The Delimitation of Continental Shelf Boundaries With Particular Reference To "Relevant Circumstances" And "Special Circumstances"

A Thesis Submitted for the
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by

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To My Mother &
Family

ABSTRACT

The delimitation question of the continental shelf has been a controversial issue since the early stages of the continental shelf doctrine. Two sets of rules and principles have so far been relevant to the delimitation question. These are, the Conventional solution of Article 6 of the 1958 Convention on the Continental Shelf (the equidistance/special circumstances formula), and the Customary solution of the 1969 North Sea Cases (the equitable principles/relevant circumstances formula). Three issues appear to have been the main problematic areas of these two solutions, namely, the actual stand of both solutions concerning the equidistance principle, and the meaning and scope of the special circumstances clause and the relevant circumstances clause. The main concern of the present thesis is these three problematic issues.

The thesis is divided into two parts, which in turn are divided into six chapters. Because the said issues, by their very nature, are connected with the problem of the legal, geophysical, economic and political bases of the doctrine, Chapter I provides a general background aiming at identifying such bases. The Second Chapter examines the Conventional and Customary solutions using analytical and comparative perspectives. In Part Two a thorough examination of the said two clauses is attempted. Chapters III examines the available State practice and the judicial and arbitral cases aiming at identifying the meaning and scope of the relevant circumstances clause. Chapter IV discusses each individual relevant circumstance in order to determine their features and requirements. In chapter V, the special circumstances clause is examined, wherein its meaning and scope as well as the features and requirements of each individual special circumstance is discussed. Then the last Chapter provides the conclusion of this study.

In the course of examining the said problematic issues, it seemed that any attempt

to provide relevant clarification would be doomed to failure unless it was based on a sound criterion. Accordingly this thesis endeavoured to search for such a criterion, which was eventually found to be *the irredressable disproportionally distorting effect principle*. In the light of this principle, the thesis tries to prove that the relevant circumstances and the special circumstances clauses, so far, have managed to embrace identical categories of circumstances, and hence they have the same meaning and scope; and the actual stand of both, the Conventional and Customary solutions, concerning the equidistance principle is identical. From this another conclusion followed. That is, the Customary and Conventional solutions are so far identical.

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M. Zahraa

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LIST OF ABBREVIATIONS

AAPG Bulletin	Bulletin Of The American Association Of Petroleum Geologists
AJIL	American Journal Of International Law
ASIL	American Society Of International Law
AYBIL	Australian Yearbook Of International Law
BYIL	The British Yearbook Of International Law
CLP	Current Legal Problems
CLR	Colombia Law Review
The 1958 Conv.	The 1958 Convention on the Continental Shelf
The 1982 Conv.	The 1982 Convention on the Law of the Sea
Hague Recueil	The Hague Academy of International Law, Collected Courses of the Hague Academy of International Law
ICJ	International Court Of Justice
ICLQ	International And Comparative Law Quarterly
ICNT	Informal Composite Negotiating Text
ICNT/Rev. 1	First Revision of the Informal Composite Negotiating Text
ICNT/Rev. 2	Second Revision of the Informal Composite Negotiating Text
ICNT/Rev. 3	Third Revision of the Informal Composite Negotiating Text
IDDE	The Irredressable Disproportionally Distorting Effect Principle
IJIL	Indian Journal Of International Law
ILA	International Law Association

ILC	International Law Commission
ILC Ybook	Yearbook of International Law Commission
ILM	International Legal Materials
J Mar. Law & Com.	Journal Of Maritime Law And Commerce
Japanese AIL	Japanese Annual of International Law
JWTL	Journal Of World Trade Law
LNTS	League Of Nations Treaty Series
Maine L. Rev.	Maine Law Review
MLR	Modern Law Review
NG5	Negotiating Group 5
NG7	Negotiating Group 7
NILQ	Northern Ireland Legal Quarterly
NILR	Northern Ireland Law Reports
NIL Rev.	Netherlands International Law Review
NYIL	Netherlands Yearbook Of International Law
Ocean Dev. & Int. L.	Ocean Development And International Law
PCIJ Ser. A/B	Permanent Court of International Justice, Series A/B
RSNT	Revised Single Negotiating Text
San DLR	San Diego Law Review
SNT	(Informal) Single Negotiating Text
UKTS	United Kingdom Treaty Series
UN Leg. & Ad. Ser	United Nations Legislative And Administrative Series ST/LEG/SER. B/1, 8, Vol. 1 & 8; &
UN Leg. Ser	United Nations Legislative Series ST/LEG/SER. B/15,16,18, Vol.15,16 &18
UNCLOS I	The First United Nations Conference On The Law Of The Sea, (Geneva, 1958)

UNCLOS III	The Third United Nations Conference On The Law Of The Sea, (1973-1982)
UNTS	United Nations Treaty Series
UNRIAA	United Nations Reports of International Arbitral Awards
Va J Int'l L	Virginia Journal Of International Law

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General Introduction

Several factors signify the importance of the continental shelf boundaries between States. International peace and security cannot be settled without clear and dispute-free territorial and maritime boundaries. This final aim of International Law has been threatened by overlapping claims over submarine areas of the continental shelf, creating numerous disputes concerning the delimitation of their respective continental shelf boundaries. At least several hundred continental shelf boundaries between states need solutions all over the world. Much less than one hundred of these boundaries have been settled by agreement between the interested States, and seven cases have been solved by judicial decisions. The remaining boundaries are awaiting to face one of three solutions: first, to seek an agreement through political and diplomatic channels whereby states will face *in good faith* political pressure and demonstration of power in order to achieve *meaningful negotiations*; second, to seek a judicial decision according to which the concerned states will be countered with an unpredictable solution emerging out of vague principles and rules of the Conventional and Customary solutions, and the statement that each case must be judged on its own merits; third, to resort to an armed conflict, though reasonably unlikely.

If the Truman Proclamation was not the real starting point of the doctrine of the continental shelf, it was at least the point from which the seeds of the doctrine were sown and in turn flourished. Although its wording was vague and ambiguous, the said Proclamation was taken up by the subsequent proclamations of other states as a guide, and consequently stamped each of them with similar vagueness. This start of the concept and doctrine of the continental shelf coloured all its history with imprecision and ambiguity and made all its principles and rules uncertain. State practice has, therefore, been unhelpful. This source, which was, in fact, a major source of the doctrine, was hindered from the start.

Another reason concerning the failure of the conceptualization of the principles and rules of the continental shelf delimitation was the multi-based legal concept of the continental shelf as was adopted by the International Law Commission and the 1958 Geneva Conference. The location of the continental shelf and its riches as being contiguous to the land territory of the coastal States, and its extension into and under the sea, involved several factors each of which was alleged to have relevance. Not only geographical, geomorphological and geological considerations were invoked, but also political ambitions and economic prospects. On this ground and based on selected sets of the said factors, States bred numerous diversified approaches of the continental shelf. This diversification cancelled any possibility of reaching agreement on an acceptable connotation of the continental shelf. Thus, the ILC, and subsequently the 1958 Geneva Conference on the Law of the Sea, had to adopt an infinite definition using the exploitability criterion, which encapsulated not only the said considerations but also any possible factor which would arise in the future. This infinite definition in turn rendered the concept of the continental shelf to be based on a multiple-choice equation according to which numerous interpretations could be possible.

A third manifest consideration that magnified the problem was the failure of the ILC and the 1958 Conference to produce a dispute-free formula of the delimitation of the continental shelf between opposite and adjacent States. That is, instead of establishing reliable principles and rules that would be helpful in such a delimitation, the resultant Article 6 contained another vague formula based on unknown facts. The unexplained "Special Circumstances" term and the vague role of the equidistance principle created a problematical confusion as to the meaning and scope of the rules and principles of Article 6. This confusion was the unavoidable consequence of the lack of sufficient clarification concerning the meaning and scope of the terminology of Article 6, and the lack of reliable criteria to help in the interpretation of the said Article, as well as of the lack of clearly-defined geophysical, legal, economic and political bases of the

continental shelf doctrine.

The fate of the Customary rules and principles of the delimitation of the continental shelf was no better than that of the Conventional rules and principles. The equitable principles/relevant circumstances formula suffers from vagueness as well as uncertainty. The lack of sufficient clarification as to the meaning and scope of the "relevant circumstances" term not only resulted in confusing the meaning and scope of the Customary rules and principles, but also in confusing the real implication of the Customary solution stand concerning the equidistance principle. Yet instead of adding more clarification, the other judicial and arbitral cases further complicated the delimitation question of the continental shelf. Each of the seven cases, that have, so far, been concluded, seems to have avoided any discussion that may give additional clarification to the Conventional and Customary solutions. As each of the judicial and arbitral decisions adhered, exclusively, to the facts of the involved case, all these decisions hastened to pessimistically declare that one must not overconceptualize the application of the rules and principles relating to the continental shelf, each case is unique, and each case must be judged on its own merits. Besides, almost all these cases insisted that the delimitation process must result in an objective solution; but none of them tried to identify a single criterion in the light of which the achievement of this goal could be attained. Bearing in mind the said pessimistic declarations concerning the uniqueness of each case, the lack of a criterion/criteria to ensure the achievement of objectivity, and the lack of clarity concerning the Conventional and Customary solutions, it seems that these solutions are empty of any legal credibility unless such a criterion/criteria as well as clarity are provided.

In a nutshell, the continental shelf doctrine suffers from only one defect, namely, the vagueness and infinite character of its legal concepts. From this defect three problematical issues flow. The only widespread acceptable aspect throughout the history of the continental shelf doctrine has been the entitlement of coastal States to

jurisdiction and control over the shelf they abut on. But, what are the limits and bases of such an entitlement ? In fact, there is no clear answer. The outer limit of the continental shelf is, therefore, the first problematical issue. Another contentious issue is the lack of a clear identification of the geophysical, legal, economic and political bases of the continental shelf doctrine. And the third is the delimitation question of the continental shelf between opposite and adjacent States.

This thesis will mainly focus on the problematical issues of the delimitation question of the continental shelf between States, namely, the meaning and scope of the "special circumstances" and "relevant circumstances" clauses, and the role of the equidistance principle in both, the Conventional and Customary solutions, as well as the criteria of interpreting the said solutions. However, the problem of the continental shelf delimitation and that of the bases of the continental shelf doctrine are interconnected and interrelated. In fact, the clearer and better identified the bases of the continental shelf doctrine are, the easier and more precise the interpretation of the rules and principles relating to the delimitation question will be. The delimitation question will, therefore, be discussed in the light of the discussion relating to the problem of the bases of the continental shelf doctrine. As for the problem of the outer limit of the continental shelf, it will be referred to when and where necessary. The reason for this choice is that the problem of the outer limit has now been solved by the UNCLOS III, whereas the delimitation question and the problem of the bases ot the doctrine are still awaiting a proper solution or sufficient clarification to the available solutions. As the development of the continental shelf doctrine, especially during the UNCLOS III, has proved that it is almost impossible to establish a new solution concerning the delimitation question, it appears that any relevant research would be better aimed at clarifying the available solutions and providing a sufficient criterion to help in their interpretation rather than attempting a new solution.

Having identified the main areas of concern, the discussion will research these

areas using historical, analytical and comparative perspectives. In order to meet the aims of this research, it has been found appropriate to divide this thesis into six basic chapters. The First will attempt a general background of the problem of the bases of the continental shelf doctrine. A second chapter will be devoted to examining the main two solutions - the Conventional and Customary solutions - of the delimitation question, in a comparative study. As the discussion reaches this point, a more thorough deliberation will be necessitated. State practice and the judicial and arbitral cases relating to the delimitation question will be examined in the Third Chapter. "Relevant Circumstances" as has been put forth by Customary International Law, and "Special Circumstance" as it is the problematical issue of the Conventional Rules, will be dealt with in the Fourth and Fifth Chapters, respectively. Then a conclusion analyzing and commenting on the work as a whole will be available in the last chapter, Chapter VI.

Part One

Chapter I
General Background

Introduction

Section 1: Historical, Economic and Technological Background

Section 2: The Problematic Matter of Definition

Section 3: The Delimitation Question of the Continental Shelf Between Opposite and Adjacent States

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Introduction

This Chapter is devoted to two basic purposes. The first is to provide a general background based on which the rest of the thesis will be discussed. The second is to try to explore the origin and foundations of the continental shelf doctrine in order to identify its real legal, geophysical, economic and political bases. On top of that, and as a matter of necessity, the final aim of this Chapter is to identify the problem of delimitation of the continental shelf, and the various types of solutions that have, so far, been used to solve it.

Thus, this Chapter is going to concentrate on three main areas. In order to clarify the historical background, the first Section will deal, very generally, with the history of the continental shelf doctrine. It will use an historical perspective depending on certain stages of development rather than on the chronological order of events relating to the

doctrine. The second Section scrutinizes the most effective reason that lay behind the failure of development of the concept of the continental shelf, namely, its loose definition. This Section will deal with the geoscientific, and legal, definition throughout the development of the concept. The third Section will try to identify the problem areas of the delimitation of the continental shelf between neighbouring States. It also discusses the available solutions to the issue at stake in the international field. A final conclusion will sum up the results of this Chapter.

Section 1

Historical, Economic & Technological Background

The Early History

In his Mare Liberum doctrine, which emphasized the freedom of the high seas, Grotius mentioned nothing about the seabed of the ocean floor or of the continental shelf. In fact nothing was known about this at the time.

The Concept of the continental shelf was first discovered by geographers late last century.[1] When the term first appeared in the legal literature early this century, it did not relate to the seabed and subsoil of the continental shelf but to the superjacent waters thereof.[2] In fact, before Barbosa's remarks, which drew attention to the concept of the continental shelf in 1927,[3] the continental shelf was referred to only for the purpose of fisheries in its superjacent waters.[4]

The failure of the Hague conference in 1930 to bring in any regulations relating to the continental shelf, delayed the start of the continental shelf doctrine. As the Gulf of Paria treaty was concluded in 1942, it managed to be regarded as the first substantial

incident relevant to the continental shelf doctrine. The U.K on behalf of Trinidad, and Venezuela concluded a treaty relating to the seabed of the Gulf of Paria. As far as the Parties to this treaty were concerned, they bisected the seabed of the Gulf between themselves for the purpose of exploiting the oil therein. Moreover, the unique feature of this treaty was that both parties exchanged a reciprocal commitment so as not to claim any sovereignty over its own portion of the sea bed.[5] The doctrine of the continental shelf, therefore, was not originated in that treaty. For, at the time, no state claimed any right on any part of the seabed beyond the territorial sea.

Nevertheless, three years later the President of the U.S.A., Harry S. Truman, announced that,

> "...the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."[6]

This explicit claim over continental shelf areas was considered the starting point of the history of the continental shelf doctrine.[7] In fact, in so doing it proved itself to be a turning point in the history of the Law of the Sea as well. The Truman Proclamation, (as will be seen,) was followed by several other proclamations, and hence drew the attention of the international community, at the time, to pay due regard to the regulation of this new concept.

The History of the Continental Shelf Post 1945

The development of the continental shelf after the Truman Proclamation of 1945, can, in theory, be divided into five phases each of which is concerned with an aspect of the doctrine according to its stage of importance.

The phase of the Legal Basis of the Continental Shelf Concept

Like every other subject matter of International Law, the continental shelf needs a legal ground based on which its connotation is legally conceptualized. A great debate was taking place in the literature of the late 1940s and early 1950s concerning this issue. Beside the fact that it was a novel issue , the entitlement of a coastal State over the continental shelf would contradict the Mare Liberum doctrine, which had been in force for a long time. Nevertheless, whereas Green,[8] and Vallat[9] were among those who suggested an effective occupation as a legal basis, Young[10] preferred to base the continental shelf entitlement on the theory of appurtenance. The end of the debate, however, was in favour of a third opinion advanced by Gidel[11] and Lauterpacht.[12] According to this opinion the entitlement over the shelf constituted an inherent right vested upon the State concerned.[13]

As the International Law Commission (ILC) started working on the codification of,inter alia, the continental shelf, it had no choice but to be involved in the debate of the legal ground of the concept. Its prolonged discussion resulted in rejecting the idea of occupation, as well as the idea of basing the concept on State practice,[14] and, eventually, in adopting the inherency doctrine.[15] This doctrine was substantiated by the ILC and was, subsequently, enumerated in its final report in 1956. The ILC says that,

> "The rights of coastal States over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."[16]

The concluded opinion of the 1958 Geneva Conference on the Law of the Sea was the same when it adopted verbatim the aforesaid wording of the ILC.[17]

In the North Sea Cases, the Court has, firmly, considered, that the most

fundamental of all is the rights of the coastal State on the continental shelf, which "... exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, ...".[18] Nonetheless, the rejection of State practice as a legal basis of the doctrine was abandoned by the International Court of Justice whose decision in the 1969 North Sea Cases counted Article 2 of the 1958 Convention among those which were "... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law...".[19]

By the time the UNCLOS III was convened, the vested rights doctrine was so credible that no substantial argument was raised against it during the Conference. That was why, the Conference adopted the exact wording of Article 2 Paragraph 3 of the 1958 Convention.[20]

The Phase of The Definition of the Continental Shelf

Having identified the legal basis of the concept of the continental shelf, there was a real need to examine the physical basis, or in other words to determine the subject matter of the concept. During the 1940s all the attention was directed to the legal basis. However, no sooner had the ILC begun its examination of the concept of the continental shelf, than it realised that a feasible definition was needed. The continental shelf is a geophysical structure involving numerous factors such as geological, geographical and geomorphological factors. The ILC was in a dilemma as to what factors it should take into account for the purpose of definition. Would it adopt or adapt the geographers definition? Or would it create an independent legal one? In case it adapted the geographers', or even if it created its own legal one, on what considerations should it base its definition? Due to the lack of requisite knowledge, the ILC had to choose a flexible compromise - the exploitability/depth criterion - which created the hottest controversy in the subsequent history of the doctrine.[21] Neither the 1958 Geneva Conference, nor the subsequent State practice, nor even the judicial decisions, managed to find a reliable definition or to put forth a better interpretation to

the available one.[22] Yet, the UNCLOS III, though it adopted a more prescribed definition, could not solve the problematical question of the geophysical, economic and political foundations of the continental shelf concept.[23] The failure of identifying these foundations of the continental shelf reflected its controversial nature on all the other aspects of the concept. The delimitation question between opposite and adjacent States, and the features and factors which would be considered in such a delimitation, were the ill-fated successors of that failure.[24]

The Phase of the Outer Limit of the Continental Shelf

The compromise definition that was recommended by the ILC and was adopted by the UNCLOS I, was enshrined in article 1 of the Geneva Convention on the continental shelf in 1958. The adopted exploitability/depth criterion created a great fear that some States might claim a limitless shelf so long as they managed to develop technological abilities to exploit further depths. Moreover, the unexplained infinity of the exploitability term created the fear that under such a criterion the continental shelf concept might embrace the deep seabed and the subsoil thereof. This fear was magnified during the 1960s due to the accelerating speed of the technological developments of the time. That was why the literature during the 1960s and early 1970s was devoted mainly to examining the consequences of the said definition. In fact, there was a general feeling that the continental shelf should terminate at a certain limit, but the problem was, on what grounds should such a limit be based and determined. A cry like that of Arvid Pardo's in 1968,[25] and a resolution like that of the UN General Assembly's, which declared the resources of the seabed and subsoil of the ocean floor as a common heritage of mankind,[26] managed to constitute the first step towards solving the said problem. The second step was to press towards redefining the continental shelf. By the time the UNCLOS III began, the need to redefine the continental shelf was at its most critical period. After a prolonged discussion the Conference adopted a more reliable definition - distance/geophysical description

criterion -,[27] terminating any possible argument on the outer limit of the continental shelf. Furthermore, it established a Commission On The Limits Of The Continental Shelf to be delegated the responsibility of solving any relating problem.[28]

The Phase of the Continental Shelf Boundaries Between States

The North Sea Cases, (Germany Vs. Denmark and Netherlands) in 1969, opened a new era of dispute over another problematical aspect of the continental shelf. The delimitation of the shelf's boundaries between opposite and adjacent States was realized as being of a controversial character since the early stages of development of the continental shelf.[29] However, it was not until the 1969 Cases, that this problem manifested its highly controversial nature.

Again, the lack of requisite knowledge, and clearly defined foundations of the continental shelf, caused the ILC to choose a flexible solution, (the equidistance/special circumstances formula), to the delimitation question.[30] The continental shelf delimitation could, according to this solution, be effected either by agreement, by a boundary justified by special circumstances, or by an equidistant line. Such a vague solution, especially its second alternative, (the "Special Circumstances" exception), opened the door for an unresolved controversy. "Special Circumstances" clause was left without definition or clarification. In fact, the preparatory work of the ILC contained only a few instances of such circumstances, which were clearly mentioned, only, as mere examples, and did not identify precisely the characteristics of the real meaning and scope of this clause, or the role of the equidistance principle.

The hot debate concerning the delimitation question during the UNCLOS I of 1958 also ended with the same fate, as it adopted the said ILC's formula, which became Article 6 of the Geneva Convention. Article 6 also left the role of the "special circumstances" clause and the equidistance principle unexplained, and did not even

provide any example of special circumstances.

The contribution of the International Court to the matter of delimitation in the North Sea Cases was also disappointing. It did nothing more than add some more vague principles and notions, the aftermath of which entangled all the subsequent judicial history relating to the delimitation question. Natural prolongation, equitable principles, macro-geography and relevant circumstances were some examples of principles which were created by the Court and left without sufficient clarification. In addition, instead of identifying a precise meaning and scope of the relevant circumstances clause, the ICJ provided some examples of the relevant circumstances, and commented that, there is no legal limit to the relevant circumstances clause but the equity requirements.[31] In fact, the ICJ had the full responsibility of providing more complications to the delimitation question especially when it, though in pain, declared that "each case must be judged on its own merits",[32] and "no attempt to overconceptualize the principles and rules of the continental shelf should be made."[33]

The subsequent judicial and arbitral cases carried on initiating more examples of circumstances which, in their opinion, were regarded as having "special" or "relevant" character. Each case, therefore, established its own and unique notion of equity, which was built, as they claim, on an objective balancing of the various relevant considerations.[34]

During the UNCLOS III, further hot debate erupted concerning the delimitation question. Consensus proved to be impossible on such a contentious problem. All efforts to provide a compromised formula failed but to adopt a final empty one that was enshrined in the 1982 Convention.[35]

The Phase of Redefinition of the Continental Shelf

The unsuccessful thirty years of development of the continental shelf forced the

participants to the UNCLOS III to seek a redefinition. Despite the variety of opinions, which were caused by world-wide participation, the Conference managed to adopt a somewhat reliable definition (the 200 mile distant/outer edge of the continental margin formula).[36] One of the advantages of the new definition was that it solved, to a great extent, the problem of the outer limit of the shelf. International law was finally convinced that the distance criterion was best suited to such a concept. Thus, according to the new definition States could choose either 200 nautical miles distance or the outer edge of the continental margin as an end to their continental shelf. Nevertheless, although the geophysical basis in the new definition was clearer than that of the definition of the 1958 Convention, it was entangled by the inclusion of the natural prolongation principle. This principle, in fact, was not well identified, nor was there any relevant clarification in the 1982 Convention. The question is, is it a geological or a geomorphological concept? Does it relate to a geoscientific, or to a legal connotation? In case it is a legal notion, what is the legal definition of the natural prolongation principle? Unfortunately, the Convention gives no sufficient answer.[37]

The Technological and Economic Background

This Subsection is going to examine the technological and economic history of the continental shelf doctrine. Because the purpose here is to highlight some relating facts which might help in providing more clarification to the bases of the continental shelf doctrine, a very general idea about the relevant technology and economy during the last four and a half decades will be available in this subsection.

To begin with, off-shore mining from shore was known long before the continental shelf was even known by geographers. However, the 1940s and early 1950s witnessed widespread expectations that a good deal of reserves of oil and gas was laying underneath the shelf.[38] These expectations proved to be correct later in numerous places such as the Persian Gulf, North Sea, and the Gulf of Mexico.

Nonetheless, the technological development was not sufficiently advanced during the 1940s,[39] nor even the 1950s.[40]

The 1960s showed another mode of technological development. What was expected in the 1950s proved to be very modest in comparison with the real development that took place in the mid 1960s. The development of machinery varied from floated platforms on the surface of the sea to submersibles, or units fixed on the bottom of the seabed, or self-elevating platforms.[41] Moreover, development occurred not only in drilling devices but also in refinery stations which reduces the expenses of the drilling process.[42] The ability to exploit the seabed advanced from less than one hundred to several hundred meters, and then, astonishingly, to several thousand meters isobath.[43]

From that time on, technology ceased to be predictable. The developments that occurred during the 1970s turned the dream of mankind to exploit the untold riches of the sea into reality. Oil, natural gas and countless number of other heavy minerals were discovered laying on, in, and underneath the seabed.[44] Technology was made feasible to serve mankind, and thus enabling them to exploit whatever they liked.[45] Since the late 1960s the exploration and exploitation of the seabed, including the continental shelf, began and has successfully continued.[46]

However, an objective estimation of the technological development leads to the following remarks. First of all, the mode of technology is very changeable and cannot be predictable. The only thing which can be anticipated is that technological advancement is increasing, but no one could ever guess the direction and speed of such an advancement. Secondly, although the technological development made it possible to exploit greater depths of the seabed, the expenses of such exploitability mitigated its effect in reality. The expenses of exploiting the seabed proved to be very high vis à vis

that of exploiting the land.[47]

Section 2

The Problematic Matter of Definition

Should a definition be a key according and referring to which any problem relating to the defined issue is solved, it must be clear and precise. Thus, the clearer and more precise the definition is, the easier and more automatic its application will be. That is to say, any vagueness or ambiguity will preclude the application of a definition and create some problems which cannot be solved unless such a gap is bridged. Therefore, every definition must be based on durable and unchangeable facts the precise identification of which will constitute the bases of the relevant issue. The definition of the continental shelf should be as such.

The present Section will terrace the problematic matter of definition following its development throughout its recent history starting from the Truman Proclamation of 1945. It will deal with the legal and geoscientific literature during the 1940s and 1950s, state practice, the ILC work, the 1958 Conference and Convention, and the UNCLOS III and the 1982 Convention. The purpose of this Section is to search for the legal, geophysical and economic, as well as the political foundations of the continental shelf doctrine.

Literature During the 1940s and 1950s

The necessity of examining the available definition in the literature during the early stages of development of the doctrine derives from the following considerations. The first is, to have an idea about the background on which States based their claims,

and on which the ILC, and the 1958 Conference, based their work. The second is, because the Truman Proclamation did not denote what it meant by the term continental shelf, then it either relied on a well known connotation of that term, or left it to be clarified by the subsequent literature; so in both cases the literature is important. The third is, what has been said about the Truman Proclamation can also be said about the subsequent State practice, because all the subsequent claims contained no clarification of the continental shelf term.

The Legal Literature

Writers during the 1940s and 1950s followed three choices in handling the definition matter. They either provide no definition at all; or adopted the geographers definition or attempted their own definition. Bingham,[48] and Young in his early writings,[49] found it sufficient to comment on the Proclamations without stating any definition. Bingham did not even provide any clarification on the matter of definition, Whereas Young, while commenting on the Truman Proclamation, said that:

> "... an accompanying press release described it [the continental shelf] as that area adjacent to the continent covered by no more than 100 fathoms of water."[50]

Vallat,[51] and Borchard,[52] stated a similar clarification. In fact, Borchard interpreted the meaning of the resources of the continental shelf as those which were "... on and under the continental shelf up to a water depth of 600 feet ...".[53]

In his book, Mouton distinguished between inner, insular, and continental shelves.[54] Then he remarked that the legal definition did not need to borrow its connotation from the other sciences.[55] However in a later article Mouton himself adhered to the geological concept of the continental shelf. Although he commented on the verified opinions of geologists, he said that,

> "All geologists agree that the continental shelf, including the inner shelves, belongs to the continental areas and that the body of the continents proper find their real limits on the continental edge."[56]

Furthermore, after providing the Geological Nomenclature of the Continental Shelf as being "the submarine continuation of the continental area up to about the 100 fathom line", he concluded that,

> "This description of the geological or oceanographical concept of the continental shelf will suffice for the time being, to make the following question understood: what has the continental shelf to do with International Law, what is the legal problem involved?"[57]

In his later writing, Young realized that some Proclamations did not contain the term continental shelf because their adjacent submarine areas were not considered, according to him, *by all geologists* as being continental shelves.[58] Yet he preferred the usage of the term "submarine areas" instead of that of the continental shelf.[59] Professor Lauterpacht, was also in favour of the preceding view point. He differentiated between the terms "submarine areas" and "continental shelf". Submarine areas, as he exclaimed, was a more general concept than the latter. He said,

> "The continental shelf is a submarine area adjacent to the coast of the State. But the converse proposition is not necessarily true."[60]

To aid this viewpoint, Professor Lauterpacht invoked the absence of the continental shelf term from some Proclamations as evidence of the inapplicability of this term to their submarine areas.[61] Moreover, he invoked the doctrine, that the continental shelf was the gentle slope until the "first substantial fall-off", to deny the existence of such a continental shelf in some areas like the English Channel and the North Sea.[62] That was why he preferred the usage of the submarine areas term.[63]

In a nutshell, the Literature circulated around two main viewpoints. The first was concerned with the geographers definition, which considered the continental shelf as the submarine areas that would slope gently until the sudden change that drops rapidly towards the ocean floor. This sudden change would usually occur at depths approximately 200 meters. The other viewpoint was that which considered all the submarine areas including the shallow waters as being continental shelf. In fact, the second viewpoint is not, at all, odd to geologists, geographers, and oceanographers; for, some, or may be the majority of them would argue in its favour. The following paragraphs are, therefore, going to examine the geoscientific literature to see if the foregoing conclusion is correct or not.

The Geoscientific Literature

Although scientists knew little about the continental shelf before, and during, the 1940s they sketched out the principal description of this phenomenon. By and large, most of the writings during the first half of the twentieth century concentrated on the geomorphological and topographical description, as well as the historical analysis of the geological origin and evolution of the continental shelf. Of special interest here is the definition of the shelf provided in some of this literature.

To begin with, in his treatise in 1948, professor Shepard devoted Chapter VI to explain the continental shelf issue. Defining the term, he stated that,

> "The shallow marine terraces which border the continents have been appropriately termed continental shelves. These shelves are the coastal plains of the ocean and, in fact, are a direct continuation in most places of the plains on the adjacent lands."
> "The term continental shelf is used here only in reference to those terraces that are clearly related to the continents. In some cases the term has been applied to an outer plateau or irregular area with depths greatly exceeding 100 fathoms, although not nearly as great as the deep oceans. For such areas the term *continental borderland* is suggested. The

continental-shelf margin is ordinarily at a depth less than 100 fathoms, but in some areas a terrace exceeding out from the land terminates at greater depths. In such cases it seems advisable to remain the name continental shelf even if the marginal depth is as great as 200 or 300 fathoms. The name is applied also to the unusually deep shelves of glaciated areas where troughs or basins may extend to depths of 300 or even 400 fathoms, although the bulk of the area is much shoaler."[64]

This understanding of Professor Shepard indicates his wide view of the geological concept of the continental shelf. In his description of the world wide continental shelves he dealt with some of the areas which were considered by lawyers problematical, such as the Persian Gulf and the North Sea. The submarine areas underneath them were unquestionably considered continental shelves by Professor Shepard.[65] He also mentioned the so called "insular shelves" as denoting those platforms which would surround the oceanic islands. The "insular shelves" term was used by Professor Shepard in order to differentiate between the continental shelf around the oceanic islands and those shelves "... around the continents and the islands which are connected by shallow water to the continents."[66]

An interesting finding in this treatise was the shelves in landlocked bodies of waters, such as the Great Lakes, the Caspian Sea, and the Black Sea;[67] some of these bodies have shelves and others do not.[68] The question here is, what is the legal status of these shelves? And are they recognized by the legal definition of the continental shelf?

In his book written ten years later, Professor Shepard went a further step when he stated that, the Continental shelf is

"... the shallow-water area extending out to a depth of 100 fathoms. This however, is purely arbitrary and does not take account that the word *shelf* refers to a flat area with a

> steep termination. There are such flat areas with rather abrupt edges around most of the continents, and it is only rarely that they terminate at or even close to 100 fathoms."[69]

This arbitrary limit of the continental shelf was given the chance of more explanation when the writer himself said that,

> "In 1953 the International Committee on the Nomenclature of Ocean Bottom Features defined the shelf as the "zone around the continents, extending from low-water line to the depths at which there is a marked increase of slope to greater depth."[70]

But this marked increase, which was called the continental slope might have two or more breaks, so which break must be considered.

> "A recent UNESCO conference [, he said,] ... resulted in the suggestion that where there are two breaks, the most marked break be used, provided it lies at depths of less than 600 meters...".[71]

As early as 1942, Professor Daly defined the continental terrace as comprising the continental shelf and the continental slope. According to him, the continental shelf is a flat belt which borders the continents and slopes gently to a depth ranging from 300 to 600 feet isobath. At this depth it breaks and slopes down rapidly until it meets the seabed of the ocean floor which is at a depth of about 2000-2500 fathoms. This gentle slope up to the fall-off, or break-of-slope, is called the continental shelf.[72]

Nevertheless, Umbogrove's opinion has followed another course of discussion. After he categorized the shallow platforms of the continents into inner and outer shelves, he denied the inner shelves, such as the North Sea and the Sunda Sea, as belonging to the marginal zone of the continents. He said,

> "Generally the shallow platforms bordering the continents are classified in two categories,

viz. the inner and the outer shelves. The first group comprises such regions as the shelf of the North Sea and the Sunda Sea."[73]

"..., *the origin and history* of the inner shelf regions will be left out of consideration here, since they do not belong to the marginal zone proper of the continents."[74] [Emphasis added]

Summing up the foregoing discussion of the geologists opinions, the following observations can be made: 1- Geologists, during the 1940s and early 1950s, were involved in explaining the origin and foundation of the continental shelf rather than in its definition. 2- Two reasons were behind their verified ways of defining the continental shelf. On the one hand, when they defined it, each was looking through his own viewpoint of the *origin* of the shelf more than looking at the shelf as a fact. On the other hand, they used different terminology to express the same fact. That was why the International Committee on the Nomenclature of Ocean Bottom Features tried to find the common elements of the available definitions when it defined the shelf in 1953, as the "... zone around the continent, extending from low-water line to depths at which there is a marked increase of slope to greater depth."[75]

State Practice

Before examining State practice relevant to the definition of the continental shelf, it is necessary to note the following, 1- for the purpose of a wider understanding the discussion will be concerned with those proclamations which were issued between the Truman Proclamation in 1945 and the beginning of UNCLOS III in 1973;[76] 2- State Practice, as is referred to here, consists of all those proclamations that have been issued by various States, though some States have issued more than one proclamation throughout the various stages of the development of the concept, during the said era.

State practice followed various ways in handling the notion of the continental shelf. Each State has its viewpoint on the matter. If we regarded the diversification of

the political stand of States, and if we regarded the various economic interests of States, we would easily realize why the resultant proclamations bred numerous connotations of the continental shelf. Furthermore, the failure of any international effort to establish a reliable definition of the shelf, added more complications, or perhaps played a decisive role in providing the suitable atmosphere of breeding such variegated claims. Such a legal vacuum helped States to announce whatever pleased their political and economic interests.

A set of 86 proclamations, that were issued between 1945 and 1973, were collected. Unfortunately, every attempt to classify them into categories, in order to analyze them, was doomed to failure. However, examining them carefully, the following results could be deduced.[77] First of all, the majority of the proclamations did not provide a clear definition of the continental shelf. It was obvious that State practice were misled by the alleged confusion of the geological definition of the continental shelf. Apart from some Latin American States,[78] the proclamations, that were issued between 1945 and 1958, mentioned either the "continental shelf" term,[79] or the "seabed and subsoil" term, without any definition.[80] Although, States kept circulating around the said two terms between 1958-1973,[81] the most popular feature of this period's proclamations was the usage of the exploitability criterion which succeeded the silence of the previous group of proclamations concerning the continental shelf definition.[82]

Secondly, States practice was, in fact, a reflection of two considerations. First, States were affected by the stage of the continental shelf development. That is to say, the majority of proclamations in each stage of development of the doctrine were stamped with the criterion that was the most popular of that sage. Second, States were, also affected by their political and economic interests and ideologies. The vagueness of the concept during the 1940s satisfied the political and economic interests of States to claim an ambiguous entitlement on an undefined area of the seabed adjacent to their land territories. Accordingly, States established their proclamations using infinite

terminology without any clarification.[83] Nevertheless, no sooner did the ILC start its work on the subject than the contemporaneous proclamations became a reflection of its hesitation with regard to the shelf's definition. Apart from the Latin American States proclamations, 10 proclamations were issued in the period between 1950-1958. Four of them kept silent on the matter of definition,[84] two chose the exploitability criterion,[85] three referred to the 200 meters isobath criterion as a definite limit of their entitlement,[86] and one identified its continental shelf areas by referring to specific co-ordinates.[87]

The adoption of the depth/exploitability combined criterion by the 1958 Conference reflected on the subsequent history of State practice. This combined criterion, which was in fact dominated by the exploitability criterion, was the most popular characteristic of the proclamations issued between 1958-1973. A total of 32 claims out of 44,[88] adopted either the exploitability criterion,[89] or the combined exploitability/depth criterion,[90] or referred to the definition of the 1958 Geneva Convention.[91]

Thirdly, because of the above mentioned reasons, and some other reasons (that will be discussed later), State practice could in no way be considered as evidence of customary law, vis à vis the definition of the continental shelf. As for the requirements of an issue to become a customary international rule, it is supposed, 1- to "... be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.";[92] 2- to enjoy widespread State practice, and "...a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.";[93] 3- not only, must State practice be extensive and virtually uniform, but must also be "... in such a way as to show a general recognition that a rule of law or legal obligation is involved.";[94] 4- the passage of time, "short though it might be."[95]

To begin with, the pressing question is, do the said proclamations produce any issue that can be regarded as having a fundamentally norm-creating character? The answer is yes, and no. It is yes because all the proclamations agreed on some kind of an entitlement in connection with areas of the seabed adjacent to their land territory.[96] And no, because, apart from some Latin American States, no State identifies the limits of those contiguous areas of seabed on which it has such an entitlement. That is to say, the limits of the continental shelf concept as was produced by State practice was vague and ambiguous. So, would international law accept such a vague issue to consider it as having a fundamentally norm-creating character(?)(!)

Moreover, as has been seen above, the proclamations satisfy the requirements of widespread practice. However, they were never uniform. Even when the largest number of proclamations chose the exploitability criterion, they could hardly constitute half of the total number.[97] In addition, assuming the exploitability criterion had created some kind of uniformity among the said proclamations, this criterion itself would be questioned as to whether it enjoyed a fundamentally norm-creating character or not.[98]

The ILC and UNCLOS I Work

The novelty of the concept of the continental shelf, and the very fact that International Law had not regulated anything quite like it before, created some difficulties on the way of the Commission's work concerning the definition of the continental shelf. Yet, the lack of the requisite knowledge on the subject,[99] added more complications to these difficulties.

Having realized the necessity to define the continental shelf, the ILC confined itself to two restrictions. The first was that its work should not result in a discriminatory definition, in the meaning that its definition must rely on facts according to which all States would be provided with an equal opportunity in their access to the

continental shelf.[100] The second is that, bearing in mind the economic, social, and juridical importance of the exploitation of the submarine resources for the benefit of mankind, the ILC believed that, "[l]egal concepts should not impede this development."[101]

In the search for a proper definition, the ILC examined the geoscientific definition of the continental shelf and found that not only did scientists differ from each other in defining the continental shelf,[102] but also according to some geologist some areas of shallow waters were excluded from being a continental shelf.[103] Such a finding caused the ILC, in its third Session, to reject geological definitions and to choose a legal definition. It provided that,

> "... the term "continental shelf" refers to the sea bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea bed and subsoil."[104]

Some States were dissatisfied with this definition. After hearing the special rapporteur on the comments of some governments, the Commission was convinced that such a definition was unable "to satisfy the requirements of certainty", and was a fertile breeder of controversy.[105] And hence, it should reconsider it. Furthermore, the Commission found that it was necessary to re-examine the geophysical facts so as to select what was proper to rely on in its new definition. The ILC had three gaps to bridge. The first concerned the question of the shallow waters that were less than 200 meters depth, due to their problematic status.[106] The seabed of the North Sea and the Arabian (Persian) Gulf, for instance, were alleged not to be regarded as constituting continental shelves.[107] The second related to the problem of islands.[108] The submarine areas that bordered some islands were not regarded as a *continental* shelf as far as geologists were concerned.[109] And the third concerned the situation where the

continuity of the continental shelf was interrupted by a narrow channel that was deeper the 200 metres[110]

Consequently, and despite the said gaps, the ILC inclined to, partially, adopt the geological definition of the continental shelf, recommending that,

> "... the term "continental shelf" refers to the sea bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres."[111]

This definition was said to be partially geological, and partially legal. For, in order to bridge the above-said three gaps, the ILC in its comments on this definition provided these three gaps as exceptions of the geological definition, and as being taken into account by the legal definition.[112]

Nevertheless, a decision like that of the "Inter-American Specialized Conference on "Conservation of Natural Resources: Continental Shelf and Oceanic Waters", in 1956, tempted the Commission to re-examine its viewpoint concerning its last definition.[113] The said Conference resulted in adopting a combination of the exploitability criterion and 200 meters depth limit. While discussing this combined criterion, the ILC split into two groups: one was in favour of the combined criterion and the other was against it. However, because the majority were, eventually, in favour of this new concept, the Commission adopted the exploitability/200 metres depth criterion in its final report in which it stated that,

> "... the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (...), or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[114]

In so doing, the ILC betrayed one, if not both of its restrictions. Its final definition was discriminatory in the meaning that it did not give every coastal State, hypothetically or in reality, equal opportunities of obtaining a continental shelf. Several questions remained without a proper answer. With regard to the depth criterion, the question is, what about coastal States whose shelf slopes down abruptly towards the ocean floor at a short distance from the shore.[115] Is it not discriminatory to grant them a small shelf vis à vis those States whose shelf extends for miles, and some times for hundreds of miles, before it slopes down to the ocean floor. Even if we imagined that this problem was solved by providing the exploitability criterion, this latter criterion is the most fertile breeder of confusion. Such a vague criterion left numerous questions without answer. For instance, what is the parameter of the exploitability criterion? Whose exploitability is it meant to be? Is it that of the coastal State or of any other State? What is the outermost extent of the continental shelf? Can it embrace the ocean floor or must it stop at a certain point? Where is this certain point, and how can it be identified? Would it not be discriminatory between developed and developing countries? Would it not be discriminatory at the expense of those States which did not have the sufficient technology to go as far as those which had?

In sum, the ILC did nothing more than entangle the problem of the definition. Objectively speaking, one should not go too far in blaming the ILC for its failure especially if one took into account the environment and stage of development of the concept during which the ILC was searching for a proper definition. However, its failure was that, since the ILC had to choose a proper definition when it did not have the requisite knowledge, it would have been best suited if it had, explicitly, chosen an interim definition.

Upon the recommendation of the ILC, the 1958 Geneva Conference adopted the exploitability/200 meter depth criterion for the purpose of defining the continental shelf.

As the Fourth Committee was in charge of examining the question of the continental shelf definition, its final vote on Article 67 resulted in 51 States in favour, 9 against, and 10 abstentions.[116] However, there was widespread anxiety concerning the vagueness and ambiguity of the exploitability/200 meter depth criterion among the conferees. At least twenty four States demonstrated their dissatisfaction with regard to the exploitability criterion, eleven of them voted, eventually, in favour of the said criterion.[117]

The remaining 13 opposing States belonged to those States which, either voted against the Article, or abstained, or did not take part in the vote at all. Out of the 9 States which voted against Article 67, seven States expressed their opposition to the exploitability criterion for various reasons.[118] Italy, Netherlands, and Pakistan preferred a definite limit, whereas Argentina wanted it to be a single criterion that would manifest a clear geographical notion of the continental shelf.[119] France did not like the uncertainty of the criterion and preferred it to have more uniformity and constancy.[120] Although the F.R. Germany and Japan did not explicitly express their opposition to the exploitability criterion, their dissatisfaction could be deduced from their hints now and again, and, as Professor Brown commented, it can also be deduced from their opposition to the adopted notion of the continental shelf itself.[121]

Three of the abstained States demonstrated their disagreement with the said criterion. Having withdrawn its combined proposal with the Netherlands, the UK inclined to support an Indian proposal in favour of the depth criterion - up to 550 metres.[122] Yet it preferred the usage of the term "submarine areas" instead of the "continental shelf".[123] The Turkish disapproval of the said criterion was because the continental shelf definition was "so ambiguous that far from avoiding conflicts".[124] And Greece said that the definition of Article 67 "was extremely flexible", and the term "continental shelf" itself "was vague and might prove misleading."[125] A fourth State in

this regard was Monaco which envisaged that the articles relating to the continental shelf should be an interim procedure until the time when an international organization was established.[126]

The three absent States did not seem to favour the exploitability criterion for various reasons. The Lebanese viewpoint agreed with the deletion of the exploitability criterion and keeping that of the depth.[127] And while Panama favoured a clear limit of the continental terrace - the shelf and the slope -,[128] Viet Nam inclined to favour the depth criterion.[129]

It is worth noting that, the only modification to Article 67 during the Conference was carried out according to the Philippines proposal which suggested the inclusion of a special provision concerning islands as being able to generate a continental shelf of their own.[130] As this suggestion managed to receive the adequate support, it was appropriately added to the provisions of Article 67 which became Article 1 of the 1958 Convention on the Continental Shelf.[131] Article 1 read,

> "For the purpose of these Articles, the term "continental shelf" is used as referring (*a*) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (*b*) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

The UNCLOS III and the Definition of the Continental Shelf

Three reasons were behind the need to redefine the continental shelf. First, as the technological development accelerated during the 1960s, it highlighted the loose character of the exploitability criterion. States, therefore, felt that it was necessary to clarify the real limits of the continental shelf in order to distinguish it from the seabed of the ocean floor which was on its way towards being declared a common heritage of

mankind. Second, the emergence of the concept of the Exclusive Economic Zone, (EEZ), during the early stage of the UNCLOS III, created an urgent need to distinguish between this new concept and that of the continental shelf. And third, the emergence of a huge number of States, as a result of the decolonization era, with various beliefs and ideologies, created a real need to reconsider numerous international concepts amongst which was the continental shelf.

The establishment of the Seabed Committee, which was a consequence of Arvid Pardo's cry of 1967, was the first step towards a Third UN Conference on the Law of the Sea. The period between 1971 and 1973 was the preparatory stage of the Conference during which the Seabed Committee organized itself into three Subcommittees and determined the subjects that were entrusted to each of them. Subcommittee II was, inter alia, responsible for the question of the continental shelf.

As the Conference held its first Session in December, 1973,[132] it organized itself into three committees similar to the already mentioned three Subcommittees. Committee II was entrusted with, inter alia, the continental shelf question.

One of the most important Sessions of the Conference was the Second Session which was held in Caracas in 1974. During this Session the EEZ concept was brought to life. Yet, most of the bases of discussions were originated in this Session. In fact, since it was not based on any preparatory work, whether they were prepared by the ILC or any international organ, the Conference had to establish its own bases of discussion. Relying on various proposals of the participants, the Chairman of Committee II arranged a document called "Main Trends", the contents of which were a summary of the trends that were provided in the said proposals.[133]

The main achievement of the third Session, which was held in Geneva in 1975,

was the preparation of the Informal Single Negotiating Texts (SNT). These Texts were prepared according to a proposal originally initiated by the President who requested each chairman of the three Committees to prepare such a text.[134] Having relied on, and subsequently reviewed, the "Main Trends", each Chairman of the three Committees prepared an SNT and circulated it among the Conferees. The revision of the SNT appeared in a Revised Single Negotiating Text (RSNT), which was established in the Fourth Session of the Conference in 1976. In order to accommodate "... in one document the draft articles relating to the entire range of subjects and issues covered by parts I, II, III[1], and IV[2], of the ..."[135] RSNT, the President, working together with the Chairmen of the three Committees, prepared an Informal Composite Negotiating Text (ICNT) in the Sixth Session of the Conference in 1977. Three revisions were made to the ICNT. The first revision was in the Eighth Session in 1979, (ICNT/Rev.1); the second was in the Ninth Session in April, 1980, (ICNT/Rev. 2); and the third revision, which was considered an informal text of the Draft Convention on the Law of the Sea, was carried out in August 1980.[136]

The final touches of the Convention towards a formal draft took place in the Tenth Session of the Conference in August, 1981.[137] And despite the fact that the Conference was proceeded by consensus, as was decided in the "Gentleman's Agreement",[138] the final Draft was submitted to vote in April 1982.[139] This vote resulted in 130 votes in favour, 4 against, 17 abstentions, and 13 absentees.[140]

In order for the Convention to become in force, it must receive 60 ratifications.[141] However, by the beginning of March, 1989, 171 States and 3 entities signed the Convention, and 40 States and one entity ratified it.[142]

With regard to the question of the continental shelf definition, States, in general, were in favour of, either the continental shelf should not exceed 200 nautical miles, or it

should embrace the whole continental margin.[143] However, as the Chairman of Committee II summarized the various proposals listing the "Main Trends" of the proposing States, he devoted Provision 68 and 81, for the purpose of the continental shelf definition. According to the provided trends, the continental shelf would be defined in accordance with either, 1- a geophysical criterion - the shelf would extend up to the outer edge of the continental margin;[144] or 2- a combined geophysical and distance criterion - natural prolongation and 200 nautical miles;[145] or 3- again a combined geophysical and distance criterion - the outer edge of the continental margin/200 nautical miles;[146] or 4- a combined depth and distance criterion - 500 meters/200 nautical miles;[147] or 5- a distance criterion - up to 200 nautical miles.[148] The first four criteria played, as will be seen, a significant role in directing the negotiations of the Conferees, whereas the fifth one was disregarded at the first round of negotiations.

In order to bridge the gap between the above-said trends, it was argued that, since every State was entitled to a 200 nautical miles EEZ, and since the EEZ included the concept of the seabed and its resources within its meaning, then the continental shelf was no longer a problematic issue within the 200 miles EEZ limit. Nonetheless, the problem would arise when the shelf extended beyond the said limit. As a result, the Conferees paid special attention to the, mentioned-above, second and third formulas as containing a possible ground for a reliable solution to the definition matter. This was taken up by a proposal advanced by Canada and some other States, in which they suggested that the shelf could be defined as up

> "... to a distance of 200 miles from the applicable baselines and throughout the natural prolongation of its [the State's] land territory where such natural prolongation extends beyond 200 miles."[149]

In order to meet this meaning, the Conference, in its third Session in 1975, envisaged

an appropriate formula which stated that

> "The continental shelf of a coastal State comprises the sea bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."[150]

This formula managed to dominate the negotiations of the Conference, for, it succeeded in being continually acceptable until it appeared in the final draft of the 1982 Convention.[151]

The distance criterion did not need to be clarified more than stating the exact distance, (which was identified in the case of the continental shelf as 200 nautical miles), whereas the outer edge of the continental margin was a flexible term which would cause difficulties of interpretation. For this reason, the Conferees endeavoured to find a more precise identification of this term. As agreement on a detailed definition was difficult, this was later identified as one of the outstanding issues of the Conference.[152] During the period between 1978 and 1980, the definition of the continental shelf was consolidated by establishing a formula which contained the above mentioned paragraph, as well as another nine paragraphs, each concerned with adding another piece of detail to this definition. Because Paragraphs 3, 4, 5, and 6 of this formula have a special importance so the discussion will deal, only, with them.[153]

In order to enrich the clarification of the continental margin term, the search started with examining a proposal that was called the "Irish Formula". Having accepted the formula which was suggested by Hedberg, the Irish Formula proposed two ways of delimitation of the outer limit of the continental margin.[154] The first was that, it suggested a distance criterion - up to 60 nautical miles measured from the foot of the

continental slope; and, the second which was a more complicated suggestion, was that, the continental shelf could be extended up to a point where the thickness of the sedimentary rocks beneath the seabed constituted at least one per cent of the shortest line drawn from the foot of the slope up to that point.[155]

Despite some critiques, the support to the Irish Formula increased as time went by, especially, when France, Japan, and F.R.Germany changed their stand to be in its favour in 1978.[156] The USSR also changed its opinion and was prepared to be in favour of the said formula when it, eventually, accepted the extension of the shelf beyond the 200 miles.[157] In fact, the USSR accepted the Irish formula "..., on the understanding, however, that the edge of the continental shelf shall not under any circumstances be fixed at more than 100 miles; beyond the outer limit of the 200-mile economic zone."[158] Yet, working with the UK, the USSR later advanced a compromise which was known as the "bisquits formula". Mixing together the Irish and the Russian formulas, the combined formula proposed that, in case of applying the combined criterion, (distance and depth), the shelf should not exceed 100 nautical miles from a 2500 meters depth. And, in case of applying the alternative of sedimentary thickness, the shelf should not extend beyond 350 nautical miles from the baselines of the territorial sea.[159]

In 1979, it was high time that the Chairman of Committee II suggested the addition of the core of the Irish Formula and the bisquits formula to Article 76 of the ICNT.[160] Having received widespread approval, this suggestion was appropriately implemented in the said Article, Paragraph 4 and 5 of which read,

> "4- (a) For the purpose of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin exceeds beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
> (i) A line delineated in accordance with paragraph 6 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the

shortest distance from such point to the foot of the continental slope; or,

(ii) A line delineated in accordance with paragraph 6 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.2/

(b) in the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5- The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4 (a) (i) and (ii), either shall not exceed 350 miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 meters isobath, which is a line connecting the depth of 2,500 meters."[161]

These two Paragraphs reappeared again in the ICNT/Rev. 2 and ICNT/Rev. 3, and finally in the Final Draft Convention in 1982.[162]

As Sri Lanka suggested the consideration of the geological and geomorphological conditions of its shelf, Paragraph 4 (a)(ii), mentioned above, was entailed with a footnote referring to the need for further discussion in the following Session of the Conference. Without going into too much detail, the Sri Lanka suggestion, that the shelf of the Bay of Bengal should be excluded from the Irish formula, which was enshrined in Paragraph 4 of Article 76, was approved by the Conference on 29 August, 1980.[163] Accordingly, this exception was included in a Statement of Understanding which was annexed to the Final Draft Convention in 1982.[164]

The 1979 draft of Paragraph 3 of Article 76 stated that,

"3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor or the subsoil thereof.1"[165]

This Paragraph was entailed with a footnote relating to the oceanic ridges which was

also left for further discussion in the following Session in 1980.[166] The Russians were afraid of the Irish Formula especially its alternative of sedimentation. However, as the Russian delegate was cautious of accepting the extension of the shelf up to 100 nautical miles beyond the depth of 2500 meters, especially with regard to the oceanic ridges, he, eventually, inclined to accept a compromise relating to distance criterion. That is, the shelf can in no way exceed 350 nautical miles from the baselines.[167] Thus, the Conference approved, with minor changes, Paragraph 3, mentioned above, and inserted a new Paragraph, (Paragraph 6), according to which the continental shelf definition excluded any submarine ridge located beyond 350 nautical miles from the baselines.[168] Concerning submarine elevations, however, an exception was provided. Paragraph 6 envisages that,

> "6. Notwithstanding the provisions of Paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This Paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs."[169]

In a nutshell, after this thorough examination of the definition matter of the continental shelf, the UNCLOS III concluded its efforts by adopting Article 76 which identified, in detail, the geophysical basis of the definition. Yet in order to eliminate any possible future disputes, the Conference managed to ~~establish~~ a Committee of 21 member-States to be charged with any problematic delimitation of the outer limit of the shelf and other relating matters. The provisions of this Committee were annexed to the Convention in Annex II.[170]

Section 3

The Delimitation Question of the Continental Shelf Between Opposite and Adjacent States

This Section is mainly interested in providing a general introduction concerning the problem of delimitation of the continental shelf. It basically aims at identifying the problematic areas of the delimitation question, for these areas will be the principal concern of the following Chapters.

Being aware of the problems that would arise between the USA and its neighbours concerning the delimitation of the continental shelf, the Truman Proclamation pointed out that

> "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles."[171]

The ILC and UNCLOS I Work

The ILC realized, from the outset, the difficulties that might arise when a continental shelf would be shared by two or more, opposite or adjacent States. However, the Commission found it sufficient to note that,

> "..., boundaries should be delimited. It should not be possible for States to penetrate into the region attributable to another State for purposes of control and jurisdiction."[172]

In its third Session, the ILC went a further step by indicating a solution according to which the delimitation of the continental shelf would be effected either by agreement or by arbitration in case of the failure of any agreement.[173] Nevertheless, it commented

that,

> "... it is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise." [Then it went on to say that,] "It is proposed therefore that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration *ex aequo et bono*."[174]

Thus, it was evident that the ILC intended to choose an elastic solution that was able to be applicable to every possible case that would arise in the future. However, as the obligation to resort to arbitration *ex aequo et bono* had found considerable opposition, the Commission decided to reconsider the inclusion of such a clause in its solution and to search for another, more acceptable, formula.[175]

The delimitation of the continental shelf between States was a new issue not only to the ILC, but also to International Law in general. The lack of any precedent as such at the time, (apart from the Paria Treaty between the UK and Venezuela,) the lack of any generally accepted method in international law, and the complexity of the involved factors in each case of the continental shelf delimitation caused the ILC to see each case from an angle different from that of the other. It considered each case as having a unique status, and, therefore, each case must be dealt with according to its own facts. As a result, the Commission, after consulting with a Committee of Experts, delivered another set of solutions in its Report in 1953. Article 7 states that in default of agreement, "... or unless another boundary line is justified by special circumstances, ..." the boundary is the median line (in case of opposite States), and according to the principle of equidistance (in case of adjacent States).[176]

Inspired by the desire to establish a clear solution of the delimitation question, and realising the vagueness of the special circumstances clause, the ILC could not turn a blind eye as to the real meaning and scope of the solution of Article 7. The ILC,

therefore, commented that, its solution is meant to be of a fairly elastic nature.[177] In the light of this elasticity, the equidistance principle was considered a general rule and the special circumstances an exception.[178] However, due to the complexity of the delimitation question and the lack of requisite knowledge, the ILC could not add any more clarification as to the scope of the said clause other than state some examples of circumstances that may play a role in deviating the boundary line from the equidistance course. These examples were, the exceptional configuration of the coast, the presence of islands, and the presence of any navigable channels.[179]

Having found no other alternative, the ILC was, finally, convinced that, the said formula contained the proper solution of the delimitation question. Thus, it adopted this formula in its final Report in 1956 recommending that,

> "In the absence of agreement and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance ... ."[180]

This solution was flexible enough to encompass any possible interpretation which could be made by States. When it was taken up to the 1958 UNCLOS I, the ILC's solution was, despite the dissatisfaction of some States, eventually, approved, with some minor amendments.[181] In fact, States were mainly dissatisfied because of the inclusion of the special circumstances clause, especially as the meaning and scope of this clause was left without a proper clarification.[182]

As some States proposed an amendment to the formula of Article 72,[183] the successful proposal was a joint one made by the UK and the Netherlands.[184] This proposal managed to add two amendments to Article 72. The first was the insertion of the words "the nearest points of" after "equidistance form" in paragraphs 1 and 2 of the

said Article,[185] whereas, the other was the addition of paragraph 3 to Article 72 which after these amendments became Article 6.[186]

It is noteworthy to state that the UNCLOS I did not manage to provide any clarification concerning the special circumstances clause. Yet it did not mention any example of special circumstances as the ILC did in its comments on Article 72.

The North Sea cases of 1969 were the first of their kind to be taken to the ICJ. Because Germany was not a party to the 1958 Convention on the Continental shelf, the Court had to search for other applicable rules and principles to this case. However, as Denmark and the Netherlands claimed that the principles and rules of Article 6 of the said Convention had become customary rules, the Court had to examine them in order to see whether they crystallized as customary rules or not.[187]

Having found that Article 6 could in no way establish any customary rules, the ICJ turned to Germany's contention. Germany asked the Court to give each party "... a just and equitable share."[188] The Court rejected Germany's contention saying that, a just and equitable share "... is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement ...".[189]

As the ICJ was attracted to the Truman Proclamation of 1945, particularly to the principles that were enshrined therein,[190] the Court found that the most appropriate solution to the North Sea cases is to effect a solution by agreement in accordance with equitable principles. For, these two concepts "..., have underlain all the subsequent history of the subject."[191] In so doing, the Court declared the two concepts - mutual agreement and equitable principles - as customary rules, and consequently applicable to the cases at stake.

The International Court, on the other hand, realised that certain factors, such as

the geographical configuration of the coasts, proportionality, and the presence of mineral deposits, might create a distorting effect on the delimitation line; and accordingly regard must be given to these circumstances.[192] Moreover, the application of the equitable principles/ relevant circumstances rule must be in such a way as to give effect to the principle of natural prolongation in the meaning that, each party should be given the natural prolongation of its land territories into and under the sea, without encroachment on the natural prolongation of the territories of the other party.[193]

Despite these examples of relevant circumstances, the real meaning and scope of the relevant circumstances clause was still obscure. The reason for this obscurity was that the ICJ mentioned only some examples leaving the door ajar for future examples of relevant circumstances to be included therein. In fact, the ICJ stated that,

> "..., there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures,..."[194]

This fact is the major reason that the subsequent cases were left free to add some other relevant circumstances without attempting to clarify the real meaning and scope of the relevant circumstances clause.

Unlike the North Sea Cases, the parties to the Anglo-French Arbitration were both parties to the 1958 Convention on the continental shelf. However, because France made some reservations to Article 6 of the said Convention, the Tribunal, after examining the English objections to these reservations, decided to apply Article 6 partially to the dispute.[195] In the remaining places, where the French reservations had a valid effect, the Tribunal decided to apply customary international law as was determined by the ICJ in the North Sea Cases in 1969.[196]

With regard to Article 6, the Tribunal interpreted the relation between the equidistance principle and special circumstances as being, not separate rules, but, in fact, forming a single combined rule.[197] The Tribunal, then, proceeded to demonstrate a significant analysis of the relation between Article 6 and the customary solution. In this analysis, the Tribunal brought to light that both Article 6 and customary solution had the same object. There is no difference, the Tribunal commented, between Article 6 and the customary solution; for, both rules would aim at solving the delimitation of the continental shelf problem in accordance with equitable principles.[198]

Apart from the North Sea Cases of 1969 and the Anglo-French Arbitration (1977-78), five other cases have, so far, been judged. These are, Iceland/Norway (Jan Mayen) Conciliation (1981), Tunisia/Libya Case, (1982), The Gulf of Maine Case (1984), Libya/Malta Case (1985), and Guinea/ Guinea Bissau Case (1985). None of these cases applied the Conventional rules of Article 6. However, applying the Customary rules and principles as was enshrined in the North Sea Cases (1969), none of the said cases introduced any new principle or rule concerning the delimitation of the continental shelf. By and large, the most notable feature of these cases was that all of them emphasised one fact; i.e., every case of continental shelf delimitation is unique. Therefore, each case was restricted to its own facts, and none of them attempted to establish any generalisation concerning the application of the rules and principles relating to the continental shelf. In fact, they did nothing more than add, or delete, or philosophise some circumstances in order to aid their final decision.[199]

The UNCLOS III and the Delimitation Question[200]

As far as the delimitation of the continental shelf was concerned, the UNCLOS III, found great difficulties in reconciling the differences between the conferees. Yet, it failed but to adopt a final formula the contents of which was very broad and general and had a good deal of ambiguity. Such a vague solution was an inevitable outcome for two reasons. On the one hand, the Conference was dominated by political thoughts

which rendered it far from having a true legal atmosphere. These political thought were motivated by the different ideological viewpoints and various economic interests of the participant States. On the other hand, the failure of the Conference was due to the absence of a legal formula that contained reliable rules and principles concerning the delimitation question of the continental shelf.

As was indicated above, two main formulas were prevailing during the years that preceded the Conference. The first was concerned with the Conventional rules, as was enshrined in Article 6 of the 1958 Convention; and the second was concerned with the Customary rules and principles of the 1969 Cases. Equidistance/Special Circumstances, and Equitable Principles/Relevant Circumstances, combined together with the priority of Agreement Solution, were the most notable features of the said two formulas. On this ground and with these formulas in mind, States took part in the UNCLOS III in 1973. These two formulas, therefore, were the focal point around which the majority of the proposals, concerning the delimitation of the continental shelf, were circulated at the beginning of the Conference. Nevertheless, the development of the debate on the delimitation question proved to have fluctuated from favouring one of the two formulas to the other, but then finally choosing none of them.

Thirteen proposals, concerning the delimitation of the continental shelf were presented to the Conference during its preparatory stage, between 1971-1973, and the First and Second Sessions in 1973 and 1974.[201] Out of these thirteen proposals, three proposals envisaged a formula similar to Article 6;[202] five proposals favoured the Customary rules;[203] three proposals preferred the equidistance method;[204] one proposal suggested a solution by agreement only;[205] and one proposal inclined to favour a combination of the Conventional and the Customary Rules.[206] Nevertheless, two principal common features can be drawn from the said thirteen proposals. On the one hand, they all alluded to agreement in accordance with equitable principles in the

first place of their formulas. On the other hand, most of them felt the need to provide some, if not a thorough, explanation as to the scope of the "special circumstances" or "relevant circumstances" clauses. Yet most of the emphasis was concentrated on circumstances such as the geographical configuration of the coast, the geological and geomorphological conditions of the shelf, and the presence of islands and islets.[207]

Preparing the Main Trends document in the Second Session of the Conference in 1974, the Chairman of Committee II examined the above-said thirteen proposals. His final finding was embodied in Provision 82 which contained four formulas. These four formulas summarized the three basic trends of the proposals, namely, the Conventional Rules of Article 6,[208] the Customary Solution,[209] and the Equidistance Principle.[210]

The Informal Single Negotiating Text (SNT), which was the product of the Third Session in 1975, devoted Article 70 for the delimitation solution of the continental shelf. It said,

> "1- The delimitation of the continental shelf between adjacent and opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistant line, and taking account of all the relevant circumstances.
> 2- If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part ... (Settlement of dispute).
> 3- Pending agreement, no State is entitled to extend its continental shelf beyond the median line or the equidistance line."[211]

Leaving the first two paragraphs of the said Article without any change, the Conference managed to modify Paragraph 3 when it revised the SNT in the Fourth Session in 1976. As embodied in Article 71 of the RSNT, the new Paragraph 3 read,

> "3-Pending agreement or settlement, the States concerned shall make provisional

arrangements, taking into account the provisions of Paragraph 1."[212]

The provision of Article 71 of the RSNT had the opportunity to be re-examined informally by Negotiating Group No 5 which was established by the Committee II in the Fifth Session in 1976. After this re-examination, the Chairman of Committee II reported to the Main Committee that the focal point of discussion was about the evaluation of

> "... the method involving the median or equidistant line in solving the problems connected with the delimitation of these marine areas."[213]

Thereafter, he went on to say that, Paragraph 1 of Article 71,

> "... may well be the solution which could bring about general agreement since it does not overlook the method involving the median or equidistant line, but at the same time restricts its use to those cases in which it can produce results that are in accordance with equity."[214]

Because no "... formula which would narrow the differences between the opposing points of view.",[215] could be reached, the contents of Article 71 of the RSNT reappeared again in the ICNT which was prepared and circulated among the conferees during the Sixth Session in 1977.[216] In his comment on the argument between the participant States concerning the contents of Article 74 and 83 of the ICNT, Dr. Jagota commented that,

> "The main controversy related to the meaning of the words 'where appropriate' in relation to the median or equidistance line."[217]

For, as he carried on, those States which were in favour of equitable principles would interpret these words as to apply the equidistance method when it was in conformity

with equitable principles, whereas those States which favoured the equidistance method wanted it "... to be recognized as a principle in itself."[218] This divergence of viewpoints reflected its controversial nature on the subsequent development of the delimitation issue of the continental shelf and caused it to change direction from one extreme to another between 1978 and 1980.

When the Conference determined the seven outstanding issues in its Seventh Session in 1978, it entrusted Negotiating Group 7 (NG7) with the question of the continental shelf boundary between States. NG7 held numerous meetings, during which it revised the SNT, RSNT, and the ICNT. Meanwhile they were arguing their points, negotiators split into two groups. The first, which consisted of 22 delegations, was the, so called, equidistance group. This group was in favour of regarding the equidistance method as a main obligatory principle. The second, which consisted of 29 delegations, was the equity group as it insisted on the equitable principles to be the dominant criterion of the delimitation of the continental shelf. As the negotiations of these two groups between 1978-1980 was not fruitful, the formula of Article 83 of the ICNT was retained in the ICNT/Rev. 1 in April 1979 without any change.[219] However, the Chairman of NG7 concluded the Group's intensive efforts by this statement:

> "Because of this firm refusal by a notable part of the members of the Group to adopt the present formulation of paragraph 1 of article 74 and 83 it is clear that it cannot be considered a text which could provide consensus on the issue."[220]

He, therefore, annexed to his report a new proposal which was embodied in the second review of the ICNT (ICNT/Rev.2) in April, 1980.[221] The new Article envisaged that the continental shelf boundary between States,

> "... shall be effected by agreement in conformity with international law. Such an

agreement shall be in accordance with equitable principles, employing the median or the equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned."[222]

This formula was, in fact, so in favour of the equidistance group, that the equity group was not satisfied with it, and resisted its inclusion in the ICNT/Rev.2. The reason for this was that, the equity group was not happy with the shift of the Conference from a formula that was in favour of the equity group position to a formula which strengthened the position of the equidistance group. For, despite the inclusion of the "where appropriate" clause, the provisions of the SNT, RSNT, ICNT, and ICNT/Rev.1, relating to the delimitation of the continental shelf, were more likely to be interpreted in favour of the equity group. Thus, the delimitation question of the continental shelf was left open to controversy.

The third revision of the ICNT towards an Informal Draft Convention in August,1980, kept the provisions of Article 83, as they were in the ICNT/Rev.2.[223] During the resumed Ninth Session between 28 July and 29 August, 1980, NG7 established a special group which consisted of 10 members from each of the equity and equidistance groups. This special group held "face-to-face negotiations" but unfortunately could reach no agreement on the issue at stake.[224] However, since no reliable solution could be reached, so a special provision was added entitling States to make reservations relating to the continental shelf delimitation formula. Because Article 309 of the ICNT/Rev.3 prohibited any reservation or exception "... unless expressly permitted by other articles of this Convention.", a footnote was added to the said Article. This footnote read,

"This Article is based on the assumption that the Convention will be adopted by consensus. In addition, it is recognized that the Article can be regarded only as provisional pending the conclusion of discussions on outstanding substantive issues such

as that relating to the delimitation of maritime zones as between adjacent and opposite States ..., where the final solution might include provision for reservations."[225]

Despite the intensive negotiations, the controversy between the two groups carried on during the Tenth Session of the Conference in March and April, 1981. Yet, in the Resumed Tenth Session the controversy could not be mitigated until towards the end of the Session when a compromised proposal, which was circulated among the conferees on August 27, 1981, was proposed by the President. President Tommy Koh suggested that the continental shelf boundaries

"... shall be effected by agreement on the basis of international Law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."[226]

This formula was first generally accepted by the two groups and then it received widespread support from the Conference, despite the dissatisfaction of some countries such as USA, China, some Arabian Gulf States, Egypt, Libya, Israel, Venezuela and Argentina.[227] The said formula was adopted and, eventually, enshrined in the final draft of the Convention in 1982. Article 83 Reads

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

2- If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided in Part XV.

3- Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4- Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement."[228]

Conclusion

In the course of assessing the definition of the continental shelf, the following remarks can be made. First, the lack of the requisite knowledge in the 1950s was replaced by the usage of very advanced means of clarification combined with very well illustrated maps and reports during the UNCLOS III. These means, maps and reports, which were prepared by qualified and professional organs with the help of advanced technology, were the main reason of the success of the UNCLOS III in providing such a clear definition of the continental shelf.[229] Second, unlike Article 1 of the 1958 Convention, Article 76 of the 1982 Convention deals thoroughly, and in detail, with the definition of the continental shelf. Third, as the UNCLOS III, rejected the exploitability/depth criterion due to its infinite character, it managed to reach a more decisive criterion using the distance/geological description criterion. This criterion was supplemented with two auxiliary parameters, viz, the depth criterion and the thickness of sedimentation criterion. Fourth, Article 1 uses vague and ambiguous terms, whereas Article 76 uses clear and definite identification of the shelf and its outer limit. Fifth, both Article 1 of the 1958 Convention and Article 76 of the 1982 Convention based their definition on a multilateral basis of geophysical and legal connotation. However, the ambiguity of Article 1 caused difficulties of interpretation, whereas the clear description of the shelf by Article 76 could be easily interpreted as an obvious indication to the fact that the legal definition of the continental shelf was mainly based on geological facts to the detriment of any other geophysical factors. One simple fact can be concluded with regard to the geophysical basis of the continental shelf. That is, the geological structure of the continental margin is the fundamental, if not the only, geophysical basis of the continental shelf doctrine. Sixth, it is according to this understanding that any problematic issue of the continental shelf doctrine, including the

natural prolongation principle, must be interpreted.

As for the delimitation question of the continental shelf between States, it has been left without a proper solution. As the 1982 Convention refers vaguely to a solution effected by agreement on the basis of international law in order to achieve an equitable solution, it does not only leave it open to the already existing principles and rules in international law, but also left it open to any probable rules that may emerge in the future.

As for the existing rules and principles in international law, the Conventional rules, as are presented by Article 6 of the 1958 Convention, and the Customary rules and principles, as are presented by the ICJ in the 1969 North Sea Cases, constitute the only possible rules and principles in international law at the moment. However, both rules contain a good deal of vagueness and ambiguity which at the end of the day will be added to the broad meaning of Article 83 of the 1982 Convention.

Notes

1- Prof. O'connell stated that "[t]he concept was enshrined by geographers in the 1890s", O'connell, D.P., The International Law of the Sea, edited by Prof. I. A. Shearer, Clarendon Press, Oxford, 1982, Vol. I, P. 469, footnote No 9; however, Green said that "[t]his expression was first used by the geographer, H.R.Mill in his *Realm of Nature*, published in 1897, see Green, L.C., The Continental Shelf, 4 CLP., 1951, P., 54, at 57.

2- Barclay was the "first international lawyer to advert to" the term "continental shelf" at the fisheries conference, see O'connell, ibid.; the term was also used for the purpose of fisheries in 1916 by de Buren at the National fishery Congress, see Green, ibid., at 57-58; it was also used at the same year by Storri and later by Suarez, see O'connell, ibid., P. 469; furthermore in 1916 "Russia claimed [its sovereignty over] islands which formed the continuation of the continental shelf of

Siberia" see O'connell, ibid., footnote No 10, see also Green, ibid., P. 58; in 1921 it was used by the Portuguese delegate to the Seventh International Fisheries Convention, see O'connell, ibid., P. 469; "Ceylon issued a Pearl Fisheries Ordinance", in which it mentioned the "Pearl Banks" term as identified by a depth criterion, in 1925, see Green, ibid.; Sir Cecil Hurst in his Article "Whose is the Bed of the Sea" with subtitle "Sedentary Fisheries Outside the Three Mile Limit" mentioned the term for the purpose of fisheries, see Green, ibid., P. 54; see also, Mouton, M.W., The Continental Shelf, I Hague Recueil, 1954, P. 343 at 360-361; and the same writer in his book, The Continental Shelf, Martinus Nijhoff, the Hague, 1952, P. 59-63; see also generally, Cosford, Edwin J., The Continental Shelf 1910-1945, 4 McGill Law Journal, (1958), P. 245.

3- Barbosa de Magalhaes, one of the members of the Sub-Committee which was to report to the Committee of experts to the Hague Codification Conference, drew the conferees attention to the concept of the continental shelf through his remarks on the subject, see O'connell, ibid., P. 469-470.

4- See supra note No 2.

5- Paria Treaty between the U.K. and Venezuela, 26 February, 1942, 205 LNTS, P. 121.

6- Truman Proclamation, 28 Sep., 1945, 40 AJIL, (1946), Supp. P. 45.

7- The ICJ (1969) Report, Para. 47.

8- Green, L.C., supra note No 1, at 79-80.

9- Vallat, F.A., The Continental Shelf, XXIII BYIL, (1946), P.333, at 334.

10- Young, Richard, The Legal Status of Submarine Areas Beneath the High Seas, 45 AJIL, (1951), P. 225, at 231-234.

11- Gidle emphasized that the rights of a coastal State over its continental shelf constituted an inchoate and exclusive title, see O'connell, supra note No 1, at 472.

12- Lauterpacht, H., Sovereignty Over Submarine Areas, XXVII BYIL, (1950), P. 376, at 431-432

13- O'connell, supra note No 1, at 471-472.

14- ILC Report, 3rd Sess., 45 AJIL, (1951), P. 141, para. 6; 5th Sess., 48 AJIL, (1954), P. 32, Para. 73; 8th Sess., 51 AJIL, (1957), P. 247, Para. 7-8.

15- Ibid.

16- ILC Report, 8th Sess., 1956, 51 AJIL, (1957), P. 247, Para. 7.

17- The 1958 Geneva Convention on the Continental Shelf (hereinafter, the 1958 Conv.), Art. 2 Para. 3.

18- The ICJ (1969) Report, Para. 19.

19- Ibid., Para. 63.

20- The 1982 Convention on the Law of the Sea (hereinafter, the 1982 Conv.), Art. 77, Para. 3.

21- ILC Report, 8th Sess., 1956, 51 AJIL, (1957), P. 177, Art. 67.

22- See below, this Chapter, Section 2.

23- The 1982 Conv., Art. 76; and see also ibid.

24- See below, this Chapter, Section 2 and 3.

25- The Maltese Ambassador to the UN, Arvid Pardo, proposed to the general assembly to declare the seabed "underlying the sea beyond the limits of present national jurisdiction" as a "common heritage of mankind", because of the increasing unilateral encroachment thereon, Arvid Pardo in UN General Assembly, Official Records, 22nd Session First Committee, 1516th Meeting, UN Doc. A/C.1/PV. 1516, 1 November 1967, P. 2, as quoted from, Anand, R.P., Origin and Development of the Law of the Sea. History of International Law Revisited, Martinus Nijhoff Publishers, The Hague, Boston & London, 1983, P. 219, Notes 7 & 8.

26- UN General assembly Resolution No 2749 (XXV), 17 Dec., 1970.

27- The 1982 Conv., Art. 76, see below, this Chapter, Section 2, P. 30-37

28- The 1982 Conv., Annex II.

29- The ILC Report, 2nd Sess., 1950, 44 AJIL, (1950), P. 148.

30- ILC Report, 8th Sess., 1956, 51 AJIL, (1957), P. 178, Art. 72.

31- The ICJ (1969) Report, Para. 93.

32- The Tunisia/Libya Case, The ICJ (1982) Report, Para. 132.

33- Ibid.

34- See below, Chapter III, Section 2.

35- The 1982 Conv., Art. 83; See below, this Chapter, Section 3, P. 43-51.

36- The 1982 Conv., Art. 76.

37- See below, this Chapter, Section 2; and also Chapter IV, Section 1, Subsection IV.

38- Lees, G.M., Nature of Continental Shelves, AAPG. Bulletin, vol. 35, No 1, January 1951, P. 108-109; Kuenen, Ph.H., Marin Geology, John Wiley & Sons, INC, New York, and Chapman & Hall, Limited, London, 1950, P. 168; Pratt, Wallace, E. & Good, Dorothy, World Geology of Petroleum, American Geological Society, Special Publication No 31, Princeton University Press, 1950, P. 322-324; Mouton, M.W., his book, supra note No 2, at 37-39.

39- Mouton, ibid., at 299-305.

40- Auguste, Barry B.L., The Continental Shelf, Librairie Minard, Paris 1960, P. 37-38.

41- Andrassy, Juraj, International Law and the Resources of the Sea, Colombia University Press, New York & London 1970, P. 22-27.

42- Ibid., P. 26; see also Laurd, Evan, The Control of the Seabed, Heinemann, London 1974, P. 21-28.

43- Andrassy, supra note No 41; Bochez, L.J. & Kaijen, L., The Future of the Law of the Sea, Martinus Hijhoff, The Hague 1973, article by Diebold, P., The Richness of the Sea: Minerales, P.51-76.

44- Ibid.; Laurd noted that nodules contain not only manganese but also other metals such as nickle, copper, cobalt, molybdenum, aluminum, and iron; moreover he noted that, the subsoil of the seabed contains, as they used to be mined from the shore, coal, iron, salt, sulphur, oil and gas, see Laurd, Evan, supra note No 42, P. 14; cf. Post, Alexandra Merle, Deepsea Mining and the Law of the Sea, Martinus Nijhoff, Publication on Ocean Development, Vol. 8, 1983, at Part 1, Chapter 1, especially P. 8-17; see also, Andrassy, supra note No 41, at, 17-20.

45- Laurd, wrote about the emergence of what was called under-sea car which can go to 182 meters isobath and can support two operators and three divers, Laurd, Evan, supra note No 42, at 25-26, and also the emergence of the submersible vehicles which can dive to a depth of 11,000 meters, and more successfully to a depth of 2,000 meters which became later 5,000 meters and then 20,000 meters, P. 26, in addition he noted that the discovery of the psychological acclimatization enabled men to stay for a long time at a depth of 200 meters, 600 meters, and later to 1,000 meters, P. 27-28; cf. Post, Alexandra M., supra note No 44, at 19-32; see also, Andrassy, supra note 41, at 22-31.

46- Laurd, ibid., especially P. 24-28.

47- Andrassy, supra note No 41, at 22-31; Post, Alexandra M., supra note No 44, at 33-56; Diebold, P., supra note No 43, at 72-74.

48- Bingham, Josef Walter, The Continental Shelf and the Marginal Belt, 40 AJIL, (1946), P. 173.

49- Young, Richard, Recent Development with respect to the Continental Shelf, 42 AJIL, (1948), P. 849.

50- Ibid., p. 851.

51- Vallat, F.A., supra note No 9, at 335.

52- Borchard, Edwin, Resources of the Continental Shelf, 40 AJIL, (1946), P. 53, at 67.

53- Ibid., P. 53.

54- Mouton, M.W., his book, supra note No 2, at 6-12.

55- Ibid., P. 11.

56- Mouton, M.W., his article, supra note No 2, at P. 349.

57- Ibid.

58- Young, Richard, Saudi Arabian Off-Shore Legislation, 43 AJIL, (1949), P. 530; and also, Further Claims To Areas Beneath the High Seas, 43 AJIL, (1949), P. 790; see also note No 59 below.

59- Young, Richard, The Legal Status of Submarine Areas Beneath the High Seas, 45 AJIL, (1951), P. 225.

60- Lauterpacht, H., supra note No 12, P. 376·

61- Ibid., P. 383-387.

62- Ibid., P. 383-84

63- Ibid., P. 383.

64- Shepard, Francis P., Submarine Geology, Harper & Brothers Publication, New York, 1948, P. 105.

65- Ibid., Persian Gulf, P. 129, and the North Sea, P. 137.

66- Ibid., P. 141.

67- Ibid., P. 142-143.

68- Ibid., the Caspian Sea and the Black Sea both have Shelves; the Great Lakes does not have a continental shelf.

69- Shepard, Francis P., The Earth Beneath the Sea, Oxford University Press, London, 1959, P. 70, the book was introduced in a simplified way especially for Lawyers, see its introduction.

70- Ibid.

71- Ibid.

72- Daly, Reginald Aldworth, The Floor of the Ocean, the University of South Carolina Press, 1942, P. 9-10, and Chapter III, P. 99-100.

73- Umbgrove, J.H.F., The Pulse of the Earth, Second Edition, Martinus Nijhoff, the Hague 1947, P. 98; see also his article, Origin of Continental Shelves, AAPG. Bulletin, Vol. 30 No 2, February 1946, P. 249, at 249-250.

74- Ibid., his book P. 99, and his article P. 250.

75- See supra note No 70.

76- State practice during the UNCLOS III will be discussed later in this Section, see below, this Chapter, Section 2, P. 30-37.

77- See Annex I.

78- Argentina, 1946; Chile,1947; Costa Rica, 1948 and 1949; Dominican R., 1952; Ecuador, 1950; El Salvador, 1950; Guatimala, 1949; Honduras, 1950 & 1957; Mexico, 1945; Panama 1946; Peru, 1947 and 1952; Venezuela, 1956; these Latin American States claimed either sovereignty or national property over the continental and epicontinental shelf or seabed; some of them defined its extent by reference to distance: 200 n. miles, others by reference to depth: 200 meters isobath, and the rest left it without definition; see August, Barry B.L., supra note No 40, at 105-139; see also Young, supra note No 50, all the article.

79- Fifteen Proclamations mentioned the continental shelf term or an equivalent terminology, namely, Australia, 1953; Bahamas, 1948; Brazil, 1950; Iceland, 1948; Iran, 1955; India, 1955; Jamaica, 1948; Korea R., 1952; New Guinea (an Australian Trust), 1953; Nicaragua, 1950; Philippinese, 1949; Portugal, 1956; Sarawak, 1954; Sri Lanka (Ceylon), 1957; and USA, 1945.

80- Fourteen proclamations mentioned the "seabed and subsoil" term, viz., Abu Dhabi, 1949; Ajman, 1949; Bahrain, 1949; British Hondoras, 1949; Dubai, 1949; Iraq, 1957; Israel used the Exploitability criterion, 1952; Kuwait, 1949; Qatar, 1949; Ras Al Khaima, 1949; Saudi Arabia, 1949; Sharjah, 1949; Trinidad & Tobago, 1945; and Umm Al Qaiwain, 1949.

81- 38 States used the "continental shelf" term; and 6 States used the "seabed and subsoil" term.

82- 32 out of 44 proclamations preferred the usage of the exploitability criterion; see infra notes No 90, 91 and 92, see also Annex I.

83- About 30 proclamations were issued between 1945-50, see Annex I; apart from some Latin American States none of these proclamations identified the scope and limits of their claims.

84- India, 1955; Iran, 1955; Iraq, 1957; and Sarawak, 1954.

85- Israel, 1952; Sri Lanka (Ceylon), 1957.

86- Australia, 1953; New Guinea (an Australian Trust), 1953; and Portugal, 1956.

87- Korea R., 1952.

88- The remaining 12 States are classified as follows: two States used 200 meters isobath, viz., Ghana,1963; Mauritania,1962; one State, used distance criterion, namely, Panama-200 n. miles,1967; three States used an infinite definition: Ireland, designated area, 1968, the UK,

designated area,1964; and Tonga, also designated area,1970; four States did not provide any definition, namely, German D.R.,1964; Saudi Arabia,1968; Seyschelles,1962, and Spain, 1966; and one State, Iraq,1968, adhered to the rules and principles of international law; and finally, one State, Turkey,1968, indicated to the necessity of complying with the provisions of the Geneva Convention on the continental shelf.

89- One State used the exploitability criterion, Norway, 1963.

90- 22 States used the combined criterion: Depth/Exploitability, see Annex I.

91- 9 States referred to the 1958 Geneva Convention, see Annex I.

92- The ICJ (1969) Report, Para. 72.

93- Ibid., para. 73.

94- Ibid., Para. 74.

95- Ibid.

96- Even the entitlement itself was a matter of controversy at the beginning, as to whether it was a sort of sovereignty or jurisdiction and control; see Prof. Lauterpacht, supra Note No 12, at 387; a similar argument occurred during the ILC relevant discussion in its eight Sessions between 1950 and 1956, and subsequently in the UNCOLS I.

97- During the period between 1945-73, 36 proclamations out of 86 preferred the exploitability criterion, see Annex I.

98- The exploitability criterion could, (it seems,) in no way satisfy the requirements of a fundamental norm-creating character; for the exploitability criterion was a vague and ambiguous concept the implication of which could be interpreted by each State according to its viewpoint, i.e., it would, and indeed it did, create a verified application in practice.

99- Mr. Yepes, ILC Ybook, 1950, Vol. II, P. 224.

100- ILC Report, 3rd Sess., 45 AJIL, (1951), Supp. P. 139-140. Art. 1, Comment No 2.

101- ILC Report, 2nd Sess., 44 AJIL, (1950), Supp. P. 148, Para. 198.

102- ILC Report, 3rd Sess., 45 AJIL, (1951), Supp. P. 139, Art. 1, Comment No 1.

103- Ibid., Comment No 2.

104- Ibid., Art. 1.

105- The ILC Report, 5th Sess.,1953, 48 AJIL, (1954), Supp. P. 30, Para. 64.

106- supra note No 103.

107- Mouton added the following examples: the seabed of the Baltic Sea, the Sunda Sea, the Hudson Bay, and the Arafura Sea; see Mouton, his article of 1954, supra Note No 2, at 348.

108- ILC Report, 3rd Sess., 45 AJIL, (1951), Supp. P. 140, Para. 4; and the ILC Report, 5th Sess., 1953, 48 AJIL, (1954), Supp. P. 31, Para. 67; the problem of islands was solved by providing special provision that gave islands a continental shelf of their own, see Art. 1-b of the 1958 Convention.

109- Some geologists named the shelf around the oceanic islands as "insular" shelf, which was, as indicated above, one of the categories of the continental shelf; see above, this Chapter, Section 2, P. 20.

110- The ILC Report, 5th Sess., 1953, 48 AJIL, (1954), Supp. P. 31, Para. 66.

111- Ibid., P. 28, Art. 1.

112- Ibid., P. 30-31, Para. 65,66, and 67.

113- The ILC Report, 8th Sess., 1956, 51 AJIL, (1957), P. 244, Para. 4.

114- Ibid., P. 243, Art. 67.

115- Some west African States and also some south western American States do not have any continental shelf according to the meaning of Article 67, or, in fact, they have a narrow strip of shelf which does not exceed few scores of meters.

116- UNCLOS I, 1958, Official Records, Vol. VI, P. 47.

117- The Dominican R. accepted Art. 67 under the understanding that its interpretation would be "... subject to considerations of continuity or proximity" Ibid., P. 9; whereas the United Arab Republic and Norway were in favour of a mere distance criterion measured from the coast, Yugoslavia identified that distance as a 100 miles from the outer limit of the territorial sea, (and 50 miles in some cases), ibid., P. 27, Para. 8-9, P. 5, Para. 21, and P. 32, Para. 7; and A/Conf.13/C.4/L.12; although India did not agree that the criterion was open to ambiguity, its proposal was in favour of a definite limit, depth criterion - first 1000 meters and then 550 meters -, ibid., P. 42, and A/Conf. 13/C.4/L.29, and L. 29/Rev.1: Canada was in favour of defining the continental shelf as to the edge of the shelf when it would be geographically well defined or the depth criterion when it would be geographically il-defined, ibid, P. 29-30, 37, and A/Conf. 13/ C.4/L. 30; Guatimala, which said that the criterion "was dangerously vague and was particularly unfair to under-developed countries", supported the Panamian proposal to embrace the shelf and the slope - the continental terrace" -, in the definition of the shelf, ibid., P. 31; while Spain said that

Article 67 should define the shelf "on the basis of specific criterion", Bulgaria found it appropriate to advise Committee IV "to give careful attention to the precise definition of the continental shelf.", ibid., P. 7 and 23; Tunisia regretted the vagueness and ambiguity of Art. 67, ibid., P. 21; and finally, although Sweden did not express its explicit opposition, its proposal, which was eventually withdrawn in favour of the above-said Indian proposal, referred to the depth criterion, see A/Conf. 13/C.4/L. 33.

118- The other two States were, Belgium which did not clarify its reasons for rejecting the criterion; and Korea which stated that the depth criterion and the exploitability criterion, could not be compatible with each other, so it suggested the deletion of the depth criterion in favour of the latter, ibid., P. 23, Para. 32.

119- Italy favoured the definition of the continental shelf to be a "definite fixed quantity", ibid., P. 16-17; for the Netherlands see, P. 6-7, 35, and 44, and A/Conf. 13/C.4/L.19, and L.19/ Rev.1, concerning Art. 68, and A/Conf.13/C.4/L.32 concerning Art. 67; for Pakistan see, ibid., P. 19; as for Argentina, it said that the provision of Art. 67 "lacked clarity", see ibid., P. 33.

120- As France criticized the criterion as being "imprecise and variable", it preferred it to be constant, definite, and known, ibid., P. 1-2, 31-32, and A/Conf. 13/C.4/L.7.

121- Ibid., P. 37-38, 44, and 14; see also, ibid., Vol. II, P. 57, Para. 35-36; see also Brown, E.D., The Legal Regime of Hydrospace, Stevens & Sons, London, 1971, P. 13.

122- UNCLOS I, 1958, Official Records, Vol. VI, P. 4, 35-36, 45, and 46, for the text of the joint proposal of the UK and the Netherlands, see A/Conf. 13/C.4/L. 32, and for the text of the UK proposal, see A/Conf. 13/C.4/L. 24/Rev. 1.

123- Ibid.

124- Ibid., P. 12.

125- Ibid., P. 5-6, and 32.

126- Ibid., P. 18.

127- Ibid., P. 14, 34, and A/Conf. 13/C.4/L. 8.

128- Ibid., P. 5, 32-33, and A/Conf. 13/C.4/L.4.

129- Ibid., P. 24.

130- A/Conf. 13/C.4/L. 26, 21 March, 1958.

131- Marijorie, M. Whiteman, Conference on the Law of the Sea: Convention of the Continental Shelf, 52 AJIL, (1958), P. 629, at 634.

132- The UNCLOS III officially started in 1973, see UN Resolution No 2750 C (XXV), 17 Dec., 1970, and No 3067 (XXVII), 16 Nov., 1973.

133- A/Conf. 62/C.2/WP. 1, 15 Oct., 1974.

134- This proposal was suggested to, and adopted by, the Conference in the 55th Meeting of 18 April, 1975, see UNCLOS III, Official Records, Vol. IV.

135- Ibid., Vol. VIII, P. 65, A/Conf. 62/C.2/WP. 10/Add 1; for the footnotes see ibid., footnotes 1 and 2.

136- See A/Conf. 62/C.2/WP. 10/Rev. 1, 1979; A/Conf. 62/C.2/WP. 10/Rev. 2, April, 1980; and the Informal Draft Convention A/Conf. 62/C.2/WP. 10/Rev. 3, August, 1980.

137- The Draft Convention, A/Conf. 62/L.78.

138- The Gentleman's Agreement was annexed to the Rules of Procedures, see A/Conf. 62/30/Rev. 1, 1974, and Rev. 2, 1976.

139- The final Draft Convention, A/Conf. 62/ 122.

140- Sea Law-"A Rendezvous With History, UN Monthly Chronicle, Vol. 19, No 6, (June 1982), P. 3, especially at 13; in addition, there were 4 non-participants, ibid.; UNCLOS III, Official Records, Vol. XVI, 1982, P. 154-155.

141- The 1982 Conv., Art. 308.

142- Simmonds, K.R., New Directions in the Law of the Sea, Oceana Publication, London, Rome and New York, 1984-, Release 89.1, Issued July, 1989.

143- After the emergence of the EEZ, some States (such as some african States, Arab States, Landlocked States, and geographically disadvantaged States, as well as the USSR, Japan, and France) preferred a precise distance criterion - 200 miles, whereas, States like UK, Canada, Norway, the USA, Ireland, Australia, and India, were in favour of the extension of the shelf to the outer edge of the continental margin, (that was why they were called the Margineers); see, Jagota, S.P., Maritime Boundary, Martinus Nijhoff Publication, the Hague, 1985, P. 36-37; see also Stevenson, John R., and Oxman, Bernard H., The Third United Nations Conference on the Law of the Sea: the Caracas Session, 69 AJIL, 1975, P. 1, at 16-17.

144- A/Conf. 62/C.2/WP. 1, 15 Oct., 1974, Provision 68, Formula A.

145- Ibid., Provision 68, Formula B, and Provision 81, Formula F, which did not identify a definite limit as 200 miles but, in fact, left it open to be identified by agreement between States.

146- Ibid., Provision 68, Formula C and D.

147- Ibid., Provision 81, Formula E and G.

148- Ibid., formula H.

149- UNCLOS III, Official Records, Vol. III, P. 81-83, Art. 19, Para. 2; the other States beside Canada were, India, Norway, Indonesia, Moritius, Iceland, New Zealand, Chile, and Mexico; this Proposal was printed in A/Conf. 62/ L. 4, 26 July, 1974.

150- A/Conf. 62/C.2/WP. 8/ Part II, Informal Single Negotiating Text, Part IV, Art. 62, ibid., Vol. IV, P. 162.

151- See Para. 1 of the following: Art. 64 of the RSNT, A/Conf. 62/C.2/WP. 8/Rev. 1, 1976; Art. 76 of the ICNT, A/Conf. 62/C.2/WP. 10, 1977; Art. 76 of the ICNT Rev. 1, A/Conf. 62/C.2/WP. 10/Rev. 1, 1979; Art. 76 of the ICNT Rev. 2, A/Conf. 62/C.2/WP. 10/Rev. 2, April, 1980; Art. 76 of the Informal Draft Convention, A/Conf. 62/C.2/WP. 10/Rev.3, August, 1980; Art. 76 of the Formal Draft Convention, A/Conf. 62/L.78, 1981; and Art. 76 of the 1982 Convention, A/Conf. 62/122; the main resources of the these documents can be found in ibid., all Volumes, and in Churchill, Nordquist & Lay, New Directions in the Law of the Sea, Oceana Publication, INC, Dobbs Ferry, New York, 1973-1981, especially Vol. VI, 1977, Vol. X, 1980, and Vol. XI, 1981, as well as in the ILM, Volumes issued between 1977-1983.

152- Having found some difficulties, the UNCLOS III identified seven issues as being outstanding problems, and subsequently designed seven negotiating groups each of them was entrusted with solving one of these issues, in its Seventh Session in 1978; Negotiating Group 6 was concerned with the outer limit of the continental shelf, see A/Conf. 62/62, 13 April, 1978.

153- As for the remaining Paragraphs, they are mainly concerned with organizing the delimitation line, Para. 7, and 8, or with the submission of the relating information to the Commission, Para. 8, or with depositing a chart with full information to the Secretary General of the UN, Para. 9, or with the scope of the Article, Para. 10, and Para. 2 as an introductory paragraph to Paragraphs 4 and 6.

154- Dr. Jagota said in his book that the solution of the outer limit of the continental margin "... was found first by developing a combination of what were popularly known as *the Hedberg Formula* and *the Irish Formula*, and later by modifying the same." [footnote omitted] More over with regard to the Hedberg Formula he explained it by saying that, "Hedberg, whose view had been adopted by the US National Petroleum Council in 1974, had suggested that the outer limits of the continental shelf should be fixed by a coastal State within an area located between the *base* of the continental shelf, which was described as the most natural and identifiable limit of the continental

shelf, and a fixed distance beyond, the width of which may be internationally agreed, say at UNCLOS. ... The Hedberg Formula was thus a depth-cum-distance formula.", see Jagota, S.P., supra note No 143, at 38; see also, Hedberg, Hollis D., Relation of Political Boundaries on the Ocean Floor to the Continental Margin, Va. J. Int'l. L., Vol. 17, No 1, (1976), P. 57.

155- The Irish Formula, which was also called the Gardiner Formula, was included "in an informal text submitted by Ireland at an informal meeting of ..." Committee II during the 4th Session of the Conference, see UNCLOS III, Official Records, Vol. IX, P. 189, A/Conf. 62/L.98 AND ADD.1-3*, 18 April, 1978, the document and its footnote.

156- See Jagota, S.P., supra Note No 143, at 39.

157- Ibid., see also Oxman, Bernard H., The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978), 73 AJIL, 1979, P. 19-22.

158- Oxman, ibid., at 20, and footnote 61.

159- See Jagota, S.P., supra note No 143, at 39; cf., Oxman, Bernard H., The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979), 74 AJIL,1980, P. 19-22.

160- A/Conf. 62/L.37, 26 April, 1979.

161- Art. 76 of the ICNT Rev. 1, A/Conf. 62/C.2/WP. 10/Rev.1, 1979.

162- See Art. 76 of the ICNT Rev. 2, A/Conf. 62/C.2/WP. 10/Rev.2, April, 1980; Art. 76 of the Informal Draft Convention, ICNT Rev. 3, A/Conf. 62/C.2/WP. 10/Rev. 3, August, 1980, Art. 76 of the Formal Draft Convention, A/Conf. 62/L.78, 1981; and finally, Art. 76 of the 1982 Conv., A/Conf. 62/122; the footnote of Para. 4 (a)(ii) was omitted since April 1980, ICNT Rev.2, when a solution was found in a statement of understanding to the Sri Lanka suggestion.

163- UNCLOS III, Official Records, Vol. XIV, 1980, P. 83-84, Para. 43 and 44.

164- The Final Act, Annex II, Statement of Understanding Concerning A Specific Method to Be Used In Establishing The Outer Edge Of The Continental Margin.

165- Art. 76 of the ICNT Rev. 1, A/Conf. 62/C.2/WP. 10/Rev.1, 1979.

166- Ibid., footnote No 1.

167- Oxman, Bernard H., The Third United Nations Conference on the Law of the Sea: the Seventh Session (1978),73 AJIL, 1979, P. 20-22; and, the Eight Session (1979), 74 AJIL, 1980, P. 19-22; and the Ninth Session (1980), 75 AJIL, 1981, P. 227-228.

168- Art. 76 of the ICNT Rev. 2, A/Conf. 62/C.2/WP. 10/Rev.2, April, 1980; Art. 76 of the Informal Draft Convention, ICNT Rev. 3, A/Conf. 62/C.2/WP. 10/Rev. 3, August, 1980, Art. 76 of the

Formal Draft Convention, A/Conf. 62/L.78, 1981; and finally, Art. 76 of the 1982 Conv., A/Conf. 62/122.

169- Ibid.; as this Paragraph was given No 6, it pushed down the numbers of the other Paragraphs which became 7, 8, 9, 10, instead of 6, 7, 8, 9, respectively.

170- The 1982 Conv., Annex II.

171- See supra note No 6.

172- The ILC Report, 2nd Sess., 1950, 44 AJIL, (1950), Supp., P. 148, Para. 199.

173- The ILC Report, 3rd Sess., 1951, 45 AJIL, (1951), Supp., P. 143, Art. 7.

174- Ibid., Comment 1.

175- The ILC Report, 5th Sess., 1953, AJIL, (1954), Supp., P. 36, Para. 82, and 38, Para. 88.

176- Ibid., Art. 7.

177- Ibid., P. 36, Para. 82; see also, the ILC Report, 8th Sess., 1956, 51 AJIL , (1957), P. 178, Comment 1 on Art. 72.

178- Ibid.

179- Ibid.

180- The ILC Report, 8th Sess., 1956, 51 AJIL , (1957), P. 178, Art. 72_{-2}; because the difference between the median and the equidistance line can be ignored and because the equidistance method is very well known to indicate to both lines, so the term "equidistance" will be used hereinafter to indicate to them both.

181- Article 72 was approved by the Fourth Committee after a vote which resulted in 36 votes in favour, none against, and 19 abstentions, UNCLOS I, Official Records,1958, Fourth Committee, Vol. VI, P. 98; it was also approved in the Plenary Session by 63 votes in favour to none against and 2 abstentions, see ibid., Vol. II, P. 15.

182-See below, Chapter V, Section 1, P. 298-299.

183- The Iranian proposal concerning the consideration of the high water mark instead of the low water mark as a special circumstance in some cases, see A/Conf. 13/C.4/L.60; and concerning islands, ibid., Additional Paragraph; and an Italian proposal concerning Islands, A/Conf. 13/C.4/L.25/Rev. 1.

184- UNCLOS I, Official Records, supra note No 181, at 96-98.

185- Ibid.

186- Ibid., the addition of Paragraph 3 was supported by the USA which suggested the substitution of

the words "should be"; and its suggestion was approved by the Conference, ibid., P. 95.

187- The ICJ (1969) Report, Para. 13, 14 and 21.

188- Ibid., Para. 15 and 17.

189- Ibid., Para 20.

190- Ibid., Para. 47.

191- Ibid.

192- Ibid., Para. 89, 97-98 and 101.

193- Ibid., Para. 43, 44, 85 and 101.

194- Ibid., Para. 93.

195- The Anglo-French Arbitration (1977-78), Para. 48 and 61.

196- The Tribunal found that it would apply customary rules to the Bay of Granville, in the Channel Islands area, and Article 6 in the Atlantic area, see ibid., Para. 195 and 242.

197- Ibid., Para. 68 and 70.

198- Ibid., Para. 70.

199- For these Cases, see Chapter III, Section 2.

200- For a general view concerning how the Conference was organized, see above, this Chapter, Section 2, P. 30-32.

201- Five proposals were submitted to the Seabed Sub-Committee II between 1971-73; they were as follows: Turkey,1973, A/AC.138/SC.II/L.22, and L.22/Rev.1; Malta, 1973, ibid/ L.28; China,1973, ibid./L.34; Australia and Norway,1973, ibid./L.36; and Japan,1973, ibid./L.56; these proposals were included in the "Report of the Committee of the Peaceful Use of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Vol. III, General Assembly, Official Records: Twenty-Eighth Session, Supplement No 21(A/9021); however, Sub-Committee II rearranged these various proposals in three different ways which were included in, ibid., Vol. IV, V, and VI. The most notable proposal of them was the one which was included in Vol. IV, according to which those proposals were formulated in sort of variants under headings and sub-headings of the agreed list of subjects and issues of the law of the sea, for the continental shelf delimitation between States, see ibid., Vol. IV, P. 67-89, No 5.3. Eight proposals were submitted to Committee II at the Caracas Session in 1974. These proposals were as follows: Netherlands, A/Conf. 62/C.2/L.14, 19 July, 1974; Romania, ibid., L.18, 23 July, 1974; Turkey, ibid., L.34, 1 Aug., 1974; Greece, ibid., L.25, 26 July, 1974; Japan, ibid., L.31/Rev.1, 16 Aug., 1974; Kenya

and Tunisia, ibid., L.28, 30 July, 1974; France, ibid., L.74, 22 Aug., 1974; and Ireland, ibid., L.43, 6 Aug., 1974; these proposals were included in UNCLOS III, Official Records, Vol. III, 1974, P. 190, 195, 201, 213, 202, 211, 205, 237, and 220 respectively.

202- Malta proposed, agreement in accordance with the equidistance method-plus-exceptional circumstances, and failing agreement the parties must submit to arbitration, A/AC.138/ SC.II/L.28, 1973; Australia and Norway, suggested agreement in accordance with equitable principles and the equidistance method-plus-special circumstances, ibid., L.36, 1973; and Ireland, favouring a solution effected by agreement in accordance with equitable principles and in absence of special circumstances the median line is applicable unless it was inconsistent with equitable principles, A/Conf.62/C.2/L.43, 6 Aug.,1974.

203-The Netherlands preferred a solution by agreement in accordance with equitable principles taking into account the relevant circumstances, A/Conf. 62/C.2/L.14, 19 July, 1974; Turkey also favoured a similar solution taking account of the relevant factors and special circumstances, ibid., L.23, 26 July, 1974, and L.34, 1 Aug., 1974; it is noteworthy to say that the Turkish proposal of 1973 accepted to give due regard to the equidistance method, see infra note No 206; Romania proposed also another similar solution, "taking account of all the circumstances of the case affecting the marine or ocean area concerned, and all relevant geographical, geological or other factors", ibid., L.18, 23 July,1974; and two other proposals were introduced by Kenya and Tunisia, on the one hand, and France, on the other, to effect a solution by agreement in accordance with equitable dividing line taking account of the special circumstances, ibid., L.28, 30 July, 1974, and L.74, 22 Aug., 1974, respectively.

204- Japan submitted two proposals, A/AC.138/SC.II/L.34,1973; A/Conf. 62/C.2/L.31/Rev.1, 16 Aug.,1974; and Greece one proposal, A/Conf. 62/C.2/L.25, 26 July,1974 ; according to the three proposals a solution could be effected by agreement, and in default of agreement no State would be entitled to extend its sovereign rights over the continental shelf beyond the median line ...".

205- China proposed a solution to effect the delimitation of the continental shelf by agreement on the basis of equal footing negotiations, A/AC.138/SC.II/L.34, 1974.

206- The Turkish proposal of 1973 suggested a solution effected by agreement in accordance with equitable principles taking account of all the relevant factors and special circumstances and "due regard could be had there to the principle of equidistance", A/AC.138/SC.II/L.22, and L.22/Rev.1, 1973.

207- Turkey, L.22,1973, and L.23, 26 July,1974; Romania, L.18, 23 July,1974; Kenya and Tunisia, L.28, 30 July,1974; Ireland, L.43, 6 Aug.,1974; France, L.74, 22 Aug.,1974.

208- A/Conf. 62/C.2/WP.1, 15 Oct., 1974, Provision 82, Formula A.

209- Ibid., Formula B and D.

210- Ibid., Formula C.

211- A/Conf. 62/WP.8, Art. 70.

212- A/Conf.62/WP.8/Rev.1, Art.71.

213- UNCLOS III, Official Records, Vol.VI, 1976, P. 138, Negotiating Group 5, Para. 46.

214- Ibid.

215- "Memorandum by the President of the Conference on Document A/Conf.62/WP.10", A/Conf.62/WP.10/Add.1, ibid., Vol. VIII, 1977, P. 65, at 69.

216- A/Conf. 62/WP.10, Art. 83.

217-See Jagota, S.P., supra note No 143, at 232; Art. 74 of the ICNT, which had an identical formula to that of Art. 83, referred to the delimitation of the EEZ.

218- Ibid.

219- A/Conf. 62/WP.10. Rev.1, 28 April, 1979, Art. 83.

220- UNCLOS III, Official Records, Vol. XIII, P. 77, Para. 7 (a).

221- Ibid., P. 77-78.

222- Ibid., P. 78, Art. 83, Para. 1.

223- A/Conf. 62/WP.10. Rev. 3, August, 1980, Art. 83.

224- See Jagota, S.P., supra note No 143, at 239-240.

225- See A/Conf. 62/WP.10. Rev. 3, August,1980, Art. 309, and its footnote.

226- A/Conf. 62/WP.11; see, the 154th meeting of Friday, 28 August,1981, Report of the President on the consultation on delimitation, UNCLOS III, Official Records, Vol. XV, 1981, P. 39-42.

227- Ibid.

228- The 1982 Conv., Art. 83.

229- See for instance, UNCLOS III, Official Records, Vol. IX, P. 189, A/Conf. 62/L.98 AND ADD.1-3*, 18 April, 1978.

Chapter II

The Available Solutions Of the Delimitation Question in International Law

Introduction

Section 1: The Conventional Rules of the Delimitation of the Continental Shelf.

Section 2: The Customary Rules of the Delimitation of the Continental Shelf.

Section 3: Conclusion.

Introduction

Having had an introduction to the principles and rules available in international law, in the first Chapter, it appears that the only two sets of rules and principles are those of the Customary and Conventional solutions. This Chapter, is mostly interested in providing some clarification to the meaning and scope of the said two sets of rules and principles. Furthermore, this Chapter is necessitated by the desire to provide an idea about the two solutions in order to highlight the problems they suffer from. It will be proceeded by analytical and comparative perspectives aiming at identifying the co-relation and interrelation between the two solutions. Thus, the discussion will examine the Conventional solution in the First Section, and then, in the Second Section it deals with the Customary solution. The Third Section, which is the conclusive one, will be concerned with analysing the relation between the two solutions.

Section 1

The Conventional Rules of the Delimitation of the Continental Shelf

As has been seen in the first Chapter, the difficulties in finding a proper solution for the delimitation of the shelf between opposite and adjacent States, forced the ILC to seek a fairly elastic solution that could be a comprehensive guide to cases with a wide variety of circumstances. This solution, despite the almost universal dissatisfaction with its vagueness and elasticity, was approved by the UNCLOS I in Geneva in 1958. Article 6 of the 1958 Convention on the Continental shelf states that,

> "1- Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.
> 2- Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured."

Before going into further discussion, some remarks are called for. First of all, Article 6 provides two different solutions for lateral boundaries of the continental shelf, viz., the opposite, and the adjacent situations. In case of the former situation Article 6 envisaged the third alternative as the median line, whereas in the latter it put it as the principle of equidistance. However, because of the absence of any material difference

between the two principles, the discussion, hereinafter, will refer to them as one principle under the title of "equidistance principle". Secondly, since there is no substantial difference between the two principles, so the solution introduced in Paragraphs 1 and 2 are identical. Paragraph 2 of Article 6, therefore, will be referred to as the symbolic text of the three-point solution of Article 6. Thirdly, Based on what has been said above, Article 6 presents the following three alternatives:

1- a boundary line effected by agreement; or

2- a boundary line justified by special circumstances; or

3- a boundary line drawn in accordance with the equidistance principle.

The Features of the Solution Provided for in Article 6

With reference to the first Chapter, Article 6 enjoys three main features. The first remarkable feature is that it is of a fairly elastic nature. This was due to the special nature of the legal concept of the continental shelf, as it involved several various factors, such as the complexity of the geophysical phenomena of the continental shelf, as well as the geopolitical, and legal factors. The second feature is that, the provisions of Article 6 contain a good deal of generality. This generality can also be attributed to the aforesaid reasons. According to these difficulties, Article 6 had to be of an obvious general terminology in order to provide a wide-ranged solution instead of an insufficient narrow-ranged one. And the third is, because of the unpredictable character of the circumstances that may prevail in every case, the provisions of Article 6 contain some vagueness regarding these circumstances. In fact, the inclusion of the "special circumstances" clause has been the underlying desire not to deprive those cases that may benefit in the future from the consideration of their own "special" circumstances. It was impossible to predict all the probable circumstances, so it was thought that the special circumstances alternative should be left open-ended.

The Legal Nature of Article 6

Since Article 6 is a conventional rule, so it is obligatory only to those States which are parties to the 1958 Convention on the continental shelf. From this fundamental qualification of Article 6, the following remarks can be made. First of all, as the number of ratifications of the said convention has not exceeded 54 ratifications, so these ratifications constitute only about 30% of the total number of States in the world. The remaining 70% are not under such a conventional obligation which means that they are subject to the alternative solutions provided in international law. These solutions could be found in the Customary rules and principles as they were envisaged by the ICJ in the 1969 North Sea Continental shelf Cases. Secondly, however, the aforesaid remark does not mean that the conventional rules lose more or less of their importance. In fact, their importance is still intact especially as they are considered conventional obligations.

Thirdly, regarding the Convention on the Continental Shelf as a whole, Article 6 is susceptible to reservations according to Article 12 of the same convention; and, indeed, a number of reservations have been provided by some States.[1] The effect of reservations is to eliminate, partially or wholly, the applicability of Article 6 in areas that fall within the meaning of such reservations. In this regard, one must differentiate between two situations. On the one hand, those reservations that identify an alternative way of delimitation. In this case, and if it is compatible with international law, the identified alternative is applicable unless it receives an objection from the other interested States. On the other hand, in case of not identifying an alternative, or if the reservations receive an objection from the other interested States, the applicable law is the customary international law.[2]

Fourthly, despite the considerable number of ratifications received by the Convention, Article 6 did not, up to 1969 crystallize as customary law. In the course of its deliberation, the International Court determined the reasons why this article did

not become a customary law at the time. These reasons were as follows:

1- Article 6 did not satisfy the requirements of being of a fundamentally norm-creating character.[3]

2- As for the widespread and representative participation in the Convention requirement, "... the number of ratifications and accessions so far secured ... [was], though respectable, hardly sufficient."[4]

3- Regarding the relevant State practice until 1969, it was not sufficient for Article 6 to crystallize into customary rules.[5] Yet it was not expressing that those States which followed the equidistance method were doing so on the basis of a belief that they were applying an obligatory rule of international law, i.e., State practice did not avail the required *opinio juris sive necessitatis*.[6]

Nevertheless, the foregoing conclusion did not mean, even in the Court's regards, that article 6 as a whole, did not crystallize into customary rule. In fact, the Court did implicitly consider that the general meaning of Article 6 had underlain the history of the concept of the continental shelf. The ICJ said that,

> "In the light of this history,... . It was, and it really remained to the end, governed by two beliefs; - namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. *It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement, - and in pursuance of the second that it introduced the exception in favour of "special circumstances".*[7] [Emphasis added.]

The court's opposition is, therefore, directed towards the equidistance principle itself and not towards Article 6 in general. In fact the Court's exaggeration of its

opposition to the principle of equidistance was motivated by its fear that this principle might produce inequitable results in some cases, as well as by the desire to mitigate the degree of emphasis given to this principle in Article 6. That was why it considered the equidistance principle as a "mere method" existing in international law. The equidistance principle, as it was envisaged in the latter viewpoint, proved to have underlain the history of the delimitation question even with respect to the conventional rules. As will be seen later, the equidistance principle has been abandoned by numerous States some of which were parties to the 1958 Convention.[8] That is to say, the mandatory character of the equidistance principle, according to Article 6, has been mitigated to its lowest effect so that it became identical to that of the same principle in customary law.

The Relation Between the Three Aspects of Solution of Article 6

Article 6 is intended to introduce the said three aspects of solution as alternatives. States that wish to determine their boundaries can choose the best suited for themselves. However, in case of a dispute, the invocation of any alternative becomes a different matter. Article 6 suggested first a solution by agreement, then another solution justified by special circumstances, and finally the application of the equidistance principle as the last resort. Although it is not hierarchical, the order of the said three aspects renders the invocation of the second and third choices to be always qualified by the exhaustion of the first one. In this respect the Court provided that,

> "(*a*) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiations *as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement;*"[9] [Emphasis added.]

The invocation of the third choice - the equidistance principle - is also qualified by the absence of any special circumstances. Yet the Court of Arbitration went far beyond this meaning when it considered the second two aspects of the solution - equidistance,

and special circumstances - as one combined rule. In the Court's view, since the equidistance was formalized as a general rule with its exception of special circumstances, so it would be a combined single rule. That is, the condition of the applicability of the equidistance as a conventional obligation is always under the stipulation that there is no special circumstance which justifies any boundary line other than the equidistance.[10]

I

The First Obligation of Article 6:
To Seek a Boundary Line By Agreement

Agreement is a well known solution in international law. Article 33 of the United Nations Charter introduces agreement as one of the means for peaceful settlement of an international dispute. Moreover, the recommendation to resort to Agreement is based on the fundamental character of this solution which derives from the "... fact that judicial or arbitral settlement is not universally accepted".[11]

Since Agreement is a general conventional and customary obligation,[12] it seems that its inclusion as a solution in Article 6 is superfluous.[13] However, a more thorough look at the history and development of the continental shelf concept would prove that Agreement has a special status with regard to the delimitation question. Agreement, in fact, played a substantial role, and yet, it was one of the two concepts that, "... have underlain all the subsequent history of the subject."[14] This solution, then, constitutes an inherent necessity of the delimitation of the shelf between neighbouring States, for,

> "... no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement...".[15]

Regarding the provisions of Article 6 according to which Agreement has a prior

character vis à vis the other two solutions, it does not mean

> "... merely to go into formal process of negotiation ... for the automatic application of certain method of delimitation in the absence of agreement; ...".[16]

On the contrary the parties are

> "... under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it; ..."[17]

It may be necessary to state here that on the basis of agreement much less than one hundred agreements have been concluded so far. These agreements followed a variety of solutions according to each case's merits.[18]

II

The Equidistance Principle

As far as the equidistance principle is concerned, it is not a new method in the international field. It has been used for the delimitation of the international rivers and other international waterways as an alternative to the middle channel line of thalweg.[19] However, although the equidistance principle seems to be the fairest solution to any boundary dispute, the peculiarities of the delimitation of the continental shelf between lateral States makes this method unacceptable in numerous cases. It was realized from the very beginning that the equidistance method would find a luke chance in achieving an equitable solution to all cases concerning the delimitation of the continental shelf. For, a single island could deviate the line further away causing extreme disproportionality at the expense of one of the parties.[20] The irregular configuration of some coasts, (in my opinion most of the coasts),[21] also creates disparity among the

parties' portions. These technical difficulties are, also, combined with various others. For instance, the determination of the baselines, from which the breadth of the territorial sea is measured, plays a considerable role in pushing the continental shelf boundary further forward, (for the equidistance line will be measured from the same baselines). So, in case of opposite States, a modest delimitation of such baselines by one State, while an advanced one made by the other State, (which shares the same continental shelf), will create some disproportionality between the portions of the parties as well. Moreover, the complex character of some coasts renders it difficult, if not impossible to use the equidistance method to delimit the continental shelf of all cases.

The equidistance method was recommended by the Committee of Experts who were asked, in their personal capacity, to examine, inter alia, the questions of the international boundaries between States. The Committee had to choose one of the following four methods:

> "A. by continuing the land frontier?
> B. by a perpendicular line on the coast at the intersection of the land frontier and the coastline?
> C. by a line drawn vertically on the general direction of the coastline?
> D. by a median line?"[22]

After a thorough examination, the Committee suggested the equidistance method to the delimitation of territorial waters between States. It furthermore, suggested that the said method

> "... could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf."[23]

In addition, it realized that,

"2. In a number of cases this may not lead to an equitable solution, which would be then arrived at by negotiation."[24]

Equidistance Principle as a General Rule

Because of the above-said reasons, the ILC, and later, the 1958 Conference, did not rely on a strict, or rigid, application of this method. Rather, they regarded it as an alternative solution when neither agreement nor special circumstances existed. In fact the equidistance principle was considered as a "general rule", recourse to which should always be justified by the absence of any exceptional circumstances that would justify a boundary line other than the equidistance. Special circumstances clause, therefore, was established as an exception from the said general rule. This meaning was emphasized by the ILC when it said,

"The rule thus proposed is subject to such modifications as may be agreed upon by the parties. Moreover, while in the case of both kinds of boundaries the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances. "[25]

The Combined Character of the Equidistance-Special Circumstances Rule

The Court of Arbitration in the Anglo-French Case (1977-78), demonstrated an interesting analysis of the relation between the equidistance principle and the "special circumstances" clause. As the equidistance principle was considered a general rule, and the "special circumstances" clause an exception, they did not form, in the view of the Court, two separate rules. Rather these two concepts were combined together to form one single rule: equidistance/special circumstances rule. The court said that,

"Article 6, ... does not formulate the equidistance principle and "special circumstances" as two separate rules. The rule there stated in each of the two cases is a single one, a

combined equidistance-special circumstances rule."[26]

And, in order to clarify the meaning of this view, the Tribunal, later, went on to say,

> "... the combined character of the equidistance-special circumstances rule means that the obligation to apply the equidistance principle is always one qualified by the condition "unless another boundary line is justified by special circumstances, ...".[27]

It seems logical here to assume that the consideration of the equidistance principle as a "general rule" and the special circumstances as an exception renders this rule to be interpreted strictly according to *exceptiones sunt strictissimae interpretationis.*[28] That is to say, the burden of proof is always on those who claim the existence of any special circumstances. However this viewpoint was entirely rejected by the Court of Arbitration in the Anglo-French case (1977-78). In order to refute the said contention, the Tribunal based its argument on the combined character of the equidistance/special circumstances rule saying that,

> "The fact that the rule is a single rule means that the question whether "another boundary is justified by special circumstances" is an integral part of the rule providing for application of the equidistance principle. As such, although involving matters of fact, that question is always one of law of which, in case of submission to arbitration, the tribunal must itself, *proprio motu*, take cognisance when applying Article 6."[29]

The Legal Nature of the Equidistance Principle

The inclusion of the equidistance principle as a general rule in article 6 has reduced the amount of emphasis on this method and precluded it from joining the corpus of customary international law. When the Netherlands and Denmark contended that the equidistance principle had become a customary rule, the International Court devoted a prolonged discussion refuting such a contention. In the view of the Court, the equidistance principle does not satisfy the requirements of a fundamentally norm-

creating character, because

> "In the first place, Article 6 is so formed to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement."[30]

The Court, on the other hand, stated the other two reasons why the equidistance principle did not satisfy the requirements of a fundamentally norm-creating character. Whereas the second reason was due to the inclusion of the exception of special circumstances, which was vague and ambiguous, the third was because Article 6 was susceptible to reservations under Article 12 of the same Convention.[31]

As has been noted above, the ICJ found that neither State practice nor the *opinio juris* of States were sufficient for the equidistance principle to become a customary international rule.[32] However, because this finding has been restricted to the time of its discovery - 1969 -, so an up to date study of State practice seems to be necessary.

Equidistance Principle and Unilateral State Practice

Despite the fact that unilateral State practice is of little importance with respect to the delimitation question, (for, the delimitation question must rest on mutual agreements), the examination of such practice is still important for the purpose of evaluating this method as unilaterally viewed by States. Some ninety-one proclamations have been collected from the available records. These proclamations might well serve the said purpose especially as they represent various parts of the world.

Out of the said 91 Proclamations only six proclamations mentioned explicitly the preference of using the equidistance principle.[33] However, another 13 proclamations inclined to accept the equidistance principle as it was provided in the 1958

Convention.[34]

The above said 19 proclamations were not the only proclamations that stated their favourable method of delimitation. In fact another 22 proclamations mentioned some other ways of delimitation, namely, in accordance with agreement/equitable principles,[35] or on the basis of reciprocity,[36] or in accordance with international law,[37] or other solutions.[38]

The remaining 50 proclamations mentioned nothing about the method of delimitation they preferred.[39]

Accordingly, unilateral State practice was not very helpful with regard to the delimitation question. However, it can be said that the equidistance principle was not given any substantial weight. In fact, State practice showed that very few States declared, voluntarily, their acceptance of the equidistance principle as a method of delimitation, whereas the vast majority preferred either to keep silent or to provide another method.

Multilateral State Practice and the Equidistance Principle

Multilateral State practice is of great importance with regard to the evaluation of the legal status of any international issue. In case of the equidistance principle, multilateral State practice is also of considerable significance especially because the legal status of this principle has been far more debatable than any other issue in international law.

Eighty bilateral and multilateral agreements have been collected from the available records.[40] These agreements related either to continental shelf boundaries,[41] or to Maritime boundaries including that of the continental shelf.[42] In addition, the said

agreements were concluded by 60 States representing various parts of the world.

To begin with, of these 80 agreements, 20 agreements determined their respective boundaries by a simple equidistant line.[43] 24 States were involved in these agreements, of which 16 States were parties to the 1958 Convention on the Continental Shelf.[44] However, of these 24 States only four countries depended solely on the equidistance method in all their agreements, concerning the delimitation of their continental shelf and maritime boundaries, (in fact, each of these four States concluded only one boundary line).[45] Three of these four States were not parties to the 1958 Convention,[46] and only one state was a party.[47] The remaining 20 States were, as will be seen hereinafter, involved in determining the rest of their boundaries on different bases other than the simple equidistance method.

Thirty-eight agreements used a modified equidistant boundary, or an equidistant boundary line modified in some of its parts. These were held between 41 countries. Of these 41 States, 19 States were parties to the 1958 Convention, and the rest were not.[48] On the other hand, 15 of the said 41 States used an equidistant line in some of their boundaries beside using a modified equidistant line in some others.[49]

Twenty-two agreements concluded negotiated boundary lines, 5 agreements of which followed the parallel of latitude boundary line. The said 22 agreements were convened between 26 States,[50] amongst which 14 States were parties to the 1958 Convention on the Continental shelf.[51] Beside using the negotiated boundary line method, 8 States of the said 26 States used a simple equidistant boundary line in some of their agreements.[52]

This citation of the relevant multilateral State practice proves that the principle of equidistance has not gained much consolidation with regard to the delimitation

question. With regard to the evaluation of this consolidation, and whether it has supported this principle to crystallize, or to approach crystallization, as a customary rule, or not, some remarks can be made. As has been seen, only 4 States depended solely on the application of a simple equidistant boundary line without any modification, whereas the remaining States, including those which used the simple equidistance method in some of their agreements, were involved in using one or more of the other methods in their other agreements. One of the said four States was a party to the 1958 Convention. That is to say, this State was, in some way or another, supposed to be inspired by the contractual obligations of Article 6.[53] On the other hand, the remaining three States were very small in number, vis à vis, the vast majority of the remaining States.[54] Yet, it could, in no way, be said that these States were applying the equidistance principle because they felt that they were applying a rule of general international law. In fact, regarding the said agreements, the *opinio juris* could hardly be proven in order to substantiate the existence of such feeling. On the contrary, it could be said that these States were using the equidistance principle as a matter of convenience in the light of reaching an equitable solution.

Regarding the remaining 56 States, they followed various choices in determining their continental shelf and maritime boundaries. These choices can be classified as follows: 1- States depended on three methods of delimitation, namely, a simple equidistance line, a modified equidistance line, and a negotiated boundary line including the parallel of latitude method;[55] 2- States followed two methods of delimitation, viz., (a) a simple equidistance line, and a modified equidistance line,[56] (b) a simple equidistance line, and a negotiated boundary line including the parallel of latitude method,[57] (c) a modified equidistance line, and a negotiated boundary line including the parallel of latitude method;[58] and 3- States applied only one method of delimitation, namely, (a) a negotiated boundary line including the parallel of latitude method,[59] and (b) a modified equidistance line.[60]

It is necessary here, therefore, to emphasise on the same conclusion that the ICJ reached in 1969 when it declared that the equidistance principle did not crystallize as a customary rule. This result, though relatively old, still has to be emphasized due to the following considerations:

1- The ICJ's conclusion was restricted to State practice prior to the 1969 North Sea cases.

2- Since the ICJ stated explicitly that that conclusion was consolidated up to the decision's date,[61] so the Court left it to future eventualities to determine whether that result would be final or would be superseded by a different one.

3- This study then is for the sake of ascertaining that even up to the present day the equidistance principle has not managed to join the corpus of customary international law.

Yet if one assumed that the rest of the world-wide States applied the equidistance principle in determining the remaining continental shelf boundaries, the status of this principle, (it seems), will never change. For the said State practice maintains the status quo and therefore suppresses any change in the legal status of the equidistance principle as it is merely a method existing in international law. It is, therefore, high time to say that the above-said State practice has established a customary rule the connotation of which is that the equidistance principle has become, customarily, "a mere method" in respect of the continental shelf delimitation between States.[62]

The foregoing conclusion is in sharp contrast with the result reached by Dr. Jagota.[63] In his opinion

> "... in a large majority of cases States have been satisfied that the median or equidistance line leads to an equitable solution or result."[64]

In fact, regarding his research, the following comments can be made. To begin with, it is not true that a large majority of States were satisfied with the equidistance method. Recalling the above cited State practice, only a very small number of States found the simple equidistance method appropriate to delimit all their continental shelf and maritime boundaries.[65] Besides, Dr. Jagota based his analysis on the delimitation question of three different concepts, namely, the territorial sea, the continental shelf, and the EEZ. As a matter of fact each of the said concepts has its own facts and circumstances which are different from the other. The delimitation of the territorial sea can almost always be easily based on the equidistance principle because its width from the shore is quite small to produce disparity in the portions of the concerned States.[66] On the contrary, as far as the continental shelf is concerned,

> "... it has been seen in case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the farther from the coastline the area to be delimited, the more unreasonable are the results produced."[67]

As for the EEZ its concept is not based on any geophysical basis, though it includes the natural resources of the seabed and subsoil. That is to say, although it extends for 200 miles from the shore its delimitation depends on different criteria other than those of the delimitation of the continental shelf. That was why in the Libya/Malta case, (1985), the concept of natural prolongation ceased to be applicable in a distance less than 400 miles between opposite States.[68]

UNCLOS III and the Equidistance Principle

As has been seen, the main controversy during the UNCLOS III concerned the weight that would be given to the equidistance principle. The division of the Conference into equity group and equidistance group was because each group viewed the equidistance principle from an angle different from that of the other. The former was in favour of considering the equidistance principle as a mere method in

international law, whereas the latter insisted on it as a principal rule in the delimitation question of the continental shelf and the EEZ. All the compromises to reconcile the differences between the two groups were doomed to failure. And because the Conference could not solve the problem, it eventually approved a compromised formula which avoided any involvement in the controversy concerning the equidistance principle (Article 83 of the 1982 Convention on the Law of the Sea).[69]

As a matter of fact, Article 83 left the delimitation question to be solved according to international law in order to reach an equitable solution. But international law in no way considers the equidistance principle to be more than a method that can be utilized where appropriate by means of satisfying the equity requirements. So, one may say, does that mean that the equidistance group has retreated its position and adopted the equidistance principle as a mere international method? The answer to this question must surely be negative, because according to the records of the Conference the controversy carried on until the last minute of its final Session. When the equidistance group eventually accepted the said formula it did so because the wording of the formula was very general and broad. In fact the equidistance group was inspired by the possibility of the wide variety of interpretations that could be arrived at by the said formula. However, since it is high time that International Law should declare, once and for all, the customary status of the equidistance principle as a mere international method, so any other interpretation is useless. i.e., the equidistance group will find itself facing a deadlock especially when Article 83 becomes in force.

Equidistance and Recent Cases

In the course of evaluating the legal nature of the equidistance principle, it is advisable to examine the stand of the judicial and arbitral cases that took place recently. The importance of this examination derives from two considerations. First, it enlightens the recent judicial opinion with respect to the legal status of the equidistance

principle. Second, judicial decisions do not usually mention only their opinions, but they examine the contemporaneous international legal status of the issue at stake as well.

So far, apart from the 1969 Cases and the Anglo-French Arbitration, five other cases have been judged, and another case is being proceeded at the time of writing.[70] The following paragraphs are going to provide a brief account on the said five cases' viewpoints concerning the equidistance principle.

Both Parties to the Tunisia/Libya Case (1982), did not appreciate the applicability of the equidistance principle.[71] However, emphasising again that equidistance did not have a mandatory character or privileged status, and because State practice was still in favour of this finding, the ICJ found that this would lead

> "... to the conclusion that, equidistance may be applied if it [would lead] to an equitable solution; if not, other methods should be employed."[72]

Correspondingly, the Court declared that if it found the applicability of the equidistance principle to the present case "... would bring about an equitable solution of the dispute, there would be nothing to prevent it from so doing ...".[73]

The Chamber in the Gulf of Maine case, (Canada & the USA,) reemphasised the fact that the equidistance principle is a mere practical method for the delimitation of the continental shelf boundaries. It says that,

> "... the second sentence of each of paragraphs 1 & 2 of Article 6 ...., do not, like the first sentence, *enumerate a principle or rule* of international law, but contemplate, *inter alia*, the use of *a particular practical method* for the actual implementation of the delimitation process."[74] [Emphasis added.]

The ICJ went a further step in the Libya/Malta case when it stated that

> "... the Court could hardly ignore the fact that *the equidistance method has never been regarded, even in a delimitation between opposite coasts, as one to be applied without modification whatever the circumstances.*" ... "It is thus certain that, for the purposes of achieving an equitable result in a situation in which the equidistance line is prima facie the appropriate method, all relevant circumstances must be examined, ...".[75]
> [Emphasis added]

The Tribunal in the Guinea/Guinea Bissau case stressed the fact that the equidistance principle is not more than a method among the other methods in international law. It provided that,

> "The Tribunal itself considers that the equidistance method is just one among many and that there is no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied."[76]

The Conciliation Commission between Iceland and Norway (Jan Mayen) took a more moderate stand in considering the equidistance principle. It said that,

> "In state practice a wide variety of situations have been used in regard to drawing boundary lines. *Frequently the median line has been chosen as providing an equitable solution. In other cases account has been taken of special circumstances leading to a great diversity of solutions in order to accommodate the relevant factors of each case.*"[77]
> [Emphasis added.]

The above citation of the recent cases viewpoints on the legal Status of the equidistance principle proves that there is an almost unanimous opinion according to which the said principle is considered as a method among many other methods in international law. For, even the most moderate opinion of them - the Conciliation

between Iceland and Norway (Jan Mayen) -, had to admit that though the equidistance principle produced an equitable solution in some cases, it had to be modified in the others where special circumstances existed.

III

Special Circumstances

When the Committee of Experts suggested the equidistance principle for the delimitation of the territorial waters and the continental shelf between neighbouring States, it realized that in certain situations the application of the equidistance method would produce inequitable solution. And it also realized that some particular circumstances should be taken into consideration in the course of the application of the said method. These circumstances were called Special Circumstances.

As the concept of the continental shelf was new in the 1940s and 1950s, very little information was available about it at the time. This little knowledge rendered it difficult to predict every possible circumstance that may affect the used method in certain situations. The establishment of the legal concept of the continental shelf, which replaced the geophysical concept, stimulated other various factors, beside the geophysical ones, to play a role in this concept. Political as well as economic factors were, therefore, involved. These three categories, - the geophysical, political and economic factors -, were (and still are) full of a great variety of factors. It follows that, if the geophysical factors were predictable, the same would not be true with respect to the other two categories. Yet the legal definition of the continental shelf rendered even the geophysical considerations to be unpredictable. For, the legal concept has its own view of these considerations. This unpredictability of the factors of the three categories affected in turn the discussion on the delimitation question by the ILC and the 1958 Conference. Accordingly, they had to provide a vague and ambiguous term which

would be a comprehensive guide to every possible factor of the said three categories, as well as any other effective factor whatsoever.

International efforts on the delimitation of the continental shelf between neighbouring States were inspired by the desire to enable every State to reach an equitable solution to its boundaries with its neighbours. Nevertheless, the limits and scope of such an equitable solution was another difficulty, or rather, an obstacle, in the way of those efforts. Would it be equal division of the continental shelf? Or would it be subject to some criterion other than giving equal share to each party? As the end of the dilemma was in favour of not giving an equal share to each party, the equidistance principle lost its importance in the delimitation question. The question is therefore, since it is not an equal division, so under what criterion should such a delimitation be carried out? In order to solve the problem it was appreciated that the equidistance principle should be regarded as a general rule from which some exceptions would be provided. Because it was quite difficult to foresee all the exceptions, the legislators had to adopt the "Special Circumstances" clause which had a broad meaning and scope, so that it could encompass every possible exception.

Nevertheless, the instigators of the "Special Circumstances" clause realized the need to provide some clarification to it. Some examples were included in the report of the Committee of Experts and in the ILC explanation on the said clause. As the special circumstances clause is the problematic area of the conventional solution, a thorough discussion concerning its meaning and scope is necessary. Such a discussion will be provided separately in Chapter V.

Section 2

The Customary Rules of Delimitation of the Continental Shelf

General

International customary law introduces another solution to delimitation of the Continental shelf between States. That is, the continental shelf boundary must be effected by agreement on the basis of equitable principles taking into account all the relevant circumstances. This solution was the product of the history of development of the continental shelf concept between 1945 and 1969 when the ICJ declared it as customary law. Agreement, equitable principles and relevant circumstances, as they are the three aspects of the customary solution, will be the subject of discussion in this Section. The discussion will attempt to define and analyse what those aspects mean and to what extent they are applicable. Furthermore, although the 1969 North Sea Cases are the principal source from which the customary solution has derived, the subsequent cases are still of considerable importance. The analysis, therefore, will concentrate on the 1969 cases as well as those subsequent cases.

The first, and foremost, case, relating to the continental shelf delimitation, was the North Sea Cases in 1969. Because Germany was not a party to the 1958 Convention on the Continental Shelf, the International Court of Justice had to search for another applicable alternative to effect the delimitation of the respective continental shelf boundaries. Denmark and the Netherlands argued that the equidistance principle had become a customary rule which meant its applicability to the dispute.[78] Germany denied the emergence of such a customary rule. However, Germany added that if the equidistance principle was judged to be a customary rule, so the irregular configuration of the North Sea coast should be considered as a special circumstance to justify a boundary line other than the equidistant.[79]

Finding that Article 6 was altogether not applicable to the dispute, the Court examined those principles and rules, that had underlain the history of the continental shelf doctrine, relating to the delimitation question. It eventually declared that, because "... no one single method of delimitation was likely to prove satisfactory in all circumstances ...",[80] the delimitation process should

> "... be effected by agreement in accordance with equitable principles, and taking account of all relevant circumstances."[81]

In addition, as an alternative solution the court envisaged that,

> "(2) if in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them; ...".[82]

With regard to the factors that are to be taken into consideration in the course of negotiations, the Court points out that they

> "... are to include:
> (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
> (2) ..., the physical and geological structure, and natural resources, of the continental shelf areas involved;
> (3) the element of a reasonable degree of proportionality; ... ."[83]

The Relation Between the Three Aspects of Solution Embodied in Customary International Law

The customary solution of the delimitation of the continental shelf between

neighbouring States consists of three basic aspects. These are, Agreement, Equitable Principles, and Relevant Circumstances. The relation between these three aspects can be seen from two different perspectives.

On the one hand, the customary solution introduces the three aspects as one single set of principles. This single set of principles is dominated by the obligation to enter into negotiations in order to reach a mutual agreement between the concerned parties. However, the function of the latter two aspects - equitable principles and relevant circumstances - is to provide the appropriate conditions according to which the negotiations must proceed. The obligation to seek an agreement, then, is the core of the customary solution which is controlled by equitable principles and the consideration of all the relevant circumstances. According to this viewpoint the three aspects are acting in co-operation and co-ordination between each other. This co-operative and co-ordinative relation renders this customary rule to have an interwoven character so that reference to each aspect is always qualified, or may be restricted by the other two aspects. That is, then, why the customary solution has not been identified by a specific set of rules, but, in fact, by a final goal. This goal is to achieve an equitable solution.[84]

On the other hand, the illustrated analysis of the preceding paragraph, can be said only in respect of the North Sea cases, (for the parties to the said cases asked the Court to identify the rules and principles that they should apply in their boundary delimitation, but not to identify the boundary line itself).[85] Nevertheless, a thorough examination of the subsequent cases leads us to see the customary solution from a different angle.

The customary solution according to another viewpoint has established two kinds of solution. The first is to attempt an agreement between the concerned parties, and the second is to seek a judicial award based on equitable principles and relevant

circumstances. Subsequently, the parties are, in the first place, "under an obligation to enter into negotiations with a view to arriving at an agreement".[86] These negotiations must be proceeded in the light of equitable principles and the consideration of all the relevant circumstances aiming at the achievement of an equitable solution. In the second place, in default of agreement a judicial decision can be sought. This judicial decision must be established in accordance with equitable principles taking into account all the relevant circumstances with a view to achieving an equitable solution.

I

The Obligation to Enter into Negotiations In Order to Reach an Agreement

As has already been said, a solution by agreement is a conventional obligation according to Article 6 of the 1958 Convention on the Continental shelf as well as under Article 33 of the United Nations Charter.[87] Every State party to the 1958 Geneva Convention or to the United Nations is under an obligation in the first place to resort to negotiations so as to solve any problem or dispute relating to the delimitation of the continental shelf. However, the agreement obligation has a special status with regard to the doctrine of the continental shelf. This special status derives from the fact that,

> "... certain basic legal notions ..., have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, ..."[88]

In addition, the Court said that the application of equitable principles must be

> "..., in accordance with the idea which have always underlain the development of the legal régime of the continental shelf in this field, namely:
> (*a*) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement ..."[89]

Agreement, in respect of the delimitation question, then, is not only a conventional or contractual obligation but also a customary one. All States are under an obligation to exhaust every possible round of negotiation as a first step towards solving any problem related to the delimitation of the continental shelf.

As a customary obligation, agreement is qualified by some conditions. Beside being meaningful,[90] negotiations must be in accordance with equitable principles. Furthermore, negotiators must consider all the circumstances that are relevant to the case concerned.[91] These three conditions render the inclusion of the obligation to enter into negotiations to be essential and not superfluous; for, negotiators must take it seriously and try their best to arrive at an equitable solution. Accordingly none of the concerned parties is supposed to insist "... upon its own position without contemplating any modification of it."[92]

II

Equitable Principles

General

The "equitable principles" term was first mentioned in the Truman Proclamation and later in some other proclamations, such as those of the Arabian Gulf States.[93] Nevertheless, the concept of equitable principles did not manage to attract the attention of legislators who codified the continental shelf doctrine in the 1950s. Because the Truman proclamation was given special status in the 1969 cases, the ICJ was most impressed with the "equitable principles" concept which was adopted as a customary principle.

To begin with, in order to explain the meaning and scope of the "equitable

principles" concept, one must differentiate between two expressions, namely, "equitable principles" and "*the* equitable principles". The meaning and scope of the latter expression is limited by means of language, whereas the former has a limitless range and meaning. That is to say, if the ICJ had used the "*the* equitable principles" clause, it would have meant that the ICJ had to identify those principles which it meant. On the contrary the Court used the "equitable principles" clause because this concept was intended to be flexible to the extent that it would be able to embrace any criterion that would be helpful in the delimitation process.

Reliance on "equitable principles" means that a just and equitable solution must be built on equitable considerations from each party to a dispute. If any circumstance, due to certain qualifications, was regarded as relevant in favour of one of the parties, so a similar circumstance, that contains the same qualifications, must be considered relevant in favour of the other party. In other words, the ground based on which a circumstance is considered as relevant to one of the parties must at the same time be the ground on which any other circumstance relating to the other party is judged. For instance, because Scilly Islands (in the Anglo-French Arbitration) was located twice as far as the Ushant Island, the Court gave full effect to the latter whereas it gave only half effect to the former.[94] The distance criterion, then, was the equitable principle that the Court sought when it was considering the said circumstances of both parties.[95]

Correspondingly, "equitable principles" has three basic functions. The first is to identify those relevant circumstances that belong to each party. In this process the "equitable principles" clause controls the selecting, classifying and judging processes of the relevance of the available factors and circumstances that are alleged, by either side, to have relevance to the case. The other function is to calculate the degree of effect of the accepted relevant circumstances. And the third is to identify the method, or the methods, of delimitation that are appropriate to the case concerned.[96]

"Equitable principles", therefore, is not a quantitative expression. Rather it is qualitative ~~clause~~. That is to say, the emphasis must always be on the word "*equitable*" more than on the word "*principles*". For, it is patently obvious that any principle, procedure or consideration can be applied in order to secure an *equitable* solution.

In order to add more clarification to the meaning and scope of the "equitable principles" term, another fact must be taken into consideration. A delimitation according to equitable principles does not necessarily secure a just and equitable share to each party. A just and equitable share might be one of the solutions that are examined in the process of balancing of the various considerations relating to the concerned case. For, the final, or rather the principal goal is always to achieve an equitable solution whether it results in equitable shares or incomparable shares. That was why the Court in the 1969 Cases rejected the German demand which asked for a just and equitable share.[97] The Court pointed out that,

> "Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical."[98]

Despite the above provided explanation, the concept of "equitable principles" still sounds vague and ambiguous. This Vagueness does not derive from unexhaustive clarification. Rather it derives from the broad meaning of the "equitable principles" concept which leaves considerable room for two gaps. On the one hand, the vagueness of the concept might lead to a subjective allocation of the principles according to which the final delimitation is contrived. On the other hand, the said vagueness might, and is very likely to lead to a subjective identification and weighing of the relevance of some, if not all the, circumstances. These two gaps jeopardize the possibility of reaching a

just and equitable solution which must be built on objective criteria.[99]

It may, however, be advisable to go into more explanation of the aspects of the "equitable principles" concept before delivering the final relevant evaluation. Equity is one of the foremost aspects of the said concept in which the discussion in the following paragraphs will be interested.

The Concept of Equity

The concept of equitable principles had the opportunity for more clarification when the ICJ endeavoured to explain the meaning of equity. Although "equity" is a well known concept in both Municipal and International Law, it has been cast with a unique meaning in respect of the delimitation of the continental shelf between States. However, this unique meaning has never been directly explained, which indicates that its real meaning has remained obscure. Yet most of the efforts have been directed to clarify the restrictions that control this concept more than to clarify the meaning of the concept itself. This study, therefore, is going to follow a way of clarification similar to the said one, i.e. to clarify the restrictions that controls the concept of equity. Nevertheless, an attempt to find a suitable definition will be attempted at the end.

To begin with, "... equity does not necessarily imply equality." This principal restriction of the equity concept results in the following findings: First, It excludes any possible meaning that gives each party an equitable share of the disputable continental shelf.[100] For, a just and equitable share

> "... is quite foreign to, and inconsistance with, the basic concept of continental shelf entitlement, ...".[101]

Second, it excludes the concept of abstract justice. In this respect, the Court explains that,

> "..., it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, ..."[102]

Thus, the unique concept of equity in the field of the delimitation of the continental shelf produces its own concept of justice. It is not "simply as a matter of abstract justice". It is, in fact, a *relative* justice, the achievement of which passes through the application of equitable principles and the balancing of all the relevant circumstances.[103]

Third, according to the said unique concept of equity,

> "[t]here can never be any question of ***completely refashioning nature.***"[104] [Emphasis added].

The word "*completely*" means, then, that there could be some room for redressing some of the inequalities produced by nature. That was why the Court, in the North Sea Cases, did not accept the disparity that would have been produced by the application of the equidistance method, although this disparity was originally, produced by a natural phenomenon - the concavity of the North Sea case. Equity, therefore, is

> "... not a question of *totally* refashioning geography whatever the facts of the situation *but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.*"[105] [Emphasis added]

In the same meaning, the Court ~~of Arbitration~~ stated that,

"*Just as it is not the function of equity* in the delimitation of the continental shelf *completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity.*"[106] [Emphasis added]

"The function of equity, ..., is not to produce absolute equality of treatment, *but an appropriate abatement of the inequitable effects of the distorting geographical feature.*"[107] [Emphasis added]

Fourth, equity, on the same plain, excludes an award in accordance with *ex aequo et bono*. A decision *ex aequo et bono* cannot be taken unless it is asked for by the parties themselves.[108] However, the Court's rejection of such a decision derives, beside the said reason, from another fact. That is,

"... when mention is made of a Court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*"[109]

Equity with regard to the continental shelf delimitation, therefore, means *an objective balancing of all relevant factors and circumstances of a given case in the light of equitable principles in order to achieve an equitable solution leaving to each party all those areas that constitute its natural prolongation without encroachment on the natural prolongation of the other party.*

If the said definition was compatible with the real meaning of equity in this field, the following observations can be made. First of all, as a matter of fact, there has not, as yet, been an exhaustive list of the relevant factors or circumstances. That is to say, the possibility of including new unforeseen circumstances will leave the door ajar for a subjective identification of some circumstances as relevant to the case concerned. This

gap sustains quite a good possibility of reaching a subjective decision, since the decision is built on a subjective allocation of some circumstances.

Secondly, the said balancing of the relevant circumstances depends on each case's merits.[110] Accordingly, a weight given to a relevant circumstance in a given case does not mean that the same circumstance will be given the same weight in another case, (the clearest example for the case in point is the position of islands as a relevant circumstance).[111] These variegated weights that may be given to the same circumstance in various cases create another possibility of a subjective balancing of relevant circumstances.

Thirdly, the identification of the goal of equity as to achieve an equitable solution is quite ambiguous. Despite the Court's fundamental reliance on the notion of equitable solution as a final goal, it did not volunteer any explanation to it. In fact, the Court's reliance on the said notion can be interpreted in two ways. The first is that the Court relied on a well known meaning of the equitable solution notion. This interpretation is manifestly wrong if one considers the uniqueness of the continental shelf doctrine with special indication to the delimitation question.

The other possibility, which is more likely to be correct, is that the Court has relied on the above-said unique meaning of the notion of equity. In this case the adjective "equitable" of the notion "equitable solution" can be interpreted according to the said meaning of equity. If this contention is correct, It is tantamount to saying that "equitable solution" is a *relative* concept, i.e. it varies from one case to another, (for, as has been seen above, the notion of equity is a *relative* concept). This leads to two observations. Firstly, bearing in mind that "equitable solution" is a *relative* concept, it contains the perils of subjectivity which are said to be attributed to the notion of equity. Secondly, when the Court identified the final goal of the delimitation process it was inspired by the idea that it should *provide more safeguards to secure an objective*

delimitation of the lateral boundaries of the continental shelf. However, since the concept of equity controls the means - "equitable principles" - and the goal - "equitable solution" -, then there is no room for any safeguard to guarantee an objective allocation of the continental shelf between States. Yet it can be said, what is the need for the identification of the goal so long as the means are based on the same concept!

In conclusion, equity cannot be an objective criterion unless it bridges the above-said gaps. That is to say, it must have an exhaustive list of relevant circumstances, a clear criterion to weigh those relevant circumstances, and a clear identification of the meaning and implication of the notion "equitable solution".

The Concept of Natural Prolongation

Like the other aspects of the continental shelf doctrine, the "natural prolongation" has been one of the most entangled concepts in international law. Although the concept was originated in the Truman Proclamation, it had no significance until it was conceptualized in the North Sea Cases in 1969. From that time on the concept of natural prolongation has passed through various channels of development. It has consequently has become so complicated that its notion has been almost impossible to clarify. However, an attempt to expose some of the relating facts will be made here in order to enlighten some of the grey areas of the said concept.

Truman Proclamation and the Concept of Natural Prolongation

The Truman Proclamation stated that, the continental shelf

> "... may be regarded as an extention of the land-mass of the coastal nation and thus naturally appurtenent to it, ..."[112]

Since the Truman proclamation was considered the starting point of the history of the

continental shelf, so it is of great importance to know what is meant by the concept of natural extension of the land-mass. The proclamation did not contain any clarification in this respect. However, as was indicated in the first Chapter, the said proclamation was inspired by the geological definition of the continental shelf.[113] That is to say, the natural prolongation concept was based on a geophysical ground to mean the natural geological land continuation into and under the sea. This interpretation could be proven by the legal and geoscientific literature that was established during the 1940s and early 1950s.

Nevertheless, the work of the ILC and the UNCLOS I (1958), which produced the legal concept of the continental shelf, would lead to a different interpretation. The natural prolongation concept was not discussed or even mentioned during the ILC work or the UNCLOS I. However, the abandonment of the geological definition of the continental shelf in favour of the legal definition tempted the interpretation of the natural prolongation to vary from the above-said one. According to the legal definition the concept of natural prolongation would have a legal connotation instead of a geophysical basis.[114] This new interpretation gained considerable support from the ICJ decision in 1969 when it reshaped the said concept into a legal notion that was alienated, to an extent, from its geological notion.

State Practice and Natural Prolongation.

In the course of approaching the real interpretation of the natural prolongation concept it may be necessary to see whether State practice has any use in this regard. Although the natural prolongation concept was mentioned in numerous proclamations, none of these proclamations volunteered any explanation concerning its meaning. State practice, with respect to the meaning of the natural prolongation concept, is helpless but to assert the significance of this concept. Nonetheless, it is very likely that the mention of the natural prolongation concept in the said proclamations has been inspired by the verified scientific viewpoints of the continental shelf. For instance, both parties to the

Tunisia/Libya case based their contentions on geoscientific viewpoints;[115] and the UK, in the Anglo-French Case, based its contention on a geological connotation of the natural prolongation concept when it spoke of the "essential geological continuity" of the continental shelf.[116] This idea is likely to prove that State practice, generally speaking, has been in favour of the geophysical basis of the natural prolongation concept.

The 1969 Cases and the Concept of Natural Prolongation

The ICJ in the 1969 cases was the first to conceptualize natural prolongation into a basic principle in the continental shelf doctrine. Delimitation of the continental shelf in the Court's view is not an apportionment of the respective areas; for, these areas already, in principle, have belonged to the coastal State. The Court's rejection of giving each party to the said dispute a just and equitable share is founded on that,

> "[d]elimitation is a process which involves establishing the boundaries of *an area already, in principle, appertaining to the coastal State and not the determination do novo of such an area.*"[117] [Emphasis added]

This notion, in the Court's view, is the natural continuation of the land into and under the sea which is considered the basis of the most fundamental rule of the continental shelf doctrine. The Court points out that,

> "... what the Court entertains no doubt is the most fundamental rules of law relating to the continental shelf, ..., - namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extention of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources."[118]

Has The Natural Prolongation Been The Favourite Son And Then, Later, The First Victim Of The ICJ ?

The natural prolongation concept was the first born of the ICJ when it rationalized the basis of the doctrine of the continental shelf. The same concept, however, was the first concept of the continental shelf doctrine to be victimised when its concept became very complicated and confusing. The Libya/Malta Case, as will be seen, was a turning point in the history and development of the natural prolongation concept for, this concept was nearly sentenced to death in the said case.

In 1969 the International Court of Justice was under the impression that the foundation of the doctrine of the continental shelf had to be of a concrete basis. So, having thoroughly examined the said doctrine, the ICJ realized that the entitlement of States over their continental shelf had derived from the fact that,

> "... the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea."[119]

In this sense, the natural prolongation concept, in the court's viewpoint, is the fundamental basis of the entitlement over the continental shelf which "exist *ipso facto* and *ab initio* by virtue of" the State's sovereignty over its land.[120]

The concept of natural prolongation, on the other hand, was not only considered a fundamental basis of entitlement, but also it was considered to have the same value with regard to the delimitation question. The "equitable solution" concept, as it was envisaged to be the final goal of the customary solution, was fundamentally based on the concept of natural prolongation. The portion of the continental shelf of each State, according to the customary solution, must

"... be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State."[121]

As it was given a fundamental character for both the entitlement and delimitation of the continental shelf, the concept of natural prolongation was, then, the favorite born of the ICJ. However, the development of the continental shelf doctrine throughout the subsequent cases proved the said concept *to seem* to have a less, or perhaps degrading importance.

The greatest debate was whether the concept of natural prolongation had a geophysical, or legal, or a combination of both legal and geophysical connotation. As this question was not settled, States tried to interpret the said concept according to the way they preferred it to be. In the example of the Tunisia/Libya Case the parties tried to prove, scientifically, their land's natural continuation into and under the sea. With the aid of Plate Tectonic and other geological doctrines, each party tried to convince the Court that the disputed area of the continental shelf constituted its territory's extension into the sea. Examining the host of scientific research made by both parties, the Court eventually rejected both sides' contentions saying that, it

"... is ... unable to accept the contention of Libya that "once the natural prolongation of a State is determined, delimitation becomes a simple matter of complying with the dictates of nature". ... . Nor can the Court approve the argument of Tunisia that the satisfying of equitable principles in a particular geographical situation is just as much a part of the process of the identification of the natural prolongation as the identification of the natural prolongating is necessary to satisfy equitable principles."[122]

What does natural prolongation mean then? The Court carried on to say that

"The satisfaction of equitable principles is, in the delimitation process, of cardinal

> importance, as the Court will show later in this judgment, and identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation, in view of its significance as the justification of continental shelf rights in some cases; but the two considerations - the satisfying of equitable principles and the identification of natural prolongation - are not to be placed on a plane of equality."[123]

Having said so, the ICJ seemed to have dealt the first blow to the natural prolongation concept. The fundamental character of the said concept seemed to be restricted to its role as a basis of entitlement. As for the delimitation question, the concept of natural prolongation became workable only as a matter of convenience. That is to say, the natural prolongation concept became merely a factor among the other factors to be taken into account when the delimitation process would be carried out. Consequently it is subject to the balancing process which will decide whether the natural prolongation factor is able to be taken into account or not.

In the Libya/Malta Case, the Court was more firm in suppressing any contention based on the natural prolongation concept. Because the Court declared the emergence of the EEZ concept, it realized that the continental shelf concept and the EEZ coincide and overlap with each other for a distance of 200 nautical miles from the shore. This idea lead the ICJ to declare the inapplicability of the concept of natural prolongation within this distance in favour of the distance criterion. And in order to rationalize its viewpoint, the Court commented that

> "This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, ..., is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concept of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf."[124]

With this development in mind, the question here is, did the ICJ sentence the natural prolongation concept to death within the 200 miles EEZ distance? Did the ICJ substitute the said concept for the distance criterion? And in this case what is the legal status of the natural prolongation concept with respect to the entitlement and delimitation aspects of the continental shelf?

The Status of the Natural Prolongation Concept

As has been said above, the natural prolongation concept was alienated from the geophysical connotation since the early 1950s when the ILC chose the legal notion of the continental shelf doctrine. However, the development of the said concept, especially since it was first conceptualized by the ICJ in 1969, succeeded in complicating the concept rather than eliminating its vagueness. In this sense the ICJ said that,

> "..., natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, ...".[125]

What does this mean?

Does this mean that the said concept began as a geophysical concept and then its development has taken it to a juridical connotation? or Does it mean that the natural prolongation concept has, since the very beginning, been a juridical concept and has never been a geophysical notion?

As for the first question it can, only, be answered in the light of the interpretation that the natural prolongation concept, when it was originated in the Truman Proclamation, had a geophysical conception. However, the development of the concept of natural prolongation has paralleled the development of the continental shelf doctrine, i.e., the said concept has developed into a legal concept.

If the answer to the second question that natural prolongation has, from the start, been a juridical concept was in the affirmative, then the ICJ meant the starting point of the natural prolongation concept to be instigated in the 1969 Cases, for, ever since then natural prolongation has been a juridical concept. Nevertheless, since in both cases the natural prolongation concept, regardless of its origin, is a juridical concept, so the question is, what does juridical concept mean? It obviously means that it has a legal definition which is different from its geological or geomorphological conception. Then what is the legal definition of the natural prolongation concept?

The legal notion of natural prolongation can be seen from two different perspectives. In the first place, since the origins of the natural prolongation concept has its roots in the physical structure of the continental shelf, so the said concept is not completely alienated from the geophysical connotation. In fact, it remains partly dependent on the geophysical structure of the continental shelf. That was why the interruption of such a physical structure was invoked in a number of cases under the title of natural prolongation, (e.g. the Hurd Deep faults in the Anglo-French Case, Tripolitanian Furrow in the Tunisia/Libya Case, and the so called "rift zone" in the Libya/Malta Case).[126]

This finding can, indeed, be proven another way. That is to say, the partial geophysical implication of the natural prolongation concept can be deduced from another fact. The partial dependence of the legal continental shelf doctrine on the geophysical structure of the continental shelf renders all the aspects of the continental shelf doctrine to have the same partial dependence on this geophysical structure. Besides, natural prolongation, as will be seen hereafter, has two interwoven conceptions. Natural prolongation in the first instance is a general principle, whereas it is a relevant factor in the second. Being a relevant factor, natural prolongation, as will also be seen, is a geological factor. And because this factor is applicable only in a small

number of cases, so, that indicates that natural prolongation, at least in such cases, depends on the geophysical structure of the geological continental shelf.

Secondly, the partial dependence of the juridical natural prolongation on the geophysical facts relates more to the geological, than any other aspects of the geophysical structure of the continental shelf. International Law is not interested in the geological theories or interpretations of origins, emergence, and movements of the continents or any other natural structures of the earth.[127] It is, in fact, more interested in the geophysical facts and realities based on which it can establish a rule of law or a judicial decision. It is this idea that underlain the Courts rejection of both parties' contentions in the Tunisia/Libya Case when both countries invoked the geoscientific doctrines to prove that the direction of the whole continent or only the direction of the Tunisian platform was in favour of one of them at the exclusion of the other.[128]

The legal concept of natural prolongation then is applicable when it can be proven by physical facts which enjoy no doubt of their existence. Based on this finding two observations are worthy of note. First, the natural prolongation concept can be applicable in only a few cases.[129] Second, there is no burden of proof on either party to a dispute because, the concerned judicial organ applies this concept whenever such a geophysical fact exists in reality.

Thirdly, Based on the above-said findings, the natural prolongation conception can be understood as a factor among the other factors, the balancing of which is supposed to produce the fairest equitable solution. The degree of effect of this factor depends always on, first, the existence of certain geological facts, and second, on the degree of seriousness of the said facts. It is on this ground that the Court, in the Libya/Malta Case, rejected the consideration of the so called "rift zone", because it could not constitute "a fundamental discontinuity" of the respective continental shelf.[130]

The fundamental discontinuity, therefore, is the principal idea that underlies the natural prolongation concept. That is to say, the natural prolongation concept is that sort of concept which can be proven in a negative way. This negative way is the existence of a natural fundamental discontinuity of the continental shelf.

Fourthly, the remaining question is, if the natural prolongation concept has become a factor among the other relevant factors, so how can this finding be reconciled with the Courts finding in the 1969 Cases? In the 1969 Cases, as has been seen earlier. "natural prolongation" was considered a fundamental principle to effect both the entitlement and delimitation of the continental shelf. The development of the concept, on the other hand, proved the natural prolongation concept to be a mere factor which might, or might not, play a role in the delimitation question. However, in order to reconcile these two findings which, in principle, contradict each other, some discussion is necessary here.

To begin with, based on paragraph 19 of the 1969 ICJ judgement there is no doubt that the natural prolongation concept is considered the basis of entitlement of the continental shelf, regardless of whether it was a descriptive expression or a normative concept.[131] As for the delimitation question natural prolongation can be understood to have two overlapping senses. Since the said concept is the sole basis of title which "exist *ipso facto* and *ab initio* by virtue of" the State's sovereignty on its land, so each State must have that part of the continental shelf which constitutes its natural prolongation into and under the sea. And so long as "natural prolongation is a juridical concept which is built on legal and certain geological facts, two remarks must be made. On the one hand, the objective of the natural prolongation concept is those areas of the continental shelf which, though exist *ab initio*, are identified by the delimitation process itself. That is not to say that the delimitation process creates or establishes

what constitutes the natural prolongation of the coastal State. The delimitation process is, in fact, the manifestation or declaration of the natural prolongation which already belonged to the State concerned. Natural prolongation, therefore, is not the delimitatory result.[132] Rather it is a juridical fact that is attributed *ipso facto* and *ab initio* to the coastal State; and it is, therefore, a normative concept but not descriptive expression.

On the other hand, the above-said interpretation of the concept can be understood to be the general principle of natural prolongation. This general principle, however, is qualified by the existence of certain geological circumstances in some cases. This restriction makes the natural prolongation concept play an auxiliary role beside its main role as a general principle. According to this auxiliary role the natural prolongation concept becomes just a factor among the other factors which are relevant to the case concerned. Being a factor, "natural prolongation" can be proven, as has already been seen, in a negative way, i.e., the existence of the natural discontinuity of the continental shelf. Natural prolongation as a general principle is applicable in all cases; for, it is considered the basis for both the entitlement and the delimitation of the continental shelf. At the same time, and conversely, natural prolongation as a relevant factor is applicable only in certain cases that could satisfy certain conditions which will be the subject of a separate discussion.[133]

Section 3

Conclusion

Having given a brief account on both the Conventional and Customary rules and principles relating to the delimitation of the continental shelf between neighbouring States, the discussion comes to the following conclusions.

General

To begin with the Conventional rule', as was enshrined in Article 6 of the 1958 Convention on the continental shelf, introduces a three-point solution. This three-point solution presents two basic rules of delimitation. The first is the rule that contains the obligation to enter into negotiations in order to achieve an agreement. Those negotiations must be serious and meaningful, and must be guided by the spirit of equitable principles which take account of all the special circumstances. The second, which is considered as an alternative solution in default of agreement, is the equidistance/special circumstances rule. The rule here stated is composed of a general rule and an exception. The equidistance principle is considered a general rule which is qualified by the special circumstances clause. According to the history of development of the continental shelf doctrine the combined character of the equidistance/ special circumstances rule was underlain by the desire that the delimitation process should achieve an equitable solution.

Two main problems are attributed to the Conventional rules. The first is concerned with the legal status of the equidistance principle. As for this problem, it is suggested that despite the consideration of the equidistance principle as a general rule, which means its obligatory character, the role that this principle plays in the Conventional rules is reduced to its lowest effect The degree of emphasis that can be had to the equidistance principle as a conventional obligation is mitigated by the inclusion of the special circumstances clause which made the legal status of this principle similar to that of the same principle in customary international law.

The other problem, or perhaps the other loophole, is the vagueness of the special circumstances clause. The meaning and scope of this clause was left without a reliable explanation. According to the available records the only relevant information

concerning the special circumstances clause were those which provided a few scattered examples (these examples were stated by the ILC and some of the judicial organs in the relevant cases). This problem is the most serious problem of the continental shelf delimitation question which, therefore, will be discussed, thoroughly, in Chapter V.

Correspondingly, although the Customary solution, like the Conventional solution, puts first the obligation to resort to agreement, the former solution consists of one single set of principles. The delimitation process, whether by agreement or by any other means, should be carried out in accordance with equitable principles taking into account all the relevant circumstances. Besides, having found that every case of delimitation was unique, and it was quite difficult to find one single reliable rule that could be applicable to all cases, the customary solution found it more appropriate to seek one final goal instead of one rule. That is, the delimitatory result should always contrive an equitable solution.

One of the most entangled principles, that is attributed to the customary solution, has been the natural prolongation concept. Because the natural prolongation concept was considered as the basis of title of the continental shelf doctrine, the greatest debate, with regard to the delimitation question, was whether this concept had a geophysical, or legal, or both geophysical and legal connotation.

As the end of the debate was that the natural prolongation concept had been a juridical concept, the remaining question is, what is the implication of such a juridical concept? Bearing in mind its development, especially throughout the related judicial cases, the natural prolongation concept is found to have two interwoven connotations. The first introduces the natural prolongation concept as a general principle which constitutes the basis of title to the continental shelf [doctrine] (i.e., it is a basis for both the entitlement and delimitation matters). In this case, the natural prolongation concept

is a pure legal concept which exists *ipso facto* and *ab initio* for the benefit of all States. The second is that, the natural prolongation concept constitutes a geological relevant circumstance in some cases where it is proven by the existence of a fundamental natural discontinuity of the relevant continental shelf. This indicates that the natural prolongation concept, in the said sense, is based on some pure geological facts. Based on what has been said, the juridical concept of natural prolongation is a combination of legal and geological considerations. In other words, the juridical natural prolongation is a legal concept which depends, partially, on some geological facts.

As for the equidistance principle, the Customary solution does not regard it as having a prior character in the delimitation question. Rather it is considered a method among the other methods in international law. The only distinction which the equidistance has, in view of the Customary solution, is that it has a scientific character, as well as easiness and practicability in application. The equidistance principle, therefore, has no privilege with respect to the other international methods. For, the utilization of any method, whether it is the equidistance or any other one, is examined in the light of achieving an equitable solution.

The Customary solution suffers from three gaps. In the first place, its principles are very broad and vague. Equitable principles, equity, and equitable solution are ambiguous terms for two reasons. Firstly, there has not been sufficient explanation as to what each term means. Secondly, Those terms have been given a *relative* meaning which varies from one case to another.

The second loophole is that, despite the mention of a number of principles to guide the delimitation process, the Customary solution is dominated by only one concept. That is the concept of equity which has a *relative* and ambiguous meaning. It is, therefore, quite difficult to secure an objective delimitation process since the concept

of equity is open to misinterpretation. The lack of sufficient criterion/criteria, by the aid of which the objective character of equity can be achieved, is the major problem that faces the Customary solution.

The third is the vagueness of the relevant circumstances clause. Like the "special circumstances" clause in the Conventional rules, the "relevant circumstances" clause has not been given enough explanation. The ICJ found it appropriate to mention some examples of those relevant circumstances. However, these examples were of very little help in illustrating or setting a precedent to judge other unforeseen circumstances in other cases. Yet according to the available records, it is definitely not easy to find any objective criterion in the light of which any circumstance can be judged whether it is relevant or not. Because this problem is the most serious of all, it will be discussed in Chapter IV.

Comparison & Conclusion[134]

The above citation of the Conventional and Customary solution leads to the following conclusions. First, both Customary and Conventional solutions introduce the obligation to resort to agreement in the first place. Yet the conditions for agreement in both solutions are identical.

Second, the Conventional solution establishes an alternative obligation to guide the parties in default of agreement, whereas the Customary solution leaves the matter to the judicial organs which will decide the appropriate solution in the light of the applicable rules and principles.

Third, although it seems that the Conventional solution gives more weight to the equidistance principle than the Customary solution, the actual weight which is given to the equidistance principle in both solutions is quite similar. The inclusion of the

"special circumstances" clause in the Conventional solution has mitigated the weight that is given to the equidistance principle to its lowest effect so that it has become the last resort when no other solution proves to satisfy the requirements of the fairest equitable solution. Obviously, it is the same weight which is given to the equidistance principle in the customary solution.

Fourth, without any question of the relation between Customary Law and Treaty Law; and regardless of the fact that the Conventional solution is applicable only between the parties to the 1958 Convention on the continental shelf whereas the Customary solution is applicable to all cases; the relation between the Conventional and Customary solutions, with regard to the delimitation question of the continental shelf, can be understood to have a unique status. Article 6, as it presents the Conventional solution, introduces two specific rules, agreement and equidistance/special circumstances rules. These two rules are supposed to be controlled by the relevant principles in international law. Customary solution, on the other hand, does not introduce, apart from the obligation to resort to agreement, any specific rules. Rather, it establishes some principles according to which the delimitation process is carried out. Equitable principles, equity, equitable solution, and natural prolongation, represent general principles which guide States in their endeavour to arrive at a reliable solution to delimitation of the continental shelf.

When the ICJ was asked to identify the rules and principles that are applicable to the delimitation question of the continental shelf it exerted most of its efforts to review the history of the development of the continental shelf doctrine. The Court eventually, instead of declaring some applicable rules, declared some general principles to guide States efforts in their delimitations. That is to say, there was an underlying acceptance of the available rules at the time. The Court found that the available Conventional rules are sufficient to effect any delimitation. However, the Court had to bridge two gaps.

The first was that the Conventional solution was applicable only between the parties to the 1958 Convention. The second was that the wording of Article 6 was broad and ambiguous.

In order to bridge the said two gaps, the Court found that the best solution was to adopt some principles, instead of rules, which were said to be the Customary solution. In so doing the Court bridged the first gap by considering these principles as a Customary solution which indicates its applicability to all cases.

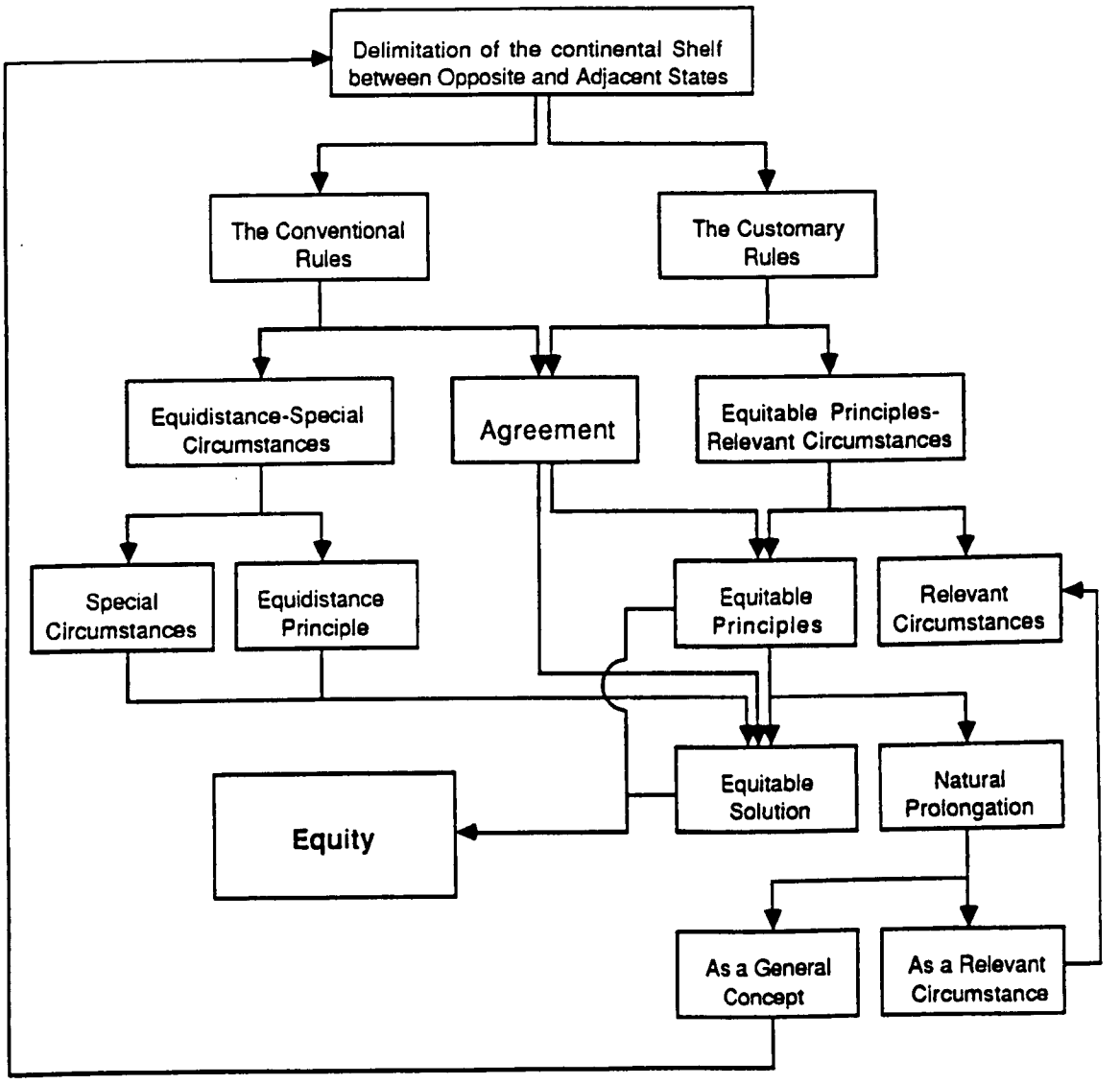
As for the second gap, the Court has established, as has been said, some general principles and not rules. For, if it had established some rules, so the question would have been related to the relation between Customary Law and Treaty Law. By establishing only general principles, the Court proved the fact that it found the relating Conventional rules to be acceptable. However, it also found that these rules needed some clarification and restrictions so as to be applicable in all cases without misinterpretation. That was why the Court tried to provide some explanations and restrictions to the Conventional rules through the Customary principles which it established. For instance, the concept of equity, especially in its unique meaning, constitutes a sort of guideline according to which the Conventional rules can be understood more easily. Yet the concept of equity constitutes some sort of restrictions in the light of which the Conventional rules are controlled. From this one can deduce that the Conventional solution of the delimitation of the continental shelf is regulatory, whereas the Customary solution is explanatory.[135]

The pressing question here is, does this mean that the Conventional and the Customary solutions are the same? The answer to this question can be seen from two different perspectives. The first, which is the rigid answer, is that the two solutions vary from each other. For, the strict interpretation of the wording of Article 6 leads to some differences between the two solutions, (such as the legal status of the

equidistance principle, and the special circumstances clause in comparison with the relevant circumstances clause). The second, which is the flexible answer, is that the two solutions are the same.

Figure II:1

The Relation Between the Conventional Solution and the Customary Solution Of the



Taking a moderate stand, the Conventional and Customary rules can be said to be very similar. For, as it has been said previously, the Customary solution constitutes a

set of principles the function of which is to explain and guide the Conventional rules in order to be applicable to all cases. Besides, the legal status of the equidistance principle is very similar in both solutions. However, with regard to the "relevant circumstances" clause, (of the Customary solution,) and the "special circumstances" clause, (of the Conventional solution,) there seems to be a need for more discussion to see whether they are similar in both solutions or not. The said two clauses will be the subject of discussion in Part II.

Notes

1- For instance, France made three reservations, see infra note No 2; and Yugoslavia one reservation claiming that it "... recognizes no special circumstances in the delimitation of its continental shelf boundary.", 552 UNTS, (28.1.1966), P. 422; and also Iran and Venezuela; see Oda, Shigeru, Boundary of the Continental Shelf, Japanese AIL., Vol. 12., (1968), P. 264, at 264-265.

2- This case happened, for instance, between France and the UK. in the Anglo-French Arbitration (1977-78). France made three reservations to Article 6 and in response the UK. made an objection to these reservations. As the Court found that the areas referred to in the first reservation were beyond its jurisdiction, (Para., 71), and the second reservation was not applicable, (Para. 72-73), it took into account the third one and decided that Article 6 was excluded from application in the Channel Islands area and that the customary rules were applicable therein instead, (Para. 74).

3- The ICJ (1969) Report, Para. 72; see also below, The Equidistance Principle, this Chapter, Section 1, Subsection II.

4- Ibid., Para. 73.

5- Ibid., Para. 75-80; and the Court's final conclusion on State practice in Para. 81.

6- Ibid., Para. 77-78.

7- Ibid., Para. 55.

8- See below, Multilateral State Practice and the Equidistance Principle, this Chapter, Section 1, Subsection II.

9- The ICJ (1969) Report, Para. 85.

10- The Anglo-French Arbitration (1977-78), Para. 68 &70; see also below, The Equidistance Principle, this Chapter, Section1, Subsection II.

11- The ICJ (1969) Report, Para. 86.

12- It is a conventional obligation according to Article 33 of the Charter of the UN; as well as a Customary obligation, see below, this Chapter, Section 2, Subsection I.

13- Andrassy said that, "[t]he rule that the boundary line shall be determined by agreement between the interested States is superfluous.", Andrassy, Juraj, Application of the Geneva Convention, 1958, in Delimiting the Continental Shelf of the North Sea Area, Revue Egyptienne De Droit International, 1967, P. 1, at 5; see also his book International Law and the Resources of the Sea, Colombia University Press, New York and London, 1970, at 92; see also, Grisel, Etienne, The Lateral Boundaries Of The Continental Shelf And the Judgement of the International Court of Justice In the North Sea Continental Shelf Cases, 64 AJIL (1970), P. 562, at 564-570.

14- The ICJ (1969) Report, Para. 47, see also Para. 86.

15- Ibid., Para. 55.

16- Ibid., Para. 85.

17- Ibid.

18- See below, Bilateral and Multilateral Agreements, this Chapter, Section 1, Subsection II, P. 79-81.

19- Andrassy, Juraj, supra note No 13, at P. 93.

20- Churchill, R.R., & Lowe, A.V., The Law of the Sea, Manchester University Press, Revised Edition, 1988, P. 155.

21- Geographically, if regularity was defined in terms of straight or, even, semi-straight configuration, and irregularity was defined otherwise, that would mean that one could hardly find any regular coast; this idea was also emphasised by Friedmann, Wolfgang, The North Sea Continental Shelf Cases - A Critique, 64 AJIL, (1970), P. 229, at 237-239.

22- Whiteman, Marjorie, Digest of International Law, Department of State Publication, 1965, Vol. 4, P. 907-908.

23- Ibid., P. 908.

24- Ibid.

25- ILC Report, 1953, 48 AJIL, (1954), Supp. P. 1, at 36, Para. 82; see also above, The ILC and UNCLOS I Work, Chapter I, Section 3, P. 38

26- The Anglo-French Arbitration (!977-78), Para. 72.

27- Ibid., para. 70.

28- See Judge Tanaka, Dissenting Opinion, the ICJ (1969) Report, P. 186.

29- The Anglo-French Arbitration (1977-78), Para. 68.

30- The ICJ (1969) Report, Para. 72.

31- Ibid.

32- See above, The Legal Nature of Article 6, this Chapter, Section 1, P. 70.

33- Italy, pending agreement, the median line, 1967; Kuwait, in the information that was given by the Permanent Commission to the UN in 1972, the median line was suggested; Malta, 1966; Norway, 1963; Oman, 1972; and India, pending agreement and unless otherwise agreed on, the boundary must not extend beyond the median line, 1976; .

34- Cayman Islands, 1969; Costa Rica, 1967; Denmark, 1963; Finland, 1965; France, with three reservations, 1968; German D.R., 1964, and in 1968, according to Article 6 with special effect to the median line; Madagascar,1970; Malaysia, 1968; South Africa, 1963; Sweden, 1966; Turkey, in the information given by its Mission to the UN in 1968,it said that, "it is normally stipulated that those undertaking the drilling should conform to the provision of the Convention on the Continental Shelf"; USSR, 1968.

35- 11 proclamations; these are, Abu Dhabi, 1949; Ajman,1949; Bahrain, just principles, 1949; Dubai, 1949; Qatar, 1949; Ras Al Khaimah, 1949; Saudi Arabia, 1949; Sharjah, 1949; Umm Al Qaiwain, 1949; the USA, 1945; and Kuwait, 1949.

36- 3 proclamations; these are, Costa Rica, 1949; Honduras, 1957; and Mexico, 1945; on the basis of reciprocity;

37- 2 proclamations; these are, Iraq "full adherence to the rules and principles of international law" in its information to the UN in 1968, and P.D.R.Yemen, 1970.

38- 6 proclamations; these are, Australia,1953, and Papua New Guinea,1953, unilateral action in accordance with the principles of International Law; F.R. Germany, by Agreement, 1964; Nicaragua, by treaty and law, 1950; Iran, in conformity with the rules of equity, 1955; Chile, Ecuador, and Peru, Declaration of 1952, the parallel of latitude.

39- Argentina, 1946, 1966, and 1973; Bahamas, 1948, and 1970; Brazil, 1950; British Honduras, 1949; British Solomon Islands, 1970; Canada, 1970; Cyprus, 1972; Dominican R., 1952, 1967, and 1977; Figi, 1970; Ghana, 1963, and 1973; Ireland, 1968; Israel, 1952; Jamaica, 1948; Korea

R., 1952; New Zealand, 1964; Nigeria, 1969; Panama, 1946, and 1967; Papua new Guinea, 1977; Sarawak, 1954; Seychelles, 1962; Spain, 1966; Sri Lanka, 1976; Sudan, 1970; Trinidad & Tobago, 1945; Tonga, 1970; UK, 1964; Venezuela, 1956; Yugoslavia, 1965; Guatemala, 1949; Iceland, 1948; Portugal, 1956; Chile, 1947; Ecuador, 1950; El Salvador, 1950; Peru, 1947; Phillipinese, 1949; Sri Lanka (Ceylon), 1959; Mauritania, 1962; Cook Islands, 1977; India, 1955, and 1959; Honduras, 1950; and Iraq, 1957.

40- These materials have been collected from, ILM, 1962-1988; Limits in the Seas, Series A, office of the geographer, Department of State, USA, No 1- 100; Churchill, Nordquist, Lay, and Simmonds, New Directions in the Law of the Sea, Vols. 1, IV, V, and VIII; UN Legislative Series, ST/LEG/SER.B/ No 15, 16, and 18; UNTS, 1971-1980; and UKTS, 1984.

41- Fourty four agreements related to the continental shelf, see Annex II.

42- Thirty six agreements related to maritime boundary including that of the continental shelf, see Annex II.

43- See Annex II, P. 1-2.

44- See Annex III.

45- Ibid.

46- Cook Islands, one maritime boundary with the USA,1980; Saint Laucia, one maritime boundary with France in 1981, and Turkey, one continental shelf boundary with the USSR in 1978; see also Annex III.

47- New Zealand, one maritime boundary with the USA, 1980; see also Annex III.

48- See Annex III.

49- Ibid.; see also infra notes No 55, and 56.

50- Ibid.; 17 States found it appropriate to apply a negotiated boundary line, 6 States appreciated the parallel of latitude method, and 3 States concluded negotiated boundaries in some of their agreements and the parallel of latitude in the others.

51- See Annex III.

52- Ibid.; see also infra notes No 55, and 57.

53- It may be necessary to comment that in this context, Article 6 is meant to be understood as it is viewed by the narrow viewpoint of interpretation which gives special emphasis to the equidistance principle.

54- The number of States is 3 out of 24 if we considered only those States which applied a simple

equidistant line; and it will be 3 out of 60 if we regarded the total number of all States of the collected agreements.

55- Ibid., 3 States, Denmark, Norway, and the USA.

56- Ibid., 12 States, Dominican R., Finland, Haiti, India, Italy, Maldives, Mexico, Panama, Poland, Sri Lanka, Sweden, and USSR.

57- Ibid., 5 States, Colombia, France, the Netherlands, Spain, and UK.

58- Ibid., 8 States, Costa Rica, German D.R., Indonesia, Malaysia, Saudi Arabia, Thailand, Uruguay, and Venezuela.

59- Ibid., 10 States, Brazil, Chile, Ecuador, F.R.Germany, Gambia, Iceland, Ireland, Peru, Senegal, and Sudan.

60- Ibid., 18 States, Abu Dhabi, Argentina, Australia, Bahrain, Canada, Cuba, Greece, Iran, Japan, Kenya, Korea R., Oman, Papua New Guinea, Qatar, Tanzania, Tunisia, U.A.Emirates, and Yugoslavia.

61- The ICJ (1969) Report, Para. 81.

62- This result emphasizes that the general meaning of Article 6 has joined the corpus of general International Law; see above, The Legal Nature of Article 6, this Chapter, Section 1, P. 70.

63- Dr., S. P. Jagota, Maritime Boundary, Martinus Nijhoff Publication, Dordrecht, Boston & Lancaster, 1985, P. 121; and his Article in, II Hague Recueil, (1981), P. 81, at 130-131.

64- Ibid., his book, at P. 121.

65- See above, Multilateral State Practice and the Equidistance Principle, this Chapter, Section 1, P. 79.

66- The ICJ (1969) Report, Para. 8, and 89.

67- Ibid., Para. 89.

68- Libya / Malta Case (1984), Para. 33-34, it is necessary to note that, Dr. Jagota based his study on agreements that were concerned with the said zones individually. In fact, the case would have been different if he based his argument on agreements concerning a single maritime boundary of two or more of the said zones. For, in this case any generalization might be correct with respect to any of the involved zones.

69- See above, The UNCLOS III and the Delimitation Question, Chapter One, Section 3.

70- El Salvador & Honduras, Case concerning the land, island, and maritime frontier dispute, initiated

in 1987.

71- The ICJ (1982) Report, Para. 110.

72- Ibid., Para. 109.

73- Ibid., Para. 110.

74- The Gulf of Maine Case, the ICJ (1984) Report, Para. 115.

75- The Libya/Malta Case, the ICJ (1985) Report, Para. 65.

76- The Guinea/Guinea Bissau Arbitration (1985), 25 ILM. (1986), P. 251, Para. 102.

77- Conciliation Between Iceland and Norway (Jan Mayen), 20 ILM. (1981), P. 797, at 824.

78- The ICJ (1969) Report, Para. 13-14.

79- Ibid., Para. 15-16.

80- Ibid., Para. 55.

81- Ibid., Para. 101, Sub-para. (*C*)(1).

82- Idid., Sub-para. (*C*)(2).

83- Ibid., Sub-para. (*D*).

84- Ibid., Para. 92.

85- Ibid., P. 6, Art. 1, Para. (1).

86- Ibid., Para. 85.

87- See above, this Chapter, Section 1, Subsection I.

88- The ICJ (1969) Report, Para. 85.

89- Ibid.

90- Ibid.

91- Ibid., Sub-para. (*b*), and Para. 101.

92- Ibid., Para. 85 (*a*).

93- The Truman Proclamation, 40 AJIL (1946), Supp. P. 45, see also above, Chapter I, Section 3.

94-The Anglo-French Arbitration (1977-78), Para. 251.

95- Ibid., see also below, Chapter III, Section 2, P. 185-186.

96- See below, Equity in a New Perspective, Chapter VI.

97- The ICJ (1969) Report, Para. 15.

98- Ibid., Para. 18.

99- See Ibid., Para. 88 ; and the Guinea/Guinea Bissau Arbitration (1985), Para, 102; see also Nelson, L.D.N., Equity and the Delimitation of Maritime Boundaries, Iranian Review of International

Relations, (1978), P. 197, at 206.

100- See above, Equitable Principle, General, this Chapter, Section 2, Subsection II, P. 93.

101- The ICJ (1969) Report, Para. 20.

102- Ibid., Para. 85.

103- Ibid., Para. 85-93.

104- Ibid., Para. 91.

105- Ibid.

106- The Anglo-French Arbitration (1977-78), Para. 249.

107- Ibid., Para. 251.

108- Article 38 of the International Court Statute.

109- The ICJ (1969) Report, Para. 88.

110- The ICJ (1982) Report, Para. 132.

111- See below, Chapter IV, Section 1, Subsection II.

112- The Truman Proclamation, 40 AJIL (1946), Supp. P. 45.

113- See above, The Legal Literature, Chapter I, Section 2, P. 17.

114- See above, Chapter I, Section 2.

115- The ICJ (1982) Report, Paras. 51-68.

116- The Anglo-French Arbitration (1977-78), Para. 104.

117- The ICJ (1969) Report, Para. 18.

118- Ibid., Para. 19.

119- Ibid., Para. 43.

120- Ibid., Para. 19.

121- Ibid., Para. 85 (*C*).

122- The ICJ (1982) Report, Para. 44

123- Ibid.

124- The ICJ (1985) Report, Para. 34.

125- Ibid.

126- See below, Chapter IV, Section 1, Subsection IV.

127- The ICJ (1982) Report, Para. 61.

128- Ibid., Para. 51-68.

129- See Below, Natural Prolongation as a Relevant Circumstance, Chapter IV, Section 1, Subsection

IV.

130- Ibid.; and the ICJ (1985) Report, Para. 39.

131- Basing his argument on the differentiation between those norms relating to the entitlement and those relating to the delimitation question, Mr. Hutchinson reached the conclusion that with regard to the natural prolongation as a basis of title "[i]t is ... descriptive rather than normative.", see Hutchinson, D.N., The Concept Of Natural Prolongation In The Jurisprodance Concerning Delimitation Of Continental Shelf Areas, LV BYIL. (1984), P. 133, at 134-138.

132- In his final conclusion, Mr. Hutchinson found that the natural prolongation concept had been used in seven senses in one of them natural prolongation is said to be used as the delimitatory result, see Ibid., P. 184-187.

133- For the conditions of the natural prolongation as a relevant circumstance, see Chapter IV, Section 1, Subsection IV.

134- For a better illustration of the relationship between the Conventional Solution and the Customary Solution, see Figure II:1

135- The question whether the court has succeeded in filling the second gap or not is another matter. As has been said above, the customary solution itself suffers from some vagueness and ambiguity. Accordingly, it can be said that the customary solution has succeeded, only to an extent, in clarifying the conventional solution; but, it at the same time contributed to the complication of the delimitation question of the continental shelf.

Part Two

Introduction

General

Having dealt with a brief comparative study of the relation and interrelation between the Conventional and Customary solutions, the second Chapter reached the conclusion that the main problem of the two solutions was the meaning and scope of the "special circumstances" and "relevant circumstances" clauses. Furthermore, the final question of the second Chapter was whether the said two clauses had identical, (or at least similar,) or different meaning and scope. So a thorough examination of the two clauses is very necessary before any such judgement is taken.

As it is suggested, this Part is going to deal with the "relevant circumstances" clause in the Third and Fourth Chapters deferring the "special circumstances" clause to the Fifth Chapter. Thus, an introductory section concerning the two clauses is indispensable. Because the two clauses have very often been mixed with each other, so it is quite important to find a reliable criterion according to which the differentiation between the two clauses is facilitated. The function of the introductory section is then to attempt to fined such a criterion.

Criterion

According to the available literature, it was almost impossible to find any differentiation between the "relevant circumstances" and "special circumstances" clauses. Yet the two terms, generally speaking, were very often used in an indistinguishable meaning to express the same thing concerning the factors and elements which would play a role in the continental shelf delimitation between neighbouring States. That being the case, it is not an easy task to find out which is which. So, in order to overcome this difficulty, it is found that some criteria must be sought. The function of such criteria is to make easy, or at least to facilitate the

identification of the scope of each of the two terms concerned.

Two criteria can be said to be of use. The first is that which is interested in the chronological order of these two terms. Before 1969, (the North Sea Cases), the only existing term was the "special circumstances" term. For, in the 1969 Cases the term "relevant circumstances" was established. From that date on the two terms appeared to parallel each other. Accordingly, all the cases, (though there could hardly have been any), and the literature that was advanced before 1969 would refer only to the "special circumstances" term. After, and including, the 1969 cases another criterion must be used because the said terms have been mixed with each other since that date.

However, an observation should be made with regard to the above-said criterion. As for State practice, this criterion cannot be applicable. For, State practice is an independent source of international law which is very hard to be classified in chronological-order categories. That is to say, State practice is very changeable and susceptible to change its direction from time to time even with respect to each individual State. Besides, State practice concerning delimitation of the continental shelf was never uniform. States adopted several verified solutions, including the equitable principles solution since the early development of the continental shelf doctrine. Accordingly, any unilateral or multilateral State practice must be studied in the light of another criterion.

The second criterion is concerned with the applicable law. According to this criterion two possibilities are likely to arise. The first is those cases, literature, and State practice that apply, or suggest the application of the Conventional rules which was embodied in the 1958 Convention on the Continental shelf - Article 6 in particular. These materials are supposed to contain a clear reference to the used *special* circumstances. However, the case is not always so easy. Some materials suggest partial application of the said Conventional rules, such as applying the Conventional rules to some areas and the Customary solution to some other areas. The case here, then necessitates the application of an auxiliary criterion which will be discussed later in this section.

The second possibility is those materials that apply, or suggest the application of the Customary solution. Like the first possibility, there is no doubt about the obvious indication to the "relevant circumstances" term where the case concerned is subject wholly to the Customary solution. However, again the partial applicability of the Customary solution will create the same difficulty which is said to arise where the Conventional solution is also partially applicable. As has been said above, this problem can be solved by the application of an auxiliary criterion.

Regarding those materials which indicate the application of the Customary solution to some of the involved areas and the Conventional solution to the other areas, there could be no problem where the circumstance is explicitly clarified as being *relevant* or *special* circumstance. The auxiliary criterion, however, is only applicable when vague or no such clarification is available.

As far as the auxiliary criterion is concerned, the environment and facts of the case in question are of great relevance. Any problematical circumstance must be examined in the light of the environment and facts according to which the circumstance is judged. The result of this examination will show either the real category - relevant or special - to which the circumstance belongs or will at least show the most likelihood of such category. For instance if one of the agreements did not mention whether the utilized circumstances were special or relevant, so these circumstances could be known in the light of questions such as: Were the States concerned parties to the 1958 Convention on the Continental shelf? Did they issue any proclamation favouring the Customary or the Conventional solution? What is the most likelihood of the applicable law? And so on.

The criteria mentioned-above are assumed to work in the light of a supplementary criterion. This criterion is concerned with the literal differences between the two words: *special* and *relevant*. According to The Oxford Dictionary the word *special* is used to mean that the item in question is "... of such a kind as to exceed or excel in

some way that which is usual or common ...". Moreover, it means that the item is exceptional in character, quality or degree.[1] So, applying this meaning to the special circumstances term, two qualifications must be available for any circumstance to be considered special. The first is that the circumstance must exceed what is usual or common. The second is that this circumstance must have something exceptional in its character, quality or degree. According to this meaning only those unusual and exceptional factors may fall within the scope of the special circumstances category. That is to say, special circumstances category, according to the literal meaning, has a reasonably limited scope.

As for the word *relevant*, it is used in two different fields in two different meanings. Relevant, in literature, means that the thing in question is bearing upon, connected with, or pertinent to the matter in hand. In the legal field, relevant is used, in Scottish Law, to mean pertinent[or sufficient][2] Accordingly, the word *relevant* can be said to have two basic meanings: connected to or pertinent, on the one hand, and sufficient, on the other. Applying these two meanings to the relevant circumstances term, two contradicting ranges of circumstances would be produced. As far as the first meaning - connected to or pertinent - is concerned, the relevant circumstances category embraces a very wide range of circumstances. For, any link, however weak, can be categorized under the meaning of the words connected to or pertinent. Such a category, then, can be said to be an open ended one. Conversely, according to the second meaning - sufficient - the relevant circumstances category is restricted to embrace circumstances that have a sufficient or adequate link with the case concerned. This sufficiency or adequacy is always tested by how serious the link is. If a circumstance has a negligible or insufficient link with the case concerned, so it can be disregarded from being relevant to the case. The scope of the relevant circumstances category according to the second meaning of the word *relevant* - sufficient - has, then, a narrower scope than according to the first meaning of the said word - connected to or pertinent.

So, what is the real meaning of the word *relevant*?

As far as the literal meaning is concerned, both said meanings are correct. However, since the main concern here is the legal connotation of the word, since the word "*relevant*" according to the second meaning - sufficient - is specified and restricted within the scope of Scottish Law, and, since the first meaning of the said word - connected to or pertinent - is more likely to be used in English Literature in general, (so the second meaning is more likely to have been meant by the ICJ and consequently attributed to the relevant circumstances term.

Conclusion

In order to facilitate the differentiation between the "relevant circumstances" and "special circumstances" clauses, three criteria are said to be applicable: first, the criterion that is concerned with the chronological order of the establishment of the two clauses; second, the criterion which is interested in the applicable law to the case concerned; and, third, the auxiliary criterion which examines the facts and environment of the case in order to judge whether the involved circumstance is *relevant* or *special.*

As for the literal differences between the two words "*special*" and "*relevant*", it is clear that they slightly vary in meaning and this variation may affect their scopes. Since "*special*" denotes something unusual with an exceptional character, quality, or degree, it restricts the special circumstances category and causes its scope to be reasonably limited. The meaning of "*relevant*" - being sufficient -, renders the relevant circumstances category to be also relatively limited.

Chapter IIII

Relevant Circumstances
General Perspective

Introduction

The relevant circumstances concept is said to contain a wide-ranged variety of circumstances. According to the available records, it has been almost impossible to find one single study or legal document that covers all, or at least all the up-to-date, circumstances that might be considered relevant. That is why this Chapter has concerned itself with making a general study examining the available materials in order to identify those circumstances and subsequently to group them into proper categories. The discussion, therefore, will be interested in three main areas. As they are the only useful source of the relevant circumstances, State practice - unilateral and multilateral -, judicial cases, and literature will be the subject matter of this Chapter.

Section 1

Relevant Circumstances

&

State Practice

I

Unilateral State Practice

Unilateral State practice has been of very little use with respect to the interpretation of the relevant circumstances clause or of any suggestion relating to circumstances as such. However, it is still important that an idea about such State practice must be provided.

A collection of proclamations, laws, acts, ... etc., which belong to 76 States, has been collected from the available records. These 76 States can be classified into two main categories: States which are parties to the 1958 Convention on the Continental Shelf, (31 States,) and States which are not parties to the said Convention, (45 States.) As for the former category of States, although it may fall within the scope of the special circumstances term, except those States which made some reservations to Article 6 of the 1958 Convention, it is still necessary to examine them here. The said 31 States could be classified into two categories. First, twenty-one States did not indicate their preferential circumstances. These 21 States could be further classified into proclamations that were promulgated before 1958;[3] and those which were enacted after 1958.[4] The remaining 10 States, were in favour of the Conventional solution; i.e., they would relate to special circumstances as they were meant to be in the said solution.[5]

The other category contains those States which are not party to the said 1958 Convention. They are 45 States which can be classified into three groups. The first, which is of no use at all, is concerned with those States which do not claim any method of delimitation or any special or relevant circumstances. These are 24 States.[6] The second is interested in those States which some methods or circumstances can be deduced from the available information about them, such as Cayman Islands, Oman, India, Italy, and Turkey.[7]

The third and last group, which is the most important of all, is that which is concerned with those States which expressed their full adherence to the solution embodied in Customary Law. These are 18 States.[8] Only two of these eighteen States have, explicitly, mentioned some information about the circumstances that might be taken into account. Honduras proclaimed that its boundaries might be modified "according to circumstances arising out of new discoveries, studies, and national interests which may emerge in the future."[9] No more explanation was provided in this decree as to what sort of circumstances it referred to. However, the inclusion of " national interests" can be understood to mean political, economic and security interests.

Table III:1

Unilateral State Practice

States Which Are not Parties to the 1958 Convention on the Continental Shelf

States Claiming Agreement or Agreement / Equitable Principles Solution		States Claiming Other Solution		States Which Did not Claim Any Solution or Relevant Circumstances	
- Abu Dhabi	10 June, 1949	- Cayman Island	1969	- Argentina	11 Oct. 1946 & .....1966 & 23 May, 1973
- Ajman	20 June, 1949	- India, Agreement/ Median line/otherwise agreed	1976	- Bahamas26	Nov., 1948 & 1970
- Bahrain	5 June, 1949	- Oman (median line)	17 July, 1972	- Brazil	8 Nov., 1950
- Cook Islands	14 Nov., 1977	- Turkey	9 May, 1968	- British Honduras	2 Dec., 1949
- Dubai	14 June, 1949	- Italy, Agreement/ median line.	21 July, 1967	- British Solomon Island	1970
- F.R.Germany	20 Jan., 1964			- Chile	23 June, 1947
- Iran (equity)	18 June, 1955			- Dahomy	14 Dec., 1950
- Iraq (in accordance with International Law)	1968			- Figi	....., 1970
- Kuwait	12 June, 1949			- Ecuador	6 Nov., 1950
- New Guinea (Australia; in accordance with the principles of International Law)	11 Sep., 1953			- El Salvador	14 Dec., 1950
- Nicaragua	6 Nov., 1950			- Iceland	5 April, 1948
- P.D.R.Yemen (the suggestion provided for the territorial sea; however because the law was both continental shelf & territorial waters, so the suggestion is valid for both.)	1970			- Ireland	1968
				- Ivory Coast	1967
				- Korea Republic	18 Jan., 1952
- Qatar	8 June, 1949			- Panama	1 March, 1946 & 2 Feb.,1967
- Ras Al Khaima	17 June, 1949			- Papua New Guinea	1977
- Saudi Arabia	28 May, 1949			- Peru	1 Aug., 1947 & 12 March, 1952
- Sharjah	16 June, 1949			- Philippenese	1949
- Umm Al Qaiwain	20 June, 1949			- Sarawak	1954
- Honduras (on the basis of reciprocity)	19 Dec., 1957			- Seyschelles	15 Oct., 1962
				- Sri Lanka (Seylon)	19 Oct., 1957
				- Sri Lanka	1976
				- Sudan	1970
				- Togo	21 May, 1968
				- India	1955, & 1959

Saudi Arabia was more confined in referring to such circumstances. Regarding the Arabian Gulf area it stated that "fishing rights in such waters and the traditional freedom of pearling by the people of the Gulf are in no way affected."[10] Furthermore, in the other decree which was concerned with the Red Sea it suggested a joint

development of the seabed "sharing with the neighbouring governments in a common zone."[11] This kind of suggestion is very often used when a mineral deposit straddles between two or more countries and they all have interests therein.[12]

Accordingly, three types of circumstances are being recommended by the said States: being , national interests - political, economic, and security -, fishing rights, and joint development of a common oil and mineral deposit. Nevertheless, an observation relating to islands is necessary.

Numerous proclamations that belong to the latter category have included a special provision giving their islands a continental shelf of their own.[13] Although, as is very obvious, these proclamations do not state islands as a relevant circumstance, they draw attention to the fact that the claimant States consider such islands as an indispensable part of their continental shelf. In fact, by claiming islands to have a continental shelf of their own it can be deduced that, it is *a fortiori* to claim these islands as a *relevant* or *special*, (subject to status,) circumstance.[14]

II

Multilateral State Practice

Multilateral State practice is purported to be more useful than the unilateral one, with respect to the differentiation between special circumstances and relevant circumstances clauses. However, it was quite difficult to get enough of such information from the available State practice without going through an analytical study of this practice. The following paragraphs are, therefore, going to *analyse* instead of, only, *cite* the relevant State practice, in order to see what sort of circumstances is used thereby.

Sixty-three agreements out of 80 agreements are said to have negotiated their boundaries on the basis of equitable principles.[15] These 63 agreements are found to belong to two categories. The first contains agreements which have used the

equidistance principle; and the second contains agreements which have used some means other than the equidistance principle.

Before embarking on the relevant discussion, an observation must be drawn to attention. Having examined these 63 agreements, almost none of them was found to have indicated, explicitly, any circumstances or factors which the contracting parties took into account during their negotiations. That is not to say that these agreements did not contain any such circumstances or factors. In fact, such circumstances and factors can be deduced from the environments and facts that can be said to have influenced each agreement.

Nevertheless, one difficulty might arise when examining each agreement in the light of its environment and facts. If the geophysical circumstances were a sufficient indicator to the underlying reasons of the agreed boundary line, so there would be no problem at all. The problem however, will be serious when either there is no geophysical circumstances at all, or the available geophysical circumstances are not sufficient to explain all the underlying justifications of the agreed boundary line. To solve this problem, it is suggested that reliance on the available data, that relate to the concerned parties, might be of great help.

i- Agreements Utilized the Equidistance Principle

As for those agreements which utilized the equidistance principle, they can be classified into two sub-categories. The first is concerned with those agreements which concluded a simple equidistant boundary line. And the second sub-category is concerned with those agreements which have applied a modified equidistant boundary line.

a- Agreements Applied a Simple Equidistance Line

Nine of the said 63 agreements found the simple equidistance method the most appropriate solution, suited to all the respective parties. Although these agreements are supposed to contain no relevant circumstances, it is still quite important to provide a

brief summary on each of them.

Two agreements of south east Asia', used a simple equidistance method. The first was between Sri Lanka and India (23 March, 1976), according to which the two countries delimited their maritime boundary in the Gulf of Mannar and the Bay of Bengal. As far as these two boundaries are concerned the two countries can be considered adjacent, rather than opposite States. The boundary line concluded in this agreement is the median line, and neither State is a party to the 1958 Convention on the Continental Shelf. (See Figure 1)

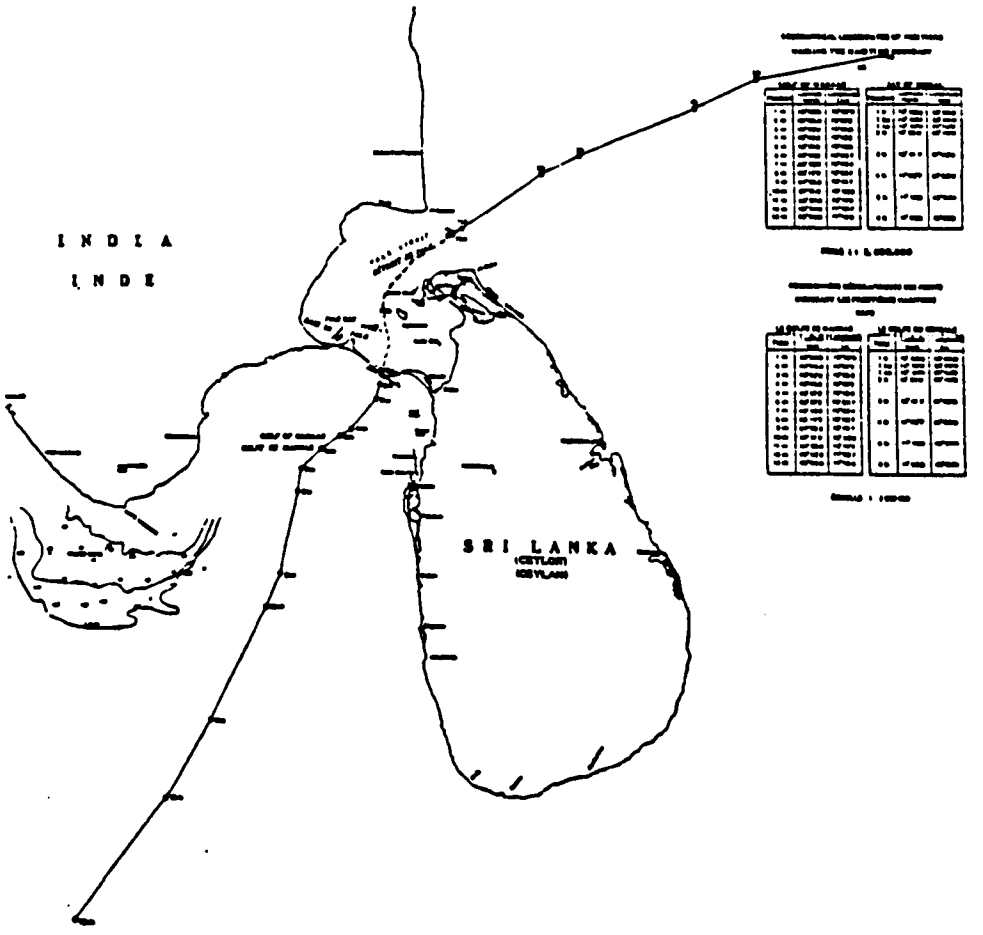


Figure 1, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 224.

The other agreement which was held between Sri Lanka, India and Maldives on 23 July, 1976, was concerned with their trijunction point. With regard to this trijunction point, which was equidistant from the nearest point of the three countries, the involved countries were also opposite States. And again none of those three States

was a party to the 1958 convention on the continental shelf.

In the Mediterranean, the convention between Italy and Spain, which was concluded on 19 February, 1974, was concerned with States of opposite coasts. According to the available maps, the agreed median boundary line gave full effect to all the relating islands in the region regardless of their size. No justifications were made in this agreement as to why those islands were given such a full effect. Regarding the membership to the 1958 Convention, Spain was a party to it, whereas Italy was not. (See Figure 2)

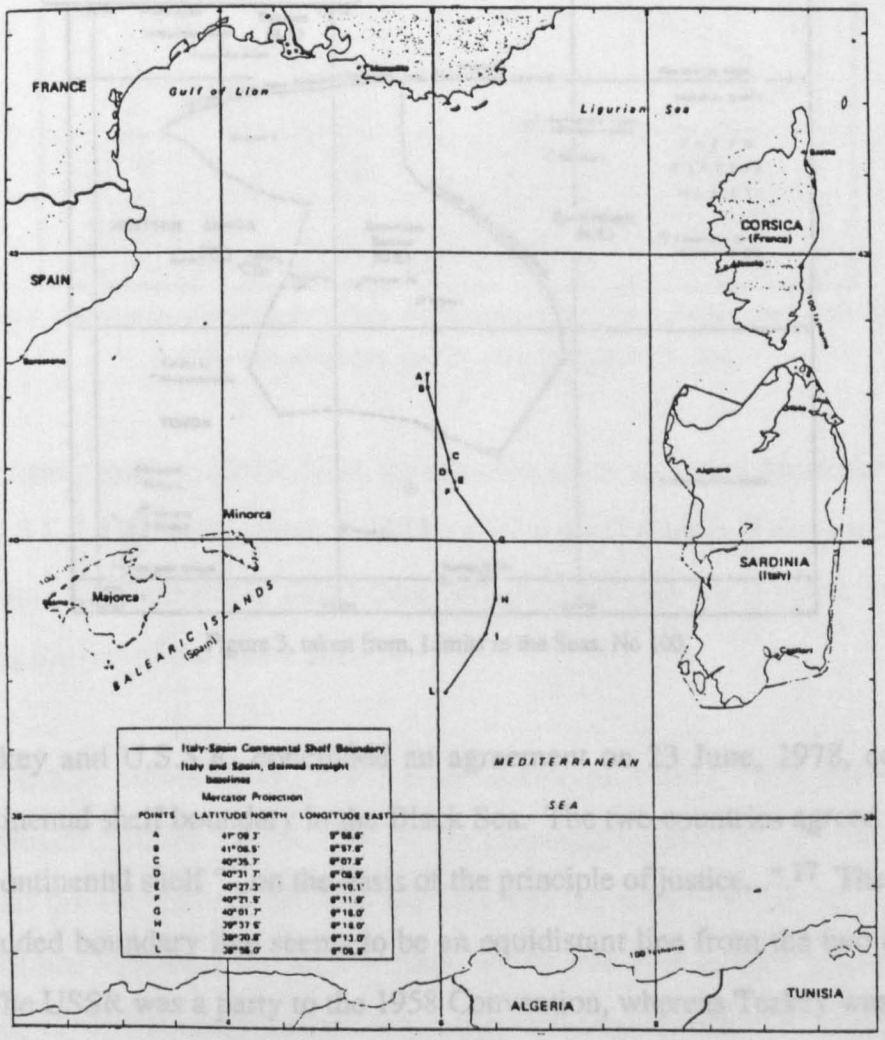


Figure 2, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 173.

In the southeast Pacific Ocean, the U.S.A. concluded two agreements, relating to Samoa Islands, with Cook Islands on 11 June, 1980, and with New Zealand (Tokelau)

on 2 December, 1980, concerning the maritime boundary therein. The two agreements, which agreed on median boundary lines were carried out by States of opposite coasts. Although the three countries were parties to the 1958 Convention on the Continental Shelf, the said Convention was not obligatory to them, when they concluded these agreements, due to the fact that they were concerned with a single maritime boundary and not with the continental shelf only.[16] (See Figure 3)

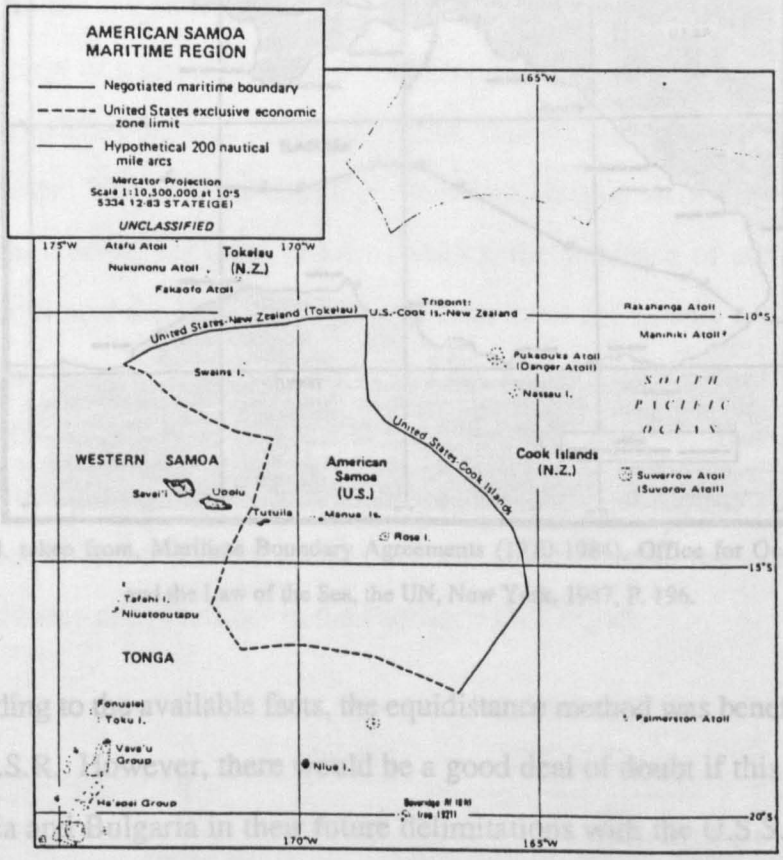


Figure 3, taken from, Limits in the Seas, No 100

Turkey and U.S.S.R. concluded an agreement on 23 June, 1978, concerning their continental shelf boundary in the Black Sea. The two countries agreed to delimit the said continental shelf "...on the basis of the principle of justice...".[17] The course of the concluded boundary line seems to be an equidistant line from the two respective coasts. The USSR was a party to the 1958 Convention, whereas Turkey was not.

The Black Sea is an enclosed sea bordering four States: U.S.S.R. from the north, Turkey and the U.S.S.R. from the east, Turkey from the south, and Romania and Bulgaria from the west. Turkey and the U.S.S.R., which have the biggest share of the Black Sea, are adjacent as well as opposite States with respect to this sea. The

geographical configuration of the Black Sea is not very complicated, consisting of a curved coast with some small indentations. As for the continental margin of the Black Sea, it is quite wide in the north-west, very narrow in the north and south, and it has a reasonable width in the east and west. (See Figure 4)

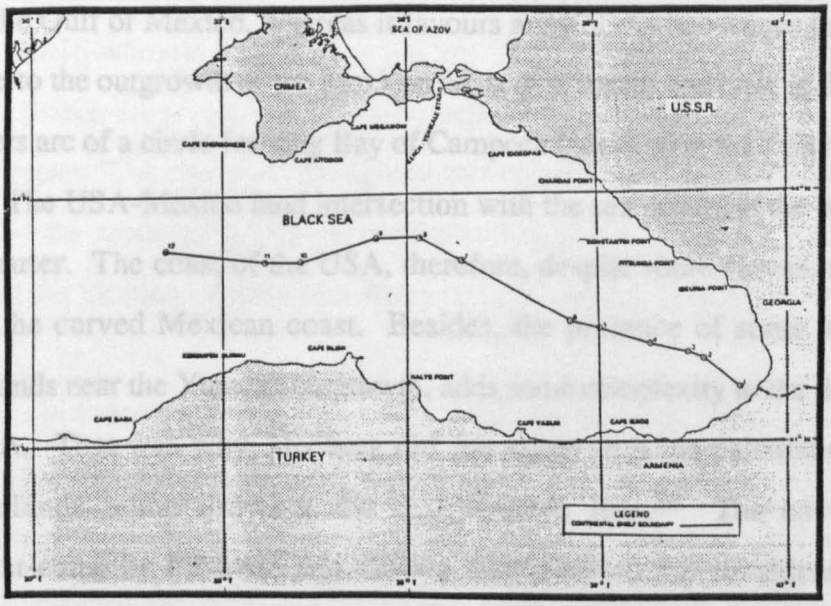


Figure 4, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 196.

According to the available facts, the equidistance method was beneficial to Turkey and the U.S.S.R. However, there would be a good deal of doubt if this method would suit Rumania and Bulgaria in their future delimitations with the U.S.S.R. and Turkey concerning the rest of the Black Sea.

The U.S.A. signed an agreement with Mexico on 4 May, 1978, concerning the Gulf of Mexico and the Pacific Ocean. As proposed by Mexico, the two countries agreed that the two boundaries - in the east and the west - would be a simplified equidistant line following the same method which was used in their agreement of 23 November, 1970,[18] concerning their respective territorial waters. The said equidistant line have given full effect to the islands from both countries regardless of their size. However, with regard to the Gulf of Mexico, the agreed boundary line left two gaps concerning those areas where the opposite coasts of the two countries exceed 400 nautical miles; the first, which extended for 129 miles, was between Louisiana (USA)

and Yutacan (Mexico); and the other was near the yet-to-be-concluded common point between the USA, Cuba and Mexico.[19]

As for the geographical considerations, the geographical configuration favours Mexico in the Gulf of Mexico, whereas it favours ~~none~~ of the two States in the Pacific Ocean. Due to the outgrowth of the Mexican coast of Yutacan, the Gulf is shaped like a three-quarters arc of a circle forming Bay of Campech (Mexico) at the first two quarters of this arc. The USA-Mexico land intersection with the sea occurs at the beginning of the third quarter. The coast of the USA, therefore, despite some curves, seems to be flat facing the curved Mexican coast. Besides, the presence of some of the small Mexican islands near the Yutacan outgrowth, adds some complexity to the disadvantage of the U.S.A. That was why, Hedberg did not agree with the calculation of those Mexican islands when drawing the equidistance line.[20] The answer to this disagreement came by Fledman and Colson who justified the consideration of the Mexican islands in the Gulf of Mexico as a compensation to the calculation of the American islands - near Florida - in the Pacific.[21] (See Figure 5)

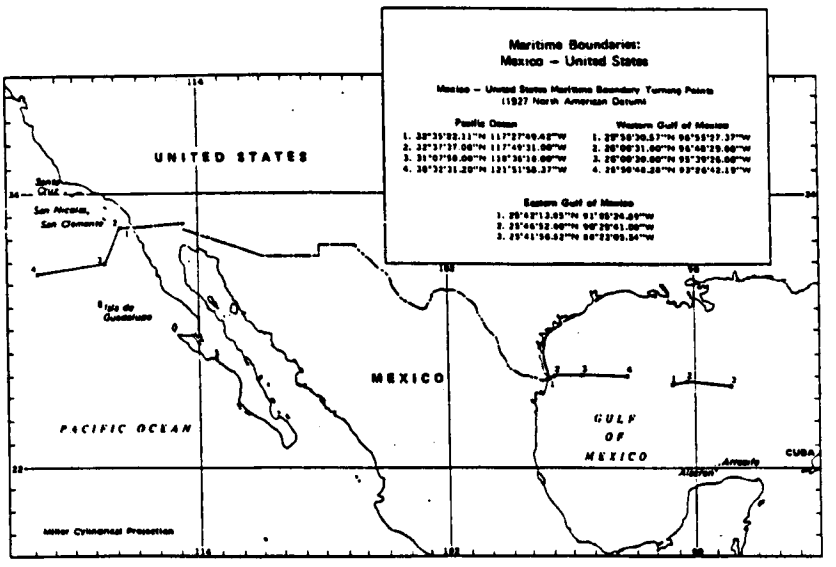


Figure 5, taken from, 75 AJIL, (1981), P. 745.

Unfortunately, due to a subsequent geological survey concerning the hydrocarbon potential in the Gulf of Mexico, the U.S.A. Senate disregarded this agreement on 16 September,1980.[22] And since it was not approved by the Senate, so the matter will be

left to future negotiations between the two countries in an effort to agree a more equitable solution. Both the USA and Mexico were parties to the 1958 Convention.

In the Caribbean Sea, one of the Colombian agreements was concluded with Panama on 20 November, 1976. Colombia has ratified the 1958 Convention on the Continental Shelf, whereas Panama has not yet. This agreement which was between two adjacent States, drew two equidistant boundary lines - in the Caribbean Sea, and in the Pacific Ocean. The choice of the agreed two equidistant lines seems to have been influenced by the macrogeographical configuration of the relating coasts of central America, and the location of these two States on these coasts. (See Figure 24)

One of the French agreements in the Caribbean Sea was concluded with Saint Lucia on 4 March, 1981, concerning the French Island of Martinique. The agreed boundary line was equidistant from the coasts of both Martinique Island and Saint Lucia Island. Apparently, there was no reason to deviate from the equidistance course of the boundary line. (See Figure 6) France was a party to the 1958 Convention, whereas Saint Lucia was not.

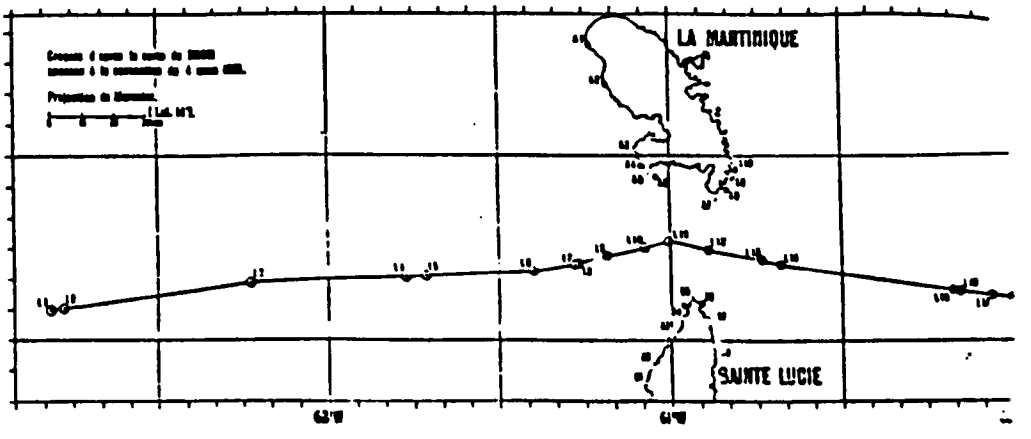


Figure 6, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 131.

b- Agreements Applied a Modified Equidistant Line

Thirty-two agreements of the said 63 agreements resulted in either a modified equidistant boundary line, or an equidistant boundary line modified in some of its parts. Italy held three of its agreements on the basis of equitable principles. All these

agreements resulted in modified equidistant boundaries. Regarding the Adriatic Sea, Italy and Yugoslavia, being adjacent and at the same time opposite States, concluded an agreement on the delimitation of the continental shelf on 8 January, 1968. Both States agreed that the equidistance principle, generally speaking, could produce an equitable solution. However, the presence of some islands therein caused the agreed boundary line to deviate from its equidistance course at some points. If the Yugoslav islands of Jabuka, Pelagrus, and Kajola were given full effect the median line would have created an inequitable result at the disadvantage of Italy. So, it was agreed that those islands should be given a partial effect pushing the boundary line towards Yugoslavia and hence giving Italy a more equitable share of the continental shelf.[23] Beside, according to the available maps, the distorting effect of the median line was not only produced by the presence of the said Yugoslav islands but also by the geographical configuration of the Italian coast against these islands. The unusual outgrowth of the Italian coast facing the said islands was the other facet as to why a true median boundary line would have created an inequitable solution. Yugoslavia ~~was~~ is a party to the 1958 Convention; but Italy ~~was~~ is not. (See Figure 7)

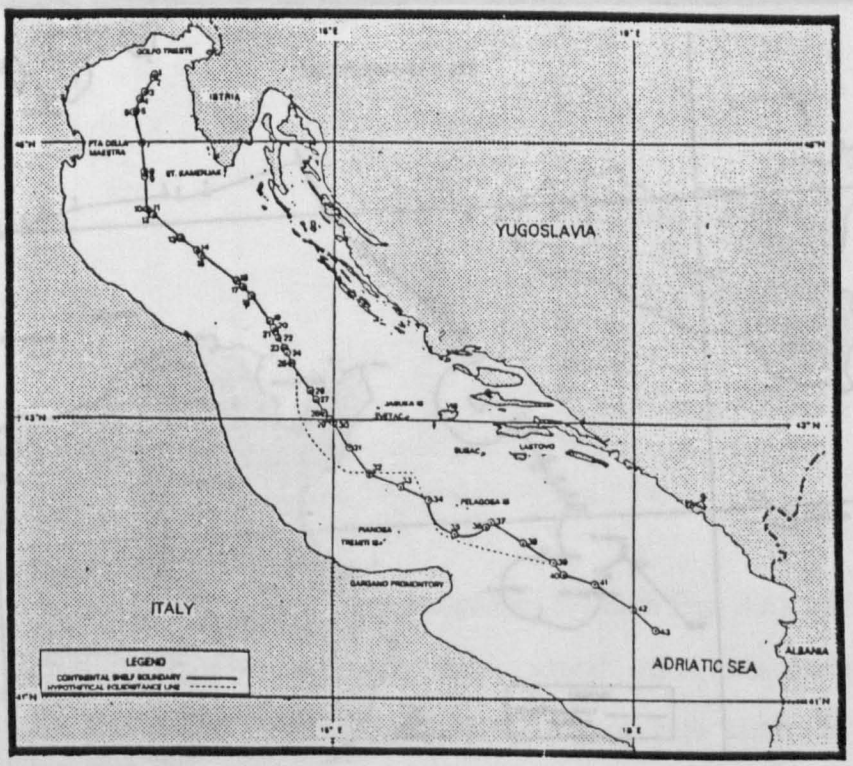


Figure 7, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 190.

In the Mediterranean Sea, Italy concluded another agreement with Tunisia, being opposite States, on 20 August, 1971. The two parties have agreed that the median line can be employed taking into account the presence of islands, islets and low tide elevations. Nevertheless, as the full effect of the Italian islands of Lampoine, Lampedusa, Linosa and Partelleria would have produce an inequitable solution, the two countries agreed that the said islands should constitute an exception. Subsequently, the said four islands were discerned from the calculation of the median line provided that these islands should be given a semi-enclaved continental shelf. This semi-enclaved continental shelf extended up to 13, (as for the Lampione Island 12), nautical miles around the Tunisian side of the said four islands and until they met the median line. This exception was caused by two circumstances. The first is the location of the said islands close to the Tunisian coast. And the other is the geographical configuration of the Tunisian coast, which, as far as macrogeography is concerned, (especially the geographical situation of Italy, Malta, Libya and Tunisia), would have made Tunisia a disadvantaged State if a true median line was used. Neither was a party to the 1958 Convention. (See Figure 8)

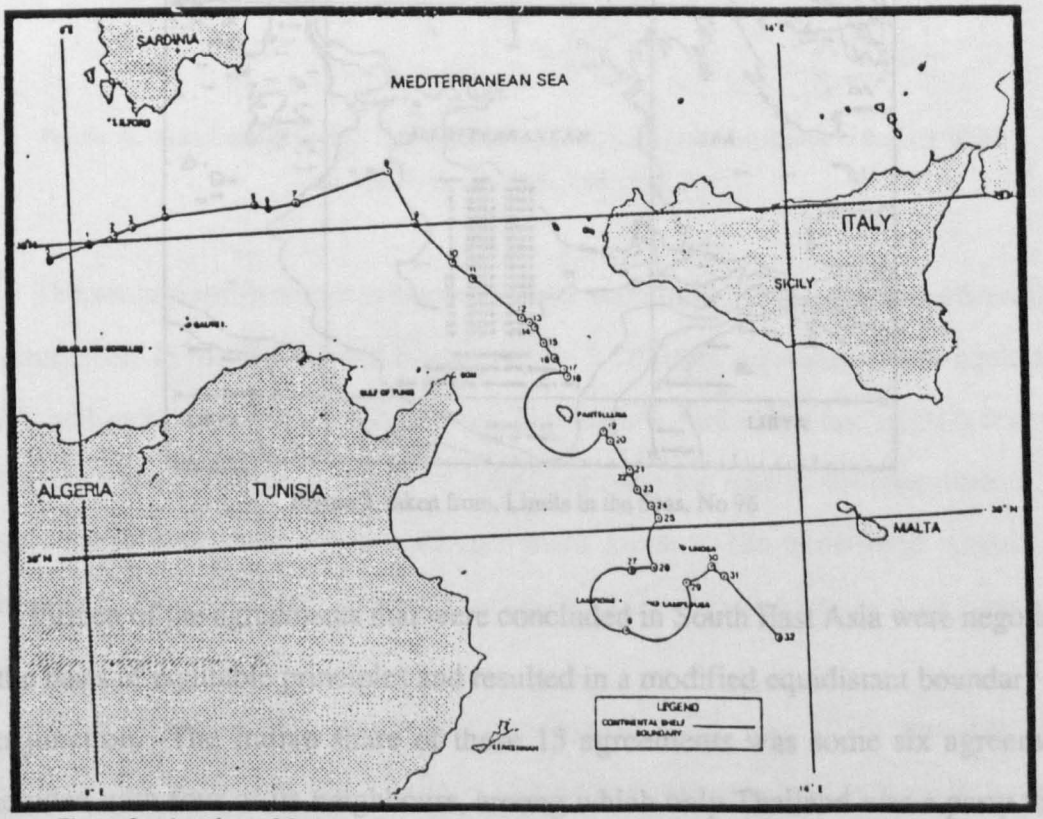


Figure 8, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 180.

The third agreement was between the two opposite States Italy and Greece, which agreed on the median boundary line with some "... mutually approved minor adjustments, ..." on 24 May, 1977. The agreed median line was adjusted at turning points 1, 2, 3, 8, 15 and 16. The agreement did not mention any justification as to why such approved adjustments were made. Yet no apparent reason could be deduced therefrom. Neither was a party to the 1958 Convention. (See Figure 9)

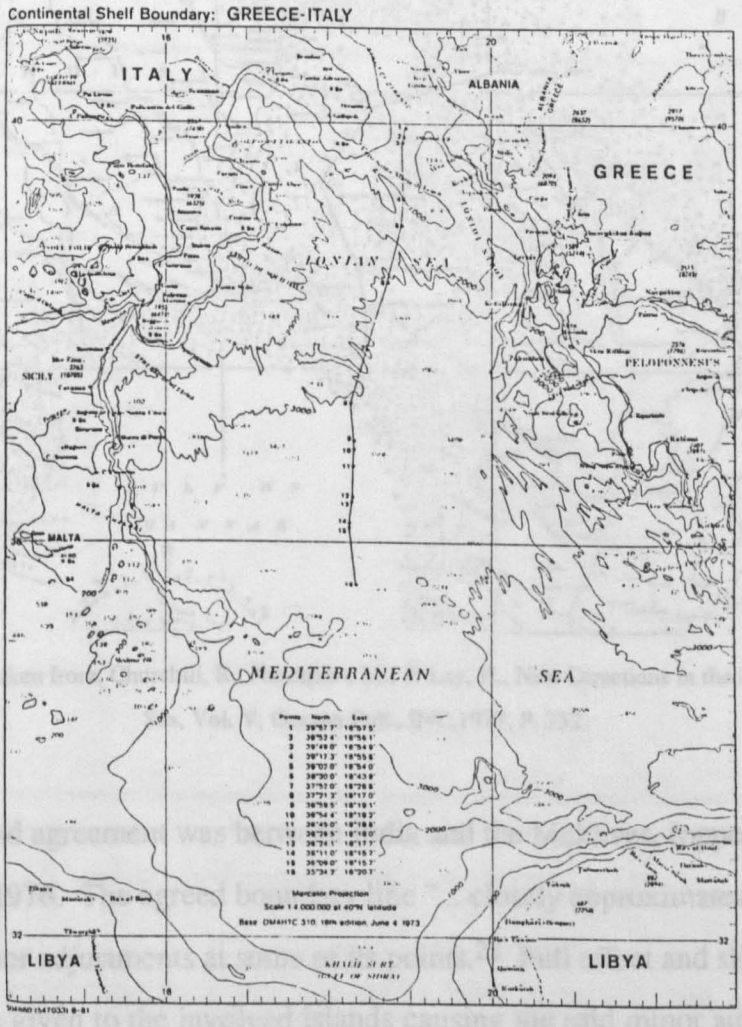


Figure 9, taken from, Limits in the Seas, No 96

Fifteen of the agreements that were concluded in South East Asia were negotiated on the basis of equitable principles and resulted in a modified equidistant boundary line or trijunction. The Indian share of these 15 agreements was some six agreements concluded with four of its neighbours, among which only Thailand was a party to the 1958 Convention. Delimiting their historic waters, India and Sri Lanka agreed on a

modified application of the equidistance method on June 26, 1974. The two countries to this agreements were of opposite coasts.[24] This agreement did not clarify the reasons of the approved modification of the median line. Seemingly, the effective underlying reasons of these modifications were the presence of a good number of the Sri Lanka islands therein, as well as the geographical configuration of the coasts of both countries. (See Figure 10)

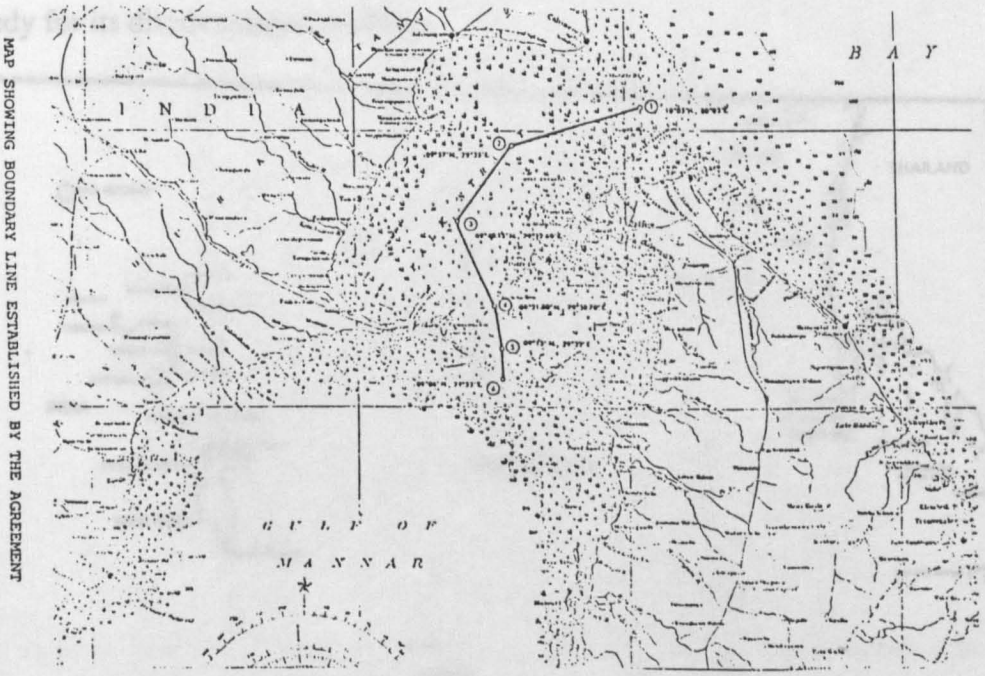


Figure 10, taken from, Churchill, R., Nordquist, M., & Lay, H., New Directions in the Law of the Sea, Vol. V, Oceana Pub., INC,1977, P. 332.

The second agreement was between India and the Maldives, (opposite States), on 28 December, 1976. The agreed boundary line "... closely approximates an equidistant line.", with minor adjustments at some of its points.[25] Full effect and slightly less than full effect were given to the involved islands causing the said minor adjustments. No reason, as to why these various effects were given to the concerned islands was mentioned in the agreement; and yet it was quite difficult to deduce any such reason.

The third agreement, which was concluded on 22 June, 1978, was concerned with the India, Indonesia and Thailand trijunction between their respective opposite coasts. The approved point was essentially equidistant from India and Indonesia, on

the one hand, but further away from Thailand, on the other. The geographical configuration of the Indonesian and the Andaman Indian Island's coasts is relatively concave against the Thai coast which is, also relatively, convex in a similar degree facing the other two coasts. Combined with this, Thailand is stuck between Malaysia and Burma, and blocked by Indonesia from facing the open Indian Ocean. These two facts were very likely to have been the reasons why the location of the agreed trijunction point was meant to give Thailand some additional continental shelf areas as a remedy for its disadvantaged position.

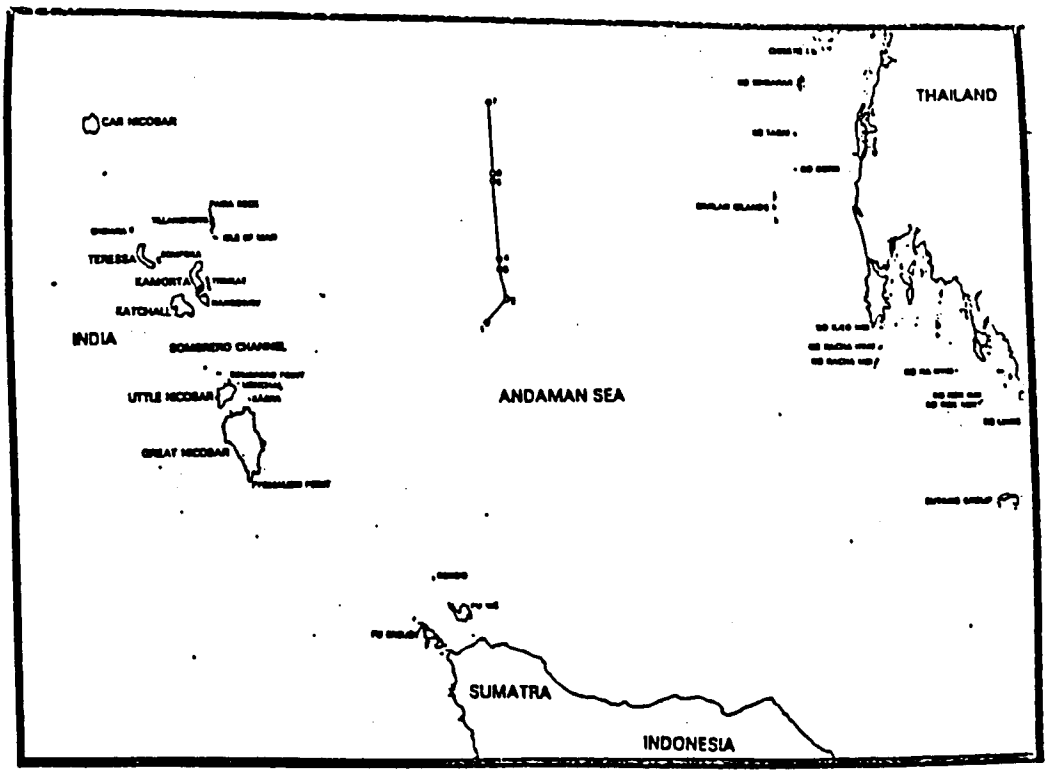


Figure 11, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 211.

Having established its trijunction point with Indonesia and Thailand, India concluded another three agreements with these two States: one agreement with Thailand on 22 June, 1978, (See Figure 11); and two agreements with Indonesia on 8 August, 1974, (See Figure 12), and 14 January, 1977, (See Figure 13). As for the India/Thailand agreement and the first India/Indonesia agreement, they conclude equidistant boundary lines modified in some of their parts. Because these two agreements have not clarified why they have deviated from the equidistance course, the analysis said with respect to their trijunction can be said here again.[26]

The third agreement, (the second India/Indonesia agreement), concluded a boundary line *essentially* equidistant from the coasts of the two countries. In addition, " it ... appears that all islands and rocks have been given full and equal weight in the equidistance calculation.[27]

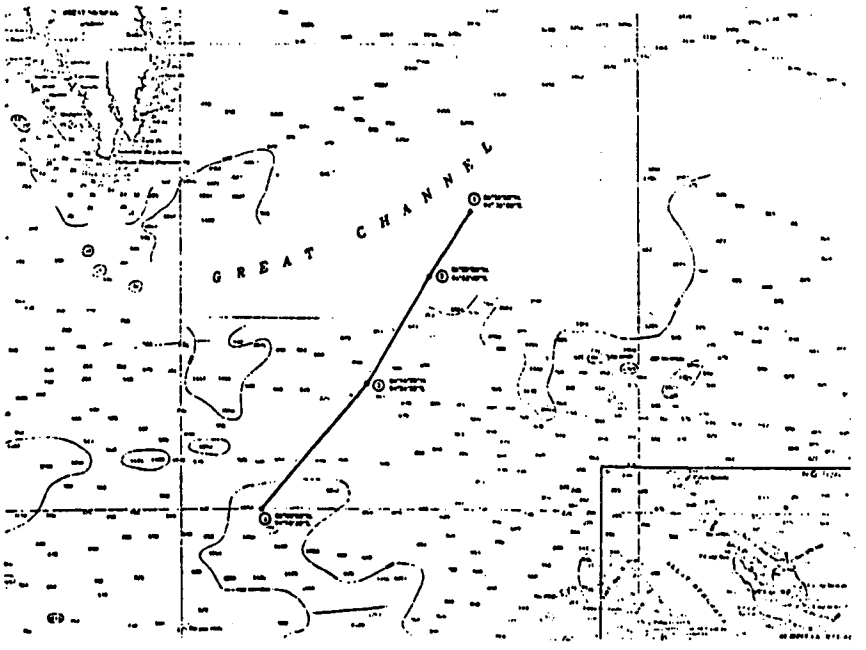


Figure 12, taken from, Churchill, R., Nordquist, M., & Lay, H., New Directions in the Law of the Sea, Vol. V, Oceana Pub., INC,1977, P. 269.

Beside the above-said two agreements with India, Indonesia concluded 5 other agreements with another two of its neighbours, (indonesia was not a party to the 1958 Convention, whereas the other two States were parties). Two agreements were concluded with Thailand on 17 December, 1971, and 11 December, 1975. The first Indonesia/Thailand agreement, (as opposite States), determined a partial continental shelf boundary starting from the agreed common point between Malaysia, Indonesia and Thailand. Although the other turning points of this partial boundary are equidistant from the baselines of the two States, it cannot be categorized as equidistant because its starting point, (the common point), is not equidistant.[28]

The Indonesia/Thailand second agreement concluded the other part of the

boundary between the two countries. This part of the boundary was close to equidistance in only one point, (point A). The rest of the boundary was a negotiated boundary line which is closer to Indonesia than to Thailand. This fact proves the above said analysis concerning the India/Indonesia/Thailand trijunction point.[29]

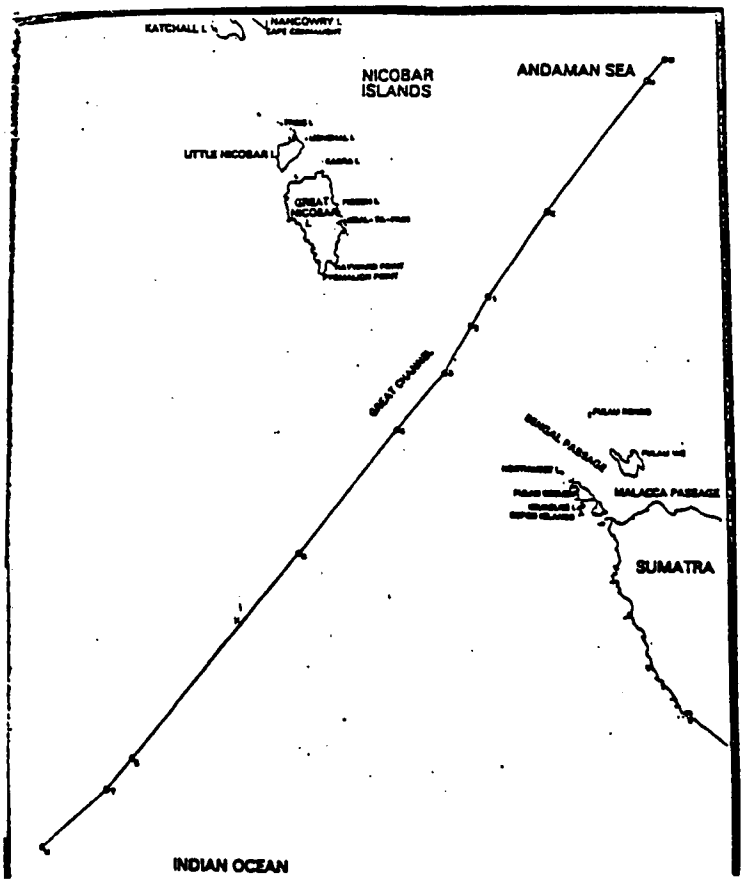


Figure 13, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 235.

The other three agreements were concluded by Indonesia and Australia, which were opposite as well as adjacent States, on May 18, 1971, (See Figure 14), October 9, 1972, (See Figure 15), and January 26, 1973. Concerning the Arafura Sea, the said two countries have agreed on a median boundary line taking full account of the islands therein. The second agreement, which was supplementary to the previous one, extended the agreed boundary line of the Arafura Sea to and into the Timor Sea forming a modified median boundary line by giving various partial effects to the islands concerned. It is necessary to say that this agreement has left the area between point A16 and A17 unsettled. The third Indonesia/Australia agreement was concerned with the lateral boundary between Indonesia and Papua New Guinea, which was at the time

an Australian Trust. The concluded boundary line seems to approximate an equidistant line joining the Indonesia/Papua New Guinea land intersection with the agreed continental shelf boundary of the first agreement.

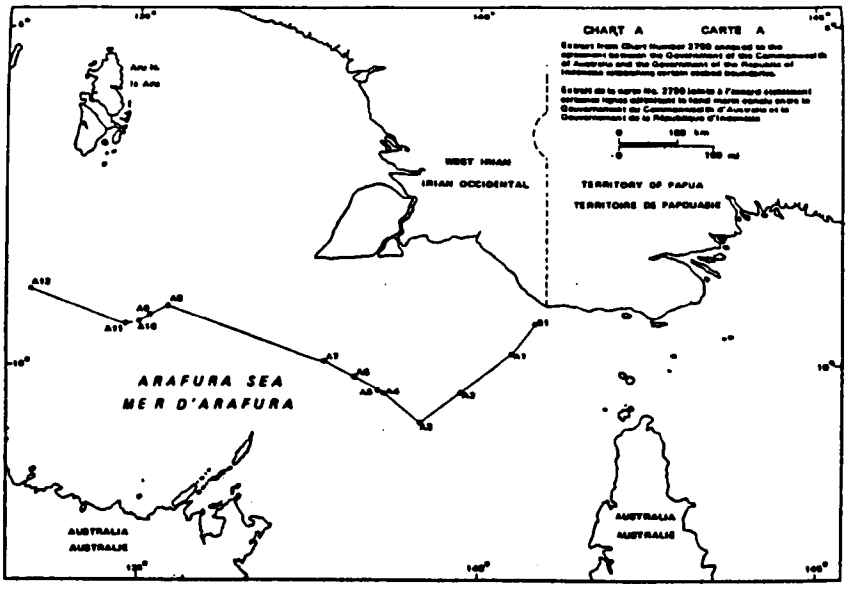


Figure 14, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 267.

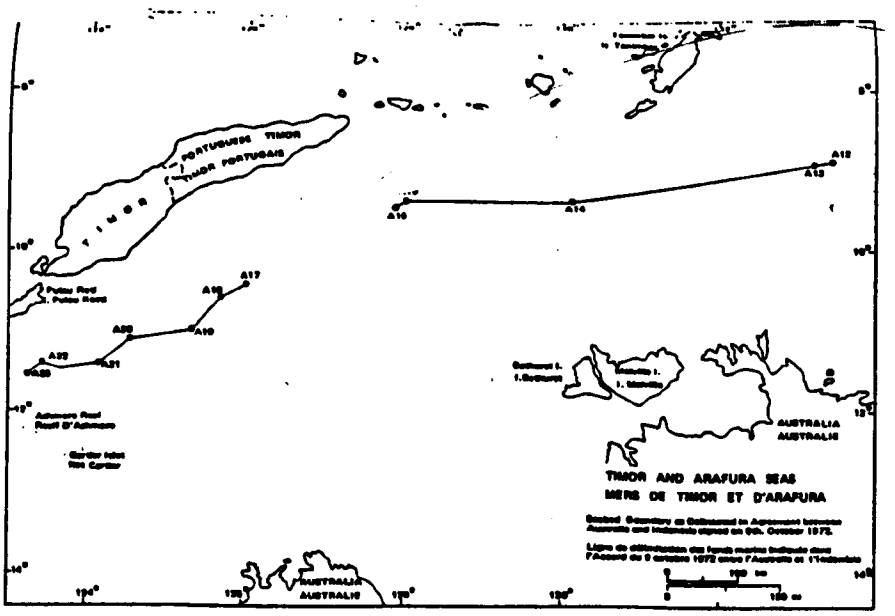


Figure 15, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 272.

As far as the said three agreements are concerned, the entire agreed boundary is equidistant at some points and negotiated at some others. The negotiated section of the

boundary seems to have been affected by the presence of a huge number of Indonesian islands scattered in the Timor Sea; the reason that a median line would have allocated an inequitable portion of the respective continental shelf to Australia. That was why some of these Indonesian islands were given partial effects to the advantage of Australia. As for the undelimited part of the boundary in the Timor Sea it was, apparently, affected by the combination of the said presence of the Indonesian islands and the geographical configuration of the Australian coast. The Australian coast facing the undelimted area of the boundary is indented concavely creating a circumstance according to which Australia is, in the Indonesian eye, supposed to lose the concession of giving a partial effect to the respective Indonesian islands.

Having become independent from Australia, Papua New Guinea concluded an agreement with Australia on 18 December, 1978, concerning their opposite maritime boundaries in the Torres Strait and the Coral Sea. After identifying the sovereignty matter over some islands in the region, this agreement contrived four kinds of boundary lines: a fishing boundary, a seabed boundary, fishing and seabed boundary and a protected zone. As a matter of concern, the latter three boundaries are relevant. The seabed boundary, which coincide with the fishing boundary at its outer edges is, in fact, a negotiated line giving various kinds of effects to the respective islands. The interesting thing about the various effects given to the islands was that the central part of the boundary had ignored completely the presence of some Australian islands which were very close to the Papua New Guinea coast. That is to say, the Australian islands situated north-wards the agreed boundary, were given a, so to speak, minus effect. This choice of the location of the boundary line was due to the geographical complexity of the area in question: the presence of scattered islands that belong to one party close to the other party's coast, and the geographical situation of the area - being as a strait. (See Figure 16)

As for the historic fishing rights of the interested people, the two parties have agreed to establish a Protected Zone within which such rights are protected for both

parties in accordance with the agreed proportion: 75% to 25% in some places; and 50% to 50% in some other places.

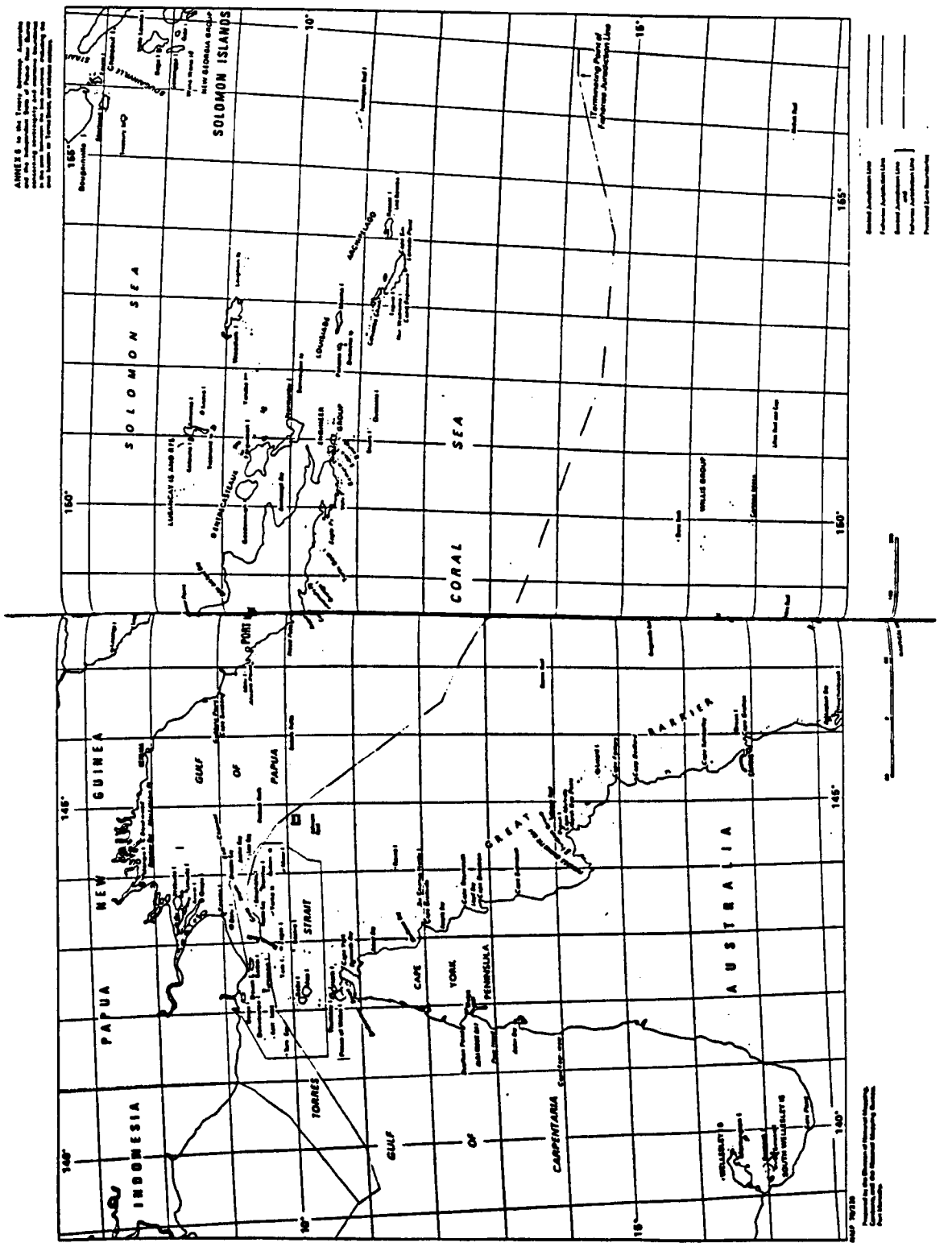


Figure 16, taken from, 18-1 ILM., (1979), P. 324-325.

In east Asia two agreements were concluded between Japan and Korea, on 5 February, 1974. As the first agreement delimited the continental shelf boundary in the northern part of their opposite coasts, it concluded, except point 3, a median boundary line. Besides, the agreement ignored the so called Liancourt group of rocks (Tok-do according to Korea, or Take-Shima according to Japan), which were located northwards the agreed boundary, due to the dispute over them between the two countries. The rest of the islands in the area were given full and equal effects regardless of their size. As for the deviation of point 3 from the equidistance course, no apparent reason could be inferred, (See Figure 17).

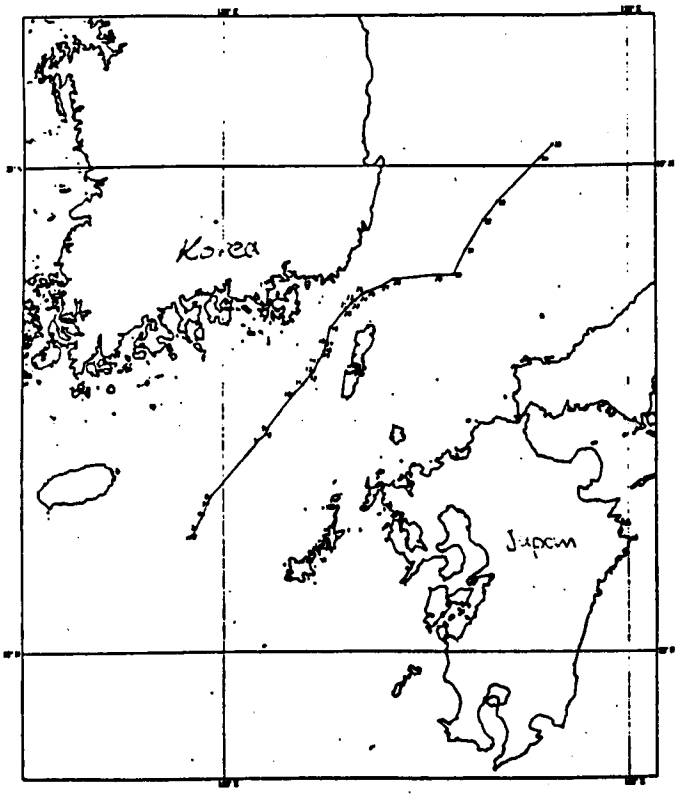


Figure 17, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 285.

The second agreement, which was interested in the southern part of their continental shelf, Japan and Korea agreed on establishing a Common Zone for the purpose of joint development. (See Figure 18)

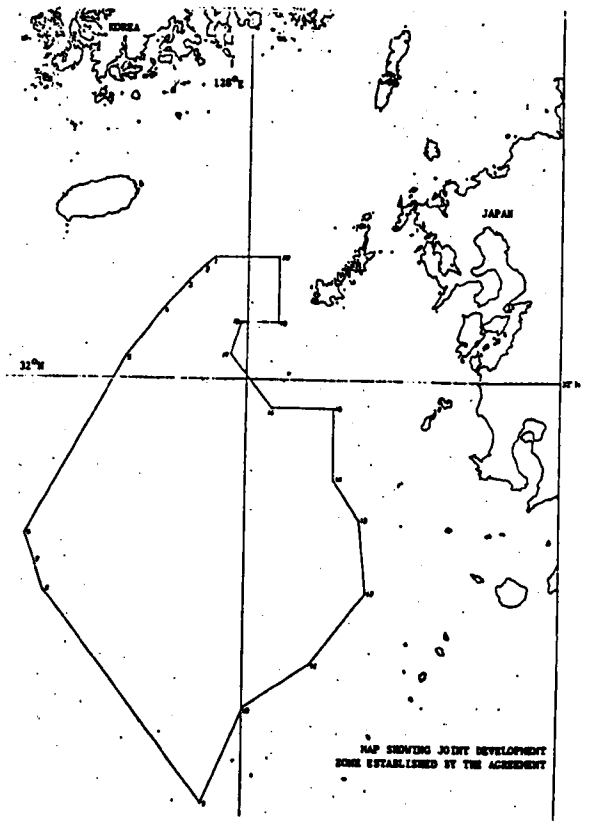
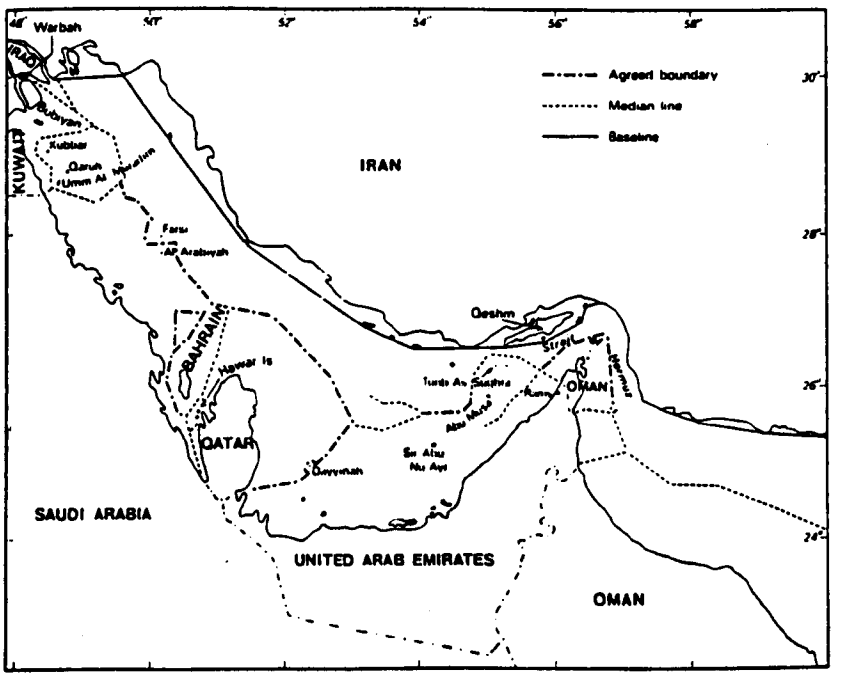


Figure 18, taken from, Churchill, R., Nordquist, M., New Directions in the Law of the Sea, Vol. IV, Oceana Pub., INC,1975, P. 133.

Another agreement in southeast Asia, which was concluded by Indonesia and Malaysia on 27 October, 1969, resulted in an equidistant boundary line modified at some of its points. The first two sections of the boundary were equidistant; and the third, which was north of Tanjong Datu - the Indonesia/Sarawak land boundary termination -, was deviated from the equidistance course towards Indonesia to the advantage of Malaysia.[30] As for the equidistant section, it was drawn by giving full effect to the concerned islands from both sides, "... even though the Indonesian islands groups lie some 250 miles from the mainland of Borneo."[31] The deviation from the equidistance course in the third section was drawn by giving partial effect to some Indonesian islands such as the groups of Kepulanan Natuna Selatan and Kepulauan Natuna Utara which were given a decreasing partial effect according to their distance from the mainland.[32]

More important than the presence of the said islands was the geographical

complication of the area concerned. The two countries were opposite in the west - Strait of Malacca -, whereas they were adjacent in the east - Borneo (Indonesia) and Sarawak (Malaysia). The Indonesian islands scattered at the mouth of Strait of Malacca as well as in the South China Sea. Malaysia had some islands therein as well. However, the Malaysian islands were smaller in number and nearer to the shore than the Indonesian's. Besides, Malaysia was a disadvantaged State as it was blocked by Indonesia and its islands from the west, south and east, as well as from Thailand and South Viet Nam in the north and north east. This disadvantaged position would have produced a very small portion of the surrounding continental shelf if it was not taken into consideration. These various factors affected, in some way or another, the drawing of the boundary line between the two States.



Agreed and potential boundaries in the Persian Gulf

Figure 19, taken from, Prescott, J.R.V.,The Maritime Boundaries of the World, METHUEN, London & New York, 1985, P. 170

At least seven of the collected agreements, which were concerned with the continental shelf of the Arabian, (Persian,) Gulf, were negotiated on the basis of equitable principles, (for a general view on all the Gulf's agreements, see Figure 19). Five of these agreements were concluded between Iran and five of its opposite neighbours; and the other two were between four of the Gulf's Arabian States. None of them was a party to the 1958 Convention.

The first Iranian agreement was held with Saudi Arabia on October 24, 1968. The resulting boundary line was a modified equidistant line. Having established a mutual recognition of sovereignty over Farsi (Iran) and Al-Arabia (Saudi Arabia) islands, the two countries agreed on giving two various kinds of effect to these two islands. Full effect was given to them with respect to each other causing the boundary line to be a median line from their low water mark; and partial effect was given to them with respect to the whole boundary line causing it to follow the respective belt of their 12 nautical miles territorial waters. In the northern part of the boundary line, the Iranian Kharg island was given a partial effect - half effect - as well.[33]

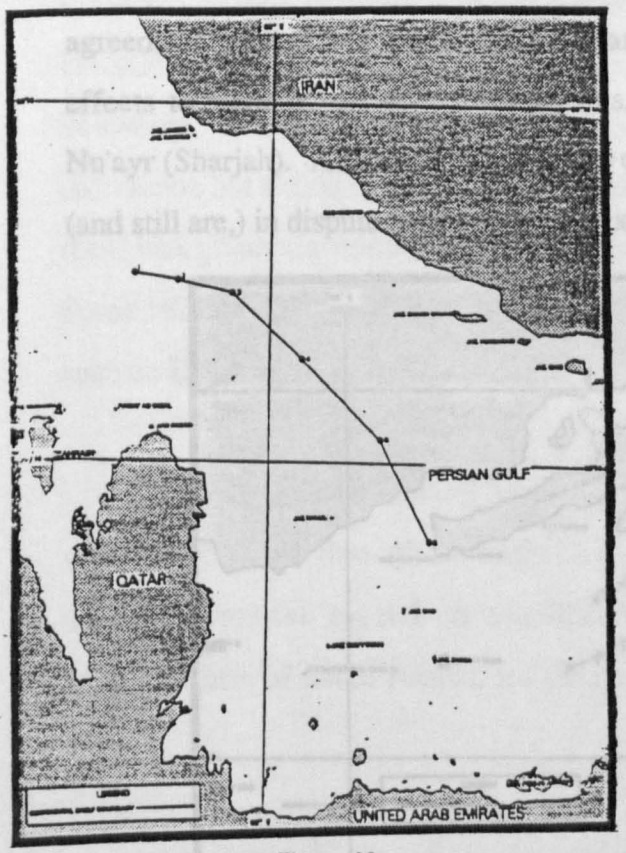


Figure 20

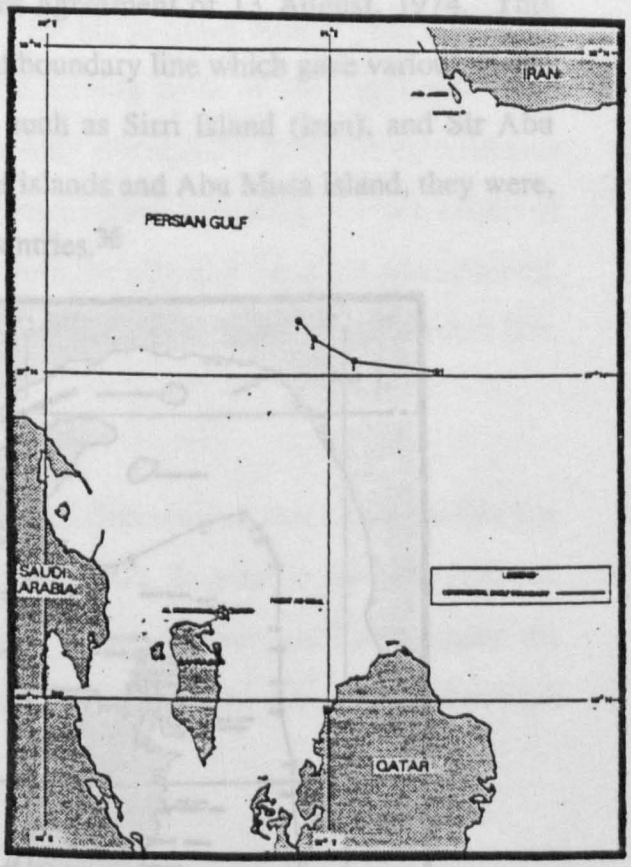


Figure 21

Taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 253, and 250.

The second agreement, which was concluded between Iran and Qatar on 20 September, 1969, seemed to have reached an equidistant boundary line. However, what was unusual about this agreement was that the agreed median line had disregarded

the presence of all islands in the area. Were the concerned islands to be taken into account, the median line would have been pushed towards Qatar giving more continental shelf areas to Iran. The boundary line then is not a true median line to the disadvantage of Iran.[34] (See Figure 20)

The third agreement was held between Iran and Bahrain on 17 June, 1971. This agreement resulted in an equidistant boundary line modified at some of its points. The unique feature of this agreement was that the modified turning points of the boundary were based on some already existing agreements.[35] (See Figure 21)

The fourth was the Iran/U.A.Emirates agreement of 13 August, 1974. This agreement resulted in a modified equidistant boundary line which gave various partial effects to some of the concerned islands, such as Sirri Island (Iran), and Sir Abu Nu'ayr (Sharjah). As for the Tumb group of islands and Abu Musa Island, they were, (and still are,) in dispute between the two countries.[36]

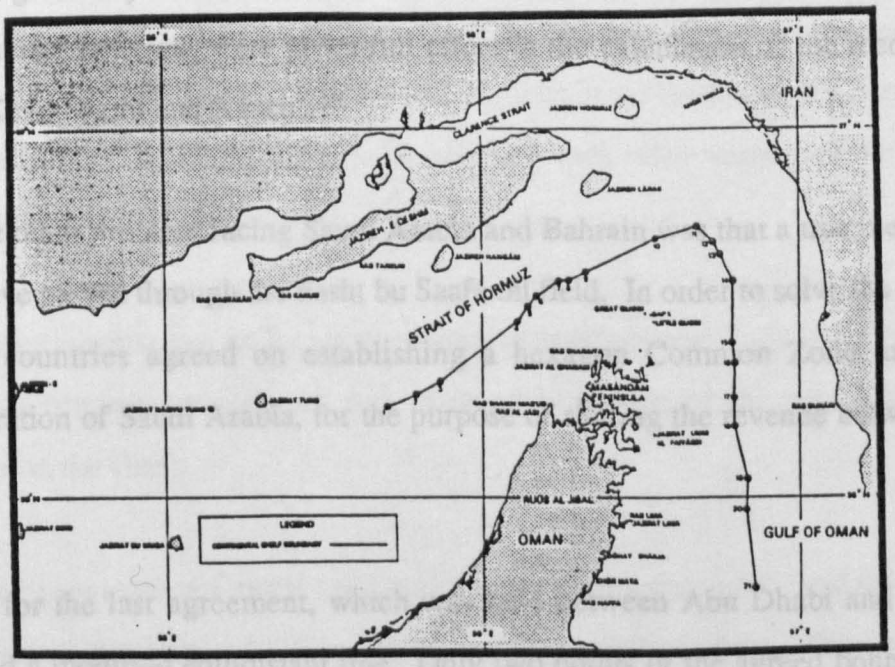


Figure 22, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 247.

The fifth, which was the Iran/Oman agreement of July 25, 1974, was concerned with the delimitation of the continental shelf boundary in the Strait of Hormuz. The agreed boundary was an equidistant line modified at some of its turning points. Apart

from the geographical configuration of the area: being as a strait, and the presence of some islands, no other geographical circumstances seem to have been present therein.[37] (See Figure 22)

The remaining two agreements were the Saudi Arabia/Bahrain (which were opposite States) agreement of 22 February, 1958, and the Abu Dhabi Qatar - adjacent States - agreement of March 20, 1969. As for the former agreement it seemed to have concluded a median boundary line. However, having disregarded all small islands, the agreed boundary could not be considered a true equidistant line, although some of its points were equidistant. After solving the question of sovereignty over the two Lubainah Islands - the small to Bahrain and the big to Saudi Arabia - the agreement considered the tip point of each island as a turning point of the continental shelf boundary. i.e., these two islands were not only disregarded from the equidistance calculation but also they were given a partial minus effect according to which neither of them was given any continental shelf areas from the side that faced the other country. Some islands, however, were given full effect in the calculation of the median line, such as Khaur Fasht and Kaskus.[38]

The other problem facing Saudi Arabia and Bahrain was that a true median line would have passed through the Fasht bu Saafa oil field. In order to solve the problem, the two countries agreed on establishing a hexagon Common Zone, under the administration of Saudi Arabia, for the purpose of sharing the revenue between each other.[39]

As for the last agreement, which was held between Abu Dhabi and Qatar, it concluded a modified equidistant line. Only two points of the agreed boundary line were equidistant from the coasts of both countries: Point A and Point D. The other two points, (B and C), were not equidistant. Whereas the location of point C was based on some obscure reason, point B was chosen "... to coincide with the location of an oil well ..." (Al-Bundoq oil well).[40] The recognition of the Abu Dhabi sovereignty over the Dayyinah Island caused the boundary line to deviate towards Qatar. The said

island, however, was not given full effect. In fact, it was given a semi enclaved arc which would coincide with the three-miles belt of territorial waters until it met the boundary line. As for the dispute over the Al-Bunduq oil well, the two countries have agreed to establish a Common Zone around the said well under the administration of Abu Dhabi for the purpose of sharing the received revenue.

The main feature of the Arabian (Persian) Gulf agreements above-cited was that the geographical considerations played a relatively minor role in comparison with the other factors. More important than the geographical factors, were the following three considerations, namely, the strategic importance of the Gulf, the land-border uncertainties, and the presence of a respectable deposits of crude oil therein. Due to the strategic importance of the Gulf, especially the Strait of Hormuz, international political influence was very likely to have taken place during the concerned negotiations.[41] Regarding the dispute over some of the Gulf islands, as well as over the territorial boundaries between the Gulf States, most of the concluded and the yet-to-be-concluded agreements were affected by those disputes and uncertainties.[42] Lastly, the presence of a huge quantity of good quality hydrocarbon deposits in the Gulf made the negotiations on the continental shelf boundaries to be based on each side's account of the location and importance of such deposits.[43]

In brief, national as well as international interests played, (and is very likely to play in the future,) a significant role in the delimitation of the continental shelf boundaries in the Gulf.

Two agreements in Central and South America were concluded by Argentina and Uruguay on 19 November, 1973, and by Costa Rica and Panama on 2 February, 1980. Although these two agreements indicated the equidistance method, the actual concluded boundary lines were different from the equidistant course. In the former agreement (Argentina/Uruguay agreement, as between adjacent and opposite states at the same time), the first section of the boundary line (Points 9 to 23) generally followed the navigation channel except in Point 10 which seemed to be equidistant from both

countries.

Considering the second section - Points 23, A, B, C, D, E and F -, the Parties agreed that the boundary line is "... defined by an equidistant line, determined by the adjacent coasts methods, which begins at the midpoint of the baseline consisting of an imaginary straight line that joins Punta del Este (Uruguay) and Punta Rasa del Cabo San Antonio (Argentina)."[44] The actual boundary between Point A and E was a modified equidistant line, or, as it was called, "... a segment of a parabolic curve.",[45] affected by Argentina's coast geographical configuration and the Uruguayan section of the closing line of Rio de la Plata - Point 23 to Pta del Esta. The presence of the Uruguayan island of Lobos was given a full effect in the calculation of the equidistant line at Point E, which continued until the 200 nautical miles limit.[46] The agreement established a Common Fishing Zone and a Pollution Control Zone as well, beside the consideration of the Argentina island, Martin Gracia, which was near the Uruguayan coast, as "devoted exclusively to a natural preserve for the conservation and preservation of the native fauna and flora."[47]

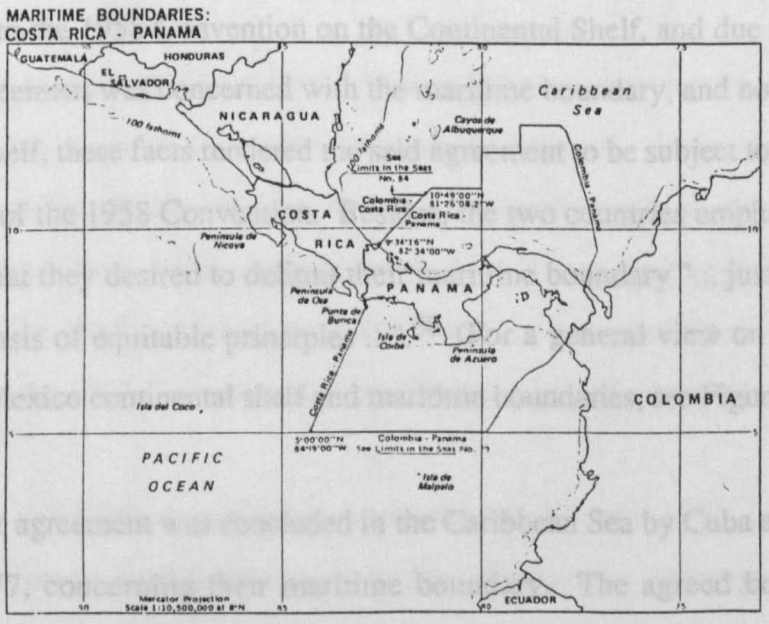


Figure 23, taken from, Limits in the Seas, No 97, 6 December, 1982.

The other agreement, which was implemented by Costa Rica and Panama, was concerned with two boundary lines, viz, in the Caribbean Sea and in the Pacific Ocean.

Apart from some points, which were equidistant from the two countries' coasts, both boundaries were more likely to be perpendicular lines to the general direction of the coast than being median lines.[48] The boundary in the Caribbean Sea was affected by the presence of some islands - Colon (Panama), and Punto Mona (Costa Rica) -, whereas the boundary in the Pacific Ocean was influenced by the coastal irregularities and the presence of islands of both countries, (near-shore Panamian islands and Coco Island of Costa Rica). (See Figure 23)

Another agreement in Central America was concerned with two Caribbean Sea States, namely, the Venezuela/Dominican Republic (being opposite States) agreement of 3 March, 1979. The western third section of the agreed boundary line was equidistant from both countries, whereas the other two thirds were a modified equidistant line. As for their tripoint with the Netherlands Antilles, Venezuela and Dominican R. agreed to connect their agreed boundary with the termini agreed by the USA and the Netherlands.[49] Apart from the presence of some near-shore islands on both coasts, there does not seem to have been any other geographical circumstances in the area. It may be necessary to say that, although both Venezuela and Dominican R. were Parties to the 1958 Convention on the Continental Shelf, and due to the fact that their said agreement was concerned with the maritime boundary, and not only with the continental shelf, these facts rendered the said agreement to be subject to the customary rules instead of the 1958 Convention. Besides, the two countries emphasized, in their agreement, that they desired to delimit their maritime boundary "... justly, accurately, and on the basis of equitable principles ...".[50] (For a general view on the Caribbean and Gulf of Mexico continental shelf and maritime boundaries, see Figure 24).

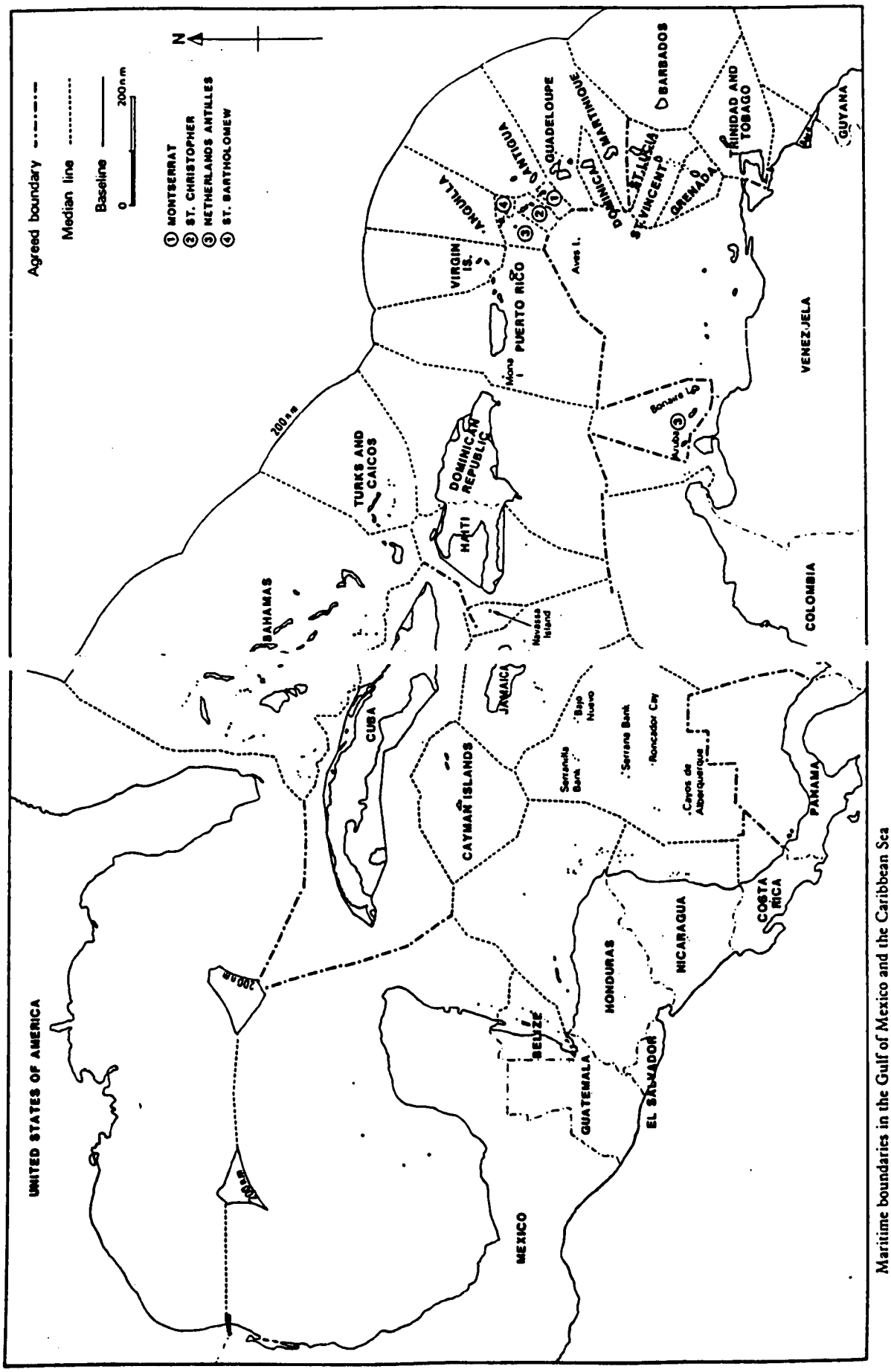
Another agreement was concluded in the Caribbean Sea by Cuba and Haiti on 27 October, 1977, concerning their maritime boundary. The agreed boundary was a median line, from the low water mark of the coasts of both countries, modified slightly at some of its points.[51] It seems that the geographical configuration of the two coasts was the underlying circumstance for the deviation of the boundary from the equidistance course. It may be necessary to say that the two countries provided that

they desired to conclude the boundary "... on the basis of the principle of equidistance or equity, as the case requires."[52] Haiti was a party to the 1958 Convention on the Continental Shelf, Cuba was not.

Concerning their maritime boundary in the Gulf of Mexico, Cuba and the USA signed a modus vivendi agreement on the basis of equitable principles, on 16 December, 1977. The agreed boundary was a modified equidistant line, though it appeared, prima facie, as if it was a pure median line. Having disagreed with the Cuban already defined baselines, USA established an "artificial construction lines"[53] around the south coast of Florida instead of rejecting the Cuban baselines which were not agreeable to the USA. Subsequently, a median line between the artificial construction lines and the Cuban baselines was established as the agreed first section of the boundary line between the two countries. Considering those artificial construction lines, the agreed first section of the boundary line cannot be counted as true median line. The third section of the boundary was a median line measured from the low water mark of the two opposite coasts. And finally, the second section was drawn according to selected points between the first and the third sections.

Apart from the said USA artificial lines, and the low water mark measurement of the third section, no other circumstances could be deduced. As for the geographical configuration of the Florida coast it constitutes a pointed outgrowth from the American coast facing the Cuban slightly concave coast. That is to say, a true median line would have been at the disadvantage of the USA. It may be necessary to say that, the USA was a party to the 1958 Convention on the Continental Shelf, Cuba was not.

Mexico and Cuba concluded an agreement on 26 July, 1976, concerning their EEZ and continental shelf boundary in the Gulf of Mexico. Although the two States agreed that the dividing line would be drawn on the basis of the equidistance principle, the actual boundary, according to the available maps, did not seem to be a true equidistant line.



Maritime boundaries in the Gulf of Mexico and the Caribbean Sea

Figure 24, taken from, Prescott, J.R.V.,The Maritime Boundaries of the World, METHUEN, London & New York, 1985, P. 342-43.

Cuba is an archipelago State consisting of the main island of Cuba and some other smaller islands around it. As far as this agreement was concerned, the main island of Cuba and Isla De Pines were relevant. The Mexican relevant coast was that of Yutacan and its surrounding islands especially Cozumel Island. Being that the case, the two countries formed an opposite as well as adjacent, geographical position. Regarding the Yutacan Channel, they were opposite each other with two pointed coasts. Conversely, in the Gulf of Mexico and the Caribbean Sea, they were more likely to be adjacent than being opposite. Thus, the geographical configuration of the two coasts together was flat in the Gulf of Mexico, and concave in the Caribbean.

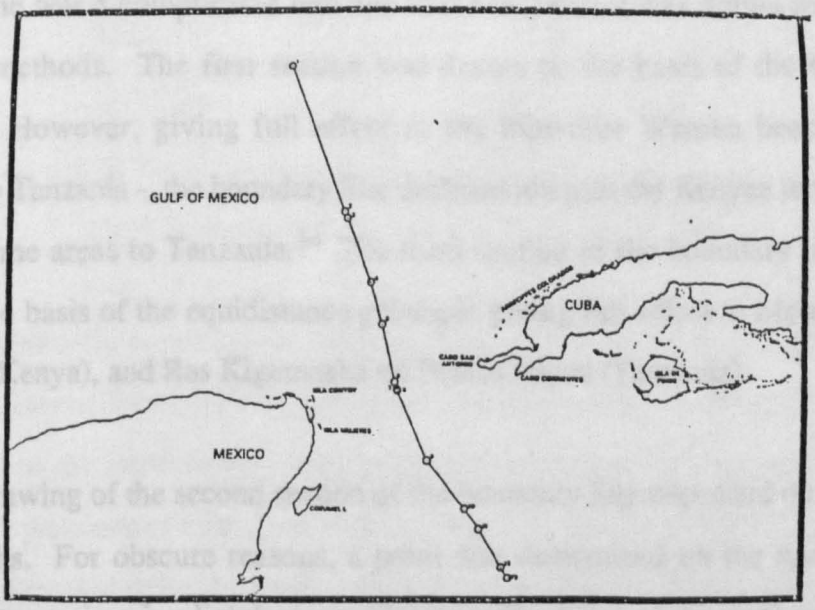


Figure 25, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 170.

Considering the above-said facts the agreed boundary was equidistant only in Yutacan Channel (points 5-8), where the two States were of opposite coasts. In the Gulf of Mexico, the situation was different. Since the geographical configuration of the two coasts was flat in the Gulf of Mexico, so the agreed boundary was more akin to a perpendicular line to the general direction of the two coasts than to an equidistant line (points 1-5). The boundary in the Caribbean Sea was a modified equidistant line (points 9-13). If a true equidistant line was drawn, full and equal weight should have

been given to the islands concerned from both sides, viz., Isla De Pines (Cuba), and Cozumel (Mexico). It follows that, a true equidistant line would have been located eastwards the actual agreed boundary line, and hence it would have given additional maritime areas to Mexico. Isla De Pines, therefore, can be said to have been given more than full weight pushing the boundary line towards Mexico in favour of Cuba. This interpretation can also be said, even if the concerned parties have measured their assumed equidistant line from the main island of Cuba and not from Isla De Pines; for it has the same result. (See Figure 25)

One of the agreements of the Indian Ocean, was the Kenya/Tanzania agreement, which was concluded on the basis of equitable principles on 9 July,1976. The resultant boundary line was a complicated one due to the fact that it was drawn in accordance with three methods. The first section was drawn on the basis of the equidistance principle . However, giving full effect to the Mawmba Wamba beacon - a rock belonging to Tanzania -, the boundary line declined towards the Kenyan territory giving more maritime areas to Tanzania.[54] The third section of the boundary line was also drawn on the basis of the equidistance principle giving full effect to Mpunguti ya juu lighthouse (Kenya), and Ras Kigomasha on Pemba island (Tanzania).

The drawing of the second section of the boundary line depended on the first and third sections. For obscure reasons, a point was determined on the mid of the line between Mpunguti ya juu lighthouse and the starting point of the third section on the boundary line. From this point, which was called X, an arc of circle was drawn between the terminus point of the first section and the starting point of third section of the boundary line. This arc of circle constituted the second section of the boundary line which was obviously a negotiated boundary line. It could be assumed that the said arc of circle gave additional maritime areas to Kenya in return for the additional areas that was given to Tanzania by giving more than full effect to the Mawmba Wamba island.

As for the fourth section of the boundary line, it was drawn in accordance with the parallel of latitude method. It is very likely that the choice of the parallel of latitude

method was inspired by both the geographical configuration and the general direction of the coast.

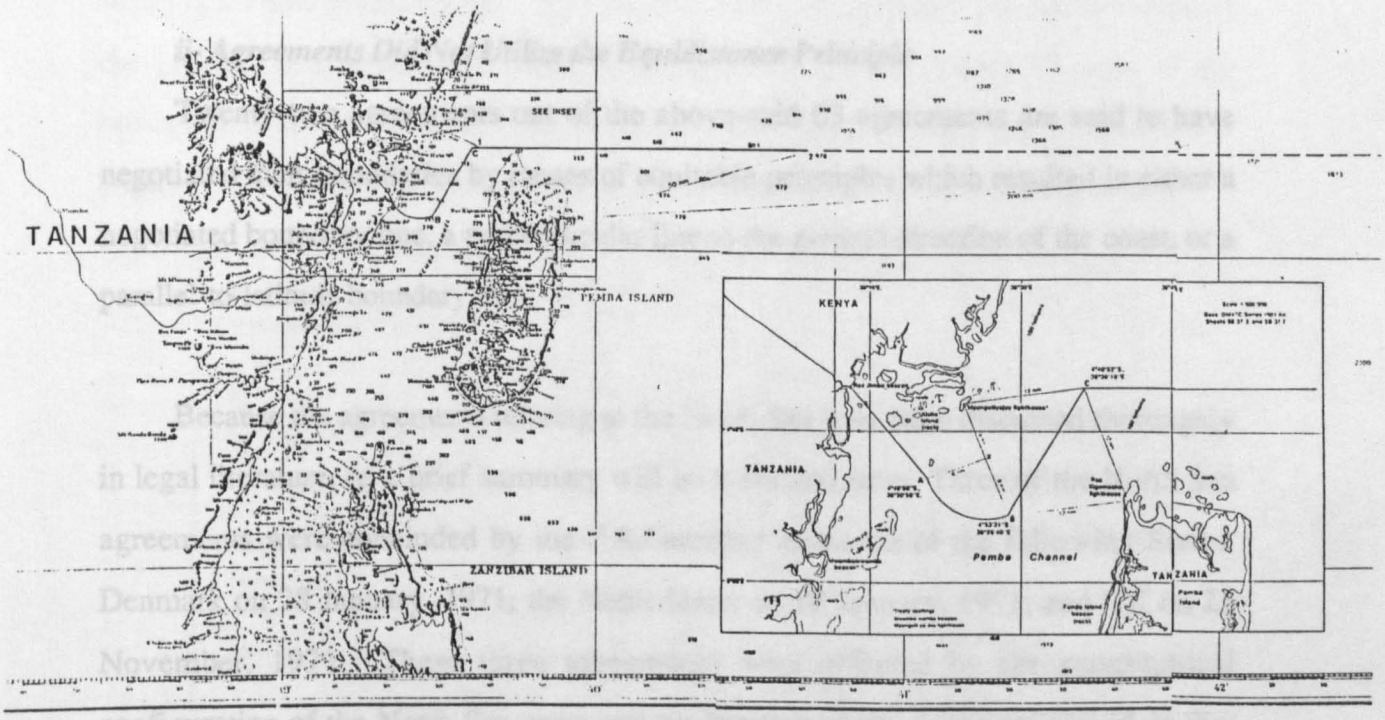


Figure 26, taken from, Limits in the Seas, No 92, 23 June, 1981.

Geographically speaking, the concerned area is very complicated. Tanzania and Kenya are adjacent States with respect to the first and second sections, opposite States with respect to the third section and again adjacent States with regard to the fourth section. The presence of islands of various sizes, that belong to both sides, facilitates this complexity. Accordingly, from a microgeographical viewpoint, this geographical complexity can be said to have been the underlying reason of the choice of methods in drawing the first three sections of the boundary line. The fourth section, however, can be said to have been affected by the general direction of the African coast, (of course as well as by the geographical configuration), in the area concerned. The geographical configuration of the Kenyan coast was slightly concave, i.e., in the normal circumstances the boundary line would be pushed downwards south of the parallel of latitude line. Nevertheless, the fact that the macrogeographical general direction of the concerned two coasts constitutes a line, though slightly concave, nearly vertical to the latitude line declining slightly towards the northeast, as well as the presence of Pemba island (Tanzania), caused the boundary line to be pushed upwards again forming a

parallel of latitude line. (See Figure 26) Kenya was a party to the 1958 Convention, but Tanzania was not.

ii- Agreements Did Not Utilize the Equidistance Principle

Twenty-two agreements out of the above-said 63 agreements are said to have negotiated their boundaries by means of equitable principles which resulted in either a negotiated boundary line, a perpendicular line to the general direction of the coast, or a parallel-to-latitude boundary line.

Because the agreements relating to the North Sea have been discussed thoroughly in legal literature, so a brief summary will be sufficient here. Three of the North Sea agreements were concluded by the F.R.Germany and each of the following States: Denmark on 28 January, 1971; the Netherlands on 28 January, 1971; and UK on 25 November, 1971. These three agreements were affected by the geographical configuration of the North Sea coast and the location of the States concerned on that coast. All three agreements were concluded after the decision of the ICJ in the 1969 Cases to which three of the said States were parties, viz, F.R.Germany, Denmark and Netherlands. As the negotiations between F.R.Germany, Denmark and the Netherlands resulted in a negotiated boundary line different from the equidistant, the UK, which would not have had a maritime boundary with Germany if the equidistance method was followed, had to conclude an agreement on the basis of equitable principles as well.

The F.R.Germany was a party to another agreement concerning its maritime boundary with the German D.R. on 29 June,1974, in the Lubeck Bay. The resultant boundary line did not follow the equidistance course. In fact, the boundary line mostly fell within the territorial waters of the German D.R. No relevant circumstances to justify such a deviation were mentioned in this agreement. However, the indication to the presence of some navigable channels might have influenced the concerned negotiations. For, "[m]ost of the boundary (A-B-C-D) coincides with the southeast

edge of the shipping rout 3 ...".[55]

Another factor might be said to have played a role in choosing the method of drawing the said boundary line. This factor is again the geographical configuration of the Lubeck Sea, which is markedly concave, and the occurrence of most of the concavity in the coast of the F.R.Germany. Conversely, the German D.R.'s coast is slightly convex against the concavity of the F.R.Germany's coast. (See Figure 27)

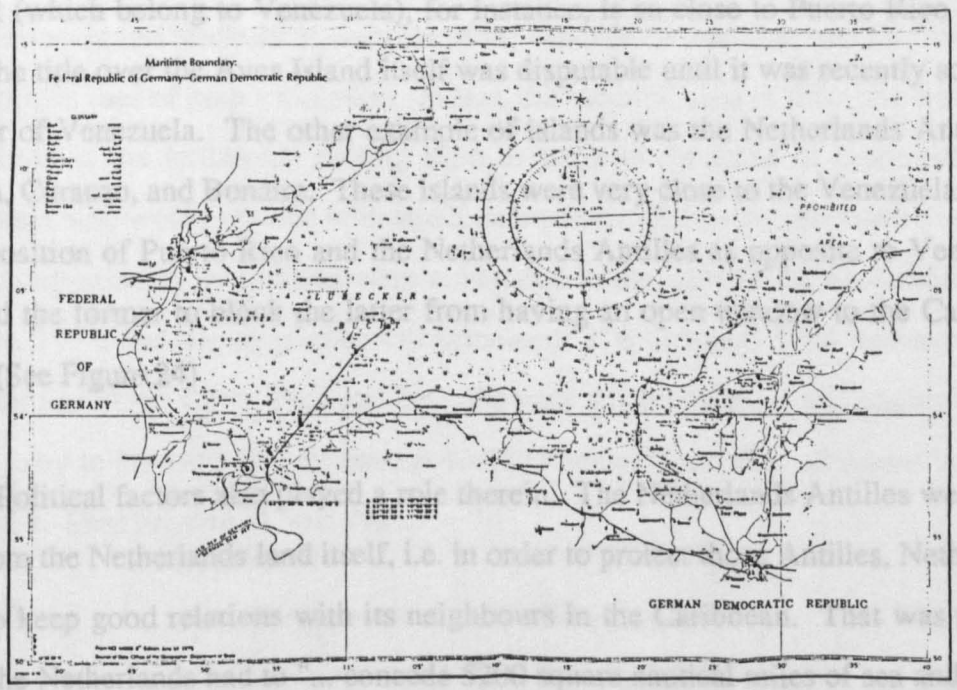


Figure 27, taken from, Limits in the Seas, No 74, 5 Oct., 1976.

Four agreements of the said 22 agreements were concerned with the Caribbean Sea. The first was held between Colombia and Costa Rica on 17 March, 1977. Having concluded a negotiated boundary line, the agreement contained no indication to any of the circumstances that were considered during the course of negotiations. The only possible geographical circumstances, that were likely to have affected the delimitation of the respective shelf, were those of the geographical configuration of the Caribbean coast from a macrogeographical viewpoint. The presence of Panama between the two States, and the concavity of the coast in the west (Costa Rica coast), facing the convexity of the coast in the east (the Colombian coast), might have constituted effective circumstances. Both States were not a party to the 1958 Convention. (See Figure 24)

Another two agreements were concluded by Venezuela and two of its neighbours: USA on 28 March, 1978, and the Netherlands, on 31 March, 1978. The agreed two boundaries of the two agreements were negotiated boundary lines. Several factors played a role in these delimitations. The first is the geographical complexity of the area concerned. Beside the geographical configuration of the Caribbean Sea (being a semi-enclosed Sea), the presence of islands constitutes a real problem therein. The Aves Island (which belong to Venezuela), for instance, is so close to Puerto Rico (USA). Yet, the title over the Aves Island itself was disputable until it was recently solved in favour of Venezuela. The other example of islands was the Netherlands Antilles of Aruba, Curacao, and Bonaire. These islands were very close to the Venezuelan coast. The position of Puerto Rico and the Netherlands Antilles as opposite to Venezuela, caused the former to block the latter from having an open window to the Caribbean Sea. (See Figure 24)

Political factors also played a role therein. The Netherlands Antilles were quite far from the Netherlands land itself, i.e. in order to protect those Antilles, Netherlands had to keep good relations with its neighbours in the Caribbean. That was perhaps why the Netherlands had to "... concede 5200 square nautical miles of sea and seabed in the west and 7000 square nautical miles in the east which would have fallen to the Netherlands if the median lines had been drawn."[56] As for the USA, it wanted to have an access to "... a democratic regime in Latin America."[57]

The fourth agreement was the France/Venezuela agreement of 17 July 1980, concerning the maritime boundary between Venezuela and the French islands of Guadeloupe and Martinique. Having followed the meridian line, the agreed boundary was a negotiated line. Due to the presence of the Venezuelan Aves island quite far from the Venezuelan coast, the Aves island was given a partial effect in favour of the said two French islands. The other fact relating to the Aves Island was that it was very small in comparison with the two french islands of Guadeloupe and Martinique. No other circumstances seem to have been present therein. (See Figure 24)

On the American coasts of the Pacific Ocean, three of the concluded agreements followed the parallel of latitude method. The Chile/Peru/Ecuador Declaration of 28 August, 1952, the Ecuador/Peru Agreement, 4 December, 1954, and the Chile/Peru agreement of 4 October, 1954, established a special Maritime Frontier Zone, which extended for 10 miles on each side of the agreed parallel of latitude boundary line beyond the 12 nautical miles territorial waters. This Zone was necessary to protect those innocent and inadvertent violators of the established maritime frontier from being penalized in case of such a violation. In fact, the establishment of this zone was sort of a solution to the traditional fishing right existing in the mind of those individual fishermen who would operate with small enterprises. It may be necessary to say that the two agreements in question were concluded in the light of the declaration of 18 August, 1952, and the supplementary agreement of 8 October, 1954, between Chile, Ecuador and Peru. Chile, Peru and Ecuador were adjacent States; and neither of them was a party to the 1958 Convention on the Continental Shelf: they all signed but never ratified it. (See Figures 28, and 29)

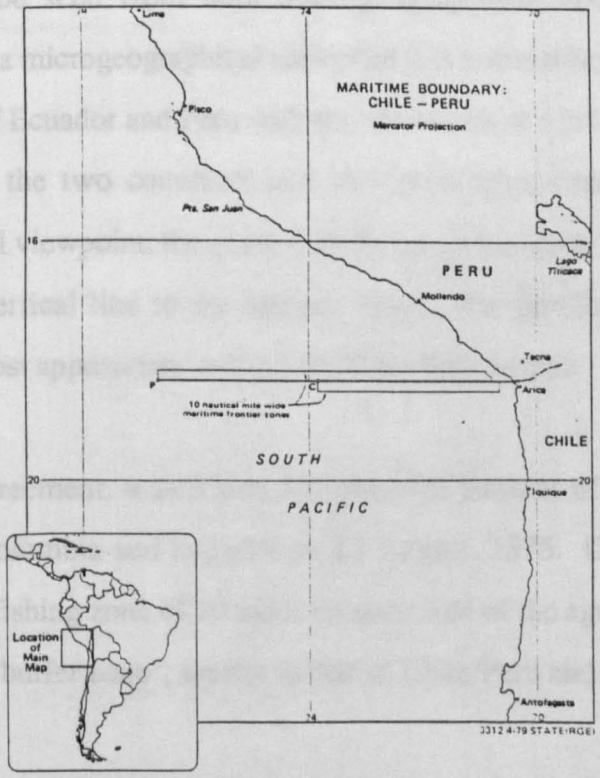


Figure 28, taken from, Limits in the Seas, No 86, 2 July, 1979.

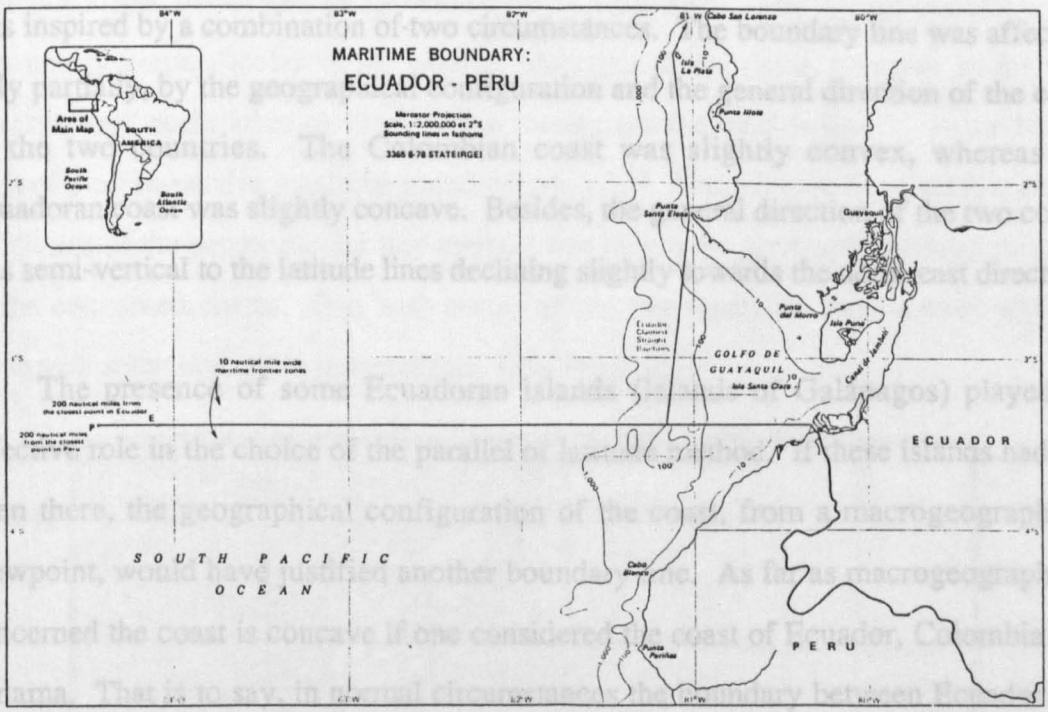


Figure 29, taken from, Limits in the Seas, No 88, 2 Oct., 1979.

The geographical factors that were likely to have affected the drawing of the boundary lines of the said two agreements were those which were concerned with the geographical configuration and the general direction of the coasts concerned. These two factors can be seen from both microgeographical, and macrogeographical viewpoints. From a microgeographical viewpoint it is noticeable that the intersection of the land frontier of Ecuador and Peru with the sea occurs at a point where it divides the relevant coast of the two countries into two semi-asymmetrical coasts. From a macrogeographical viewpoint, the general direction of the Chile-Peru-Ecuador coast is forming almost vertical line to the latitude lines. The parallel of latitude method, therefore, is the most appropriate method for those three States.

The third agreement, which also followed the parallel of latitude method, was signed between Colombia and Ecuador on 23 August, 1975. Colombia and Ecuador also established a fishing zone of 10 miles on each side of the agreed maritime frontier, which was called "buffer zone", similar to that of Chile/Peru and Peru/Ecuador ones.

The choice of the parallel of latitude method in the Colombia/Ecuador Agreement

was inspired by a combination of two circumstances. The boundary line was affected, only partially, by the geographical configuration and the general direction of the coast of the two countries. The Colombian coast was slightly convex, whereas the Ecuadoran coast was slightly concave. Besides, the general direction of the two coasts was semi-vertical to the latitude lines declining slightly towards the north-east direction.

The presence of some Ecuadoran islands (Islands of Galápagos) played an effective role in the choice of the parallel of latitude method. If these islands had not been there, the geographical configuration of the coast, from a macrogeographical viewpoint, would have justified another boundary line. As far as macrogeography is concerned the coast is concave if one considered the coast of Ecuador, Colombia and Panama. That is to say, in normal circumstances the boundary between Ecuador and Colombia must give effect to the Colombia/Panama maritime boundary which is supposed to push down the Ecuador/Colombia boundary line. However, the presence of the said Ecuadoran islands managed to push the Ecuador/Colombia boundary line up again causing it to be a parallel of latitude boundary line. (See Figure 30)

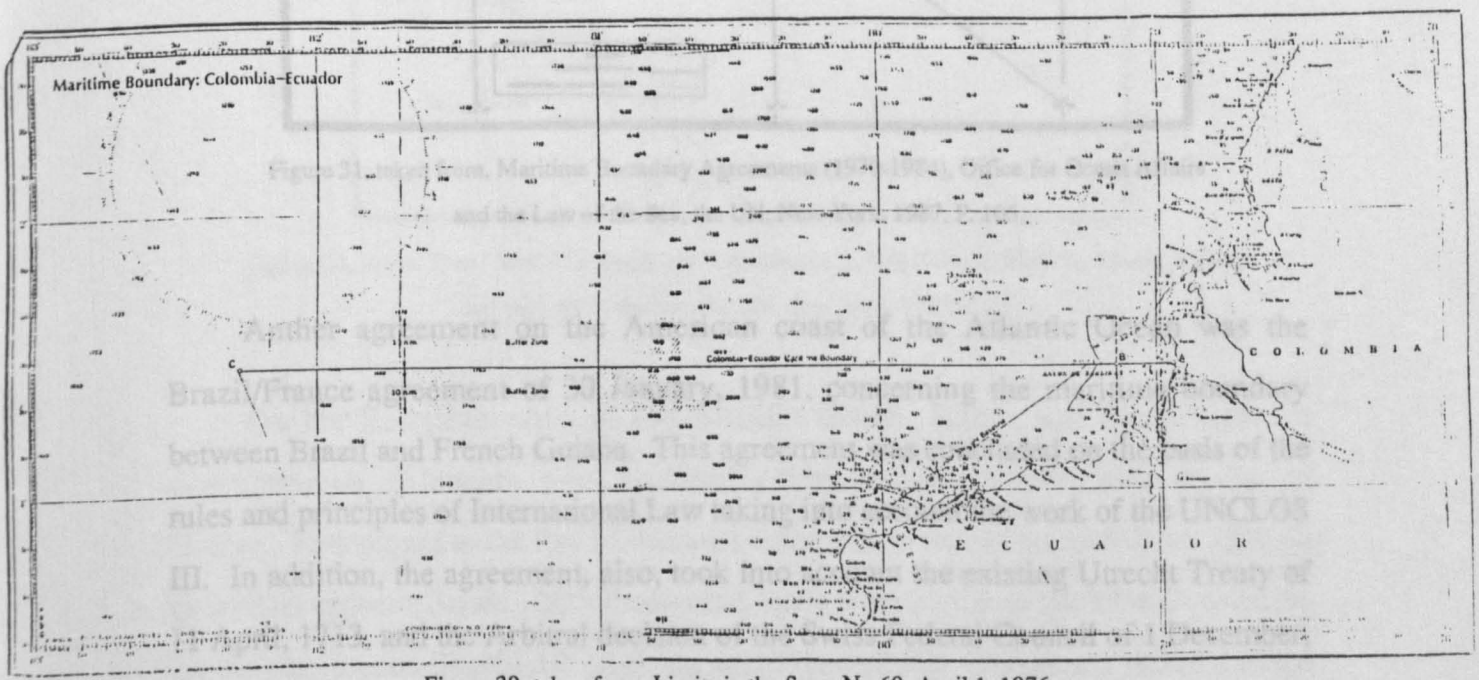


Figure 30, taken from, Limits in the Seas, No 69, April 1, 1976.

On the American coast of the Atlantic Ocean, Brazil and Uruguay, which were

adjacent States, concluded an agreement on 21 July, 1972. The agreed boundary line was nearly perpendicular to the general direction of the coast, contrary to the two governments' declaration of 1969, which recognized the median line "... as the lateral limit of their respective maritime jurisdictions, ...".[58] According to the available maps, the choice of the perpendicular line method was due to the geographical configuration of the concerned coasts. For, both coasts of the two countries form a semi-straight coast with some negligible indentations. (See Figure 31)

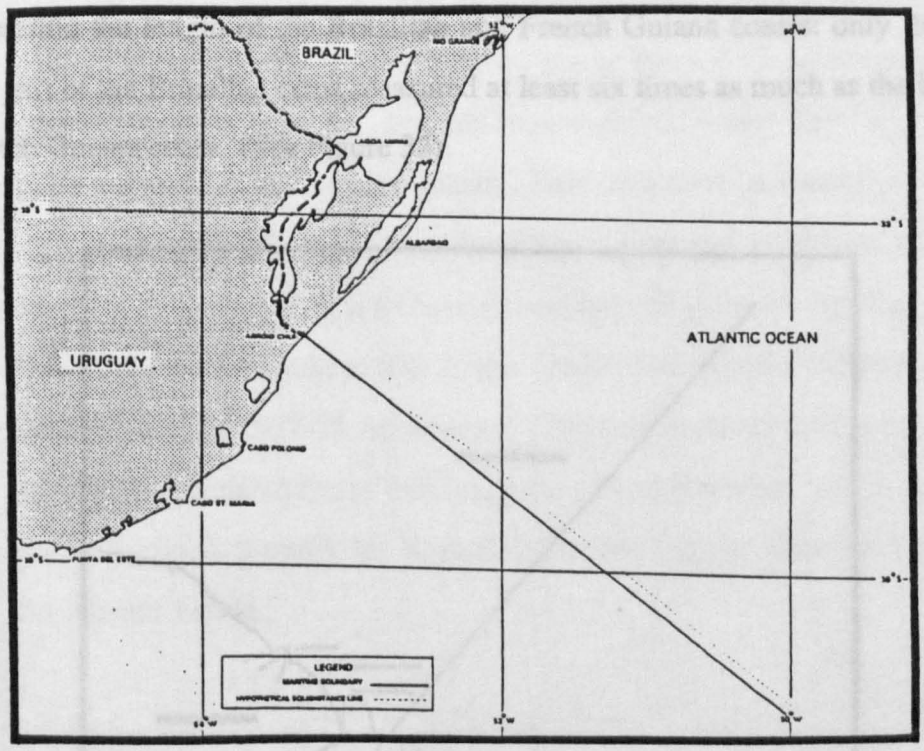


Figure 31, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 105.

Anther agreement on the American coast of the Atlantic Ocean was the Brazil/France agreement of 30 January, 1981, concerning the maritime boundary between Brazil and French Guiana. This agreement was concluded on the basis of the rules and principles of International Law taking into account the work of the UNCLOS III. In addition, the agreement, also, took into account the existing Utrecht Treaty of 11 April, 1713, and the Arbitral decision of the Swiss Federal Council of 1 December, 1900, and its application by the French-Brazilian Joint Commission on Border Delimitation following the negotiations held between 24-28 September, 1979, and between 19-23 January, 1981.[59]

Due to the geographical configuration of the concerned American coast, the agreed boundary was perpendicular to the general direction of the coast. despite the presence of some indentations on the relevant Brazilian coast, and the slight concavity of the Amapa (Brazil) - Surinam (French Guiana) outgrowth of the American coast, the macrogeographical general direction of the respective American coast formed more or less a straight line. That was why a perpendicular line to the general direction of the coast constituted an appropriate solution for both parties especially if one took into consideration the length of the Brazilian and French Guiana coasts: only the north-eastern part of the Brazilian coast measured at least six times as much as the length of the French Guiana coast. (See Figure 32)

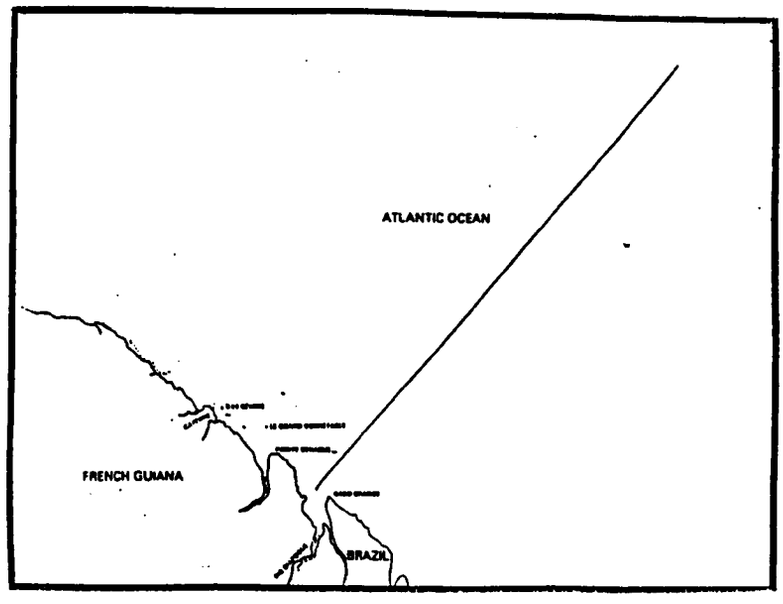


Figure 32, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 89.

On the European coast of the Atlantic Ocean, France and Spain signed a convention on 29 January, 1974, concerning their maritime boundaries in the Bay of Biscay. With regard to the Bay of Biscay, France and Spain can be considered adjacent as well as opposite States. Both France and Spain were parties to the 1958 Convention on the Continental Shelf. Although the said France/Spain Convention referred to the 1958 Convention on the Continental Shelf, France expressed its full adherence to its reservations to Article 6 which excluded the Bay of Biscay from being subject to the

provisions of the said Article.[60]

The negotiations between the two Parties resulted in a boundary line consisting of two sections. The first section, which was concerned with the territorial waters and the contiguous zone, was drawn in accordance with the equidistance principle, whereas the second section, which was concerned with the continental shelf, was a negotiated boundary line. The geographical configuration of the Bay of Biscay was concave in its north-eastern part (the French coast), and straight in its south-western part (the Spanish coast). Such a configuration would have made France disadvantaged if the equidistance method was used; for, it would have deprived France from the extension of its continental shelf to the Atlantic Ocean. This idea must be considered not only from a microgeographical but also from a macrogeographical viewpoint, taking into account the Spanish coast, which is a convex coast, and the yet-to-be concluded Anglo-French continental shelf boundary; (the Anglo-French continental shelf boundary was later concluded after the 1977-78 Arbitration). The geographical configuration of the coast, then, was the decisive factor justifying the agreed boundary line in the second section which declined towards the Spanish coast leaving the door open to France towards the Atlantic Ocean.

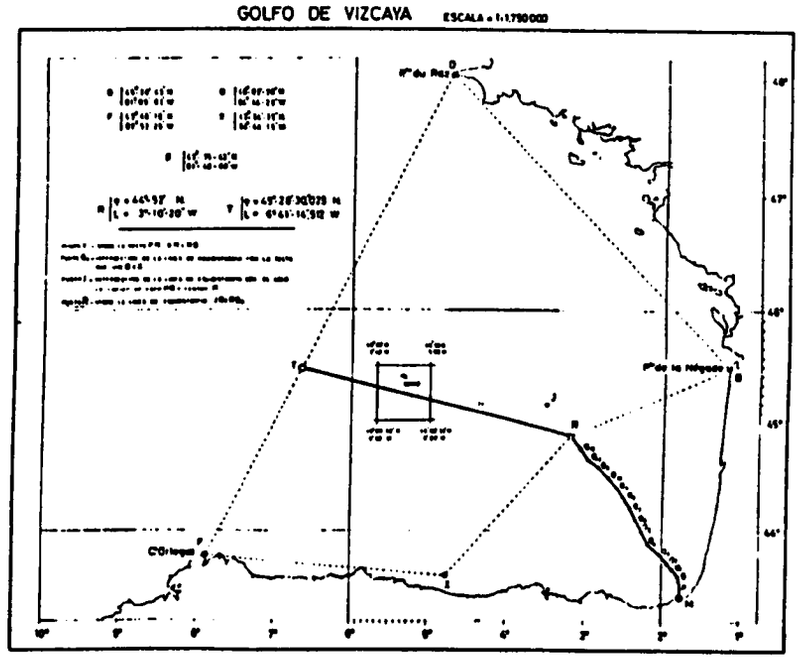


Figure 33, taken from, Churchill, R., Nordquist, M., & Lay, H., New Directions in the Law of the Sea, Vol. V, Oceana Pub., INC,1977, P. 260.

Another important factor had underlain the choice of the agreed boundary line. The presence of some natural resources deposits near (relatively speaking) the spanish coast was the other reason why the boundary line declined towards Spain. For, France desired access to these natural resources. Having made the boundary line pass through the deposits area, the two countries agreed to consider this area as a Common Zone for the purpose of joint and equal development. (See Figure 33)

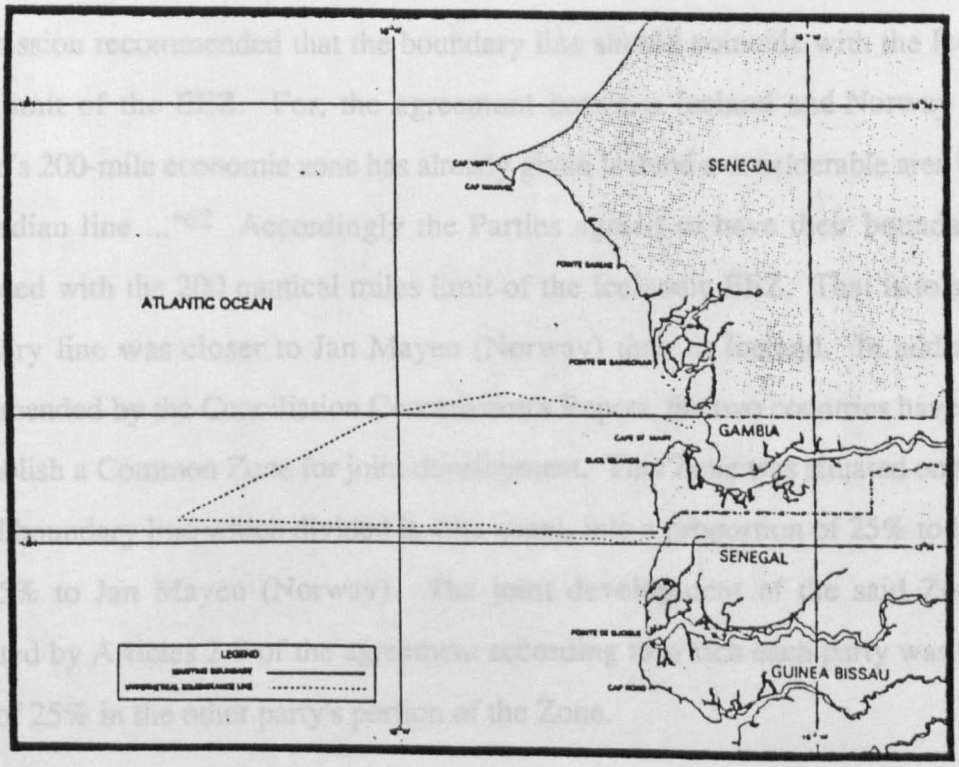


Figure 34, taken from, Maritime Boundary Agreements (1970-1984), Office for Ocean Affairs and the Law of the Sea, the UN, New York, 1987, P. 102.

On the African coast of the Atlantic, Gambia and Senegal signed an agreement on 4 June, 1975. Because Gambia was situated within the Senegal's territories, (Senegal surrounds Gambia from the north, east and south), the two countries had to negotiate two boundaries: the northern and southern boundaries. Having negotiated these two boundaries the two countries concluded a parallel of latitude line in the north, and a parallel of latitude line, with some deviations, in the south. With regard to the choice of the parallel of latitude method, it is very likely to have been affected by the general

direction of the geographical configuration of the coast. From a macrogeographical viewpoint, despite some negligible curves, the eastern coast of Africa forms a semi-straight configuration which is perpendicular to the latitude lines. However, as for the deviations from the parallel of latitude method in the southern boundary line it is very likely to have been influenced by the presence of some indentations as they are considered from a microgeographical viewpoint. (See Figure 34)

In the Norwegian Sea the agreement between Iceland and Norway of 22 October, 1981, was based on the Parties' conciliation of June, 1981.[61] The Conciliation Commission recommended that the boundary line should coincide with the Icelandic outer limit of the EEZ. For, the agreement between Iceland and Norway on "... Iceland's 200-mile economic zone has already given Iceland a considerable area beyond the median line ..."[62] Accordingly the Parties agreed to have their boundary line coincided with the 200 nautical miles limit of the Icelandic EEZ. That is to say, the boundary line was closer to Jan Mayen (Norway) than to Iceland. In addition, as recommended by the Conciliation Commission's Report, the two countries have agreed to establish a Common Zone for joint development. This Zone was situated on the said agreed boundary line which divided it, (the zone), into a proportion of 25% to Iceland, and 75% to Jan Mayen (Norway). The joint development of the said Zone was regulated by Articles 2-9 of the agreement according to which each party was given a share of 25% in the other party's portion of the Zone.

According to the Conciliation Report, it could be understood that the choice of the boundary line was based on two factors. The first is the existing agreements of the two countries which identified the outer limit of the Icelandic EEZ. The second is the economic circumstances of Iceland. This latter factor was considered in the light of the potential presence of the natural resources in the area, and the fact that "... Iceland is totally dependent on imports of hydrocarbon products." Subsequently, as the continental shelf, which surrounded Iceland, "... is considered by scientists to have very low hydrocarbon potential.", and since the Jan Mayen Ridge is "... the only area which is considered to have the possibility of finding hydrocarbons.", which Iceland

can have access to; so the Conciliation Commission recommended that the boundary should coincide with the outer limit of the Icelandic EEZ and around the Jan Mayen Ridge a Common Zone should be established.[63] (See Figure 35)

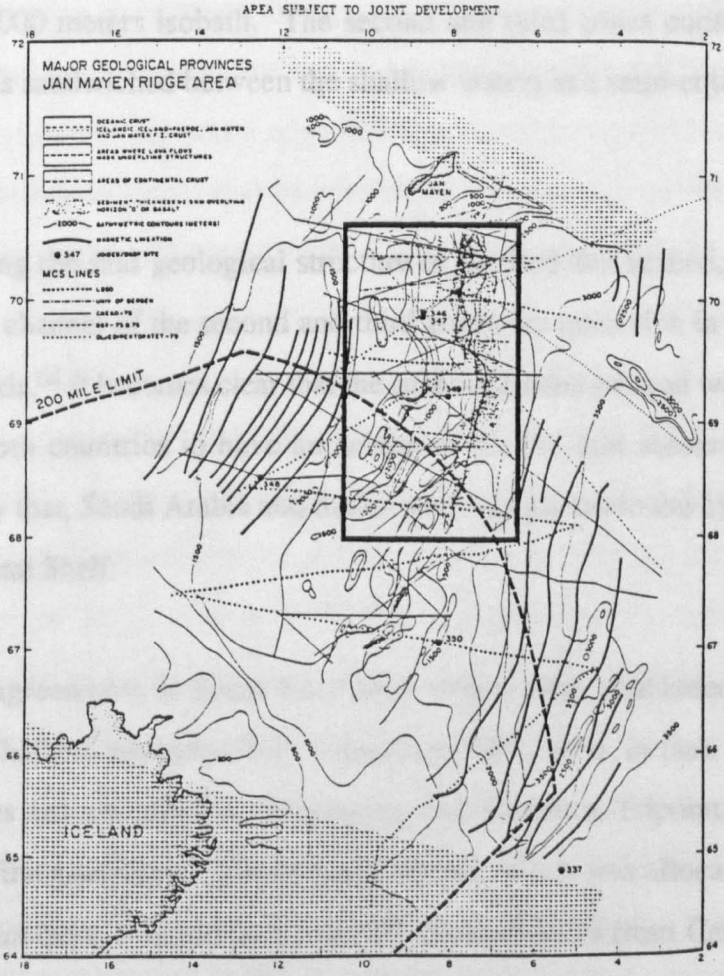


Figure 35, taken from, 20 ILM, (1981), P. 828.

Sudan and Saudi Arabia concluded an agreement regulating their seabed and subsoil in the Red Sea on 16 May, 1974. The agreement established three zones. Each of the two zones, which extended up to 1000 meter isobath from each party's coast, was allocated, exclusively, to the party concerned. The third zone, which consisted of the area between the said two zones, was designated as a Common Zone for the purpose of joint exploration and exploitation on the basis of equal shares.

The choice of this method of delimitation was due to the geological structure of

the seabed in the Red Sea, and the location of both parties on its two banks: being opposite States. Such a choice is almost akin to the 'Mid' Thalewg Channel Method which has been used in the delimitation of some international rivers. The seabed of the Red Sea consists of three basic zones. The first is the shallow waters up to 1000 meters isobath; the second is up to 2000 meters isobath; and the third is the deep seabed of more than 2000 meters isobath. The second and third zones constitute a narrow channel which is sandwiched between the shallow waters in a semi-equal portion from the two sides.

Considering the said geological structure of the Red Sea seabed, beside the fact that the narrow channel of the second and third zones are quite rich in hot brine pools and mineral fields,[64] it becomes clear that the said concluded method was motivated by the desire of both countries to have an access to the the said resources. It may be necessary to say that, Saudi Arabia and Sudan were not parties to the 1958 Convention on the Continental Shelf.

A set of agreements in South East Asia, which were concluded by Indonesia, Malaysia and Thailand between 17-21 December, 1971, were, in fact, concerned with three boundaries and a trijunction. Regarding their Common Tripoint, the said States concluded the first agreement. The agreed Tripoint, which was allocated on the basis of equitable principles, resulted in a point 52 nautical miles from Cape Jumbu Ayre (Indonesia), 98.9 nautical miles from Lang Kaui (Malaysia), and 76.1 nautical miles from Buntang (Thailand). This agreement did not mention why this point was chosen in that location. However, the geographical configuration of the respective coasts, and the presence of some near-shore islands may have affected such a choice.

As it is seen on the available maps, the most disadvantaged State, with respect to the Strait of Malacca, is Malaysia. Thailand and Indonesia have a good access to the Andaman Sea. The Tripoint was, therefore, chosen to be far from the Malaysian shore. As for Thailand, the presence of Kophuket Island and some other small islands made the general direction of its coast concave in a way that was able to give Thailand an

additional circumstance to push the location of the said Tripoint towards the Indonesian coast. That was the reason why, the agreed Tripoint was nearer to the Indonesian coast than to any of the other two countries.

The second agreement was concluded by Indonesia and Malaysia, (being opposite States). This agreement extended the agreed continental shelf boundary of the 1969 agreement and connected it with the above-said agreed Indonesia/Malaysia/Thailand Tripoint. Since the Tripoint was a negotiated point, so the agreed boundary between Indonesia and Malaysia would also be considered a negotiated boundary line. Hence, the justification regarding the choice of the Tripoint, mentioned-above, could be stated here again.

The third agreement was between Indonesia and Thailand on 21 December, 1971, which drew the section of the disputed boundary line between the Indonesia/Malaysia/Thailand Tripoint and the terminus point of the Indonesia/Thailand agreed boundary of 17 December, 1971.[65] This section of the maritime boundary between the two States was a negotiated boundary based on the same reasons that were justified with respect to the said Tripoint of the three countries.

The fourth agreement was signed between Malaysia and Thailand as adjacent States. Having negotiated the respective maritime boundary, Malaysia and Thailand concluded a boundary line closer to Thailand than Malaysia. It was assumed that the choice of the turning points of this boundary line was inspired by the fact that all the concerned Thai islands were smaller than the Malaysian islands present in the area.[66] That is to say, the size of the islands was the utilized factor in deciding the proper solution.

Having overcome their difficulties and solved their problems without invoking an ad hoc Arbitration, as was decided in 1980, the UK and the Irish Republic concluded an agreement on 2 November, 1988. This agreement established two boundary lines: the first was concerned with the Irish Sea, St. Georges Channel and Celtic Sea; (see

Figure 36) and the second was mainly interested in the continental shelf boundary west of Scotland, (see Figure 37). The method of delimitation used in determining both boundary lines was a combination of parallel of latitudes and longitudes forming a kind of irregular zigzag lines.

Although Ireland is geographically situated opposite to the UK, the two States could be regarded as opposite and simultaneously adjacent States with respect to the said two boundary lines: they were opposite in the Irish Sea and St. Georges Channel, and adjacent in the Celtic Sea and west of Scotland, (in the Atlantic Ocean). As far as the geographical configuration is concerned the coast of Ireland which faces the UK constituted a smoothly curved line with numerous minor and negligible indentations except in the Dundalk Bay and Wexford promontory. Besides, few small off-shore islands were present close to the said Irish coast. Conversely, the UK's west coast was indented deeply in several places in the middle and south, and full of fjords and fringe of islands in the north. This geographical complexity of the UK coast revealed great difficulties so that a true median line would be almost impossible to be drawn. Alternatively, the Parties found that the zigzag of parallel of latitude and longitude could serve the same purpose especially if it followed a course similar to that of the median line.

Thus, the actual courses of the agreed boundary lines in the Irish Sea and St. Georges Channel of the southern boundary, and in the very beginning of the northern boundary, where the Scottish and Irish coast were opposite each other, were very likely to be equidistant from selected points on the coasts of the two countries. That is to say, the said boundary lines were negotiated median lines although they were drawn in accordance with the method of zigzag of parallel of latitudes and longitudes.

The remaining sections of the two boundary lines, where the coasts of the two countries were more likely to be adjacent than opposite States (in the Celtic Sea and west of Scotland), were very likely to have followed a course of negotiated lines. As for the general course of the remaining part of the southern boundary it seemed that it

was close to a perpendicular to the closing line of the upper part of the Celtic Sea which would be drawn between the Scilly isles and the most south-western point of the Irish coast. Similarly, the remaining part of the northern boundary line seemed to have been influenced by the general direction of the two countries' coasts. The general direction of the two countries coasts, which faced the Atlantic Ocean, constituted a right angle especially if one disregarded the Connacht outgrowth of the Irish Island. This right angle formed a line of north-south direction which declined slightly towards the north-east and the south-west. If the general direction of the said coast was vertical to the latitude, then a single parallel of latitude boundary line would have been the most proper solution. However, as the general direction of the coast declined slightly in a north-east/south-west direction, the situation necessitated a redress in favour of Ireland. That was why the two Parties agreed on a set of parallel of latitude lines joined together with a set of parallel of longitude lines forming a zigzag boundary line the general course of which deviated towards the north-west direction in favour of Ireland.

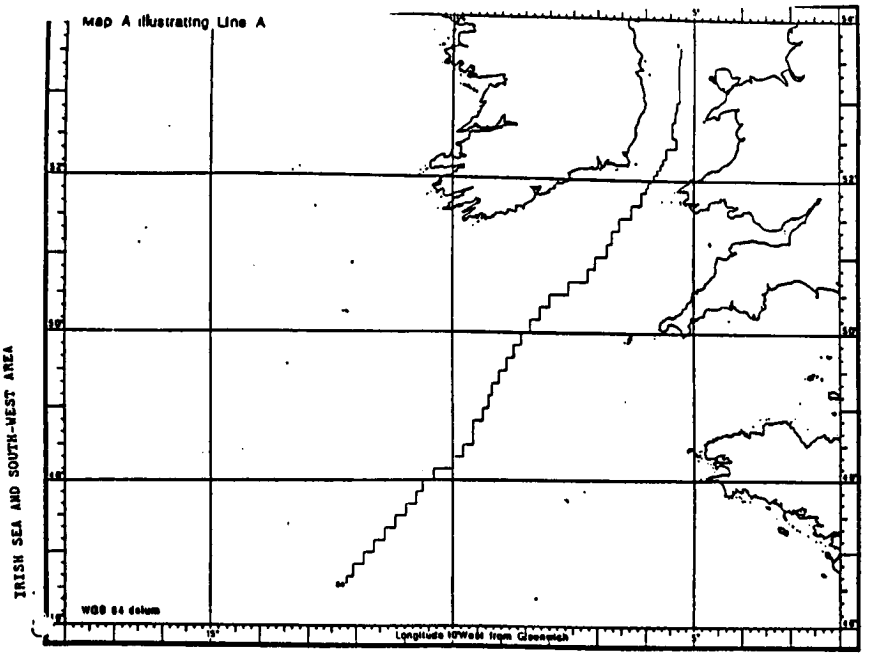


Figure 36, taken from, Press Release

In summary, the agreed two boundaries were negotiated lines drawn in accordance with two combined methods: negotiated equidistance method, and a zigzag of parallel of latitudes and meridian method. The choice of the said method was mainly influenced by the geographical configuration of the coasts of the two countries

especially the United Kingdom's. As for the question of islands, it does not seem to have played any role in such a choice; for instance, the Scilly isles were given very little weight in the calculations of the used method.

Nothing in this agreement was mentioned as to the status or weight of the Rockall Islet the sovereignty over which was claimed by the UK and disputed by Ireland, Denmark and Iceland.[67] However, in the debate that was proceeded in front of the House of Commons, both the UK Prime Minister and the Foreign Minister emphasized that the agreement with Ireland on the delimitation of the continental Shelf would not affect the status of the Rockall Islet as it belonged to the UK.[68]

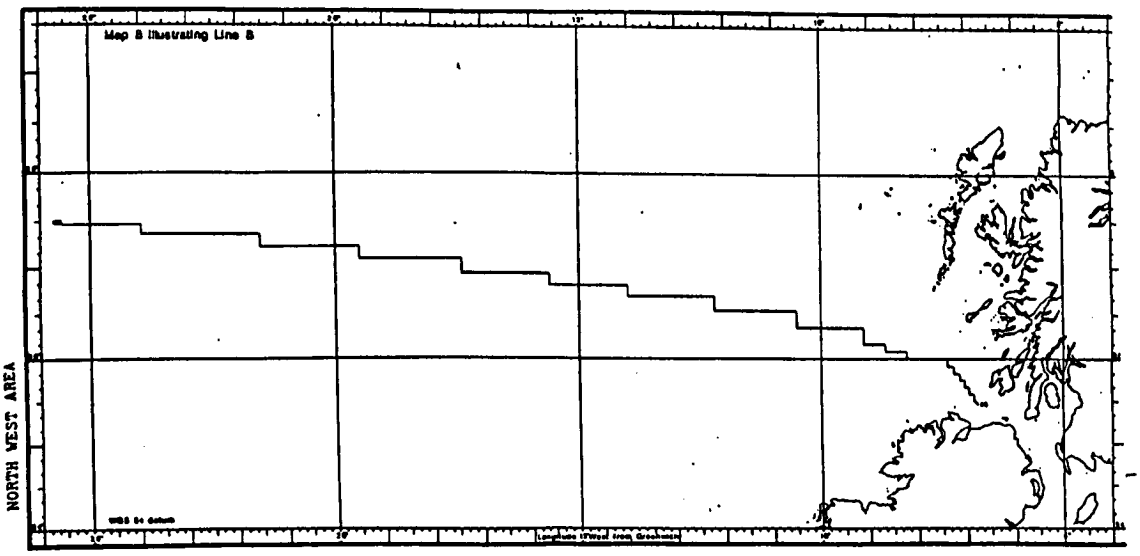


Figure 37, taken from, Press Release

It may be necessary to state that, the UK has ratified the 1958 Convention on the Continental Shelf, whereas Ireland, though it signed it, has not ratified it yet. The agreement, therefore, can be assumed to have been negotiated on the basis of equitable principles.

Section 2

Relevant Circumstances
&
The Judicial, Arbitral and Other Cases

Judicial cases relating to the delimitation of the continental shelf, or to the maritime boundary, are of great significance with respect to the identification of the relevant circumstances. This Chapter has concerned itself with the examination of the available cases in a bid to discover what sort of circumstances they regard as falling within the scope of the relevant circumstances clause.[69]

Being the first, and the foremost, case relating to the delimitation of the continental shelf, the North Sea Cases, (1969), established the term "relevant circumstances", which replaced the conventional term "special circumstances". Due to the lack of sufficient State practice, and because the continental shelf delimitation question was still, relatively speaking, a new issue in International Law, the ICJ desired not to restrict itself with a precise definition of the relevant circumstances clause. That is why it says that,

> "..., there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures."[70]

However, the ICJ did not leave the matter without clarification at all. It, in fact, provided some examples of such circumstances; and yet it discussed some of these examples. In its concluding decision, the International Court stated that,

> "(D) in the course of negotiations, the factors to be taken into account are to include:
> (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
> (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region."[71]

Beside these three categories of factors, another factor is of fundamental importance. When applying the agreement-equitable principles customary solution, the concerned parties must take

"... account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other; ...".[72]

According to the International Court, therefore, five geographical factors fall within the scope of the relevant circumstances term. These five factors are: the geographical configuration of the coast, the presence of any special or unusual features, the unity of any oil or mineral deposit, the element of a reasonable degree of proportionality, and the non encroachment on the natural prolongation of the other States.[73]

Of these five circumstances the actual applicable circumstances to the North Sea Cases were those which related to the geographical configuration of the North Sea coast, the reasonable degree of proportionality and the presence of mineral deposits. As for the geographical configuration, the North Sea concave coast made F.R.Germany disadvantaged, especially if the equidistance method was used; for, it would have produced an inequitable result.[74] The question of proportionality would be applicable as well, due to the fact that the three concerned countries had coastlines which were comparable in length.[75] Finally, the North Sea is quite rich in mineral deposits, especially petroleum, the reason that the Court suggested the unity of deposit as a

circumstance to be taken into account during the Parties renegotiations.

Because of the partial applicability of the Customary solution to the delimitation of the continental shelf in the Anglo-French Arbitration, (1977-78), some relevant circumstances could be deduced therefrom. These relevant circumstances were mainly geographical circumstances.

Regarding the Channel Islands area the applicable law was the Customary solution.[76] The Channel Islands were considered a relevant circumstance which would justify some deviation from the median line.[77] Two factors underlain the consideration of these Islands a relevant circumstance. The first was that these British Islands were situated closer to the French coast than the British that if a true median line was employed giving full effect to these Islands, this would have created inequities.[78] The other factor was that the Channel Islands were considered separate islands of the United Kingdom.[79] In fact, the Channel Islands were not only "on the wrong side" of the mid-Channel median line but also "wholly detached geographically from the United Kingdom".[80] It was, therefore, according to these factors that the Tribunal decided to use two methods of delimitation. The main boundary line was the median line which ignored the presence of the Channel Islands; and a band of 12-mile continental shelf around the northern and western coasts of the Channel Islands was drawn leaving the continental shelf areas between this band and the median line to belong to France.[81]

The choice of the 12-mile limit around the Channel Islands was due to the existing 12-mile Fishery Zone of the Channel Islands, which was "... expressly recognized by the French Republic ...";[82] and also due to "... the potentiality of an extension of their territorial sea from three to 12 miles."[83] Besides, the invocation of the security, defence and navigational defence considerations by the UK was approved by the Court which accepted these equitable considerations "... as carrying a certain weight;".[84] Due to, inter alia, these considerations the Court rejected the French proposition of giving the Channel Islands a 6-mile enclave continental shelf around them.[85]

Security, defence and navigational defence considerations were also invoked by France "... in favour of a continuous link between the eastern and western parts of its continental shelf in the Channel; ...".[86] Having examined this contention, the Court concluded that the said considerations "... tend to evidence the predominant interest of the French Republic in the southern areas of the English Channel, ...".[87]

Another example of relevant circumstances, relating to this Case, can be found in the Atlantic sector of the boundary line. Although the applicable rules in the Atlantic sector were those of the Conventional solution, (Article 6 of the 1958 Convention), the Tribunal commented that,

> "... the course of the boundary in that region will be the same whether the delimitation is made on the basis of Article 6 or of the rules of customary law."[88]

The presence of the Ushant Island and Scilly Isles, therefore, can be said to have been considered a "special circumstance" and a "relevant circumstance" as well. Whereas the Ushant Island was given full effect, the Scilly Isles were given only half effect, due to the fact that,

> "[t]he distance that the Scilly Isles extend the coastline of the mainland of the United Kingdom westwards onto the Atlantic continental shelf is slightly more than twice the distance that Ushant extends westwards the coastline of the French mainland."[89]

The distance criterion, then, was the factor which was behind the Tribunal's decision of giving half effect to the Scilly Isles despite the Tribunal observation that, it

> "... without attributing any special force as a criterion to this ratio of the difference in the distances of the Scillies and Ushant from their respective mainlands, *finds in it an indication of the suitability of* the half effect method as a means of arriving at an equitable delimitation in the present case."[90] [Emphasis added]

Having found that the natural prolongation concept could not be "... a suitable basis for the solution..." in the Iceland/Norway (Jan Mayen) Conciliation in 1981, the Conciliation Commission recommended two basic circumstances: the existing agreement of 1980 between Iceland and Norway, and the economic circumstances of Iceland.

The Iceland/Norway agreement of 28 May, 1980, recognized the 200 miles Icelandic EEZ which was claimed by Iceland in June 1, 1979.[91] In so doing, Iceland was given considerable areas of continental shelf beyond the median line, bearing in mind that the shortest distance between Jan Mayen and Iceland was about 290 nautical miles.[92] This finding was combined with the relevant economic circumstances which were based on four considerations. These considerations were, a- the total dependence of Iceland on imports of hydrocarbon products; b- the very low hydrocarbon potential of the continental shelf surrounding Iceland; c- the sole possibility of finding hydrocarbons is considered to be available in the Jan Mayen Ridge situated between Jan Mayen and the Icelandic 200 miles EEZ; and d- the fact that, due to the water depths, the exploitation of hydrocarbons was not commercial unless found in great quantities.[93]

Weighing up the above-said considerations, the Commission found no reason to recommend a boundary line different from that which coincided with the outer limit of the Icelandic EEZ. Besides, concerning the Jan Mayen Ridge area, it recommended the Parties to establish a Common Zone for the purpose of joint development.[94] Briefly, the Common Zone constituted a rectangle enclosing the Jan Mayen Ridge, and situated on the said outer limit of the Icelandic EEZ at a proportion of about 75% beyond the Icelandic EEZ, and 25% within the said Zone. Subsequently, each Party was given the right of 25% of the joint-venture arrangement in that part of the rectangle which was on the other Party's continental shelf, and 75% in that part of the rectangle which is located on the Party's own continental shelf.[95] Needless to say, the Parties have implemented these recommendations in their agreement of 1981.[96]

Several relevant circumstances were said to have played a role in identifying the

method of delimitation of the continental shelf between the concerned States in the Tunisia/Libya Case of 1982. Some of these circumstances were of a geographical nature, and others were of a legal nature.

Having divided the concerned continental shelf areas into two sectors, the International Court based its determination of the boundary line of the first sector on three factors. These three factors were, the conduct of the two parties,[97] the method of perpendicular line to the general direction of the coast,[98] and the land frontier between the Parties.[99] The presence of a line from Ras Ajdir at an angle of some 26° east of north was considered by the Court as a de facto line due to the fact that the said line divided

> "... concession areas which were the subject of active claims, in the sense that exploration activities were authorised by one party, without interference, or (until 1976) protest, by the other."[100]

The 26° line was, in fact a perpendicular to the general configuration of the concerned coast ignoring the outgrowth of the coast near Jerba Island and the presence of the said Island itself.[101] That is to say, Jerba Island and the relating outgrowth were not given any weight at all during the course of identifying the proper method of delimitation.[102]

The second sector of the line was influenced by the geographical configuration of the coast, as well as by the presence of Kerkennah Islands. The so called radical change in the direction of the Tunisian coast northwards the Gulf of Gabes forming Ras Kaboudia was taken into the Court's account; and subsequently affected the course of the perpendicular line to deviate towards the east. This deviation started from a point occurring at the latitude line which passed through the most westerly point of the Gulf of Gabes.[103] The fact that the said change of the Tunisian coast rendered Tunisia and Libya more likely to be opposite, rather than adjacent, States convinced the Court that the equidistance principle became

"... a factor to be given more weight in the balancing of equitable considerations than would otherwise be the case."[104]

This conclusion was also underlain by the presence of the Kerkennah Island.[105] However, bearing in mind the presence of some islets and low-tide elevations around them, the Kerkennah Islands could not be given full effect because such an effect would have amounted "... to giving excessive weight to the Kerkennahs".[106] Accordingly, the said island was given half effect in the calculation of the equidistant line in the second sector.[107]

Regarding the Gulf of Maine Case of 1984 between Canada and USA, the conventional solution was not applicable thereto, though both Parties had ratified the 1958 Convention on the Continental Shelf.[108] The reason for this was that Canada and USA asked the Court to determine a single boundary line for both the continental shelf and the EEZ areas. As there was no codified rules applicable to a single maritime boundary the applicable rules and principles were those which were deduced from General International Law, (agreement, equitable principles, relevant circumstances, and a proper method of delimitation),[109] as well as Special International Law, (principles such as the land dominates the sea, and the non encroachment principles).[110]

The major relevant circumstance that affected the drawing of the boundary line in the Gulf of Maine was the geographical configuration of the respective coasts. It was due to this geographical configuration that the Chamber divided the Gulf into two sectors. In the first sector the two States were considered adjacent States, whereas in the second, they were considered opposite each other.[111] In the first sector an equal division of the areas concerned was appreciated by the Chamber.[112] However, the equidistance method was not the method used.[113] Alternatively, the dividing line, (from A to B) was based on a simple geometrical method which bisected the areas of the first sector into two equal sections.[114]

The dividing line in the second sector was influenced by several relevant circumstances, namely, the coastal configuration, the general direction of the coasts, the presence of islands, and the element of proportionality.[115] These various factors played an important role in achieving a modified equidistant line giving only half effect to the Seal Island and the surrounding small islets.[116]

Beyond the second sector, which fell outside the Gulf of Maine areas onto the Atlantic Ocean, the concluded boundary line was a perpendicular to the closing line of the Gulf.[117] This choice of method was due to the fact that the said closing line

> "... would form a right angle, corresponds eventually to the direction of the coastline at the back of the Gulf,..."[118]

The most effective relevant circumstances in the Libya/Malta Case of 1985 were those which related to the geographical position of the two States concerned, and to the proportionality element. The delimitation process started with establishing a provisional median line by the help of which the final boundary line could be better assessed.[119] Because of the distorting effect of the Maltese Filfla Islet, the provisional median line did not take it into account; for, the inclusion of such an island in the calculation of the median line would have dissatisfied the test of equitableness.[120]

However, the geographical position of the Island of Malta, from a macrogeographical viewpoint, "... as a relatively small feature in a semi-enclosed sea ...", in addition to "... the great disparity in the lengths of the relevant coasts of the two Parties.", convinced the ICJ that "... some northward shift of the boundary line [(the provisional median line) was] needed to produce an equitable result."[121]

The interesting thing about the above-mentioned geographical circumstance was that it was inspireded by a hypothetical situation. Because of the disadvantaged position of Malta (being a small island in a semi-enclosed sea), the ICJ established an assumption the implication of which was that the Maltese Islands were assumed to be part of the Italian territory and the question of delimitation was between Libya and Italy.

In such a situation, the Maltese Islands would have been in the position of a geographical circumstance for which at least some account would have been taken;

> "...; and even if the minimum account were taken, the continental shelf boundary between Italy and Libya would be somewhat south of the median line between the Sicilian and Libyan coasts."[122]

That was why the Court considered such an imaginary circumstance in favour of Malta; and hence it concluded that the shift of the said provisional median line between Malta and Libya must fall south of the said imaginary median line between Sicily and Libya.[123]

The degree of the said shift of the provisional median line was based on the weighing of several various circumstances. These various circumstances were: the general geographical configuration of the two countries' coasts and their relation with each other within the macrogeographical context, the great disparity between the lengths of the coasts of the two States, and the avoidance of bringing into play other circumstances such as security; of course as well as the said upper limit of the shift of the imaginary median line between Sicily and Libya. Eventually, a shift of about three-quarters of the distance between the provisional and the imaginary median lines was approved by the Court. That is to say, the final boundary was that line which emanated from the transposition of the provisional median line northwards up to the distance of three-quarters of the distance between the provisional and imaginary lines.[124]

Finally, a test of the absence of any disproportionality between the portions allocated to both Parties was carried out by the Court proving that the resultant boundary was an equitable solution.[125]

The most recent case was the Guinea/Guinea Bissau Arbitration, which delivered its award on 14 February, 1985. Like the Gulf of Maine Case, this Arbitration was concerned with the delimitation of a single maritime boundary between the two

countries. Resting on the west African coast, the two States were adjacent States; and according to the Tribunal, (though this question was not that important), the two countries may be partially opposite each other.[126]

The circumstances that influenced this case were mainly concerned with an existing agreement, which was in force between the two Parties, and with the geographical considerations of the respective area. The final boundary line constituted three sectors each of which was based on circumstances different from the other. As for the first sector, it was drawn by employing the southern limit of the maritime boundary agreed on in the Convention of 12 May, 1886, which was held between France and Portugal and succeeded by Guinea and Guinea Bissau. Following the said southern limit, this sector of the boundary approached the Alcatraz Island at a distance of 2.25 miles to its north. Because the Tribunal believed that the Alcatraz Island (Guinea) should be given a distance of 12 miles - the territorial sea limit according to the 1982 Convention on the Law of the Sea - to the west, the Tribunal drew the second sector between the terminus point of the first section and the said point at a 12 mile-distance to the west of the said Island with no account being given to the respective reefs.[127] That is to say, the Alcatraz Island was given a partial effect which was at its minimum weight near the intersection of the first and second sectors - 2.25 nautical miles -, and its maximum weight near the end of the second sector - 12 nautical miles - where the third section was due to be drawn. The third sector of the boundary line was based on a combination of the geographical configuration and the general direction of the two coasts. Due to the presence of numerous islands close to the shore, the coastal configuration of Guinea Bissau was convex. On the contrary, the Guinean coast was slightly concave. However, as far as macrogeography was concerned, the geographical configuration of the two coasts together formed a concave coast line which was "accentuated" by "... the presence of Sierra Leone further south."[128] Finding that the equidistance method was inappropriate, (due to its drawbacks, and cut-off effects),[129] the Tribunal favoured the employment of the general direction of the coast line in the course of their search for the appropriate method. After studying the macrogeographical general direction of the respective coastline, and the possible ways

of identifying such a direction, the Tribunal rejected one of the possible ways which was concerned with the outer perimeter of the coasts and their islands.[130] Instead, the Tribunal preferred that way which would use the maritime façade by "... selecting a straight line joining two coastal points on the continent."[131] The Tribunal chose the two points - Almadie Point (Senegal), and Cape Chilling (Sierra Leon) -, which were thought to be the most suitable for identifying the general direction of the coast and, subsequently, decided that the third sector of the boundary line should be a perpendicular line to the line joining the said two points.

From this, it can be deduced that the Guinea Bissau's Bijagos and Poiao islands were ignored in the calculations of the delimitation as a remedy to the disadvantaged position of Guinea. For, Guinea had a concave coast, i.e., it would be disadvantaged if the equidistance method was used in delimiting its maritime boundaries with its two neighbours, (Guinea Bissau and Sierra Leone).

Conclusion

Having cited States practice - Unilateral and Multilateral -, and the judicial, arbitral and other cases, which applied the customary solution of the delimitation of the continental shelf, in order to search for the used relevant circumstances, numerous such circumstances could be found therein or deduced therefrom. The most effective relevant circumstance, which was used by the majority of cases was the one relating to the geographical configuration of the involved coasts. This circumstance manifested itself in three various forms. These forms were, the geographical configuration of the relevant coasts in both macrogeographical and microgeographical contexts, the general direction of the respective coast from microgeographical as well as macrogeographical perspectives, and the geographical complexity of the area concerned.

The question of Islands occupied the second rank of importance in influencing the parties during their negotiations. Islands were not dealt with in all cases on the same plane. Rather, variegated weights were given to islands in various situations. These variegated weights ranged from giving islands full effect, to partial effect, to complete

disregard, and even to giving them minus effects.

The legal circumstances played a significant role in the delimitation question of the continental shelf. The applicable law to the case concerned, the existing agreements, treaties or conventions which were in force between the interested parties, and the presence of any historical or traditional rights in the area in question were examples of such legal circumstances that influenced both the selection of the method of delimitation and the identification of the final boundary line of the continental shelf.

As far as the economic circumstances were concerned, they were very likely to have underlain the impulses and motivations of States during the process of selecting the method of delimitation and identifying the actual course of the final boundary line. The presence or the possibility of the presence, of potential hydrocarbon, or mineral deposits, or any natural resources in the relevant areas of the continental shelf, beside the likelihood of their commercial exploration, were some of the salient factors that contributed to a considerable number of the concluded agreements on the delimitation of the continental shelf.

And finally, although it was quite difficult to prove the role of political considerations, they were very likely to have backed the stand of the interested States concerning the economic circumstances mentioned-above. Nevertheless, circumstances such as those relating to the security and defence considerations of the interested States, and the strategic importance of the area in question, could be included in the manifest façade of the said political considerations.

Notes

1- The Oxford Dictionary, Vol. X, P. 542.

2- Ibid., Vol. VIII, P. 404.

3- Eleven States: USA,1945; Mexico,1945; Israel,1952; Jamaica,1948; Trinidad & Tobago,1945;

Venezuela,1956; Guatimala,1949; Portugal,1956; Costa Rica,1948, and 1949; Dominican R.,1952, Australia, 1953.

4- Thirteen States, Malta,1966; Norway,1963; Costa Rica,1967; Canada,1970; Cyprus,1972; New Zealand,1964; Nigeria,1969; Spain,1966; Tonga,1970; UK.,1964; Yugoslavia,1965; Mauritania, 1962; Dominican R.,1967, and 1977.

5- Denmark, 1963; Finland, 1965; France, with three reservations, 1968; German D.R., 1964, 1967, and 1968; Madagascar, 1970; Malaysia, 1968; South Africa, 1963; Sweden, 1966; USSR, 1968; Australia, 1968.

6- See Table III:1.

7- Cayman Island proclaimed that the continental shelf "has the same meaning of" the 1958 Convention; see UN leg. Ser., Vol. 16, P. 114. This indicates that the method of delimitation - that is valid in face of Cayman Islands - is assumed to be in accordance with Article 6 of the said Convention. i.e., it falls within the scope of the special circumstances term. Oman proclaimed the median line as a method of delimitation, which indicated that either it did not accept any special or relevant circumstances or it accepted the equidistance principle as it was provided in the 1958 Convention; see Ibid., P. 23-24. That is to say, according to the latter interpretation, it falls within the meaning of the special circumstances clause. Italy, 1967, claimed that pending agreement, the median line is applicable; and India, 1976, claimed agreement, and pending agreement and unless otherwise agreed on, the boundary must not extend beyond the median line; accordingly, the interpretation of these two proclamations is very likely to be similar to that of Oman. In its information to the United Nations in 1969, Turkey stated that, "... it is normally stipulated that those undertaking the drilling should conform to the provisions of the Convention on the Continental Shelf."; see Ibid., Vol. 15, P. 441. Having declared so, Turkey could be said to have implied its acceptance to the provisions of the said Convention without any reservation and hence it implied the applicability of Article 6 of that Convention on it. If this interpretation is correct, so Turkey's practice is likely to fall within the scope of the special circumstances term.

8- See Table III:1.

9- UN Leg. & Ad. Ser., Vol. 8, P. 10, Decree of 19 December, 1957.

10- Ibid., Vol. 1, P. 22, Proc. of 28 May, 1949,

11- Lay, Churchill & Nordquist, New Directions in the Law of the Sea, Vol. 1, Dobbs Ferry, New York, (1973), P. 119, Decree of 7 September, 1968.

12- See Mineral Deposits & The Customary Solution, Chapter IV, Section 1, Subsection V.

13- Such as India, 1959; Sri Lanka, 1976; and Dominican R., 1967.

14- Because claiming an island as having a continental shelf of its own means a claim for a greater area

of continental shelf than claiming an island as a relevant or special circumstance, so the former claim includes the latter's especially in the situation of overlapping claims.

15- The remaining 17 agreements were negotiated on the basis of the 1958 Convention on the Continental Shelf; for a brief account on them see Chapter V, Section 2, P. 308.

16- As for the Cook Islands, although it had the permission to conclude the said agreement by itself, its external affairs used to be (and still is) attributed to Australia; i.e., the membership of Australia to the 1958 Convention on the Continental Shelf is valid against the Cook Islands for the time being.

17- The preamble.

18- 17-2 ILM., (1978), P. 1073.

19- Fledman, Mark B. & Colson, David, The Maritime Boundaries of the United States, 75 AJIL, (1981), P. 729, at 743-745.

20- Prescot, J.R.V., The Maritime Political Boundaries of the World, METHUEN, London & New York, (1985), P. 346.

21- Fledman & Colson, supra note No 19, at 744.

22- Ibid.

23- See Lay, Churchill & Nordquist, supra note No 11, P. 115, Analysis.

24- cf. the above discussed India and Sri Lanka agreement of 1976; in the said agreement the same two countries were considered adjacent States due to the fact that despite their opposite position concerning their historic waters, the two States became adjacent with respect to the Bay of Bengal and the Manaar Sea; see above, this Chapter, Section 1, P. 136.

25- Limits in the Seas, No 78, at 7, see also the attached map to it.

26- See above, this Chapter, Section 1, P. 145-146.

27- Limits in the Seas, No 93, P. 3.

28- Clarification on the Malaysia/Indonesia common point will be provided later, see below, P. 153-154.

29- See above, this Chapter, Section 1, P. 145-146.

30- Prescott, J.R.V., supra note No 20, P. 217.

31- Bowett, Derek W., The Legal Regime of Islands in International Law, Oceana Publication, Dobbs Ferry, New York , 1979, P. 173.

32- Ibid., P. 180-181.

33- Churchill, R., Nordquist, M., & Lay, H., New Directions in the Law of the Sea, Vol. V, Oceana Pub., INC, 1977, P. 216, at 218-220

34- Ibid., P. 226, at 228-229, Analysis taken from, Limits in the Seas, No 25.

35- Ibid., P. 230, at 232-234, Analysis taken from, Limits in the Seas, No 58.

36- Ibid., P. 242, at 244-245, Analysis taken from, Limits in the Seas, No 63.

37- Ibid., P. 235, at 238-239, Analysis taken from, Limits in the Seas, No 67.

38- Ibid., P. 207, at 209-211.

39- Ibid.

40- Churchill, Nordquist and Low, New Direction in the Law of the Sea, Vol. V, P. 224-225.

41- Johnston, Douglas M. & Saunders, Phillip M., Ocean Boundary Making: Regional Issues and Development, Croom Helm, London, (1988), P. 209.

42- Ibid., P. 208-209.

43- Ibid., P. 209-210.

44- The Argentina/uruguay agreement of 19 November, 1973, Art. 70.

45- Limits in the Seas, No 64, P. 15.

46- Ibid., See the attached map.

47- Supra note No 44, Art. 45.

48- Limits in the Seas, No 97, 1982, P. 4-5.

49- Prescott, J.R.V., supra note No 20, P. 345.

50- The Venezuela/Dominican R. agreement of 3 March, 1979, the preamble.

51- Prescott, J.R.V., supra note No 20, P. 341.

52- The Cuba/Haiti agreement of 27 October, 1977, Art. 1.

53- Prescott, J.R.V., supra note No 20, P. 341, as noted from Smith.

54- Mawmba Wamba beacon rock was given more than full effect because turning point A was equidistant from Kisit Island and a point located on Ras Jimbo-Mawmba Wamba rock up to a distance of 12 miles from Ras Jimbo; see the agreement Art. 2-a.

55- Limits in the Seas, No 74, 5 October, 1976, P. 2.

56- Prescott, J.R.V., supra note No 20, P. 344-345.

57- Nweihed, Kaldone G., EZ (Uneasy) Delimitation in the Semi-enclosed Caribbean Sea: Recent Agreements Between Venezuela and Her Neighbours, Ocean Development and International Law, Vol. 8, No 1, 1980, P. 1, at 22-23.

58- Limits in the Seas, No 73, P. 4-5, at 5.

59- The Brazil/France agreement of 30 January, 1981, the Preamble.

60- See Exchange of Letters between France and Spain, 29 January, 1974.

61- The Conciliation Commission Report, 20 ILM, (1981), P. 797; for the Agreement see 21 ILM, (1982), P. 1222-1226; see also below, this Chapter, Section 2, P. 187.

62- The Conciliation Commission Report, Ibid., P. 825.

63- Ibid., P. 825-826.

64- Luard, Evan, the control of the Seabed, 1974, P. 11.

65- See above, Agreements Utilized the Equidistance Method, this Chapter, Section 1, P. 135.

66- Limits in the Seas, No 81, P. 5-6 at 6.

67- for the dispute over Rockall Islet see, Symmons, C.R., Legal aspects of the Anglo-Irish Dispute over Rockall, 26 NILQ, No 2, Summer (1975), P. 65; and Clark, R.B., The Waters Around the British Isles, Clarendon Press, Oxford, (1987), P. 25-27.

68- Parliamentary Debates, HANSARD, Sixth Series, Vol. 140, Session (1987-88), 8 November, 1988, Written Answers, P. 156-157, and Oral Answers, P. 169.

69- For a general view of these circumstances, see Annex IV.

70- The ICJ (1969) Report, Para. 93.

71- Ibid., Para. 101.

72- Ibid., Subpara. (1).

73- Ibid., Para. 94-99.

74- Ibid., Para. 89-b.

75- Ibid., Para. 91 and 98.

76- The Anglo-French Arbitration, (1977-78), Para. 74 and 195.

77- According to the Tribunal, the same Islands could have been considered a special circumstance rather than a relevant circumstance if Article 6 of the 1958 Convention was applicable in the area concerned; see Ibid., Para. 196; cf. Brown, E.D., The Anglo-French Continental Shelf Case, 16 San DLR, (1979), P. 461, at 471.

78- The Anglo-French Arbitration, (1977-78), Para. 196.

79- Although the Channel Islands enjoyed "... a very large measure of political, legislative, administrative and economic autonomy; ...", they were considered "... separate Islands of the United Kingdom, not separate States..." ; see Ibid., Paras. 183-190, especially, 184 and 190.

80- Ibid., Para. 199.

81- Ibid., Para. 201-202.

82- Ibid., Para. 187.

83- Ibid.

84- Ibid., Para. 188, 198-199.

85- Ibid., Para. 198.

86- Ibid., Para. 188.

87- Ibid.

88- Ibid., Para. 73.

89- Ibid., Para. 251.

90- Ibid.

91- The Iceland/Norway (Jan Mayen) Conciliation (1981), 20 ILM., (1981), P. 798.

92- Ibid., P. 825.

93- Ibid., P. 826.

94- Ibid., P. 825-826.

95- Ibid., P. 826-842.

96- For the agreement see 21 ILM, (1982), P. 1222; this agreement was discussed above, see this Chapter, Section 1, P. 176.

97- The ICJ (1982) Report, Para. 117-118.

98- Ibid., Para., 119-121.

99- Ibid., Para. 82-86, and 133.

100- Ibid., Para. 117, see also 118-119.

101- Ibid., Para 120-121.

102- It is noteworthy to say here that, the test of proportionality, that was done by the Court, took into consideration the presence of Jerba Island as a promontory; see Ibid., Para. 131; however, that did not mean that Jerba Island was taken into account; for, the test of proportionality was a dispensable test which was done only to add more assurance that the final boundary line was a real equitable solution.

103- Ibid., Para. 122-124.

104- Ibid., Para. 126.

105- Ibid., Para. 127.

106- Ibid., Para. 128.

107- Ibid., Para. 129.

108- The Gulf of Maine Case, the ICJ (1984) Report, Section V, especially Para. 125 and 155.

109- Ibid., Para. 112.

110- Ibid., Para. 114 and 155-163.

111- Ibid., Para. 206.

112- Ibid., Para. 209.

113- Ibid., Para. 210-211.

114- Ibid., Para. 212-213.

115- Ibid., Para. 215-222.

116- Ibid., Para. 222.

117- Ibid., Para. 224-225.

118- Ibid., Para. 225.

119- The ICJ (1985) Report, Para. 61-63.

120- Ibid., Para. 64.

121- Ibid., Para. 73, see also Para. 66-72.

122- Ibid., Para. 72.

123- Ibid.

124- Ibid., Para. 73.

125- Ibid., Para. 74-75.

126- The Guinea/Guinea Bissau Dispute Concerning Delimitation of the Maritime Boundary of 14 February, 1985, 25 ILM., (1986) , P. 251, at Para. 91.

127- Ibid., Para. 111.

128- Ibid., Para. 103.

129- Ibid., Para. 103-104.

130- Ibid., Para. 109.

131- Ibid., Para. 110.

Chapter IV

The Actual Categories of Relevant Circumstances

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Introduction

As the previous Chapter has discussed the up-to-date utilized relevant circumstances as they have been used in the context of each case of delimitation, this section is going to deal with the said circumstances, as they can be seen from their own perspective. That is to say, this Chapter is mainly interested in examining each individual circumstance in order to see why and how such a circumstance has been

considered relevant to the cases concerned, as well as in identifying the degree of credibility of such a circumstance.

For the purpose of a better illustration, it is suggested that the examination of the relevant circumstances will be more appropriate if they are considered into categories each of which contain those circumstances which have common elements with each other. So far, four categories seem to be the most likely categories that are able to comprehend all the relevant circumstances: being, the geophysical, legal, economic and political circumstances.

Section 1

Physical
Relevant Circumstances

Mainly, five relevant circumstances can be said to have a geophysical character. These are, the geographical configuration of the coasts, the presence of islands, natural prolongation, proportionality and the presence of mineral deposits.

I
Geographical Configuration
Relevant Circumstance

The geographical configuration of the coasts has been the prime relevant circumstance throughout the history of development of the continental shelf doctrine. State practice as well as the juridical cases have proven that the geographical configuration considerations have been the most effective circumstances in respect of

the delimitation question. Yet a thorough look at the world-wide map proves that the geographical configuration circumstance will be the most effective circumstance in the delimitations that may arise in the future.

The origin of the geographical configuration considerations was rooted deeply in the early stages of the development of the continental shelf doctrine.[1] However, it was not until the 1969 Cases that the ICJ articulated these considerations as a relevant circumstance. Among the other factors to be considered was

> "1- the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;"[2]

As it was put in the first place, the ICJ's citation of this circumstance gave it special emphasis the implication of which could be interpreted as giving it priority with respect to the other cited factors. Indeed, this primacy, as will be further seen below, became more credible when the subsequent judicial cases developed it into a concrete fact.

Two foundations had underlain the geographical configuration when it was advanced into a relevant circumstance. These two foundations were the genuine link between the geophysical fact of the continental shelf and law, and the appurtenence of the coastal State to this geophysical fact. The geophysical structure of the shelf was the indispensable basis of the legal doctrine of the continental shelf without which such a doctrine "... would never have existed,".[3] So far as the geophysical structure of the continental shelf constitutes the natural extension of the land into and under the sea, so due account should be given to certain configurational features; for,

> "..., in certain localities, they point-up the whole notion of the appurtenence of the continental shelf to the State whose territory it does in fact prolong."[4]

Based on the notion of appurtenence and the land extension into and under the sea, and "..., since the land is the legal source of power which a State may exercise over territorial extensions to seaward, ..."[5] so the applicable principle is that "...the land dominates the sea."[6] Yet the International Court of Justice went far beyond these notions when it considered the continental shelf as "... no longer areas of sea, ... but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and subsoil, two words evocative of the land and not of the sea."[7] For these reasons, the delimitation process must first examine the features that are attributed to these stretches of submerged land.

The importance of the geophysical features of the continental shelf was reaffirmed in the recently judicial, arbitral and other cases; and, furthermore, it was given a priority to the other factors. For instance, the Tribunal in the Anglo-French Arbitration,1977-78, says that the method of delimitation "... is a function or reflection of the geographical and other relevant circumstances ...".[8] In another Paragraph the Tribunal says that, "... the appropriateness - the equitable character - of the method is always a function of the particular geographical situation."[9] In the Tunisia/ Libya Case, 1982, the ICJ comments that "[t]he coast of each of the Parties, ..., constitutes the starting line from which one has to set out ... ."[10] By the time the Gulf of Maine Case was at stake, it was high time that the Chamber declared that, "[t]he delimitation line to be drawn in a given area will depend upon the coastal configuration."[11]

The geographical configuration as a relevant circumstance can be found in various forms. The coastal configuration of the concerned States has been the classical form of the geographical configuration circumstance, so to speak. In the North Sea Cases, the concavity of the coastal configuration of the three interested States made Germany disadvantaged as it was stuck between Denmark and the Netherlands.

As time went by, it was realized that, not only the coastal configuration of the interested States was relevant but also the coastal configuration of the whole area in question whether it related to the States concerned or to their neighbours. The most recent examples of the case in point were, the Libya/Malta Case of 1985, and the Guinea/Guinea Bissau Case of 1985. In the former case, the geographical configuration of the States concerned was considered in the light of the coastal configuration of the whole Mediterranean Sea, as a semi-enclosed sea, as well as in the light of the coastal configuration of the neighbouring States especially Italy.[12] Similarly, the coastal configuration of Guinea and Guinea Bissau was examined in the light of the coastal configuration of their neighbouring States - Sierra Leone and Senegal -, bearing in mind the concerned coastal configuration of the whole of west Africa.[13] This latter form of the said circumstance is interested in the macrogeographical coastal configuration taking into account any other "actual or prospective" neighbouring continental shelf delimitation that may affect the interested States. In fact, the geographical configuration from a macrogeographical viewpoint, was (as will be shown later) first instigated by the ICJ in the North Sea Cases in 1969, when it provided the example of proportionality as a relevant circumstance.[14] However, it was not until the said two cases were agreed, that the notion of macrogeography was put in to application.

The geographical configuration circumstance appears in another form concerning the general direction of the coast. The selection of the method of delimitation is very likely to be affected by the general direction of the coast. If the general direction of the coast constituted a right or semi-right angle, so the method of delimitation would be, and very often was, a perpendicular line to that general direction. At least two instances can be recalled. The first was the third sector of the boundary line in the Gulf of Maine Case, (1984). Due to the general direction of the back of the Gulf, which constituted a right angle, the appropriate method of delimitation was a perpendicular line to that angle.[15] The other was that of the Guinea/Guinea Bissau Case, 1985.[16] The third

section of the final boundary line was a(perpendicular)line to the general direction of the west African coast, which was chosen instead of the general direction of the coasts of the concerned States, as it would result in a more equitable solution. Besides, the presence of any unusual change in the general direction of the coast might result in a change in the used method. This case was found in the Tunisia/Libya Case, (1982), when a radical change in the general direction of the Tunisian coast showed the inappropriateness of the method used in the first sector to be used in drawing the boundary in the second sector. That was why the Court used the equidistance principle in the second sector in substitution for the perpendicular to the general direction of the coast which was used in the first sector.[17]

Although the general direction of the coast is more likely to be a macrogeographical circumstance, it also appears as a microgeographical circumstance. For example, whereas the general direction of the coast in the Gulf of Maine and Tunisia/Libya cases was examined in a microgeographical context, it was used in a macrogeographical context in the Guinea/ Guinea Bissau Case.

Finally, the geographical configuration can be seen in the form of a geographical complexity where a mixture of several geographical factors are present in the same place. Such a geographical complexity can be formed by a combination of the coastal configuration and the presence of islands, (Guinea/Guinea Bissau Case, second sector,)[18] or a combination of the coastal configuration and the general direction of the coast, (the Gulf of Maine Case, first sector,)[19] or a combination of the general direction of the coast and the presence of islands, (Tunisia/Libya Case, the second sector),[20] or a combination of the coastal configuration, the general direction of the coast, and the presence of islands, (the Gulf of Maine Case, second sector,[21] and Guinea/Guinea Bissau Case, the third sector).[22]

Although the geographical configuration relevant circumstance can be said to possess a sort of priority to the other relevant circumstances, it is still the function of equity to decide the weight which is supposed to be given to such a circumstance during the weighing process. To illustrate this fact two instances can be provided. In the Tunisia/Libya Case, (1982), the geographical configuration stood side by side with the conduct of the parties relevant circumstance in deciding the course of the boundary line in the first sector.[23] It was due to both said circumstances that the boundary was a perpendicular line. Despite the fact that the said perpendicular line, when originally chosen as a modus vivendi,[24] was based on the geographical configuration of the relevant coasts, the conduct of the parties circumstance was an essential subsequent element according to which the line was granted approval by both parties. The situation of the second sector of the boundary line in the Tunisia/Libya Case was different. In this sector the geographical configuration was the prime factor that justified deviation from the perpendicular method used in the first sector. Nevertheless, due to the presence of Kerkennah Islands, which created complexity in the geographical configuration circumstance, the requirements of equity made it sufficient to grant the said island only half effect.[25] That is to say, the weight given to the geographical complexity circumstance was modified *only* to the extent that the requirements of equity were satisfied.

In the second sector of the Gulf of Maine Case, (1984), the situation was quite similar to that of the second sector of the Tunisia/Libya Case discussed-above. The coastal configuration, and the general direction of the coast were combined with the presence of the Seal Island creating a geographical complexity circumstance which required some modification of the boundary line. Accordingly, using the proportionality element as a parameter, the weight given to the said circumstance was modified by giving the Seal island only half effect.[26]

II

Islands

As a

Relevant Circumstance

So as to avoid any confusion, it is advisable to differentiate between two main problematical issues concerning islands: the first is islands when generating a continental shelf of their own; and the second is islands as a relevant circumstance. Because the discussion in this thesis is more interested in the latter issue than in the former, the relevant discussion hereunder will be exclusively interested in islands as a relevant circumstance. In addition, because this issue has been thoroughly dealt with in legal literature, the present subsection is going to deal with it as briefly as possible.

Islands, as a geographical relevant circumstance, play a significant role in the delimitation process of the continental shelf. However, despite the orthodoxy that the presence of islands is considered a relevant circumstance in most of the cases, the biggest controversy is very often attributed to two groups of considerations. One can find, first, those considerations which relates to the identification and qualifications of islands; and second, those considerations which are concerned with the degree of effect that can be given to an island when it is regarded as a relevant circumstance. These two groups of considerations will be the ultimate concern of this Subsection.

To begin with, several questions identify the problem matter of the definition of islands. These are, what is the definition of islands? In other words, what features must be available in a geographical projection in order to be considered an island? Are small islands, islets, rocks, and reefs considered islands? On what criterion/criteria must such an evaluation be based? Is it the size, population, political status, or only geographical status that is of concern?

Because of the great difficulties faced in the search for a confined and comprehensive definition of islands, it was not until the UNCLOS III that islands found the least controversial definition. It is, therefore, advisable to study the definition of islands throughout the history of the development of the continental shelf doctrine, so that it enriches the clarification of the issue at stake.

Working on, inter alia, the definition of islands, the ILC concluded that,

> "... . An island is an area of land surrounded by water which in normal circumstances is permanently above high-water mark."[27]

However, in order to restrict the broad meaning of this definition, the Commission commented that two categories must be excluded from the said definition. These two categories were,

> "(i) Elevations which emerge at low tide only. .... .
> (ii) Technical installations built on the seabed, ..."[28]

Besides, Article 12 of the same Report suggested that,

> "Drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea."[29]

As the above-said definition of islands was recommended by the ILC in its final report, it went over to the UNCLOS I, held at Geneva in 1958. In the Conference, Article 12, referred to above, was deleted, whereas Article 10 was subject to two main changes. The first change was the omission of the first sentence which read, "Every island has its own territorial sea."[30] The other change was the addition of the expression "naturally-formed" to the second sentence. Accordingly, the new definition

reads,

> "1- An island is a naturally-formed area of land, surrounded by water, which is above water at high tide."[31]

Obviously, the expression "naturally-formed" was added so that the definition excludes all those artificial projections which were stated by the ILC comment on Article 10, mentioned-above.[32]

Two features can be attributed to the concluded definition of islands: being, the definition is somewhat general, and has a broad and wide-ranged interpretation. The definition is somewhat general because it describes the *general framework* of the qualifications that must be available in a geophysical object so that it can be considered an island. This framework consists of three basic qualifications. The first is that, the object in question must be a naturally formed area of land excluding all artificial and man-made projections. The second is that such an object must be surrounded by water, in order to exclude all sorts of promontories, outgrowths, peninsulas, and so on. And the third is that this object must be above water at high tide.[33] These qualifications, though they seem prima facie, confined and well formed, are in fact so general that their meaning might include numerous objects which are not islands in the actual meaning of the word. This leads us to the second feature concerning the fact that the said definition has a broad and wide-ranged interpretation.

The geophysical objects that can fall within the scope of the said qualifications of islands range from a small drying off-shore rock, such as Eddystone rock, to a huge island such as the British island itself. Such a wide-ranged meaning can include, islets, reefs, cays, rocks of various sizes, shoals, as well as islands in the actual meaning of the words. These features render the definition of islands insufficient and subject to criticism.

In order not to fall in the same trap, the ICJ found itself obliged to provide some more restrictions to the qualifications of islands when they would be used for the purpose of delimitation of the continental shelf. It says,

> "These prolongations meet and overlap, and can therefore only be delimited by means of a median line; *and, ignoring the presence of islets, rocks, and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.*"[34] [Emphasis added]

Having said so, the Court can be said to have taken into account an implicit criterion, the implication of which is two fold. On the one hand, it considered the size of a geophysical projection as an indication to its importance. If it is a small islet or a little rock, so it cannot be regarded as a relevant circumstance. On the other hand, and of foremost importance, the ICJ considered the "disproportionally distorting effect" of such a geophysical projection as a criterion in the light of which the projection in question can be judged as to whether it is a relevant circumstance or not.[35] Should the *disproportionally distorting effect* of a geophysical projection be *redressable by other means*, it is by no means a relevant circumstance, and vice versa. Nevertheless, what is the idea that underlies the expression "disproportionally distorting effect"? Is it not the distance criterion - how far from the shore the object is -, especially if we bear in mind that the above-cited ICJ wording has been taken from a paragraph which originally discusses the situation of opposite States? If the answer to the latter question was affirmative, so the two fold meaning of the ICJ's implicit criterion would be concerned with the size and distance parameters.

The need for a precise criterion suitable for a confined definition of islands grew more than ever during the UNCLOS III, when numerous suggestions were submitted

by the conferees. According to Karl,

> "[t]he common thread running through almost all of the draft articles submitted to the Conference was a belief that factors such as population, size, economic viability, geographical configuration, and distance from the mainland, as well as the political status of an island should be considered when maritime delimitations are affected by the presence of that island."[36] [Footnotes omitted]

Without unnecessary details, the final result of the Conference was in favour of the economic viability and population criteria. This meaning was provided in Article 121 the first paragraph of which repeated verbatim the wording of paragraph 1 of Article 10 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. However, paragraph 3 of Article 121 stated that,

> "3- Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive zone or continental shelf."[37]

Having cited the definition of islands as was embodied in the 1982 Convention, an observation must be brought to attention. As terminology is an important matter in respect of legal issues, so each term must be interpreted according to the text and wording of the article concerned. With regard to Article 121, the term "an island" has two meanings, viz, a general definition of islands - paragraph 1 -, and the definition of islands when generating, inter alia, a continental shelf of their own - paragraphs 2 and 3. Unlike the latter definition, which is restricted for certain purposes - generating a continental shelf or EEZ of their own -, the former was devoted to a general definition of islands whenever the term "an island" was mentioned in International Law. The economic viability and population conditions are, therefore, applicable only when the question is concerned with islands as an independent object, and strictly speaking, when islands are questioned whether they are entitled to, inter alia, a continental shelf

of their own or not. On the contrary, since the first paragraph of Article 121 provides a general definition of islands for all purposes, so the question of whether an island can be considered a relevant circumstance or not, falls within the meaning and scope of this general definition; i.e., within the scope of Paragraph 1, and only Paragraph one, of Article 121.

As explained earlier, the definition of islands provided in paragraph 1 of Article 121 of the 1982 Convention used the exact wording of paragraph 1 of Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone. Hence, the same comments that have been said in respect of the latter can be said, again, in respect of the former. That is to say, the UNCLOS III has brought nothing new regarding the definition of islands as a relevant circumstance. And despite the fact that the 1982 Convention on the Law of the Sea has not come into force yet, its implication is still important because it reflects State practice on the issue at stake.

Bearing in mind the above, islands as a relevant circumstance has a wide-ranged scope restricted only in four respects. These are, 1- it must be naturally formed area of land; 2- it must be surrounded by water; 3- it must be above water at high tide; and 4- the disproportionally distorting effect of it must not be able to be redressable by other means. One other qualification must be provided in this regard. That is, the consideration of islands as a relevant circumstance must not be dominated by the other relevant circumstances of the case involved. Under such a wide-ranged definition, rocks, reefs, islets, and islands of all sizes, can be included whether they are inhabited or uninhabited and without any question of their respective economic or political status or any other consideration other than the above-said qualifications.

To prove the foregoing conclusion two examples can be invoked. The first is concerned with the consideration of Eddystone Rock "as a relevant base-point for delimiting the continental shelf boundary in the Channel.", in the Anglo-French

Arbitration in 1977-78.[38] The other is interested in Jerba Island which has not been considered as a relevant circumstance in the Tunisia/Libya Case in 1982.[39] These two examples indicate that, though Eddystone is just a rock and Jerba Island is an inhabited island and there is no doubt that it has an economic life of its own, they were examined by relying on respects other than their respective economic and population status. Both, Eddystone Rock and Jerba Island manage to satisfy the first three qualifications of the said definition of islands as a relevant circumstance: being naturally formed areas, surrounded by water, and above water at high tide. However, Eddystone Rock managed to pass the test of the fourth and fifth qualifications, whereas Jerba Island did not. The disproportionally distorting effect of the presence of Eddystone Rock was so great that disregarding it would have created an inequitable solution to the disadvantage of the UK. Besides, the consideration of Eddystone Rock as a base-point was confirmed by the conduct of the parties relevant circumstance.[40] On the contrary, despite the fact that the disproportionally distorting effect of Jerba Island was also great, this distorting effect was supposed to have been redressed by the presence of the other relevant circumstances, and also was dominated by the presence of the conduct of the parties relevant circumstance.[41]

Two other similar examples can be demonstrated in another two cases. Due to the fact that the consideration of Filfla Islet, in the Libya/Malta Case in 1985, had the impact of an irredressable disproportionally distorting effect at the expense of Libya, the said Islet was disregarded.[42] And the other happened in the Guinea/Guinea Bissau Case in which the group of islands including Bijagos and Poiao, which belong to Guinea Bissau were disregarded because the disproportionally distorting effect of their presence was remedied by the method of considering the general direction of the coast a relevant circumstance.[43]

Having dealt above with the qualifications of islands as a relevant circumstance,

the last two qualifications - concerning the disproportionally distorting effect, and being not dominated by the presence of other relevant circumstances -, show the need for more discussion. Such a discussion is more likely to be connected with the second problem of islands as a relevant circumstance to which the discussion will now turn.

The other problem of islands as a relevant circumstance relates, as has been seen above, to the degree of effect that can be given to an island when it is considered a relevant circumstance. According to State practice and the judicial, arbitral and other cases, variegated kinds of weight were given to islands in various situations. These variegated kinds of weight were, full effect, partial effect, no effect at all, and minus effect. Full effect was given when the concerned island, or islands, is, or are, considered as a full relevant circumstance at the exclusion of the others in the area involved. These can be found, for instance, in the Ushant Island in the Anglo-French Arbitration, and in the Italian and Spanish islands in the Convention between Italy and Spain in 1974.[44] It is realized that in almost all the cases that have given islands full effect, a simple median line has been used unless it has been affected by the presence of other relevant circumstances. In the examples mentioned-above, Italy and Spain agreed on a median boundary line, whereas the Anglo-French Arbitration drew a modified equidistant line in the Atlantic Region, due to the effect of the partial weight that was given to the Scilly isles.

As far as the partial effect is concerned, it appears also in various forms. The most salient form of the partial effect is the half-effect form. This form was used in numerous cases such as the above-said Scilly isles in the Anglo-French case, Kerkennah Island in the Tunisia/Libya case, and the Seal Island in the Gulf of Maine case.[45] The other form of the partial effect ranges between giving islands some more or some less effect than the half effect. The notable example of such forms can be seen in the Guinea/Guinea Bissau case in which the Alcatraz island was given two kinds of

partial effect - minimum in the north, and maximum in the west and south.[46] Giving islands partial effects appears also in another form. That is the enclaved and semi-enclaved method of delimitation around islands: the example of the former is the Channel Islands in the Anglo-French case,[47] and of the latter is the agreement between Italy and Tunisia in 1971.[48] The most likelihood of the boundary line, when islands are given partial effect, is either a modified equidistant line, or a negotiated line, or a mixture of both methods, beside the usage of the enclaved or semi-enclaved methods in some cases.

Although it seems illogical to call it *minus effect,* it is, in fact, one of the kinds of effects that can be given to islands in certain situations. Such a case can be found in Torres Strait agreement between Australia and Papua New Guinea in 1978, and in the agreement between Saudi Arabia and Bahrain in 1958. In the Torres agreement some of the Australian islands were so close to the Papua New Guinea coast that if the boundary line gave them the minimum partial effect, it would have resulted in an inequitable solution at the expense of Papua New Guinea. Instead, the said Australian islands were left without any continental shelf and the boundary line was drawn on their southward side leaving the shelf around them to belong to Papua New Guinea.[49] That was why such an effect was called a minus effect since it deprives the concerned islands from any continental shelf by means of a cut-off effect. This kind of minus effect can be called a *full* minus effect.

As for the example of Saudi Arabia and Bahrain the minus effect that was given to each of the Lubainah islands was different from the one said-above. Because the sovereignty problem over the said islands was solved by giving each party that island which was closer to the other country's territories than to his own, the two Parties agreed to use these two islands as turning points of the boundary line.[50] Accordingly a selected point on the tip of each island was chosen for that purpose. That is to say these two islands were cut off and deprived from any continental shelf from the side

that faced the territories of the other country. So, this kind of effect is called a *partial* minus effect.

In order to have a better view of the said *full* and *partial* minus effects, these effects must be compared with an example of islands which are given no effect at all during the delimitation process. When the presence of islands is dominated by the presence of other relevant circumstances these islands will be given no effect at all in the delimitation of the continental shelf. However, the deprivation of an island from any weight does not mean that this island will have no continental shelf at all. What it does mean is that this island will still have a marginal continental shelf the extent of which is always dependent on the weighing up process of the other effective relevant circumstances in the case concerned. On the contrary, as far as the minus effect - whether full or partial - is concerned, the island in question is deprived not only from any weight, but also from having any marginal continental shelf whatsoever. In such a case the only remaining power of the interested State is its sovereignty over the mainland of the island involved. The best examples of the comparison at stake would be the case of the Jerba island, which was disregarded and given no weight at all in the Tunisia/Libya case, and the Australian islands northwards the continental shelf boundary line, which were said to have been given minus effect in the Australia/Papua New Guinea agreement. Jerba Island remained on the Tunisian portion of the continental shelf, meaning that it was still enjoying a marginal shelf. The Australian islands were located on the Papua New Guinea portion, and away from the Australian portion of the continental shelf, which meant that they were allocated no continental shelf at all and the only remaining thing was the Australian sovereignty over their mainland.

One remaining observation must be made in this regard. This observation is interested in the difference between the *full* and *partial* minus effects. The only

difference between the two said minus effects is that, the full minus effect deprives the involved islands completely from any continental shelf however small it is, whereas the partial minus effect deprives only some parts of the involved islands from having any continental shelf. The above-said example of the two Lubainah islands would illustrate how those parts that faced the other country were cut off from having any continental shelf, and those parts that faced the interested party have a marginal shelf connected with the country's portion of the continental shelf. As can be recalled, in the case of the Australian islands, these islands were given no continental shelf at all.

Having had an idea about the various kinds of effects which can possibly be given to islands when they are considered relevant circumstances, it is high time that the discussion now turns to another associated problem. That is, the factors and conditions which control the degree of effect that is given to an island. As has been seen, when an island is judged to be a relevant circumstance, such a judgement is supposed to be based on the five qualifications referred to above. In fact, three of these qualifications relate to the geophysical structure of islands, namely, being naturally formed area of land, surrounded by water, and above water at high tide. The other two qualifications - the irredressable distorting effect, and being not dominated by the presence of other relevant circumstances -, are more concerned with the effectiveness of islands when they become a relevant circumstance. That is to say, the former three qualifications are of a qualitative nature, whereas the latter two qualifications are of a quantitative nature. Thus, the degree of effect of an island as a relevant circumstance can be said to be controlled by the latter two qualifications.

As for the irredressable disproportionally distorting effect principle, it controls three kinds of the said effects, namely, the full, partial, and minus effects. When an island is given no weight at all, it cannot be said to be controlled by the said principle, for, its effectiveness in such a case is nil. On the contrary, the degree of the

effectiveness of the other kinds of effects is always measured in the light of the irredressable disproportionally distorting effect principle. But, what is the implication of this principle?

The irredressable disproportionally distorting effect of islands is a condition which, as has been seen earlier, might involve some factors such as the islands' size and the distance from the shore.[51] More effective than these two factors is the geographical complexity of the concerned area as a whole. Being proven by State practice, and the judicial, arbitral and other cases, it is found that the geographical complexity factor is very often the most likely condition that decides the degree of the disproportionally distorting effect of islands; and subsequently it decides the degree of effect that must be given to those islands whose presence cannot be ignored. In the Gulf of Maine case example, it was due to the geographical complexity of the Gulf that the presence of the Seal island could not be ignored. Yet, for the same reason, it would have, simultaneously, been excessive to give this island full effect. That was why the Chamber, with the help of the proportionality element, decided to give the said island half effect.[52] Such a case can be found in numerous other examples such as the presence of the Kerkennah island in the Tunisia/Libya case, and the presence of the Al-Katraz island in Guinea/Guinea Bissau case.[53]

The remaining question is, how does the said principle decide the degree of effect of islands as a relevant circumstance? In order to answer this question the exact wording, that established this principle, of the ICJ must be recalled. It said that,

> "...; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, ..."[54]

Having said so, the ICJ described or rather qualified the distorting effect of a coastal projection by the word *disproportionally*. In order for the distorting effect of the

presence of a coastal projection to be irredressable, it must create some sort of disproportionality between the portions allocated to the concerned parties at the expense of one of them.

Does this mean that the principle of irredressable disproportionally distorting effect of islands is underlain by the principle of proportionality? To an extent, the answer is, yes, especially if one considers the Tribunal's opinion in the Anglo-French case, regarding the proportionality principle which is said to be tested by the absence of any disproportionality between the portions allocated to each party.[55] It will, therefore, be the function of the proportionality principle to decide the degree of effect that can be attributed to certain islands when they are considered a relevant circumstance.

However, if the foregoing conclusion has managed to involve one of the other relevant circumstances, (the proportionality principle,) in the process of deciding the degree of effect that can be given to islands, the following discussion will show that all the other relevant circumstances are involved in playing a role in such a process. The intended discussion is primarily interested in the last qualification of islands as a relevant circumstance. That is, when an island is qualified enough to be a relevant circumstance, such a circumstance must not be dominated by any other relevant circumstance.

As far as this last qualification is concerned, it is a condition in which, during the weighing process of the available circumstances, some circumstances occupy a degree of effectiveness higher than that of the involved islands; and hence those circumstances dominate the presence of islands circumstance. If such a case happened, the result would depend on whether the domination was wholly or partly. Had the presence of islands circumstance been *wholly* dominated by the presence of some other circumstances, such islands would no longer constitute a relevant circumstance. In the

Guinea/Guinea Bissau case, 1985, the geographical configuration of the coast was the dominant circumstance, the consideration of which resulted in disregarding the presence of the Bijagos and Poiao islands.[56] Similarly, this also occurred in the Tunisia/Libya case, (1982), regarding the Jerba island.[57]

When the presence of islands is dominated only *Partly* by the presence of some other relevant circumstances, it is realized that the degree of domination always leaves its marks on the degree of effect that is given to the presence of islands circumstance. The radical change in the Tunisian coast affected the presence of the Kerkennah island and consequently resulted in giving it only a partial effect - half effect.[58] The Channel Islands were not only detached geographically from the UK, but they were also on the wrong side of the median line, the fact that caused these islands to be also given partial effect by means of enclaved method.[59] In the example of the Australia/Papua New Guinea agreement of 1978, the fact that the Australian islands were very near to the Papua New Guinea coast and were also on the wrong side of the median line resulted in giving those Australian islands a full minus effect.[60]

The above-cited discussion calls to attention the question, would it be possible for the relevant circumstance of islands to dominate wholly or partly the presence of other circumstances? The answer, in theory, is yes, though in practice this is very seldom the case. According to the notion of equity, the presence of islands in some situations might be more effective than any other circumstance. This usually happens in areas where the presence of islands play the decisive role in forming the geographical complexity of the area in question, such as the Greece/Turkey dispute in the Aegean Sea.

In sum, the islands relevant circumstance constitutes a wide-ranged category embracing several kinds of naturally formed coastal projections which are surrounded by water and above water at high tide. This category includes rocks of all sizes, reefs,

shoals, isles, islets, and islands in the actual meaning of the word. As a relevant circumstance, islands were given four kinds of effects; being: full, partial, no weight at all, and minus effects. As for the process of calculating the proper weight of the relevant circumstance of island in a given situation, it is said to be controlled by two principles. The first is that the presence of islands must not produce an irredressable disproportionally distorting effect, and the second is the presence of islands must not be dominated by the other relevant circumstances. The degree of the said distorting effect, and how far the presence of islands is dominated by the other involved circumstances, are the most likely factors that play the decisive role in identifying the degree of effect that the concerned islands are supposed to be given.

III

Proportionality

Having given a brief account on the first two geographical relevant circumstances - the geographical configuration of the coast and the presence of islands -, the discussion provided hereunder will address itself to the third geographical circumstance. That is, the proportionality circumstance.

Proportionality is one of the most complicated and vague principles of the delimitation question of the continental shelf. Although it is originally a simple geographical consideration, the said concept has, in fact, a more complicated implication than first meets the eye. In the beginning, the proportionality principle was vague and ambiguous, especially when it was clarified in two various ways by the North Sea Cases and the Anglo-French Arbitration judgement. However, it was not until further cases came to light that the implication of proportionality was given more clarification, enough to identify its real meaning.

Having established the customary rules and principles that were applicable to the delimitation of the continental shelf between neighbouring States, the ICJ found itself bound to provide some examples of circumstances in its final decision of the 1969 Cases. One of these examples was the concept of proportionality, which was embodied in the following paragraph.

> "(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region."[61]

Proportionality according to the above-cited paragraph is a concept that is mainly concerned with the mutual relationship between the lengths of the coasts of the coastal States and the continental shelf areas on which these States abut. In order to facilitate the identification of the implication of this mutual relationship, the ICJ established some conditions. Firstly, the lengths of the coasts must be measured in the general direction of the coastlines. That is to say, the measurement of the length of the coast will not necessarily follow all the swellings and sinuosities of the sea shore. Instead, the general curvature of the coastline is the sole sufficient basis for such a measurement.

Secondly, the said relationship between the lengths of the coasts and the extent of the continental shelf areas is to take into consideration any actual or prospective continental shelf delimitation that has an effect on the parties concerned. So, does that mean that proportionality is a macrogeographical concept? The answer is, it depends on the possibility of the presence of other delimitations which have an effect on the delimitation in question. The presence, or the possibility of presence, of some other delimitations in the area concerned is, in fact, not in itself the intended factor; for such a

presence must produce some *actual or prospective effects* on the delimitation at stake. If such a kind of effects was produced, then proportionality would be a macrogeographical concept. On the contrary, the absence of such a kind of effects would render proportionality to be a microgeographical concept. Proportionality, therefore, is to be understood not only as a macrogeographical concept but also as a microgeographical one.

Above all, and the most important condition of all is that, proportionality is qualified by the condition that, it must be of a reasonable degree. The mutual relationship between the lengths of the coasts and the areas of continental shelf is not supposed to impose its fullest effect on the delimitation of the continental shelf. When the ICJ was explaining how the measurement of the coastline should be, it said that,

> "..., these being measured according to their general direction *in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.*"[62] [Emphasis added].

The necessary balance between the said kinds of coastlines is, therefore, the final aim of proportionality. Such a final aim can be achieved by granting the mutual relationship between the lengths of the coasts and the areas of continental shelf, only a reasonable degree.

But, what is the meaning of '*a reasonable degree*'? And to what criterion is such a reasonableness subject? The word '*degree*' can be said to be an equivalent of the word '*weight*' which was discussed in the Islands Section where islands were said to be given various kinds of weight. If this contention is true, the phrase '*a reasonable degree of proportionality*' means that proportionality is to be given a reasonable weight or a reasonable effect.

As for the word *'reasonable'*, it can be said that it is subject to the weighing process of the various circumstances of the case concerned. The weighing process is supposed to result in assigning a certain weight to each involved circumstance according to the degree of effectiveness and credibility that such a circumstance enjoys. The criterion of reasonableness, therefore, is interested in the effectiveness and credibility of the proportionality circumstance as compared with the effectiveness and credibility of the other available circumstances. The result is to give each circumstance its due weight. A reasonable degree means, therefore, that, proportionality is to be given its due weight in each continental shelf delimitation in the light of the involved circumstances of that case.

In conclusion, according to the North Sea judgement, proportionality is a geographical concept which is based on the mutual relationship between the extent of the continental shelf areas and the lengths of the coasts of the States concerned.

In the Anglo-French Arbitration, the proportionality concept was facilitated with even more discussion. Proportionality according to the Arbitration was broader than it was in the North Sea cases; for, it was in the former "..., not linked to any specific geographical feature."[63] In order to explain this meaning, the Tribunal said,

> "[t]he factor of proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the *North Sea Continental Shelf* cases. But it may also appear, and more usually does, as a factor for determining the reasonable or unreasonable - the equitable or inequitable - effects of particular geographical features or configurations upon the course of an equidistance-line boundary."[64]

So, what is the implication of the proportionality principle in the eyes of the Tribunal? The answer can be found in the following paragraph.

"In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. ...; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features ... . Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf."[65]

What does this paragraph mean? Does it mean that the Tribunal has defused and dismantled the proportionality concept? Or, does it mean that the Tribunal has reshaped the said concept into a new form?

It seems, prima facie, that the last sentence of the above-cited paragraph is a declaration of death of the proportionality concept as an independent relevant circumstance. However, this is not, at all, the case. In fact, the Tribunal believes that the proportionality concept does exist, but it has mixed two variant concepts together under a single title, namely, proportionality, and the irredressable disproportionally distorting effect of islands. To prove this contention, some discussion is necessary.

To begin with, the contention that the Tribunal believes that the proportionality principle does exist can be proven by providing the following two findings. On the one hand, the above-cited paragraph proves that the Tribunal has accepted the fact of the existence of the proportionality concept, although it does not agree with the ICJ in the North Sea Cases about the scope and meaning of such a concept.[66] The Tribunal, on the other hand, has applied the proportionality concept in two places, the second of which is the focal point of confusion between proportionality and the principle of irredressable disproportionally distorting effect of islands.

The Tribunal applied proportionality in the English Channel as a relevant circumstance relying on the relationship between the continental shelf areas and the lengths of the coasts. In the course of identifying the boundary in the said area, the Court says that it,

> "... considers that the primary element in the present problem is the fact that the Channel Islands region forms part of the English Channel, throughout the whole length of which the parties face each other as opposite States *having almost equal coastlines.*"[67] [Emphasis added]

This paragraph denoted that the length of the coastlines was one of the circumstances that justified the choice of the equidistance method, which resulted in equal division, because the Parties had almost equal coastlines in that area.

In the Atlantic region the proportionality element was also utilized; and unsurprisingly, it was also based on the ratio between the continental shelf areas and the lengths of the coasts. According to the Tribunal's justifications,

> "[t]he distance that the Scilly Isles *extend the coastline of the mainland of the United Kingdom westwards* onto the Atlantic continental shelf is slightly more than twice the distance that the Ushant *extends westwards the coastline of the French mainland.*"[68] [Emphasis added]

Because the said islands created various extensions to the mainland of the two interested countries, and such extensions were realized as producing a disproportional effect the ratio of which was *two* to the Scillies and *one* to the Ushant, the Scillies were given only half effect.

However, the question that is called for, here, is, does the principle which has been invoked in the Atlantic region relate to the proportionality concept or to the

irredressable disproportionally distorting effect of islands concept?

If one considered the said question from the viewpoint of the North Sea Cases judgement, the answer would be that the invoked principle to solve the problem of the Scilly isles was the irredressable disproportionally distorting effect of islands. But, should it be the viewpoint of the Anglo-French Arbitration, the answer would be that the invoked principle related to both concepts, the proportionality and the disproportionally distorting effect of islands; for both concepts, according to the Tribunal, could fall within the meaning and scope of one single principle, namely the proportionality principle. In fact, these two viewpoints, though seeming to be at odds with each other, draw attention to the most effective principle that plays the decisive role in the delimitation question of the continental shelf between neighbouring countries. This principle is *the irredressable disproportionally distorting effect.*

Equity, as has been seen above and will further be seen, is the balancing process of the irredressable disproportionally distorting effects of the effective circumstances. This contention has been built on the fact that, in order for any circumstance to be considered relevant, such a circumstance must produce an irredressable disproportionally distorting effect. And, in order to produce an equitable solution, the various distorting effects of the relevant circumstances in a given case must be subject to the balancing process which evaluates and identifies the proper weight to each involved circumstance. The principle of the *irredressable disproportionally distorting effect* is, therefore, said to be the underlying infrastructure of the concept of equity.[69]

Nevertheless, the question is, what is the relationship, if any, between the proportionality principle and the irredressable disproportionally distorting effect principle? In other words, is the latter principle implied, in whole or in part, in the former principle, or are both principles different from each other? These questions can

only be answered in the light of the development of the proportionality concept throughout the recent cases of the continental shelf delimitation between States.

In the Tunisia libya Case, 1982, the proportionality concept was introduced as a ratio between the extent of the continental shelf areas and the lengths of the relevant coasts.[70] In addition, more emphasis was provided in this case on the reasonableness feature of the proportionality principle, the reason why the Court did not deal "... with absolute areas, but with proportions."[71] However, the new significant feature of the said principle was that, proportionality was not dealt with as a relevant circumstance, but as a test in accordance with which the equitableness of the solution was tested.[72] Proportionality in this case can be classified under the irredressable disproportionally distorting effect principle; for, when proportionality is used as a test, it means that it is used as a yardstick to assure the absence of any disproportionality between the areas of the continental shelf that are to be allocated to each of the concerned parties. Such a test is, in fact, identical with the balancing process of the irredressable disproportionally distorting effect of the relevant circumstances.

Emphasizing again the reasonableness concept, the Tribunal in the Gulf of Maine Case used the proportionality principle as a relevant circumstance by means of the ratio between the continental shelf areas and the lengths of the coasts concerned.[73] Proportionality in this case was utilized as an auxiliary criterion to evaluate the weight that could be granted to Seal Island which was eventually given half effect.[74] The question is, Does the used proportionality concept fall within the scope of proportionality as an independent relevant circumstance, or as an irredressable disproportionally distorting effect principle. According to the judgement, it is more likely that proportionality was used as an independent relevant circumstance. For, the proportionality element was first calculated as producing a ratio of 1.38 to 1; and then due to the half effect that was given to Seal Island, this ratio was replaced by another

one, namely, 1.32 to 1.[75] The best analysis that can be said in this regard is that the balancing process of the irredressable disproportionally distorting effects of the proportionality ratio and the presence of Seal Island - as being the most effective relevant circumstances in the area concerned -, has resulted in modifying the proportionality ratio so that it becomes more equitable.

Proportionality was used in a similar sense - as an independent relevant circumstance -, in the Libya/Malta case, 1985.[76] The great disparity between the lengths of the coasts of both countries was considered a relevant circumstance.[77] However, proportionality was simultaneously utilized as a test of equity by the Court which emphasized that,

> "... there is certainly no evident disproportion in the areas of shelf attributed to each of the Parties respectively ..."[78]

And finally, similarly proportionality was used as a test of equity in the Guinea/Guinea Bissau Case in 1985.[79]

According to the recent cases one can deduce that the proportionality principle has been used in two various forms. The first is proportionality as an independent relevant circumstance; and the second is proportionality as a test ground of equity. Regarding these two forms, proportionality has been in all cases, used as representing a ratio between the extent of the continental shelf areas and the lengths of the coasts concerned.[79α]

Calling back the question of the relation between proportionality and the irredressable disproportionally distorting effect principles, the answer will be that the two principles are different from each other. Proportionality is solely concerned with the ratio between the continental shelf areas and the lengths of the coasts, whereas the

irredressable disproportionally distorting effect principle can belong to any relevant circumstance including the proportionality circumstance.

Since equity is the balancing process of the irredressable disproportionally distorting effects of the relevant circumstances in a given case, and since every relevant circumstance is tested by the degree of its distorting effect, so the proportionality circumstance is tested in the same way. i.e. it is tested by how much disproportional its distorting effect is. The irredressable disproportionally distorting effect of the proportionality circumstance, therefore, is a component among the other components of the irredressable disproportionally distorting effect principle.

The foregoing conclusion can be best manifest in the case where proportionality is used as an independent relevant circumstance and as a test ground of equity, such as the Gulf of Maine case and Libya/Malta case. In such a case it is the absence of any disproportionality rather than the presence of proportionality that becomes the decisive factor.

IV

Natural Prolongation

as a

Relevant Circumstance

As has been seen in the Second Chapter, the natural prolongation concept is said to play two variant roles in the delimitation question of the continental shelf, namely, as a general principle, and as a relevant circumstance.[80] This subsection in turn is mainly concerned with discussing, and proving why and how, the natural prolongation is regarded as a relevant circumstance beside its having the main role as a general principle.

When the natural prolongation concept is invoked as a general principle to effect both the entitlement and delimitation of the continental shelf, it is regarded as being founded on a combined basis of legal and geophysical connotation. Conversely, natural prolongation as a relevant circumstance is, as will be seen, based on, and solely on, a geophysical ground. Of course, that is not to say that the natural prolongation in the latter meaning - as a relevant circumstance - is not a legal notion any more. In fact, the natural prolongation relevant circumstance is a legal notion which, like the other geophysical relevant circumstances, has been built on a geophysical basis.

The other difference between the two implications of the natural prolongation concept is that whereas natural prolongation as a general principle is applicable in all cases, the said concept as a relevant circumstance is applicable, only, in certain cases. The question here is, what sort of cases can find the chance of applying natural prolongation as a relevant circumstance? In other words, what sort of features must be available so that such a relevant circumstance becomes indispensably applicable?

The answer to these two questions can only be considered in the light of the concluded judicial, arbitral and other cases. Apart from the 1969 North Sea cases, which has instigated the natural prolongation concept, the said concept has been invoked in all the other cases that has been concluded up to date. Examining the facts of each of the said cases, the natural prolongation concept as a relevant circumstance was found inapplicable to any of them.

In the pleading of the Anglo-French Arbitration, the UK emphasized that, "... the Hurd Deep and the Hurd Deep Fault Zone were regarded as marking the limits of the respective natural prolongations of the two States.",[81] and that the said Deep constituted "a major and persistent structural discontinuity of the seabed and subsoil" of such a kind as to "interrupt the essential geological continuity of the continental

shelf,".[82] The answer of the Court was that,

> "The geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the seabed and subsoil which do not disrupt the essential unity of the continental shelf either in the Channel or the Atlantic region."[83]

Excluding the Tripolitanian Furrow from being considered a relevant circumstance, the ICJ in the Tunisia/Libya Case, 1982, commented that unless the geophysical features

> "... were such as to *disrupt the essential unity of the continental shelf* so as to justify a delimitation on the basis of its identification as the division between areas of natural prolongation, it would be an element inappropriate for inclusion among the factors to be balanced up with a view to equitable delimitation."[84] [Emphasis added]

In the Gulf of Maine Case, (1984), the continental shelf of the concerned States was "... a single continuous, uniform and uninterrupted physiographical structure, ...";[85] and no marked elevations or depressions, including the Northeast Channel,[86] and Georges Bank,[87] was able

> "... to distinguish one part that might be considered as constituting the natural prolongation of the coasts of the United States from another part which could be regarded as the natural prolongation of the coasts of Canada."[88]

The Court of Justice in the Libya/Malta Case, (1985), found that the "... "rift zone" cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary."[89] However, having recognized the concept of the Exclusive Economic Zone, the Court realized that the two concepts, the continental shelf and the

EEZ, would coincide with each other within the 200 miles distance from the shore. Thus, the ICJ indicated that, the concept of natural prolongation as a relevant circumstance cannot be applicable within the said 200 miles distance.[90] Nevertheless,

> "[t]his is not to suggest that the idea of natural prolongation is now superseded by that of distance.[91]

What does it suggest then? The Court replies,

> "The concepts of natural prolongation and distance are ... not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf."[92]

Emphasizing again the inapplicability of the natural prolongation concept as a relevant circumstance within the 200 miles distance from the shore,[93] the Tribunal in the Guinea/Guinea Bissau Case, (1985), said that,

> "... the rule of natural prolongation can be effectively invoked for purposes of delimitation only where there is a separation of continental shelves."[94]

On this basis, the continental shelf of the two concerned States was realized to be "one and the same".[95]

The essential unity or continuity of the continental shelf is, therefore, the focal point of the natural prolongation concept. From this, one can deduce the difference between the natural prolongation concept as a general principle, on the one hand, and as a relevant circumstance, on the other. If the continental shelf preserves its unity and/or continuity, then the natural prolongation concept is applicable as a general principle only. On the contrary, should the continental shelf display discontinuity, the natural

prolongation concept will be applicable as a relevant circumstance.

But, what sort of discontinuity should the continental shelf display in order to satisfy the requirements of natural prolongation as a relevant circumstance? According to the above-cited paragraphs concerning the judicial cases, the conditions of the continental shelf discontinuity are:

- It must be natural;
- It must be substantial so that it constitutes a fundamental interruption of the continental shelf. The condition here stated is to exclude all the minor geomorphological projections, (such as troughs, rifts, ridges, banks, and so on,) that do not constitute a real interruption of the geological continuity of the continental shelf.
- It must be beyond 200 miles from the shore, because within these limits the distance criterion is the applicable one.

It follows that, the relevant circumstance of natural prolongation is that sort of concept which can be proven in a negative way. That is to say, the applicability of the said circumstance must always be justified by the absence of interruption of the essential unity and/or continuity of the continental shelf. In other words, in order to apply the natural prolongation as a relevant circumstance, a substantial and fundamental discontinuity of the concerned continental shelf must be available. These qualifications of the discontinuity concept are, therefore, the principal ideas that underly the natural prolongation concept when it is considered a relevant circumstance.

The foregoing conclusion calls to attention an old doctrine which has similar interests. That is, the substantial fall-off doctrine. The intimate relationship between the natural prolongation concept and the substantial fall-off doctrine, to which the discussion hereunder will be interested, is of vital importance to understand better the said concept as a relevant circumstance.

Natural Prolongation
and the
Substantial Fall-off Doctrine

According to the discussion cited-above, when the natural prolongation concept displays itself as a relevant circumstance, the indispensable conclusion is that such a circumstance is demonstrated by the geophysical structure of the continental shelf. It is, therefore, essential to examine this concept in order to identify what category of geophysical structure it belongs to. In other words, it is essential to know whether the natural prolongation circumstance belongs to the geological, or to the geomorphological considerations, or to both at the same time.

The natural prolongation relevant circumstance is, in fact, found to belong exclusively to the geological considerations of the continental shelf. This fact is based on two reasons. The first is that, revising the judicial cases of the continental shelf delimitation, one can find that all the conditions relating to the geomorphological considerations were regarded by the concerned judicial organ as not constituting a fundamental interruption of the geological continuity of the continental shelf in question. Examples of these can be found in the Hurd Deep and the Hurd Deep Fault Zone, Tripolitanian Furrow, Georges Bank, and the "rift zone".[96]

The second is that, as a matter of fact, the unity of a geological structure is only interrupted by a geological feature which puts an end to that unity. So, the essential unity, continuity or prolongation of the continental shelf cannot be interrupted by any geophysical feature unless this feature is of geological nature.

Accordingly, and bearing in mind the stated-above three conditions necessary for

the natural prolongation to be a relevant circumstance, the definition of such a circumstance becomes as follows: *The natural prolongation relevant circumstance is that geological feature which constitutes a fundamental interruption of the geological continuity of the continental shelf.* The only geological feature that can satisfy such requirements is the substantial fall-off of the continental shelf, or, as is termed by Geographers, the continental slope.

Because the outer limits of the continental shelf was difficult to be identified in the late 1940s and early 1950s, according to some the problem was solved by initiating the substantial fall-off doctrine. According to this doctrine, the continental shelf would constitute that slight slope of the seabed contiguous to a coastal State until it reached the first substantial fall-off.[97] In terms of Geographers this substantial fall-off was the so called continental slope. This doctrine lost its importance with regard to the outer limit of the continental shelf when the ILC's deliberations in the 1950s resulted in the adoption of the 200-meter depth/exploitability criterion, for the purposes of defining the continental shelf.[98] However, in the 1970s the UNCLOS III awakened this doctrine when it relied to a great extent, and in details, on the geological basis when defining the continental shelf. Generally speaking, the continental shelf is defined to extend up to the end of the continental margin, i.e., it embraced the geographical continental shelf, the continental slope, and the continental rise.[99] That is to say, the doctrine of substantial fall-off has been reemphasized as, and proved to be, the best suited basis to define the outer limits of the legal continental shelf, with only one difference. That is, the fall-off doctrine defined the continental shelf as it would terminate at the beginning of the continental slope, whereas the new definition of the continental shelf would terminate it not only at the foot of the slope but at the end of the continental rise as well. From this angle the natural prolongation relevant circumstance can be seen.

Should the said discussion be true, it leads to two undoubted conclusions. The

first is that, the natural prolongation relevant circumstance is only applicable in situations where the continental slope and rise are present; and this continental slope and rise are located beyond the 200-mile distance from the shore. These situations are, as will be seen, very limited in number.

The second conclusion is that, since the continental shelf is that geophysical structure which surrounds the continents and the oceanic islands, so it is almost impossible to find any adjacent-States position that is not on the same continental shelf. Thus, bearing in mind the first conclusion, (which indicates that the natural prolongation is tested by the presence of the continental slope and rise,) such a circumstance finds a luke chance in application in case of adjacent-States position.[100] The position of opposite States, however, can be assessed differently. Opposite States might belong to two different continents, the fact that indicates the likelihood of each of them abutting on a different continental shelf. That is to say, the natural prolongation relevant circumstance might find applicability only in the opposite-States position.

Is there, in reality, any such situation in which the natural prolongation relevant circumstance might be applicable? And if it is applicable, Is it fruitful?

Having examined the world-wide map, it is found that, the natural prolongation relevant circumstance might, in principle, be applicable in numerous opposite-States situations. These situations may mainly be present in areas such as the following:

- In the Bering Sea, between USSR and USA.
- In the Sea of Japan, between Japan and each of North Korea and South Korea, and USSR.
- In the Pacific Ocean, between Philippines and each of Marianas Islands and Japan; and in the complexion of the far east oceanic archipelagoes such as between Papua New Guinea and Solomon Islands, and between New Caledonia and each of Vanuatu, Figi and Australia.

- In the Coral Sea, between Australia and each of Papua New Guinea and New Caledonia.
- In Tasman Sea, Between Australia and New Zealand.
- In the Bay of Bengal, between India and each of Sri Lanka and Burma.
- In the Arabian Sea, between India and Oman.
- In the Indian Ocean, between Seyschelles and each of Somalia, Kenya and Tanzania; and between Seyschelles and Maldives.
- In the Norwegian Sea, between Norway and each of Iceland and Greenland (Canada).
- In the Bafin Bay and Labrador Sea, between Greenland (Denmark) and Canada.
- In the North Atlantic Ocean, between UK and Ireland, on the one hand, and each of the said two States and Iceland, and between Ireland and Iceland and Greenland (Denmark), on the other hand.
- And finally, in the Gulf of Mexico, between each of USA, Mexico and Cuba.

Examining these situations, the following conclusions could be said. First, the natural prolongation relevant circumstance is, in practice, not applicable to the majority of the above-said situations; and although this relevant circumstance is applicable to the remaining few situations, its applicability to them is not fruitful.

Second, the main reason for the inapplicability of the said relevant circumstance to the majority of these cases is that, apart from some oceanic islands, *the continental shelves of all the continents are connected with each other so that they constitute a single and continuous continental shelf.* That is to say, it is almost impossible to find any fundamental disruption of the continental shelf even between the continents themselves. In fact, the only fundamental disruption of the continental shelf of all the continents could be found at the outer edge of the continental margin, which is located

at a far distance from any opposite-States situation.

Third, the reason for the fruitlessness of the applicability of the natural prolongation relevant circumstance to the said remaining few situations is that, since the presence of a fundamental disruption always marks the outer limit of the continental shelf, so it is not a matter of dispute between States. For, as a matter of fact, except within the 200-mile distance of the EEZ, no State can claim any right over the seabed beyond the outer edge of the continental margin; and consequently, it is not possible to find any overlapping claims beyond the said outer limit.

Fourth, in order to prove these conclusions, a selected set of three samples of the above-cited opposite-States situations will be examined hereunder.

The Bering Sea is a semi-enclosed Sea and is shared with by the USSR, in its far northeastern coasts, and the USA, in the Alaska coasts - the property of which has been transferred from the USSR to the USA since 1867.[101] The seabed of the Bering Sea varies in depths. Whereas it is shallow in the north and northeast, the Bering Sea is quite deep with some ridges in the middle, south and southwest.

Because the Bering Sea is located in the area between two continents - America, and Asia -, so it is supposed to show the outer limits which mark the end, or start, of each of the two continents with respect to each other. However, the situation of the Bering Sea is completely different. As the land of each of the two continents slopes down into and under the sea, they meet each other in shallow depths forming a single and continuous continental shelf belonging to both continents. This single continental shelf is quite wide in the north and northeast - contiguous to Alaska (USA,) and the shores of Chukotskiy (USSR) -, and very narrow in the west and southwest - contiguous to the Kamchatka peninsula and Koryakskiy Khrebet shores of the USSR.

Besides, this continental shelf is connected with the continental shelf of the Arctic, passing through the Bering Strait, and forming also a single and continuous continental shelf.

Being single and continuous, the continental shelf of the Bering Sea does not contain any geological feature that is able to be considered a fundamental disruption of that shelf except the continental slope and rise which mark its outer limit. That is to say, if, in theory, the natural prolongation relevant circumstance is best applicable to an opposite-States situation belonging to two different continents, such a relevant circumstance is found inapplicable, in practice, to the Bering Sea due to the continuity of the continental shelf therein.

A similar situation can be found in the Norwegian Sea and North Atlantic Ocean areas as being the supposed marking limits of the two continents, Europe and America. The continental shelf of Europe and that of America are connected with each other constituting a single and continuous continental shelf. And despite the presence of two basins - the Norwegian and Greenland Basins -, which slope down to great depths, these two Basins do not constitute a fundamental and continuous disruption of the said shelf. In fact, the presence of the Voring Plateau, Jan Mayen Ridge, the Aegir Ridge, the Icelandic Plateau, and Iceland-Faeroe Ridge, which are connected with each other, cause the continental shelf of Europe and that of America to be a single and continuous continental shelf.

Accordingly, no State in the area can invoke the natural prolongation relevant circumstance so as to justify its entitlement over certain parts of the concerned continental shelf. Such a relevant circumstance, therefore, cannot be invoked in the network of continental shelf boundaries between the following States, the UK, Norway, Iceland, the Faeroe Islands (Denmark), Ireland, and Greenland (Denmark). Such was the case between Iceland and Jan Mayen (Norway) in their conciliation of

1981.[102]

Nevertheless, two cases in the North Atlantic Ocean illustrate another fact concerning the natural prolongation relevant circumstance. That is, the natural prolongation relevant circumstance is very unlikely to be applicable because once its conditions are available, the situation ceases to be a matter of continental shelf delimitation between States. Rather, it becomes a matter of the outer limit of the continental shelf,[103] which is, relatively speaking, the concern of each State alone, and is subject to different rules, namely, Article 1 of the 1958 Convention on the Continental Shelf and Article 76 of the 1982 Convention.

The first case is concerned with the shelf delimitation between Iceland and Greenland (Denmark).[104] Although both countries abut on the same continental shelf, the presence of a thalewg, which slopes down to great depths, between Reykjanes Ridge (Iceland) and Eirik Drift (Greenland), might play an important role in this case.[105] Because this thalewg can meet the conditions of the natural prolongation relevant circumstance - as being a fundamental disruption of the concerned continental shelves -, so it might be used to mark the southern part of the continental shelf boundary between Iceland and Greenland. However, the more likely solution is that the delimitation process between Iceland and Greenland will proceed only in the part of the continental shelf which is located northward of the said thalewg until the point where the thalewg starts. For, once the thalewg starts it marks the outer limit of the remaining parts of the continental shelf - the outer limit of the Reykjanes Ridge and that of the Eirik Drift -, which mean that there will not be any overlapping claims between Iceland and Greenland concerning the deep seabed of the thalewg area, because it is no longer a continental shelf. This area becomes, in fact, part of the seabed where no State has any right or any entitlement.

This analysis can also be true with respect to the continental shelf delimitation between Ireland and Iceland. The presence of a thalewg slopping down to great depths between the Rockall Plateau and Gardar Drift (Iceland) might play a significant role in this delimitation.[106] The role of the said thalewg is dependent on the solution of the dispute over the Rockall Island between Ireland and the UK, and between each of the said two States and Iceland and Denmark. If the dispute was solved in favour of Ireland, it would cause the boundary line between Ireland and Scotland to shift northward of the Rockall Island giving extra continental shelf areas to Ireland; and it would also mean that the said thalewg would become a minor feature in the area, which may or may not play a role in the delimitation of the continental shelf. On the contrary, if the dispute over the Rockall island was solved in favour of the UK or any of the other said States (apart from Ireland), it would cause the boundary line between the UK and Ireland to shift south of the Rockall Island giving Ireland less continental shelf areas; and this would mean that such a boundary line would meet the said thalewg causing it to become a major feature in the area. In this case the said thalewg would constitute a fundamental disruption of the continental shelf between Ireland and Iceland marking the outer limits of their continental shelves. Accordingly, there will not be any dispute between Iceland and Ireland concerning overlapping continental shelf areas, because the said deep seabed of the thalewg will constitute part of the seabed and not part of the continental shelf of either country.

The situation between Australia and New Zealand will lead to a conclusion similar to the foregoing one, concerning the natural prolongation relevant circumstance. The continental shelf of Australia and New Zealand are connected with each other forming a single and continuous continental shelf. If a continental shelf delimitation question arises between the two countries, the only relevant areas of shelf will be located in the north of the Tasman Sea, namely, Lord Howe Rise and Norfolk Ridge. For, in the southern part of the said Sea the continental shelf of Australia and that of New Zealand

are both very narrow and all in all less than 200 nautical miles from the shores of each country, (as included in the EEZ limits).

The Lord Howe Rise extends in a northwest-southeast direction joining the continental shelf of Australia with that of New Zealand. The Norfolk Ridge is a northward extension of the New Zealand continental shelf. Separating Lord Howe Rise from Norfolk Ridge, the Norfolk Trough slopes down to great depths ranging from 2890 to 3740 meters isobath. The outer edge of the Lord Howe Rise and Norfolk Ridge - as are marked by the Tasman Basin in the south and Norfolk Trough in the north - are the only features that can play a role as a fundamental disruption of the continental shelf of Australia and New Zealand. However, if these features are considered a natural prolongation relevant circumstance, the following findings will be of great significance. Firstly, if there had not been any other relevant circumstances in the area, the outer edge of the Lord Howe Rise would have been the best suited to identify the outer limit of the New Zealand continental shelf as distinguished from that of Australia; for, although the Rise is concerned with the Australian continental shelf, the point of connection occurs in the very northern parts of the Shelf and the Rise close to the Coral sea forming the continental shelf of Australia and that of New Zealand to be opposite each other in most of their parts.

Secondly, nevertheless, the presence of the Lord Howe and Norfolk islands, which belong to Australia, on the Lord Howe Rise and Norfolk Ridge, respectively, constitute a significant relevant circumstance. In fact, the presence of these islands reduces the natural prolongation relevant circumstance to its lowest effect, because their presence on the New Zealand continental shelf constitute an extension of the Australian continental shelf beyond the Tasman Sea and Norfolk Island Trough. In this case, even if the minimum effect is given to the said two islands, and unless they are given minus effect, the question of continental shelf delimitation will be concerned with the division of Lord Howe Rise and Norfolk Ridge between the two countries. That is to

say, the outer edges of the said Rise and Ridge, as representing the natural prolongation relevant circumstance, will find a luke Chance in playing a role in such a delimitation.

However, the outer edge of the Lord Howe Rise and Norfolk Ridge is not deprived completely from playing any role in identifying the outer limit of the concerned continental shelf. In fact, the southern part of the outer limit of Lord Howe Rise, which abuts on the Tasman Sea, and the southern Part of the Norfolk Trough, will carry on playing their role as representing the outer limit of the New Zealand continental shelf, where no dispute between the two States would arise.

Conclusion

Having studied the world map in order to see where the natural prolongation relevant circumstance can be applicable, the following are of prime importance. First, the natural prolongation relevant circumstance is in no way applicable to an adjacent-States situation. Second, because the continental shelves of all the continents are connected with each other, and because of the presence of the EEZ concept, the natural prolongation relevant circumstance is also found inapplicable in the majority of opposite-States situations.[106] In the remaining minority of opposite-States situations, the said relevant circumstance is, though in theory applicable, not fruitful in practice. The main reason for this is that, no sooner do the conditions of the natural prolongation relevant circumstance exist than the situation becomes a question of outer limit of the continental shelf rather than a question of delimitation of the shelf between States.

However, although the natural prolongation relevant circumstance is more likely to belong to the question of the outer limits of the continental shelf, that does not mean that it is applicable once its requirements are met. In fact, like every other relevant circumstance, the natural prolongation circumstance is subject to the balancing process which will decide the degree of effect that can be attributed to such a circumstance.

Yet, it seems that the natural prolongation relevant circumstance is very likely to be a weak circumstance, because the presence of any other relevant circumstances might result in such other circumstances taking over the natural prolongation circumstance. This case can be best illustrated by a situation similar to that of Australia and New Zealand. If, in the said case, the two Australian islands - Lord Howe and Norfolk - had not been situated on the Lord Howe Rise and Norfolk Ridge, the outer limit of the Lord Howe Rise would have constituted a relevant circumstance as identifying the outer limit of the New Zealand continental shelf against the outer limit of the Australian EEZ. That is to say, the presence of the two Australian islands, as a relevant circumstance has wasted any opportunity for the natural prolongation circumstance to be effective.

Accordingly, another requirements of the natural prolongation relevant circumstance is that, it must be subject to the balancing process which will help to identify the due weight that it must be given in a particular case. Regarding this condition, it is doubtful that the natural prolongation relevant circumstance can be given partial effect. In fact, it is more likely that this relevant circumstance can either be given full effect or no effect at all due to its special nature.

V

Mineral Deposits

&

The Customary Solution

Before this Subsection proceeds, some notes are important to be provided. First, the term '*mineral deposits*' is meant here to include not only petroleum or natural gas but also any mineral or non-living natural resources, whether they are in the form of a field or structure, that is straddle underneath the continental shelf. Second, this Subsection is going to deal with the Customary solution of the common mineral

deposits, as to whether they constitute a relevant circumstance or not. As for the Conventional solution concerning common mineral deposits - whether they constitute a special circumstance or not -, it will be dealt with in the Fifth Chapter. Accordingly, the historical background of the problem of common mineral deposits is going to be deferred for discussion in that Chapter also.

The main questions that identify the direction of discussion in this subsection are: do common mineral deposits constitutes a relevant circumstance? What are the applicable rules and principles to such a problem? And, what are the available solutions of this issue?

Common mineral deposits have been a matter of concern since the early development of the doctrine of the continental shelf.[108] However, it was not until the 1969 North Sea Cases that common mineral deposits were, explicitly adopted as a factor to be considered in the continental shelf delimitations between States. According to the ICJ, one of the factors to be taken into account is,

> "2- so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;".[109]

A two-point comment is called for here. First, the main issue concerning common mineral deposits is that such deposits extend underneath the continental shelf and might lie on both sides of a dividing line between two States. Consequently,

> "..., a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned."[110]

Second, the preservation of the unity of deposits has, therefore, become, according to the International Court, the focal point of the factor of common mineral deposits, and

this unity becomes the *relevant* circumstance.[111]

Commenting on the 1969 ICJ's judgement, Professor Brown said that,

> "[t]he existence of the deposit would scarcely seem to constitute a "special circumstance," however, entitling a coastal State to demand a deviation from the equidistance line."[112]

However, relying on the Grisbadarna principle of refraining from modifying a settled state of things, and on the historical right doctrine, Professor Brown's above-said conclusion was followed by an exception to the effect that mineral deposits could be considered a relevant circumstance, only, if

> "... a coastal State had acquired exclusive rights to such resources independently of, and prior to, the development of the continental shelf doctrine."[113]

The conclusion reached by Professor Brown was reaffirmed by Professor O'Connell who also relied on the Vested Rights doctrine to aid his conclusion.[114]

Contrary to this conclusion, judge Padilla put his view saying,

> "In addition to special situations of a technical nature-...., indivisible deposits of mineral oil or natural gas, etc.-... have been regarded as special circumstances."[115]

More recently, the mineral deposits circumstance was dealt with in two other cases. In the Iceland/Norway (Jan Mayen) Conciliation of 1981, the potential presence of hydrocarbon deposits in the Jan Mayen Ridge was one of the prime factors that had underlain the choice of the location of the delimitational line. This meaning was provided by the Conciliation Commission when it stated its four considerations. One of these considerations was that, the only area which contains the possibility of finding hydrocarbons is considered to be available in the Jan Mayen Ridge situated between Jan

Mayen and the Icelandic 200 EEZ.[116] Thus, based on this and the other considerations, the Commission recommended the outer limit of the Icelandic EEZ to be the boundary line, and concerning Jan Mayen Ridge, it recommended the establishment of a common zone for joint development.[117]

Although it was not dealt with directly, mineral deposits factor played an important role in the Tunisia/Libya Case in 1982. The granting of petroleum concessions by both Parties to their nationals - as forming the parties conduct -, was the dominant consideration that had underlain the establishment of a de facto line (angle 26° line). This line was taken up by the ICJ and subsequently adopted as the dividing line of the first sector of delimitation of the continental shelf concerned.[118] That is to say, the conduct of granting concessions by both parties was motivated by a subconsciously acceptable division of the petroleum deposits present in the area. Yet one can say that, if there had been no petroleum deposits in the area concerned, there would not have been any conduct between the parties, and subsequently the Court would have to rely on circumstances other than the conduct of the parties. This finding proves that the presence of petroleum deposits was, though indirectly, the decisive factor that affected the choice of method of delimitation in the first sector of the area concerned.

Due to the shortage of the requisite scientific knowledge, the extent of mineral deposits fields or structures, as they straddle underneath the continental shelf, are, in practice, quite difficult to be identified. In order to bridge this gap, numerous States have provided a special conditional provision in the agreements concerning the delimitation of their continental shelves. Out of a collection of 80 agreements, 43 agreements have provided such a conditional provision. The remaining 37 agreements have kept silent concerning the problem of common mineral deposits. The principal purpose of this conditional provision was to oversee a solution, or a method of solution, if a problem would arise out of a subsequent discovery of a mineral deposit

extending across the delimitational line. Almost all these conditional provisions had, with minor differences, similar or identical contents. A symbolic provision could be found in the following selected Article.

> "If any single geological petroleum or natural gas structure extend across the boundary line ... and the part of such structure which is situated on one side of the line is exploitable, wholly or in part, from the other side of the said line, the two governments shall seek to reach agreement as to the manner in which that structure shall be most effectively exploited."[119]

Examining the available State practice, the following remarks can be made. First, agreements which provided a conditional provision concerning mineral deposits constitute about 54% of the total available agreements, (43 out of 80). The remaining 46% have not provided such a conditional provision, (37 out of 80). That is to say, although the agreements that adopted the said provision constitute the majority, this majority is a small majority with a difference of 4% only. So, it is quite difficult to say that there is a widespread State practice concerning the mineral deposits issue. Yet studying the said 43 agreements, one can realize that the adopted conditional provisions, though similar, have provided a variety of solutions. To begin with 32 agreements left the matter for a future agreement. However, 22 of these 32 agreements provided the agreement solution without clarifying according to what sort of rules and principles such an agreement must be reached.[120] The remaining 10 agreements of the said 32 agreements, adopted either the agreement solution which would secure an equitable share to each party,[121] or the agreement solution that would secure those parts of the common deposit that were originally located in its share of the continental shelf.[122]

In the second place, five agreements referred to the agreement solution provided that in default of agreement the parties would resort to arbitration, (two of these 5

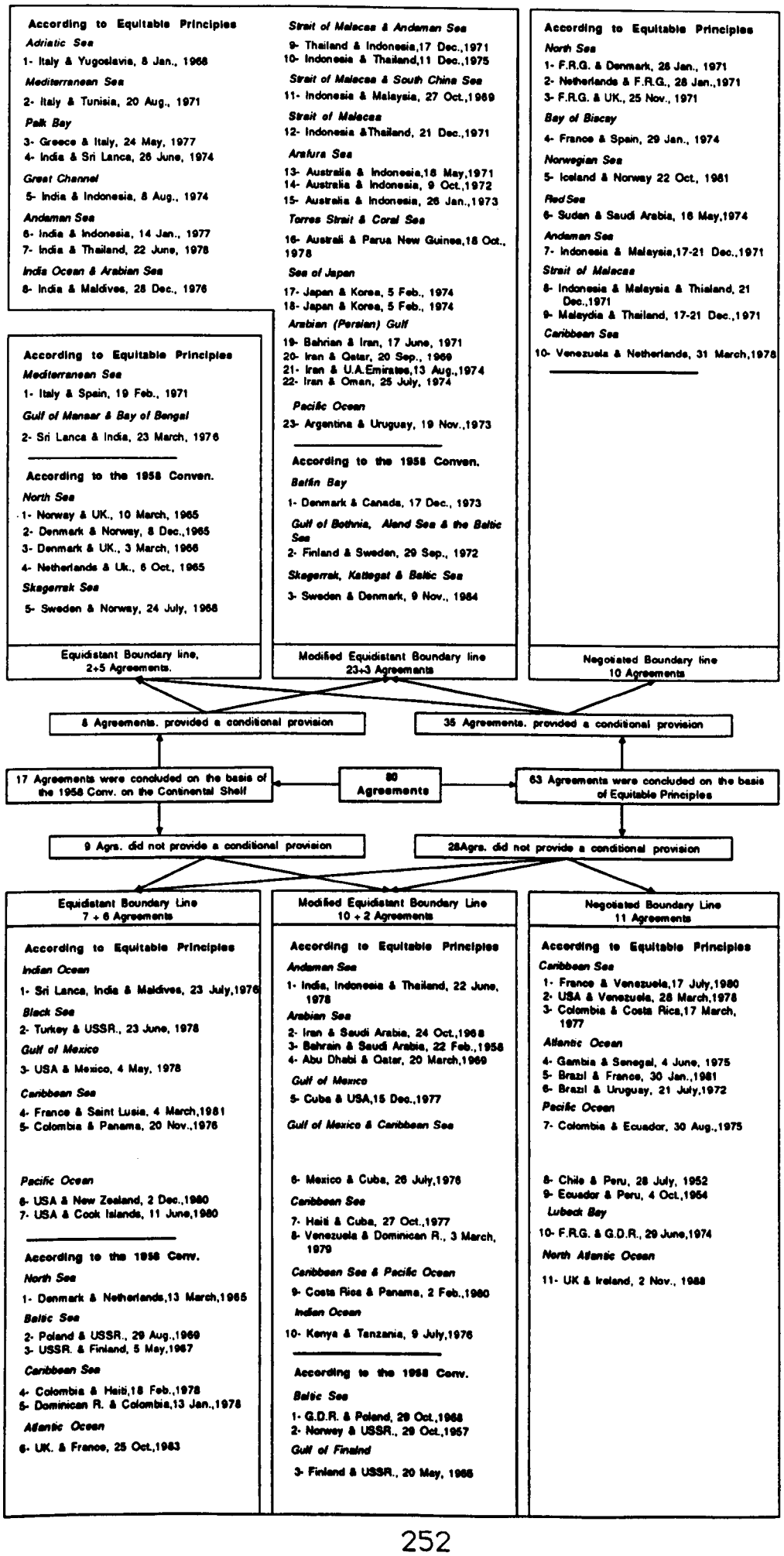
agreements provided that the arbitration decision must secure an apportionment of the common deposit proportional to the volume of resources on each side of the boundary);[123] four agreements have established a protected zone on both sides of the boundary line within which no State has the right of exploitation unless by a subsequent mutual agreement;[124] one agreement referred to an apportionment of the common deposit proportional to the volume of resources on each side of the boundary line;[125] and one agreement left the power of decision to a joint commission which was established by the agreement itself, provided that the commission's solution should secure an equitable share to each party.[126]

Second, in order to find out the underlying reason of States' behaviour, almost all attempts to classify those agreements which have, and which have not, provided the said conditional provision, have failed, due to the fact that they belong to a wide variety of situations.[127]

Third, it is quite difficult, then, to generalize any specific justification, which, (as an evidence of the *opinio juris*,) identify why those States did, or did not, provide a conditional provision concerning their common mineral deposits.

Fourth, State practice as such cannot be helpful to establish any customary rule relating to the common mineral deposits issue. This conclusion which does not go in line with Onorato's conclusion, does not mean, at all, that the mineral deposits issue is left in a legal vacuum without any proper solution.[128] It, also, does not mean that a solution effected by agreement is not acceptable. The only thing it does mean is that State practice to date is not helpful to establish a customary rule to the effect that if a mineral deposit field is discovered extending across the dividing line of the continental shelf, the parties are under an obligation to resort to negotiations in order to reach an agreement.

Table IV:1


According to Equitable Principles
Adriatic Sea
1- Italy & Yugoslavia, 8 Jan., 1968
Mediterranean Sea
2- Italy & Tunisia, 20 Aug., 1971
Palk Bay
3- Greece & Italy, 24 May, 1977
4- India & Sri Lanca, 26 June, 1974
Great Channel
5- India & Indonesia, 8 Aug., 1974
Andaman Sea
6- India & Indonesia, 14 Jan., 1977
7- India & Thailand, 22 June, 1978
India Ocean & Arabian Sea
8- India & Maldives, 28 Dec., 1976
Strait of Malacca & Andaman Sea
9- Thailand & Indonesia,17 Dec.,1971
10- Indonesia & Thailand,11 Dec.,1975
Strait of Malacca & South China Sea
11- Indonesia & Malaysia, 27 Oct.,1969
Strait of Malacca
12- Indonesia &Thailand, 21 Dec.,1971
Arafura Sea
13- Australia & Indonesia,18 May,1971
14- Australia & Indonesia, 9 Oct.,1972
15- Australia & Indonesia, 26 Jan.,1973
Torres Strait & Coral Sea
16- Australi & Parua New Guinea,18 Oct., 1978
Sea of Japan
17- Japan & Korea, 5 Feb., 1974
18- Japan & Korea, 5 Feb., 1974
Arabian (Persian) Gulf
19- Bahrian & Iran, 17 June, 1971
20- Iran & Qatar, 20 Sep., 1969
21- Iran & U.A.Emirates,13 Aug.,1974
22- Iran & Oman, 25 July, 1974
Pacific Ocean
23- Argentina & Uruguay, 19 Nov.,1973
According to Equitable Principles
North Sea
1- F.R.G. & Denmark, 28 Jan., 1971
2- Netherlands & F.R.G., 28 Jan.,1971
3- F.R.G. & UK., 25 Nov., 1971
Bay of Biscay
4- France & Spain, 29 Jan., 1974
Norwegian Sea
5- Iceland & Norway 22 Oct., 1981
Red Sea
6- Sudan & Saudi Arabia, 16 May,1974
Andaman Sea
7- Indonesia & Malaysia,17-21 Dec.,1971
Strait of Malacca
8- Indonesia & Malaysia & Thialand, 21 Dec.,1971
9- Malaydia & Thailand, 17-21 Dec.,1971
Caribbean Sea
10- Venezuela & Netherlands, 31 March,1978
According to Equitable Principles
Mediterranean Sea
1- Italy & Spain, 19 Feb., 1971
Gulf of Manaar & Bay of Bengal
2- Sri Lanca & India, 23 March, 1976
According to the 1958 Conven.
North Sea
1- Norway & UK., 10 March, 1965
2- Denmark & Norway, 8 Dec.,1965
3- Denmark & UK., 3 March, 1966
4- Netherlands & Uk., 6 Oct., 1965
Skagerrak Sea
5- Sweden & Norway, 24 July, 1968
According to the 1958 Conven.
Baffin Bay
1- Denmark & Canada, 17 Dec., 1973
Gulf of Bothnia, Aland Sea & the Baltic Sea
2- Finland & Sweden, 29 Sep., 1972
Skagerrak, Kattegat & Baltic Sea
3- Sweden & Denmark, 9 Nov., 1984
Equidistant Boundary line, 2+5 Agreements.
Modified Equidistant Boundary line 23+3 Agreements
Negotiated Boundary line 10 Agreements
8 Agreements. provided a conditional provision
35 Agreements. provided a conditional provision
17 Agreements were concluded on the basis of the 1958 Conv. on the Continental Shelf
80 Agreements
63 Agreements were concluded on the basis of Equitable Principles
9 Agrs. did not provide a conditional provision
28Agrs. did not provide a conditional provision
Equidistant Boundary Line 7 + 6 Agreements
According to Equitable Principles
Indian Ocean
1- Sri Lanca, India & Maldives, 23 July,1976
Black Sea
2- Turkey & USSR., 23 June, 1978
Gulf of Mexico
3- USA & Mexico, 4 May, 1978
Caribbean Sea
4- France & Saint Lusia, 4 March,1981
5- Colombia & Panama, 20 Nov.,1976
Pacific Ocean
6- USA & New Zealand, 2 Dec.,1980
7- USA & Cook Islands, 11 June,1980
According to the 1958 Conv.
North Sea
1- Denmark & Netherlands,13 March,1965
Baltic Sea
2- Poland & USSR., 29 Aug.,1969
3- USSR. & Finland, 5 May,1967
Caribbean Sea
4- Colombia & Haiti,18 Feb.,1978
5- Dominican R. & Colombia,13 Jan.,1978
Atlantic Ocean
6- UK. & France, 25 Oct.,1983
Modified Equidistant Boundary Line 10 + 2 Agreements
According to Equitable Principles
Andaman Sea
1- India, Indonesia & Thailand, 22 June, 1978
Arabian Sea
2- Iran & Saudi Arabia, 24 Oct.,1968
3- Bahrain & Saudi Arabia, 22 Feb.,1958
4- Abu Dhabi & Qatar, 20 March,1969
Gulf of Mexico
5- Cuba & USA,15 Dec.,1977
Gulf of Mexico & Caribbean Sea
6- Mexico & Cuba, 26 July,1976
Caribbean Sea
7- Haiti & Cuba, 27 Oct.,1977
8- Venezuela & Dominican R., 3 March, 1979
Caribbean Sea & Pacific Ocean
9- Costa Rica & Panama, 2 Feb.,1980
Indian Ocean
10- Kenya & Tanzania, 9 July,1976
According to the 1958 Conv.
Baltic Sea
1- G.D.R. & Poland, 29 Oct.,1968
2- Norway & USSR., 29 Oct.,1957
Gulf of Finalnd
3- Finland & USSR., 20 May, 1985
Negotiated Boundary Line 11 Agreements
According to Equitable Principles
Caribbean Sea
1- France & Venezuela,17 July,1980
2- USA & Venezuela, 28 March,1978
3- Colombia & Costa Rica,17 March, 1977
Atlantic Ocean
4- Gambia & Senegal, 4 June, 1975
5- Brazil & France, 30 Jan.,1981
6- Brazil & Uruguay, 21 July,1972
Pacific Ocean
7- Colombia & Ecuador, 30 Aug.,1975
8- Chile & Peru, 28 July, 1952
9- Ecuador & Peru, 4 Oct.,1954
Lubeck Bay
10- F.R.G. & G.D.R., 29 June,1974
North Atlantic Ocean
11- UK & Ireland, 2 Nov., 1988

Fifth, as State practice is not sufficient to establish any rule concerning the common mineral deposits issue, the matter is to be left to the general rules and principles of the continental shelf doctrine and to those of General International Law. Searching the latter field one can find that there is a general customary principle to submit to negotiations any dispute arising between two or more States concerning any international issue; and failing agreement the parties are under an obligation to resort to the other possible means, available in International Law, the last of which is to invoke an arbitral or judicial settlement.[129]

With regard to the general rules and principles of the continental shelf doctrine, it is well established that there is a customary rule to submit any dispute relating to the delimitation of the continental shelf between States to negotiations; and

> "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, ..."[130] [In addition], "... if, ..., the delimitation leaves to the parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;".[131]

From these, one can deduce the following rules and principles concerning any dispute relating to the common mineral deposits issue:

1- No one State is allowed to exploit a mineral deposit field or structure unilaterally if this deposit is discovered to extend on both sides of the dividing line of the continental shelf, unless it does so with the consent of the other States concerned. If a unilateral exploitation has already taken place by one or more of the involved States, these States are responsible towards the other concerned States for an adequate and proper compensation.

2- The parties to a common mineral deposit are under an obligation to enter into negotiations with a view to arriving at an agreement.

3- Failing agreement the dispute must be submitted to an arbitral or judicial settlement which will decide the appropriate solution.

As for rule 1, which prohibits a unilateral exploitation of a common mineral deposit it is a logical consequence of the basic rules and principles of the continental shelf entitlement. The delimitational line of the continental shelf between States is supposed to identify the limits of their national jurisdiction inter se. Now, if a mineral deposit field or structure is discovered to extend on both sides of such a line, it means that both States are entitled to the part of the deposit which is located within its national jurisdiction limits; i.e., both States have the same right concerning such a deposit. As a consequence, any unilateral exploitation from one State will constitute an encroachment on the national jurisdiction of the other State. Thus a solution by agreement or arbitration will be the best solution for both States since it involves the will of them both.

During the course of negotiations, the parties are absolutely free to decide whatever suits them including the invocation of arbitration or judicial settlement. As will be seen below, State practice offers an interesting variety of solutions that States can follow when facing such a problem. The important thing to say here is that, resort to negotiations must be meaningful. Each party must try its best to arrive at an agreement; and each of them must not insist upon his position without contemplating any modification of it.[132]

In default of agreement, the parties are under an obligation to submit to arbitration or judicial settlement any dispute relating to the common mineral deposits. The arbitral or judicial organ can choose an equal division, or proportional division, or the establishment of a common zone for joint development, or any other solution the judicial organ may find as appropriate to the dispute concerned.

Having discussed the applicable rules and principles of the problem of common mineral deposits, the discussion now turns to the available solutions of such a problem. State practice offers an interesting variety of examples of solutions that can be followed when facing the problem of common mineral deposits. In the first instance, one can find those States which have tried to avoid the whole problem of common deposits by establishing a common zone for the purpose of joint exploitation or development. Examples of this can be found in the Japan/Korea agreement of 5 February, 1974, which established a Common Zone for the purpose of joint development of the southern part of the continental shelf adjacent to both countries; in the Bahrain/Saudi Arabia agreement of 22 February, 1968, the Parties designed a Common Zone in the Saafa Hexagon which would be developed as Saudi Arabia saw fit, but the two governments would share equally the received revenue; similarly, Abu Dhabi/Qatar agreement of 20 March, 1969, established the Al-Bunduq Joint Development Zone, which would be exploited by Abu Dhabi and the received revenue would be shared equally by the two governments; the France/Spain agreement of 29 January, 1974, established a Joint Zone for the purpose of equal opportunities of exploitation for both Parties; the Iceland/Norway (Jan Mayen) agreement of 22 October, 1981, designed a Common Zone for joint development in which each Party was entitled to participate in a share of 25% of the petroleum activities in the areas which would fall within the part of the Zone that belonged to the other Party; and finally, the Sudan/Saudi Arabia agreement of 14 May, 1974, established a Common Zone in which each party had an equal right of exploration and exploitation.

Other agreements tried to face the problem of common mineral deposits by suggesting the manner which could help them to overcome such a problem. As has been seen above, numerous solutions can be found in those agreements. For instance, some agreements suggested effecting a solution by agreement; others suggested an arbitral solution as an alternative when failing agreement; others established a protected

zone within which none of the parties was allowed to initiate any exploitation unless by agreement with the other party; others established a joint commission which would solve any problem relating to common mineral deposits; others suggested a division proportional to the volume of the resources on each side of the delimitational line; and finally, one can find those States which although have suggested a solution by agreement they preserve for themselves an equitable share of the resources, and others preserve for themselves all those resources that are located on their portion of the continental shelf.[133]

The apportionment of a common mineral deposit can be done in various forms. The simplest form is to effect an equal division of the common deposit, or an equal share of the received revenue, or equal opportunities of exploitation for the parties involved. Another form is to effect a division proportional to the extent of the common deposit on each side of the delimitational line. Assuming that 70% of a common deposit is located on State A's side of the dividing line and only 30% of the deposit is located on the side of State B, the proper proportion of division of the deposit, or share of the received revenue, will be 70% to State A and only 30% to State B. Obviously, the proportional method of division is the ideal equitable solution of the problem of the common mineral deposits. However, this solution is not always feasible due to the lack of the requisite scientific knowledge that is able to identify the exact extent of such deposits.[134]

The method of proportional division of a common mineral deposit can be effected by relying on various criteria other than the volume of resources on each side of the delimitational line. Because States are absolutely free to choose whatever method of division, they might base their division of a common mineral deposit on criteria such as the economic, political, or legal criteria. This case, for instance, occurred in the Iceland/Norway (Jan Mayen) agreement of 22 October, 1981, in which the economic

circumstances of Iceland were the dominant factor during the negotiations and the Conciliation.[135]

Conclusion

Having examined the problem of common mineral deposits, it is found that State practice is not sufficient to establish any rule applicable to the problem. The applicable rules, therefore, are those of the general doctrine of the continental shelf and those of General International Law, namely, the agreement solution or alternatively the arbitral or judicial solution.

Common mineral deposits have been considered a relevant circumstance in some cases. This can be found in the Iceland/Norway (Jan Mayen) Conciliation of 1981, Tunisia/Libya case of 1982, and in those agreements which have established a common zone for the purpose of joint development. In the first two instances the drawing of the boundary line was based on, inter alia, the presence of petroleum deposits in the area concerned. In the latter instance - the establishment of a common zone -, the drawing of a continental shelf boundary line became a minor issue. Due to the presence of mineral deposits, the concerned States abandoned completely the drawing of any boundary line, and instead, they designed a common zone and co-ordinated their rights of exploitation.

However, common mineral deposits have been considered a separate problem in the majority of cases. This can be found in those agreements which drew their boundary lines regardless of the presence of any mineral deposit field or structure. Although some of these agreements indicated to the manner according to which they would solve any problem relating to common mineral deposits, and others did not, this would not change the fact that they all drew final boundary lines and left the problem of common mineral deposits to be solved separately in the future.

Although the preservation of the unity of deposits is the major issue in the common mineral deposits problem, States can agree to the contrary. In practice, the unity of common deposits has not been preserved to one of the parties at the exclusion of the others. Rather, the unity of common mineral deposits has been, in the majority of cases, preserved for the benefit of all States concerned. This can be seen through the variety of solutions of the common mineral deposits problem available in State practice.

Various solutions of the apportionment of common mineral deposits can be found in State practice, such as, an equal division of the deposit, equal rights of exploitation, equal shares of the received revenue, a division proportional to the volume of resources on each side of the delimitation line, and rights of exploitation proportional to the volume of resources on each side of the delimitation line.

Section 2

Non-Physical Relevant Circumstances

I

Legal Relevant Circumstances

The legal circumstances are the most important category of relevant circumstances. The reason for this is that once States establish any legal conduct between, or towards, each other, this establishes legal rights and duties enforceable among themselves, and in face of the other States. The legal power of the legal circumstances, therefore, stems not only from the continental shelf doctrine, but also from the doctrine of General International Law.

This subsection is mainly interested in three legal relevant circumstances, namely, Navigation and Fishing Rights, Historic Rights, and the Conduct of the Parties. These three circumstances are going to be discussed in order to see whether they constitute relevant circumstances or not, and if they do, to what extent they can play such a role. However, it is important to note that the discussion will not attempt any historical background concerning the evolution of these circumstances during the early development of the continental shelf doctrine. For, this background will be the subject of the Chapter V, which will deal mainly with the special circumstances and their evolution.

Navigation and Fishing Rights

The continental shelf doctrine is based on the seabed and its non-living resources; and it has nothing to do with the waters that superjacent the continental shelf. According to the basic concepts of the Law of the Sea, the waters above the continental shelf, and of course beyond the territorial sea, are the subject matter of the doctrine of the freedom of the high seas; and its living resources are the subject matter of the fishing and conservation of fishing in the high seas doctrine, and the fishing zone doctrine. Therefore, it has been quite difficult to see the connection between the delimitation of the continental shelf between States and the role of navigation and fishing rights in such a process, unless it relies on a doctrine different from that of the continental shelf. On the contrary, fishing rights concerning non-living resources of the continental shelf are more plausible when playing such a role in the delimitation question.

However, the emergence of the EEZ which embraces in a single doctrine the living and non-living resources of the seabed and its superjacent waters within the limits of 200 nautical miles from the shore, has caused real confusion with regard to the

role of navigation and fishing rights in the delimitation question of the EEZ and the continental shelf. There are two reasons for this. The first is that, the EEZ doctrine comprehends the continental shelf within its limits; and the second is that, the recent history of the EEZ and the continental shelf doctrines has shown that the new trend of States is to draw one single boundary line for their maritime space instead of a different boundary for each maritime zone.

The question, which remains to be examined, therefore, is, can navigation and fishing rights constitute a relevant circumstance when delimiting the continental shelf?

As the ICJ was obsessed with the geological and geographical structure of the continental shelf of the parties to the 1969 cases, its examples of relevant circumstances remained within the limits of the geophysical considerations. Nevertheless, the fact that the Court did not put any "... legal limit to the considerations which States may take account of ..."[136] when delimiting their continental shelves, this left the door ajar for any relevant consideration to be included therein. The subsequent cases and State practice are, therefore, the best fields to search for the answer to the above-said question.

As the British claimed a 12-mile Fishery Zone around the Channel Islands in 1964, and this was recognized by the French, the Tribunal in the Anglo-French Arbitration (1977-78) regarded that as a relevant circumstance.[137] This circumstance was backed by some other circumstances resulting in an enclaved method of delimitation around the Channel Islands. Obviously, the presence of the said fishery zone was not invoked under the entitlement of fishery rights. Rather, it was invoked under the conduct of the parties title; for, the Tribunal emphasized that it was an "existing fishery zone" claimed by the British, and "... expressly recognized by the French... ."[138]

Both France and the UK invoked the navigational defence circumstance to aid their contentions. After a considerable examination of this circumstance, the Tribunal concluded it to be one of the circumstances which, "... tend to evidence the predominant interest of the French Republic in the southern areas of the English Channel,".[139]

In the Tunisia/Libya case, (1982), Tunisia claimed fishery rights under the title of historic rights.[140] Distancing itself from any discussion relating to the historic rights question, the Court excluded the Tunisian contention from consideration basing its decision on the ground that the final boundary line would

> "... undoubtedly leave Tunisia in the full and undisturbed exercise of those rights - whatever they may be - over the area claimed to be subject to them, so far as opposable to Libya, ..."[141]

From this, an observation can be made. At first sight, it seems that the Court has not regarded the claimed fishery rights of Tunisia as an independent relevant circumstance which would have affected the choice of method of delimitation. However, as is evident by the rest of the Court's judgement, a deeper examination of this judgement proves that the Court has taken the Tunisian claims of fishery rights into account as an element of the Tunisian/Libyan conduct towards each other.[142]

Both Canada and the USA, the parties to the Gulf of Maine Case of 1984, claimed fishery rights concerning particular areas of the Gulf.[143] The Chamber, however, rejected both Parties' contentions saying that,

> "It is, ..., evident that the respective scale of activities connected with fishing - ... - cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line."[144]

Moreover, in order to clarify when the socio-economic factors - including fishery rights - can be considered a relevant circumstance, the Chamber noted that such a circumstance must be

> "... likely to entail catastrophic repercussion for the livelihood and economic well-being of the population of the countries concerned."[145]

Similarly, the parties to the Guinea/Guinea Bissau Arbitration invoked the fishery rights issue under the economic circumstances title.[146] Nevertheless, the Tribunal rejected these contentions clarifying that, it had no power to remedy the natural inequality.[147] Besides, indicating to the ICJ judgement of 1982 concerning Tunisia/Libya Case, the Tribunal said that, in order for the economic factor to be considered a relevant circumstance it must be of a permanent nature.[148]

Bearing in mind what has been seen above,[149] as far as State practice is concerned, it has been quite difficult to discover the real relevant circumstances that have influenced States during the drawing of their continental shelf or their maritime boundaries. However, the presence of navigation and fishing rights circumstance could be deduced from a few agreements. For instance, in the agreement between F.R.Germany and German D.R., of 29 June, 1974, the boundary line was very likely to have been affected by the presence of Shipping Rout 3.[150] Similarly, the boundary line of the Argentina/ Uruguay agreement of 19 November, 1973, was found to generally follow the navigation channel.[151]

The presence of Traditional fishery rights induced some States to establish a special fishery zone in which such traditional rights would be protected. These can be found in the Colombia/Ecuador agreement of 23 August, 1975, according to which the

Parties established a Special Zone of 10 Miles on both sides of the boundary line and beyond 12 mile from the coast of each country. This Special Zone is, without recognition of any fishing rights, designed to protect "... the accidental presence of local fishermen of either country ..." within it.[152] Being supplementary to the Chile/Peru/Ecuador Declaration of 18 August, 1952, the Chile/Ecuador/Peru Declaration of 4 December, 1954, established two 10-mile Special Maritime Frontier Zones on each side of the boundary line of the respective States and beyond 12 miles from their shores, (within these 12 miles, fishery rights were exclusively preserved to the nationals of the country concerned). These Special Maritime Frontier Zones were to avoid inadvertent violations of the maritime boundaries by national fishermen of the States concerned.[153] The Kenya/Tanzania agreement of 9 July, 1976 provided that, ".. Indigenous fishermen from both countries engaged in fishing for subsistence, be permitted to fish within 12 nautical miles of either side of the territorial sea boundary in accordance with existing regulations."[154] Although Australia/Papua New Guinea agreement of 18 December, 1978, established a fishing boundary different from that of the continental shelf, (it coincided only in some of its parts with the continental shelf boundary,) it created a Protected Zone the main purpose of which was to "... acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement."[155]

From the preceding paragraphs one can deduce the following conclusions. First, the presence of navigable channels and fishing rights have been invoked as a relevant circumstance in numerous cases. However, in the majority of these cases the said rights were invoked under the title of other relevant circumstances - such as economic, historic and defence circumstances -, rather than under their own title.

Second, the presence of fishing rights has never, to date, been accepted as an independent relevant circumstance. That is to say, the presence of fishing rights is very unlikely to be considered a relevant circumstance unless it is backed by the presence of

other factors such as the conduct of the parties, or historic rights, or economic or political factors.

Third, that is, of course, not to say that the presence of navigation and fishing rights is left unprotected. In fact, in cases where such rights exist, some precautional measures have been taken. In some cases the final boundary line secured a free and undisturbed exercise of the claimed fishing rights to the claimant State. In others, a protected zone, or a buffer zone, or a fishery boundary line different from that of the continental shelf was designed. The purpose of these zones was either to protect the exercise of the existing traditional fishing rights or to protect inadvertent breaches of the boundary line by the local fishermen.

Finally, it is suggested that two differentiations can be made. The first, which is in line with Professor Brown's viewpoint,[156] is concerned with the differentiation between sedentary fishery, and any other non-living natural resources fishery rights that belong to the continental shelf and its subsoil, on the one hand, and those of the living resources, on the other. The second is to differentiate between delimitation of a continental shelf boundary, and delimitation of a single maritime boundary. If it was a question of a continental shelf delimitation, so living resources fishery rights are very unlikely to constitute a relevant circumstance, due to the fact that such rights are not related to the continental shelf entitlement. On the contrary, sedentary and non-living natural resources fishery rights are very likely to constitute a relevant circumstance when delimiting the continental shelf, provided that such rights have been acquired prior to the establishment of the continental shelf doctrine.[157]

Nevertheless, in case of a single maritime boundary delimitation, living as well as non-living natural resources fishery rights may constitute a relevant circumstance, if these rights are concerned with areas that are located within the 200-mile EEZ limits,

and if the rights to the living resources have been acquired prior to the establishment of the EEZ doctrine. As for the non-living natural resources fishery rights, their title have to have been acquired prior to the establishment of the continental shelf doctrine, whether they fall within or outside the 200-mile limits of the EEZ, because non-living resources rights already belong to the continental shelf doctrine.

Historic Rights

Before this subsection embarks on a discussion of the historic rights relevant circumstance, it is necessary to give a brief account of the historic rights doctrine. Although the historic rights doctrine belongs to General International Law, it mainly has been developed through some of the Law of the Sea issues.[158] Historic waters, historic bays and historic fishery rights have been the main concern of the said Law of the Sea issues. The doctrine of historic rights is not yet a settled question in International Law. However, regardless of the controversial views concerning this doctrine, this Subsection is basically interested in the prime, and generally accepted, conditions that must be satisfied in order for States to be able to invoke an historic title.

Numerous arbitral and Judicial decisions have dealt with the conditions of historic titles. According to these decisions, three principal conditions must be available in order to invoke an historic title. These are: 1- there must be an effective and continuous display of State authority, with the intention and will to do so, over the area in question;[159] 2- the acquiescence of the other States in the meaning that no objection or protest, concerning the display of the concerned State authority has been made;[160] and 3- the lapse of a long period of time.[161]

Is it possible for an historic title to play the role of a relevant circumstance?

As to the answer to this question Professor O'connell says no; because,

"... the continental shelf doctrine of 'inherency' is deliberately aimed against the operation of the ordinary rule relating to historic rights, so that what is excluded as a matter of doctrine cannot be allowed to re-enter as a matter of exception."[162]

To this, one can say that, the continental shelf doctrine is not an absolute doctrine which has no exceptions at all. Although the entitlement over the continental shelf exists ipso facto and ab initio in favour of the coastal States, the inclusion of the natural prolongation concept, proportionality and the open-ended list of relevant, (or special), circumstances have rendered the continental shelf doctrine riddled with exceptions. These exceptions are, in fact, part and parcel of the doctrine itself. As far as the early development of the continental shelf doctrine is concerned, historic rights circumstance, though an exception, has been one of the component of this doctrine.[163] That is to say, according to this contention, historic rights might be able to constitute a relevant circumstance, or not, depending on the calculations of each individual case.

Professor Brown differentiates between historic rights relating to historic bays or historic waters, and those relating to sedentary fisheries. As far as sedentary fisheries, and any other natural resources of the seabed, are concerned, historic rights can, according to Professor Brown, constitute a special (or relevant) circumstance, if the title has been acquired prior to the establishment of the continental shelf doctrine.[164] As for historic bays and historic waters, Professor Brown believes that they "... will very seldom be relevant to the delimitation of the continental shelf as distinct from delimitation of the territorial sea."[165] That is because historic bays and historic waters questions affect more the baselines, which in turn will affect the breadth of the territorial sea.[166]

In the Tunisia/Libya Case, (1982), Tunisia invoked the historic rights circumstance concerning areas which belonged either to the continental shelf in the legal sense or to its territorial and internal waters. The ICJ did not desire to go into a detailed

discussion concerning the historic rights issue. This can be deduced from the Court's citation of the failure of international efforts to reach an acceptable-to-all judicial regime of historic bays and historic waters.[167] Rather, the Court developed its argument by distinguishing between those areas that belonged to the territorial and internal waters and those which belonged to the continental shelf. Regarding the latter areas, the Court tried, and, in fact, succeeded to delimit the continental shelf boundary, leaving Tunisia "... in the full and undisturbed exercise of those rights - ... ."[168] In so doing, the Court avoided any discussion as to whether the Tunisian claims constitute true historic rights or not, and whether such historic rights can constitute a relevant circumstance or not. However, it seems that, although the Court avoided any such discussion, it indicated to an important finding. That is, if the delimitation line was to deprive Tunisia from the full and undisturbed exercise of its historic rights, these rights would have constituted a relevant circumstance. For, the avoidance of discussing the historic rights issue must be understood as an objective avoidance and not to the disadvantage of one of the parties. Thus, when the Court argued its reasoning, it could be understood to have in mind two requirements for a historic title to be regarded as a relevant circumstance. The first is concerned with certain prerequisites of a title to be regarded as a true historic right,[169] and the second is concerned with the location of the areas within which the historic rights are claimed to be. If the delimitation line did not encroach upon the areas of historic rights, these rights would not constitute a relevant circumstance, though they would be true historic rights. On the contrary, if the delimitation line was to encroach upon such areas, the historic rights would constitute a relevant circumstance by means of justifying a deviation from the delimitation line.

It is, therefore, the test of the disproportionally distorting effect concept that will identify whether historic rights constitute a relevant circumstance or not. If such rights exist in areas which if they are ignored produce a disproportionally distorting effect, these rights are to be considered a relevant circumstance, and vice versa. The

disproportionally distorting effect of the presence of historic rights is, therefore, the decisive element which has the final say in regarding such rights as a relevant circumstance.

As for those areas which belonged to the territorial sea and internal waters, the ICJ began its discussion by excluding them from being contended by Tunisia to be "... co-extensive with the area claimed as that of historic rights; ... ."[170] However, as Tunisia asked the Court to exclude these areas from the calculation of proportionality, the International Court, surprisingly, rejected this demand saying that,

> "... the element of proportionality is related to lengths of the coasts of the States concerned, not to straight baselines drawn around those coasts. [And] ...; since it is a question of proportionality, the only absolute requirement of equity is that one should compare like with like."[171]

Now, does this mean that the Court disregarded those historic rights, which belong to the territorial and internal waters, as not constituting a relevant circumstance? In fact, the Court not only disregarded these rights from being a relevant circumstance in favour of Tunisia, but also encroached upon the Tunisian seabed areas which were not a continental shelf in the true legal sense. This encroachment was done at the expense of, and to the disadvantage of Tunisia.[172]

From the preceding discussion it can be concluded that the question of whether an historic title can constitute a relevant circumstance or not is not a settled question. This is due to the complexity of the issue and the lack of a judicial regime to cover all the aspects of historic titles. However, it seems that historic rights might constitute a relevant circumstance if they satisfy the following requirements. First, in order to constitute a true historic right, the title must satisfy three prerequisites, namely, effective display of the concerned State authority, the acquiescence of the other States,

and the lapse of a long period of time. Second, the entitlement of historic rights have to have been acquired prior to the establishment of the continental shelf doctrine. Third, historic rights must be aided by the conduct of the concerned parties as indicating their acquiescence. And lastly, the areas, where historic rights are claimed to be present, must be able to produce a disproportionally distorting effect in the meaning that if the boundary line ignores them, the concerned parties will be deprived of the full and undisturbed exercise of their historic rights.

The Conduct of the Parties

The conduct of the parties denotes the legal attitude of States concerning the identification of the limitations of their sphere of jurisdiction vis à vis each other. This conduct can be deduced from any legal document, or measure, produced, or taken by States, such as the laws, regulations, decrees, declarations, proclamations, international agreements, internal and international judicial decisions, and so on. As such, the conduct of the parties stems from General International Law rather than from the Law of the Sea or the continental shelf doctrine.

The conduct of the concerned parties is the most important relevant circumstance in the delimitation question of the continental shelf between States. Due to its high legal credibility, the conduct of the parties plays, successfully, its role as the most dominant relevant circumstance; for it indicates the local traditional limitations of States' spheres of jurisdiction according to their own viewpoint and their own legal history. This Subsection is interested in examining how far the conduct of the parties can constitute a relevant circumstance and how much the weight of such a circumstance is.

The first case, in which the conduct of the parties circumstance was invoked, was the 1969 North Sea Cases. Denmark and the Netherlands invoked Germany's conduct concerning the 1958 Convention on the Continental Shelf, as evidence of the obligatory character of the Convention on Germany.[173] The Court rejected this contention,

because, "... none of the elements invoked is decisive; each is ultimately negative or inconclusive; all are capable of varying interpretations or explanations."[174] In another instance, the Court also rejected Denmark and the Netherlands invocation of the already concluded agreements concerning their respective territorial waters with Germany, as indicating the obligatory character of the equidistance principle on Germany.[175]

In the Anglo-French Arbitration, (1977-78), the Tribunal relied on, inter alia, the conduct of the party's circumstance in order to identify the method of delimitation in the Channel Islands area.[176] Examining the UK conduct, the Tribunal found that, although the Channel Islands enjoyed "... a very large measure of political, legislative, administrative and economic autonomy; ...",[177] they were "... separate islands of the United Kingdom, not separate States."[178]

The ICJ in the 1982 Tunisia/Libya Case, relied to a larger extent on the conduct of the parties circumstance in order to identify the course of the boundary line in the first sector.[179] At least three contentions were discussed in the light of the conduct of the concerned parties. The first was the 1910 Convention which established the land frontier between the two countries.[180] After discussing the subsequent conduct of Tunisia and Libya, and their predecessors, the Court concluded that, it regarded "... the 1910 Convention as important for the consideration of the present case, ..."[181]

As Tunisia invoked the ZV45° line, the Court, after examining the conduct of both Parties, rejected the line because Tunisia relied on "... unilateral acts, internal legislative measures, which were never the subject of agreement by Libya."[182] Furthermore, the line ZV45° "... constitutes a unilateral claim, but was never a line plotted for the purpose of lateral maritime delimitation, ..."[183]

Eventually, while the Court was examining the conduct of Tunisia and Libya, it

realized that a de facto line was present at an angle of 26°.[184] Having been confirmed by the conduct of both countries, the line 26° was adopted by the Court as the delimitation line of the first sector.[185]

Canada and the USA, the parties to the Gulf of Maine Case, (1984), invoked their conduct in order to aid their contentions.[186] The Chamber examined the conduct of both States and found that,

> "[t]he submissions formulated by both Canada and the United States at the end of the oral proceedings only served to confirm the line which each Party had presented in its initial written submissions."[187]

In the search for a proper method of delimitation, the Chamber made another examination of the conduct of the Parties so as to see whether this conduct

> "... constituted an acquiescence by one of them in the application to the delimitation of a specific method advanced by the other Party, or precluded it from opposing such action, or whether such conduct might have resulted in a *modus vivendi*, respected in fact, with regard to a line corresponding to such an application."[188]

Briefly, without going into further details, the result of the examination of the conduct of the Parties was negative.[189]

In the Libya/Malta Case, (1985), a brief examination of the conduct of the Parties was provided. However, This examination proved also to be negative.[190]

Existing Agreements

One of the most important aspects of the conduct of the parties is the existing agreements. The significance of the existing agreements aspects stems from the fact that, whereas the other aspects of the conduct of the parties might reveal an *implicit*

agreement or a de facto situation, the existing agreements aspect is interested in the existing *explicit* agreements. That is to say, while the legal credibility of the former aspect might, sometimes, be questioned, the legal credibility of the latter is absolute, unless in default of its legality.

Existing agreements circumstance, was relied on in State practice as well as in judicial cases. In State practice one can find examples such as, Bahrain/Iran agreements of 17 June, 1971; Brazil/France (French Guinea) agreement of 30 January, 1981; Brazil/Uruguay agreement of 12 July, 1972; Iceland/Norway (Jan Mayen) agreement of 22 October, 1981; the Chile/Peru/ Ecuador Declaration of 4 December, 1954; Poland/USSR agreement of 29 August, 1969; and Finland/USSR agreement of 20 May, 1965.[191]

In Iceland/Norway (Jan Mayen) Conciliation, 1981, the presence of an existing agreement played an important role in identifying the course of the boundary line. The 1980 agreement between Iceland and Norway, which recognized the 200 Icelandic EEZ, was one of the factors that caused the final boundary line to coincide with the outer limit of the Icelandic 200-mile EEZ.[192]

As the, 19 May, 1910 Convention between the Bey of Tunisia and the Emperor of the Ottomans, established the land frontier between Tunisia and Libya; and as the implication of the said Convention was consolidated by the practice of both Tunisia and Libya during the subsequent history; the ICJ considered the Convention relevant to the delimitation of the continental shelf in the Tunisia/Libya Case in 1982.[193]

Although the Tribunal In the Guinea/Guinea Bissau Case of 1985, decided that the 12 May, 1886 Convention, which was held between France and Portugal and succeeded by the two Parties to this Case, did not establish the respective maritime

boundary, it took the Convention's boundary line into account when it was delimiting the maritime boundary in the first sector.[194]

Conclusion

The conduct of the parties is the most important relevant circumstance of the delimitation of the continental shelf between States. Any legal conduct - previous to the delimitation process - between the parties concerned must be evaluated in order to ascertain whether there is an agreement, explicit or implicit; or a de facto situation that can be utilized in the delimitation process of the continental shelf. In order for the conduct of the parties to be effective, it must satisfy the following conditions: 1- it must be decisive, in the meaning that it is not negative or inconclusive; 2- it must not be capable of varying interpretations or explanations; and 3- the conduct of the parties must be based on the ground of reciprocity, in the meaning that it reveals a mutual explicit or implicit agreement or a unilateral conduct which is followed by a subsequent acquiescence of the other parties concerned.

II

Economic & Political

Relevant Circumstances

Economic & Socio-economic Relevant Circumstances

As a matter of fact, the continental shelf doctrine originally triggered off geographical as well as, and more effectively, economic considerations. The discovery of huge quantities of crude oil and other mineral deposits on, and underneath, the continental shelf attracted the ambition of the coastal States. They dreamt of having powerful economic resources coming from the continental shelf, and to be subsequently added to their own. Out of such a dream the continental shelf doctrine emerged, and subsequently crystallized into a legal doctrine. Thus, the economic

factors occupy a high rank of importance in the governments' minds when they claim the extent of their continental shelf, and, as a subsidiary matter, the method of delimitation they accept. The economic factors are, therefore, the most likely underlying reason of States' differences which leads, and has, in fact, lead to disputes over overlapping claims concerning the continental shelf.

"Economic Circumstances" is a general and wide-ranged term under the title of which numerous considerations can be included, such as, the presence of oil, gas or any other mineral deposits, the presence of fishery rights or interests, and the presence of other maritime interests concerning the continental shelf areas. As some of these issues have been dealt with individually in the previous Sections, this Section will be interested in the general conditions of the economic factors that might be able to constitute a relevant circumstance.

The prime case to envisage, and to take account of, the economic circumstances of the parties concerned, was the Iceland/Norway (Jan Mayen) Conciliation, (1981). The economic circumstances of Iceland was one of the principal circumstances that affected the choice of the method of delimitation between the two Parties. In its final report the Conciliation Commission states that,

> "Special consideration has ... been given to the following factors:
>
> (a) Iceland is totally dependent on imports of hydrocarbon products.
>
> (b) The shelf surrounding Iceland is considered by scientists to have a very low hydrocarbon potential.
>
> (c) The Jan Mayen Ridge between Jan Mayen and the 200-mile economic zone of Iceland is the only area which is considered to have the possibility of finding hydrocarbons. The experts consider, however, the whole area to be a high geological risk.
>
> (d) The water depths overlying the Jan Mayen Ridge are too great to permit exploration using present technology. The distances from the natural markets for hydrocarbons--especially gas--are great. Consequently, very large hydrocarbon discoveries would seem

necessary in order to make such finds commercial."[195]

Obviously, all these considerations, beside being geological, are, in fact, of economic nature.

Both parties to the Tunisia/Libya case of 1982, invoked contentions concerning economic factors. Tunisia claimed economic circumstances in two respects, namely, "... its relative poverty vis-à-vis Libya in terms of absence of natural resources like agriculture and minerals, ..." and its claim concerning its historic fishing rights.[196] Libya rejected the Tunisian contention relating to its poverty and asked the court to consider the presence or absence of oil-wells as an indication to the geological natural prolongation.[197] In its reply, the Court says that, the economic considerations invoked by the Parties

> "... are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other."[198]

As Canada and the USA contended, inter alia, their fisheries interests under the title of socio-economic impact, the Chamber, in the Gulf of Maine Case, (1984), commented that,

> "[w]hat the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussion for the livelihood and economic well-being of the population of the countries concerned."[199]

Consequently, having carried out a test according to its own criteria, the Chamber

rejected the parties contentions concerning the economic circumstances.[200]

Malta invoked its economic circumstances as being poor and not having resources in the Libya/Malta case, 1985. In reply, the Court said that, it

> "... does not ... consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensated for its inferiority in economic resources."[201]

In the Guinea/Guinea Bissau case of 1985, both Parties claimed economic circumstances relating to their lack of resources, their development plans, marine transport, fishing, petroleum resources, and their maritime interests.[202] Having indicated to Paragraph 107 of the Tunisian/ Libya case, (1982), cited-above, the Tribunal concluded that, as it was

> "... concerned only with a contemporary evaluation, it would be neither just nor equitable to base a delimitation on the evaluation of data which changes in relation to factors that are sometimes uncertain."[203]

Furthermore, it, later on, said that,

> "[t]he boundaries fixed by man must not be designed to increase the difficulties of States or to complicate their economic life. The fact is that the Tribunal does not have the power to compensate for the economic inequalities of the States concerned by modifying a delimitation which it considers is called for by objective and certain considerations. Neither can it take into consideration the fact that economic circumstances may lead to one of the Parties being favoured to the detriment of the other where this delimitation is concerned."[204]

According to the above-cited paragraphs, in order for any economic factor to play

the role of a relevant circumstance, it must satisfy the following requirements:

1- It must be of a permanent nature in the sense that it is not related to variable situations which are subject to change.

2- It must be likely to entail catastrophic repercussion on the livelihood and economic well-being of the population of the concerned States, if it is not taken into account.

3- It must satisfy the equity requirements, namely it must be examined on a mutual basis and it must be able to produce a disproportionally distorting effect. As equity does not necessarily imply equality; and as equity has not concerned itself with remedying the natural inequality; the function of the economic relevant circumstances will be restricted to producing a relative remedy to the situation involved. This relative remedy must be based on a mutual ground in the sense that the economic interests of all the parties concerned are taken into account and tested vis à vis each other. In addition, the economic relevant circumstances of all the parties concerned must be subject to the weighing process which will identify who is entitled, if any, to claim successfully economic circumstances; it will also determine the degree of the disproportionally distorting effect of these circumstances, and the weight that may be given in the delimitation concerned.

Political Relevant Circumstances

The world contains various types of States, big and small, powerful and weak, developed and developing, etc.; and each of these States has its own ideology and beliefs which dictate its policy towards the other States. It is, therefore, quite hard to imagine any international relationship between States without realizing the genuine link between such relationship and the political influence of the States' ideologies and beliefs. The continental shelf boundary is no exception. However, because political factors are very seldom released by States, this Subsection is going to examine, and to

recall some of the previous analysis of the available data in order to see if there is any possibility of deducing the general requirements of the said factors.

As France and Britain asked the Tribunal to take account of their navigational defence and security interests present in the English Channel, the Tribunal after the proper examination of the available data, concluded that the said interests

> "... cannot be regarded by the Court as exercising a decisive influence on the delimitation of the boundary in the present case. They may support and strengthen, but they cannot negative, any conclusions that are already indicated by the geographical, political, and legal circumstances of the region which the court has identified."[205]

Nevertheless, the Tribunal eventually regarded the navigational defence and security interests as

> "... tend to evidence the predominant interests of the French Republic in the southern areas of the English Channel, a predominance which is also strongly indicated by its position as a riparian State along the whole of the Channel's south coast."[206]

In the course of commenting on the fact that the Northeast Channel possessed the same character of unity and uniformity of the waters and seabed of the Gulf of Maine, which meant the absence of any natural boundary, the Tribunal, in the Gulf of Maine Case, 1984, stated that,

> "[i]t must, however, be emphasized that a delimitation, whether of maritime boundary or of a land boundary, is a legal-political operation, and that it is not the case that where a natural boundary is discernible, the political delimitation necessarily has to follow the same line."[207]

The Court in the Libya/Malta case, (1985), rejected Malta's contention that the

Parties' security and defence interests would favour the equidistance method."[208] However, in its reply the Court stated that,

> "[s]ecurity considerations are of course not unrelated to the concept of the continental shelf. They referred to when this legal concept first emerged, particularly in the Truman Proclamation."[209]

Upon the invocation of the security circumstance of the parties to the Guinea/Guinea Bissau Case, (1985), the Tribunal commented that,

> "... neither the exclusive economic zone nor the continental shelf are zones of sovereignty. However, the implication that this circumstance might have had were avoided by the fact that, in its proposed solution, the Tribunal has taken care to insure that each State controls the maritime territories situated opposite its coasts and in their vicinity. ... . [The Tribunal's] ... prime objective has been to avoid that either Party, for one reason or another, should see rights exercised opposite its coast or in the immediate vicinity thereof, which could prevent the exercise of its own right to development or compromise its security."[210]

Few examples, of the influence of political circumstances on the delimitation question of the continental shelf, can be found in State practice. As the strategic importance of the Arabian (Persian) Gulf was magnified by the presence of exploitable oil deposits and the presence of the Strait of Hormuz, international political influence was very likely to have affected the continental shelf boundary making therein.[211] In the Caribbean Sea, the two agreements that were concluded between Venezuela and each of the USA and the Netherlands in 28 March, 1978, and 31 March, 1978, respectively, were said to have been influenced by, inter alia, political factors. The need to protect those far Antilles caused the Netherlands to cede additional continental shelf areas to Venezuela, whereas the desire to have an access to a democratic regime in Latin America caused the USA to draw a negotiated boundary line with Venezuela instead of a median line.[212]

Thus, political factors appear in various forms. Examples of these can be found in security, defence, the desire to keep good relationship with other States, strategic importance, and other political interests which, for one reason or another, cannot be revealed, (such as the political factors of the conflict between Turkey and Greece concerning the Aegean Sea).

In short, it seems that there is no limit to the political factors that may influence States during their negotiations concerning the boundary making of the continental shelf. However, it also seems that it is very unlikely that a judicial or arbitral organ will take into account any political factors which are not related to categories such as security and defence.[213] The reason for this is that, most of the political factors are changeable depending on the ambitions of the political regimes of States. On the contrary, security and defence factors are more related to the principal conditions of the survival and stability of States.

Nevertheless, that is not to say that security, or defence, or any such like political factors, are going to be taken into account unconditionally. In fact, like the other relevant circumstances, political factors must satisfy certain conditions in order for them to be regarded as relevant circumstances. The most likely conditions are: political factors must be of a permanent, or at least of a relatively permanent, nature; they must be considered on mutual ground, i.e., the political factors of all the parties concerned must be taken into account; and finally, they must be able to produce a disproportionally distorting effect in the meaning that if they are not taken into account they endanger the survival and stable functioning conditions of the State concerned or compromise its security.

Section 3

Conclusions

Having studied the most likely categories of relevant circumstances, the following conclusions can be drawn. To begin with, relevant circumstances belong to a wide variety of considerations which can be classified into two main categories, namely, Physical Circumstances, and Non-Physical Circumstances. The First category contain circumstances which are of geographical and geological nature, whereas the Second contains circumstances such as legal, economic and political circumstances.

Geographical relevant circumstances appear in various forms. The most likely forms are, the geographical configuration of the coasts, the general direction of the coasts, the presence of islands, and the geographical complexity of the area concerned as a mixture of two or more of the preceding three forms. These forms may be found in two contexts, namely, microgeographical context, and macrogeographical context, depending on the continental shelf areas involved, and the location of the States concerned. Despite the priority of the geographical relevant circumstances, with respect to the other relevant circumstances, (except the conduct of the parties relevant circumstance) it is the function of equity to decide the weight that can be given to such circumstances in a given case.

The identification of islands as a relevant circumstance is not dependent on their size, or economic or population status, or any criteria other than the satisfaction of the equity requirements. Thus rocks of all sizes, reefs, islets, isles, and, of course, islands in the true sense, can constitute a relevant circumstance. In practice, islands have been given four kinds of effects in the delimitation of the continental shelf between States, namely, full effect, partial effect, no effect at all, and minus effect. Some cases have

taken into account all the islands present in the area concerned, whereas others have disregarded the presence of some, and in some cases all, the islands and drawn their continental shelf boundary relying on other relevant circumstances.

Proportionality is concerned with the ratio between the lengths of the coasts of the interested States and the extent of their continental shelf areas. It plays successfully the role of being an independent relevant circumstance and, at the same time, as a test ground of equity. When the disproportionally distorting effect of the proportionality circumstance is irredressable, this circumstance plays the role of being an independent relevant circumstance. On the contrary, if its disproportionally distorting effect is redressable, proportionality turns to be employed as a test ground of equity. As for the relationship between the *proportionality* and the *irredressable disproportionally distorting effect* principles, the two principles are different from each other. As they both have co-existed, each has its own sphere of application. Nevertheless, they have an interrelation between each other. That is, the irredressable disproportionally distorting effect principle constitutes a general concept to which the proportionality principle is subject.

Natural prolongation is the most complicated concept of the continental shelf delimitation between States. However, two main roles can, in principle, be attributed to this concept, namely, as a general principle, and as a relevant circumstance. Because it is not applicable unless there is a separation between the continental shelves, the natural prolongation relevant circumstance is found to belong to the geological structure of the continental shelf as is indicated to by the presence of the continental slope and rise. As such, the natural prolongation relevant circumstance can be said to belong to the question of the outer limit of the continental shelf rather than to the question of delimitation of the continental shelf between States. That is, of course, not to say that, the natural prolongation relevant circumstance, as it identifies the outer limit of the continental shelf, will be applicable once its geological requirements are met. It is, in

fact, the function of equity that will decide whether the natural prolongation circumstance will be taken into account or not. In practice, natural prolongation is found to be a very weak relevant circumstance; for, the presence of other relevant circumstances might easily result in dominating the natural prolongation circumstance.

As far as the common mineral deposits issue is concerned, the unity of a deposit is the major issue in the delimitation of the continental shelf between States in the sense that, such a unity is preserved for the benefit of all the concerned parties and not for the benefit of one of them to the detriment of the others. The presence of mineral deposits has been considered a relevant circumstance in some cases. However, in the majority of cases, the presence of mineral deposits has been regarded as a separate problem from that of the continental shelf delimitation. Some States left the mineral deposits problem for a future settlement, whereas others solved the problem by establishing a common zone, - with various solutions of apportionment -, for the benefit of all the parties concerned. The apportionment of common mineral deposits can be effected by various solutions, such as, an equal division of the deposit, or equal rights of exploitation, or equal shares of the received revenue, or a division proportional to the volume of resources on each side of the delimitation line of the continental shelf.

Turning to the legal circumstances, it is found that, navigation and fishing rights are very unlikely to play the role of a relevant circumstance unless they are backed by the presence of other relevant circumstances, such as, the conduct of the parties, or historic rights, or economic or political factors. As for the historic rights relevant circumstance, it is still not a settled question in the delimitation of the continental shelf between States. However, it seems that, historic rights might constitute a relevant circumstance if, 1- they belong to the continental shelf as compared with the seabed of the territorial sea or the internal waters, 2- the title to such historical rights has been acquired prior to the establishment of the continental shelf doctrine, and 3- the location

of such historic rights must be able to produce a disproportionally distorting effect, in the meaning that, if they are not taken into account, the concerned State will be deprived of a free and undisturbed exercise of its rights.

The conduct of the parties factor is the most important relevant circumstance in the delimitation question of the continental shelf. If the conduct of the parties revealed a de facto boundary line, or a modus vivendi respected in fact, or an explicit or implicit agreed boundary line, this will have an absolute priority with respect to the other involved circumstances. In order to be effective, the conduct of the parties must be decisive, not capable of varying interpretations or explanations, and reciprocal.

Economic as well as political considerations may play the role of a relevant circumstance. Economic circumstances are such as, fishing, natural resources, marine transport, and other maritime interests, whereas political factors are such as, security and defence. In order for economic circumstances to be considered relevant to a given case, they must be permanent, mutual, and able to have catastrophic repercussion on the livelihood and well-being of the population of the countries concerned. Similarly, political factors must be permanent, or *at least relatively* permanent, mutual, and able to have catastrophic impact on the survival and stable functioning conditions of the State concerned, or compromise its security.

Finally, as the said classification of relevant circumstances into physical and non-physical circumstances, it must be recalled, is based on purely academic reasons, all relevant circumstances are, in reality, of a physical nature. For, it is almost impossible to find any circumstance, - whether it is legal, or historic, or economic, or political -, that are without a physical basis within the limits of which such a right is exercised. In fact, it is apparent that all relevant circumstances, except the conduct of the parties, are of, or belong to, and only to, geographical or geological considerations. Even if they

are fishery rights concerning living resources of the waters superjacent the continental shelf, such circumstances are, at the end of the day, going to be considered according to their location. This location belongs, in one way or another, to geographical considerations especially if fishery rights are seen as belonging to waters that overly certain areas of the seabed of the EEZ or the continental shelf.

Based on the foregoing conclusion, it is found that, the most important requirement of any factor to be regarded as a relevant circumstance is to satisfy the condition of the disproportionally distorting effect principle. After meeting the requirements of its own category, each relevant circumstance must be able to produce a disproportionally distorting effect in the meaning that if the circumstance in question is not taken into consideration, the concerned State will be deprived of exercising certain rights which belong exclusively to that State.

Notes

1- Because the geographical configuration circumstance in the early stages of the development of the continental shelf doctrine can be seen from an angle concerning the special circumstances clause rather than the relevant circumstances clause, so the discussion on those early stages will be deferred to the Fifth Chapter which will be concerned with the Special Circumstances Clause; see Chapter IV, Section 1, Subsection I.

2- The ICJ (1969) Report, Para. 101.

3- Ibid., Para. 95.

4- Ibid.

5- Ibid., Para. 96

6- Ibid.

7- Ibid.

8- The Anglo-French Arbitration, (1977-78), Para. 97.

9- Ibid., Para. 84.

10- The ICJ (1982) Report, Para. 74; see also the ICJ (1985) Report, Libya/Malta Case, Para. 47.

11- The ICJ (1984) Report, Para. 205.

12- The ICJ (1985) Report, Para. 66-73.

13- The Guinea/Guinea Bissau Case (1985), 25 ILM, (1986), P. 251, at Para. 103-110.

14- The ICJ (1969) Report, Para. 101; see also above, Proportionality, this Chapter, Section 1, Subsection III.

15- The ICJ (1984) Report, Para. 224-225.

16- The Guinea/Guinea Bissau Case (1985), supra note No 13, at Para. 109-110.

17- The ICJ (1982) Report, Para. 122-129.

18- The Guinea/Guinea Bissau Case (1985), supra note No 13, at Para. 111.

19- The ICJ (1984) Report, Para. 209-213.

20- The ICJ (1982) Report, Para. 122-129.

21- The ICJ (1984) Report, Para. 215-222.

22- The Guinea/Guinea Bissau Case (1985), supra note No 13, at Para. 103-110.

23- The ICJ (1982) Report, Para. 117-121.

24- Ibid., Para. 119.

25- Ibid., Para. 129.

26- The ICJ (1984) Report, Para. 222.

27- The ILC Report, 6th Session, 1954, 49 AJIL, (1955), P. 31, Art. 10; the same definition reappeared in the final report of the ILC in its 8th Session, 1956, 51 AJIL, (1957), P. 163, Art. 10. Although this definition of islands was provided in the course of defining islands as having a territorial sea of its own, it could be safely understood that the said definition of islands could be used for all purposes including the issue in question. To prove this, three justifications can be said. Firstly, the said definition was the only definition of islands in the whole adopted four Conventions on the Law of the Sea in 1958. That is to say, the legislators did not feel that there was any legal vacuum not to provide another definition somewhere else in the said Conventions. Secondly, during the 1958 UNCLOS I, the first sentence of the said Article - Article 10 -, which read, "Every island has its own territorial sea.", was omitted and the definition there provided became solely interested in defining islands as a general term; see Convention on Territorial Sea and the contiguous Zone, Art. 10-1. Thirdly, it has been so considered by most international

lawyers.

28- The ILC Report, 6th, Ibid., Comment on Article 10. The low-tide elevation category was reconsidered during the UNCLOS I, (1958), resulting in taking the low-tide elevation into account for the purpose of identifying the baselines provided that the distance of such an elevation should not exceed the breadth of the territorial waters.

29- The ILC Report, 6th, Ibid., Art. 12, and 8th Session, supra note No 27, Art. 11; it is necessary to say that this Article was not adopted by the UNCLOS I in 1958.

30- It is noteworthy to say that the meaning of this deleted sentence was provided in Article 1 of the same Convention - Convention on the Territorial Sea and the Contiguous Zone.

31- The 1958 Convention on the Territorial Sea and the Contiguous Zone, Article 10.

32- See above, this Chapter, Section 1, P. 209; see also Bowett, Derek W., the Legal Regime of Islands in International Law, Oceana Publication, Dobbs Ferry, New York, 1979, P. 2-5.

33- See Bowett, Ibid., P. 2-7.

34- The ICJ (1969) Report, Para. 57.

35- cf., Symmons, Clive Ralph, The Maritime Zones of Islands In International Law, Martinus Nijhoff Publishers, The Hague, Boston & London, 1979, P. 170-172.

36- Karl, Donald E., Islands and the Delimitation of the Continental Shelf: A Framework for Analysis, 71 AJIL., (1977), P. 642, at 643-645.

37- The 1982 Conv., Article 121.

38- The Anglo-French Arbitration (1977-78), Para. 144. It is noteworthy to say here that Eddystone Rock can be considered a relevant as well as a special circumstance due to the special status of the Anglo-french Arbitration. The Arbitration tried to close the gap between the Conventional and Customary solutions and the result was that the Court discussed all the circumstances of the case as being circumstances under both of the said two solutions.

39- The ICJ (1982) Report, Para. 120-121, see also above, Chapter III, Section 2, P. 187-189.

40- The Anglo-French Arbitration, (1977-78), Para. 143.

41- The ICJ (1982) Report, Para. 120.

42- The ICJ (1985) Report, Para. 64.

43- See above, Chapter III, Section 2, P. 191-193.

44- Ibid., Section 2, P. 185-187, and also Section 1, P. 137.

45- Ibid., Section 2, P. 187-189.

46- The Guinea/Guinea Bissau Case, (1985), supra note No 13, at Para. 111.

47- See Above, Chapter III, Section 2, P. 185-187.

48- For the Channel Islands see ibid., and for the Italy/Tunisia agreement see ibid., Section 1, P. 143.

49- See above, Chapter III, Section 1, P. 150-151.

50- Ibid., P. 157.

51- See above, this Chapter, P. 211.

52-The ICJ (1984) Report, Para. 215-222.

53- See above, Chapter III, Section 2.

54- The ICJ (1969) Report, Para. 57.

55- See below, Proportionality, This Chapter, Section 1, Subsection III.

56- See above, Chapter III, Section 2, P. 191-193.

57- Ibid, P. 187-189.

58- Ibid.

59- Ibid, P. 185-186.

60- Ibid., Section 1, P. 150-151.

61- The ICJ (1969) Report, Para. 101.

62- Ibid., Para. 98.

63- The Anglo-French Arbitration (1977-78), Para. 99.

64- Ibid., Para. 100.

65- Ibid., Para. 101.

66- Ibid., Para. 98-101, especially the last sentence of Paragraph 101.

67- Ibid., Para. 199.

68- Ibid., Para. 251.

69- See above, Chapter II, Section 2, P. 93-100; see also below, Equity In A New Perspective, Chapter VI.

70- The ICJ (1982) Report, Para. 130-131.

71- Ibid., Para. 130.

72- Ibid., Para. 131.

73- The ICJ (1984) Report, Para. 219-221.

74- Ibid., Para. 222.

75- Ibid.

76- The ICJ (1985) Report, Para. 54-59, and 66-70.

77- Ibid., Para. 73.

78- Ibid., Para. 75.

79- Guinea/Guinea Bissau Case (1985), supra note No 13, at Para. 118-120.

79a- Cf. Evans, M.D., Relevant Circumstances and Maritime Delimitation, Clarendon Press, Oxford, 1989, P. 224-231; See also Appendix.

80- See above, Chapter II, Section 2, P. 100.

81- The Anglo-French Arbitration (1977-78), Para. 105, as quoted from the UK contention.

82- Ibid., Para. 104.

83- ibid., Para. 107.

84- The ICJ (1982) Report, Para. 80; see also Para. 66 and 68.

85- The ICJ (1984) Report, Para. 45.

86- Ibid., Para. 46.

87- Ibid., Para. 50.

88- Ibid., Para. 45.

89- The ICJ (1985) Report, Para. 39.

90- Ibid., Para. 34.

91- Ibid.

92- Ibid.; see also above, Chapter II, Section 2, P. 105-106.

93- The Guinea/Guinea Bissau Case (1985), supra note No 13, at Para. 115.

94- Ibid., Para. 116.

95- Ibid., Para. 117.

96- See above, Chapter III, Section 2; and cf. Evans, supra note No 79a, at 99-118, esp. 112-118.

97- See Lauterpacht, H., Sovereignty Over Submarine Areas, XXVII BYIL, 1950, P. 376, at 383-384.

98- See above, Chapter I, Section 2, especially, the ILC and UNCLOS I Work.

99- Ibid., especially UNCLOS III; and the 1982 Conv., Article 76.

100- This idea was first foreseen by Prof. E.D. Brown, The Legal Regime of Hydrospace, Stevenson & Sons, London, 1971, P. 49; and his Article, The Anglo-French Continental Shelf Case, 16 San DLR, (1979), P. 461, at 476.

101- See Prescott, J.R.V., The Maritime Political Boundaries of the World, METHUEN, London & New York, 1985, at 248-257.

102- See Annex IV.

103- Brown, E.D., supra note No 100.

104- This case is being examined by the ICJ at the time of writing this thesis.

105- The depths of this thalewg are about 2943 meters isobath in the northern part and up to 3058 in its southern part.

106- The depths of this thalewg are about 3092 meters isobath in its northern part and up to 3547 meters isobath in its southern part.

107- Salient examples of the inapplicability of the natural prolongation relevant circumstance - because of the presence of the EEZ - can be found in areas such as the Mediterranean Sea. The width of this Sea in most of its parts is less than 400 nautical miles which means the applicability of the distance criterion instead of the natural prolongation relevant circumstance.

108- For the historical background see Chapter V, Section 3, Subsection III.

109- The ICJ (1969) Report, Para. 101.

110- Ibid., Para. 97.

111- Ibid.

112- Brown, E.D., supra note No 100, his book, P. 67, and his Article P. 492. It is necessary to note that the usage of the term 'special circumstances' by Prof. Brown can be said to mean *relevant* or *special* circumstances; for, Prof. Brown does not differentiate between the two terms.

113- Ibid.

114- O'connell, D.P., The International Law of the Sea, Clarenson Press, Oxford, 1982, Vol. II, P. 711.

115- The ICJ (1969) Report, Judge Padilla, Separate Opinion, P. 93.

116- The Conciliation Report, 20 ILM., (1981), P. 826, Para. C; see also below, this Chapter, P. 274-275.

117- Ibid.

118- The ICJ (1982) Report, Para. 21 and 117.

119- Thailand/Indonesia Agr. of 11 Dec., 1975.

120- Italy/Yugoslavia agr. of 8 Jan., 1968; Italy/Tunisia agr. of 20 Aug., 1971; India/Sri Lanka agr. of 25 June, 1974; Thailand/Indonesia agr. of 17 Dec., 1971; Indonesia/Malaysia agr. of 27 Oct., 1969; Indonesia/Thailand agr. of 21 Dec., 1971; Indonesia/Thailand agr. of 11 Dec., 1975; India/Maldives agr. of 28 Dec., 1976; F.R.Germany/UK agr. of 25 Nov., 1971; Iceland/Norway (Jan Mayen) agr. of 22 Oct., 1981; Indonesia/Malaysia agr. of 17-21 Dec., 1971; Indonesia/

Malaysia/Thailand agr. of 12 Dec., 1971; Malaysia/Thailand agr. of 17-21 Dec., 1971; Venezuela/ the Netherlands agr. of 31 March, 1978; Sri Lanka/India agr. of 23 March, 1976; Denmark/Canada agr. of 17 Dec., 1973; Finland/Sweden agr. of 29 Sep., 1972; Sweden/Denmark agr. of 9 Nov., 1984; Norway/UK agr. of 10 March, 1965; Denmark/Norway agr. of 8 Dec., 1965; Denmark/UK agr. of 3 March, 1966; and Sweden/Denmark agr. of 24 July, 1968.

121- Seven agreements: India/Indonesia agr. of 8 Aug., 1974; Australia/Indonesia agr. of 18 May, 1971; Australia/Indonesia agr. of 9 Oct., 1972; Australia/Indonesia agr. of 26 Jan, 1973; Australia/Papua New Guinea agr. of 18 Oct., 1978; India/Indonesia agr., of 14 Jan., 1977; and India/Thailand agr. of 22 Jan., 1978.

122- Three agreements: Greece/Italy agr. of 24 May, 1977; France/Spain agr. of 29 Jan., 1974; and Italy/Spain agr. of 19 Feb., 1974.

123- The former three agreements are, Japan/Korea 2 agreements on 5 Feb., 1974; and Netherlands/UK. agr. of 6 Oct. 1965. As for the latter two agreements, they are, F.R.Germany/Denmark agr. of 28 Jan., 1971; and the Netherlands/F.R.Germany agr. of 28 Jan., 1971.

124- Bahrain/Iran agr. of 17 June, 1971; Iran/Qatar agr. of 20 Sep., 1969; Iran/U.A.Emirates agr. of 13 Aug., 1974; and Iran/Oman agr. of 25 July, 1974. These four agreements established a protected zone of 125 meters on each side of the boundary line.

125- Argentina/Uruguay agr. of 19 Nov., 1973.

126- Sudan/Saudi Arabia agr. of 16 May, 1974.

127- See Table IV-1.

128- See Onorato, William T., Apportionment of an International Common Petroleum Deposit, ICLQ, (1977), P. 324, especially 326-329. As will be seen later, there is almost total agreement with Onorato about what the applicable rules are. However, the disagreement here is only related to State practice as an evidence of those rules.

129- These principles have been embodied in the UN Charter, Article 33; see also the ICJ 1969 Report, Para. 86-87.

130- Ibid., Para. 85, subpara. a.

131- Ibid., Para 101, subpara. 2.

132- Ibid., Para. 85.

133- See above, this Chapter, P. 251-255; and cf. Evans, supra note No 79a, at 190-199.

134- That is why some agreements provided the submission of any relating data to arbitration in case

of dispute over them; see, for instance, F.R.Germany/Denmark agreement of 28 Jan., 1971, Art. 2; and the Netherlands/F.R.Germany of agreement of 28 Jan., 1971, Art. 2.

135- See supra discussion on the Iceland/Norway (Jan Mayen) Conciliation of 1981, and the agreement of 22 Oct., 1981, Chapter III, Section 1, P. 176-177, and also Section 2, P. 187.

136- The ICJ (1969) Report, Para. 93.

137- The Anglo-French Arbitration (1977-78), Para. 187.

138- Ibid.

139- Ibid., Para. 188.

140- The ICJ (1982) Report, Para. 98-102.

141- Ibid., Para. 105.

142- Ibid., Para. 82-121.

143- The ICJ (1984) Report, Para. 57-59, and 232-236.

144- Ibid., Para. 237.

145- Ibid.

146- The Guinea/Guinea Bissau Case (1985), supra note No 13, at Para. 121.

147- Ibid., Para. 123.

148- Ibid., Para. 122; for further explanation, see below, Economic, & Soci-economic Relevant Circumstances, this Chapter, Section 3, Subsection I.

149- See Chapter III, Section 1.

150- Ibid., P. 166-167; see also, Limits in the Seas, No 74, P. 2.

151- See Chapter III, Section 1, P. 158-159; see also, Limits in the Seas, No 64, P. 14-16.

152- The Agreement, Article 2.

153- See Limits in the Seas, No 86, and No 88.

154- Ibid., No 92.

155- The Agreement, Parts 4 and 5, especially Article 10.

156- Brown, E.D., supra note No 100, his book at 69, and his Article at 494-495

157- Ibid.

158- Blum, Yehuda Z., Historic Titles In International Law, Martinus Nijhoff, The Hague, 1965, P. 241.

159- Clipperton Island Case, (1931), 26 AJIL 1932, P. 390-394, at 393-394; Island of Palmas Case, UNRIAA, Vol. II, P. 831, at 839-840; the Legal Status of Eastern Greenland Case, PCIJ, Ser.

A/B, No. 53, P. 22, at 45-46.

160- Grisbadarna Arbitration, (1909), UNRIAA, Vol. XI, P. 153, for translation see, 4 AJIL, (1910), P. 226, at 233-234; Island of Palmas Case, Op. Cit. at 868; Anglo-Norwegian Fisheries Case, ICJ (1951) Report, P. 116, at 136-138; The Temple of Preah Vihear Case, ICJ (1962) Report, P. 6, at 23-31; Gulf of Maine Case, ICJ (1984) Report, Para. 126-148.

161- Grisbadarna Arbitration, Op. Cit., at 233; Island of Palmas Case, Op. Cit., P. 839-840, and 867-868; Anglo-Norwegian Fisheries Case, Op. Cit., at 139; Clipperton Case, Op. Cit., at 393; The Legal Status of Eastern Greenland Case, Op. Cit., P. 45-46; Tunisia/Libya Case, ICJ (1982) Report, Para. 100.

162- O'connell, D.P., supra note No 114, at 713.

163- See below, Historic Rights as a Special Circumstance, Chapter V, Section 3, Subsection II.

164- Brown, E.D., supra note No 100, his book at 69, and his Article at 494-495.

165- Ibid., his Book at 69, and his Article at 494

166- Ibid.

167- The ICJ (1982) Report, Para. 100.

168- Ibid., Para. 105.

169- See above, this Chapter, P. 265.

170- Ibid., Para. 102.

171- Ibid., Para. 104.

172- See above, Proportionality, this Chapter, Section 1, Subsection. III.

173- The ICJ (1969) Report, Para. 27-33.

174- Ibid., Para. 32.

175- Ibid., Para. 5-9, and 35-36.

176- The Anglo-French Arbitration (1977-78), Para. 183-190.

177- Ibid., Para. 184.

178- Ibid., Para. 190.

179- The ICJ (1982) Report, Para. 82-121.

180- Ibid., Para. 82-85.

181- Ibid., Para. 85.

182- Ibid., Para 90.

183- Ibid.

184- Ibid., Para. 117-121.

185- Ibid., Para. 121, and 131.

186- The ICJ (1984) Report, Para. 60-78.

187- Ibid., Para. 78.

188- Ibid., Para. 126.

189- Ibid., Para. 126-154.

190- The ICJ (1985) Report, Para. 24-25.

191- For these agreements, see Chapter III, Section 1, P. 156, 172-173, 171-172, 176-177, 169-170, and Chapter V, P. 308 and note No 58 , respectively.

192- The Conciliation Report, 20 ILM., (1981), P. 789, and 825-26.

193- The ICJ (1982) Report, Para. 82-85, see also above, this Chapter, P. 270.

194- The Guinea/Guinea Bissau Case, (1985), supra note No 13, at Para. 111, see also above, Chapter III, Section 2, P. 191-193.

195- The Conciliation Report, 20 ILM., (1981), P. 826.

196- The ICJ (1982) Report, Para. 106.

197- Ibid.

198- Ibid., Para. 107.

199- The ICJ (1984) Report, Para. 237.

200- Ibid., Para. 237-238.

201- The ICJ (1985) Report, Para. 50.

202- The Guinea/Guinea Bissau Case, (1985), supra note No 13, at Para. 121.

203- Ibid., Para. 122.

204- Ibid., Para. 123.

205- The Anglo-French Arbitration (1977-78), Para. 188.

206- Ibid.

207- The ICJ (1984) Report, Para. 56.

208- The ICJ (1985) Report, Para. 51 and 73.

209- Ibid., Para. 51.

210- 25 ILM., (1986), P. 253, at Para. 124.

211- See above, Chapter III, Section 1, P. 158.

212- Ibid., P. 168.

213- Cf. Evans, supra note No 79a, at 172-178.

Chapter V

Special Circumstances

Introduction

Section 1: General View of the Meaning of the "Special Circumstances" Clause

Section 2: General View of the Scope of the "Special Circumstances" Clause.

Section 3: The Actual Categories of Special Circumstances

- Physical Special Circumstances

I- Geographical Configuration of the Coast

II- Islands as a Special Circumstance

III- Mineral Deposits as a Special Circumstance

IV- Other Possible Physical Special Circumstances

- Non-Physical Special Circumstances

I- Navigation and Fishing Rights as a Special Circumstance

II- Historic Rights as a Special Circumstance

III- Other Non-Physical Special Circumstances

Conclusion

Introduction

As has been seen in the Second Chapter, the "Special Circumstances" clause is provided in the Conventional rules of Article 6 of the 1958 Convention on the Continental Shelf as to justify deviation from the equidistance method when any special

circumstance is present. It is also necessary to recall that, the "special circumstances" clause has been left without sufficient clarification as to the true meaning and scope of its implication. This Chapter is supposed to attempt a modest examination of the meaning and scope of the said clause in order to identify what sort of circumstances can be embraced therein.

In order to provide the required explanation, this Chapter will function through three dimensions. The first Section will be interested in the meaning of the "special circumstances" clause; and the second will be concerned with examining the scope of the said clause. The purpose of these two sections is to see whether it is possible to deduce a general criterion/criteria in accordance with which the true categories of special circumstances can be identified. The third Section will endeavour a thorough examination of each individual circumstance in order to see whether such a circumstance is a true special circumstance or not, and if it is, how it performs its role as a special circumstance.

Section 1

General View of the Meaning of the "Special Circumstances" Clause

The Committee of Experts recommended, as was already seen, the equidistance principle to effect the delimitation of, inter alia, the continental shelf between States. It, also, drew attention to the fact that, due to the presence of some exceptional circumstances, the equidistance principle might be inapplicable in some situations. This created a general feeling among the ILC's members, especially those who agreed with

Professor Sandström, that "[a] general rule was necessary, but it was also necessary to provide for exceptions to it."[1] In response, Professor Françios suggested a formula, which was an amendment to Mr. Pal's proposal, that "..., the boundary of the continental shelf ... shall, as a general rule and unless otherwise agreed by them, be the median line ... ."[2] This formula found a widespread opposition due to the inclusion of the "as a general rule" phrase which, as was commented by Professor Lauterpacht, was not clear and "... deprived the rule of its legal character."[3] Professor Spiropoulos suggested to replace the phrase "as a general rule" by the phrase "unless another boundary line is justified by special circumstances".[4] Professor Lauterpacht was also not happy with Professor Spiropoulos' suggestion. Although Professor Lauterpacht agreed that "... mention should be made of exceptions, but [,he commented,] ... it would be better to specify the cases rather than to open the door to difficulties of interpretation."[5] In fact, most of Professor Lauterpacht's fear was because the said phrase was vague and likely to "... give the arbitrators the power to judge ex aequo et bono."[6] "If the Commission had certain specific exceptions in mind, it should say so.", Professor Lauterpacht commented.[7] Mr. Alfaro went in line with Professor Lauterphacht when he said that, "[n]othing would be gained by prescribing a rule qualified by a very general exception."[8] In reply Professor Françios said that, "[t]he purpose of inserting an escape clause was to enable arbitrators to deviate from the rule in such circumstances."[9]

Professor Lauterpacht suggested a formula, "... which was in his opinion less indefinite than [Professor] Spiropoulos' amendment ...", to the effect that, where it was "Physically impossible" or could "cause undue hardship" the boundary "... shall be determined by arbitration in a manner *approximating as closely as possible to the principle of equidistance.*"[10] However, as he was prepared to accept Professor Spiropoulos' formula, Professor Lauterpacht withdrew his proposal provided that, "... an explicit reference were included in the comments to the extent of the latitude to be

given to arbitrators."[11] Subsequently, the ILC debate seemed to have come closer and closer to the "unless another boundary line is justified by special circumstances" formula which was eventually approved by the Commission and embodied in Article 7 of the 1953 Report.[12]

In its commentary notes on Article 7 of the 1953 Report, the ILC stated that,

> "... while ... the rule of equidistance is the general rule, *it is subject* to modification in cases in which another boundary line in justified by special circumstances."[13] [Emphasis added]

The ILC, also, referred to the general arbitration clause of Article 8 of the same Report, and so as to meet Professor Lauterpacht's demand, added that,

> "Such arbitration, while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration ex aequo et bono."[14]

The formula of Article 7, indicated to above, was reintroduced, with minor changes, in Article 72 of the ILC 1956 Report.[15] Commenting on Article 72, the Commission repeated the verbatim words of some of its comments on Article 7 of the 1953 Report.[16] Nevertheless, no reference was made either to the "general arbitration clause" or to the "major principle of equidistance" as they were cited in the ILC comments on Article 7 of its 1953 Report.

The formula of Article 72 was taken up to the 1958 UNCLOS I where it was formalized, with minor changes, and embodied in Article 6 of the 1958 Convention on the Continental Shelf.[17] During the Conference, numerous States commented on the "special circumstances" clause. Those States which were dissatisfied with the "special circumstances" clause were mostly not happy with the vagueness and ambiguity of the

clause. For instance, the Colombian delegation stated that, "... the term "special circumstances" was vague and could give rise to disagreement."[18] This vagueness was also the reason why Yugoslavia rejected Article 72. In his statement, the Yugoslav delegate said that, "... a different solution might be justified by special circumstances, was unacceptable on legal grounds. It was both vague and arbitrary and likely to give rise to misunderstanding and disagreement."[19] In addition Yugoslavia submitted a proposal in which it suggested the deletion of the alternative solution of special circumstances.[20] Referring to the "... unacceptable criterion of special circumstances", the Netherlands also inclined to submit the same Yugoslav proposal.[21] The UK was most of the time in favour of a precise method, viz, the equidistance method. Thus, its proposals contained no reference to the special circumstances alternative until the end of the Fourth Committee's deliberations when the UK eventually accepted the inclusion of such an alternative.[22]

As for those States which were satisfied with the inclusion of the "special circumstances" clause, they were happy with its flexibility which would enable interpreters to include predictable as well as unpredictable exceptional circumstances. For instance, Tunisia found that, "the considerable flexibility" of Article 72 was necessary to take account "of the geographical configuration of the region".[23] Mrs., Whiteman, the delegate of the USA, repudiated the deletion of the "special circumstances" clause because "... It was impracticable to expect that all special circumstances could be dealt with by agreement."[24] Being the most extreme, the Venezuelan contention regarded Article 72 as having so insufficient flexibility that Venezuela suggested the omission of the special circumstances alternative in favour of a solution effected by agreement "or by other means recognized in international law."[25]

Nevertheless, the interpretation of the inclusion of the "special circumstances" clause in Article 6 can be seen from two different viewpoints, namely, the narrow

viewpoint, and the wide-ranged viewpoint. According to the narrow viewpoint, the following beliefs control the interpretation of the meaning of the "special circumstances" clause. It first of all believes that, the emphasis must be attributed to the equidistance principle to the extent that the formula of Article 6 contained only two mandatory rules, viz, 1- the agreement solution, and 2- the equidistance/special circumstances. And, since the inclusion of the obligation of the agreement solution is more likely to be superfluous, so the formula of Article 6 contains only one mandatory rule which is the equidistance/special circumstances rule. Secondly, so long as the emphasis is on the equidistance principle, the interpretation of the special circumstances exception must be restricted to include certain particular exceptional circumstances. Judge Tanaka was in favour of this viewpoint of interpretation as he said that the "special circumstances" clause

> "... does not constitute an independent principle which can replace equidistance, but it means the adaptation of this principle to concrete circumstances. If for the foregoing reasons the exceptional nature of this clause is admitted, the logical consequence would be its strict interpretation."[26]

Applying this viewpoint to the concrete circumstances of the North Sea, Judge Tanaka reached the conclusion that the configuration of the German coastline could not "... be recognized as special circumstances within the meaning of Article 6 ... ."[27] Judge Koretsky and Judge Lachs were also in favour of this viewpoint of interpretation.[28] Yet an extreme viewpoint as that of Judge Morelli would eliminate the existence of any kind of exception as indicated by the "special circumstances" clause in favour of an absolute mandatory character of the equidistance principle.[29]

The other viewpoint of interpretation, has been more flexible than the first one. This flexibility has lead this viewpoint to the following findings. First, it regards the inclusion of the special circumstances clause in Article 6 as an alternative solution to the

equidistance principle. Judge Padilla Nervo points out that he thinks,

> "... it is correct to say that the discussion on the reservation of "special circumstances" showed that this clause was understood not so much as a limited exception to a generally applicable rule, but more in the sense of an alternative of equal rank to the equidistance method."[30]

Second, the emphasis according to this viewpoint does not rest on the equidistance principle. Rather, it rests on the desire to achieve an equitable solution. Having recommended the equidistance principle for the delimitation of, inter alia, the continental shelf, the Committee of Experts commented that,

> "2- In a number of cases this may not lead to *an equitable solution*, ..."[31] [Emphasis added]

It was, in fact, according to this comment that the ILC felt the need to find an alternative solution to that of the equidistance. Similarly, the UK delegate to the 1958 UNCLOS I stated that,

> "... the adoption of the median line as a boundary was the fundamental principle and the *most equitable solution*, to be departed from only if special circumstances so required."[32] [Emphasis added]

Judge Padilla Nervo pointed out that, "[i]f the application of the equidistance rule would result in *harsh inequities* in a given specific case, this result may be considered as a special circumstance ..."[33]

Secondly, the formula of Article 6, therefore, contains three alternatives, namely, 1- the agreement solution, 2- another boundary justified by special circumstances, and 3- the equidistance solution.

Thirdly, due to the priority of the alternative of "another boundary line justified by special circumstances" solution vis à vis that of the equidistance; and due to the fact that the ILC deliberately left the "special circumstances" clause without explanation so as to attribute flexibility to the formula of Article 6; the logical consequence would be that the "special circumstances" clause must be interpreted as having a considerably wide-ranged meaning and scope which can embrace any exceptional circumstance whether they are predictable or unpredictable. Judge Ammoun seemed to be in favour of this viewpoint as he said,

> "Special circumstances have not been defined by a text of positive law; nor could they be listed exhaustively, *in view of the extreme variety of legal and material factors which may be of account.*"[34] [Emphasis added]

However, this wide-ranged meaning and scope of the "special circumstances" clause is, according to the this viewpoint, restricted in one respect. That is, the "special circumstances" clause must secure an equitable solution; i.e., it must satisfy the equity requirements.

Fourthly, since the equidistance solution was put as the last alternative, so it is, also, logical to agree with Mr. Laing that "... the principle of equidistance was attenuated almost to the point of non-existence, ..."[35], or, more optimistically, to its lowest effect.

The Anglo-French Arbitration of 1977-78 reached a conclusion very similar to the latter viewpoint of interpretation. The Tribunal considered the equidistance principle and the "special circumstances" clause, a single and combined rule;[36] and,

> "... the obligation to apply the equidistance principle is always one qualified by the

condition "unless another boundary line is justified by special circumstances".[37]

As the tribunal found that, the formula of Article 6 and the customary solution had the same object, this object was identified by the Tribunal as to carry out the delimitation of the continental shelf between States in accordance with equitable principles in order to achieve an equitable delimitation.[38] Furthermore, applying its own criterion, the Tribunal concluded that, the circumstances in both, the Channel Islands area, and in the Atlantic Ocean Region, constitute *relevant circumstances* in the meaning of the Customary solution as well as *special circumstances* in the meaning of the Conventional solution of Article 6.[39]

Regarding the said two viewpoints of interpretation, it seems that the wide-ranged viewpoint is more likely to be the acceptable one due, in addition to what has been said-above, to the following reasons. First of all, it is clear, as can be deduced from the above discussion, that the instigators of the "special circumstances" clause intended to leave it without explanation so that it could, in the subsequent future, bear as wide-ranged an interpretation as possible. Secondly, this can also be deduced from the wording of the two Paragraphs of Article 6, as they are evidence of: a- the equidistance principle was put as the last resort; b- the phrase "another boundary line", as well as the location of the "special circumstances" clause in both Paragraphs, prove that the presence of special circumstances in a given case, not only justify deviation from the equidistance course of the boundary line but also justify any other boundary line whether it is a modified equidistant line or not, i.e., a boundary line justified by the special circumstances is an alternative solution to that of the equidistance; and c- this wide variety of alternative solutions also proves that resort to the equidistance solution is almost attenuated to its lowest effect in the formula of Article 6.

Accordingly, as the application of the equidistance/special circumstances formula

is always one qualified by the achievement of an equitable solution, the consideration of any factor as a special circumstance must be examined in the light of the equity requirements. As far as the general doctrine of the continental shelf is concerned, the meaning of equity can be approached from two angles. The first is that, "equity does not necessarily imply equality";[40] and the second is that equity is the balancing process of certain factors in a given case in the light of equitable principles. With reference to the equidistance/special circumstances formula, equity is, therefore, the balancing process of all the special circumstances in a given case in the light of equitable principles taking into account that the final result is not necessarily required to secure an equal share to each of the parties concerned. But how are such factors assessed as to whether they are special circumstances or not?

As the applicability of the equidistance principle is based on the absence of any special circumstances, so the assessment of whether a particular factor is a special circumstance or not must take into account the effect of the presence of such a factor on the course of the equidistance line. If the course of the equidistance line was, due to the effect of a particular factor, distorted in a manner that might produce an inequitable solution, such a factor could be regarded as a special circumstance. The distorting effect of the factor on the course of the equidistance line, and not the presence of the factor itself is, therefore, the focal point of the test of whether the factor is a special circumstance or not. What does it distort? It distorts the proportion of the continental shelf areas that, in principle, is attributed to each party if the principle of equidistance is applied without taking the circumstance in question into account. Thus equity, therefore, becomes the balancing process of the disproportionally distorting effect of all the special circumstances of the parties concerned in a given case. If such a balancing process resulted in some of those distorting effects of factors which belonged to one party redressing the effects of some factors which belonged to the other party, so the factors whose distorting effects were redressed cannot constitute special circumstances. Accordingly, the test of the irredressable disproportionally distorting effect is the

criterion of examining whether certain factors are special circumstances or not. By definition equity, therefore, is the balancing process of the irredressable disproportionally distorting effects of all the special circumstances of all the parties concerned in a given case.

The wide-viewpoint of interpretation will be more proven as the most acceptable one when the discussion will address itself to the scope and the actual categories of the "special circumstances" clause. This will be the function of the next two sections.

Section 2

General View of the Scope of the "Special Circumstances" Clause

The function of this Section is mainly concerned with identifying the categories of special circumstances. In fact, this Section aims at determining the factors and considerations that have so far been, or are able to be, regarded as special circumstances.

Having faced some difficulties in establishing proper rules for the delimitation of the territorial waters and the continental shelf between States, the ILC, as was already seen, consulted the committee of Experts in 1953. In its reply, the Committee after suggesting the equidistance principle, stated that,

> "Unless otherwise agreed between the adjacent States, all islands should be taken into consideration in drawing the median line. .... There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary from the median

line."[41]

During the ILC debate, some examples of special circumstances were also mentioned. In the search for a proper formula to embody the equidistance principle, Professor Françios commented that, "... the configuration of the coast should be taken into account in applying the principle of equidistance."[42] Reference to islands as a special circumstance was also made numerous times by various ILC members such as Professor Françios[43] and Spiropoulos.[44]

Having, eventually, been convinced that the equidistance/special circumstances formula was appropriate for the purpose of delimiting, inter alia, the continental shelf, the ILC realized that the scope of the special circumstances clause needed some explanation. Due to the lack of the requisite knowledge, the ILC could not identify the real scope of the special circumstances clause. Instead, it tried to provide some examples of circumstances which the ILC was sure of as being special circumstances. In its comments on the equidistance/special circumstances formula, the ILC stated that,

> "..., provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels."[45]

As the Fourth Committee of the 1958 UNCLOS I was discussing the equidistance/special circumstances formula, some delegates, motivated by the need to add more clarification to the "special circumstances" clause, suggested some examples of special circumstances. The Tunisian delegate, for instance, was impressed by the considerable flexibility of the formula of Article 6, as this flexibility was necessary to take account "... of the geographical configuration of the region."[46] After suggesting islands, the UK delegate indicated to "... special mineral exploitation rights or fishery rights or the presence of a navigable channel;", as "[o]ther types of special

circumstances.[47] The USA delegate was not happy with those proposals which preferred the omission of "... the reference to special circumstances, since account would have to be taken of great variety of complex geographical situations that existed."[48]

However, the result of the Conference was the adoption of Article 6 which enshrined the equidistance/special circumstances formula. Article 6 did not provide any clarification as to the meaning and scope of the special circumstances clause; and yet it did not mention any of the examples of special circumstances that were mentioned during the conference or those which were mentioned in the ILC comments on Article 72 of its final Report of 1956. The logical finding that can be deduced from the absence of these examples or any relevant clarification from Article 6 is that, the Conference intended, in fact, to establish an unrestricted and "fairly elastic" formula which would be able to embrace a wide-variety of predictable and unpredictable exceptional circumstances.

In legal literature, some examples of special circumstances were also mentioned. In the ILC meeting of 17 July, 1950, Professor Hudson read out a passage from the ILA report on "rights to the sea bed and its subsoil" quoting that, "[c]riteria for the division of the sea bed (and subsoil) of a continental shelf shared by two or more States should be developed, taking into account factors such as the configuration of the coastlines, the economic value of proven deposits of minerals, etc."[49] [Footnote omitted]. Commenting on the equidistance/special circumstances formula, Professor Mouton mentioned four categories of special circumstances, namely, the exceptional configuration of the coast, the presence of islands, navigable channels and the existence of common deposits situated across the mathematical boundary.[50] Elaborating on the examples of special circumstances, Professor Brown discussed the said four categories of special circumstances and added the presence of historical special circumstances to them.[51] These five examples of special circumstances, in addition to Proportionality,

Proximity and Geomorphological Circumstances, were also discussed by Professor O'Connell.[52] And finally, commenting on the "special circumstances" clause, Padwa stated that, "... it may be observed that the term "special circumstances" can have reference to certain legal, political and economic considerations as well as geographic ones."[53] In the light of this contention, Padwa discussed some examples of special circumstances, such as the presence of islands, common mineral deposits, geographical configuration of the coast and historic rights.

As far as State practice is concerned, 17 agreements are said to have been concluded in the light of the equidistance/special circumstances formula. Examining these 17 agreements, the following results could be reached. To begin with, the said agreements can be classified into two categories, namely, agreements which concluded negotiated equidistance boundary lines (6 agreements), and agreements which concluded simple equidistance boundary lines (11 agreements[54]). The latter category is supposed to contain no special circumstances, whereas the former is very likely to contain some examples of such circumstances. It is, therefore, important to examine the agreements of the former category in order to see what sort of circumstances can be said to have been the reason that caused the concerned States to choose a negotiated equidistance method. According to the available data, three kinds of special circumstances seem to be the likely circumstances that have played a role in the choice of the said method. These are, the geographical configuration,[55] the geographical complexity (geographical configuration and the presence of islands,[56] and geographical configuration and the general direction of the coast[57]), and existing agreements.[58]

According to the preceding paragraphs, the scope of the "special circumstances" clause is very likely to embrace factors that belong to legal, economic and geophysical considerations. Examples of these factors can be found in, the geographical configuration of the coast, the presence of islands, the geographical complexity of the

region, the presence of common mineral deposits, the presence of navigable channels and fishing rights, historic rights, and other factors. These examples of circumstances will be examined in Section 3 in order to see whether they constitute true special circumstances or not, and also to determine the degree of effect that might be attributed to each individual circumstance in a given case.

Section 3

The Actual Categories of Special Circumstances

The aim of this Section is three fold. The first is to examine the available examples of circumstances so as to see whether they are considered special circumstances or not. The second is to see if one can deduce certain criterion/criteria in the light of which the degree of effect of a particular circumstance in a given case can be determined. And the third is to try to find a general criterion with the aid of which the real scope of the "special circumstances" clause can be identified. This section, for academic reasons only, is going to classify the categories of special circumstances into two main categories, namely, Physical Special Circumstances and Non-Physical Special Circumstances.

Physical

Special Circumstances

I

Geographical Configuration

The geographical configuration of the coasts is the oldest and most popular special circumstance. The early mention of the geographical configuration circumstance by Professor Hudson in 1950, when he was quoting from the ILA Report, and the subsequent frequent mention of this circumstance by the ILC members through their comments on the equidistance/special circumstances formula, and in legal literature, prove that the geographical configuration of the coasts has undoubtedly been meant to be counted as a special circumstance.[59] However, more important than this is the question, what sort of geographical configuration can constitute a special circumstance?

In its comments, the ILC referred to "... departures necessitated by any exceptional configuration of the coast, ..."[60] It is, therefore, not the geographical configuration of the coast, but the *exceptional* geographical configuration of the coast that is meant to be the special circumstance. Nevertheless, what does *exceptional* geographical configuration mean? And how exceptional should it be? The ILC answered none of these questions. Nor did the 1958 UNCLOS I.

By the time the 1969 North Sea Cases were examined by the ICJ, the answer to the said questions became indispensable. Two viewpoints, concerning the geographical configuration special circumstance, were put forwards before the ICJ. The first was Germany's viewpoint in which the Germans said,

> "Special circumstances are always present should the situation display not inconsiderable divergencies from the *normal case*."[61] [Emphasis added]

In order to explain what they meant by the term "normal case", the Germans went on to say, "[t]he normal case, ..., *is a more or less straight coastline*, ... "[62] [Emphasis added]. According to the Germans, the normality, in the meaning that it is more or less a straight line, of the geographical configuration of the coasts, is the criterion in the light of which the word "exceptional" can be identified. If the coastline is concave, (such as that of the North Sea) or convex, i.e., it is not a more or less straight coastline, so it is, according to Germany, an exceptional geographical configuration and consequently a special circumstance.

In their reply, Denmark and the Netherlands rejected the Germans viewpoint because, according to them, the application of the "special circumstances" clause must be based on mutual account from all the parties concerned, in the sense that,

> "*... deviation from the equidistance line is justified towards both States-i.e., the State which "gains" and the State which "loses" by the correction.*"[63]

Applying this criterion to the North Sea, Denmark and the Netherlands went on to say that the "special circumstances" clause,

> "*... can be invoked against a State whose continental shelf boundary under the equidistance principle reflect projecting geographical features (primarily certain islands and peninsulas) whereas it cannot be applied against a State whose continental shelf has a solid geographical connection with the territory of that State whereby constituting a natural continuation of the territory of the State in conformity with the general geographical situation.*"[64]

Thus, Denmark and the Netherlands can be said to have relied on two basic criteria. The first is interested in the mutual calculation of the impact of taking into account the geographical configuration of the coasts. If the taking into account of the configuration

of the coasts results in deviation from the equidistance principle at the expense of one of the parties, such a configuration is not regarded as exceptional. The second is concerned with a concept very similar to that of the natural prolongation of the Customary solution. According to this criterion, the geographical configuration of the coasts is not considered exceptional if the application of the equidistance principle leaves to each party all those seabed areas which constitute the natural continuation of the territory of that party.

The ICJ did not favour any of these two viewpoints. Instead, it preferred to keep silent with respect to the special circumstances clause. As the ICJ discovered the inapplicability of Article 6 to the 1969 North Sea cases, it found that it was superfluous to go into a detailed discussion concerning the special circumstances clause. However, since the ICJ concluded the geographical configuration of the parties concerned as a relevant circumstance; and since the ICJ concluded the Customary solution as to include the natural prolongation principle, proportionality, and the necessity of the mutual calculations of the impact of the inclusion of any relevant circumstances; so the logical conclusion is that, the ICJ took a moderate viewpoint which would fall mid-course between the Germans' and the Denmark's and the Netherlands' viewpoints, above-cited.

As the application of the equidistance/special circumstances rule is always one qualified by the necessity to achieve an equitable solution, the consideration of the geographical configuration special circumstance must be subject to the conditions of achieving an equitable solution. If, due to certain geographical configuration of the coasts, the application of the equidistance principle resulted in inequitable solution, such a geographical configuration would constitute a special circumstance. But, what is the implication of "equitable solution"? According to the general principles of International Law, "equitable solution" can be understood to mean a solution that is

based on mutual and equitable calculations of the circumstances of all the parties concerned. In this regard, one should refer to the general meaning of equity as was indicated to above.[65] That is to say, the consideration of the geographical configuration of the coast must be examined in the light of the equity requirements. Equity, as has been seen, is the balancing process of the irredressable disproportionally distorting effects of the special circumstances of all the parties to a given case. In order for the geographical configuration of the coast to be regarded as a special circumstance, it, therefore, must be able to produce an irredressable disproportionally distorting effect. Consequently, the consideration of the geographical configuration as a special circumstance will always depend on the calculation of each individual case.

The geographical configuration of the coast appears in various forms, such as, a concave or convex coastline, or a complex geographical situation which is formed by a combination of two or more of the geographical circumstances such as a concave coast with some outgrowths and/or islands.[66] There is no doubt that these forms can be considered special circumstances when they are in a microgeographical context. But would they also appear in a macrogeographical context? The answer is, definitely, yes, for the following reasons. The first is that, since the consideration of any factor as a special circumstance is only qualified by one condition which is the satisfaction of the equity requirements, so there would be no limit as to the forms that the geographical configuration might appear in. That is to say, in order to achieve an equitable solution, an arbitrator might have to bring into play the geographical configuration circumstance whether it is in a microgeographical or macrogeographical context. The second is that, since the "special circumstances" clause was deliberately designed so as to attribute flexibility to the formula of Article 6, so this formula is able to embrace any factor whether it is of a microgeographical or macrogeographical nature if the arbitrator is happy with it as affecting the case in front of him, and if the equity requirements are satisfied. Thirdly, during the 1958 UNCLOS I, the Tunisian delegate, when

commenting on the "special circumstances" clause, stated that the delimitation of the continental shelf "... should take account of the geographical configuration *of the region*, ..."[67] [Emphasis added]. This, of course, means to take into account the geographical configuration of the whole region and not only the coastal configuration of the parties concerned.

II

Islands

as a Special Circumstance

The role of islands in the continental shelf doctrine can be seen from various angles. Islands, as has been seen, can play the role of a relevant circumstance, they can generate a continental shelf of their own, and finally, they may play the role of a special circumstance. The main concern of this Section will be the latter role, i.e., islands as a special circumstance. Two problems are related to islands when they are examined as to whether they are a special circumstance or not, namely, the definition of islands, and how far an island can play the role of a special circumstance. These two problems are going to be examined hereunder respectively.

There is no doubt about the fact that an island can constitute a special circumstance. This can be seen through the above-cited ILC comments on its proposed equidistance/special circumstances formula, the Report of the Committee of Experts of 1953, and the comments of the members of the ILC and those of the 1958 UNCLOS I on the said formula.[68] Despite this finding, no agreement could be reached as to explicitly include islands as a special circumstance in the formula of Article 6 of the final draft of the 1958 Convention on the Continental Shelf. There was, however, a general feeling that the mention of the special circumstances phrase would be by itself sufficient to imply islands within its scope.[69]

As has been seen above, islands have been frequently mentioned as being able to constitute a special circumstance which justify a deviation from the equidistance course of the continental shelf boundary. However, the question is, what sort of coastal projection can constitute an island in the sense that it can play the role of a special circumstance?

The result of the ILC in the 1950s, and the 1958 UNCLOS I deliberations, it must be recalled, was the adoption of a definition of islands formula which included three main qualifications. In order for any coastal projection to constitute an island, it must be, 1- a naturally formed area of land, 2-surrounded by water, and 3- above water at high tide.[70] These three qualifications were, also consolidated and reaffirmed by the UNCLOS III, and the 1982 Convention.[71]

Accordingly, any coastal projection satisfies the above-said three qualifications can constitute an island for the purpose of being a special circumstance. This means that, the islands special circumstance may include rocks of all sizes, islets, isles, reefs, islands in the actual meaning of the word, and so on. Nevertheless, the satisfaction of the said three qualifications is not the only requirement of the definition of islands as a special circumstance. In fact this definition is also restricted in one respect. Recalling the wording of the Report of the Committee of Experts of 1953, the following can be of special importance:

> "..., all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals *within T miles* of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both States should be disregarded in laying down the median line."[72] [Emphasis added]

According to this wording, the distance of the coastal projection from the coast is an element to be added to the above-said three qualifications. However, the distance

criterion seems to be inapplicable to islands in the actual meaning of the word. Rather, the distance criterion, as far as the Committee of Experts is concerned, is only applicable to rocks and shoals and the like. In addition, it is important to note that the distance criterion is applicable when such a rock or shoal is located within a certain distance from only one State. Yet, according to the Committee, the definition of islands as a special circumstance must exclude those elevations of an undetermined sovereignty that are within T miles of both States.

More importantly is the condition that, since the application of the special circumstances clause is qualified by the condition that it must achieve an equitable solution, so islands as a special circumstance must satisfy the equity requirements. That is to say, in order for an island to be regarded as a special circumstance, it must be able to produce an irredressable disproportionally distorting effect, in the sense that if the island was not taken into account, this will produce inequity at the expense of one of the parties concerned. The distorting effect of islands is, in fact, more related to their location and distance from the shore than to any other criterion, for, the further from the shore the location of an island, the greater the distorting effect will be. The distance criterion, therefore, is not only applicable to rocks and shoals, but also to any other object that might fall within the scope of islands as a special circumstance.

How far can an island play the role of a special circumstance?

Since the special circumstance of islands must be examined in the light of the equity requirements, so it is the function of equity to decide the degree of effect that can be given to an island when it is considered a special circumstance in a given case. So far, only one case has been judged in the light of, inter alia, the equidistance/special circumstances formula, (the Conventional solution), namely, the Anglo-French Arbitration of 1977-78. In this Arbitration, three examples of islands were present. Due to the location of the Channel Islands on the wrong side of the median line (closer

to the French Republic), and their semi economic and political independence, the Tribunal considered these islands a special circumstances, (as well as a relevant circumstance), and gave these islands a partial effect using the enclaved method of delimitation around them.[73] As for the Eddystone Rock, it was given a full effect in the drawing of the median line.[74] And finally, because the Scilly Isles extended the English coast twice the distance that the Ushant Island did with respect to the French coast, the Scilly Isles were given half effect whereas the Ushant island was given full effect in the drawing of the boundary in the Atlantic Region.[75]

Apart from the said Arbitration no other case was judged in the light of the Conventional solution as they may indicate to the possible ways of solution of the problem of islands as a special circumstance. However, recalling State practice concerning islands, four kinds of effect could be attributed to islands when they would be taken into account. These were, 1- full effect, 2- partial effect with variation of modified equidistant boundary line, and enclaved and semi-enclaved methods, 3- no effect at all, and 4- minus effect.[76]

III

Mineral Deposits

as a

Special Circumstance

The presence of oil or gas or any other mineral deposits was realized, since the early stages of the Continental shelf doctrine development, as an important element to be taken into account when delimiting the continental shelf between States. However, it is still a controversial matter whether the presence of such a deposit can constitute a special circumstance which justifies deviation from the equidistance method or not.

As he read out a passage of the ILA Report, Professor Hudson stated that when delimiting the continental shelf, account should be taken of, inter alia, "... the economic value of proven deposits of minerals, ...".[77] In his remarks on the mineral deposits issue, Gidel stated that, the "... preservation of the unity of the deposit ..." is the primary concern.[78] This meaning was confirmed by Professor Mouton who observed that, "[a]ccount must be taken of *the essential unity of a deposit.*"[79] Yet Professor Mouton believed that "... two concessionnaires should not tap the same pool, or in a descriptive parable: never two straws in one glass."[80] During the 1958 UNCLOS I, one of the examples that were referred to by Commander Kennedy (UK) was "... the possession by one of the two State concerned of special mineral exploitation rights ...".[81] The delegate of Uruguay feared that the continental shelf boundary "... might cut across a mineral deposit in the ocean subsoil in a manner prejudicial to one of the States concerned."[82] Onorato also was in favour of considering common mineral deposits as a special circumstance within the meaning of Article 6.[83]

Contrary to this, after quoting, inter alia, the above cited wording of Professor Mouton, Padwa stated that,

> "Nevertheless, it is believed that the better view would not include this type of situation within the meaning of "special circumstances". The possibility that one party might deplete such a divided reserve before the other commenced exploitation is not sufficient reason to justify a departure from the principle of equidistance. In such a case the parties must arrive at an accommodation between themselves."[84]

In line with this viewpoint, Judge Ammoun was of the opinion that, "... if the preservation of the unity of deposit is a matter of concern to the Parties, they must provide for this by a voluntary agreement ...".[85]

Professor Brown seems to have taken a more moderate viewpoint. Relying on the historical rights doctrine as was envisaged in the Grisbadarna case, Professor

Brown observed that the only situation which a natural resources deposit would constitute a special circumstance would be when "... a coastal State had acquired exclusive rights to such resources independently of, and prior to, the development of the continental shelf doctrine."[86] Apart from this situation, Professor Brown believes that, the presence of such a deposit,

> "... would scarcely seem to constitute a "special circumstance," however, entitling a coastal State to demand a deviation from the equidistance line."[87]

Professor O'connell agrees with Professor Brown saying that,

> "The only occasion, ..., when the existence of mineral deposits could be regarded as a 'special circumstance' would be when interests in the deposit have been established independently of the continental shelf doctrine."[88]

In order to know whether common mineral deposits can constitute a special circumstance or not, there must be, it is believed, differentiation between the position in theory and that in practice. In theory, it seems that, the presence of mineral deposits can constitute a special circumstance for the following reasons. To begin with, the ILC recognized the economic and social importance of the exploitation of the continental shelf resources since the early stages of the development of the continental shelf doctrine.[89] The ILC, accordingly believed that, "[l]egal concepts should not impede this development."[90] This fact proves that the economic value of a proven deposit was always present in the ILC's mind whenever it discussed any legal concept relating to the definition or delimitation of the continental shelf. It is highly logical consequence, therefore, to assume that the ILC has meant to regard the presence of mineral deposits as a special circumstance, though it has not explicitly mentioned it in its commentary notes on the equidistance/special circumstances formula in 1953 and 1956.

In practice, the mineral deposits issue has been dealt with in various ways.[91] In order to solve the problem of the presence, or the possibility of the presence, of mineral deposits some States disregarded the drawing of a boundary line; and instead they designed a common zone for the purpose of joint development. The Choice of using the common zone method of delimitation proves that due to the presence of mineral deposits, States excluded the use of any other method of delimitation including that of the equidistance; i.e., the presence of such deposits was regarded as a special circumstance justifying deviation from, or may be exclusion of, the equidistance method. In some other instances States established a boundary line as well as a common zone for joint development where they were sure of, or suspected, the presence of mineral deposits. It is noteworthy to say that, the apportionment of the common zone has been effected by a variety of solutions such as equal apportionment, equal rights of exploitation, equal rights of the received revenue, a division proportional to the volume of the resources on each side of the boundary line and rights of exploitation, or rights of the received revenue, proportional to the volume of resources on each side of the boundary line.[92]

Other States preferred to deal with the problem of mineral deposits independently of the delimitation question of the continental shelf. Accordingly, such States negotiated and designed their continental shelf boundary line regardless of the presence of mineral deposits. However, these States preserved for themselves the rights of re-negotiating with their partners whenever a new survey would prove the presence of a common mineral field or deposit extending across the continental shelf boundary line. It seems that, even in this case States have been aware of the fact that the presence of mineral deposits is very likely to constitute a circumstance which will justify another method of delimitation in the area concerned. That is why these States have provided their precautionary conditional provision of renegotiation so as to abolish the established boundary line, when necessary due to new discoveries in the area

concerned, and design a new boundary line or at least a common zone for the purpose of joint venture.[93]

In what sense can the presence of mineral deposits constitute a special circumstance? According to the above-cited literature, the unity, or the essential unity, of a mineral deposit has been considered to have the prime importance. This unity, as expressed by one extreme viewpoint, must be preserved for the benefit of only one party, for, "two concessionaires should not tap the same pool." This viewpoint has proved to be refutable. Since the matter of the continental shelf delimitation has been left to be subject to agreement between States, so States can follow whatever method of delimitation they feel suits them. In practice, as has been seen above, numerous agreements have established a common zone for the purpose of joint development in the areas within which they were sure, or suspected, the presence of mineral deposits. Some of the concerned States have been given equal or proportional rights of exploitation in such common zones. That is to say, two concessionaires can, and indeed they do, tap the same deposit. In fact, if the unity of deposit is the prime element of the mineral deposit special circumstance, this unity is, and must be, preserved for the benefit of all the parties concerned and not for the benefit of one of them to the detriment of the others.

IV

Other Possible

Physical Special Circumstances

Two other special circumstances are very likely to be taken into account when delimiting the continental shelf in the light of the equidistance/special circumstances formula. These are, the natural prolongation special circumstance and proportionality.

Natural Prolongation

In order to prove the possibility of applying the natural prolongation concept as a special circumstance, the following discussion is necessary. To begin with, natural prolongation is one of the foremost pioneer concepts of the continental shelf doctrine. This fact has been indicated to by the Truman Proclamation of 1945 and other numerous subsequent proclamations.[94] Secondly, as the 1958 Convention adopted the exploitability/200 meter depth criterion for the purpose of defining the outer limit of the continental shelf, this left the door open for a variety of interpretations ranging from a limited to a somewhat limitless continental shelf. However, there was a general feeling that the continental shelf should terminate at a certain point so as to distinguish it from the seabed of the ocean floor. This can be seen through the development of the law of the sea during the 1960s which resulted in declaring the resources of the deep seabed as a common heritage of mankind and subsequently resulted in calling for the UNCLOS III. During the UNCLOS III, the definition of the continental shelf was revised and eventually replaced by the distance/geological description criterion. Thus the continental shelf which exceeded the 200 nautical miles limit was defined, generally speaking, as the geological continuation of the land territory of the coastal State up to the outer limit of the continental margin, (the continental slope and the rise). Thirdly, the concept of natural prolongation was considered by the ICJ "... the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, ..."[95] Similarly, indicating to the said wording of the ICJ, the Tribunal in the Anglo-French Arbitration of 1977-78 regarded natural prolongation as one of the concepts which "... were, ..., evidently of a general character and applicable to a delimitation under Article 6 no less than under customary law."[96] Fourthly, bearing in mind the definition of the natural prolongation circumstance,[97] the geological natural prolongation is by its very nature a special circumstance, for, once a geological feature indicates to a natural disruption of the continental shelf, this will be creative of inequities if it is not taken into account. Fifthly, if the foregoing justifications were able to prove the applicability of natural

prolongation as a *special* circumstance, then such applicability would be subject to the conditions which were said in respect of the natural prolongation *relevant* circumstance.[98]

Proportionality

The concept of proportionality was first enshrined in the customary rules of the 1969 North Sea Cases. However, this does not mean that the concept of proportionality is an alien element to the Conventional rules of Article 6 of the 1958 Convention. To begin with, by definition proportionality is the ratio between the lengths of the coasts of the parties concerned and the extent of their continental shelf areas. The extent of the configuration of the coasts and the extent of the continental shelf areas are, accordingly, the main elements of the proportionality concept. These two elements are, in fact, part and parcel of the geographical configuration special circumstance and the natural prolongation special circumstance. Secondly, as the final aim of the equidistance/special circumstances formula is to achieve an equitable solution, proportionality becomes not only an important element in the delimitation question of the continental shelf, but also a test ground in the light of which the equitableness or inequitableness of the final boundary can be judged. These facts were the main reasons why, as was seen above, the Tribunal in the Anglo-French case (1977-78) elaborated the principle of proportionality into two concepts, namely, proportionality as a special, or relevant, circumstance, and the disproportionally distorting effect of the geographical special, or relevant circumstances.[99] Thirdly, based on the "land dominates the sea" principle, the relation, or the ratio, between the lengths of the coasts and the extent of the continental shelf areas is a significant factor in the delimitation question of the continental shelf between States. Should the preceding evidences prove that proportionality can play the role of a special circumstance, such a circumstance is subject to the main requirements which has been previously said with respect to the proportionality relevant circumstance.[100]

Non-Physical
Special Circumstances

I

Navigation and Fishing Rights
as a
Special Circumstance

The continental shelf doctrine has emerged from certain legal, geophysical and economic realities which are concerned with the seabed and its non-living natural resources. It seems, therefore, that it is quite foreign to the core of the continental shelf doctrine to take account of any other factors which are not related to the seabed and subsoil thereof, and to their non-living natural resources. Consequently, it is quite difficult to see any link between the delimitation of the continental shelf and the navigation and fishing rights factors, unless they are concerned with the said resources. However, it is still important to examine the history of the development of the doctrine so as to see whether navigation and fishing rights managed to be included in the scope of the "special circumstances" clause or not.

Three viewpoints have been developed concerning navigation and fishing rights. When the Committee of Experts was asked to lay down a proper method to effect, inter alia, the delimitation of the continental shelf, it mentioned navigation and fishing rights as "special reasons" "which may divert the boundary from the median line."[101] In the light of this recommendation the ILC, while commenting on the equidistance/special circumstances formula stated that, "... provision must be made for departures necessitated by ... the presence of ... navigable channels."[102] During the debate of the Fourth Committee in the 1958 UNCLOS I, Commander Kennedy (UK) included the

presence of a navigable channel and the possession of fishery rights as "types of special circumstances".[103] Professor Mouton, also considered navigable channels as a special circumstance which would necessitate departure from the equidistance principle.[104] And finally, adding them to his long list of special circumstances, Judge Padilla Nervo mentioned navigable channels and "the protection of fisheries (fish banks)".[105] Yet, he also added safety and defence requirements.[106]

On the contrary, Professor Françios did not agree with Córdova to extend the territorial sea boundary for the purpose of delimiting the continental shelf because "... many of the special considerations, which were involved in delimiting the territorial sea, particularly questions of navigation and fishing interests, were irrelevant in delimiting the continental shelf."[107] Furthermore, Professor Françios believed that "... navigation and fishing rights were protected by Article 5 of the Commission's draft."[108]

Recalling the situation where exclusive rights to sedentary fisheries had been acquired prior to the establishment of the continental shelf doctrine as a situation to be regarded as a special circumstance, Professor Brown believed that, "... references to navigation and fishing rights ... [were] the result of rather automatic repetition of propositions first stated in relation to the somewhat different problem of delimiting the territorial sea."[109]

In the Anglo-French Arbitration, 1977-78, although the presence of the English fishery zone around the Channel Islands was taken into account, this was not considered a circumstance under the title of fishing rights but under the conduct of the parties title.[110] As the navigational defence circumstance was invoked by both France and Britain, the Tribunal concluded this circumstance to be in favour of the French Republic in the southern areas of the English Channel. This latter circumstance was more likely to belong to security circumstance than to the presence of navigable channel

circumstance.[111]

For the purpose of clarification, as far as fishing rights is concerned, one should distinguish between fishing rights relating to sedentary fisheries and other non-living organs of the seabed of the continental shelf and those relating to the living resources of the Shelf's superjacent waters. The former rights are very likely to constitute a special circumstance if title to them have been acquired prior to the establishment of the continental shelf doctrine, whereas the latter are very unlikely to constitute a special circumstance. That is because living resources of the superjacent waters of the continental shelf do not belong to the continental shelf doctrine. As for Article 5 of the 1958 Convention on the Continental Shelf, it referred to the *protection* of navigation, fishing, or conservation of the living resources of the sea, and not for considering the said objectives as special circumstances when delimiting the continental shelf. This can be understood from the wording of the said Article 5, particularly the phrase "... must not result in any unjustifiable interference... ."[112]

In practice, fishing rights have been dealt with independently and without affecting the delimitation of the continental shelf by establishing either a fishery boundary line different from that of the continental shelf or a special zone within which such rights are protected, or trying to establish a continental shelf boundary which leave the concerned States with undisturbed exercise of its fishery rights.[113]

II

Historic Rights

as a

Special Circumstance

As has been already indicated above, the doctrine of historic rights is a

controversial one. However, it is found that, in order for any title to constitute a historic right, three elements are the most generally acceptable prerequisites. These are, the effective display of State authority, the acquiescence of the other States, and the lapse of time.[114] This Section is basically concerned with whether historic rights can constitute a special circumstance in the delimitation question of the continental shelf or not, and if the answer is affirmative, in what sense such historic rights can be regarded as a special circumstance.

The question whether historic rights can be regarded as a special circumstance or not has been dealt with in various ways. According to Padwa "... it might reasonably be alleged that prior use of an area of the continental shelf is by its very nature a special circumstance; ... ."[115] Professor Brown is of the opinion that, historic rights, though in reality "... will very seldom be relevant to the delimitation of the continental shelf as distinct from delimitation of the territorial sea."[116], they are in fact embraced in the "special circumstances" clause.[117] At sharp contrast, Professor O'Connell excludes the possibility that historic rights can constitute a special circumstance because, "... the continental shelf doctrine of 'inherency' is deliberately aimed against the operation of the ordinary rule relating to historic rights, so that what is excluded as a matter of doctrine cannot be allowed to re-enter as a matter of exception."[118] Judge Oda reached a conclusion similar to that of Professor O'Connell, though by providing different evidence. In his dissenting opinion in the Tunisia/Libya Case of 1982, Judge Oda commented that historic rights may constitute a special circumstance if the delimitation question was concerned with the territorial sea, but they "... would not have any impact on delimitation of the continental shelf."[119]

Nevertheless, despite the foregoing controversial viewpoints, and despite the fact that historic rights were not mentioned as a special circumstance by the ILC comments on the equidistance/special circumstances formula, historic rights, it seems, are able to

constitute a special circumstance due to the following reasons. To begin with, the historic rights question, as a matter of fact, belongs to the bulk of General International Law as distinct from that of the continental shelf doctrine. It also belongs to the Grisbadarna principle of "stable state of things" which is, in fact, one of the most important principles of General International Law. These facts prove that the historic rights question has a priority in application over any other concept of the continental shelf doctrine if title to such historic rights has been acquired prior to the establishment of the said doctrine. Judge Jessup put it rightly as he quoted from the Grisbadarna case the following paragraph:

> "... in the law of nations, it is a well established principle that it is necessary to refrain as far as possible from modifying the state of things existing in fact and for a long time; ... that principle has a very particular application when private interests are in question, which, once disregarded, cannot be preserved in an effective manner even by any sacrifices of the State to which those interested belong ..."(wilson, *The Hague Arbitration Cases*, 1915, PP. 111-129)"[120]

In what sense can historic rights constitute a special circumstance?

Historic rights might, in principle, belong to historic waters or internal waters or historic bays, or historic rights relating to the resources of the continental shelf or historic rights relating to the resources of waters that overly the continental shelf. It is important first to exclude the possibility of those historic rights relating to the resources of waters that superjacent the continental shelf, because they are not related to the continental shelf doctrine. As for historic and internal waters and historic bays, they are more related to the question of baselines than to the delimitation question of the continental shelf. However, since the baselines question is, according to the provisions of Article 6 (especially the conditions of the applicability of the equidistance principle), related to the delimitation question of the continental shelf, so the determination of whether historic waters, or internal waters, or historic bays are true historic rights or not, will at the end of the day affect the extent of the continental shelf areas that may be

attributed to each party. That is to say, the determination of such issues as true historic rights will push the baselines forwards and consequently give the concerned State the chance of getting extra areas of continental shelf. Historic rights relating to historic and internal waters and historic bays, are therefore, by their very nature a special circumstance especially if such circumstances are recognized by the other concerned parties.

And finally, historic rights concerning sedentary fisheries and any other mineral or non-living natural resources of the seabed of the continental shelf are undoubtedly regarded as a special circumstance if title to such rights has been acquired prior to the establishment of the continental shelf doctrine. As for these rights, the location of the resources in question is very important in determining whether they are a special circumstance or not. In order for such rights to constitute a special circumstance they must be located in areas where, if the continental shelf boundary does take them into account, the concerned State will be deprived of free and undisturbed exercise of them. It is, then, again the principle of irredressable disproportionally distorting effect that will have the last say as to whether historic rights relating to sedentary fisheries and any other mineral or non-living natural resources can constitute a special circumstance or not.

III

Other Non-Physical Special Circumstances

Other Legal Special Circumstances

Some of the legal circumstances, such as the conduct of the parties and the existing agreements, in fact, belong to the doctrine of General International Law, rather than to the continental shelf doctrine. This fact indicates the applicability of such legal

circumstances to any question relating to the continental shelf doctrine unless such applicability is explicitly prohibited, or is patently foreign to the core of the doctrine itself. Regarding the conduct of the parties and the existing agreements circumstances, it seems that, their applicability is not only in harmony with, but also part and parcel of, the core of the continental shelf doctrine. That is to say, the conduct of the parties and the existing agreement circumstances can constitute, and, indeed they are, special circumstances. The conditions of these circumstances are the same conditions which were said with respect to them as relevant circumstances.[121]

Economic and Political Circumstances

Economic and political factors are, due to their nature, very likely to be regarded as special circumstances. As the continental shelf doctrine emerged out of geophysical and, more importantly, economic considerations; and as the ILC recognized that, due to the economic, social and juridical importance of the exploitation of the continental shelf, "[l]egal concepts should not impede this development.";[122] economic factors should *a fortiori* be recognized as special circumstances.

Economic circumstances is a broad term under the category of which numerous factors can be embraced, such as fishing rights or interests, mineral deposits, maritime transport and other maritime interests. Because not all economic circumstances can constitute special circumstances, so it is quite important to determine the general requirements of the economic factors which can be regarded as special circumstances. These requirements are, in fact, the same requirements of the economic relevant circumstance as was indicated to in the Fourth Chapter.[123]

As for political factors, numerous factors can fall within the meaning of such category, such as security, defence, the need to establish good relationship with the neighbouring States and other political interests. Political factors are by their very

nature special circumstances, especially if they are related to categories such as security and defence. The ICJ indicated in the Libya/Malta Case of 1985 that "[s]ecurity considerations are not unrelated to the concept of the continental shelf. They were referred to when this legal concept first emerged, particularly in the Truman Proclamation."[124] Furthermore, as both parties to the Anglo-French Arbitration of 1977-78 invoked their navigational defence and security interests present in the English Channel, the Tribunal was of the opinion that these circumstances "... tend to evidence the predominant interest of the French Republic in the southern area of the English Channel, ...".[125] Of course, it is necessary to identify the requirements that political factors must obtain in order to be regarded as special circumstances, for not all political factors can constitute special circumstances. For these requirements, reference must be made to those requirements of the political relevant circumstances since they are the same.[126]

Conclusion

Having examined the meaning and scope of the "special circumstances" clause, it is found that the clause could be interpreted in two ways. The narrow viewpoint interprets the clause in a restrictive way which embraces those circumstances that are in line with the interpretation that the "special circumstances" clause is provided in Article 6 as a narrow exception of the equidistance principle. On the contrary, the broader viewpoint believes that the "special circumstances" clause has a broad meaning and scope which can embrace a wide variety of circumstances that pleases the requirements of equity and goes in line with the interpretation that the clause is provided in Article 6 as an alternative solution to that of the equidistance. The latter viewpoint has proved to be more plausible. The "special circumstances" clause can, accordingly, embrace a variety of legal, economic and political as well as geophysical circumstances. These varieties are found to belong to factors such as, the geographical configuration of the coast, the geographical complexity of the region, the presence of islands, the presence of common mineral deposits, natural prolongation, proportionality, sedentary fishery

rights, historic rights, the conduct of the parties and the existing agreements, security and defence.

More importantly, having said that the broad viewpoint of interpretation is more likely to be the correct one; and that the "special circumstances" clause is restricted only in respect of the equity requirements; it is found that the relevant criterion in the light of which the real meaning and scope of the "special circumstances" clause can be revealed is the irredressable disproportionally distorting effect (IDDE) principle. Any factor is alleged to be a circumstance in a given case must be subject to the test of IDDE principle. If such a factor is proven to have the ability of producing an irredressable disproportionally distorting effect, in the meaning that if the factor is not taken into account, it deprives the interested party from exercising his rights, so this factor is a special circumstance.

Notes

1- I ILC Ybook, (1953), P. 128, Para. 37

2- Ibid., Para. 40.

3- Ibid., Para. 47.

4- Ibid., P. 130, Para. 62.

5- Ibid., P. 131, Para. 10; Mr. Hsu also agreed with Prof. Lauterpacht, see ibid., Para. 13.

6- Ibid., Para. 17.

7- Ibid.

8- Ibid., Para. 18.

9- Ibid., Para. 14.

10- Ibid., P. 132, Para. 23.

11- Ibid., P. 133, Para. 34.

12- II ILC Ybook, (1953), P. 213.

13- Ibid., P. 216.

14- Ibid.

15- II ILC Ybook, (1956), P. 300.

16- Ibid.

17- Article 72 was approved by the Fourth Committee after a vote which resulted in 36 votes in favour, none against, and 19 abstentions, see The 1958 UNCLOS I, Official Records, Vol. VI, P. 98; It was also approved in the Plenary Session by 63 votes in favour, none against, and 2 abstentions, see ibid., Vol. II, P. 15.

18- The 1958 UNCLOS I, Official Records, Vol. VI, P. 10, see also, P. 94.

19- Ibid., P. 91, and also P. 11; see also, A/Conf. 13/C.4/L.16 and Add 1*.

20- A/Conf. 13/C.4/L.16 and Add 1* of 19 March, 1958.

21- The 1958 UNCLOS I, Official Records, Vol. VI, P. 91, Para. 5; see also Footnote of A/Conf. 13/C.4/L.16 and Add 1* of 19 March, 1958 which stated that, "Under addendum 1 (26 March 1958), the above amendment is to be regarded also as an amendment to the Netherlands proposal (A/Conf. 13/C.4/L. 23).

22- The 1958 UNCLOS I, Official Records, Vol. VI, P. 92, 93 and 96; see also A/Conf. 13/C.4/L.28.

23- The 1958 UNCLOS I, Official Records, Vol. VI, P. 21-22.

24- Ibid., P. 95.

25- Ibid., P. 94; see also, A/Conf. 13/C.4/L. 42.

26-The ICJ (1969) Report, Dissenting Opinion, P. 186.

27- Ibid.

28- Ibid., P. 162, and 239.

29- Ibid., P. 206-207.

30- Ibid., Separate Opinion, P. 92.

31- The Report of the Committee of Experts, 1953, UN Doc., A/CN.4/61/Add. 1, 18 May, 1953, and Annex, P. 6-7.

32- The 1958 UNCLOS I, Official Records, Vol. VI, P. 96, Para. 5.

33- The ICJ (1969) Report, Separate Opinion, P. 92.

34- Ibid., P. 148, Para. 53, see also P. 148-150

35- I ILC Ybook, 1953, P. 132, Para. 22.

36- The Anglo-French Arbitration, (1977-78), Para. 68-70.

37- Ibid., Para. 70.

38- Ibid.

39- Ibid., Para. 73, and 196.

40- The ICJ (1969) Report, Para. 91.

41- The ILC Report, 6th Sess., 1954, 49 AJIL, (1955), Supp. P. 34, comment on Art. 15.

42- I ILC Ybook, (1953), P. 127, Para. 33.

43- Ibid., P. 128, Para. 37-38.

44- Ibid., P. 126, Para. 17, and P. 132, Para. 21.

45- The ILC Report, 5th Sess., 1953, 48 AJIL, (1954), Supp. P. 36, comment on Art. 7; see also, the ILC Report, 8th Sess., 1956, 51 AJIL, (1957), P. 251, comment on Art. 72.

46- The 1958 UNCLOS I, Official Records, Vol. VI, P. 21-22, at 22.

47- Ibid., P. 93, Para. 3.

48- Ibid., P. 95, Para. 22.

49- I ILC Ybook, 1950, P. 233.

50- Mouton, M.W., I Hague Recueil, (1954), P. 343, at 420-421.

51- Brown, E.D., The Legal Regime of Hydrospace, Stevensons & Sons, London, 1971, P. 62-70; see also his Article,16 San DLR, (1979), P. 461.

52- O'connell, D.P., The International Law of the Sea, Clarendon Press, Oxford, 1982, Vol. II, P. 708-723.

53- Padwa, David J., Submarine Boundaries, 9 ICLQ, (1960), P. 628, at 644.

54- Denmark & the Netherlands, 31 March, 1965; Poland & USSR, 29 August, 1969; Finland & USSR, 5 May, 1967; Colombia & Haiti, 18 Feb., 1978; Dominican R. & Colombia, 13 Jan., 1978; UK (Pitcairn) & France (Polynensia), 25 Oct., 1983; Norway and UK, 10 March, 1965; Denmark & Norway, 8 Dec., 1965; Denmark & UK, 3 March, 1966; the Netherlands & UK, 6 Oct., 1965; Sweden & Norway, 24 July, 1968.

55- German D.R. & Poland, 29 Oct., 1968.

56- Denmark & Canada, 17 Dec., 1973; and Sweden & Denmark, 9 Nov., 1984.

57- Norway & USSR, 29 Nov., 1957.

58- Finland & USSR, 20 May, 1965, (and also Poland & USSR, 29 Aug., 1969), see Butler, William E., The Soviet Union and the Law of the Sea, the Johns Hopkins Press, Baltimore & London,

1971, P. 146; and Finland & Sweden, 29 Sep., 1972.

59- See above, this Chapter, Section 2.

60-The ILC Report, 5th Sess., 1953, 48 AJIL, (1954), Supp. P. 36, comment on Art. 7; see also, the ILC Report, 8th Sess., 1956, 51 AJIL, (1957), P. 251, comment on Art. 72.

61- The ICJ (1969) Report, Pleadings, Vol. 329, P. 68.

62- Ibid., P. 68-69.

63- Ibid., P. 526.

64- Ibid., P. 527.

65- See above, Chapter II, Section 2; see also, below, Equity in a New Perspective, Chapter VI.

66- See above, Chapter IV, Section 1, Subsection I.

67- The 1958 UNCLOS I, Official Records, Vol. VI, P. 22, Para. 35.

68- See above, this Chapter, Section 2; see also, Symmons, Clive Ralph, The Maritime Zones of Islands in International Law, Martinus Njhoff, the Hague, 1979, P. 165-170.

69- The 1958 UNCLOS I, Official Records, Vol. VI, the USA delegation, P. 95.

70- See above, Chapter IV, Section 1, Subsection II.

71- Ibid.

72- The ILC Report, Sixth Sess., 1954, 49 AJIL, (1955), Supp. P. 1, at, 34.

73- The Anglo-French Arbitration, (1977-78), Para. 183-202, see also above, Chapter III, Section 2.

74- Ibid., Para. 143-144.

75- Ibid., Para. 251.

76- See above, Chapter III, Section 1.

77- I ILC Ybook, (1950), P. 233.

78- Ibid., Vol. II, P. 112, as quoted from O'connell, supra note No 52, at 711, footnote 110.

79- Mouton, M.W., supra note No 50, at 421.

80- Ibid.

81- The 1958 UNCLOS I, Official Records, Vol. VI, P. 93.

82- Ibid., P. 95.

83- Onorato, William T., Apportionment of an International Common Petroleum Deposit, 17 ICLQ, (1968), P. 85 at 86; see also his Article, Apportionment of an International Common Petroleum Deposit, 26 ICLQ, (1977), P. 324, at 325.

84- Padwa, David J., supra note No 53, at 645.

85- The ICJ (1969) Report, Separate Opinion, P. 149.

86- Brown, E.D., supra note No 51, his book at 67, and his article at 492.

87- Ibid.

88- O'connell, D.P., supra note No 52, at 711.

89- The ILC Report, Second Sess., 1950, 44 AJIL, (1950), Supp. P. 105, at 148.

90- Ibid.

91- See above, Chapter IV, Section 1, Subsection V.

92- Ibid.

93- Ibid.

94- See above, Chapter II, Section 2.

95- The ICJ (1969) Report, Para. 19.

96- The Anglo-French Arbitration, (1977-78), Para. 77 and 79.

97- See above, Chapter IV, Section 1, Subsection IV.

98- Ibid.

99- Ibid., Subsection III; see also the Anglo-French Arbitration, (1977-78), Para. 98-101.

100- See above, Chapter IV, Section 1, Subsection III.

101- The Report of the Committee of Experts, 1953, UN Doc., A/CN.4/61/Add. 1, 18 May, 1953, and Annex, P. 8.

102- The ILC Report, 5th Sess., 1953, 48 AJIL, (1954), Supp. P. 36, comment on Art. 7; see also, the ILC Report, 8th Sess., 1956, 51 AJIL, (1957), P. 251, comment on Art. 72.

103- The 1958 UNCLOS I, Official Records, Vol. VI, P. 93.

104- Mouton, M.W., supra note 50, at 420.

105- The ICJ (1969) Report, Separate Opinion, P. 93.

106- Ibid.

107- I ILC Ybook, (1953), P. 129, Para. 55, see also P. 134, Para. 53.

108- Ibid., P. 127, Para. 35, see also Art. 5 of the 1958 Conv.

109- Brown, E.D., supra note No 50, his book at 68, and his Article at 492-493.

110- See above, Chapter IV, Section 2, Subsection I and III.

111- Ibid., Section 2, Subsection I, and Section 3, Subsection II.

112- Article 5 states that, "1- The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the

conservation of the living resources of the sea, ..."

113- See above Chapter III; and see also Chapter IV, Section 2, Subsection I.

114- See above, Chapter IV, Section 2, Subsection II.

115- Padwa, David J., supra note No 53, at 644-645.

116- Brown, E.D., supra note No 51, his book at 69, and his article at 494.

117- Ibid.

118- O'connell, D.P., supra note No 52, at 713.

119- The ICJ (1982) Report, P. 211.

120- The ICJ (1969) Report, P. 79-80.

121- See above, Chapter IV, Section 2, Subsection III.

122- The ILC Report, 2nd Sess., 1950, 44 AJIL, (1950), Supp. P. 105, at 148.

123- See above, Chapter IV, Section 2, Subsection I.

124- The ICJ (1985) Report, Para. 51; see also Truman Proclamation of 1945.

125- The Anglo-French Arbitration, (1977-78), Para. 188; see also above, Chapter III, Section 2.

126- See above, Chapter IV, Section 3, Subsection II.

Chapter VI

Conclusions

General

The continental shelf doctrine originated as legal concept defining unknown facts, and developed into legal concept defining somewhat well known geophysical, judicial, economic and political realities. The lack of the requisite scientific knowledge in the 1940s and 1950s caused the continental shelf doctrine to stumble its way through the darkness resulting in a vague and broad definition of the unknown physical realities of the continental shelf as was enshrined in the exploitability/depth criterion. However, no sooner had the speed of technological development increased, than the defects of the said legal concepts were realised. As the vague legal concepts of the continental shelf enabled interpreters to claim limitless continental shelf areas, some States cried out for a more precise definition of the continental shelf as distinct from that of the seabed of the ocean floor As a result, the UNCLOS III was held, and eventually resulted in, inter alia, a precise descriptive definition of the continental shelf based on clearly identified geological realities.

The delimitation question of the continental shelf between States was deeply affected by the lack of the requisite knowledge, the 1958 vague definition of the continental shelf, and the economic and political ambitions of States. These three factors were the main reason why the Conventional solution of Article 6 of the 1958 Convention adopted the equidistance/special circumstances formula to effect the delimitation of the continental shelf between States. The equidistance/special circumstances formula was not only vague and ambiguous, but was also deliberately left without sufficient clarification. Besides, the equidistance/special circumstances formula has suffered from two weaknesses. The first concerned the real implication of

the equidistance role, whereas the second is ~~interested in~~ the actual meaning and scope of the special circumstances clause. These two weaknesses are, in fact, interconnected, interrelated, and interdependent on each other. For, any precise solution to one of them will, automatically, result in a precise solution to the other. Any identification of the real meaning and scope of the "special circumstances" clause will, undoubtedly, result in identifying the role of the equidistance principle as is provided in Article 6; and a precise identification of the role of the equidistance principle will automatically result in a precise determination of the meaning and scope of the "special circumstances" clause. Furthermore, the wider and broader the meaning and scope of the "special circumstances" clause is, the less the emphasis on the equidistance principle will be; and the more the emphasis on the equidistance principle proves to be, the more restrictive the meaning and scope of the "special circumstances" clause.

Although the ILC, explicitly, commented that it considered the equidistance principle a general rule and the "special circumstance" clause an exception, this did not end the debate on the real role of the said principle and clause in Article 6. Two viewpoints have tried to explain the real role of the principle and the clause. The first believes that, since the equidistance principle is provided as a general rule and the "special circumstances" clause an exception, this gives greater emphasis to the equidistance principle to the extent that the "special circumstances" clause is a narrow exception with a narrow scope of exceptional circumstances. The other viewpoint assesses the role of the equidistance principle and the "special circumstances" clause not only in the light of the said ILC comments, but also in the light of the entire deliberations concerning the equidistance/special circumstances formula, and in the light of the wording of Article 6. This viewpoint realised that the instigators of the equidistance/special circumstances formula, indeed, intended to provide a formula that would be able to guarantee and produce an equitable solution. And since the equitable solution is the final aim of Article 6, so the interpretation of the role of the equidistance

principle and the "special circumstances" clause must be carried out in the light of the equity requirements. This has lead them to the conclusion that, the "special circumstances" clause is not an exception but an alternative solution to that of the equidistance, which is intended to be the last resort, and accordingly is attenuated to its lowest effect. As far as this thesis is concerned, the latter viewpoint is found to be more credible because of reasons relating to the instigators deliberations on the equidistance/special circumstances formula, the wording of Article 6, and the discussion on the "special circumstances" clause.[1]

As the ICJ found the Conventional solution not applicable to the North Sea Cases of 1969, (because Germany was not a party to the said Convention), it searched for other rules and principles that could be applicable to the delimitation question of the continental shelf. The ICJ's efforts were concluded by adopting the equitable principles/relevant circumstances formula as the Customary solution of the delimitation of the continental shelf between States.

Although the equitable principles/relevant circumstances formula was left without adequate clarification, there was an explicit mention of the Customary solution stand concerning the equidistance principle. It regarded it as a "mere method" existing in International Law. The applicability of the equidistance method, therefore, was made subject to the satisfaction of the equity requirements. However, the weaknesses of the customary solution stems from its lack of sufficient clarification as to the real meaning and scope of the "relevant circumstances" clause. In fact, because the "relevant circumstances" clause was left without sufficient clarification, this affected the implication of the Customary solution stand relating to the equidistance principle. As the applicability of the equidistance principle has been made subject to the satisfaction of the equity requirements, and as equity has been defined as the balancing process of the relevant circumstances in a given case, it is logical to conclude that the broader the

meaning and scope of the "relevant circumstances" clause, the less possible the applicability of the equidistance principle will be. This leads to two conclusions. The first is that, since the meaning and scope of the "relevant circumstances" clause has not been clearly identified, so the real stand of the Customary solution concerning the equidistance principle is not yet known. The second is that, the real stand of the Customary solution concerning the equidistance principle is dependent upon the identification of the meaning and scope of the "relevant circumstances" clause.

The failure of the Conventional solution as well as the Customary solution to clarify their stand relating to the equidistance principle, pushed the Conferees during the UNCLOS III towards uncertainty and confusion regarding the role of the said principle in the delimitation question of the continental shelf. The Conferees, therefore, inclined to circle around two views: the first, the equity group, preferred to grant the equidistance principle the minimum effect leaving the major effect to the equity requirements, whereas the second, the equidistance group, was in favour of embodying the said principle as an obligatory rule in the 1982 Convention. Unfortunately, none of these two views won. Rather, the 1982 Convention adopted a formula of general terminology, the implication of which could be interpreted as indicating to the said-above Conventional and Customary solutions. Accordingly, one can safely say that the Conventional solution - the equidistance/special circumstances formula -, and the Customary solution - equitable principles/relevant circumstances formula -, are the only available solutions of the continental shelf delimitation in International Law.

Recalling what has already been said, both, the Conventional and Customary, solutions could not determine their real and precise stand concerning the equidistance principle, the "special circumstances" clause and the "relevant circumstances" clause. The main reason for this appears to be due to the lack of a reliable criterion in the light of which such a stand can be identified. As both solutions seem to have left the identification of the role of the equidistance principle to the equity requirements, so the

reliable criterion very likely belongs to the equity principle. Having examined this problem in the light of the facts, rules and principles and the continental shelf doctrine, it is found that the most relevant and reliable criterion is the *irredressable disproportionally distorting effect* (IDDE) principle to which the discussion will now turn.

Equity In A New Perspective

Equity and Objectivity

Equity, as has been seen above, is an objective balancing of the relevant circumstances in a given case. The emphasis on the objectivity of the balancing process can be found in almost all the judicial and arbitral cases that were concerned with the delimitation question of the continental shelf. However, none of these cases provided even a single piece of information that identified how the objectivity of the said process could be attained, or what the parameters to effect such an objectivity were. Of course, that is not at all to suspect the objective character of the equity principle, but in fact to draw attention to the real need for more clarification of the criterion/criteria that control equity in order to keep it within the scope of objectivity.

Equity and the Equidistance Principle

Despite the inapplicability of the equidistance principle to numerous cases, there is no doubt, whatsoever, about the objectivity of this principle. If the equidistance principle is understood to indicate to the method of delimitation which produces an equidistant line from certain points of the baselines, there would be no room for any subjective element to play a role therein.

According to the available cases, the applicability of the equidistance method is always said to be dependent on the satisfaction of the equity principle requirements.

The question, therefore, is, what is the relationship between equity and the equidistance principle? More importantly, is it true that the applicability of the equidistance principle is dependent upon the satisfaction of the equity requirements? Yet a more courageous question would be, which principle controls the other? Does equity control the equidistance principle or does the equidistance principle control equity? To answer these questions, some discussion is necessary.

Let us first recall the principal features of the equity principle. Equity, in the first place, is a relative concept. The relativity of equity is always dependent upon the balancing of the relevant, or special circumstances of each individual case, which are, in principle, different from those of the other cases. In the second place, equity is not necessarily supposed to produce equality. It, in fact, aims at achieving an equitable solution which is not interested in completely remedying the natural inequality. It was, therefore, on these bases that equity was defined as an objective balancing process of the relevant, or special circumstances.

Since equity depends solely on the circumstances of each individual case, so the question is, how are these circumstances evaluated so that they become a sufficient basis for an objective outcome? Before answering this question another question needs to be asked. That is, is it the presence of relevant or special circumstances or the impact of the presence of such circumstances that is the subject of evaluation? As a matter of fact, it is the impact of the presence of such circumstances and not the circumstances themselves that are evaluated. Then, what is the implication of this impact? The answer is, it is the distorting effects that are produced by the presence of the relevant, or special circumstances in a given case. What do they distort? They distort the proportion between the continental shelf areas that each State, in principle, is entitled to. The relevant, or special circumstances are, accordingly, not the focal point of equity; rather, equity focuses on the disproportionality distorting effect of the presence of such

circumstances. Consequently, equity, in reality, is an objective balancing of the disproportionally distorting effects of the relevant, or special, circumstances in a given case.

Then, how are the disproportionally distorting effects of the relevant, or special circumstances evaluated objectively? In order for the evaluation to be objective, there must be a reliable criterion/criteria in the light of which an objective assessment of the said effects can be achieved.

Although equity does not believe that the equidistance method is the proper method to effect all delimitations of the continental shelf, it is still of cardinal importance that the most ideal equitable solution is the equal division of the continental shelf areas, where the presence or the absence of certain circumstances justify such a division between the parties concerned. However, so long as the equal division solution is not feasible in all cases, the proper solution of some cases deviates from being an equal division to being an unequal division of the areas in question. Such a deviation is always justified by the presence of certain circumstances, the disproportionally distorting effects of which renders the equal division to become an inequitable solution, and the unequal division to become an equitable solution. The equal division can, therefore, be considered the underlying parameter that serves as a guide for an objective balancing process of the disproportionally distorting effects of the relevant, or special, circumstances.

To prove the foregoing conclusion, two sources of evidence can be cited. The first is the evidence of logic. Since the most ideal equitable solution is the equal division solution; and so long as not all delimitations are able to produce such an equal division; so it is logical to say that those delimitations which fail to produce this solution will try to aim, as far as possible, to achieve the equal division solution. For, the final aim of equity is not to achieve an equitable solution, but, in fact, to achieve

the most equitable solution. It is, equally, logical to say that, in order to approach, as far as possible, the equal division solution, the equal division solution must be taken into account as a guide, in the light of which any other solution can be assessed.

The other evidence can be deduced from the judgements of the judicial and arbitral cases. The expression of "the distorting effect of the equidistance line" was mentioned on numerous occasions in most of these cases. The question is: is it the equidistance line or the presence of the circumstances concerned that produces the said distorting effect? According to the said cases, the answer must surely favour the understanding that it is the distorting effect of the presence of the effective circumstances. Such a distorting effect plays the decisive role in deviating the equidistance line from its normal position as it is supposed to produce an equal division of the continental shelf areas concerned. That is why it is usually, mistakenly, called the distorting effect of the equidistance line.

Besides, when the ICJ, in the 1969 North Sea Cases, was discussing the position of opposite States, it stated that,

> "...; and, ignoring the presence of islets, rocks and other minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved."[2]

According to this paragraph, the disproportionally distorting effect of the stated relevant circumstances, is the decisive criterion, in the light of which such circumstances are assessed as to whether they can cause the boundary line to deviate from the equal division of the continental shelf areas or not.

The most important geophysical circumstances in the opposite States situation are the presence of islands, islets and other coastal projections, whereas it is the

geographical configuration of the coast in the lateral States situation. The disproportionally distorting effect, therefore, not only can be said to be attributable to the presence of islands, islets and other coastal projections, but also to the presence of any irregular coastal configuration.[3] Yet, the Tribunal, in the Anglo-French Arbitration, went a further step when it regarded all geographical circumstances as being able to produce a disproportionally distorting effect.[4] In fact, since equity is more interested in the distorting effect of certain circumstances than in the presence of the circumstances themselves; and since all geophysical circumstances are, by their very nature, able to produce a distorting effect; so the disproportionally distorting effect principle can function as a criterion in the light of which all geophysical circumstances can be evaluated.

More importantly, in the course of examining the individual categories of "special" and "relevant" circumstances, it is found that all such categories, whether they are of a geophysical, legal, economic, or political nature belong, directly or indirectly, to a geophysical objective.[5] This finding is proven by the fact that any legal, or economic, or political right or interest, relating to the continental shelf is, undoubtedly and indispensably, concerned with a geophysical objective. For instance, historic rights, sedentary fishing rights or interests and security and defence rights are undoubtedly and *sin qua non* related to certain areas of the continental shelf within which the concerned State claims its exclusive rights or interests. This leads to the conclusion that, the disproportionally distorting effect principle can be attributable to any special or relevant circumstance, and, accordingly, constitute a criterion in the light of which all such circumstances, regardless of their nature, can be evaluated.

In the light of the IDDE principle, the evaluation process of the circumstances in a given case may proceed in three stages. In the first stage, each circumstance is evaluated as to whether it is able to produce a distorting effect or not. If the

circumstance at stake is proven to be able to produce a considerable distorting effect, so it can be regarded as an *effective* circumstance. On the contrary, if the circumstance is proven to have a negligible distorting effect, or a minor distorting effect that can be remedied by other means, (such as giving additional weight to some other circumstances - e.g. Filfla Islet in the Libya/Malta case of 1985 -,[6]) this circumstance is susceptible to be totally disregarded. That is why, in order for any circumstance to be taken into account, it must be able to produce an *irredressable* distorting effect.

In the second stage of the evaluation process, the resultant circumstances of the first stage, are evaluated and their distorting effect is assessed. Because this is an important stage of the delimitation process; and because it must result in an objective evaluation of the involved circumstances; so it is equally important that it should function in accordance with a solid technique which guarantees objective results.

Having searched for such a solid technique, it has been found that the best technique, which provides the best assessment of the distorting effect of a particular circumstance, is the one that concerns itself with the comparison between two situations. These two situations are, an equal division delimitation, and a delimitation using the equidistance principle that takes into account the presence of the circumstance in question. To explain this technique, it would be better if an example is provided. If a geographical configuration is considered an effective circumstance in a given case, the degree of its distorting effect can be measured by identifying the difference between an equal division of the continental shelf areas concerned and an equidistance line delimitation that takes into account the said configuration. However, because the presence of the effective circumstances in a given case is, in reality, more complicated than the above-said example, and because some continental shelf areas are affected by the presence of more than one circumstance at the same time, (such as the geographical complexity circumstance), so, the identification of the degree of the distorting effect can

be concerned with a set of effective circumstances, instead of only one, due to their interplay effect. The identification of the degree of the distorting effect of a given circumstance is the first step in evaluating this circumstance in order to find out its due weight.

The second step is to determine how much the proportionality of the concerned continental shelf areas of the parties concerned is affected by the distorting effect of the circumstance/set of circumstances in question. In fact, this step is interested in identifying the gains and losses of the concerned parties. These gains and losses can be identified by two ways, viz, either by a ratio representing the proportion between the degree of the distorting effect of an effective circumstance and the party's ideal portion - by equal division - of the continental shelf area, or a ratio representing the proportion between the degrees of the distorting effect of the circumstances relating to one party and those relating to the other. So long as equity is not completely refashioning nature; and because the "equitable principles" concept is said to necessarily imply the notion of mutual calculations of the circumstances of all the parties concerned, and that one should compare like with like; so the first of the said two ways cannot be acceptable. Rather, the second way, which is concerned with the ratio between the degrees of the distorting effects of circumstances relating to one of the parties concerned and those of the other, is more plausible as falling within the meaning of the equity principle. In order to ideally operate this step, the calculation of the degrees of the *disproportionally* distorting effect of the effective circumstances must be proceeded by the help of a criterion. This criterion is usually deduced from the common features of the involved circumstances such as the distance criterion with respect to the Scilly Isles and Ushant Island in the Anglo-French Arbitration. This kind of evaluation results in a set of ratios representing the degrees of the disproportionally distorting effects of the effective circumstances of all the parties in a given case.

In the third and final stage, the balancing process is proceeded. During this stage,

the resultant degrees of the disproportionally distorting effects of the effective circumstances of all the parties concerned are evaluated, compared, and, subsequently, given due weights. The due weight of each circumstance is identified in the light of the degree of the disproportionally distorting effect of, 1- the circumstance is question; 2- the other circumstances relating to the same party concerned, and 3- the corresponding circumstance/circumstances of the other party. Finally, the balancing process proceeds by evaluating the resultant various weights that are given to the involved circumstances. In the light of this evaluation the method of delimitation is eventually chosen. If the gains and losses of the distorting effects of the involved circumstances from each side of the concerned parties redress each other, so an equal division of the continental shelf areas becomes the indispensable equitable solution. That is to say, all the involved circumstances were given equal weights, or may be completely disregarded - for in this case the result is the same whether the circumstances are given equal weights or completely disregarded. On the contrary, should the said effects not redress each other, the various weights that are given to the involved circumstances will be the responsible criterion that identifies the course of boundary line which is definitely not going to be an equal division of the areas concerned.

To illustrate the preceding discussion, a simple example is selected from the Anglo-French Arbitration. This example is concerned with the Scilly Isles (UK) and the Ushant Island (France). So as to avoid repetition, it is advisable to refer to a previous discussion concerning this example bearing in mind the following observations: *a*- both, the Scilly Isles and the Ushant Island, managed to produce an irredressable distorting effect; *b*- the degree of the disproportionally distorting effect of the Scillies was 2 and that of the Ushant Island was 1; and *c*- accordingly the Scillies were given half effect and the Ushant full effect.[7]

Applying the IDDE principle to the equidistance principle, "special circumstances"

clause and the "relevant circumstances" clause, the following conclusions could be found. As the determination of the meaning and scope of the "special circumstances" clause and the "relevant circumstances" clause will automatically result in identifying the role of the equidistance principle in both, the Conventional and Customary, solutions, and as the identification of the said two clauses has become easier by the help of the IDDE principle, it is suggested that the meaning and scope of the said two clauses is, first, identified, and, subsequently, the role of the equidistance principle is deduced.

Thus, as far as the "special circumstances" clause is concerned, its scope is, so far, found to be able to embrace factors belonging to geophysical, legal, economic and political considerations, within the scope of which the following categories could be found: the geographical configuration of the coast, the geographical complexity of the area concerned, the presence of islands, the presence of common mineral deposits, historic rights, sedentary fishing rights, the conduct of the parties and the existing agreements, natural prolongation, and proportionality. Yet, it is found that the "special circumstances" clause is more likely to be regarded as an alternative solution to that of the equidistance. Accordingly, since the meaning and scope of the "special circumstances" clause is as broad as this, so the role of the equidistance principle in the Conventional solution, is attenuated to its lowest effect.

As for the "relevant circumstances" clause, it is also an alternative solution to that of the equidistance principle, since it has been explicitly regarded as such by the Customary solution. The scope of the "relevant circumstances" clause can include considerations of geophysical, legal, economic and political nature, embracing categories such as, the geographical configuration of the coast, the geographical complexity of the area concerned, the presence of islands, the presence of common mineral deposits, historic rights, sedentary fishing rights, the conduct of the parties and

the existing agreements, natural prolongation, and proportionality. Subsequently, such a wide-ranged meaning and scope of the "relevant circumstances" clause results in mitigating the role of the equidistance principle to its lowest effect.

The question is, since the meaning and scope of the "special circumstances" clause and the "relevant circumstances" clause has, so far, enabled both clauses to embrace identical categories of considerations, so does that mean that the meaning and scope of the two clauses are the same? Professor O'Connell observed that there was two views concerning this problem. The first is that the "special circumstances" clause possesses

> "... only a minor corrective role in the use of the equidistance principle because of its apparent subordinate position in the arrangement of the concepts in Article 6, and may play either no role at all, or a greater or a lesser role, in customary law because of the mandatory character which equidistance has in Article 6 but may not have in customary law."[8]

The other view believes that,

> "... there is no difference in practice between the role played by special circumstances in Article 6 and in customary law because in both it is the obverse of equidistance."[9]

As far as this thesis is concerned, and according to the available facts so far, the latter viewpoint is more credible than the former. That is, the meaning and scope of the "special circumstances" clause and the "relevant circumstances" clause are more likely to be the same.[10] Does that mean that the role of the equidistance principle is the same whether under the Conventional solution or Customary solution? So far, the answer is yes, the role of the equidistance principle is the same in both solutions. Furthermore, this leads to the conclusion that both, the Conventional and Customary, solutions are, so far, identical. In fact, this finding consolidates the conclusion of the Second

Chapter, that the Customary solution of the 1969 cases has not been an alternative solution to that of Article 6, but an explanatory solution in the light of which the real meaning of the Conventional solution can be clarified.

As the implication of both, the Conventional and Customary, solutions is, so far, the same, there is, therefore, only one solution regarding the delimitation question of the continental shelf. That is, *the delimitation of the continental shelf between States shall be effected by a proper method of delimitation so as to achieve an equitable solution, taking into account the presence of all the effective circumstances that may produce an irredressable disproportionally distorting effect, in the meaning that if the circumstance is disregarded the concerned State will be deprived, wholly or in part, of the exercise of its legal rights.*

Yet, this conclusion is very likely to dominate the future development of the delimitation question of the continental shelf (and single maritime boundaries) due to the fact that any judicial organ will find itself obliged to give priority to the equity requirements when delimiting certain continental shelf areas, whether it applies the Conventional solution of Article 6, or the Customary solution, or the Conventional solution of the 1982 Convention.

Notes

1- See above, Chap. V, Section 1 and 2; see also below, this Chapter, P. 349-352.

2- The ICJ (1969), Report, Para. 57.

3- Ibid., Para. 59.

4- The Anglo-French Arbitration (1977-78), Para. 99-101.

5- See above, Chapter IV and V.

6- The ICJ (1985), Report, Para. 64.

7- See above, Chapter III, Section 2.

8- O'connell, D.P., The International Law Of The Sea, Clarendon Press, Oxford, 1982, Vol. II, P. 705-706.

9- Ibid., P. 706.

10- Cf. Evans, M.D., Relevant Circumstances and Maritime Delimitation, Clarendon Press, Oxford 1989, P. 78-83. Evans has provided a short discussion relating to the difference between the special circumstances and relevant circumstances clauses; and concludes that the two clauses "...tend to be seen as interchangeable." Although he attributes an ameliorative function to the special circumstances clause and an indicative function to that of relevant circumstances, Evans comments that the two functions "... are not clearly distinguished as separate aspects by the judicial reasoning. This, it is suggested, is at least in part due to the use of the same term to describe both, and their separation would be an aid to clarity." (P. 83.)

APPENDIX

Since completing the writing of this thesis I have become aware of the work "Relevant Circumstances and Maritime Delimitation" by M. D. Evans (Oxford University Press, 1989). The conclusions reached in that work are not dissimilar to those which I have reached independently. So as to take account of Mr. Evans work I have gone through my thesis and I have drawn attention to the references in Evans' work where it is relevant to what I have said. My understanding is that it is not unusual for two scholars to work on similar unresolved issues while being unaware of each other's interests. However, this does not affect the originality of the work of either. In my own particular case the fact that Mr. Evans has written on the same subject indicates the novelty of the issue to scholars.

Nevertheless, because the fourth Chapter, and consequently the sixth Chapter, of the present thesis have dealt with the relevant circumstances concept in the context of continental shelf delimitation, and regardless of any discussion relating to the difference between maritime boundary delimitation and that of the continental shelf,[1] the following remarks are necessary.

Evans referred to the expression "distorting effect", and this might create confusion regarding the said expression and the "Irredressable Disproportionally Distorting Effect (IDDE)" principle which I have arrived at in the thesis. So as to clarify the difference between his use of the expression and the principle I arrive at, the following observations are of significance. To begin with, Evans mentioned examples of the "distorting effect" concept in the context of "a particular coastal configuration",[2] in the context of islands,[3] and in the context of proportionality as

1. Regarding the difference between maritime boundary delimitation and that of the continental shelf, see my opinion at 82-83 above; and cf. Evans, P. 44-63.

2. Evans, P. 89.

"... 'assessing the distorting effect of a particular feature', ...".[4] Obviously, all these examples indicate that Mr. Evans attributes the distorting effect concept solely to geographical circumstances. For, even the broad idea of"assessing the distorting effect of a particular feature" denotes by the use of the word "feature" that a geographical feature is being considered.[5] Besides, Mr. Evans put the said statement in inverted comas as an indication that he adopted this expression from one of the decided cases, which is most likely to be the Anglo-French Arbitration.[6]

As for the IDDE principle, the thesis suggests that it can be attributed to all circumstances, whether they are of geographical, geophysical, economic, political or even legal nature.[7]

As the expression "distorting effect" is used in Evans', (P. 89), during the discussion relating to his suggested framework of analysis, this might indicate that Evans means it to be used as a component of his framework. Having studied the relevant text carefully, however, I realised that he used the said expression in the context of *an example* simply to advance his discussion. In sharp contrast, the IDDE concept, as I see it, can be used as a main principle. Yet the IDDE principle, unlike Mr. Evans' framework which "is presented as a tool of analysis",[8] is suggested in the thesis as a *lex ferenda* principle aiming at bridging the gaps relating to what should be the *objective character* of the delimitation process, and providing an *objective criterion* in the light of which the relevance or special character of a given circumstance can be

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3- Ibid., P. 147, and 156, as quoted from the ICJ (1969) Report, Para. 13, and 57.

4- Ibid., P. 231.

5- See the use of the word "feature" by Evans, in Chapters 6, 7 & 8, Evans, P. 119-151; it is necessary to say that the term "distorting effect" was also used in the same sense by the Anglo-French Arbitration (1977-78), see Para. 99-101.

6- Evans, P. 225-226; see also the Anglo-French Arbitration (1977-78), ibid.

7- The thesis, P. 345-346; see also generally Chapter IV, esp. the Conclusions.

8- Evans, P. 88.

identified:[9] this aims at the solution of problem which Evans admits to being unable to solve.[10]

A source of confusion may lie in the various roles attributed to the "proportionality" principle and the confusion between the concept of proportionality and the IDDE principle as I use it. Evans identifies "two broad forms of proportionality: first, as a means of assessing the impact of factors upon a delimitation line, second, as a test of equitability."[11] The first of these two uses might lead to confusion.

As far as the present thesis is concerned, the proportionality concept is found to have also played two roles in the decided cases, namely, as an independent relevant circumstance, and as a test of equity.[12] So, both, Evans and I, agree that proportionality plays the role of assessing the equitability of the resultant solution; but we differ as to the second function of the proportionality concept: it is a means of assessing the impact of the geographical features in Evans' opinion, whereas it is an independent relevant circumstance in mine.

In fact, a closer study of the Evans' two uses of the proportionality concept shows that Evans, like the decision in the Anglo-French Arbitration, has mixed together two variant concepts and put them under the title of proportionality. These two concepts are, proportionality in the true sense and the disproportionally distorting effect

9- The thesis, P. 341-344, and 346-349.

10- Evans could not avoid stating that the weighing up process "... will always remain a somewhat subjective operation.", (P. 91), the statement which was denied by all the judicial and arbitral cases which insisted on the necessity of the objective character of the delimitation process, (see the thesis at 342); see also his statement "you know one when you see one", (P. 90). In another instance, Mr. Evans pointed out that his suggested framework "... does not help determine what is to be a relevant circumstance.", (P. 88).

11- Evans, P. 230.

12- The thesis, P. 222-231, esp. 230.

of the geographical circumstances, from which the thesis has developed the IDDE principle.[13] As the thesis has already dealt with this issue in Chapter IV, and so as to avoid repetition, the reader is asked to refer to the relevant passage.[14]

Difficulty may also result from confusing the word "disproportionally" as used in the IDDE principle and the proportionality concept itself. As Evans refers to the expression "distorting effect" in the context of proportionality, so the word "disproportionally" seems to be, according to Evans, a component of the proportionality concept in the same fashion as it is referred to in the Anglo-French Arbitration.[15] The present thesis distinguishes between the two words and attributes a different meaning to each. Proportionality, according to the thesis, appears exclusively as the relation between the length of the coasts of the concerned states and the extent of their continental shelf areas.[16] When the word "disproportionally" is presented as a component of the IDDE principle in the thesis I understood the need to clarify the implication of this word. Since the presence of the effective circumstances must be able to produce an irredressable distorting effect, so the question is, what do they distort? They distort the proportion of the continental shelf areas of the States concerned. Which proportion is it? It is the *ideal* proportion of the continental shelf areas. What does ideal proportion mean? It means the equal division of the continental shelf areas between the concerned States. Accordingly, as far as the IDDE principle is concerned, the word "disproportionally" is presented as meaning the distortion of the hypothetical ideal proportion - equal division - of the continental shelf areas of the States concerned. It is on this ground that in my view the IDDE principle should function in the second stage of the delimitation process.[17]

13- Ibid., P. 345-346.

14- See ibid., P. 225-231.

15- See previous page.

16- The thesis, P. 230.

17- Ibid., P. 348-349.

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Annex I

Unilateral State Practice (Definition Aspects)

State's Name	1945 to 1950	1951 to 1958	1959 to 1973	According to the Conv., or 200 mt./ Exploitability Criterion.	Exploit-ability Criterion	Continenta Margin or 200 n.mi. or any other definit limit	Infinit Limit, or No Definition	Conti-nental Shelf	Seabed & Subsoil of Submarine Areas	Designated or Controled Areas
1- Abu Dhabi	1949						No Def.		@	
2- Ajman	1949						No Def.		@	
3- Argentina	1946						No Def.	@		
4- Argentina			1966	@					@	
5- Argentina			1973	@				@		
6- Australia		1953				@ 100 fath. isobath As it was identified in a subsequent act		@		
7- Australia			1968	@ It has the same meaning of the 1958 Convention				@		@
8- Bahamas	1948	Alteration of Boundaries					No Def.	@		
9- Bahamas			1970	@				@		@
10- Bahrain	1949						No Def.		@	
11- Brazil	1950						No Def.	@ & Insular Shelf		
12- British Honduras	1949						No Def.		@	
13- British Solomon Islands			1970	@				@		@
14- Canada			1970	@					@	
15- Cayman Islands			1969	@ It has the same meaning of the 1958 Convention				@		
16- Chile	1947					@ 200 nml.		@		
17- Costa Rica	1948 & 1949					@ 200 nml.		@ Cont. & Insular & Submarine Platform		
18- Costa Rica			1967	@				@		
19- Cyprus			1972	@ & Natural Prolongation				@		
20- Denmark			1963	@ As Defined in the 1958 Convention				@		
21- Dominican R.		1952	1967	@			@	@		
22- Dubai	1949						No Def.		@	
23-Ecuador	1950					@ 200 mt. depth		@		
24- El Savador	1950					@ 200 marine miles		@		
25- F.R. Germany			1964	@				@		
26- Figi			1970	@				@		@
27- Finland			1965	@ According to the 1958 Convention				@		
28- France			1968	@ In conformity with the 1958 Convention/with three reservations				@		
29- German D.R.			1964				No Def.		@	
30- German D.R.			1968	@					@	

State's Name	1945 to 1950	1951 to 1958	1959 to 1973	According to the Conv., or 200 mt./ Exploitability Criterion.	Exploit-ability Criterion	Continenta Margin or 200 n.mi, or any other definit limit	Infinit Limit, or No Definition	Conti-nental Shelf	Seabed & Subsoil of Submarine Areas	Designated or Controled Areas
31- Ghana			1963			@ 200 mt. isobath		@		
32- Ghana			1973	@				@		
33- Guatemala	1949						No Def.	@ or Platform		
34- Honduras	1950						No Def.	@ or Insular Shelf & Submarine Platform		
35- Honduras		1957		@				@ & Insular Terrace & Other Submarine Areas		
36- Iceland	1948	Concerning Fisheries Regulations					No Def.	@		
37- India		1955					No Def.	@		
38- India			1959	@				@		
39- Iraq		1957					No Def.		@	
30- Iraq			1968	Official Spokesman:" to emphasize its full adherence to the rules and principles of International Law "				@		
41- Iran		1955					@	@		
42- Ireland			1968				@	@		@
43- Israel		1952			@				@	
44- Italy			1967	@				@		
45- Jamaica	1948	Alteration of boundaries					No Def.	@		
46- Korea R.		1952				@ identified by co-ordinates		@ Shelf Adjacent to the peninsular and Insular Coasts		
47- Kuwait	1949						@		@	
48- Madagascar			1970	@ In conformity with the 1958 Convention				@		
49- Malaysia			1968	@				@		
50- Malta			1966	@				@		
51- Mauritania			1962			@ 200 mt. isobath		@		
52- Mexico	1945					@ 200 mt. isobath		@ or Platform		
53- New Guinea (An Australian Trust)		1953				@ 100 fathom as it was identified by a subsequent Austalian Act.		@		
54- New Zealand			1964	@				@		
55- Nicaragua	1950						No Def.	@		
56- Nigeria			1969	@				@		
57- Norway			1963		@				@	
58- Oman			1972	@				@		
59- Panama	1946						No Def.	@		
60- Panama			1967			@ 200 nml.		@ and Insular Bed and Subsoil		
61- Peru	1947 & 1952					@ 200 nml.		@ or Insular Shelf		
62- Philippinese	1949						No Def.	@ or its analogue in an archipelago		
63- Portugal		1956				@ 200 mt. isobath		@		

State's Name	1945 to 1950	1951 to 1958	1959 to 1973	According to the Conv., or 200 mt./ Exploitability Criterion.	Exploit-ability Criterion	Continenta Margin or 200 n.mi, or any other definit limit	Infinit Limit, or No Definition	Conti-nental Shelf	Seabed & Subsoil of Submarine Areas	Designated or Controled Areas
64- Qatar	1949						@		@	
65- Ras Al Khaimah	1949						@		@	
66- Sarawak		1954	Alteration of Boundaries				No Def.	@		
67- Saudi Arabia	1949						No Def.		@	
68- Saudi Arabia			1968	Related to the red sea			No Def.		@ Seabed adjacent to the saudi	Cont. Shel
60- Seychelles			1962				@	@		
70- Sharjah	1949						@		@	
71- South Africa			1963	@ As defined in the Acceptable to South Africa		1958 Conv. or any other Conv.		@		
72- Spain			1966				@	@		
73- Sri Lanca (Ceylon)		1957			@			@	or Insular Shelf	
74- Sudan			1970	@				@		
75- Sweden			1966	@ In accordance with	the 1958	Convention		@		
76- Tonga			1970				@	@		@
77- Trinidad & Tobago	1945						@		@	
78- Turkey			1968	"I is normally stipulated that provisions of the Convention Information of its Mission to		those undertaking the drilling on the Continental Shelf" the UN.		should @	conform with the	
79- Umm Al Qaiwain	1949						@		@	
80- U.K.			1964				@	@		@
81- U.S.A.	1945					@ Accompanying press identified it i.e., up to 200 mt. isobath.		@	in a geological sense,	
82- U.S.S.R.			1968	@ The text is very similar to Article 6 of the 1958 Convention				@		
83- Venezuela		1956		@				@		
84- P.D.R.Yemen			1970	@ & 960 mt depth/exploitability according to Ar. 4				@		
85- Yugoslavia			1965	@				@		

The informations cited above have been cllected from the following references: UN Legislative and Administrative Series, Vol. 1, Second Ed., 1974, Vol. 6 Second Ed., 1974, and Vol. 8 Second Ed., 1974; UN Legislative Series, (ST/LEG/SER.B/...) No 15, 16 And 18; Churchill R., Nordquist, M., and Lay, S.H., New Directions in the Law of the Sea, Oceana Pub. INC, Dobbs Ferry, New York , 1977, Vol. I, IV, and V; Auguste, Barry B.L., The Continental Shelf, Librairie Minard, Paris, 1960.

Annex II

Multilateral State Practice & the Delimitation Question

States That Applied the Equidistance Method

State's Name	Date	Continental Shelf Boundary	Maritime Boundary	Reference
1- Colombia & Haiti	18 Feb., 1978		@	New Directions, Vol. VIII, P. 76
2- Colombia & Panama	20 Nov., 1976		@	New Directions, Vol. VIII, P. 88
3- Denmark & Netherlands	31 March 1965	@		New Directions, Vol. 1, P. 128
4- Denmark & Norway	8 Dec., 1965	@		New Directions, Vol. 1, P. 123
5- Denmark & UK.	3 March 1966	@		New Directions, Vol. 1, P. 125
6- Dominican R. & Colombia	13 Jan., 1978		@	New Directions, Vol. VIII, P. 78
7- Finland & USSR	5 May 1967	@		UN Leg. Ser., No 15, P. 784 & 7 ILM., 1968, P. 560
8- France & Saint Lucia	4 March 1981		@	Maritime Boundaries Agreements (1970-1984), UN, 1987, P. 129.
9- Italy & Spain	19 Feb., 1974	@		New Directions, Vol. V, P. 261
10- Netherlands & UK.	6 Oct., 1965	@		New Directions, Vol. 1, P. 126
11- Norway & UK.	10 March 1965	@		New Directions, Vol. 1, P. 120
12- Poland & USSR	29 Aug., 1969	@		9 ILM., 1970, P. 697
13- Sri Lanka & India & Maldives	23 July 1976	@		New Directions, Vol. VIII, P. 102
14- Sri Lanka & India	23 March 1976		@	New Directions, Vol. VIII, P. 99-101
15- Sweden & Norway	24 July 1968	@		UN Leg. Ser., No 16, P. 413
16- Turkey & USSR	23 June 1978	@		Maritime Boundaries Agreements (1970-1984), UN, 1987, P. 194.
17- UK (Pictarine) & France (Polynensia)	25 Oct., 1983		@	UKTS, No 56, 1984.

18- USA & Cook Islands	11 June 1980		@	Limits in the Seas, No 100
19- USA & Mexico	4 May 1978		@	17 ILM. 1978, P. 1073
20- USA & New Zealand (Tokelau)	2 Dec., 1980		@	Limits in the Seas, No 100

States That Applied A Modified Equidistance Boundary line

State's Name	Date	Continental Shelf Boundary	Maritime Boundary	Reference
1- Abu Dhabi & Qatar	20 March 1969	@		New Directions, Vol. V, P. 223
2- Argentina & Uruguay	19 Nov., 1973		@	Limits in the Seas, No 64
3- Australia & Indonesia	18 May 1971	@		New Directions, Vol. IV, P. 91
4- Australia & Indonesia	9 Oct., 1972	@		ibid.
5- Australia & Indonesia	26 Jan., 1973	@		UN Leg. Ser., No 18, P. 444
6- Australia & Papua New Guinea	18 Dec., 1978	@		18 ILM., 1979, P. 291
7- Bahrain & Saudi Arabia	22 Feb., 1958	@		New Directions, Vol. V, P. 207
8- Bahrain & Iran	17 June 1971	@		New Directions, Vol. V, P. 230
9- Costa Rica & Panama	2 Feb., 1980		@	Limits in the Seas, No 97
10- Cuba & USA	16 Dec., 1977		@	17 ILM. 1978, P. 110
11- Denmark & Canada	17 Dec., 1973	@		New Directions, Vol. IV, P.105
12- Finland & Sweden	29 Sep., 1972	@		UN Leg. Ser., No 18, P. 439
13- Finland & USSR	20 May 1965	@		6 ILM. 1968, P. 727
14- German D.R. & Poland	29 Oct., 1968	@		Limits in the Seas, No 65
15- Greece & Italy	24 May 1977	@		Limits in the Seas, No 96
16- Haiti & Cuba	27 Oct., 1977		@	New Directions, Vol. VIII, P. 69

17- India & Indonesia	8 Aug., 1974	@		New Directions, Vol. V, P. 265
18- India & Indonesia	14 Jan., 1977		@	Limits in the Seas, No 93
19- India & Maldives	28 Dec., 1976		@	Limits in the Seas, No. 78
20- India & Sri Lanka	26 June 1974	@		13 ILM., 1974, P. 1442
21- India & Thailand	22 June 1978		@	Limits in the Seas, No. 93
22- India & Indonesia & Thailand	22 June 1978	@		Limits in the Seas, No 93
23- Indonesia & Malaysia	27 Oct., 1969	@		9 ILM. 1970, P. 1173
24- Iran & Qatar	20 Sep., 1969	@		UN Leg. Ser., No 16, P. 416
25- Iran & U.A.Emirates	13 Aug., 1974	@		New Directions, Vol. V, P. 242
26- Iran & Oman	25 July, 1974	@		New Directions, Vol. V, P. 235
27- Iran & Saudi Arabia	24 Oct., 1968	@		New Directions, Vol. V, P. 216
28- Italy & Yugoslavia	8 Jan., 1968	@		New Directions, Vol. 1, P. 112
29- Italy & Tunisia	20 Aug., 1971	@		New Directions, Vol. V, P. 247
30- Japan & Korea	5 Feb., 1974	@		New Directions, Vol. IV, P. 113
31- Japan & Korea	5 Feb., 1974	@		New Directions, Vol. IV, P. 117
32- Kenya & Tanzania	9 July 1976		@	Limits in the Seas, No 92
33- Norway & USSR	29 Nov., 1957	@		312 UNTS., P. 289; see also Limits in the Seas, No 17
34- Mexico & Cuba	26 July, 1976	@		Maritime Boundaries Agreements (1970-1984), UN, 1987, P168-169.
35- Sweden & Denmark	9 Nov., 1984	@		Maritime Boundaries Agreements (1970-1984), UN, 1987, P 20.
36- Thailand & Indonesia	17 Dec., 1971		@	UN Leg. Ser., No 18, P. 437
37- Thailand & Indonesia	11 Dec., 1975		@	Limits in the Seas, No. 93
38- Venezuela & Dominican R.	3 March 1979		@	New Directions, Vol. VIII, P. 80

States That Applied A Negotiated Boundary Line

State's Name	Date	Continental Shelf Boundary	Maritime Boundary	Reference
1- Brazil & France	30 Jan. 1981		@	Maritime Boundaries Agreements (1970-1984), UN, 1987, P. 87-89.
2- Colombia & Costa Rica	17 March 1977		@	New Direction, Vol. VIII, P. 93
3- F.R.Germany & Denmark	28 Jan., 1971	@		10 ILM. 1971, P. 603.
4- F.R.Germany & German D.R.	29 June 1974		@	Limits in the Seas, No 74
5- F.R.Germany & UK.	25 Nov., 1971	@		11 ILM. 1972, P. 731; see also Limits in the Seas, No 10
6- France & Spain	29 Jan., 1974	@		New Directions, Vol. V, P. 251
7- France & Venezuela	17 July. 1980		@	Maritime Boundaries Agreements (1970-1984), UN, 1987, P. 132.
8- Iceland & Norway	22 Oct., 1981	@		21 ILM. 1982, P. 1222
9- Indonesia & Malaysia	17-21 Dec., 1971		@	Limits in the Seas, No 81
10- Indonesia & Thailand	17-21 Dec., 1971		@	Limits in the Seas, No 81
11- Malaysia & Thailand	21 Dec., 1971		@	Limits in the Seas, No 81
12- Netherlands & F.R.Germany	28 Jan., 1971	@		10 ILM. 1971, P. 607
13- Sudan & Saudi Arabia	16 May 1974	@		UN Leg. Ser., No 18, P. 452
14- Thailand & Indonesia & Malaysia	17-21 Dec., 1971		@	UN Leg. Ser., No 18, P. 429
15- USA & Venezuela	28 March 1978		@	New Directions, Vol. VIII, P. 84
16- Venezuela & The Netherlands	31 March, 1978		@	Maritime Boundaries Agreements (1970-1984), UN, 1987, P139-145.
17- U.K. & Ireland	2 Nov., 1988		@	Press released.

States That Applied Another Method: Parallel of Latitude

State's Name	Date	Continental Shelf Boundary	Maritime Boundary	Reference
1- Brazil & Uruguay	21 July 1972		@	Limits in the Seas, No 73
2- Chile & Peru	28 Aug.,1952 & 4 Oct.,1954		@	Limits in the Sea, No 86
3- Colombia & Ecuador	23 Aug., 1975		@	New Directions, Vol. V, P. 12
4- Ecuador & Peru	28 Aug.,1952 & 4 Dec.,1954		@	Limits in the Seas, No 88
5- Gambia & Senegal	4 June, 1975		@	New Directions, Vol. VIII, P.104

Annex III

Multilateral State Practice: Method of Delimitation Aspects

State's Name	Simple Equidistance Line	Modified Equidistance Line	Negotiated Boundary Line	Other Methods e.g. Parallel of Latitude	Party to the 1958 Conv. on the Cont. Shelf
1- Abu Dhabi		& Qatar, 1969			
2- Argentina		& Uruguay, 1973			
3- Australia		& Indonesia, 3 Agr. 1971, 72, 73. & Papua New Guinea, 1978			14. 5. 1963
4- Bahrain		& Iran, 1971 & Saudi Arabia 1958			
5- Brazil			& France, 1981	& Uruguay, 1972 (Perpendicular)	
6- Canada		& Denmark, 1973			6. 2. 1970
7- Chile				& Peru, 1952, & 1954	
8- Colombia	& Dominican R., 1978 & Panama, 1976 & Haiti, 1978		& Costa Rica, 1977	& Ecuador, 1975	8. 6. 1962
9- Cook Islands	& USA, 1980				
10- Costa Rica		& Panama, 1980	& Colombia, 1977		16. 2. 1972
11- Cuba		& Haiti, 1977 & USA, 1977 & Mexico, 1976			
12- Denmark	& Netherlands, 1965 & Norway, 1965 & UK., 1966	& Canada, 1973 & Sweden, 1984	& F.R.Germany, 1971		12. 6. 1963
13- Dominican R.	& Colombia, 1978	& Venezuela, 1979			11. 8. 1964
14- Ecuador				& Colombia, 1975 & Peru, 1952, & 1954	
15- F.R. Germany			& Denmark, 1971 & Netherlands, 1971 & UK.,1971 & German D.R., 1974		
16- Finland	& USSR, 1967	& Sweden, 1972 & USSR, 1965			16. 2. 1965
17- France	& Saint Lucia,1981 & U.K.,1983		& Spain, 1974 & Brazil, 1981 & Venezuela, 1980		14. 6. 1965
18- Gambia				& Senegal, 1975	
19- German D.R.		& Poland, 1968	& F.R.Germany,1974		27.12.1973
20- Greece		& Italy, 1977			6. 11. 1972

21- Haiti	& Colombia,1978	& Cuba, 1977		29. 3. 1960
22- Iceland			& Norway, 1981	
23- India	& Sri Lanka, 1976. & Sri Lanka & Maldives, 1976	& Indonesia, 1974 & Sri Lanka, 1974. & Indonesia, 1977 & Thailand, 1978 & Maldives, 1976 & Indonesia, & Thailand, 1978	.	
24- Indonesia		& Australia, 3 Agr. 1971, 72, 73. & India, 1974. & Malaysia,1969. & Thailand,1971 & Thailand,1975 & India, 1977 & India & Thailand 1978	& Thailand & Malay- sia, 1971 & Thailand, 1971 & Malaysia, 1971	
25- Iran		& Bahrain, 1971 & Oman, 1974 & Saudi Arabia, 1968 & Qatar, 1969 & U.A.Emirates, 1974		
26- Ireland			& U.K.,1988	
27- Italy	& Spain, 1974	& Greece, 1977 & Yugoslavia, 1968 & Tunisia, 1971		
28- Japan		& Korea, 2 Agr. 1974		
29- Kenya		& Tanzania, 1976		20. 6.1969
30- Korea R.		& Japan, 2 Agr. 1974		
31- Malaysia		& Indonesia,1969	& Thailand & Indo- nesia, 1971 & Indnesia, 1971 & Thailand, 1971	21. 12. 1960
32- Maldives	& India & Sri- Lanka, 1976	& India, 1976		
33- Mexico	& U.S.A.,1978	& Cuba,1976		
34- The Nether- lands	& Denmark, 1965 & UK., 1965		& F.R.Germany,1971 & Venezuela, 1978	18. 2. 1966
35- New Zealand	& USA., 1980			18. 1. 1965
36- Norway	& Denmark, 1965 & UK., 1965 & Sweden, 1968	& USSR., 1957	& Iceland, 1981	9. 9. 1971
37- Oman		& Iran, 1974		
38- Panama	& Colombia, 1976	& Costa Rica, 1980		
39- Papua New Guinea		& Australia, 1978		

40- Peru				& Chile,1952, & 1954 & Ecuador,1952 & 1954	
41- Poland	& USSR., 1969	& German D.R., 1968			29. 6. 1962
42- Qatar		& Abu Dhabi, 1969 & Iran, 1969			
43- Saint Lucia	& France, 1981				
44- Saudi Arabia		& Iran, 1968 & Bahrain, 1958	& Sudan, 1974		
45- Senegal				& Gambia, 1975	25. 4.1961, & Denunciation in 1. 3.1976
46- Spain	& Italy, 1974		& France, 1974		25. 2. 1971
47- Sri Lanka	& India & Maldives, 1976 & India,1976	& India, 1974			
48- Sudan			& Saudi Arabia, 1974		
49- Sweden	& Norway, 1968	& Finland, 1972 & Denmark,1984			1. 6. 1966
50- Tanzania		& Kenya, 1976			
51- Thailand		& India, 1978 & Indonesia, 1971 & Indonesia, 1975 & India & Indonesia, 1978	& Indonesia & Malaysia,1971 & Indonesia, 1971 & Malaysia, 1971		2. 7. 1968
52- Tunisia		& Italy, 1971			
53- Turkey	& U.S.S.R.,1978				
54- U.A.Emirates		& Iran, 1974			
55- UK.	& Denmark, 1966 & Netherlands, 1965 & Norway, 1965 & France,1983		& F.R.Germany, 1971 & Irelans,1988		22.11. 1960
56- Uruguay		& Argentina, 1973		& Brazil, 1972	
57- USA.	& Cook Islands, 1980 & New Zealand, 1980 & Mexico, 1978	& Cuba,1977	& Venezuela, 1978		12. 4. 1961
58- USSR.	& Finland, 1967 & Poland, 1969 & Turkey, 1978	& Norway, 1957 & Finland, 1965			22. 11. 1960
59- Venezuela		& Dominican R., 1979	& USA., 1978 & France, 1980 & The Netherlands, 1978.		13. 8. 1961
60- Yugoslavia		& Italy, 1968			28. 1. 1966

Annex IV: Judicial and Arbitral Cases & relavant Circumstances

The Case's Name / Relevant Circms-tances	Geophysical	Relevant	Circumstances		
	Geographical Configuration	The Presence of Islands	Natural Prolongation	Proportionality	Common Mineral Deposits
The 1969 North Sea Cases	*"... the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;"* One of the actual relevant circumstances was the concavity of the North Sea, and the special location of the concerned Coutries on that coast.		*Equal division of the overlapping natural prolongation areas; or the natural prolongation as a relevant circumstance.*	*A reasonable degree of proportionality* One of the factors was that the coasts of the Parties were comparable in length.	*The unity of any mineral or oil deposit.*
The Anglo-French Arbitration 1977-78		The Channel Islands: being on the wrong side of the median line; enclaved method. In the Atlantic, The Scillies (UK) were given half effect, and the Ushant (France) was given full effect.	Not applicable	*The absence of any disproportionality.* The Parties in the Channel Islands had "... almost equal coastlines ..."* Para 199.	
The Iceland/Jan Mayen Conciliation Iceland & Norway 1981			Not applicable		The Only possibility of the Presence hydrocarbons was in the Jan Mayen Ridge. This was solved by establishing a Common Zone.
The Tunisia/Libya Case 1982	The geographical configuration of the Tunisian-Libyan coasts, and the general direction of the said two coasts with special effect given to the radical change in the direction of the Tunisian coast.	Whereas Jerba Island was ignored, the Kerkennah Island was given half effect. Both islands belong to Tunisia.	Not applicable	A successful test of proportionality	
The Gulf of Main Case USA & Canada 1984	The geographical configuration of the Gulf as well as the general direction of the USA's and Canada's coasts within and beyond the configuration of the Gulf.	The Seal Island and its surrounding islets, which belong to Canada, were given half effect.	Not applicable	Proportionality was a factor among other factors that affected the drawing of the second sector.	
The Libya/Malta Case 1985	The macrogeographical configuration of the area, especially Malta as a relatively small feature in a semi-enclosed sea, and the disadvantaged position of Malta as being not part of the Italian territory.	Filfla islet (Malta) was ignored.	Not applicable	The "... great disparity between the lengths of the two coasts ...," was one of the factors for the shifting up of the provisional median line.	
The Guinea/Guinea Bissau Arbitration 1985	The concavity of the Guinean coast and the convexity of the Guinea Bissau's coast due to the presence of islands; beside the macrogeographical configuration and the general direction of the relevant coast.	The Alcatraz Island (Guinea) was given partial effect, whereas the Bijagos and Poiao Islands (Guinea Bissau) were ignored.	Not applicable	A successful test of proportionality	

The Case's Name / Relevant Circumstances	Legal Relevant Circumstances			Economic & Socio-economic Relevant Circumstances	Political Relevant Circumstances	
	Existing Agreemants	Historic &Traditional Rights	The Parties' Conduct		Security & Defence	Strategic Importance
The 1969 North Sea Cases	*There is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, ..."*					
The Anglo-French Arbitration 1977-78			Test of the conduct of the UK with regard to the Chailel Islands; it was in favour of UK		In connection with the Channel Islands the "... Court accepts the equitable considerations [inter alia, defence and security] invoked by the United Kingdom as carrying a certain weight; ..."* Para 197-198; and also the French dominant interests in the south-western areas of the Channel.	Beside the security and defence considerations invoked by the UK there was the navigational defence consideration; it can be included in the meaning of the said Paragraph 198; see also Para. 188.
The Iceland/Jan Mayen Conciliation Iceland & Norway 1981	Agreement of 1980 between Iceland and Norway recognized the 200-mile Icelandic EEZ; i.e., it "... granted Iceland considerable areas beyond the median line."			The Iceland's complete dependence on the exports of hydrocarbons; it was solved by establishing a Common Zone.		
The Tunisia/Libya Case 1982	The tacit modus vivendi perpendicular line to the general direction of the coast was considered by the Court a conduct of the Parties factor to justify the choice of the method of delimitation.* Para. 93-95.	The Court avoided any relevant discussion	The implicit acceptance of the line 26° by both Parties; it was the basis of the drawing of the first sector of the boundary line.	Rejection		
The Gulf of Main Case USA & Canada 1984	The method of delimitation, in the first sector, was affected by the agreed location of point A which was identified by the agreement between Canada and the USA. * Para 211.	Rejection	Rejection	*Such a circumstance must be "... likely to entail catastrophic repercussion for the livelyhood and economic well-being of the countries conderned."* Successful test of socio-economic circumstances.	*"Delimitation, whether of maritime boundary or of land boundary, is a political-legal operation, ..."* Para. 56. Successful test of security and defence circumstances.	
The Libya/Malta Case 1985			Rejection	Rejection	Successful test of security.	
The Guinea/Guinea Bissau Arbitration 1985	Agreement of 1886 as succeeded by the Parties from France and Portugal; this agreement was the basis for the drawing of the First Sector of the boundary line.			Rejection	Successful test of security.	