectively apply *ex post facto* delimitation is a task that remains impossible, without the calculation of a ratio between coastal length and the delimited area. I do not support the pursuit of such a ratio, as it would blur the lines of delimitation with apportionment of space and underscore the primacy of geography. Malcolm Evans believes the ICJ have 'thrown in the towel' by claiming it is 'difficult if not impossible' to compute.[82]

I hold doubts regarding the material effects of *ex post facto* disproportionality in jurisprudence, which are exacerbated by looking at the origins of the concept. Germany proposed in *North Sea Continental Shelf* that the boundary should represent a 'just and equitable share'.[83] The ICJ while rejecting the German motion, seemed to appreciate the utility of proportionality as a final stage, establishing 'a final factor to be taken into account of is the element of a reasonable degree of proportionality'.[84] Under the mechanism of equitable principles, the ICJ utilised proportionality to ameliorate the spatial disadvantage that would have been implemented from Germany's perspective. However, it was not treaty as an autonomous stage of delimitation, but its function was not dissimilar to its use in *Black Sea*. It is conclusive that the operation and application of a test based on proportionality is not a new addition to the appliable methodology. I do accept that it is highly doubtful the ICJ in *North Sea Continental Shelf* would have foreseen its uniform application,[85] such as in *Black Sea*.

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[79] M Evans, '*Maritime Boundary Delimitation: Where Do We Go from Here*?' in D Freestone, R Barnes, and D Ong (eds.), The Law of the Sea: Progress and Prospects (OUP 2006) 155.
[80] *Maritime Delimitation in the Black Sea* (n. 9), [129] [213].
[81] Tanaka, *Disproportionality* (n. 38) p. 315.
[82] M D Evans, '*Maritime Boundary Delimitation: Whatever Next*?' in J Barrett and R Barnes (eds.), Law of the Sea: UNCLOS as a Living Treaty (London 2016) p. 65.
[83] Tanaka, *Disproportionality* (n. 38) p.315.
[84] *North Sea Continental Shelf* (n. 39) [52],[98].
[85] *Libyan Arab Jamahiriya/Malta* (n. 73), (Dissenting Opinion of Judge Oda), [134-135].

A limitation of disproportionality was discussed by Judge Oda, who provides an observation that there is an infinite number of lines that can produce the same ratio of proportionality.[86] Theoretically, disproportionality cannot therefore objectively facilitate an alteration of a boundary. Mathematically this is a simplistic notion but exposes a glaring hinderance on the clarity and objectivity that disproportionality can provide. There are also existing fears that the prominence of disproportionality will blur delimitation with apportionment.[87] As previously noted, in *North Sea Continental Shelf* the ICJ rejected the notion that a boundary should reflect a 'just and equitable share',[88] and in the case between Tunisia and Libya established that equitable principles are not intended to be an 'operation of distributive justice'.[89] This observation is strongly concurred with by Vaughan Lowe; 'states with short coastlines are not to be compensated by giving them a greater share of the seas adjacent to their coasts'.[90] By offering disproportionality a central procedural role, I am concerned delimitation is taking further steps in consolidating what is becoming a strict geographical exercise of spatial apportionment, suffocating the influence of critical commercial factors. This concern is shared by Hugh Thirlway.[91] I concur with Rosalyn Higgins in that disproportionality is 'full of uncertainties and problems'.[92]

Based on the lack of tangible results in jurisprudence, it is easier to conclude that disproportionality does not afford procedural delimitation much utility as a distinct concept. In the Nicaragua and Colombia case, the Court explicitly referred to a disproportionality test that is used when there is a significant disproportionality to the boundary, not to check for proportionality itself. Therefore, small territorial advantages lost and gained by coastal states which can yield a massive commercial opportunity and wreak havoc with existing private rights, is not a primary concern. It signifies a trend towards geographical supremacy, a concerning feature for states who seek delimitation to clarify the legality of commercial operations.

[86] *Tunisia/Libya Arab Jamahiriya* (n. 13) (Dissenting Opinion of Judge Oda) [258].
[87] Tanaka, *Disproportionality* (n. 38) p.316.
[88] *North Sea Continental Shelf* (n. 39).
[89] *Tunisia/Libya Arab Jamahiriya* (n. 13) [60], [71].
[90] V Lowe, *International Law: A Very Short Introduction* (OUP 2015) p.122.
[91] H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol. 1 (OUP 2013) p.500.
[92] R Higgins, *Problems and Process: International Law and How We Use It*, (Clarendon Press 1995), p.230.

1.3 CONCLUDING REMARKS

Establishing the structure and practical operation of the modern-day maritime delimitation methodology must be undertaken to fulfil the overarching objectives of this paper and performs several functions. Firstly, I believe providing detail on how the judiciary will approach and delimit boundaries provides crucial context for any further commentary made. Deriving the applicable concepts and the structural procedure that they operate within is a task only achievable by analysing jurisprudence and case law, owing to the absence of any codified or expressly referenced principles in UNCLOS.[93] The *Black Sea* case in 2009 is afforded an extended evaluation, as this case can be marked as the most up to date major legal progression in this regard and enshrines the 'three-stage' test as the applicable formulation.[94] Secondly, in analysing the individual concepts that operate in tandem to judicially delimit maritime territory, it is clear and unequivocal that judicial delimitation is not a dormant area of law and is continuously altered. The post-*Black Sea* use of equidistance is evidence of this, with the Court diluting the concept's strict applicability in subsequent judgments. Providing evidence of the undertaking of continuous judicial progression breathes life into the proposal of further change and shows an appetite for beneficial updates to delimitation methodology.

The endorsement of private rights and commercial activity as a consistently applicable feature of delimitation cannot be adequately achieved without the individual analysis of each current concept in a commercial context. The opportunity to use the existence of private rights as a functional tool used by the judiciary is structurally limited. This is a natural consequence of a procedure that is inherently geographical in practice. Currently there is procedural capacity for the judiciary to routinely acknowledge and utilise the existence of private rights and commercial activity, during the exercise of 'relevant circumstances'; the second-stage. Upon evaluation of the concept, it is conclusive that the Court almost exclusively affords primacy to geographical features, owing to the objectivity and less contentious nature of their application. Consequently, judicial consideration of non-geographical factors such as the existence of private rights and the operation of commercial activity at sea is strangled and is so routinely overlooked one may conclude that it does not form a noteworthy part of the current formulation.

[93] UNCLOS (n. 6).
[94] *Black Sea* (n. 9).

The judiciary do not utilise the capacity of the second stage of procedural delimitation, perhaps in anticipation of criticism regarding subjectivity and disloyalty to previous jurisprudence. I therefore conclude that to facilitate the consistent consideration and applicability of private rights, the only way this is achievable is if there are substantial structural alterations made to the applicable methodology. The numerous amounts of operational boundary agreements are completely offset by the amount of undelimited maritime territory across the globe, affording judicial delimitation a central role in the future governance of the oceans. This statistic leads me to conclude that any advantageous developments to the procedure to increase the inclusivity of relevant circumstances should be undertaken. This will support a more polished methodology that is mindful of the extremely precarious nature of disputes and protective of the crucial commercial activity that sustains coastal states. The current formulation is inadequate in this regard.

CHAPTER II: PRIVATE RIGHTS AT SEA

To successfully establish that procedural delimitation should continue its trend of judicial development by way of affording private rights an elevated role during proceedings, their current influence must be analysed. Chapter II will accordingly begin by establishing the legal competence of states in granting private rights to third parties at sea. Following this, I will discuss the wider role of private rights in maritime delimitation. Conclusions will be drawn on the disproportionate ratio between private rights' involvement in disputed territory and their tangible effects on judgments, paving the way for the proceeding Chapter III to discuss differing rationales for the expansion of their influence. Jurisprudence highlighting non-state actor presence and commercial activity will be discussed with the objective of showing the disproportionate consideration afforded to private rights by the judiciary in proceedings.

A principal exhibition of a state's sovereignty is their capacity to grant private rights to third parties within their jurisdictional territory. Several United Nations resolutions recognise the inalienable right of states to explore and benefit from their territory in the name of prosperity for their citizens.[95] This also includes natural resources found *in situ* of their territory.[96] One such method of benefitting from sovereignty over territory is to grant private rights to non-state actors. In delimited maritime zones, this is comparably straightforward and unproblematic for the actors involved. An uncontested boundary in theory clearly denotes what space a state has control over and gives third party investment a concrete foundation for any rights granted to them. The presence of an established boundary is often viewed as a prerequisite to exercising authority at sea, and of course on land.[97] Even if the boundary is contested, it is crucial that the exploration and exploitation of the disputed area resumes. Constantinos Yiallourides points to 'energy security, social welfare, and economic development' as the motivation behind the imperative progression of commercial activities during boundary disputes.[98] I believe his point demonstrates that the benefits of such activity are too financially crucial to cease, which also has implications for international harmony should states be willing to risk infringing the sovereignty of their neighbours. This can also

[95] UNGA Resolution 3281 (XXIX) (12 December 1974) Charter of Economic Rights and Duties of States.
[96] A Ronne, '*Public and Private Rights to Natural Resources and Differences in their Protection*?' in A McHarg and others (eds), Property and the Law of Natural Resources (OUP2010) p.118.
[97] P Blyschak, '*Offshore Oil and Gas Projects amid Maritime Border Disputes: Applicable Law'* (2013) 6 Journal of World Energy Law and Business p.210-211.
[98] C Yiallourides, 'Oil and Gas Development in Disputed Waters Under UNCLOS' (2013).

escalate disputes even after judicial delimitation has been enacted as seen in *Nicaragua v. Colombia*.[99]

This Chapter will conclude that private rights have a near non-existent influence on boundary delimitation at sea, prompting the need for further legal progression; by providing a structural platform in the procedure for private rights to be consistently utilised in finalising a boundary.

2.1 A STATE'S CAPACITY TO CREATE PRIVATE RIGHTS AT SEA

Private rights in uncontested maritime zones are not particularly problematic, and as such this leads scholars to maintain that boundaries are a prerequisite for coastal players to exercise their authority at sea.[100] The creation and control of private rights is down to each individual coastal state and is therefore subject to their domestic laws. Article 56 of UNCLOS establishes a coastal states' sovereign right to explore, exploit, conserve, and manage the natural resources in the territory.[101] A primary method of doing so is granting private rights to non-state actors. In the instance of a private right granted to a non-state actor regarding the exploitation of hydrocarbons, the authorities involved shall issue a permit detailing exactly what activities they are permitting to perform, whether it be to simply explore the area for opportunity, or to drill down into the seabed and extract the resource. The manner which it is granted is dependent on the domestic rules of the state. The United Kingdom do so through multiple bidding rounds. Kenneth Dam notes that the United Kingdom may not automatically award the rights to the highest bidder, and it is a combination of factors such as the proposed plan and compliance with health and safety regulations that may be determinative in an auction, as well as the size of the monetary offer.[102]

Kenya chooses an alternative route, awarding rights directly through the form of a contract between the government and the non-state actor. Bernard Taverne notes the dual function of such types of contracts, primarily its representation as a right at self, and secondly detailing the obligations of both state and non-state actor.[103] These types of contracts are known as

[99] *Nicaragua. v. Colombia*, (n. 3), [624].
[100] V Adami, *National Frontiers in Relation to International Law* (T Behrens tr, OUP 1927) p.3; P Blyschak, '*Offshore Oil and Gas Projects*' (n. 97).
[101] UNCLOS (n. 6) Article 56(1).
[102] K Dam, *Oil Resources: Who Gets What How?* (University of Chicago Press 1976) p.6–7.
[103] B Taverne, *An Introduction to the Regulation of the Petroleum Industry: Laws, Contracts and Conventions* (Martinus Nijhoff 1994)

production sharing agreements. .[104] A practical example is the production sharing contract between Saudi Arabia and ARAMCO, detailing the split of profit, as well as a royalty scheme.[105] Oil concessions, regardless of the method of their distribution, will carefully detail the scope of activity to be undertaken, obligations of the parties, and the economic benefit attributed. It will also commonly include a dispute resolution clause.[106] Affirmed by the European Court of Human Rights, licenses are proprietary in nature.[107]

Fishing is another commercial activity which is strictly controlled and monitored by domestic regimes. Unlicensed fishing will infringe the jurisdiction of the maritime state, and therefore a license must be obtained in accordance with domestic law. In the United Kingdom, commercial fishing licenses are granted by the Government's Marine Management Organisation and are subject to revocation at any time. Specifications of boat size, accessible territory, and penalties for non-conformity are detailed within the licenses.[108] The volume of fishing activity is also controlled by UNCLOS,[109] as continuous exploitation of the same area, or the same species of fish can wreak environmental havoc and destabilise the maritime food chain. Protection of the marine environment is obligatory and laid out in UNCLOS Article 56(1)(b)(iii). Fishing is one of the most hotly debated topics in the delimitation sphere. For example, France and the United Kingdom have been locked in debate regarding the fishing licenses held off Guernsey Island post-Brexit.[110] The French have accused the UK of purposefully withholding licenses and denying access to French vessels, poisoning diplomatic relations, and holding a tangible economic importance.[111] There is also a very real social and political element to this dispute, with French fisherman blockading the port of Calais to disrupt Britain's trade links and led to President Emmanuel Macron vowing to resolve the embattled maritime zone prior to his re-election in 2022.[112] The row between France and the UK is a clear example of the numerous political, social, diplomatic, and economic effects that a maritime dispute can lead to and is symptomatic of

[104] Dr. Taiwo Adebola Ogunleye, *A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry,* (Journal of Energy Technologies and Policy, Vol.5, 2015).
[105] K Bindemann, *Product-Sharing Agreements: An Economic Analysis*, Oxford Institute for Energy Studies, 1999.
[106] G Gordon, '*Petroleum Licensing'* in G Gordon, J Patersonand E Usenmez, Oil and Gas Law: Current Practices and Emerging Trends (2nd edn, Dundee University Press 2011) p.72–73.
[107] *Zubani v Italy* (1996) 32 EHRR 14.
[108] 'Planning and Development: Marine Licences - Detailed Information - GOV.UK' <https://www.gov.uk/topic/planning-development/marine-licences> accessed 29 March 2023.
[109] UNCLOS (n. 6), Articles 56(1), 61, 62.
[110] For further insight into post-Brexit fishing, see J Echebarria Fernández, M Lennan and others, *Fisheries and the Law in Europe: Regulation After Brexit* (Routledge 2022).
[111] Reuters, 'France Secures Guernsey Fishing Licences in Post-Brexit Row' *Reuters* (1 December 2021) <https://www.reuters.com/world/europe/guernsey-says-issues-fishing-licenses-40-eu-vessels-2021-12-01/> accessed 13 March 2023.
[112] ibid.

the current hot debate surrounding the commercial operation of fishing. A minor commercial activity in scientific research remains noteworthy, as such research can lead to the discovery of oil and gas fields which will then be subjected to an oil and gas concession, or in rare cases can lead to the detection of new maritime species.[113] Scientific research is also controlled by domestic regimes and UNCLOS.[114]

The legal competence of states who wish to create private rights relating to commercial activity in areas of contested sovereignty will now be discussed. When there are overlapping claims to a disputed area, this is a result of two or more states claiming title over one territory. Of course, sovereignty can only be held by one state, whichever has the stronger claim to title. Prosper Weil supports this by saying 'in the event of a dispute, the right course... is to determine which of the parties has produced the more convincing proof of title to the disputed area'.[115] A delimited boundary enables states to be completely aware of how far their land or waters stretch, while simultaneously being able to keep the peace with their neighbours by ensuring any commercial activity is undertaken within their jurisdiction.

The *North Sea Continental Shelf* case reinforces the notion that in disputed territory, two differing states can have overlapping valid titles with neither having exclusive rights.[116] Disputed territory will not be wholly awarded to one or the other in judicial delimitation, therefore dividing the two claims to title. Prosper Weil summarises this:

> 'Far from assuming that there can be only one title to a given area, [maritime delimitation] postulates the existence of two equally valid titles in competition with one another over the same area. It is not a question of which proof is more or less convincing, which title is the weightier, but of requiring from each of the parties with these equally well-founded titles a reasonable sacrifice such as would make possible a division of the area of overlap.'[117]

A state's powers in the ocean are not created by delimitation, it only resolves conflicts and competing claim over territory. However, while judicial delimitation is pending, states are free to exercise their bona fide claims to the area. Consequentially, states are permitted and

[113] L Kimball, Inter*national Ocean Governance: Using International Law and Organizations to Manage Marine Resources Sustainably* (IUCN 2001) p.8.
[114] UNCLOS (n. 6), Article 249ff.
[115] P Weil, *The Law of Maritime Delimitation: Reflections* (Grotius 1989)
[116] *North Sea Continental Shelf Cases* [20]
[117] Weil, *Maritime Delimitation: Reflections* (n. 115) p.92.

eager to grant private rights in disputed territory, which can exacerbate tension between coastal neighbours.[118] However, the nature of the operation of these private rights can give rise to an infringement of the other party's right of exploration.

This issue has been raised a handful of times. In *Aegean Sea*, the ICJ stated that 'seismic exploration of natural resources of the continental shelf without the consent of the coastal state might, no doubt, raise a question of infringement of the latter's exclusive right of exploration'.[119] While the ICJ eventually decided that no irreparable harm was caused by the seismic surveys, this raises the possibility that a state could be held accountable for actions undertaken pending delimitation. Articles 74(3) and 83(3) UNCLOS impose obligations on states while awaiting delimitation of a disputed area.[120] Firstly, the positive obligation to negotiate with the objective of striking a practical arrangement of a temporary nature. Secondly, the negative obligation not to put the final delimitation into jeopardy. In *Guyana and Suriname* these obligations were discussed, and it was established that these could be violated in good faith. However, the Court were eager to differentiate between activity that could permanently cause damage such as drilling, and those that would not.[121] Violation of these obligations could arise if the unilaterally acting state refused negotiation with its neighbour. There is no prohibition of unilateral operations in the disputed zone, however this may breach UNCLOS obligations dependent on the conditions under which they are performed.

2.2 THE MINIMAL INFLUENCE OF PRIVATE RIGHTS IN JUDICIAL DELIMITATION

I will now examine how international judicial bodies consider private rights procedurally. When a boundary is judicially charted, what role, if any, do private rights have? Commercial activity in maritime zones can be of extreme economic and social benefit to coastal states, therefore it is logical to probe how much procedural consideration is afforded to the presence of private rights. Historically, the very first method of land delimitation was the anthropogeographic method. Simply, delimitation was approached in full respect of the human element and the financial interests of the area. Private rights were awarded the highest priority, so much so that delimitation in some cases would coincide perfectly with the

[118] C Yiallourides, 'Oil and Gas Development' (n. 98).
[119] *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Order on Request for the Indication of Interim Measures of Protection, 11 September 1976) [31].
[120] UNCLOS (n. 6) Articles 74(3) and 83(3).
[121] *Arbitration between Guyana and Suriname* (2007) XXX RIAA 1, [470].

positioning of privately owned land.[122] What exists in maritime delimitation could not be further from this. As well as the examination of private rights interaction with the delimitation process, I will begin to articulate the reasoning behind their minimal impact.

Often it is the judge's task in any given delimitation case to construct and impose a *de novo* boundary.[123] Pre-existing boundary agreements are not common in maritime spaces, perhaps down to the relatively young history of oceanic boundary-making, however there are exceptions.[124] During proceedings, states are free to invoke any factors that they deem relevant to plotting the boundary's' course. One such factor which is commonly raised is the existence of private rights pertaining to commercial activity, with the hope that the resulting boundary will not encroach upon existing licenses given to non-state actors. Maritime delimitation has been subject to constant judicial progression, with the emergence and diminishment of different concepts undertaken to produce the applicable formulation.

In the era directly after the Geneva Convention in 1958, maritime delimitation was undertaken utilising any and all relevant factors that would produce an equitable boundary. There was no exhaustive list or express guidance provided as to what factors could be invoked, but most examples followed a pattern stemming from 'physical, mathematical, historical, political, economic or other facts … and from the characteristics peculiar to the region'.[125] In practice, this broad inclusion of factors was met with scepticism as the factors the court routinely considered were geographic in nature. The trend of decisions led Edward Collins and Martin Rogoff to suggest that it 'may be viewed as a progression of attempts to reduce the factors that may be considered'.[126] While I agree with this conclusion, I do not think that it fully appreciates the context of the avoidance of private rights in jurisprudence. It is not logical for the Court itself to establish a broad scope of potential factors only to backtrack and scale it back down almost immediately. I believe there are several reasons why geographic factors have been awarded precedence, including the level of objectivity that elements of that nature produce, and a judicial hesitance to incorporate non-geographic factors stemming from a fear of subsequent backlash and criticism. Rather than a concerted reduction of factors, I believe it is more accurate to describe it as a product of post-judgment

[122] S Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (Columbia University Press 1940) p.104.
[123] Pappa, *Non-State Actors* (n. 11), p. 73.
[124] *Peru v Chile* (n. 42).
[125] *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau*) (1985) XIX RIAA 149, [89].
[126] E Collins and M Rogoff, '*The Gulf of Maine Case and the Future of Ocean Boundary Delimitation'* (1986) 38 Maine Law Review 1, p.39.

reaction. Marianthi Pappa also notes the 'systematic'[127] rejection of any factors remotely linked to the commercial activity present in the disputed area at this time. There have been some forms of judicial explanation for this trend, with the ICJ not believing it was delimitation's task to compensate states for natural inequalities.[128]

There are examples in the aftermath of the Geneva Convention where private rights have been judicially incorporated and utilised in delimiting a boundary. One such example can be found in the *Tunisia/Libyan Arab Jamahiriya* case in 1982, where adjoining oil concessions were held to form a *de facto* boundary.[129] The judges were subjected to intense criticism for their acknowledgement of adjoining concessions in the disputed area. It was a significant deviation from the trend of case law as seen from the cases discussed earlier. Perhaps trying to influence the jurisprudence in a less radical way would have seen a gentler transition into private rights being acknowledged. Thomas Cottier describes Libya as finding the Court in this case to be playing an 'activist role'.[130] I think this is a very easy criticism to make, without a full appreciation of the benefits that incorporating private rights brings. The adjoining concessions were long-standing and operated in a manner that could be described as a *de facto* boundary. By adjudicating it so, it doesn't appear to have disproportionately disadvantaged either state to a notable degree and avoided the reallocation of existing rights.

The radical deviation from previous case law that the judgment represented was perhaps abrasive and resulted in it being subsequently criticised and abandoned. A more subtle solution to the issue exists, made by Judge Evensen. He suggests a policy of joint exploration, where the parties agree upon an adjusted equidistance line, and on both sides of the line be another line 10-15 degrees from the original. The areas on both sides would be equal in size and would indicate a joint exploration zone where a policy on activity and financial details could be agreed. Tunisian and Libyan domestic law would prevail on either side of the boundary.[131] By doing so, the Court could have indicated a gentler elevation of the consideration of private rights in delimitation, allowing the trend a chance of survival. However, the dissenting opinions of Judge Evensen, Gros, and Oda were scathing,[132] and perhaps as a result the Court were extremely eager to quash any signs of a new trend of delimitation towards private rights.

[127] Pappa, *Non-State Actors* (n. 11) p.188.
[128] *North Sea Continental Shelf* (n. 39) [91] *Libyan Arab Jamahiriya/Malta* (n.71) [46].
[129] *Tunisia/Libyan Arab Jamahiriya* (n. 13).
[130] T Cottier, *Equitable Principles of Maritime Boundary Delimitation* (CUP 2015) 284.
[131] *Tunisia/Libyan Arab Jamahiriya* (n. 13), Dissenting Opinion of Judge Evensen [278].
[132] ibid.

In the *Gulf of Maine*, the judges held that a 'consistent and unequivocal'[133] presence of licenses and concessions could potentially be treated as a *de facto* boundary. A particular piece of territory known as Georges Bank was 'the real subject of the dispute … from the viewpoint of the potential resources of the subsoil and that of fisheries that are of major economic importance'.[134] Initially it was acknowledged that the United States 'showed a certain impudence in maintaining silence after Canada had issued the first permits'.[135] It was swiftly concluded that silence should not be legally consequential in this circumstance, and the Chamber subsequently denied the existence of a *de facto* boundary on this basis. Instead, it found private rights to be indicative of whether the finalised boundary was inequitable and 'likely to entail catastrophic repercussions'.[136] The Chamber tested the equitableness of the boundary against resource-related factors, similar to the modern function of *ex post facto* disproportionality in *Black Sea*. For Massimo Lando, there was an absence of a clear legal basis for 'ascribing this function to resource-related factors'.[137] Unsurprisingly, the line evident from pre-existing licenses was rejected, and displayed a strict stance on the admissibility of oil concessions as a relevant circumstance. For Marianthi Pappa, this raises some extremely serious concerns over the suitability of the international judges in making decisions surrounding the conduct of the parties and their commercial activity in disputed territory.[138] I do not find any reason to disagree with her.

As the jurisprudence of maritime delimitation developed after the adoption of UNCLOS, where equidistance at the first instance would then be modified by disproportionality *ex post facto,* the treatment of private rights in the process remained consistently ignored. Complete deviation from this method is extremely rare, with the only possibility of a change being where 'there are compelling reasons that make it unfeasible'.[139] Deviation has been seen in *Nicaragua v. Honduras*, where the geographical situation forced the judges into adopting the bisector method.[140] The Court also maintained the 'catastrophic repercussions' test post UNCLOS, in deciding whether the existence of natural resources warranted adjusting a

[133] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States)* [1984] ICJ Rep 292, [309–12].
[134] Lando, *Maritime Delimitation* (n. 47) p.197.
[135] Pappa, *Non-State Actors* (n. 11) p.200.
[136] T McDorman et al., '*The Gulf of Maine Boundary: Dropping Anchor or Setting a Course*?' (1985) 9 Marine Policy 90, 97.
[137] Lando, *Maritime Delimitation* (n. 47) p.198.
[138] Pappa, *Non-State Actors* (n. 11) p.77.
[139] *Black Sea* (n. 9), [116].
[140] *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659.

boundary.[141] I take issue with the practical operation of such test, catastrophe is unquantifiable and therefore troublesome. For Massimo Lando, states have shown 'directly and indirectly, that resource-related factors may be the reasons for litigating maritime disputes', and tribunals have duly responded by adopting a hard-line restrictive approach.[142] Until express definition is provided, catastrophic repercussions is a puzzling concept and is unappreciative of the differing economic reliance that maritime commerce provides for coastal states. In Scotland for example, in 2018 fishing accounted for 0.21% of the Scottish Gross Domestic Product (GDP).[143] Oil and gas in Scotland meanwhile is worth approximately £19.44 billion or 12% of the Scottish GDP.[144] Are catastrophic repercussions based on the value of the commercial operations, or citizen reliance for employment, or some other factor? Simply put, catastrophe can only be judged from the perspective of the affected state.

The Court in *Jan Mayen* provided a rare example in which resource-related factors altered a boundary's course.[145] Jan Mayen is a microscopic island off the coast of Greenland, which is used for Norwegian military purposes, and has no native population. Both nations have a crucial economic dependency on Capelin, a small forage fish found in the North Atlantic. The Court came to the realisation that the provisional line plotted at the first stage of delimitation would award Norway a far larger share of the Capelin-rich area. To combat this inequity, the Court acknowledged the issue and shifted the line so that both parties could continue to heavily rely on the fishing industry in this area, which was of great importance to both populations.[146] The decision of the panel, even though an overwhelming majority was found at fourteen to one, was heavily criticised for 'sending strong echoes of distributive justice'.[147] It is clear from this case that consideration of private rights and commercial activity is entirely possible, but the method of its implementation needs further examination and careful application. In both examples of such deviation, *Jan Mayen* as in *Tunisia/Libyan Arab Jamahiriya*, the Court responded to its criticisms by refusing to try again and following up with defiant refusal. Such consideration of fishing rights, even though crucial in this case

[141] *Jan Mayen* (n. 31).
[142] Lando, *Maritime Delimitation* (n. 47) p. 201.
[143] '3. Commercial Fishing' <http://www.gov.scot/publications/scotlands-marine-economic-statistics-2018/pages/3/> accessed 6 May 2022.
[144] 'Oil and Gas Worth £18bn to North-East Economy, Research Shows' <https://www.energyvoice.com/oilandgas/345637/oil-and-gas-worth-a-huge-18bn-to-north-east-economy-research-shows/> accessed 6 May 2022.
[145] *Jan Mayen* (n. 31).
[146] ibid., 72ff.
[147] R Churchill, '*The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation*' (1994) 9 International Journal of Marine and Coastal Law 1, p.21–22

as not doing so would have completely cut Denmark off, has never been seen again to this day. The view that economic factors are completely autonomous from international boundary-making currently prevails.[148]

In the *Eritrea/Yemen Arbitration*, the Tribunal held that the fishing regime in the area was not to have 'its limits drawn by reference to claimed past patterns of fishing.'[149] It also affirmed that delimitation should not promote petroleum operations.[150] This was followed by the Special Chamber, who stated that it was impossible for private rights to have any role in maritime proceedings.[151] The rationale of the Court in rejecting commercial activity as a justification for altering a boundary is it views it as solely economic. There is of course a social element to this, with the disregard of fishing being heavily criticised by local communities that feel the impact of interrupting long-standing fishing concessions, which then spurns the need for re-allocation. The human impact of delimitation is often a secondary thought, but it is something that Mariano Aznar has written extensively about. [152] Aznar gives three primary reasons as to why the human dimension of international boundaries is often overlooked in adjudication. Firstly, there is a structural and ethnographic cause. There is a very particular western-type model of organisation which is the *clef de voûte* of the international system, which proceeds to neglect other actor's interests. Secondly, there is a material motive in which international law is bound by normative structure which leaves no practical opportunity for human factors to be accounted for. Lastly, procedural delimitation simply just isn't equipped to account for human impact.[153] With the minimal impact of resource-related factors, fishing and other commercial activities that directly impact the livelihoods of citizens are routinely ignored, and accordingly I strongly agree with Aznar's third observation.

Regarding oil concessions, its irrelevance is uniform across case law. There is a strict adherence to existing and pending permits being unable to influence the position of a boundary, unless in the rare case that mutual acceptance of both neighbouring states' oil concessions constitutes a tacit agreement.[154] This appears to acknowledge that in fact, the presence of oil concessions can influence the outcome of a territorial dispute. However, with

[148] *Eritrea/Yemen Arbitration (Second Stage: Maritime Delimitation)* (2001) 40(4) ILM 983, [109].
[149] ibid.
[150] ibid., [354–55].
[151] *Ghana/Côte d'Ivoire* (n. 70) [211–28], [468–79].
[152] M Aznar, 'The Human Factor in Territorial Disputes' in MKohen and M Hebie (eds), Research Handbook on Territorial Disputes in International Law (Edward Elgar 2018) 291.
[153] ibid.
[154] *Delimitation of Maritime Areas between Canada and the French Republic (St Pierre et Miquelon)* (Arbitral Award) (1992) [89–91].

a frustrating consistency of vagueness, the Court has not given any further indication of what legal requirements must be met for a tacit agreement to deemed as operational. I believe that introducing precedence of tacit agreements in maritime territory would be a dangerous stance to take that would create new issues such as the ignorance of pertinent geographical factors. There should not be a procedural dominance of either, they should be conjunctively considered in tandem, allowing the final boundary to reflect a result that is wholly appreciative of all the relevant circumstances. There are numerous maritime delimitation cases that are populated by oil concessions, yet to date no such tacit agreement has been found to be in place, and therefore this exception remains unused and undefined. Marianthi Pappa denotes the rationale for this judicial trend as a 'desire to follow previous case law'.[155] I agree with her, but I do not believe this entirely defines the reasoning for their reluctance. The history of judicial development in maritime delimitation shows a trend of commendable progression, so I do not think pure loyalty can be the only factor at play.

2.3 CONCLUDING REMARKS

By affording a section dedicated to establishing the minimal influence of private rights, this demonstrates that there is a procedural gap left majorly untouched by the current formulation. To begin a wider discussion on gauging the role and current practical utility of private rights and commercial activity, a state's capacity to create and govern such rights must be introduced. Oceanic territory is synonymous with financial benefit, and states are free to exploit and manage their natural resources under Article 56 of UNCLOS.[156] A state's ability to create and reap the economic benefits of their oceanic territory is not based upon the fixation of a permanent boundary, and as such they are free to do so in areas of contested sovereignty. The capacity and eagerness of states in granting private rights establishes that they are of extreme financial consequence, and by doing so in contested area they may be risking a perceived jurisdictional overreach, straining the diplomatic relations with their coastal neighbours. What is concludable here is that private rights and commercial activity are the key method in which states benefit from their oceanic territory. The absence of judicial protection of such activity introduces an issue, as it means that judgments are often lacking in appreciation of the nature of disputes and risk economic and diplomatic complications as a result.

[155] Pappa, *Non-State Actors* (n. 11) p.219.
[156] UNCLOS (n. 6) Article 56.

To underline this issue, an extensive commentary on the minimal influence of private rights and commercial activity in current procedural delimitation is provided. This concluded that while judicial delimitation has been subject to major procedural development and the differing applicability of concepts, the development of the treatment of private rights have stalled and is therefore relatively disproportionate. The existence of non-state actors and the operation of privately held rights was certainly not uncommon at these junctures and was invoked by states in numerous cases. Analysis of the treatment of private rights in delimitation allows me to conclude that while of extreme consequence for the states in question, they are almost exclusively overlooked during proceedings. In the rare examples in which they were deliberated and applied to the final boundary the Court seemed extremely keen to quash any further ratification of this trend in the proceeding jurisprudence. I believe that this abrasive introduction and subsequent abandonment of private rights certainly contributed to their modern minimal role, and perhaps if a gentler trend towards the procedural elevation of private rights was signified it would enjoy a role of primacy today. The chasm of applicability from case-to-case attracted much academic and judicial criticism and has contributed to what can only be concluded as non-existent influence.

In discussing the minimal role of private rights in maritime boundary jurisprudence, it also plays a secondary function in establishing the consequences that underpin their lack of judicial protection. To harness and illuminate this, the existence of non-state actors in territory of contested sovereignty merits further discussion. Commercial activity is undoubtedly a factor in oceanic zones that is commonplace and highly beneficial, leading its systematic procedural rejection to flip these benefits into possible tangible disadvantages for coastal states who are subject to judicial delimitation. What is conclusive from the lines of commentary provided in Chapter II, is that the current delimitation methodology is largely incapable and extremely hesitant in incorporating private rights and commercial activity into judgments. Possible lines of reasoning as to why private rights are approached with hesitance are introduced, with the most convincing argument lying in what can be concluded as a concerted effort to circumvent post-judgment criticism. I believe that prior to posing a possible solution to protect and appreciate the commercial motivations that lead many states to seek judicial delimitation, it must be further demonstrated why this is an issue to be solved. Accordingly, I will now examine multiple lines of rationale that promote the justification behind the petition for affording private rights and commercial activity a more centralised and key role in the applicable methodology.

CHAPTER III – EXPANDING THE INFLUENCE OF PRIVATE RIGHTS IN PROCEDURAL DELIMITATION

As demonstrated by the preceding chapter, commercial activity and their coinciding private rights are almost wholly disregard by the judiciary when delimiting a maritime boundary, offering geographical factors the preponderant role in shifting a provisional line. Consequentially they are often left exposed to reallocation, which have repercussions for non-state actors, coastal states, and their citizens who depend on maritime commerce for sustenance. There are numerous potential reasons why this is the case, with Marianthi Pappa noting the geographical trend can be seen as loyalty to previous jurisprudence, and the post-judgment criticism surrounding previous judicial consideration of private rights perhaps facilitating hesitance to repeat it. I am unconvinced by either as a rounded explanation and believe that the origins of non-consideration lie in the drafting and adoption of the Geneva Convention 1958, and UNCLOS. Thus, this chapter will begin by analysing the influence private rights had in the drafting of the treaties. This will build on the conclusions drawn in Chapter II regarding the reasons why private rights have been attached a lesser priority.

I will provide a detailed commentary on the possible implications for states and their citizens caused by the diminutive role private rights have upon boundary delimitation. While highlighting the tangible consequences of procedural delimitation and boldly affirming why it is crucial that the procedure appreciates and utilises all issues invoked by states, this will simultaneously begin to construct my own rationale for the expansion of the influence that private rights have in the judicial process. I will also examine some leading academic rationale for expanding the consideration that private rights are afforded, to provide a broader and more inclusive picture of the argument. By doing so, this will provide a gauge of the appetite in international legal scholarship for using the existence of private rights as a tool in the delimitation process. I will also argue that at the very least, private rights can be extremely useful to the judiciary in expediting the delimitation process, while at the same time providing a more well-rounded judgment that could aid in circumventing international disharmony. While an entirely satisfactory outcome is increasingly unlikely by the time a dispute has escalated to the point of judicial intervention, circumventing as much post-judgment dissatisfaction as possible should be a central objective. There are also existing opinions from judges, either dissenting or otherwise that will offer a different perspective on the judicial avidity for incorporating private rights.

While the paramount priority of delimitation is to maintain and facilitate the harmony and peace between coastal states, it affects the 'lives and activities of any natural or legal persons situated in the transboundary area'.[157] It is therefore crucial to be mindful that there are some less-obvious parties to the disputes, and by entertaining private rights and their associated economic activities it may also provide protection for any consequences that an inter-state territory dispute can cause for the citizens of the states involved.

3.1 THE FACILITATION OF NON-CONSIDERATION BY CONVENTION

The 1958 Geneva Convention was birthed by the very first United Nations Conference on the Law of the Sea. It was rather simplistic in its purpose, but it was of extreme significance. Drafted by the International Law Commission (ILC) in Geneva, it divided the territorial sea into four distinct zones, for the purpose of apprising states of their rights in each individual zone.[158] While it was recognised as the 'first great effort' to determine oceanic territory by way of international legislation,[159] the presence of non-state actors was a complete and uncompromising omission. This is particularly surprising as the existence of non-state actors in maritime territory was unequivocally clear at the time the Convention was held in Geneva. It is not a criticism of the convention *per se*, more an observation of its true purpose. The protection of private rights was not their objective, and it was treated as such – although untreated is perhaps a more accurate descriptor. While the Convention undoubtedly laid the foundations of the origins of modern judicial delimitation, in my view it can also be viewed as the birthplace of the consistent non-consideration of private rights.

Non-state actors' presence in the ocean is not something that is exclusively modern. Commercial activity in maritime zones, while it is mostly characterised nowadays by drilling for oil and ground-breaking scientific work, is something that non-state actors have conducted throughout history. More ancient maritime practices such as mapping, fishing, and navigation were common at the time of the Geneva Convention. Therefore, the omission of any mention of non-state actors cannot be explained by a simple sign of the times. This seemed like a natural point to grab the opportunity to expressly define the rights and duties of non-state actors to the state and vice versa. The period of delimitation that proceeded the Geneva Conventions where relevant factors to the boundary would lead to an equitable

[157] Pappa, *Non-State Actors* (n. 11) p. 136-162.
[158] Geneva Convention 1958, (n. 22)
[159] R Young, 'The Geneva Convention on the Continental Shelf: A First Impression' (1958) 52 American Journal of International Law p.733.

result, reflects the omission of non-state actors in the legal framework. While I don't believe that this is the exclusive reason as to why the judiciary have refused to consider commercial activity and the associated private rights, it certainly enables this attitude to an extent. The process of delimitation at this point in history certainly had the potential to incorporate commercial activity into their considerations through the mechanism of any and all relevant factors, which shows that other reasons must have contributed to the judicial reluctance. The avoidance of criticism or the devotion to previous case law which I discussed earlier is perhaps the stronger argument for this trend.

UNCLOS 1982 was a concerted attempt to eradicate the weaknesses from the Geneva Conventions. For example, Sun Pyo notes the attempt of UNCLOS in trying to introduce a maximum limit on the territorial sea, which the Geneva Convention failed to do.[160] Countries such as Panama and Iceland proclaimed their territorial sea to be 12 nautical miles.[161] Limiting this to 6 nautical miles with the option of a further 6 lacked a singular vote to previously take effect. Nevertheless, trying to provide solution to issues post-1958 was the objective. The overwhelming majority of states became signatories, and for the sixteen that did not, the provisions of UNCLOS are now recognised to essentially have the force of custom. This gives it quasi-universal impact.[162] It had a ground-breaking impact on the law of the sea, transforming the legal landscape and tightening the gaps left in 1958. Its' achievements are plentiful, with some of the most noteworthy work coming in the fixed extent of state's power at sea, their rights, and their obligations. No express comment was given on the preferred method to delimit a boundary, leaving the development of this procedure to the judiciary.

The attempt to address the notable shortcomings of the Geneva Convention provides clarity on the true objective of the law of the sea. Establishing methods to peacefully negotiate boundaries and establishing principles that govern maritime activity shows a clear and concerted effort to progressively develop the law for the benefit for all parties. This is a point that is supported by James Harrison.[163] There is a clear upshot to this, in that the legal framework for maritime activity and rights retains the possibility for development, which leaves the proverbial door open for further adaptation. Unfortunately, it has a negative

[160] KS Pyo, *Delimitation and Interim Arrangements in North East Asia* (Brill 2004) 7.
[161] M H Nordquist et al. eds., United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. 2, p.801, (Martinus Nijhoff Publishers 1993).
[162] Evans, *The Oxford Handbook of the Law of the Sea* (n. 2), p.254.
[163] J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) p.27–36.

counterpoint. While legal development is procedurally possible and prioritised, UNCLOS did not make any reference to non-state actors either, who currently were major players with heavy investment and legal rights in the disputed zones that were subject to these rules. For Marianthi Pappa, this leaves non-state actors virtually invisible, giving them no solid legal ground to challenge and defend their investments before international courts.[164] The only reference to private or legal persons in the entire convention is made in relation to piracy and deep-sea exploration which falls outside the jurisdictions of any state.

The inclusion of private or legal persons in zones that are not under the jurisdiction of coastal states is confusing when we consider the omission of the same terms in the relevant area. For example, exploration of the deep seabed remains rare. Compared to the vast spread of private activity conducted by a range of non-state actors in zones under the jurisdiction of coastal states, it is infrequently exercised. To cater for sporadic activity in uncontrolled zones yet simultaneously failing to address commercial activity routinely undertaken is confusing. For example, since 1982 the International Seabed Authority have granted 27 contracts for mineral exploration beyond the continental shelf and the jurisdiction of any coastal state.[165] By comparison, there are numerous offshore oil and gas platforms worldwide, with that figure rising to more than twelve thousand when rigs that are becoming unprofitable and defunct are considered.[166] Oil operations only represents a portion of activity undertaken in maritime zones by non-state actors. Statistically, it is difficult to grasp the reasoning behind their omission.

The president of the Third United Nations Conference on the Law of the Sea, Tommy Koh, hailed UNCLOS as a 'constitution for the oceans', covering every matter in relation. While at the time it certainly improved upon the Geneva Convention, it prioritised matters that were at the forefront of the international community at the time, and as such addressed and developed the law relating to state activity at sea. However, I believe that the drafting of UNCLOS failed to exercise appropriate foresight as the presence of non-state actors in maritime zones is not a modern phenomenon, it is a well-aged practice that is synonymous with states and their seas. Maritime zones are the cornerstone of many coastal state's

[164] Pappa, *Non-State Actors* (n. 11) p. 136-162.
[165] Kathryn A Miller and others, 'An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps' (2018) 4 Frontiers in Marine Science <https://www.frontiersin.org/articles/10.3389/fmars.2017.00418> accessed 13 March 2023.
[166] 'The New Use for Abandoned Oil Rigs - BBC Future' <https://www.bbc.com/future/article/20210126-the-richest-human-made-marine-habitats-in-the-world> accessed 13 March 2023.

economies, and they should be permitted to economically benefit from it as they see fit, without hinderance and with the full protection of the delimitation framework.

3.2 IMPLICATIONS OF NON-CONSIDERATION FOR STATES AND THEIR CITIZENS

Coastal states are the most obvious beneficiaries of the clear delimitation of oceanic territory, providing clear definition of their jurisdiction to allow them to peacefully harness and maximise their commercial activity at sea. With this premise, it is therefore concludable that a judicial delimitation procedure that is not appreciative of the commercial roots of a territorial argument can prove extremely damaging for states. There are several disadvantages this can cause, whether it be the disruption of current commercial operations, legal issues arising from the ceasing of such activity, or the reallocation of existing licenses and concessions granted to non-state actors. I will now examine the range of implications that current delimitation methodology risks by refusing to incorporate private rights and commercial activity into the final judgment. The jurisprudence examined will provide evidence pointing to the spread of consequences, and the huge potential current delimitation holds in damaging the economic prosperity of coastal states who heavily rely on maritime commerce. This will contribute to the main objective of this paper, in establishing the current procedure fails in considering private rights, fuelling the risk of exacting wide-ranging repercussions on numerous parties. This will begin to establish justification for the legal progression of delimitation, to place the structural formulation in a position where it can minimise the discussed ramifications.

One such example in modern jurisprudence that provides constructive evidence of the wide-ranging implications for states that the judicial non-consideration of private rights facilitates, is the *Somalia v. Kenya* dispute. This is a particularly potent example due to the recency of the judgment, with the ICJ judicially delimiting the disputed territory on the 12th of October 2021.[167] The Court applied the universally standard three-stage approach, favouring Somalia's position, and rejecting the applicability of a host of private rights and commercial activities invoked by Kenya. The East African states whose maritime boundaries meet in the Indian Ocean, adopted starkly different delimitation methodologies during rounds of negotiations in 2009, favouring the procedure that would prove advantageous to each claim.[168] The dispute between the countries was intensified by the discovery of large reserves

[167] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya*), Judgment, I.C.J. Reports 2021.
[168] Artstor, 'Letter to Ban Ki-Moon from Hassan Sheikh Mahamoud, President of the Federal Republic of Somalia' <https://library.artstor.org/public/28493112> accessed 29 March 2023.

of hydrocarbons, with both states being very eager to economically exploit the territory through their capacity to grant private rights to non-state actors.[169] In 2012, Kenya proceeded to award exploratory concessions to several foreign oil companies.[170] Somalia, aggravated by the granting of these licenses, contended that Kenya had contravened the domestic Somalian regime that defines their maritime territory.[171] Consequentially, Somalia sought the assistance of the ICJ in declaring that Kenya had breached customary international law, UNCLOS, and their sovereignty.[172] What is resoundingly clear at this juncture, is that the dispute was created, fuelled, and sustained by commercial opportunity, making it inherently gravitated towards private rights. It seems logical that the procedure to delimit the boundary and extinguish the dispute should have been appreciative of this fundamental context.

In the judgment, the ICJ addressed the claims of Kenya, who argued that by way of tacit agreement, the boundary's course had already been established. They argued firstly that Somalia had not displayed any behaviour that could be taken as a protest, and therefore the prolonged absence of such rejection should count as Somalia's assent. Secondly, and more to the point, Kenya claimed that both states consistent practice of 'naval patrols, fisheries, maritime scientific research, and oil concessions',[173] which was limited to each side of the alleged boundary, could also contribute to establishing Somalia's acceptance. The ICJ laid out the 'grave importance' of establishing a permanent boundary, therefore the 'proof of the existence of a maritime boundary requires more than the demonstration of longstanding oil practice or adjoining oil concession limits'.[174] Subsequently, Kenya's claims were firmly rejected, as it was not evident that Somalia's conduct had clearly and consistently acquiesced to the boundary proposed by Kenya.[175] I believe that qualifying the operation of private rights as a tacit agreement can be extremely troublesome, and in this regard I believe the Court were entirely correct to approach this with caution and proceed to reject this argument. The evidence of a tacit agreement would have to be met with the upmost stringency. 'Actions speak louder than words'[176] is an apt conclusion by Malcolm Evans, and I concur that it deserves the attention of the judges, but I am uncomfortable with any suggestion that maritime boundaries delimited via tacit agreement should be commonplace and easy to

[169] Ioannides, *Indian Ocean* (n. 62).
[170] ibid.
[171] A Khalfaoui and C Yiallourides, 'Maritime Disputes and Disputed Seabed Resources in the African Continent' (7 February 2019).
[172] *Somalia v. Kenya* (n. 167) [198-200].
[173] Ioannides, *Indian Ocean* (n. 62).
[174] *Ghana/Côte d'Ivoire* (n. 68).
[175] Ioannides, *Indian Ocean* (n. 62).
[176] *M Evans, Relevant Circumstances* (n. 59) *p.*220.

achieve. I believe the existence of private rights true function should be more suggestive, influencing the alteration of the boundary.

While I believe the Court's strict attitude towards the presence of a tacit agreement was well-placed, I take issue with their handling of the invoked non-geographical factors on Kenya's behalf. The applicability of private rights while not extending to meet the requirements of a tacit agreement, should have been afforded due consideration in the second stage of delimitation under the principle of relevant circumstances.[177] Kenya firstly argued that the cruciality of the security interests of themselves, Somalia, and the wider international community should be considered as a relevant circumstance. They referred specifically to threats of terrorism and piracy, and the adjustment of the line would support the ability to effectively combat it.[178] Secondly, Kenya argued that the existence of a de facto maritime boundary between the states, derived by non-geographic factors such as oil concessions, naval patrols, fisheries, and marine science should also be considered in the adjusting of the provisionally charted boundary.[179] Thirdly, Kenya contested that by refusing to adjust the provisional line, this would lead to devastating impacts on the livelihoods of their fisherfolk, and the economic well-being of their citizens who so heavily depend on the disputed territory.[180] Kenya invoked several relevant circumstances, diversified in consequence, however uniformly and firmly rejected by the Court.[181] Delimitation in this case was a 'purely geometric exercise',[182] and hampered the Courts' ability to reach an outcome of true equitability.

I believe systematically ignoring the applicability of private rights and commercial activity without expressly deriving a bar of evidence which could be met to expedite their chances of inclusion, is erroneous and places parties in a state of unsurety. Kenya were angered by the 'procedural unfairness'[183] of the Court and subsequently refused to further participate, believing they were dragged and rushed to the Court by Somalia due to their resurgent expansionist agenda, disregarding the precarious security situation in the territory. Somalia's

[177] Extensive commentary on the concept of 'Relevant Circumstances' can be found in Chapter I.
[178] *Somalia v. Kenya* (n. 167) [151].
[179] ibid. [152].
[180] ibid. [153].
[181] ibid.[158-60].
[182] Craig D Gaver, *'Maritime Delimitation in the Indian Ocean (Som. v. Kenya) (I.C.J.)*' (2022) 61 International Legal Materials 501.
[183] 'World Court Sides Mostly with Somalia in Border Dispute with Kenya | Reuters' <https://www.reuters.com/world/africa/world-court-rule-kenya-somalia-sea-border-row-2021-10-12/> accessed 14 March 2023.

commercial interest in the zone was also extremely consequential.[184] Historically Somalia has struggled to enforce its sovereignty in the territory, with illegal deep-water fishing off their coast commonplace. In 2005, it was estimated that the value of such illegal activity cost Somalia around USD $300m, over 5% of their GDP, leading to economic ramifications for their fishing-dependent communities.[185] What can be concluded without hesitation is that the dispute is inherently commercial, with oil concessions and the extraction and exportation of fish hugely beneficial for both and foundational to the nature of the institution of proceedings. The ICJ somewhat achieved the goal of protecting Somalia from Kenyan overreach, with the Somalian president stating his appreciation for 'the fruit of a long struggle'.[186] However, I believe the endorsed methodology failed to duly consider the full commercial context of the dispute, leaving Kenya and its citizens exposed to unequitable access of its previously operational fishing zones. By elevating the influence of private rights and commercial activity in the applicable procedure, the protection afforded to Somalia could have been retained, but any undue disadvantages to Kenyan fisherfolk and their security regimes could have been avoided simultaneously. With the recency of the judgment, perhaps the scale of the damage is yet to reveal itself.

Another clear example of private rights being central to oceanic territory is the long-running commercial relationship between Australia and Timor-Leste. While judicial delimitation has not been undertaken here, this case firmly supports the conclusion that the non-consideration of private rights holds the potential to levy a colossal financial toll, thereby advocating their procedural inclusion and application in judgments. After multiple rounds of negotiation through the 1970's and 1980's, Australia and Indonesia came to an ingenious agreement in 1989, where oil and gas revenue was split 50/50 in the central area, and a 90/10 revenue split in favour of Indonesia to the north, and Australia to the south. This solved the issue of the 'Timor Gap', an undelimited zone that lay outside the previous agreement, essentially creating a maritime no-man's land. Timor-Leste was granted its independence in 2002, with Australia and the newly independent nation coming to a similar scheme as agreed in 1989.[187] The Timor Sea Treaty provided for the unitisation of two of the oil and gas fields, combining to become known as the 'Greater Sunrise' field.[188] Agreement between the two nations to

[184] 'Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)' <https://www.globalsecurity.org/military/world/war/somalia-v-kenya.htm> accessed 14 March 2023.
[185] ibid.
[186] ibid.
[187] Helen Davidson, 'Australia and Timor-Leste Sign Historic Maritime Border Treaty' *The Guardian* (6 March 2018) <https://www.theguardian.com/world/2018/mar/07/australia-and-timor-leste-sign-historic-maritime-border-treaty> accessed 28 March 2023.
[188] 'Australia Ratifies Maritime Boundaries with East Timor | Reuters' <https://www.reuters.com/article/us-australia-timor-treaty-idUSKCN1UO0Y8> accessed 29 March 2023.

derive a permanent boundary failed, resulting in the two nations agreeing upon the financial proceeds of the newly named Greater Sunrise field instead, in the form of three treaties.[189]

Timor-Leste and Australia were opposed to the method that should be taken to delimit the boundary in question. Timor-Leste commenced proceedings against Australia under the United Nations Convention on the Law of the Sea (UNCLOS) in 2016. A conciliation commission was convened and led to the establishment of the *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea* in 2018.[190] This is a stark example of how the judicial process itself can be avoided with participation and negotiation between both nations involved, with the Honourable Julie Bishop MP, the Australian Minister for Foreign Affairs called it a 'landmark for international law and the rules-based order'.[191] I concur with her, it should be hailed as the example to be followed by nations whom seek clarification of their maritime territory, and is an exemplary workaround of judicial delimitation that ensures extensive protection and consideration of private rights. If commercial factors were utilised in a manner which could aid the establishment of a judicially imposed boundary, then perhaps the states would have been more comfortable in proceeding down this route. While the series of treaties are commendable, it is unfortunately not a commonly achieved solution, owing to the strain that a boundary dispute has upon the harmony between states.

Timor-Leste, as a small, relatively newly independent nation, is heavily dependent on their commercial activity in the disputed area. The importance of every square foot available to them for exploration and exploitation of natural resources is crucial to the livelihoods of their population and the stability of their economy.[192] The Bayu-Undan reserve provides a large portion of their GDP. Timor-Leste is estimated to be the second-most oil-dependent nation on earth. However, it is predicted that their oil reserves in the Bayu-Undan area will run dry in the next three years. The Timorese government is desperately scrambling to

[189] *Timor Sea Treaty between the Government of East Timor and the Government of Australia* (Timor Sea Treaty) signed in 2002; *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields* (International Unitisation Agreement) signed in 2003; and the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea* (CMATS) signed in 2006.

[190] The *Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea* is available from the Permanent Court of Arbitration website: https://www.pcacases.com/web/view/132.

[191] Hon. Julie Bishop, MP, Minister for Foreign Affairs, *House of Representatives Hansard*, 26 March 2018, p. 70.

[192] Helen Davidson, 'Timor-Leste's Big Spending: A Brave Way to Tackle Economic Crisis or Just Reckless?' *The Guardian* (25 May 2017) <https://www.theguardian.com/world/2017/may/25/timor-leste-spending-big-economic-crisis> accessed 29 March 2023.

diversify its economic portfolio before this occurs, as the petroleum fund accounts for 90% of their annual budget. They have poured money into improving infrastructure, with new roads, bridges, schools, and hospitals being prioritised to brace the country for the impact of the oil drying up. This has drawn criticism from Timorese politicians, who believe that the government is neglecting social issues for 'the small people'.[193] The Timorese economic expansion also includes plans for a harbour and large international airport to help facilitate economic growth. The consequences of Timor-Leste losing out on any commercial gain from the oil fields present off their coasts would be catastrophic and would elevate their debts into the stratosphere. In turn, their entire population who are dependent on the new projects, in which the workforces are comprised of 70% of locals, would suffer.[194] Private rights and commercial gain from their maritime territory is synonymous with their chances of prospering in the future.

It is worth noting that Australia and Timor-Leste still do not have a permanent boundary between them, instead having their maritime relationship governed by a series of treaties.[195] Their current agreement is beneficial to both nations, with the latest treaty developing the Greater Sunrise field which could yield 'revenue in the vicinity of $US 8-10bn'.[196] This is a fascinating example of how international commercial activity can be maintained without the need for actual judicial delimitation, but also demonstrates the colossal financial consequence that the non-consideration of private rights could incur. The Conciliation Commission was invoked in this case for the very first time, and although there certainly has been issues, the important commercial benefits to both nations have been upheld. This provides an interesting alternative to judicial delimitation and circumvents the limitations that the insistence on using geographical methods provides. Approximately, in the first year since the signing of the maritime border treaty in 2018, Australia made more in revenue from the disputed zone than they have given to Timor-Leste in foreign aid, and more than the entirety of the Timor-Leste annual health budget.[197] Thankfully, negotiation and commendable compromise on both sides produced a successful and operational treaty.[198] The reality is the charged tension that a territorial dispute brings between two states means

[193] ibid.
[194] ibid.
[195] Mr Larsen, DFAT, *Committee Hansard*, 7 May 2018, p. 37
[196] Davidson, 'Australia and Timor-Leste Sign Historic Maritime Border Treaty' (n 186).
[197] Helen Davidson, 'Australia Accused of "siphoning" Millions in Timor-Leste Oil Revenue' *The Guardian* (15 April 2019) <https://www.theguardian.com/world/2019/apr/16/australia-accused-of-siphoning-millions-in-timor-leste-oil-revenue> accessed 28 March 2023.
[198] 'Maritime and Sovereignty Disputes in the East China Sea' (*The National Bureau of Asian Research (NBR)*) <https://www.nbr.org/publication/maritime-and-sovereignty-disputes-in-the-east-china-sea/> accessed 28 March 2023.

that evasion of judicial delimitation via agreement is often not possible. Examination of judicial practice means I can confidently conclude that the fundamental private rights that sustain Timor-Leste would have most likely been overlooked. This is a deeply disconcerting notion, and justifies that under the correct circumstances, legal progression is needed to provide a structural mechanism for their consistent and elevated influence upon boundaries.

A final example of a dispute that shows the consequences of private rights in maritime law, is the arbitration between the RSM Production Corporation and Grenada, heard before the ISCID. RSM sought 500 million USD in compensation from Grenada, as they were unable to exercise an oil and gas agreement stemming back to 1996, due to a force majeure clause which was triggered by Grenada's negotiations with Trinidad and Venezuela.[199] Grenada subsequently sought to terminate the agreement. This case did not involve two states and was therefore not brought under UNCLOS before the ICJ or any maritime tribunal. Therefore, I do not want to provide a more detailed analysis of the judgment or the dispute. The purpose of highlighting the dispute is to establish the colossal damages that can be brought from a non-state actor's inability to commence and fulfil their licensed activity in maritime zones. For Grenada, who are still considered a developing country with a 1.123 billion USD GDP, the economic consequences of being required to pay $500 million USD, would be utterly devastating.[200] The ISCID rejected the compensation sought by RSM owing to the untimely fashion of their applications, and Grenada were protected by domestic laws allowing them to terminate the contract.[201] However, it does display the scale of monetary relief that could be claimed in the event an oil and gas agreement being broken. Should the ICJ fail to consider any commercial factors invoked by states party to a dispute, there is a very real chance of the rights being reallocated, and prior agreements being rendered unfulfillable.

To conclude, the consequences of the non-consideration of private rights and commercial activity in procedural maritime delimitation are wide-ranging, with the potential for economic devastation. Compensation sought for broken agreements pertaining to licenses and concessions granted to non-state actors have the potential to incur colossal financial relief owed by states. More commonly, the disruption of security measures to combat terrorism, piracy, and drug-trafficking has wider implications for the international

[199] 'International Centre for the Settlement of Investment Disputes', in Charles Wankel, *Encyclopedia of Business in Today's World* (SAGE Publications, Inc 2009)/
[200] 'GDP (Current US$) - Grenada | Data' <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=GD> accessed 1 February 2023.
[201] Wankel, 'International Centre for the Settlement of Investment Disputes' (n. 199).

community. The potential ramifications of the judiciary refusing to incorporate private rights and commercial activity into procedural delimitation begins to provide justification for my claim that this area of law would benefit from further development. This justification will be reinforced further in this Chapter by existing academic rationale, dissenting opinions from judges regarding the sole use of geographic factors under the principle of relevant circumstances, and the implications for non-state actors that non-consideration brings. I would like to add that I firmly believe that geographical and non-geographical factors should not be applied in a way where it is either one or the other. Chapter IV will expand on this and denote a procedure that attempts to incorporate the benefits that considering geographical and non-geographical factors would bring in seeking an equitable solution.

3.3 PREVENTING INTERNATIONAL DISHARMONY

In maritime zones that are bereft of a clarified and permanent boundary, one may initially conclude that states may be hesitant to grant private rights, considering the backdrop of territorial uncertainty. The reality is that states continue to grant private rights in undelimited zones at will, for a variety of different reasons.[202] Firstly, as previously discussed, the ownership and granting of private rights is a sure-fire way for states to ratify their territorial claim against an opponent.[203] The success of such strategy is far more successful on land. The presence of private rights can be invoked as evidence of jurisdiction, or the location of the exact boundary under the doctrines of acquiescence for example.[204] Secondly, granting rights pertaining to the exploration of natural resources can be extremely lucrative, and can provide the granting states with the means to meet their energy needs. Thirdly, creating private rights can drastically improve the livelihoods of the population that reside there, providing jobs and wealth. Fishing is the most straight-forward example of this. The motivations behind the continuous progression of commercial activity in territory that is unclarified are defined by Yiallourides.[205] State willingness to grant private rights in undelimited territory is underpinned by a serious consequence, in that by maximising oceanic commercial gain, this can put immense pressure on the diplomatic relations should the neighbouring state deem to be such activity as a contravention of their perceived sovereignty. The circumvention of international disharmony should be a central objective of the applicable delimitation methodology. I will analyse case law that provides examples of

[202] Pappa, *Non-State Actors* (n. 11) p.24.
[203] R Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) 50.
[204] *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, [1094].
[205] Yiallourides, '*Oil and Gas Development'* (n. 98).

private rights inducing the decomposition of diplomatic relations at sea, providing justification for their full consideration in judicial procedure.

The maritime dispute between Nicaragua and Colombia is a case that supports the conclusions in the previous section, in that the judicial non-consideration of private rights can be of extreme socio-economic consequence. It also begins to introduce that by prioritising private rights and commercial activity, this can aid the circumvention of international tension between coastal neighbours, something that should be a central objective of the procedure. I therefore believe this case is a useful starting point here, as it has duality of function. In November 2012, Colombian fishermen reacted against the ICJ's judgment, claiming that the Court had ignored their fishing activities in the disputed zone.[206] Both parties in this case raised the issue of equitable access to natural resources in the territory, but the ICJ considered the evidence of such circumstances to be insufficient, and it was subsequently deemed that they could not be treated as relevant.[207] This shows that even in a dispute, there is a consistent appetite from states for their private rights and commercial activities to be incorporated into judgment. How this could possibly fail to successfully meet the requirements of relevance, is unknown and puzzling to me. This case is especially important in showing the impact of the non-consideration of private rights and commercial activity, as after laying down their judgment in 2012, the ICJ found itself having to rule on this dispute once more almost a decade later. Their initial judgment in 2012 declared that Nicaragua's area included a particular piece of maritime territory that was previously disputed, a decision that severely aggravated Colombia. They declared they would no longer recognise the jurisdiction of the ICJ in solving maritime boundary disputes.

Soon after, Nicaragua filed a fresh claim to the ICJ, claiming that Colombia was infringing their sovereignty over the previously split territory. They also alleged that Colombia had responded by threatening to use force to gain control over the natural resources in the area, flexing their naval powers to outmuscle Nicaraguan fishing fleets out of the zone.[208] Colombia replied to the accusations by claiming their presence in Nicaraguan territory was due to their campaigns to combat drug trafficking and to aid international maritime rescue.[209] They also added that Nicaragua had interfered with indigenous fishing rights, with the loss

[206] M Aznar, '*The Human Factor in Territorial* (n. 149) 291.
[207] *Nicaragua. v. Colombia*, (n. 3),[223].
[208] 'ICJ: Colombia Must Stop Activity in Nicaraguan EEZ Waters | News | Al Jazeera' <https://www.aljazeera.com/news/2022/4/21/icj-colombia-must-stop-activity-in-nicaraguan-eez-waters> accessed 1 February 2023.
[209] ibid.

of territory in 2012 leading to a negative socio-economic impact on the Raizal people, who are descendants of slaves abducted from Africa.[210] Colombia entirely disregarded the ICJ's authority, which contravenes their obligations under UNCLOS.[211] This dispute negates any possible claims that by refusing to consider non-geographic factors, it somehow expedites the delimitation process. By failing to incorporate private rights and commercial activity, as well as the historic standing of the dispute itself, the ICJ can find itself having to clean up the fallout years later. The dispute between Nicaragua and Colombia has escalated to threats pertaining to the use of force, and the supposed final judgment in 2012 just seemed to ignite further tension.[212] It is a leap to presume that by considering private rights, this dispute would have perhaps dissipated into peaceful relations, but it does accurately show the consequences of failing to consider them. For Nicaragua, the heightening of tension and the disruption of the legal exercising of their sovereignty. For Colombia, their ability to combat drug trafficking and the economic impacts on indigenous fishing. Lastly, the ICJ and the reignition of international tension.

The *Guyana/Suriname* arbitration is an additional example that displays the international tension that can exist and be exacerbated during a maritime dispute. In 2004, Guyana began proceedings concerning the maritime boundary between themselves and Suriname.[213] This case is a more potent example of the scale of disharmony and threat to international peace that maritime delimitation can produce. In the case, Guyana additionally sought reparations for Suriname's conduct in the disputed area. Suriname was accused of intimidatory and hostile behaviour, by preventing CGX Resources inc., a Canadian petroleum company, from carrying out their legitimate drilling operations within the Guyana boundary. They were licensees of Guyana, who granted them private rights to carry out operations in the area. As a result, CGX were forced to relocate to another prospecting area within their concession.[214] This was an extremely worrying set of circumstances, especially when coupled with the fact that the nations were locked in consultations about how to diffuse the situation at the highest political level. After having its jurisdiction affirmed, the Tribunal held that their actions were akin to military actions, not simply law enforcement.[215] The addressing of the use of force

[210] ibid.
[211] United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 59.
[212] 'Colombia-Nicaragua Maritime Tensions May Endure' (2022) Emerald Expert Briefings <https://doi.org/10.1108/OXAN-ES268767> accessed 14 March 2023.
[213] Y Tanaka, '*The Guyana/Suriname Arbitration: A Commentary*' (2007) 2 Hague Justice Journal 177.
[214] Government of Guyana Press Statement, 3rd June 2000, Memorial of Guyana, Annex 39.
[215] Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between Guyana and Suriname.

is of interesting note here, as Tanka establishes together with the *M/V Saiga case*, the judgment lays down important judicial precedent on this issue.[216]

The claim in the end was dismissed due to the damages not being proven to the satisfaction of the Tribunal. However, the threatening behaviour was an escalation of hostility at an extremely sensitive diplomatic point in the relationship between the two nations. The Tribunal, in their final decision, still refused to acknowledge the existence of private rights as a relevant circumstance.[217] The boundary was plotted by equidistance and remained unchanged throughout the further steps of the judicial process.[218] The *Guyana/Suriname* arbitration was undercut by a very tense relationship between the parties. Private rights are enough of a motivation for states to mobilise conduct akin to military action upon one another. This is a warning that must be heeded. Further ignorance of private rights may produce an outcome that one or both nations are unhappy with, providing disruption to oil concessions and risking economic regression. It also risks the escalation of international disharmony should either party feel aggrieved enough to endorse aggressive behaviour. Maritime delimitation considering and discussing the existence of private rights is not a guarantee of entirely circumventing this, but surely its inclusion as an evidentiary tool would be conducive to maintaining relative satisfaction between the parties. Both parties feeling that a fair economical split has been achieved judicially could have provided a more solid base for peaceful international relations in the future, and this could have been achieved through full consideration of private rights and commercial activity.

A final example in the hotly contested piece of territory known as the Senkaku Islands, located in the East China Sea, is a very current and modern example of international relations being strained at sea. Governed by Japan, after an agreement struck saw the Japanese Government fork out around $14.5m to seize control of the uninhabited rocks in 2012.[219] On the surface, historically deemed *terra nullius*, the Senkaku Islands don't seem to be exceedingly valuable. However, after a UN survey in 1968, it was indicated that the petroleum resources in and around this area could exceed even the most high-volume reservoirs in the world.[220] Japan has effective occupation, claiming that the Senkaku Islands are not mere rocks, but islands with their own EEZ and Continental Shelf under UNCLOS.

[216] Tanaka, 'The *Guyana/Suriname Arbitration: A Commentary*' (n. 213).
[217] ibid.
[218] ibid.
[219] 'China, Japan and the Dispute in the East China Sea - Investment Monitor' <https://www.investmentmonitor.ai/features/east-china-sea-japan-china-senkaku-islands/> accessed 29 March 2023.
[220] ibid.

Ever since 1971, China has made dubious and seemingly unsubstantiated claims about their historical ties to the islands. The lack of corroborating documents relating to these claims has undeterred the Chinese Authorities from claiming the Senkaku Islands to be a 'part of China since ancient times'.[221]

Following Japan's purchase agreement in 2012, China have retaliated with escalating acts of defiance. Initial retaliation came in the form of minor and peaceful protests outside the Japanese embassy in Beijing. In late 2013, another step was taken in escalating the dispute, with China establishing 'the East China Sea Air Defence Identification Zone', for the purpose of defending against potential air threats. This zone covers the disputed territories. In the last 7 years, Chinese Naval vessels have frequented the disputed zones, counted by Japanese authorities to be over 1097 times by 2019.[222] In July 2020, Japan released its defence white paper, stating that China has 'relentlessly continued attempts to unilaterally change the status quo by coercion in the sea area around the Senkaku Islands' adding that 'Japan cannot accept China's actions to escalate the situation'.[223] The US in 2014 provided clear support to Japan, with Barack Obama stating, 'we oppose any unilateral attempts to undermine Japan's administration of these islands.'[224] Japan's position is clear, it will not negotiate. China on the other hand, have continued to push and challenge Japan's authority, sending more advanced military vessels into the zone in a show of aggression. With no leeway given on either side, it is unknown how this dispute will evolve.

A maritime delimitation process that openly discusses and incorporates the existence of private rights and opportunities to grant further concessions is conducive to the maintenance of international harmony. Looking at disputes between Nicaragua and Colombia, Guyana and Suriname, and China and Japan, tensions run extremely high between both parties. Gisela Grieger forecasts an imminent flashpoint over the Senkaku Islands.[225] Any perceived overreach of sovereignty over territory can be met on the other side by protests, escalating to forcing licensees out of the territory, to sending machines of war into the zones as an act of strength and aggression. If a hotly contested zone is judicially delimited, it is likely that at least one party will not be entirely satisfied with the outcome produced, which then runs

[221] M Chansoria,'*China, Japan, and Senkaku Islands: Conflict in the East China Sea Amid an American Shadow'* (*Routledge & CRC Press 2018*)
[222] ibid.
[223] '*China, Japan and the Dispute in the East China Sea - Investment Monitor'* (n 219).
[224] ibid.
[225]G. Grieger *'Sino-Japanese controversy over the Senkaku/Diaoyu/Diaoyutai Islands an imminent flashpoint in the Indo-Pacific?*', European Parliamentary Service, 2021.

the risk of the opposing states being hostile to one another. The hostilities are not borne from geographical factors, they are a product of the extreme financial advantage attached to private rights. Therefore, the procedure that is tasked with delimiting the disputed territory should reflect this and use the presence of private rights as an evidentiary tool to derive the true boundary, with the overarching goal of maintaining peace and harmony between coastal neighbours.

3.4 ASYMMETRY BETWEEN LAND AND SEA

An academic line of reasoning I would like to explore is Marianthi Pappa's intriguing comparison to the way private rights are treated in instances of delimitation on land. While maritime delimitation and land delimitation both at their base function deal with the apportionment of space, their method and subsequent outcomes can be wholly different. If there is no pre-existing boundary agreement, the court or tribunal will take care in the examination of factors that states choose to invoke. Of course, if any private rights exist in the disputed area, it goes without saying this will be included in the states' petitions and will be duly considered.[226] At sea private rights can include fishing, oil and gas concessions, and scientific exploration amongst others. On land, deeds of private ownership, farming rights, and hunting licenses are examples of commercial interest that should be considered. The existence of these both on land and at sea is simple to establish but have been wholly unbalanced across the two. Thorough inclusion on land is equated with almost instinctive ignorance at sea. On land, consideration will be given in any case, regardless of both states relying on them,[227] or only one.[228] The qualifying factor of consideration is the quality of the evidence presented.[229]

Marianthi Pappa justifies this comparison between land and sea delimitation by firstly highlighting the similarities between the processes. Firstly, in both instances the method of invoking private rights is the same in any case. For a particular private right to be considered it must be brought to the attention of the court or tribunal by one or both disputing states. Non-state actors possess no *locus standi* and remain unable to bring forward private rights.[230] Secondly, only matters that are pertinent to the boundary may be considered in the judgment.

[226] *Arbitration Regarding the Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army* (2009) [598], [752], [692], [754].
[227] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, [75–76].
[228] *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* [2002] ICJ Rep 303, [68].
[229] Pappa, *Non-State Actors* (n. 11) 3.3 p.38.
[230] ICJ Statute, Articles 34(1), 62(1); PCA Rules 2012, Article 17(5); ITLOS Rules, art 31(1).

Therefore, private rights can only be invoked in support of a claim. Thirdly, both land and maritime delimitation are unbounded by a predetermined method, codified in international law.[231] Maritime delimitation is aided by the conventions of the sea, with both being ruled upon based on the sources and rules of public international law.[232] Therefore, only matters of legal fabric are admissible, and the presence of private rights must be examined by judges through what Pappa refers to as the 'lens of international law'.[233] These similarities provide the justification for their comparison, but also exacerbate the wholly imbalanced treatment of private rights across land and sea. I believe it is important to discuss the origins of private rights in delimitation cases, as if there were major differences at their first instance, it would provide justification for their differing treatments. Alas, it is the opposite.

The importance of private rights on land can be further established while analysing case law, which shows they have a marked and significant impact in three ways. Interestingly, the role of private rights doesn't need to conform to any of the three examples, it can be invoked without their specific and express reference. In the *Abyei Area* case, overseen by a boundary commission, they established that 'pre-existing rights may result in spatial adjustments when delimiting boundaries'.[234] They believed examining where people took their cattle to be of enough significance to be introduced into proceedings as it would help the authorities in their judgment.[235] If the ownership of cows is deemed important enough for inclusion into delimitation on land, it doesn't constitute a proverbial leap to assume it reasonable to at least discuss the presence of established oil concessions at sea worth unimaginable amounts to the economies of coastal states and the stability of their commercial operations.

Firstly, former colonial states usually desire to upgrade their administrative boundaries to international boundaries based on the doctrine of *uti possidetis*. This is widely acknowledged and accepted by the courts, as the transformative nature of these boundaries into frontiers with international qualities protect their independence and their sovereignty.[236] If the states cannot agree upon the exact location of the boundary based on the doctrine of *uti possidetis*, then private rights are treated as valuable tools that can be used to derive the boundary's position. One fascinating example of such is found in *Croatia v. Slovenia,* where housing

[231]ICJ Statute, (n. 207) Article 38.
[232] Convention on the Territorial Sea and the Contiguous Zone, art 12; Convention on the Continental Shelf, art 6; UNCLOS, Articles 15, 74, 83.
[233] Pappa, *Non-State Actors* (n. 11) 3 p.68.
[234] *Arbitration Regarding the Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army* (2009).
[235] ibid., [598].
[236] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep 554, [20].

and farming rights that were granted by the authorities at the time of the Socialist Federal Republic of Yugoslavia were deemed a 'prima facie indication' of the boundary's true location.[237] Delimitation was therefore enacted in alignment with historical municipal districts. The existence of private rights plays more than one crucial function here. Simplistically, it is an extremely useful tool that can greatly assist the judiciary in delimitation. Based on *Croatia v. Slovenia,* it also plays a more nuanced role in providing great protection against reallocation, circumventing the issues that would arise from overlapping municipal districts that contravene the international boundary[238]. It can play a very tangible role in protecting the sovereignty of the state. At sea, issues of these nature, such as the existence of well-established fishing licenses or oil and gas concessions, would be reallocated if adequate consideration was not given. It seems far more logical to avoid such issues.

Secondly, in cases which delimitation is not based upon upgrading administrative boundaries in the case of independence from the colonial rulers, their determination will be made by judges. Private rights play an indicative function of a boundary under the doctrine of *acquiescence* and *estoppel,* both distinct concepts but two expressions of the same idea.[239] Generally, consistency is the key, maintaining an attitude 'consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions.'[240] It is widely accepted that a land boundary can be created by tacit recognition, created by a passive stance taken by one state to another's sovereign acts, such as the creation and exercise of private rights.[241] This is another strong example of the role private rights can play on land, increasing their function from merely evidentiary to substantive, as it has the ability to create title. Judge Alfaro recognises this; 'passiveness in front of given facts is the most general form of acquiescence or tacit consent. Failure of a State to assert its right … can only mean abandonment to that right.'[242] Therefore, barring any negative reaction from the neighbouring state before litigation, private rights can constitute a valid boundary, establishing the principle of *venire contra factum proprium non valet*.[243] Jurist Georg

[237] *Arbitration between the Republic of Croatia and the Republic of Slovenia (Croatia v Slovenia)* (2017) [256].
[238] ibid.,
[239] H Thirlway, '*The Law and Procedure of the International Court of Justice: Part Two'* (1990) 62 *British Yearbook of International Law* 30.
[240] E Luard, *The International Regulation of Frontier Disputes* (Thames & Hudson 1970) 182.
[241] *Arbitration between India and Pakistan for the Indo-Pakistan Western Boundary (Rann of Kutch) (India v Pakistan)* (1968) 71ff, [346], [440–54].
[242] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6, 39 Separate Opinion of Judge Alfaro).
[243] 'No one may set themselves in contradiction to their own previous conduct'.

Schwarzenberger hails the 'pliability of recognition as a general device of international law' as what makes it the perfect tool for validating a boundary, irrespective of the strength of the title or any other criterion.[244] Sovereign acts such as the granting of private rights without resistance from your neighbour therefore creates an aura of finality consistent with that of a boundary agreement.[245] I am hesitant to commend this as a feature that should be uniformly adopted at sea.

Thirdly, private rights can affect a delimitation outcome on the legal basis of the doctrine of *effectivités*. This pertains to the effective exercise of authority over territory, not specifically while claiming a specific boundary line.[246] There are plenty of examples that in the absence of rigid title, the execution of authority over territory is as good as title.[247] Granting private rights is an example of said execution of authority. It can manifest itself through political, military, or administrative control, with no set duration prescribed.[248] However, the act of authority must not be of a private nature, and the intention of the state must be to act as a sovereign.[249] Private acts themselves cannot invoke the doctrine of *effectivités*.[250] They can however create title if they are ratified and validated by the invoking state through domestic regulation.[251] For example, in *Eritrea/Yemen (First Stage),* private activity by a state's nationals was not enough to independently suggest the presence of sovereignty, however if accompanied by state authority such as a licensing scheme, it can.[252] Hence, private rights can establish sovereignty in this instance, insofar as the public authorities ratify them upon creation, or subsequently.

Pappa firmly establishes the vital role private rights play in land delimitation rulings. In stark contrast with maritime delimitation, private rights, insofar as they are invoked with the expected standard of evidence before the court or tribunal, will be deeply explored and can themselves play a substantive function in determining a boundary. Pappa's purpose of highlighting the disparity between the two delimitation processes, even though almost identical in origin, is not only to show the value of private rights in the process, which can

[244] G Schwarzenberger, '*Title to Territory: Response to a Challenge'* (1957) 51 AJIL 308, 316.
[245] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6, [34].
[246] *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659.
[247] I*sland of Palmas Case (Netherlands/USA)* (Arbitral Award) (1928) 839.
[248] N Hill, *Claims to Territory in International Law and Relations* (OUP 1945) [156–57]
[249] Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) [1992] ICJ Rep 351), [399].
[250] Schwarzenberger, *Title to Territory* (n. 244) p.316.
[251] *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, [1105-1106].
[252] *Eritrea/Yemen Arbitration (First Stage: Territorial Sovereignty and Scope of Dispute)* (2001) 40(4) ILM 900, [313–16].

be major. I believe her rationale for expanding the role of private rights in maritime processes is for the uniformity of the law across land and sea, which is a reasonable and logical justification. I find this a convincing justification to merit their inclusion from maritime proceedings, especially when it is clear they have such a central and important role on land. Regarding the doctrine of *acquiescence*, I would like to add further commentary. Private rights on land can not only be evidentiary of where a boundary may lie, it can be the factor that substantively decides where the boundary is.[253] While I argue strongly for the inclusion of private rights into the maritime delimitation process, I do not believe it should be concrete in showing where the boundary is without any flexibility at all. Geographical functions play the overwhelmingly major role in maritime proceedings and should retain a prominent function, but only in conjunction with a deep analysis and consideration of all commercial activity and private rights invoked by the states party to the dispute.[254] The following chapter will provide deeper analysis of my proposed reforms, but it should represent a balance of geographical and commercial factors. Plotting a boundary solely based on the exercising of private rights, made possible through the doctrine of *acquiescence* on land, would create issues by ignoring geographical factors unique to each coastline at sea.[255]

Private rights should have an evidentiary function, and I do not believe they should exceed this. Attributing a substantive function to private rights in allowing them to create title could cause issues to arise regarding the presence of vexing geographical factors that may contravene the perceived sovereignty of a state party to the dispute. The Boundary Commission in the *Abyei Area case* established the need to explain why geographical factors should enjoy primacy over other evidence including private rights on land in each case. They stated that:

> 'if a decision-maker wishes to base its decision on geographical features, some additional explanation is in order as to why that geographical feature should be determinative for the location of the boundary, thereby overriding other evidence that may have been presented by the parties'.[256]

On land, both factors can be considered, with the stronger evidence being favoured to produce an outcome. Balancing both in maritime methodology, incorporating the two

[253] R Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) 50.
[254] *Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas* (signed 18 April 1990).
[255] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6, [39].
[256] *Abyei Area Case* (n. 234), [692].

elements thoroughly, to produce a judicially and financially fair outcome, preserving established commercial activity while remaining mindful of geographical factors, should efficiently produce a judgment that circumvents as much inequity and international disharmony as possible.

3.5 JUDICIAL APPETITE

Another source that can provide justification for the expansion of private rights can be found in the dissenting opinions and declarations of judges in cases that choose to attach a far lesser importance on non-geographic factors under the principle of relevant circumstances. Before I begin, I would like to add that I note there is also a wealth of dissenting opinion in the rare examples of judgments that choose to incorporate private rights into the adjusting of a provisional equidistance line. This is still an extremely useful resource, as a I believe this to provide a unique insight into why the judiciary has been reluctant to ratify such an attitude in proceeding jurisprudence, perhaps a concern over the amount of scrutiny that will be received. It also allows us to gauge the judicial appetite for the systematic consideration of private rights in the current formula, something that has not been achieved.

One example of such judicial declaration was made by Judge Xue in the judgment between Somalia and Kenya. As already established in the ICJ's judgment, the second stage of procedural delimitation in which relevant circumstances can be considered in adjusting the provisional equidistance line failed to consider the wide range of commercial factors at play. She notes that there is purposefully no exhaustive list of relevant circumstances that could potentially adjust the provisional boundary, as there is a wide-ranging set of factors that differ from case to case, including geographic, social, and economic impacts.[257] This reinforces another point of this thesis, that the wide range of possible circumstances and affected parties is large and worthy of consideration. Judge Xue establishes that believing that maritime delimitation is purely for portioning up territory is erroneous, and the underlying interests of the parties is often 'at the heart' of the disputes.[258] She finds the fact that the ICJ in Somalia and Kenya refused to consider naval patrols, scientific research, oil concessions, fishing, and security regimes, a regrettable decision.[259] Equidistance couldn't satisfactorily delimit the boundary alone, and the second stage should have allowed for

[257] *Somalia v. Kenya*, Declaration of Judge Xue, (n. 12) p.13-14.
[258] ibid.
[259] Ioannides, *Indian Ocean* (n. 62).

adjustment, something that should be the main strength of the current procedure. In practice, this is not the case.

I would like to align myself with the position of Judge Xue in Somalia and Kenya. She succinctly outlines the usefulness that non-geographic factors could play and provides justification for their inclusion. For me, the argument can be boiled down to this simplistic point, it is an untapped resource that could be utilised by the Court in achieving an equitable result. She also delves a little deeper in her criticisms of affording primacy to geographic factors. It is perhaps a little paradoxical that the ICJ refuse to provide an exhaustive list of relevant circumstances to account for the wide ranging and complex issues that can arise in disputes, yet in practice they solely consider a small geographic set of circumstances such as the concavity or convexity of the coastlines themselves. For Judge Xue, this renders the second stage of delimitation a purely mathematical exercise, laying down further jurisprudence that reinforces and facilitates the disregard for the high economic and social stakes that fuels the disputes.[260] If this were to continue, Judge Xue believes that equitable principles would eventually vanish from procedural delimitation.[261] I believe that non-geographical factors, mainly the existence of private rights and commercial activity, should be procedurally incorporated to combat the trend that Judge Xue identifies. This is a stark judicial endorsement for procedural development which afford full consideration to all the economic and social issues raised in each case. The range of factors that can arise has been previously highlighted by Judge Weeramantry; 'one can never foretell what circumstances may surface or achieve importance in the unknown disputes of the future'.[262]

3.6 CONCLUDING REMARKS

The minimal role of private rights upon the altering of judicially imposed boundaries exposes several parties to a wide-ranging spectrum of consequences. State can be relatively certain as to the principles that will be used to delimit their territory, affording a crucial element of predictability to the procedure. However, they may also be certain that their undertaking of commercial activity and granting of private rights will be unprotected during the application of delimitation methodology. Upon examination of these implications and the parties that will be on the receiving end of them, it is conclusive that judicial development

[260] Somalia v. Kenya, Declaration of Judge Xue, (n. 12) [114].
[261] ibid.
[262] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, separate opinion of Judge Weeramantry, p. 261, [182].

is required to address this issue. The systematic trend of the rejection of private rights cannot be solely explained by a judicial avoidance of criticism and loyalty to previous jurisprudence, it was perhaps borne and facilitated by the Geneva Convention 1958 and UNCLOS 1982. Both conventions elude any express reference to the operation of private rights or non-state actors, a noteworthy omission as it can be conclusively shown that their existence in disputed territory was common at the time of respective drafting.

The most obvious beneficiaries of clarified territory are coastal states, as they may undertake commercial activity with the knowledge that such operation will not infringe upon their neighbour's sovereignty. Examination of jurisprudence allows for several conclusions. Firstly, upon examination of the oil-driven dispute between Somalia and Kenya, it displays the wide range of consequences that the non-consideration of private rights creates, impacting the livelihoods of fishing-dependent citizens and the inadequate judicial appreciation of the turbulent context of the dispute. The series of treaties between Timor-Leste and Australia represent an interesting workaround, prioritising and implementing an acceptable split of commercial operations in the resource rich territory. Timor-Leste almost exclusively relies on such financial benefit to support their development and economy. This illustrates the shortcomings of judicial delimitation, as examination of case law allows me to conclude that there is a likelihood that such crucial undertakings would have been deemed procedurally irrelevant should the states have failed to come to agreement, risking the exposure of Timor-Leste to economic chaos. This entirely justifies that under the correct circumstances, the applicable judicial methodology should elevate the examination of private rights to circumvent such consequence and hold the capability for the existence of commercial activity to alter the boundary accordingly.

I believe that international disharmony is the gravest of implications that the applicable delimitation methodology exposes parties to. During examination of jurisprudence where states have been motivated to seek judicial clarification of their territory due to the undertaking of private rights and commercial activity, it is clear this is underpinned by an extremely tense diplomatic relationship between the parties. The operation of private rights in area of contested sovereignty can escalate and accelerate the dispute, leading states to force licensees from the area to halt further exploitation, threaten the use of force, and to deploy naval vessels as a strategy to intimidate the neighbouring states. By disallowing private rights and commercial activity to influence judicial proceedings, the applicable delimitation formulation does not adequately anticipate the escalation of disputes post judgment. The examination of the dispute between Nicaragua and Colombia illustrates this

point, as the ICJ have found their own jurisdiction in such disputes being questioned and have had to repeatedly intervene, threatening the supposed finality of judgments. I believe the extinguishment of international disharmony should be a central objective of maritime delimitation, so I believe this to be one of the most convincing lines of rationale. The justification for the elevated influence of private rights is supported by Pappa's comparisons to land delimitation and the dissenting opinion of Judge Xue, which shows an academic and judicial appetite for legal progression in this area. Finally, I am now in a position where I believe that the discussion on a reformed procedure can be undertaken.

CHAPTER IV – REFORMING JUDICIAL DELIMITATION

I will now introduce my proposal for reforming the applicable delimitation methodology, one that retains the advantages afforded by the current procedure but expands in affording a distinct structural stage for the consideration of private rights and commercial activity. I believe that the current formulation represents a concerted judicial effort to tangibly progress the law, and as such has several decided advantages. My proposal of reformation is intended to compliment these, not diminish them. To ensure this is achieved, I think it would be prudent for private rights and commercial activity to be given structural autonomy from the consideration of geographical features, essentially adding a further step to the 'three-stage' test that has been systematically applied since *Black Sea.*[263]

I will firstly discuss why I believe it is necessary for private rights and commercial activity to be considered at a distinct stage of procedural delimitation, instead of attempting to incorporate them at an existing point of the process. At this juncture, I should establish that the distinct structural alteration to allow the consideration of private rights and commercial activity should also be inclusive of any factors that are not of a geographical nature. I have focused upon private rights and commercial activity as I believe them to be of overriding importance, but in ensuring that the list of possible non-geographic factors remains non-exhaustive, it ameliorates the risk of security regimes and other circumstances being overlooked and left behind. Any such factors that are deemed important enough by states insofar that they are invoked to alter the boundary in a material way should be afforded the same platform for consideration and capacity for influence. Regardless, private rights are the focus of this dissertation as I believe it provides the strongest arguments for expanding non-geographic influence on the delimitation of contested territory.

Secondly, I will discuss how this would operate in practice, what factors should be considered, and how the Court should differentiate between factors that are worthy of consideration, and not, at this point. This development will also have ramifications for the other stages of delimitation, notably relevant circumstances, so how this would be reformed will also be discussed. I believe it is important to provide commentary on what details should be given particular weight in determining the relevancy of non-geographic factors, as the objective of the adoption of a fourth stage of procedural delimitation is not to guarantee their effect on a boundary's' course, more to facilitate their discussion on a distinct platform. A

[263] *Black Sea* (n. 9).

strict attitude towards what non-geographic factors could be deemed relevant should be maintained, but such high bar can be met by providing details on their operations and evidence that supports the detrimental effects that non-consideration would render. To assist with the clarity of the assertions made in this section, I will also provide a fictional dispute to show how the judiciary would theoretically proceed under the reformed structure.

Finally, I will conclude with a summary of the main criticisms that the consideration of non-geographic factors has drawn for the Courts in the past, and how my reformed procedure would be structured to avoid a repeat of the same scrutiny. I believe this is crucial, because the preceding chapters have shown criticism from peers to be a major stumbling block in further development for the judiciary. To account for these criticisms in structuring the reformed procedure, this should aid in alleviating concerns over the dubiety of routinely considering private rights and commercial activity. Of course, entirely anticipating all possible contravening opinions is not feasible, yet I believe the benefits of incorporating private rights into procedural delimitation with consistency would far outweigh the drawbacks. Being mindful of such drawbacks in the proposal of procedural development is crucial to the realistic chances of its implementation.

4.1 RATIONALE FOR THE 'FOUR-STAGE' TEST

I will now provide clarifications on why I believe the adoption of a fourth stage of delimitation represents the best vehicle for affording private rights and commercial activity the capacity to influence boundaries. The first point I would like to establish is that the utilisation of an additional 'stage' of procedural delimitation should only guarantee a discussion as to the existence of non-geographical factors in the disputed territory; by no means do I think that their capacity in altering a boundary should be guaranteed. I would be uncomfortable granting private rights a guaranteed influence on each case, as I believe this would spur states into a rush of granting such rights prior to judicial delimitation to strategically increase their territory. This would also risk the decomposition of coastal relations, as states would be more willing to infringe each other's sovereignty to advance their territorial claim. I therefore believe weight should be given to longstanding commercial operations, to ensure that states aren't trying to influence proceedings in an artificial and unethical manner. Natalie Klein observes that 'typical tactic is for States to submit maximalist claims … and [international tribunals] are left the task of devising a compromise

position between these claims.'[264] By setting a low bar for the inclusion of private rights, I feel this would exacerbate Klein's conclusions. The operation and structure of the additional stage of procedural delimitation will be detailed in the next section with greater clarity, but before justifying a fourth stage I believed that was a salient point to initially establish.

The introduction of distinct stages working in synchronisation in *Black Sea* for the purpose of deriving equitable judgments is intuitive and affords surety to the procedure.[265] I believe the procedural inclusion of such 'stages' represents a material legal progression in this regard, despite the dubiety surrounding its practical benefits. The structure of the current methodology formulated in *Black Sea* not only provides a clear and distinct staged process for the judiciary to implement, but it also provides coastal states a relative degree of predictability. They know how the procedure will operate, and as such can be confident of what factors the Court will consider when delimiting their boundary. I also believe the structure of the current procedure provides perhaps a less obvious benefit, insofar that the division of the procedure into stages can facilitate subtle developments through jurisprudence that do not require wholesale changes to the entire process. It would be erroneous to say that the *Black Sea* three-stage test was wholly heralded as a positive legal development, with Yoshifumi Tanaka expressing serious concerns over the use of disproportionality as an *ex post facto* test.[266] However, I believe the division of delimitation into three distinct stages is clear and intuitive, and so my proposed reformation shall retain this aspect of the current formulation.

Chapter I established that in the current delimitation formulation, the only possible means of incorporating private rights and commercial activity is through the mechanism of relevant circumstances. However, upon exploration of the Courts treatment of the second delimitation stage, the consideration of non-geographic circumstances is rare. Having previously concluded that the consideration of private rights and commercial activity would prove to be a shrewd legal development, combined with the conclusions drawn on the shortcomings of the current methodology, I believe the only method of guaranteeing the acknowledgement of commercial factors crucial to boundary disputes is to incorporate a fourth stage into the procedure. I will now attempt to justify why this is the most effective manner of facilitating the consistent application of private rights and commercial activity.

[264] N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP, 2005) p.254.
[265] ibid.
[266] Tanaka, *Disproportionality* (n. 38).

The most straightforward justification I can provide in supporting the argument for the adoption of a fourth stage of procedural delimitation, is that it provides something that the current formulation does not. The proposed reformation grants a distinct, structural mechanism dedicated to the deliberation of private rights, commercial activity, and other non-geographical circumstances that may be invoked by states pending judgment. This will facilitate the consistent application and influence of commercial activity upon boundaries, and appreciation of the contextual economic background to most oceanic disputes. Currently, the judiciary hear and deliberate geographical and non-geographical elements at the same stage. I believe this presents a choice, in which the judiciary almost reflexively favours the less dubious and objective geographic factors. To remove the competitive element between the two would allow for their separate consideration, in which they are judged on the merits of the argument, instead of against one another. Unfortunately, I believe the biggest obstacle to private rights is the judicial preference of geographical features. States' commercial activity is therefore exposed and unprotected during judicial proceedings. The importance of commercial operation could perhaps represent the sole point of agreement between states who are in territorial dispute.

This can be seen in cases in which both parties to the dispute both invoke commercial activities through the mechanism of relevant circumstances, such as the dispute between Eritrea and Yemen in the Red Sea. Both parties provided great structure and detail to their arguments revolving around the operation of existing fishing regimes. They detailed the current and historic fishing activity, their location, the economic dependency of such practices, national consumption of fish, and the direct effect that fishing practices have on the boundaries proposed by each party.[267] Interestingly, both parties detailed each other's circumstances. These factors were invoked against the general background of the Anglo-Norwegian Fisheries Case of 1951, in which it was established that non-geographic factors would be considered if 'catastrophic' repercussions could be demonstrated in the event that they weren't factored in by the Court.[268]

The Tribunal provided conclusions upon the arguments made by both parties. Generally, they stated that both parties' arguments were confusing and contradictory to a large extent.[269] Expectedly, each party's argument reflected upon the other state's arguments, essentially

[267] *Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation) (Eritrea/Yemen*) (1999) XXII RIAA 335, [47].
[268] *Fisheries Case (UK v Norway)* [1951] ICJ Rep 116.
[269] *Second Stage of the Proceedings between Eritrea and Yemen,* (n. 264) [61].

diminishing each other's claims. Since the dispute was centred upon both states fishing practices, it was natural that their arguments would clash, with each state championing their own advantage. Both parties suggested boundaries and attempted to establish that these lines would not deleteriously affect the citizens and economy of its neighbour. I believe the Tribunal's conclusion regarding the clashing arguments was contradictory of the very objective of the judiciary; to resolve dispute. It is entirely expected that the arguments set forth by both states were contradictory of one another, this was the very nature of the dispute. This is not sufficient reasoning to disregard the entire argument and deny the factors influence upon the boundary. Both states detail how crucial fishing is to their economies and citizens, a point that the Tribunal acknowledges. In analysing the points of both countries, I fail to see what more they could provide the Tribunal for them to accept fishing as a relevant circumstance, however, it was concluded that the arguments of both states should have no effect upon the determination of delimitation.[270]

Peter Dutton notes that since the judgment, the parties have continued to haggle over the Tribunals' handling of artisanal fishing rights;

> 'Eritrea rejects the portion of the tribunal's ruling that Yemen's fishing rights extend to its territorial sea, and the Eritrean Navy has arrested and detained hundreds of Yemeni fishermen in the years since the tribunal's award.'[271]

I believe this is material proof that there is a consequential shortcoming of the applicable procedure. By granting the fishing rights that gravitated the parties towards seeking judicial delimitation a structural platform to be considered and applied to the boundary, such post-judgment effects could have been ameliorated to a greater degree. Currently, geographic factors are routinely deliberated and produce tangible results upon the final delimitation boundary.[272] This is certainly the more favourable option for the Courts to take, as geographic factors will not attract the same criticism. It is less contentious and removes an element of perceived subjectivity. I believe relevant circumstances pits geographic and non-geographic factors in competition with one another, in which there is a far simpler option. Consequentially, the rejection of private rights and commercial activity at the second stage

[270] ibid., [74].
[271] P. Dutton, '*Eritrea v. Yemen: A Case Summary for the Maritime Dispute Resolution Project'*, U.S. – Asia Law Institute, 2016.
[272] *Agreement between the Government of the Hellenic Republic and the Government of the Italian Republic for the Delimitation of the Continental Shelf* (signed 24 May 1977); *Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Delimitation of their Respective Continental Shelf and Other Maritime Zones* (signed 27 April 2009).

is systematic. The adoption of a fourth stage, essentially separating the deliberation of geographic and non-geographic factors, would perhaps change the judicial attitude from the preference of mathematical surety to avoid scrutiny, to being able to appreciate the range of issues and circumstances that private rights can contribute to in a territorial dispute, autonomously.

To say that the Tribunal entirely ignored the crucial fishing subtext to the dispute is incorrect. Instead of allowing artisanal fishing rights to affect the boundary's course, the Tribunal decided to provide access to traditional fishing grounds to the fishermen of both states to all waters throughout the region. The award therefore permits Eritrean fishermen access to the Yemeni EEZ and vice-versa. For me, this is a bizarre and convoluted solution that has stoked post-judgment tension. It is evidence of how the judiciary will seek any such solution to deal with private rights whilst wholly avoiding their incorporation into procedure. Expectedly, this approach has been quashed by proceeding judgments, which deem it contrary to the explicit provisions in UNCLOS.[273] The decision even facilitated access for fishermen to each state's ports, which not only exceeds anything the states requested in the first place, but it also supports the intrusion of each other's internal borders. Dutton notes that these aspects of the decision only exacerbate the dispute, and I am in firm agreement.[274]

Another key justification for dedicating a separate stage of delimitation purely for the invoking and deliberating of private rights and commercial activity, and in turn any such non-geographic factors, is that it will provide states surety and confidence that the Court will hear and appreciate their merits in altering a boundary. This structural change to relevant circumstances would opt not to pit geographical circumstances against economic circumstances that may be wholly crucial to the prosperity of the parties' economies and citizens. This effect would have particular benefits for states who are almost solely financially dependent on a particular maritime commercial regime such as fishing, and states who have peculiar coastal features that would take judicial precedence. The example of East Timor, whose oil concessions are fundamental to the future of the nation, is extremely relevant there. Had they not negotiated and ratified a series of treaties with Australia, judicial delimitation would conceivably have ignored the cruciality of private rights and commercial activity in the territory, favouring geographical elements.[275] Countries such as Timor-Leste,

[273] Arbitration between Barbados and the Republic of Trinidad) Tribunal Award of 11 April 2006, RIAA, Vol. XXVII, p. 214, para. 241 ILR, Vol. 139.
[274] Dutton, *Eritrea v. Yemen* (n. 268).
[275] *Series of Treaties between East Timor and Australia* (n. 186)

with the knowledge that procedural delimitation had the structural capacity for considering and utilising their existing and potential licenses, would perhaps have the confidence that their commercial operations have more of a chance of survival post-delimitation.

One example that advocates the adoption of consistent deliberation and utilisation of private rights and commercial activity, is the long-running territorial feud between Nicaragua and Colombia.[276] On December 6th, 2001, Nicaragua commenced proceedings against Colombia before the ICJ, centred around the maritime territory on the western Caribbean. Since then, the ICJ has ruled several times regarding their own jurisdiction in 2007, and the territory itself in 2012 and 2022. Importantly, in the aftermath of the 2012 ruling, Colombia met the decision with extreme defiance. They continued patrolling and controlling fishing zones that were determined to be within the jurisdiction of Nicaragua, granting licenses in territory judicially deemed to be under their rule. The 2012 judgment had granted Nicaragua access to underwater oil deposits, as well as the fishing rights associated with those waters. Both parties at this juncture flagged equitable access to natural resources as a relevant circumstance. The Court rejected this as relevant, citing the Arbitral Tribunal in the *Barbados/Trinidad and Tobago* case; 'resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance'.[277] Colombia subsequently felt aggrieved by the judgment, and responded by essentially ignoring the decision altogether, proceeding to violate Nicaragua's sovereignty.[278] This case allows for two conclusions to be made regarding the justification of adopting a distinct stage of procedural delimitation for the deliberation of private rights and commercial activity.

Firstly, in the aftermath of the 2012 judgment, Colombia's conduct continued to infringe the sovereignty of Nicaragua, and most certainly heightened the existing tensions between the two coastal states. Colombia's main grievances were the socio-economic consequences that judicial delimitation led to for indigenous citizens who relied heavily on fishing in the disputed territory. With the knowledge of the long running territorial feud, and both states invoking equitable access to natural resources during the 2012 judgment, it was conceivable that this decision would lead to further issues between the countries. Should there have been another step of delimitation in which the Courts could have heard the invoked non-geographic factors autonomously from geographic factors, this could have given the ICJ the

[276] Further commentary on Nicaragua v. Colombia is found in Ch III s III.
[277] *Arbitration between Barbados and the Republic of Trinidad* (n. 273),[523]
[278] 'ICJ: Colombia Must Stop Activity in Nicaraguan EEZ Waters | News | Al Jazeera' (n. 207).

platform to appreciate the merits of each state's argument vis-à-vis the existence and access to natural resources. The key issue with the second stage of delimitation, is that when deliberating the relevancy of geographic and non-geographic elements, geographic factors have a far higher chance of affecting a boundary's course. I believe that due to this, crucial economic circumstances are being ignored in favour of mathematical certainty and perceived objectivity. In cases with historical background such as Nicaragua and Colombia, I believe that the Court could make a greater attempt at circumventing further tension by appreciating the key commercial aspects of the dispute. I also believe that if both opposing states invoke the same non-geographic factor, this should be indicative that it should play a part in establishing a permanent boundary. This point will be expanded upon in due course.

Secondly, the ICJ found itself having to adjudicate upon the territorial infringements between the two nations yet again in 2022. I believe that procedural delimitation should attempt to retain a degree of efficiency. One potential criticism of expanding the current formulation is that it may take longer. However, this argument is entirely counteracted by Nicaragua and Colombia. ICJ once more found itself in the middle of the dispute now spanning over two decades. Should the non-geographic circumstances have been afforded a greater chance of survival in procedural delimitation, with an appreciation that not doing so would leave the states with a high degree of dissatisfaction, perhaps the ICJ wouldn't have found itself having to adjudicate once more. If Colombia had felt that the key commercial issues were heard and that a suitable compromise had been struck, they would have been less likely to have conducted themselves so aggressively. Subsequently, it is possible that allowing for the independent examination of the historical nature of the feud, as well as utilising the invoked non-geographic factors to establish the boundary, then the 2022 judgment could have been avoidable. Perhaps adding another step of delimitation would detract from the overall streamlined process that has been developed through jurisprudence, however, reducing the possibility of repeat judgments is certainly an advantage worth pursuing. After discussing the advantages that a fourth, distinct, stage of delimitation would bring to current methodology, I will now attempt to derive how this would operate in practice.

4.2 PROCEDURAL OPERATION OF A FOURTH STAGE

I will now discuss how a fourth stage of delimitation would operate, and how the delimitation procedure would be structured. I believe the first point to establish is that in practice, the only necessary change that requires implementing is structural. Non-geographic factors are

currently invoked regularly in the second stage of delimitation; however, their influence is heavily obstructed. The key objective of my reformation is to provide the judiciary with a platform where non-geographic elements can be deliberated separately from any coastal configurations that may convince them to alter the boundary. The current uniformly adopted approach of rejecting private rights reflexively is severely problematic and indicates that delimitation is heading towards a trend of total geographic supremacy. Craig Gaver supports this observation, stating that the 'reticence to apply social, economic, or security-based factors turns the second stage into a purely geometric exercise'.[279] Consequently, this reduces the ability of the judiciary to reach an equitable outcome. Spatial equity does not equate to commercial equity. My proposal of reforms primarily intends to counteract this trend and remove judicial hesitance in affording private rights a central role. To begin, the first crucial aspect to discuss is the positioning that an additional stage would take in the current formulation.

The easiest criticism to make of permitting private rights and commercial activity is that it reduces objectivity.[280] To retain as much of a degree of consistency and objectivity possible, I believe that the first step of maritime delimitation should always be equidistance, unless there are compelling reasons to deviate and use an alternative method. The important factor here is that the first boundary should be charted mathematically. In any given dispute, State A and State B can prepare for judicial proceedings with the expectance of what the provisional boundary shall look like, affording them the predictability required to tailor their invoked relevant circumstances to affect it accordingly. Massimo Lando notes a lack of academic interest in equidistance, with most constructive output done by French writers. This is seemingly due to a concurring academic and judicial acceptance that equidistance is a well-established principle of delimitation.[281] I therefore see no material reason to deviate from a mathematically calculated provisional line.

Standard practice dictates that the second stage of procedural delimitation is the invoking and consideration of all relevant circumstances. To lessen the abrasiveness of any proposed reformation, I believe this should be retained. However, the dual consideration of geographic and non-geographic factors shall be abandoned. Factors and circumstances are largely interchangeable terms, however Massimo Lando notes one difference in his use; factors designate potential circumstances, and 'relevant circumstances' designates their legal

[279] Gaver (n. 182).
[280] *Tunisia v Libya* (n. 13) Dissenting opinions of Judges Gros, Evensen and Oda.
[281] Lando, *Maritime Delimitation* (n. 47) p. 103.

qualification.[282] Essentially, all relevant circumstances are factors but not all factors are relevant circumstances. I believe this differentiation is not materially useful for the purposes of my proposal and has the potential to confuse, therefore they can be read herein as having the same definition. This leaves a key question to be answered, should geographic or non-geographic factors be discussed first? I believe geographical factors should be afforded procedural priority. It would be illogical to deviate from a mathematically calculated provisional line using non-geographic factors only to introduce geographically induced changes afterwards. Also, by considering geographically relevant circumstances first, it lessens the opportunity for criticisms regarding subjectivity to be levied. Of course, this criticism will remain regardless, but by allowing geographical factors the first opportunity to alter the provisional line, it aids the perception that the judiciary approach delimitation with objective eyes. That is not to say that I believe the consideration of non-geographic circumstances is strictly subjective. The main justification for permitting geographic considerations procedural priority is to maintain the perception of objectivity in anticipation of criticism. Therefore, at the second stage, State A and State B will have the opportunity to invoke geographical factors in support of altering the provisionally charted line. The product of the first two stages should be a mathematically calculated boundary that has been objectively and efficiently established.

I will now discuss the third stage of my reformed delimitation methodology. It is at this stage that states will invoke non-geographic factors for judicial consideration. State A and State B will have the opportunity to invoke any non-geographic factors, to alter the boundary and provide protection to such factors. For example, if State A had long-standing fishing rights in the disputed territory, they may provide evidence of this to ensure that the judiciary will reflect this practice in their judgment. Since geographical factors will already have played their part, this removes the opportunity for the judiciary to favour their use and affords private rights and commercial activity the unburdened capacity to alter a boundary. I am not necessarily elevating the importance of private rights to the detriment of geographical factors; it is a concerted attempt to provide both with an equal capacity for influence. Accordingly, the first point to establish is that the addition of this stage of delimitation in no way guarantees that the Court will accept and utilise private rights and commercial activity in changing a boundary. It simply grants procedural delimitation a dedicated platform for their discussion, without the influence of existing geographic factors on the judiciary. This will structurally allow the judiciary to utilise private rights and commercial activity in the

[282] ibid., p. 167.

disputed territory, as if nothing else, they are an extremely useful evidentiary tool to be used to strike a compromised result that attempts to respect any historical baggage to the dispute, and therefore reduces the likelihood of a repeat judgment or the escalation of international disharmony. Massimo Lando reinforces this advantage 'If a judicially established boundary strikes a balance between the lines suggested by the parties, such parties may likely be more willing to implement the judicial decision establishing that boundary.'[283]

The addition of a fourth stage in practice, is not in truth an addition at all. It is a structural alteration to the current second stage, but one I believe to be vital. As Chapter I concluded, the current formulation does not have the capacity to routinely appreciate and utilise private rights and commercial activity and thus further development is needed to achieve this objective. I also believe the fact that my proposed alteration to current procedural delimitation is subtle, makes the chances of its adoption in jurisprudence more likely. Should a judge petition for an entirely fresh system, this type of wholesale change would be likely to never get off the ground. Loyalty to previous jurisprudence is simply too strong, and historically when changes are introduced, they are slight. Marianthi Pappa points to the timing and nature of legal developments, any sudden and unsupported deviation is likely to be strongly criticised as an 'untimely departure from existing case law'.[284] Small and subtle developments is what has polished and refined the current methodology, and thus I believe the current formulation should be retained as much as possible to ease any ensuing progression into uniform practice. Maritime delimitation is a big ship, incapable of sharp turns.

Moving on to the deliberation of private rights and commercial activity, I believe there are certain indicators available to the judiciary that could convince them of their relevancy. The introduction of these indicators would also establish a line of reasoning and rationale as to exactly why they have or have not had a tangible effect on the boundary's course. This would provide key express clarification for states who intend to invoke private rights, affording them pre-judgment insight into what is evidentially required. Currently, the only available gauge we have to use, is the vague concept of 'catastrophic repercussions'.[285] What exactly qualifies as catastrophic is unknown, and therefore it has produced an aura of uncertainty as to why private rights and commercial activity have been routinely rejected by the judiciary. International Tribunals have approached 'catastrophic repercussions' with an extremely

[283] Lando, *Maritime Delimitation* (n. 47) p.237.
[284] Pappa, *Non-State Actors* (n. 11) p. 77.
[285] *Fisheries Case (UK v Norway)* [1951] ICJ Rep 116.

stringent attitude, which for Massimo Lando allows the conclusion that 'the international tribunals' approach could be criticised as indifferent to the real concerns of states'.[286] I agree wholeheartedly, the current applicable methodology is unappreciative of the commercially driven factors that motivate states to seek judicial clarification of their territory. Therefore, in invoking private rights and commercial activity, states should be met with a bar that can be overcome. One such indicator that non-geographic factors should influence the boundary, is if both states locked in argument agree that the Court should deliberate and utilise the same relevant circumstance. If both states invoke the existence of the same private rights or commercial activity, and the Court denies its relevancy and fail to reflect it in the judgment, then it is foreseeable that this particular factor will continue to cause strain on the harmony between the states post-delimitation. Therefore, I believe some weight should be afforded to factors invoked by both sides, as it is indicative of its cruciality to the dispute itself.

I would also give weight to detail when the states invoke their private rights and commercial activity before the judiciary. If a state can provide comprehensive detail and evidence supporting the invoking of non-geographic factors, then it should there be more likely that the factor is deemed relevant and affects the boundary's course. For an example, private rights that are long-standing and can be deemed as consistent commercial activity in the area, I believe highlighting this at the point of invoking this should also be indicative of relevancy. This concept of consistency when determining relevancy is established in the Gulf of Maine, where it was held that a line of oil concessions could not be held to be the boundary itself unless its operation was 'consistent' and 'unequivocal'.[287] However, the ICJ failed to further clarify what legal elements would have resulted in oil concessions being consistent. Nevertheless, I like the concept in determining relevancy if it was clarified further. It also offers a certain element of protection against states strategically granting licenses and concessions before judicial delimitation is enacted in an effort to gain advantage in proceedings. I therefore think that another indicator of relevancy should be consistent practice, and states should aim to demonstrate so.

Another detail that could perform an indicative function for the Court, is if the states are able to provide evidence supporting claims that by not deeming the particular non-geographic circumstance irrelevant, they would provide tangible negative effects for their economic prosperity. For example, if a smaller island nation is heavily dependent on oil concessions,

[286] Lando, *Maritime Delimitation* (n. 47) p. 201.
[287] *Gulf of Maine Area (Canada/ United States)* (n. 132).

which would be at the risk of reallocation if they were not deemed relevant, then they should aim to provide evidence purporting so. I think dependency on the commercial factor in relation to their GDP should be important, as states with a wider economic portfolio may be in a better position to financially brace for reallocation. The commentary on Timor-Leste in Chapter III and their dependence on oil is relevant here. Once again, I believe detail to be crucial. If a state feels a particular non-geographic element is important and should affect the final boundary, then they should provide as much detail on the economic impact that this commercial activity provides to provide the Court. I believe that there should be a strict bar, and I don't think this should easily be achieved. Accordingly, I believe the test of catastrophic repercussions should be diluted. A numerical threshold would certainly quash claims of subjectivity; however, this would perhaps prove challenging to establish, and problematic for economically diverse nations. A strict case-by-case examination of the financial implications of invoked non-geographic factors should be undertaken. This should not be easily achievable, but not impossible.

Another detail that is closely tied to the financial impact upon states' economies, is a demonstration that by deeming a non-geographic factor irrelevant, this would be consequential for their citizens. The human factor in territorial disputes has been explored thoroughly by Mariano Aznar, which allows me to draw conclusions about their treatment on land.[288] During the *Abyei Area case*, the Boundary Commission were tasked on deliberating the opposing views of the parties regarding the presence of two tribes disputing the territory. The Commission states;

> 'Although the Misseriya have clear 'secondary' (seasonal) grazing rights to specific location north and south of Abyei Town, their allegation that they have 'dominant' (permanent) rights to these places is not supported by documentary or material evidence [and that] [t]here is compelling evidence to support the Ngok claims to having dominant rights to areas along the Bahr el-Arab and Ragaba ez-Zarga and that these are longstanding claims that predated 1905.'[289]

This allows two conclusions. Firstly, that dominance, if supported by material evidence, could have a tangible impact on delimitation. Secondly, seemingly there is weight given to claims that are longstanding. I believe determination of relevance should be dependent on

[288] Explored in Chapter II s.II.
[289] Report presented by the Boundary Commission Experts to the Sudanese Presidency on 14 July 2005, Part I, at 16–19, available at http://www.sudanarchive.net.

these two factors, and if it is demonstrated in detail, supported by documentation and evidence, then it increases the likelihood that the judiciary will deem it relevant and alter the boundary accordingly. Another interesting point in the *Pulau Ligitan and Pulau Sipadan* case, is that 'activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulation or under government authority'.[290] I believe this is also important to demonstrate when invoking effect upon citizens, as it establishes a link between the human consequence and state practice. I believe if these three points are proven and met, then this should prove strongly indicative for the judiciary that this factor should be evidentiary to where the true boundary lies. This would also bridge the chasm in land and maritime delimitation identified by Marianthi Pappa.

Finally, I believe that a demonstration of the historical and political situation between the two states should strain the importance of the invoked non-geographic factor. If the judiciary is tasked by delimiting a boundary against the backdrop of a long-running international feud, then it should be mindful of this fact and take steps to prevent further tensions post-judgment. By accepting a hotly debated line of oil concessions for example as a relevant factor, then perhaps by striking compromise between the two nations instead of rejecting its relevance outright, then it may aid the circumvention of further disharmony. I would also like to briefly comment on states who invoke security concerns as non-geographic factors. I do believe quite often this is a 'catch-all' type factor, in a last-ditch attempt to gain spatial advantage. No boundary has ever been adjusted based on security regimes, so it is entirely unclear how the judiciary would establish this in practice. Although international tribunals have been consistent in maintaining that it could be deemed as a relevant circumstance, the bar for a boundary to threaten a state's security seems unattainably high. Malcolm Evans concludes that 'it is neither possible nor necessary to devise any general rules on these points'.[291] It is difficult disagree, however if a state invoked a genuine security concern that a boundary would exacerbate, I would be uncomfortable if this were not probed further by the judiciary. Absence of jurisprudence on this point should not strictly preclude its consideration and effect. I take more issue with Evan's use of 'unnecessary'. I do not agree that seeking clarification on how security concerns could influence a boundary is unnecessary, as it would aid the amelioration of any post-judgment troubles. As to Massimo Lando's concurrence

[290] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia*), 2002 I.C.J. 625, 683, [140] (17 December).
[291] MD Evans, Relevant Circumstances and Maritime Delimitation (OUP, 1989) p.177.

with Malcolm Evans on the impossibility of doing so by looking at case law, I do agree; it is non-existent in practice and any attempt to provide further detail would be speculative[292].

Generally, I believe invoked non-geographic factors that are founded in fact and supported by evidence and documentation, should retain a higher chance of affecting a boundary's course. I have summarised some main points that a state could make in supporting an invoked non-geographic factor, but this list should certainly be non-exhaustive, to support the general flexible characteristic of maritime delimitation, and to cater for the wide range of circumstances in any given dispute. Generally, it should not be easy for this to succeed, but the bar should be lower than the systematic rejection we have at present. After discussing how non-geographic factors including private rights and commercial activity could form a fourth stage of procedural delimitation, and why this is necessary, I will now provide commentary on the potential criticisms that such a development would face, and crucially how these criticisms could be averted in practice. Of course, any deviation from previous case law will attract scrutiny, which is why it is important to discuss these. Such scrutiny and criticisms can be incredibly useful in shaping future developments, and so by anticipating them and attempting to circumvent them, it would perhaps aid a smoother transition into jurisprudence. As has been established previously, the attraction of widespread academic scrutiny and criticisms from peers is enough to halt development before it can be considered judicial practice.

4.3 POTENTIAL CRITICISMS

The first potential criticism that could be levelled at the adoption of a fourth stage of delimitation is that it may slow the process down, reducing the overall efficiency of judgments. While a fourth stage seems like it would add to the overall process, I prefer to regard it as a structural alteration of what is currently operational. I do believe efficiency should be a key objective of procedural delimitation, however my proposed development does not actually include any legal principles or mechanisms that are not currently present. Dedicating a stage of delimitation to the invoking and deliberation of non-geographic factors simply allows for their consideration to be undertaken free from existing geographic circumstances which at present largely take precedence. I would go further and suggest that by affording private rights and commercial activity a greater influence upon boundaries, the Court would simultaneously grant appreciation to the issues that fuel the dispute at the first

[292] Lando, *Maritime Delimitation* (n. 47), p. 210.

place. By doing so, this would perhaps aid state harmony in the aftermath, as theoretically no state should be disadvantaged financially to a disproportionate measure. This reduces the risk of the judiciary being in the position to rejudge territorial disputes, and in some circumstances their own jurisdiction. In practice, this should aid the efficiency and finality of judgments.

Secondly, in the past, the judiciary has been accused of playing an 'activist role'.[293] In cases where it has deemed non-geographic factors relevant, and they have consequentially altered a boundary's course. For example, the dissenting opinion of Judge Gros in *Tunisia v. Libya* is scathing. He stated that by affording non-geographic factors the prominent role over geographic factors, 'the judgment has strayed into subjectivism',[294] to a point where it veered 'wide of the mark'.[295] I believe this is a strong insight into the judicial attitude to relevant circumstances, where geographic and non-geographic factors are pitted together. In a battle of objectivity, there is one winner. I believe by assessing both independently of each other, this will go some way to removing the perceived competition between the two. The adoption of a fourth stage also supports the quest for objectivity in several ways. Firstly, by allowing geographic factors to be assessed first, it retains the mathematical certainty of equidistance of the first stage, and geographically relevant circumstances at the second. Mathematical certainty is given procedural priority. Secondly, by maintaining a strict but achievable bar for non-geographic factors to be deemed relevant, it means that any tweaks to the boundary line as a result will be backed by a wealth of evidence and documentation to support it. Thirdly, by structurally permitting non-geographic factors to be assessed autonomously from geographic factors, it facilitates their consistent treatment and consideration. Consistent practice in jurisprudence negates calls of subjectivity, as judgments will be able to refer to previous case law and demonstrate that the judiciary isn't taking an exception in certain cases. Simultaneously, this will alleviate judicial fear of post judgment scrutiny.

Finally, a criticism of the proposed alteration of procedural delimitation that could be levied is that an entire structural change to current procedure is unlikely to be adopted. While I somewhat agree, I believe that future developments are very much realistic for two reasons. Firstly, while the adoption of a fourth stage of delimitation may seem on the face of it to be a wholesale change, in practice, this certainly is not the case. Deliberating relevant circumstances in two distinct phases still entails the same procedural steps as the current

[293] T. Cottier, *Equitable Principles of Maritime Boundary Delimitation* (CUP, 2015), 284.
[294] *Tunisia v Libya* (n. 13), Dissenting Opinion of Judge Gros.
[295] ibid.

second stage, and so it could perhaps be subtly introduced into jurisprudence without attracting glaring controversy. The point of affording two distinct stages to the same concept of relevant circumstances is to outline the autonomous nature of geographic and non-geographic factors so that they may be judged on each invoked factors merits. Secondly, constant development is part of the very fabric of maritime delimitation. A lack of codified rules in Articles 74 and 83 of UNCLOS affords jurisprudence the opportunity to develop and adapt to vexing circumstances and emerging key factors.[296]

4.4 CONCLUDING REMARKS

In discussing a theoretical structural alteration to the current delimitation procedure, I feel it is vitally important to proceed in two ways. Firstly, I believe that it must be justified as to why it should be established and secondly, it then should be established how it would operate in practice. In that light, I believe there are several justifications on why a fourth stage of delimitation should be incorporated. A more simplistic justification is that this structural alteration to procedural delimitation provides something that the current methodology does; a distinct step of delimitation dedicated to non-geographic factors, where they can be considered for their merits based on evidence and documentation free of geographic factors. Another practical benefit of such development is that it would give states the confidence that their all-important economic activity in the territory will be heard and judged, with an opportunity that it may tweak the boundary in their favour. If this is achieved, states would perhaps retreat post-delimitation and accept what they believe to be a compromise with the opposition. This would help in quelling any post-delimitation tension and reduce the risk that the judiciary will have to consider the dispute again, further down the line.

In determining where in the procedure is most appropriate to consider non-geographic factors and how it would operate in practice, there are numerous elements to consider. In attempting to maintain the objective mathematically calculated starting point, I believe the consideration of geographical circumstances is the next natural step to take post equidistance. In quelling as much controversy that any such development would take, I do not believe a proposal of a wholesale change to the procedure would survive in case law, nor academic scrutiny and critique. Therefore, I believe that developments must be made as minimally intrusive as possible, which gives the structural alteration to relevant circumstances a more realistic chance of incorporation. Maritime delimitation is also an

[296] UNCLOS (n. 6), Articles 74(1) and Art 83(1).

extremely flexible area of the law in that it can develop through practice, which also makes development not only an intrinsic factor of this area, but ever imminent. It is also vitally important to ensure that all invoked non-geographic factors have the possibility of affecting a boundary's' course, and this should be achieved through a high bar of evidence and documentation to support the claim. I believe objectivity can be gained through consistent judicial practice, so there can be no calls of special treatment or intermittent activism.

It is also vital to consider possible criticisms that could be levied against my theoretical developments to the procedure. This allows the proposal to reflect those criticisms and utilise it to try and circumvent them. Criticisms surrounding calls of subjectivity, reduced judicial efficiency, and realistic chances of implication are all key to consider. The role of private rights and commercial activity, and the role of non-geographic relevant circumstances is very hotly debated, shown by the wealth of dissenting opinion and academic commentary. While I firmly believe that a fourth stage of delimitation would symbolise procedural progression for the better, I also believe that failing to consider the controversial nature of this area of law and existing criticism would be naïve. No legal development will go unscrutinised, which is a healthy characteristic that facilitates further development and constant change.

CONCLUSION

To conclude, the consistent consideration and application of commercial activity and the associated private rights into maritime boundary judgments would represent tangible legal progression. The applicable procedure as developed in the *Black Sea* case,[297] is a testimony to the continuous progression that has been facilitated by jurisprudence in this area of law, something I believe to be a uniquely beneficial aspect. As the applicable methodology has undergone significant structural alterations and delimitation principles have been afforded roles of differing importance, the lack of judicial consideration afforded to private rights and maritime commerce has been contrastingly consistent. It would be largely correct to conclude that the influence that private rights have on the delimiting of oceanic territory is non-existent and contradicted by a handful of rare examples. Accordingly, I firmly believe the most effective manner of elevating the role of private rights in boundary-making, is by structurally altering the current procedure to dedicate a distinct stage of delimitation to their consideration and application. To illustrate this issue and justify my proposed solution, several conclusions had to be drawn.

Firstly, Chapter I introduced and detailed the current maritime delimitation procedure. Furthermore, I undertook an assessment of each applicable delimitation concept and their practical operation. On paper, the procedural delimitation retains the capacity to incorporate private rights into judgments, which perhaps induces the idea that change is not necessary. The second stage of delimitation in which the judiciary considers relevant circumstances invoked by the states to justify the alteration of the provisional line, theoretically holds the capacity for private rights to be influential. However, upon deeper exploration of pertinent jurisprudence, it is wholly conclusive that this is not consistently achieved and denotes a judicial trend of hesitance to do so. As such, the current procedure is heavily weighted towards geographic factors, leading scholars to conclude that delimitation is often a purely geometric exercise.[298]

Chapter II probed the function of private rights and commercial activity in maritime delimitation proceedings. Upon analysis of jurisprudence, it became clear that resource-related factors are afforded a non-existent influence upon the judicial establishment of a boundary. While there are a couple of rare instances in which they were considered and

[297] *Black Sea* (n. 9).
[298] Gaver (n. 182).

applied, such judgments were deemed untimely and abrasive, contravening previous practice and attracting scrutiny. A gentler indication towards the inclusion of private rights in judgments would perhaps have facilitated its subsequent judicial endorsement. Regardless, irrespective of which commercial factor quantifies the life-source of the dispute, international legal bodies strictly approach them in a systematic manner. This has led scholars to conclude that current judicial practice is 'indifferent to the real concerns of states'.[299]

To support the proposal of procedural reformation, I do not believe it is enough to simply illustrate that the current maritime delimitation methodology is unappreciative of the commercial nature of disputes. Accordingly, Chapter III explored multiple lines of rationale to justify legal development in this area. I drew on multiple sources to demonstrate that the consistent judicial consideration of private rights would be advantageous. Firstly, by examining cases in which private rights were deemed irrelevant and unable to reflect an alteration to the boundary, this displayed coastal states were being left exposed to a wide range of repercussions, which hampered their economic prosperity and the livelihoods of their citizens. One such repercussion that was deserving of further expansion was international disharmony, with states being left unsatisfied by geographically calculated decisions and duly responding with aggressive behaviour post-judgment. Secondly, by analysing existing academic rationale for their expansion, namely Pappa's comparisons to land delimitation and the advantages that private rights afford it, this illustrated that there was a chasm in uniformity between land and sea delimitation. Finally, by examining dissenting judicial opinion in cases where private rights have been deemed irrelevant, this affords a unique insight and shows an appetite within the judiciary for their elevated influence.

Chapter IV concluded the most efficient method of affording private rights and commercial activity a central role in maritime delimitation is by dedicating a distinct procedural stage for their judicial consideration. I believe the staged formulation in *Black Sea* should be retained, and as such I named my proposed reformation the 'four-stage' test. By doing so, this ameliorates the need for wholesale structural change. Such major change would be unlikely to be adopted, as it would be deemed an abrasive abandonment of jurisprudence. My reformation does not actually include the adoption of any new concepts, it splits the consideration of geographic and non-geographic relevant circumstances into two

[299] Lando, *Maritime Delimitation* (n. 47) p. 201.

autonomous stages. As geographic factors are seen to be less contentious in their applicability to boundaries, the current formulation poses a choice between geographic and commercial factors, in which there is an easier option that is shielded from criticisms regarding subjectivity.

The chances of a provisional boundary being altered by private rights and commercial activity should in no way be guaranteed. However, the current procedure maintains a bar that is largely impossible to meet in practice. My proposed reformation attempts to strike a compromise between these conclusions. I believe a strict attitude to the incorporation of commercial factors should be maintained, but it should represent a bar that can be overcome. It should be stressed and implemented in judicial practice that private rights retain the capacity to influence a boundary if their existence is long-standing and backed up by evidence and pertinent documentation. I believe that the judiciary should approach the deliberation of private rights with unfettering transparency, to afford states party to future disputes clarification and explanation on what is required for their commercial activities to influence a boundary.

By analysing the criticisms that could potentially be levied against my proposed reformation, this allows the alterations to brace for such scrutiny. By doing so, this results in a more finessed solution with a larger opportunity for systematic adoption across international bodies. If my reformations did not account for potential scrutiny, it would fail to appreciate the controversial nature of delimitation itself and as such would be naïve. Academic and judicial scrutiny is an invaluable tool that ensures that maritime delimitation continuously develops and smooths out chinks in the procedural armour. Criticism is not a negative in this instance, it constructively aids progression. Abandoning any indication of a trend towards the primacy of resource-related factors due to post-judgment scrutiny is an unfortunate conclusion of recent delimitation jurisprudence. Any further scrutiny levied at the adoption of the ‘four-stage’ test should be viewed as a positive constructive tool.

While I believe that the current judicial treatment of private rights and commercial factors is regrettable, I maintain optimism for further development. Maritime delimitation is an extremely contentious and heavily scrutinised area of law, but it is wholly conclusive that international legal bodies have achieved beneficial change in the past. The continuous development that procedural maritime delimitation is subject to is unfortunately offset by the stagnation of resource-related factors. However, maritime delimitation does not lay

dormant, and I have confidence that the practical advantages of private rights and commercial activity shall be realised in time.

'Competing claims in the maritime domain by some coastal states are becoming more numerous and contentious. Some of these claims, if left unchallenged, will put us at risk, our operation of the rights and our freedoms'.[300]

- Admiral Samuel J. Locklear III, Commander of the U.S. Pacific Command.

[300] Prachi Naik on Jun 27 and 2012, 'The Law of the Sea: Key Quotations' (*American Security Project*) <https://www.americansecurityproject.org/the-law-of-the-sea-convention-key-quotations/> accessed 30 March 2023.

BIBLIOGRAPHY

Online Sources

Artstor, 'Letter to Ban Ki-Moon from Hassan Sheikh Mahamoud, President of the Federal Republic of Somalia' <https://library.artstor.org/public/28493112> accessed 22 March 2023.

'Australia Ratifies Maritime Boundaries with East Timor | Reuters' <https://www.reuters.com/article/us-australia-timor-treaty-idUSKCN1UO0Y8> accessed 29 March 2023.

'A Commentary on the Dispute Concerning the Maritime Delimitation in the Indian Ocean (Somalia v Kenya)' <https://www.biicl.org/blog/27/a-commentary-on-the-dispute-concerning-the-maritime-delimitation-in-the-indian-ocean-somalia-v-kenya> accessed 11 January 2022.

'Colombia-Nicaragua Maritime Tensions May Endure' (2022) oxan-es Emerald Expert Briefings <https://doi.org/10.1108/OXAN-ES268767> accessed 14 March 2023.

Commercial Fishing' <http://www.gov.scot/publications/scotlands-marine-economic-statistics-2018/pages/3/> accessed 6 May 2022.

'GDP (Current US$) - Grenada | Data' <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=GD> accessed 1 February 2023.

Helen Davidson, 'Australia and Timor-Leste Sign Historic Maritime Border Treaty' *The Guardian* (6 March 2018) <https://www.theguardian.com/world/2018/mar/07/australia-and-timor-leste-sign-historic-maritime-border-treaty> accessed 28 March 2023.

Helen Davidson, 'Australia Accused of "siphoning" Millions in Timor-Leste Oil Revenue' *The Guardian* (15 April 2019) <https://www.theguardian.com/world/2019/apr/16/australia-accused-of-siphoning-millions-in-timor-leste-oil-revenue> accessed 28 March 2023.

Helen Davidson, 'Timor-Leste's Big Spending: A Brave Way to Tackle Economic Crisis or Just Reckless?' *The Guardian* (25 May 2017) <https://www.theguardian.com/world/2017/may/25/timor-leste-spending-big-economic-crisis> accessed 29 March 2023.

'Maritime Delimitation and Associated Questions |' <https://lawexplores.com/maritime-delimitation-and-associated-questions/> accessed 24 March 2023.

'Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)' <https://www.globalsecurity.org/military/world/war/somalia-v-kenya.htm> accessed 14 March 2023.

'Oil and Gas Worth £18bn to North-East Economy, Research Shows' <https://www.energyvoice.com/oilandgas/345637/oil-and-gas-worth-a-huge-18bn-to-north-east-economy-research-shows/> accessed 6 May 2022.
'Planning and Development: Marine Licences - Detailed Information - GOV.UK' <https://www.gov.uk/topic/planning-development/marine-licences> accessed 29 March 2023.

Prachi Naik on Jun 27 and 2012, 'The Law of the Sea: Key Quotations' (*American Security Project*) <https://www.americansecurityproject.org/the-law-of-the-sea-convention-key-quotations/> accessed 30 March 2023.

'The New Use for Abandoned Oil Rigs - BBC Future' <https://www.bbc.com/future/article/20210126-the-richest-human-made-marine-habitats-in-the-world> accessed 13 March 2023.

ICJ: Colombia Must Stop Activity in Nicaraguan EEZ Waters | News | Al Jazeera' <https://www.aljazeera.com/news/2022/4/21/icj-colombia-must-stop-activity-in-nicaraguan-eez-waters> accessed 1 February 2023.

Reuters, 'France Secures Guernsey Fishing Licences in Post-Brexit Row' *Reuters* (1 December 2021) <https://www.reuters.com/world/europe/guernsey-says-issues-fishing-licenses-40-eu-vessels-2021-12-01/> accessed 13 March 2023.

World Court Sides Mostly with Somalia in Border Dispute with Kenya | Reuters' <https://www.reuters.com/world/africa/world-court-rule-kenya-somalia-sea-border-row-2021-10-12/> accessed 14 March 2023.

Books

Adami V, *National Frontiers in Relation to International Law* (OUP 1927)

Aznar M, '*The Human Factor in Territorial Disputes'* in M Kohen and M Hebie (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar 2018)

Boggs S, Inter*national Boundaries: A Study of Boundary Functions and Problems* (Columbia University Press 1940)

Chansoria M, '*China, Japan, and Senkaku Islands: Conflict in the East China Sea Amid an American Shadow'* (*Routledge & CRC Press 2018*)

Cottier T, *Equitable Principles of Maritime Boundary Delimitation* (CUP 2015)

Dam K, Oil Resources: *Who Gets What How*? (University of Chicago Press 1976)

Echebarria Fernández J, Lennan M and others, Fisheries and the Law in Europe: Regulation After Brexit (Routledge 2022).

Evans M.D, '*Maritime Boundary Delimitation: Whatever Next*?' in J. Barrett and R. Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty* (London 2016)

Evans M.D, '*Maritime Boundary Delimitation: Where Do We Go from Here*?' in D. Freestone, R. Barnes, and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (OUP 2006)

Evans M.D, '*Maritime Delimitation and Expanding Categories of Relevant Circumstances'* (1991) 40 ICLQ

Evans M.D, *Maritime Boundary Delimitation*, in Rothwell et al, *The Oxford Handbook of the Law of the Sea*, (OUP 2015)

Fulton T, '*The sovereignty of the sea: an historical account of the claims of England to the dominion of the British seas, and of the evolution of the territorial waters'* (OUP 1911).

Gordon G, '*Petroleum Licensing'* in G Gordon, J Paterson and E Usenmez, *Oil and Gas Law: Current Practices and Emerging Trends* (Dundee University Press 2011)

Harrison J, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 27–36.

Higgins R, *Problems and Process: International Law and How We Use It,* (Clarendon Press 1995)

Hill N, *Claims to Territory in International Law and Relations* (OUP 1945)

Jennings R, *The Acquisition of Territory in International Law* (Manchester University Press 1963)

Khalfaoui A and Yiallourides C, *Maritime Disputes and Disputed Seabed Resources in the African Continent* (February 7, 2019). in Tina S Hunter et al (eds) Routledge *Handbook of Energy Law* (Routledge 2020)

Kimball L, *International Ocean Governance: Using International Law and Organizations to Manage Marine Resources Sustainably* (IUCN 2001)

Klein N, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP, 2005)

Lando M, *Maritime Delimitation as a Judicial Process*, (CUP 2019)

Lowe V, *International Law: A Very Short Introduction* (OUP 2015)

Luard E, *The International Regulation of Frontier Disputes* (Thames & Hudson 1970).

Nordquist M.H et al, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (Martinus Nijhoff Publishers 1993).

Pappa M '*Non-State Actors' Rights in Maritime Delimitation: Lessons from Land'* (CUP 2021)

Pyo KS, *Delimitation and Interim Arrangements in Northeast Asia* (Brill 2004)

Ronne A, '*Public and Private Rights to Natural Resources and Differences in their Protection*?' in A McHarg and others (eds), *Property and the Law of Natural Resources* (OUP 2010)

Tanaka Y, *The Disproportionality Test in the Law of Maritime Delimitation*, in A.G Oude Elferink et al *Maritime Boundary Delimitation*: *The Case Law* (CUP 2018)

Tanaka Y, *The International Law of the Sea* (CUP 2012)

Taverne B, *An Introduction to the Regulation of the Petroleum Industry: Laws, Contracts and Conventions* (Martinus Nijhoff 1994)

Thirlway H, The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence, vol. 1 (OUP 2013)

Weil P, *The Law of Maritime Delimitation: Reflections* (Grotius 1989)

Yiallourides C, '*Oil and Gas Development in Disputed Waters Under UNCLOS'* (2013).

Articles

Adebola Ogunleye T, '*A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry'*, (Journal of Energy Technologies and Policy, Vol.5, 2015).

Bindemann K, *Product-Sharing Agreements: An Economic Analysis*, Oxford Institute for Energy Studies, 1999.

Blyschak P, '*Offshore Oil and Gas Projects amid Maritime Border Disputes: Applicable Law'* (2013) 6 Journal of World Energy Law and Business

Churchill R, '*Dispute Settlement in the Law of the Sea: Survey for 2021'*, The International Journal of Marine and Coastal Law.

Churchill R, '*The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation'* (1994) 9 International Journal of Marine and Coastal Law 1.

Collins E and Rogoff M, '*The Gulf of Maine Case and the Future of Ocean Boundary Delimitation*' (1986) 38 Maine Law Review

Dutton P, '*Eritrea v. Yemen: A Case Summary for the Maritime Dispute Resolution Project'*, U.S. – Asia Law Institute, 2016.

G Schwarzenberger G, '*Title to Territory: Response to a Challenge'* (1957) 51 AJIL 308

Gaver C, '*Maritime Delimitation in the Indian Ocean (Som. v. Kenya) (I.C.J.)*' (2022) 61 International Legal Materials 501.

Grieger G *'Sino-Japanese controversy over the Senkaku/Diaoyu/Diaoyutai Islands an imminent flashpoint in the Indo-Pacific?*', European Parliamentary Service, 2021.

H Thirlway H, 'The Law and Procedure of the International Court of Justice: Part Two' (1990) 62 British Yearbook of International Law 30.

Ioannides N, '*A Commentary on the Dispute Concerning the Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*' (*EJIL: Talk!* 22 October 2021)

Kariotis T, '*Hydrocarbons and the Law of the Sea in the Eastern Mediterranean: Implications for Cyprus, Greece, and Turkey*' (2011) 22 Mediterranean Quarterly 45.

Khalfaoui A and Yiallourides C, *'Maritime Disputes and Disputed Seabed Resources in the African Continent'* (7 February 2019)

Lavrov S and Gahr Støre J, "*Canada, Take Note: Here's How to Resolve Maritime Disputes*," The Globe and Mail, 21 September 2010

McDorman T et al., '*The Gulf of Maine Boundary: Dropping Anchor or Setting a Course*?' (1985) 9 Marine Policy

Miller K.A and others, '*An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps'* (2018)

Østhagen A & Schofield C.H (2021) *An ocean apart? Maritime boundary agreements and disputes in the Arctic Ocean,* The Polar Journal, 11:2

Peiris N, *Ghana v. Ivory Coast*. American Journal of International Law 2018, *112*(1)
Tanaka Y, '*The Guyana/Suriname Arbitration: A Commentary*' (2007) 2 Hague Justice Journal 177.

Ward A, '*Tullow Oil to Resume Drilling in Ghana after Resolving Dispute'* Financial Times (24 September 2017).

Yiallourides C, '*Part I: Analysis of Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean'* (*EJIL: Talk!*, 19 October 2017)

Young R, '*The Geneva Convention on the Continental Shelf: A First Impression*' (1958) 52 American Journal of International Law 733.

Zacher M, '*The Territorial Integrity Norm: International Boundaries and the Use of Force'* (2001) 55 International Organization 215.

Official Documents

Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields (International Unitisation Agreement) (signed in 2003)

Agreement between the Government of the Hellenic Republic and the Government of the Italian Republic for the Delimitation of the Continental Shelf (signed 24 May 1977)

Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Delimitation of their Respective Continental Shelf and Other Maritime Zones (signed 27 April 2009).

Hon. Julie Bishop, MP, Minister for Foreign Affairs, *House of Representatives Hansard*, 26 March 2018.

Report presented by the Boundary Commission Experts to the Sudanese Presidency on 14 July 2005, Part I, at 16–19, available at http://www.sudanarchive.net.

The US Dept of State, *Bureau of Oceans and International Environment and Scientific Affairs, Limits in the Seas*, No: 108, 1st Rev (Maritime Boundaries of the World, 1990).

Timor Sea Treaty between the Government of East Timor and the Government of Australia (Timor Sea Treaty) (signed in 2002)

Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS) (signed in 2006).

Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas (signed 18 April 1990)

UNGA Resolution 3281 (XXIX) (12 December 1974) Charter of Economic Rights and Duties of States.

United Nations, Statute of the International Court of Justice, 18 April 1946.

United Nations, Charter of the United Nations, 24 October 1946.

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.