

WHOSE IS THE BED OF THE SEA? THE PROBLEM OF
CONTINENTAL SHELF DELIMITATION IN RELATION TO SMALL
ISLANDS: PART II

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IV. *Customary Principles Concerning Seabed Boundaries*

A. *The Principle of Alluvium and Increment*

Prima facie an island belongs to the state within whose territorial waters it lies, but the presumption may be rebutted on proof of an adverse root of title.¹⁷⁹ The natural appendage doctrine was first applied to uninhabited and permanently exposed rocks or reefs adjacent to a mainland coast and in some cases lying outside the belt of territorial waters as measured from the coast.¹⁸⁰

The term 'coasts' includes the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified, but it does not include all the shoals i.e. those continuations of the land perpetually covered with water. The rule of law on this subject is *terrae dominium ubi finitur armorum vis*.¹⁸¹

In the case of *The Anna, La Porte*,¹⁸² concerning the legality of a capture alleged to have been made at the south of the Mississippi within the neutral territory of the U.S., a question arose as to what was to be deemed the shore, since there were a number of little mud islands, composed of earth and trees drifted down by the river. These islands formed a kind of portico to the mainland. It was contended that these were not to be considered as any part of the American territory—that they were a sort of 'no man's land', not of a consistency firm enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It was argued that the line of territory was to be taken only from the Balize, which was a fort raised on the mainland by the former Spanish possessors. The judge, Lord Stowell, held that they were the natural appendages of the coast on which they bordered and from which, indeed, they were formed. Their elements derived immediately from the territories, and on the *principle of alluvium and increment*, on

which, the judge said, so much is to be found in the books of law, *quod vis fluminis de tuo praedio detraxerit, & vicino praedio attulerit, palam tuum remanet*,¹⁸³ even if it had been carried over to an adjoining territory. Whether the areas are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

In brief, Lord Stowell found that a mud islet formed by accretion which remained dry at high tide, was a natural appendage of the mainland. However, he did not mention the distance of the island from the mainland. Therefore one may observe that he did not regard distance as important where 'the principle of alluvium and increment' applies. Assuming this presumption is sound, it will follow that even the smallest islands are entitled to their own territorial sea.

In the *Bulama Island Arbitration* (Great Britain - Portugal), the Arbitrator based the award of the disputed island to Portugal on its possession of the mainland and thus of its natural appendage, because:

[I]slands in the vicinity of the mainland are regarded as its appendages . . . the ownership and occupation of the mainland includes the adjacent islands, even though no positive acts of ownership may have been exercised over them.¹⁸⁴

The principle of alluvium and increment was also applied in the *Secretary of State for India v. Sri Raja Chelikani Ramo Rao*,¹⁸⁵ where the Privy Council held that the ownership of the islands arising in the sea within the three-mile limit in the estuary or mouth of the Godaveri River resided in the British Crown, because geographically these islands had risen from the sea at a distance within the three-mile limit of the territorial sea and were thus formed from the seabed which belonged in property to the Crown.

On 15 November 1963, a volcanic island off the south coast of Iceland was erupting and rising to a height of 130 ft. and 1,500 ft. in length, a few miles southwest of the Vestmann Islands. It was claimed by Iceland and named Surtsey.¹⁸⁶

Islands thus forming outside territorial waters, but within close proximity to the territory of a state would be naturally connected with the coastal state.¹⁸⁷ If the coastal state is entitled to exclusive rights of exploitation over its continental shelf, it would seem logical that if that part of the submarine areas thrown up form an island, it would be naturally connected with the coastal state.

B. *The Principle that the Land Dominates the Sea*

The principle of the dominance of the land over the sea is taken with scarcely any alteration from the *Jus Gentium*, and is part of that heritage of Roman law

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handed down to the law of nations via Grotius and the writings of his followers.¹⁸⁸

Following this notion, water is held to be appurtenant to land, not land to water. In other words, land is the primary object of acquisition or alienation and water is not.¹⁸⁹ As water is naturally appertaining to land, so occupation of a piece of land includes occupation of the surrounding water as well, provided there are no other islands which are owned by other states.

In acquisition of territory, the question of islands much depends upon the facts, the size of the island and the nature of the occupation, but occupation of one part of the island is more easily assumed to determine the occupation of the whole.¹⁹⁰

In the *Minquiers and Ecrehos Case* the French Government's argument referred to 'the principle of land dominates sea'. It argued that: (a) the archipelago, taken as a whole, represented a dismemberment of the mainland, and (b) the state to which the principal islands belonged should also possess sovereignty over the islands whose territorial status is uncertain.¹⁹¹ Judge Levi Carneiro stated that:

Just as a state which has occupied the coast or an important part of an island is deemed to have occupied the island as a whole, the occupation of the *principal islands* of an archipelago *must also be deemed to include the occupation of islets and rocks, in the same archipelago*, which have not been actually occupied by another state?¹⁹²

But it must be questioned whether he was right. In considering the 'land dominates the sea' principle, should not the unoccupied islets and rocks be close to the mainland power rather than to the cross-channel power? It is regrettable that the Court failed to take the opportunity to clear this matter up. In the case of small islands, is it necessary to consider whether or not the 'land dominates the sea' principle applies particularly and whether this should be applicable to the delimitation of a continental shelf boundary?

In the *Anglo-Norwegian Fisheries Case*, the Court observed 'the close dependence of the territorial sea upon the land domain', and maintained that 'it is the land which confers upon the coastal state a right to the waters off its coasts'.¹⁹³ Moreover, in the *Anglo-Norwegian Fisheries Jurisdiction Case*, the Court recognised the preferential rights of the coastal state,¹⁹⁴ at least over fisheries in waters adjacent to its coasts.

In the *North Sea Continental Shelf Cases* and the *Aegean Sea Continental Shelf Case*, the Court explained that the continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea'; and that it is solely by virtue of the coastal state's sovereignty over the land that rights of exploration and ex-

ploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal state.¹⁹⁵

In the *Case Concerning the Continental Shelf* (Tunisia-Libyan Arab Jamahiriya), the Court said that:

The geographic correlation between coast and submerged areas off the coast is the basis of the coastal state's legal title . . . As has been explained in connection with the concept of natural prolongation, the coast of the territory of the state is the decisive factor for title to submarine areas adjacent to it.¹⁹⁶

In the light of the foregoing considerations, the principle that the land dominates the sea appears to be relevant to the question of delimitation of a continental shelf boundary and should be given special consideration. If this principle is thus so applied, there can be little doubt that the mainland power should overrule the cross-channel power. But there is a conflict with other principles such as that islands can have their own territorial sea and continental shelf and the problem of selecting between or accommodating rival principles remains.

C. *The Natural Prolongation Rule*

As has already been discussed in the *Grisbadarna Arbitration* concerning the maritime frontier between Norway and Sweden, the Permanent Court of Arbitration recognised that 'the maritime territory is an essential appurtenance of land territory'.¹⁹⁷

In the *Isle of Pines Dispute* between Cuba and the United States in 1922,¹⁹⁸ the disputed isle was geologically a natural appurtenance off the coast, connected by islets and shoals which had been for centuries a part of Cuba. Therefore, one writer was convinced that the Cuban claim was the sounder under international law,¹⁹⁹ over that of the United States and that the continued occupation of the Isle of Pines by Cuba strengthens its claim.

The origin of the notion that the concept of natural prolongation is relevant for the delimitation of the lateral boundaries of the continental shelf is to be found in the judgment of the ICJ in the *North Sea Continental Shelf Cases*.²⁰⁰ The *North Sea Continental Shelf Cases*, aspects of which have already been discussed, related to the competing claims of the Federal Republic of Germany, Denmark, and the Netherlands to certain areas of continental shelf in the North Sea. The ICJ was asked by the three countries to declare the principles on which the continental shelf boundaries between them should be determined. The Court found, by eleven votes

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to six, that the use of the equidistance method of delimitation was not obligatory as between the parties; that the delimitation of the contested areas was to be affected by agreement, leaving to each party as much as possible of those parts of the continental shelf that constituted a natural prolongation of a state's land territory, and that there should be no encroachment upon the natural prolongation of another state's land territory. The Court emphasised natural prolongation as the most fundamental of all the rules of law relating to the continental shelf. Its decision, enshrined in Article 2 of the 1958 Continental Shelf Convention, is that the rights of the coastal state, with respect to the area of the 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 that state's sovereignty over the land, and as an extension of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.²⁰¹

The concept of the legal regime of the continental shelf is that it is 'an extension of something already possessed'. Furthermore:

What confers the *ipso jure* title which international law attributes to the coastal state in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has domination - in the sense that, although covered by water, they are a prolongation or continuation of that territory, an extension of it under the sea.²⁰²

A state's legal continental shelf is a seaward prolongation of its land territory, that is, the continental shelf appertains *ipso jure* to the coastal state in so far as it constitutes a natural prolongation of a state's land territory. It was indicated that the court's use of the description of the continental shelf in the Truman Proclamation as being 'an extension of the land mass and thus naturally appurtenant to it'²⁰³ stretched the language of the proclamation beyond all reason.

In 1971 the concept of natural prolongation, as Professor Brown rightly observed, was irrelevant to the delimitation of lateral boundaries of the continental shelf under customary international law because Article 6(2) of the 1958 Continental Shelf Convention provides specific rules for the delimitation of lateral boundaries and nowhere mentions any such concept as natural prolongation.²⁰⁴

In the *Aegean Sea Continental Shelf Case*, the same court stated that:

a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal state's rights over the continental shelf are both appurtenant to and directly derived from the state's sovereignty over the territory abutting on that continental

shelf. This emerges clearly from the emphasis placed by the Court in the *North Sea Continental Shelf Cases* on 'natural prolongation' of the land as a criterion for determining the extent of a coastal state's entitlement to a continental shelf as against other states abutting on the same continental shelf . . . In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal state. It follows that the territorial regime . . . of a coastal state comprises, *ipso jure*, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law.²⁰⁵

In the *Anglo-French Continental Shelf Arbitration*, the Court of Arbitration recognised that

The continental shelf of the Channel Islands and of the mainlands of France and of the United Kingdom, in law, appertains to each of them as being the natural prolongation of its land territory under the sea. The physical continuity of the continental shelf of the English Channel means that geographically it may be said to be a natural prolongation of each one of the territories which about upon it.²⁰⁶

The UK contested the French Government's thesis that the whole Channel Islands region forms part of the natural prolongation of the land mass of France. That thesis, according to the UK, confused the geological with the juridical concept of the continental shelf.

In its decision, the Court of Arbitration declared

it is clear both from the insertion of the 'special circumstances' provision in Article 6 [of the Continental Shelf Convention] and from the emphasis on 'equitable principles' in customary law that the force of the cardinal principle of 'natural prolongation of territory' is not absolute, it may be subject to qualification in particular situations.²⁰⁷

Thus the principle of natural prolongation is not of a prolongation under the sea of a continent or geographical land mass, but of the land territory of a particular state. This principle, which may be said to have emerged from the Court, has had considerable impact upon the development of international law.

It is important to note that the principle of natural prolongation may not properly be regarded as relevant to the delimitation of boundaries of the continental shelf between adjacent or opposite states except possibly in a situation where a major geological discontinuity runs laterally seaward from the vicinity of the coastal terminus of the land territory of adjacent states or lies between the coasts of opposite states. For example, in the *Case Concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya)*, the ICJ held that

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the area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parties, so that in the present case, no criterion for delimitation of shelf area can be derived from the principle of natural prolongation as such.²⁰⁸

The Court thought that the single continental shelf area was the natural prolongation of both states; i.e. if both had had separate natural prolongations, the Court might have regarded natural prolongation as more relevant and would have had to take it into account for the delimitation. But problems can still arise in certain situations. It may be asked whether a small island which has emerged from a continuous continental shelf of a coastal state could be occupied by another state; or where a small island belonging to one state is situated on the same continental shelf near the coast of another state, whether the state which owns the small island could claim the continental shelf appurtenant to that small island.

As far as occupation is concerned, the area of occupation depends on effective control, whilst the question of the effectiveness and the range of such control would appear to depend largely on the special circumstances of each particular case.²⁰⁹

As has already been mentioned, submarine areas differ by nature from the land territory. It is now clear, however, in this context, what 'effective occupation' really means. Does it mean a formal proclamation or physical exploitation of the seabed? Does 'a formal proclamation' constitute 'an act of effective occupation in the light of the *Island of Palmas Arbitration*, the *Clipperton Island Arbitration* and the *Eastern Greenland Case*? 'A proclamation', as H. Lauterpacht rightly asserted, 'is a means by which a title, claimed or acquired, is announced. It is not a *source* of a title nor a means of acquiring it'.²¹⁰ Apart from the fictitious nature of occupation through proclamation, it is doubtful whether submarine areas can actually display state authority. If 'notional occupation' were sufficient, there would be nothing to prevent the distant and industrialised countries from occupying submarine areas adjacent to other states by proclaiming their annexation.²¹¹ Further, the most serious objection against the theory of occupation is its total disregard for the rights and interests of coastal states. Rights would be vested in the first occupier, no matter where he came from and no matter what his connection with the region was. Such a situation would be intolerable especially for the developing countries which through inadequate technology and finance are unable to develop immediately on their own. If such trends were left unchecked or if no better alternatives were found, it could lead to a new era of territorial imperialism analogous to the nineteenth century's 'Grab for Africa'.²¹²

Article 2(3) of the 1958 *Continental Shelf Convention* provides that the rights

of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation. In this context, there appears to be no reason why Article 2(3) of the convention should not also be applicable to small islands. Thus, in the *Aegean Sea Continental Shelf Case*, a statement was made by the Turkish Foreign Minister to Radio Ankara on 24 July 1976 to the effect that seismic research being carried out by the Turkish vessel, MTA Sismik I, 'cannot establish rights in the areas'. The Turkish Government also declared that

Exploitation by Turkey of the kind . . . cannot be regarded as involving any prejudice to the existence of any possible rights of Greece over continental shelf areas in the Aegean Sea. The sovereign rights over the continental shelf (including the exclusive right to exploration) that may exist are not taken away or diminished by exploration.²¹³

The question remained to be decided whether Turkey's activity in seismic exploration in the Aegean Sea might be considered an infringement of Greece's sovereign rights. The Court held that:

in the present instance, the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means.²¹⁴

Thus, if any damage were done as a consequence of Turkey's exploration, Greece would then be entitled to claim compensation.

To conclude, it is submitted that where there is a natural prolongation of states adjacent or opposite to each other with a common continental shelf, the delimitation of this common continental shelf should be settled by agreement, giving due weight to equitable principles.

D. The Equitable Principles

The role of equitable principles in international law is well-established.²¹⁵ In the first place, concepts of equity and consistency appear as a natural part of legal, and therefore of judicial, reasoning. It was in this form that Judge Hudson, in the *Diversion of Water from the Meuse Case*, applied the principle that equality is equity and stated as a corollary that a state seeking the interpretation of a treaty must itself have completely fulfilled the obligations of that treaty.²¹⁶ Secondly, the power of an international judge to apply 'equity' instead of 'law' under certain conditions has already been sanctioned by international treaties.²¹⁷ Thirdly, in contemporary in-

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ternational law, the states having recourse to international arbitration are free to choose by *compromis* which principle in particular would apply.²¹⁸ Fourthly, in the delimitation of submarine boundaries between the continental shelves of adjacent or opposite states, the Truman Proclamation stated that such boundaries 'shall be determined by the United States and the state concerned in accordance with equitable principles'.²¹⁹ Fifthly, the international tribunals have accorded equitable principles a leading role in the delimitation of submarine boundaries between opposite or adjacent states abutting upon the same submarine areas.

The judgment in the *North Sea Continental Shelf Cases*,²²⁰ which was based on equity as incorporated into rules of customary law, is in many respects, however, inequitable: it gives a large share of the continental shelf to states with a long coastline and does nothing for states with a short coastline or no coastline, even though the latter may have a lower standard of living and fewer alternative sources of fuel.²²¹ In certain geographical circumstances, the Court considered that the application of the equidistance method would unquestionably lead to inequity.²²² In the Court's view,

So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.²²³

The Court emphasised that equity does not necessarily imply equality,²²⁴ and explained that there is no legal limit to the considerations which states may take into account to ensure the application of equitable principles. The Court further identified equity with such factors as the general configuration of the coasts, the physical and geological structure and natural resources of the continental shelf and a reasonable degree of proportionality between a continental shelf appertaining to the coastal state and the length of its coasts.²²⁵

The principles laid down in the *North Sea Continental Shelf Cases*, as applied and elaborated upon by the Court of Arbitration in the *Anglo-French Continental Shelf Arbitration*,²²⁶ lead to a striking result. In the latter case where both disputants were parties to the Continental Shelf Convention, the Court of Arbitration found that in practice there was little difference between the 'equitable principles' applied in the former cases and the effect of taking into consideration 'special circumstances' under the Convention,²²⁷ where these existed, as they did in the present case. It decided that the equitable principles should be used for the purpose of mitigating the inequity that would be produced if a line of strict equidistance was used and the parties were on the same shelf - as in the case in question. The Court, however, did not consider the criterion adopted in the *North Sea Continental Shelf*

*Cases of achieving a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines.*²²⁸ The Court, on the one hand, considered that the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation was a reflection of the geographical and other relevant circumstances in each particular case. On the other hand, the Court was of the view that certain equitable considerations regarding the size, population and economy of the Channel Islands militated against complete acceptance of the French position. Consequently, the Court adopted an intermediate solution that effects a more appropriate and a more equitable balance between the respective claims and interests of the parties.²²⁹

The choice of the method or methods of delimitation in any given case, whether under the 1958 Continental Shelf Convention or under customary law, has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must achieve 'an equitable solution'.²³⁰ There is no longer, on the basis of this judgment, even a presumption in favour of equidistance for delimitation in the case of adjacent areas of shelf; the actual delimitation produced in this case on the basis of 'equitable principles' suggests that in this context such principles amount to no more than a bundle of highly impressionistic ideas about the 'distorting' effect of islands. Employed in this way 'equitable principles' become merely faint indications of the reasoning-or of the unreasoned premises-on the basis of which judicial discretion has been exercised and may be exercised in other cases. The point is a simple one: with little or no clear content, a direction to apply equitable principles is a conferment of a general discretionary power upon the decision-making body.²³¹ It appears that none of the Arabian Gulf States is a party to the 1958 Geneva Convention on the Continental Shelf. Despite the difficulties involved in the problem of continental shelf delimitation in the Arabian Gulf, the submarine boundary agreements so far reached in that area seem to have achieved their aim of a 'just' and 'equitable' solution.²³²

It is interesting to note that a corollary of the equitable principles, as applied in treaties and international tribunals, is 'the equitable apportionment of benefits'.²³³ When continental shelves overlapped, the legitimate interest of the states concerned must be weighed against each other in accordance with the circumstances of each case.²³⁴ Moreover, in the draft articles adopted by the ILC on Succession of States in Respect of Matters Other Than Treaties, several articles refer to 'equitable proportion' and also to 'equitable compensation'.²³⁵

Under Article 83(1) of the 1982 Convention on the Law of the Sea, the delimitation of the continental shelf between states with opposite or adjacent coasts

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shall be effected 'by agreement' between the parties on the basis of international law, as referred to in Article 38 of the Statute of the ICJ, in order to achieve 'an equitable solution'.²³⁶ In the *Case Concerning the Continental Shelf (Tunisia-Libya)*, the ICJ thus emphasised that the principles and rules applicable to the delimitation of continental shelf areas were those which were appropriate to bring about 'an equitable result'.²³⁷

When this provision is compared to Article 6 of the Continental Shelf Convention, it seems that the emphasis is displaced from equidistance to equity; the main purpose of the negotiations or of the peaceful settlement must be to reach an equitable solution, the line of equidistance being simply one method available for achieving that result when its application is appropriate; that is, when it leads to an equitable delimitation. Thus, while the method involving the median or equidistance line is not ignored, its application is subject to the condition that it produces results that are in accordance with equitable principles. The reference to 'all relevant circumstances' instead of 'special circumstances' makes the departure from the median line easier to justify.

It seems difficult to deny that Article 83 of the 1982 Convention on the Law of the Sea emphasises 'an equitable solution' which does not as such resolve delimitation problems. The draft seems to be underestimating the value of the equidistance line which remains, as state practice demonstrates, a very important rule.²³⁸ The Article does not seem to provide any satisfactory solutions regarding the delimitation of the continental shelf boundary.

The material concerning equitable principles in contemporary international law seems to justify two general observations. First, the role of equitable principles is limited to particular contexts and to the occasional necessities of legal and judicial reasoning. Secondly, the most significant role of 'equitable principles' is to confer a wider discretion on tribunals and this is also the case in specific contexts. Whatever the particular significance of equity in the law of nations, as a general reservoir of principles and solutions for sophisticated problems, it at least provides a basis for compromise.

V. *Legal Aspects of Troughs*²³⁹

One of the problems in the delimitation of the submarine boundary of the continental shelf is that of trenches,²⁴⁰ troughs or depressions in the seabed. The issue in any particular case is whether the existence of such a feature constitutes a geographical discontinuity sufficient to form a limit to the continental shelf adjacent

to it. The existence of a wide rift, trough or depression causing a break in the shelf - a not uncommon phenomenon - could equally give rise to the argument that the shelf beyond the break is no longer adjacent. Such material as bears on the subject only serves to emphasise that the effect of a trough is dependent entirely upon its own characteristics and on the attitude which the parties adopt to it.

A. *The Norwegian Trough*²⁴¹

The classic example concerning this problem is the Norwegian Trough, where depths substantially exceeding 100 fathoms or 200 metres are generally cited as marking the edge of the shelf. However, in geological terms, the rim of the Norwegian Trough is not a true shelf edge, for the Trough itself is rather a deep gouge in the wide North Sea Shelf caused largely by glacial action of the kind so conspicuous on the Norwegian mainland. In the words of a scientific study prepared for the 1958 UNCLOS I, under the auspices of UNESCO, the depressions in the Norwegian shelf should not be dissociated therefrom because they form an integral part of the shelf from the morphological point of view. The study suggests that the 'Norwegian Trough forms part of the North Sea Shelf' because of its enclosure by a rill, about 150 fathoms deep, which separates its northern end from the oceanic depths of the North Atlantic.²⁴²

Norway, however, does not regard this trough as the natural termination of the Norwegian Shelf, and its reluctance to become a party to the 1958 Convention is said to be due to its fear that the 200 metre definitions, despite the exploitability criterion, would be against its interpretation. Norway's position is that the trough is only a depression in the shelf properly appertaining to Norway, and that Norway is entitled to this full expanse of shelf, under generally accepted principles of international law irrespective of the Convention, as far out as the median lines between Norway and the opposite states. As noted earlier, there is scientific support for this view, and it was also affirmed by Norway at the UNCLOS I without exception being taken by the other states. At the Conference, Miss Gutteridge (UK) said:

In cases where - as off the West coast of Norway - there was a deep channel immediately off the coast, the provisions would apply in the same way as to a continental shelf in the geological sense of the term.²⁴³

Stabell (Norway) thanked Miss Gutteridge for this statement and confirmed the view that the Norwegian Trough was a part of the continental shelf, and did not exclude Norway from the seabed beyond it.²⁴⁴

It may be of interest to compare this statement with the criterion adopted

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by the PCIJ in the *Eastern Greenland* Case. The Court held: 'a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs'.²⁴⁵ Judge Anzilotti, in his dissenting opinion, thought it must be recognised that declarations made by the Minister of Foreign Affairs of a state, are binding upon the state.²⁴⁶ Accordingly, a delegate of the British Government, acting within the scope of her departmental affairs, is in a position to bind her country by a declaration or statement made to the representative of a foreign state.²⁴⁷

On a strict geological interpretation, the UK could lawfully claim jurisdiction and control up to the outer edge of the Trough, while the corresponding Norwegian rights would be confined to an extremely narrow coastal strip of the shelf which lies mostly under its territorial waters. However, when technology reached a state at which the lowest point in the Trough could be exploited, Norway, too, would claim at least some of the area between the Trough and the UK. But no country has so far appeared to have taken up this point nor to have challenged Norway's right to 'jump over' the Trough and take in the area up to the median line with her neighbours. The UK appears to agree with the Norwegian view that the Trough is not deep enough to preclude Norway from operating on the subsoil of the shallower waters beyond it. Thus, the UK and Norway agreed in 1965 upon a continental shelf boundary line which is not materially influenced by the Norwegian Trough.²⁴⁸ Since the course of negotiations remains confidential, it is impossible to deduce from the situation whether the parties were agreed that the Trough was too narrow and too shallow to amount to a discontinuity, whether it was too short in relation to the overall area under division to amount to a relevant feature, or whether-notwithstanding possibly negative answers to those questions-the overall political relationship between the parties and the date of the negotiations was such that the general balance of considerations dictated a solution without regard to the existence of the Trough.²⁴⁹ There is no question, however, that the action of the UK and Norway is based on terms found in Articles 1 and 6 of the Continental Shelf Convention without regard to the principles of adjacency and depth of water, and, possibly without much consideration of the geographic features of the seabed in the case of the Norwegian Trough, which is not adjacent to Norway. It may well have been because of the Norwegian Trough that Norway felt unable to ratify the Continental Shelf Convention.

The 1963-1964 debates in both Houses of Parliament preceding the passage of the Act are quite illuminating. On the Second Reading in the House of Lords, the

Minister of State to the Home Office, Lord Derwent, responded to Lord Shackleton's question about the status of the Norwegian Trough saying that it was agreed during the Geneva negotiations and in the Convention that not only the shelf proper but 'all adjacent *waters* [sic] to countries should count as part of the continental shelf' and that this dealt with the deep channel off the Norwegian coast.²⁵⁰ Effect was given to this view in the Agreement between the UK and Norway relating to the delimitation of the continental shelf on 10 March 1965. The principle upon which the delimitation is based is stated in Article 1 to be the application of a line of equidistance 'with certain minor divergencies for administrative convenience'. The parties have entirely disregarded for the purposes of delimitation the existence of the so-called Norwegian Deep, a trench off the Norwegian coast whose depth considerably exceeds 200 metres.²⁵¹ They approach the problem - that of a single geological petroleum structure or petroleum field which extends across a dividing line - in the following terms:

If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned.²⁵²

Article 4 of the UK-Norwegian Agreement envisages the problem of the exploitation of a single geological petroleum structure or petroleum field extending across the dividing line on the continental shelf under the North Sea but provides only for an agreement to 'seek to reach agreement'. The wording of the provision is similar to that employed in relevant Articles of the UK-Danish Delimitation Agreement²⁵³ and the UK-FRG Agreement,²⁵⁴ except that neither instrument makes any mention of the part to be played by licensees.

The 1965 UK-Netherlands Agreement entitled 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands relating to the Exploitation of Single Geological Structures extending across the Dividing line on the Continental Shelf of the North Sea'²⁵⁵ to be reached. The operative parts of this Agreement warrant quotation in full:

If any single geological mineral oil or natural gas structure or field extends across the

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dividing line and the part of such structure or field which is situated on the side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties will seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the costs and proceeds relating thereto shall be apportioned, after having invited the licensees concerned, if any, to submit agreed proposals to this effect.²⁵⁶

Where a structure or field referred to in Article of this Agreement is such that failure to reach agreement between the Contracting Parties would prevent maximum ultimate recovery of the deposit or lead to unnecessary competitive drilling, then any question upon which the Contracting Parties are unable to agree concerning the manner in which the structure or field shall be exploited or concerning the manner in which the costs and proceeds relating thereto shall be apportioned shall, at the request of either Contracting Party, be referred to a single Arbitrator to be jointly appointed by the Contracting Parties. The decision of the Arbitrator shall be binding upon the Contracting Parties.²⁵⁷

There is, however, another agreement signed on the same day (6 October 1965) between the UK and the Netherlands which relates to the delimitation of the continental shelf under the North Sea. The preamble recites that both Governments desire 'to establish the boundary between the respective parts of the Continental Shelf under the North Sea on the basis of a line, every point of which is equidistant from the nearest points of the baselines from which the territorial sea of each country is at present measured.'²⁵⁸

It could be argued that the UK's disregard of the Trough was not one governed by any binding principle of international law. From the geological point of view it might have been argued that the Trough itself contained a divide in the sense that the shore bank was part of the coastal mountains, while the seaward bank was part of the shelf. An argument of this kind should have had at least some partial effect and should have altered the boundary between Norway and the UK. However, since this argument was neglected in that case, it remains, at least in the context of Article 6 of the 1958 Continental Shelf Convention, a precedent for the negative effect of troughs on delimitation. Similarly, in 1965, an Agreement was made dividing the Continental Shelf between Denmark and Norway, in which the Norwegian Trough was also ignored in the Skagerrak as a determinant factor.²⁵⁹

B. *The Impact of International Adjudication*

It may be significant that there have been two international judicial references to the Norwegian Trough - both of them *obiter dicta*.

The first appears in the *North Sea Continental Shelf Cases* where the Court

was considering the notions of adjacency and natural prolongation.

The waters of the North Sea are shallow, and the whole seabed consists of continental shelf at a depth of less than 200 metres, except for the formation known as the Norwegian Trough, a belt of water 200-650 metres deep, fringing the southern and south-western coasts of Norway to a width averaging about 80-100 kilometres. Much the greater part of this continental shelf has already been the subject of delimitation by a series of agreements concluded between the United Kingdom (which lies along the whole western side of it) and certain of the states on the eastern side, namely Norway, Denmark and the Netherlands. These three delimitations were carried out by the drawing of what are known as 'median lines' which may be described as boundaries drawn between the continental shelf areas of 'opposite' states, dividing the intervening spaces equally between them.²⁶⁰

The fluidity of all these notions is well illustrated by the case of the Norwegian Trough. Without attempting to pronounce on the status of that feature, the Court notes that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation. They are nevertheless . . . to appertain to Norway up to the median lines [which] are themselves drawn on equidistance principles; but it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all.²⁶¹

The Court did not formally address the question of the effect of the Norwegian Trough upon delimitation of the North Sea continental shelf. Neither Norway nor the UK was a party to the case, and in any event the interested states had reached bilateral agreement as to the areas in question.

The second reference to the Norwegian Trough appears in the *Anglo-French Continental Shelf Arbitration*.²⁶² The UK argued, as 'an alternative and subsidiary Submission' derived from the ICJ's 'natural prolongation' criterion and its reference to the Norwegian Trough in the *North Sea Continental Shelf Cases*, that, as the Court did not find the median line to be the appropriate boundary line, then it should decide that the boundary ran 'along the axis of the Hurd Deep and the Hurd Deep Fault Zone', if it also found that there were 'a major and persistent structural discontinuity of the seabed and subsoil' that 'interrupted the essential geological continuity of the continental shelf'.²⁶³ The Hurd Deep (Fosse Centrale) is described by the Court as 'a distinct fault' in the geomorphology of the Channel. It is situated a few nautical miles to the north and north-west of the Channel Islands, extending in a south-westerly direction for a distance of some 80 nautical miles, with a width of between one and three nautical miles and a depth of over 100 metres.²⁶⁴ The Hurd Deep Fault Zone consists of a series of faults stretching into the Atlantic area

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from west of the outer limits of the land of the two states, in a general south-westerly direction extending almost as far as the 1,000 metre isobath.²⁶⁵ The geological feature of the Hurd Deep and Hurd Deep Fault Zone was, therefore, argued to be an interruption in the continental shelf in the nature of a trench or trough.

In the course of describing the area in question, the Court, referring to the Hurd Deep Fault Zone, said:

The Parties are in accord as to the existence of the faults in the geological structure of this region, and as to their general south-westerly direction. They are also at one in considering that the faults do not detract from the essential geological continuity of the continental shelf.²⁶⁶

The Court went on to say that France considered the Hurd Deep Fault Zone to constitute, at most, minor and disconnected rifts in the structure of the shelf and that France was unable to see in them any coherent or continuous fault zone. The UK on the contrary considered the faults to establish the existence of a major and persistent rift in the structure of the shelf constituting a prolongation of the Hurd Deep into the Atlantic region. The Court, however, did not consider the Hurd Deep Fault Zone to be a geographical feature capable of exercising a material influence on the determination of the boundary either in the Atlantic region or in the English Channel. Therefore, the Court did not find it necessary to resolve the differences between the Parties concerning the character and the significance of the geological faults of the continental shelf.²⁶⁷ But it nevertheless shared the view that the continental shelf throughout the disputed area was characterised by its essential geological continuity. After examining the significance for the delimitation of the geological feature known as the Hurd Deep and Hurd Deep Fault Zone, the Court concluded that these geological faults, 'even if they are 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.'²⁶⁸

The impact of a trench, trough or depression upon the course of delimitation of the continental shelf boundary has never been finally settled, and there are few examples of state practice where a trench, trough or depression has been allowed to influence the delimitation. The Hurd Deep and Hurd Deep Fault Zone were regarded by the Court as 'minor faults' in comparison with the 'deep' Norwegian Trough.²⁶⁹ Bearing in mind the essential continuity of the continental shelf in this case, the Court observed that there did not seem to be any legal ground for discarding the

equidistance or any other method of delimiting the boundary in favour simply of such a feature as the Hurd Deep-Hurd Deep Fault Zone. Therefore, it was not persuaded of the pertinence of such a feature as a significant factor in determining the method of delimitation in this shelf area. But, far more significantly, the Court suggested that, if the equidistance line were to be departed from, it would have to be due to some *geographical* feature amounting to 'special circumstances'.²⁷⁰ It remains an open question whether, on the same shelf, geological or geomorphological features can constitute such a break in the continuity of the shelf as to form a 'natural' boundary and, if so, what manner of features will bring about this result. One view is that the Court is saying that a trench, trough or deep may provide a boundary where it *either* constitutes a significant break in the continuity of the shelf so as to produce, in effect, different shelves on either side; *or* where there are quite extraneous 'special circumstances', probably geographical, which justify in equity some boundary other than the median line, and the feature in question. It is, nevertheless, difficult to fit the Norwegian Trough into either of these categories, and the Court's treatment of that feature is as obscure as that of the ICJ, so the question must remain an open one.²⁷¹

In the light of the foregoing discussion, it is evident that the Court did not reject the material influence of the trough as relevant to the delimitation of the continental shelf boundary, rather it has afforded two ways in which a boundary based on a trough or depression may be supported. First, where the trough itself is of such a nature as to constitute a rift in the geology of the shelf, thereby signifying the end of the natural prolongation of each state, it may be the appropriate boundary. The rupture must presumably be one that signifies the end of the shelf appertaining to one state and the beginning of the shelf of the other. Secondly, in cases where there is no interruption of the essential geological continuity of the continental shelf, a boundary following a trough rather than an equidistance or median line may be appropriate in order to produce an equitable delimitation, but minor faults in the geological structure of the shelf do not necessarily create inequity.

In conclusion, it must be observed that neither of these cases sheds much light upon the attitude to be adopted towards troughs in the future. Nonetheless, it may be possible to extract from both cases support for the view that there is no rule of international law which prescribes absolutely that even a trough of a certain depth and width amounting to a geological discontinuity must of necessity be treated as marking the outer edge of the continental shelf or even as creating a legally effective discontinuity in the shelf in question.

VI. *State Practice*

Undoubtedly state practice is an important source of and provides evidence of international law. Despite the absence of a general rule of international law concerning the effect of small islands on the demarcation of seabed boundaries, state practice indicates the various factors that are usually acknowledged as being of great importance. As has been mentioned above, there are three main attitudes which respectively advocate either full or partial effect, or no effect at all, for islands or islets on the determination of the continental shelf boundaries. In most continental shelf boundary agreements, the line of equidistance has been adopted between the coasts of mainlands. However, owing to diplomatic negotiations, certain islands have been given full effect, or partial effect or no effect at all.

Having surveyed some thirteen instances of contemporary state practice, Ely pointed out that small islands, which would create a distorting effect on a boundary, have been ignored in these cases. He went on further to suggest that in those cases in which islets are denied recognition as basepoints for the calculation of a median or equidistance line for the demarcation of seabed boundaries because of their small size and distance from their owner's major territories, their 'special circumstances' can be met by recognizing that another state cannot extend its continental shelf rights into the seabed and subsoil underlying the waters of the islet's contiguous zone, and that only the state owning that islet can explore and exploit the seabed resources which are within its contiguous zone. The result of this reasoning is that an islet which is denied effect as a basepoint for the calculation of a median line as against an opposite coast, or the calculation of an equidistance line between adjacent states on the same coast, for demarcation of continental shelf boundaries, is, nevertheless, to be accorded continental shelf rights in an area of the seabed and subsoil co-extensive with its twelve mile contiguous zone.²⁷²

After careful study of the geographical setting of the Persian Gulf, Young observed that in the construction of median lines along the axis of the Gulf, small outlying islands have generally been disregarded, with the result that the lines tend to reflect a 'true' median line between the opposite mainlands.²⁷³ In the Gulf region, Iran formerly maintained that no effect should be given to islands in the Gulf. The Iranian proposal in relation to the continental shelf of islands, submitted to the UNCLOS I, read that:

Where an island or islands exist in a region which constitutes a continuous continental shelf, the boundary shall be the median line and shall be measured from the low-water mark along the coasts of the states concerned. Provided, however, that where special

circumstances so warrant, the median line shall be measured from the high-water mark along the coastline of such states.²⁷⁴

It is noteworthy that the Iranian proposal was substantially the same as the Italian amendment,²⁷⁵ except that the Iranian amendment recommended the reference, in special circumstances, to the high-water mark. Iran explained that:

The question that arose, however, was how to trace the median line in relation to islands. It was clear that, if they were to be taken into account, serious complications would arise and the benefit of having adopted the median rule would be lost by the difficulty of applying it. It was because such difficulties were always encountered that his delegation believed that the most convenient and most equitable solution was . . . not to permit islands situated much further out than the territorial sea to have any influence on the boundary.²⁷⁶

The Iranian proposal was rejected. Since 1958, Iran has abandoned its 'no effect' argument.²⁷⁷ However, in the Iran-Saudi Arabia Agreement of 1968, the Iranian island of Kharg was recognised as having a partial effect on the continental shelf delimitation.²⁷⁸

Moreover, judging from the state practice in the treatment of islands in continental shelf treaties, out of over twenty bilateral agreements there were only five involving regard or disregard of islands. Reviewing these treaties, Dr. Park stated that islands were treated primarily on the basis of their size and location and any inequity arising from strict adherence to the equidistance principle. Small islands, especially those situated near coastlines, should be disregarded as basepoints for measurement, but those situated near or at the median points should be given due weight in the delimitation of the territorial sea only, thereby displacing the median line slightly in favour of the state that owns them.²⁷⁹

Perhaps it is instructive to notice that the Iranian-Saudi Arabian treatment of the islands of Farsi and Arabi illustrated that a small island may be used as a basepoint for the measurement of the territorial sea. In the 1968 continental shelf boundary agreement between Saudi Arabia and Iran, the Iranian island of Kharg was given a partial effect on the continental shelf delimitation.²⁸⁰

The practice of Saudi Arabia and Iran was further supported in the *Anglo-French Continental Shelf Arbitration*. The presence of a number of islands was among the difficulties hindering attempts to delimit the continental shelf between the two states. In delimiting the boundaries, the Court of Arbitration said:

A number of examples are to be found in state practice of delimitations in which only

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partial effect has been given to offshore islands situated outside the territorial sea of the mainland. The method . . . employed was to give half, instead of full, effect to the offshore island in delimiting the equidistance line. The method of giving half effect consists in delimiting the line equidistant between the two coasts, first, without the use of the offshore island as a base-point and secondly, with its use as a base-point; a boundary giving half-effect to the island is then the line drawn mid-way between those two equidistance lines.²⁸¹

In considering the role of the Scilly Isles, the Court rendered the Scilly Isles as having a half effect on the submarine boundary line.

Would it be justifiable for small islands or even rocks in the middle of the ocean, for example, Rockall, the Azores and the Galapagos, to attract a disproportionately large part of the submarine areas when they are tiny, in comparison to the adjacent mainland? In the *Anglo-French Continental Shelf Arbitration*, the Court of Arbitration held that the half-effect method was an appropriate and practical method of abating the disproportion and inequity which otherwise resulted from giving full effect to the Scilly Isles as a base-point for determining the submarine boundary. The distance that the Scilly Isles extend the coastline of the mainland of the UK westwards onto the Atlantic continental shelf is slightly more than twice the distance that Ushant extends westwards the coastline of the French mainland. The Court, without attributing any special force to this ratio of the difference in the distance of the Scillies and Ushant from their respective mainlands, as a criterion in delimitation, found in it an indication of the suitability of the half-effect method as a means of arriving at an equitable delimitation of the boundary.²⁸²

In the *Case concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya)*, the Court recalled that a number of examples are to be found in state practice of delimitations in which only partial effect has been given to islands situated close to the coast; the method has varied in response to the varying geographical and other circumstances of each case. One possible technique for this purpose, in the context of a geometrical method of delimitation, is that of the 'half-effect' or 'half-angle'. The Court said:

Briefly, the technique involves drawing two delimitation lines, one giving to the island the full effect attributed to it by the delimitation method in use, and the other disregarding the island totally, as though it did not exist. The delimitation line actually adopted is then drawn between the first two lines, either in such a way as to divide equally the area between them, or as bisector of the angle which they make with each other, or possibly by treating the island as displaced toward the mainland by half its actual distance therefrom. Taking into account the position of the KerKennah Islands,

and the low-tide elevations around them, the Court considers that it should go so far as to attribute to the islands a 'half-effect' of a similar kind.²⁸³

It is therefore submitted that one of the best solutions to achieving an equitable result would be in accordance with the principle of proportionality, and the partial-effect method would be highly recommended as an equitable method of achieving this.

As a question of *lex ferenda* the evidence thus produced by various state practices shows that many small islands belonging to one state are situated within the area of the continental shelf of another state. If such islands are treated as islands which have territorial waters of their own, the state to which they belong may claim the continental shelf appurtenant to the islands in question; if small islands belonging to one state but situated within the area of the continental shelf of another state are treated as rocks, then they should be entitled to have a territorial sea only.²⁸⁴

VII. *Juridical Opinion*

In its judicial decisions the ICJ is instructed to apply 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. In practice in looking for 'subsidiary means' for the determination of rules of law the Court refers to a body of evidence concerning *lex lata* rather than to *lex referenda*.²⁸⁵ It is hardly necessary to point out that the *opinio juris* only constitutes evidence of the law, but, in some cases, text-writers have had a formative influence.²⁸⁶

It is customary for writers on the law of nations to contribute their opinions to the discussion of unsettled problems. It is submitted that, in the absence of a universal rule governing the effect of small islands for the delimitation of the continental shelf boundary, the writings of eminent jurists may be regarded as being of some significance.

Several writers have concluded that the division of continental shelf boundaries on the strict principle of the equidistant line may in some cases lead to certain inequitable results. The following examples will suffice to illustrate writers views on this point. If there exists, says Miss Gutteridge, a very small island, which lies approximately in the middle of the shallow sea, the delimitation of the seabed boundary between two states, on the strict principle of median line, could result in many curious and inequitable results.²⁸⁷ Professor Brownlie seems to have the same view

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as Miss Gutteridge. He thought that isolated and quite tiny islands may attract a disproportionate legal continental shelf, but pointed out that this is no more inequitable than the extent of shelf a well-placed coastal state may claim in some situations such as Kerguelen Island in the South Indian Ocean.²⁸⁸

To answer the question as to how the median line would apply in narrow seas such as the English Channel, where the shelf extends to the shores of another state or is shared with an adjacent state, Vallat suggests it is necessary to seek some other guide. In this connection, he proposes that a more satisfactory method would be to take a point or a line, the position of which could be calculated to give the desired division of area, and to draw the boundaries of the submarine area from the point or line to the land boundaries of the limitrophe states.²⁸⁹ However, Py criticised Vallat's proposed delimitation of the continental shelf in accordance with coastline length on the following grounds: (a) it favours unduly states with a long coastline; (b) it separates some points of the continent from the continental shelf, although they might be dependent on one another and form an organic whole; (c) it does not provide the boundary line of the frontiers in accordance with which the division would be made.²⁹⁰ Py, instead, favoured the median line principle as the best solution for delimitation where more than one state is on the same continental shelf. Nevertheless, both Vallat and Py admit that their proposed solutions may not always provide a satisfactory answer and advocate negotiations between the states concerned with a view to reaching an agreement.

Certainly Oda shared the same view, as if the equidistance principle is applied strictly in a case where an island belonging to one state is situated near the coast of another state, in such case, the latter's share of the continental shelf will be considerably reduced. The question relates to how the boundary line is to be drawn in cases where islands are located near the coast. He reckoned, in relation to Article 1 of the Continental Shelf Convention, that the continental shelf need not be a shelf adjacent to a continent, merely because the expression 'continental' shelf is used; a seabed contiguous to an island can also be a continental shelf. No intention was evidenced during the drafting of the Convention that the existence of islands should be disregarded in delineating the boundary of the continental shelf. As a matter of fact, it might be possible that the boundary line of a continental shelf could be drawn between the states concerned in an inequitable manner when based on the existence of a very small island off the coast of one of the states. In cases where very small islands or sand banks exist, it may be justifiable to take 'special circumstances' into account, and draw a boundary line in disregard of the existence of such islands.²⁹¹

Admittedly the Continental Shelf Convention provides that every island has its own continental shelf. So, states may claim sovereign rights over submarine areas surrounding all their island possessions. Although this solution is reasonable and justified, if the islands are near the coast of the claiming state, it becomes questionable, says Andrassy, when the island is far from the metropolitan territory. For instance, the Channel Islands are located near the coast of the claiming state but yet nearer the coast of another state, and the Aegean Islands are similarly placed.²⁹² It is debatable whether the islands' continental shelf should be recognised and the principle of equidistance applied.

Padwa states as his solution that islands should be treated like enclaves, with separate continental shelf areas proportional to their size, thereby leaving unaffected the division of the area between opposite coasts into equal parts by means of the median line.²⁹³

Finally, in the Pleadings of the *North Sea Continental Shelf Cases*, Bent Jacobsen argued, on behalf of Denmark, that an island is too small and unimportant an area to represent a state's land territory. The obvious solution would be to disregard the island and delimit the equidistance boundary as if the island did not exist. The result would be a median line based on the two mainland coasts only.²⁹⁴

Following the views of all these learned jurists it can be said that: in cases concerning the delimitation of a continuous continental shelf between two mainlands, the small islands could be disregarded; and in cases concerning the delimitation of a continuous continental shelf between the mainland and small islands that small islands could be justified as special circumstances and exempted from consideration in applying the principle of equidistance.

In interpreting the legal texts, one of the applicable principles of interpretation is the literal interpretation, i.e. the rule that words must be read in their context and the document construed as a whole, which involves a considerable emphasis on *travaux préparatoires* and finding out the intention of the contracting parties.²⁹⁵

A questionnaire drawn up by the Special Rapporteur of the International Law Commission on the 'Regime of the Territorial Sea', was submitted to the Committee of Experts.²⁹⁶ Question VI read:

How should the international boundary be drawn between two countries, the coasts of which are opposite each other at a distance of less than 2 T miles (T standing for the width of the territorial sea)? To what extent have islands and shallow waters to be accounted for?

To this, the Committee of Experts replied:

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An international boundary between countries the coasts of which are opposite each other at a distance of less than 2 T miles should as a general rule be the median line, every point of which is equidistant from the base-lines of the states concerned. Unless otherwise agreed between the adjacent states, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of 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.

Is this answer relevant in the solving of the continental shelf boundary problems? Should this principle also apply to the demarcation of the continental shelf boundary? If so, to what extent can small islands be reasonably ignored in laying down the median line?

The answer to this question has been put forward by Robert D. Hodgson, an American geographer. He proposed that small and uninhabited islands, falling into the rock and islet categories, should be disregarded in the construction of equidistant boundaries.²⁹⁷

The same point was made by Kennedy, a British governmental expert and a well-known hydrographer, who was a British delegate to UNCLOS I, practised in giving advice on boundary matters at the 32nd meeting of the Committee IV of the Geneva Conference on the Law of the Sea in 1958. He observed:

For the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand cays on a continuous continental shelf and outside the belts of territorial sea being neglected as base points for measurement and having only their own appropriate territorial sea.²⁹⁸

It seems reasonable that, in view of the great variety in their size, islands should in each case be considered on their own merits. From Kennedy's suggestion it can be clearly seen that he would not take very small islands into account in drawing the median line on the same continental shelf. According to the official records, nobody seemed to disagree with his opinion because of its apparent fairness.

In accordance with the above views of experts it may well be deduced that in delimiting the boundaries of the continental shelf, small islands, like rocks or shoals, could be disregarded. Conversely, however, on the basis of Article 6 of the 1958 Convention on the Continental Shelf and the *travaux préparatoires*, Delin concludes that islands, in general, cannot be ignored when drawing the median line.²⁹⁹ Similarly, in the *Anglo-French Continental Shelf Arbitration*, the UK concluded that all true islands generate their own continental shelves, irrespective of their location, and

that for boundary purposes there is no difference between islands and the mainland, and that, therefore, the median line is the proper boundary with any opposite state in the absence of agreement of special circumstances. It was further emphasised that only very small islands indeed may not, in certain circumstances, be given full effect.³⁰⁰

In considering the principles of equity and proportionality, it is submitted, however, that an equitable delimitation would choose to give partial effect to a small island in determining the submarine boundary line.

VIII. *Conclusion*

In the light of the preceding discussion it is possible to draw a number of conclusions concerning the legal issues which involve small islands. First, if a small island off the coast situated outside the territorial sea in the middle of the ocean were to be treated as an 'island' then presumably it should be entitled to claim its territorial sea as well as continental shelf. Correspondingly, if small islands off the coast situated outside the territorial sea in the middle of the ocean were to be treated as drying rocks and shoals, then in that case, small islands should not be entitled to claim a continental shelf.

Secondly, in case concerning the delimitation of a continuous continental shelf between two mainlands, small islands can be disregarded; and in cases concerning the delimitation of a continuous continental shelf between the mainland and small islands, the small islands could be considered as special circumstances and allowed some exemption from the strict application of the principle of equidistance.

Thirdly, in the case of a mainland coastal state, all the nearest uninhabited small islands, drying rocks and shoals could be regarded as naturally connected with this mainland, so as to be relevant as baselines in any shelf delimitation. This practice can be based on the principle of alluvium and increment.

Fourthly, however, certain state practice indicates that in determining continental shelf boundaries the presence of such tiny and uninhabited islands can be ignored; but such cases have been confined to small islands far distant from a claimant coastal state.

Fifthly, an island within or without the territorial sea of a mainland state may generate a new territorial sea and a continental shelf of its own; but very small islands far off the mainland in shallow waters might not be considered as islands because of the disproportionate share of the continental shelf they would attract for their claimant states.

Finally, it appears that if all islands, irrespective of their size, were to generate

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continental shelves, the results would not be legally desirable. Possibly, very small islands should be limited to a territorial sea only as is incorporated in the 1982 United Nations Convention on the Law of the Sea.

Notes

179. See, e.g., *Secretary of State for India v. Sri Raja Chelikani Ramo Rao* [1916] 32 TLR 652; *The Anna, La Porte* (1805) 5 C. Rob. 373.
180. See, e.g., *Anglo-Norwegian Fisheries Case*, ICJ Reports, 1951, p. 116. Cf. Sørensen, *op. cit.*, *Varid Juris Gentium*, p. 315; O'Connell, *op. cit.*, 45 BYIL (1971), p. 1; Marston, *op. cit.*, 4 *Annals of International Studies* (1973), p. 171; Amerasinghe, *op. cit.*, 23 ICLQ (1974), p. 539.
181. 'Where the control over land ends, the power of arms ends'. Cornelius van Bynkershoek, *De Dominio Maris Dissertatio* (1744, rpt; New York: Oxford U.P., 1923), Ch. II.
182. *The Anna, La Porte* (1805) 5 C. Rob. 373; 2 BILC, p. 699.
183. 'That which the force of a river carries off from your field and attaches to a neighbouring field, . . . will remain yours'.
184. [1870] J.B. Moore, *International Arbitrations*, Vol. 2, p. 1909, at p. 1919. The Island of Bulama is adjacent to the mainland and so near to it 'that animals cross at low water'.
185. [1916] 85 LJPC 222; 32 TLR 652; 2 BILC 841. Cf. J.E.S. Fawcett, 'The Judicial Committee of the Privy Council and International Law', 42 BYIL (1967), p. 263.
186. *Keesing's Contemporary Archives* 1963, p. 19748 B. On 27-28 September 1957, a newly-formed volcanic island, some 800 yards in diameter and over 300 ft. high, rose from the sea as a result of a violent undersea eruption in the Azores. The Portuguese flag was formally hoisted on the island on 12 October 1957. *Ibid.*, 1957, p. 15808 B. For discussion, see Mark Dingley, 'Eruptions in International Law: Emerging Volcanic Islands and the Law of Territorial Acquisition', 11 *Cornell ILJ* (1978), p. 121; J.L. Verner, Jr., 'Legal Claims to Newly Emerged Islands', 15 *San Diego LR* (1978), p. 525; Jan Mayer, a volcanic island off Norway, is considered as an island and therefore entitled to a territorial sea, an economic zone and a continental shelf. 'Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen', 20 *ILM* (1981), pp. 797 *et seq.*
187. On November 3, 1864, Roundell Palmer and R.P. Collier, together with the Queen's Advocate, Robert Phillimore, replied to the Foreign Office which had asked them to advise on the distance to which the rocks, reefs and banks near San Domingo were considered to extend. They replied: 'That in places where the possession of particular rocks, reefs, or banks, naturally connected with the mainland of any part of Her Majesty's territory, is necessary for the safe occupation and defence of such mainland, Her Majesty's Government also claim the waters inclosed between the mainland and those rocks, reefs, or banks, whatever may be the distance between them and the nearest mainland'. McNair, *op. cit.*, Vol. 1, pp. 367-68.
188. *Jus Gentium* is a phrase which, about the time of Grotius, was passing from its ancient Roman meaning, *the law common to most nations*, to its modern meaning, *the law between*

- nations. William Whewell, *Grotius on the Rights of War and Peace: An Abridged Translation* (Cambridge, M.DCC.LIII), Editor's Preface, ix. See also Sir Frederick Pollock, *Essays in the Law* (London: Macmillan & Co., 1922), p. 13, 34 *et seq*; T.J. Lawrence, *The Principles of International Law*, 7th ed., Revised by Percy H. Winfield (London: Macmillan 1923), p. 138.
189. *Wheaton's Elements of International Law*, 6th English Ed., Revised by A. Berriedale Keith, Vol. 1 (London: Stevens 1929), p. 335.
190. See, e.g., the *Clipperton Island Arbitration*, II RIAA, p. 1108; *Eastern Greenland Case*, PCIJ Series A/B, No. 53, p. 22; *Frontier Land Case*, ICJ Reports, 1959, p. 209. In the essence of evidence to the contrary, see e.g., Cyprus, Ireland.
191. ICJ Reports, 1953, pp. 97-98. See above, II. D.
192. *Ibid.*, p. 99 [italics added].
193. ICJ Reports, 1951, p. 133. See above, II. D.
194. The judgment lays the emphasis on Iceland's obligation to respect the United Kingdom's existing fishing rights and the United Kingdom's obligation, in turn, to respect Iceland's preferential rights. The Court held: 'The concept of preferential rights is not compatible with the exclusion of all fishing activities of other states. A coastal state entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of the coastal state's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other states, and particularly of a state which has for many years been engaged in fishing in the waters in question' *Fisheries Jurisdiction Judgment*, ICJ Reports, 1974, pp. 27-28.
195. ICJ Reports, 1969, p. 51, para. 96; ICJ Reports, 1978, p. 36, para. 86.
196. ICJ Reports, 1982, p. 61, para. 73.
197. Scott, *Hague Court Reports*, 1916, p. 127.
198. See generally, Gordon Ireland, *Boundaries, Possessions, and Conflicts in Central and North America and Caribbean* (Cambridge, Mass.: Harvard U.P., 1941), pp. 332-33; John Bassett Moore, *A Digest of International Law* (Washington: Gov't Printing Office, 1906), Vol. 1, pp. 285, 351, 536; *Hall's International Law*, 8th ed., by A. Pearce Higgins (Oxford: Clarendon Press, 1924), p. 149; James Brown Scott, 'The Isle of Pines', 17 *AJIL* (1923), p. 100; Quincy Wright, 'The Isle of Pines Treaty', 19 *AJIL* (1925), p. 340.
199. Wright cites W.E. Hall's *A Treatise on International Law* to support this view that the Isle of Pines is a typical example of islands naturally appurtenant to the coast. See Quincy Wright, 'Territorial Propinquity', 12 *AJIL* (1918), p. 519.
200. *North Sea Continental Shelf Cases*, ICJ Reports, 1969, p. 3.
201. ICJ Reports, 1969, p.22, para. 19. The judgment was given on the basis of customary international law, and the *dicta* have been widely considered relevant to the interpretation of Article 6 of the Continental Shelf Convention and have influenced the draftsmen of the Draft Convention on the Law of the Sea. Cf. L.F.E. Goldie, 'The ICJ's "Natural Prolongation" and the Continental Shelf Problem of Islands', 4 *Netherlands YBIL* (1973), p. 237.
202. *Ibid.*, p. 31, para. 43.

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203. UN Doc. ST/LEG/SER. B/1 (1951), pp. 38-39.
204. E.D. Brown, 'The Anglo-French Continental Shelf Case', 16 *San Diego LR* (1979), pp. 476-77.
205. *ICJ Reports*, 1978, p. 36, para. 86. Cf. *North Sea Continental Shelf Cases*, *ICJ Reports*, 1969, pp. 31 *et seq.*
206. Miscellaneous No. 15 (1978), Cmd. 7438. Award, para. 191.
207. *Ibid.*
208. *ICJ Reports*, 1982, p. 92, para. 133 A(2). The conclusion which, in the Court's view, has ineluctably to be drawn was that, despite the confident assertions of the geologists on both sides that a given area was 'an evident prolongation' or 'the real prolongation' of the one or the other state, for legal purposes it was not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference solely or mainly to geological considerations. For details, see pp. 52-54, paras. 57-61.
209. Occupation to support a claim to territorial sovereignty must be effective. Discovery alone without any subsequent act could not at the present time suffice to prove sovereignty over Palmas. *Island of Palmas Arbitration* [1928] II *RIAA*, p. 829. Normally occupation would require the setting up of some form of administration in a territory, and not simply the expression of an *animus occupandi*. *Clipperton Island Arbitration* [1932] II *RIAA* p. 1105. In the *Eastern Greenland Case*, the Court held that 'a claim to sovereignty based . . . upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. PCIJ Ser. A/B, No. 53, at pp. 45-56. In the *Minquiers and Ecrehos Case*, the Court found sovereignty lay with the exercise of legislative authority, jurisdiction and administration. *ICJ Reports*, 1953, p. 47. In the *Western Sahara (Advisory Opinion) Case*, the Court said that the evidence does not show that Morocco displayed effective and exclusive state activity in Western Sahara. *ICJ Reports*, 1975, p. 3.
210. H. Lauterpacht, 'Sovereignty over Submarine Areas', 27 *BYIL* (1950), p. 418 [italics supplied].
211. It is difficult to imagine any arrangement more calculated to produce international friction than one which entitles state A, although it may be thousands of miles from state B, to stake out claims in the continental shelf contiguous to state B by 'squatting' on B's doorstep - at some point just outside state B's territory water limit. *Petroleum Development Ltd. v. Sheik of Abu Dhabi* 18 *ILR* (1951), p. 156. Cf. Lauterpacht, *op. cit.*, 27 *BYIL* (1950), p. 420; Richard Young, 'The Legal Status of Submarine Areas Beneath the High Seas', 45 *AJIL* (1951), p. 230; M.S. McDougal and W.T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale U.P., 1962), p. 631.
212. R.P. Anand, *Legal Regime of the Sea-bed and the Developing Countries* (Leyden: A.W. Sijthoff, 1976), p. 78; Cf. II *YBILC* (1951), p. 142; II *YBILC* (1953), p. 515; II *YBILC* (1956), p. 298; L.F.E. Goldie, 'A General View of International Environmental Law: A Survey of Capabilities, Trends and Limits', Alexandre Charles Kiss (ed) *The Protection of the Environment and International Law* (Leyden: Sijthoff, 1975), pp. 36-39.
213. *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976*. *ICJ Reports*,

- 1976, p. 10, para. 29.
214. *Ibid.*, p. 11, para. 33.
215. In the *Diversion of Water from the Meuse Case*, Judge Hudson observed that 'principles of equity have long been considered to constitute a part of international law, and . . . they have often been applied by international tribunals'. 1937. PCIJ Ser. A/B, No. 70, p. 76. See generally, Rolet Chih-shih Chen, *The Non-Navigational Uses of International Rivers* (Taipei: Ching Sui Publ., 1965), pp. 156-59; Tomas Rothpfeffer, 'Equity in the North Sea Continental Shelf Cases', 42 *Nordisk Tidsskrift for International Ret* (1972), pp. 81-92; Georg Schwarzenberger, 'Equity in International Law', *YBWA* (1972), p. 371; Michael Akehurst, 'Equity and General Principles of Law', 25 *ICLQ* (1976), p. 801.
216. PCIJ Ser. A/B, No. 70, pp. 73-80. See above, III. C.
217. For details, see Max Habicht, *The Power of the International Judge to Give a Decision 'ex aequo et Bono'* (London: Constable, 1935).
218. See, e.g., Art. 5 of the Germano-Swiss Treaty of 1921 provided: 'If the Parties agree, the Tribunal may, instead of basing its decision on legal principles, give an award in accordance with considerations of equity'. See Habicht, *op. cit.*, p. 29. In the *Beagle Channel Arbitration* however, the Court of Arbitration has no power under the 1971 *Compromiso* or otherwise to reach a conclusion *ex aequo et bono*. *Award of Her Britannic Majesty's Government pursuant to the Agreement for Arbitration (Compromiso) of a Controversy between the Argentine Republic and the Republic of Chile concerning the region of the Beagle Channel* (London: HMSO, 1977), p. 3, para. 7(b).
219. Presidential Proclamation No. 2667, Department of State Bulletin, Vol. 13, No. 327, September 30, 1945, p. 485. See also UN Doc. ST/LEG/SER. B/1 (1951), p. 38.
220. *ICJ Reports*, 1969, p. 3. Cf. pp. 49-50, para. 91. It is a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the apportionment of roughly comparable attributions of continental shelf to each state would be indicated by the geographical facts.
221. Friedman criticised the case on these grounds but is there not a distinction to be made between 'equity' in a general sense (standard of living etc.) and equity in the legal sense - equity between competing *legal* rights and principles? See Wolfgang Friedman, 'The North Sea Continental Shelf Cases - A Critique', 64 *AJIL* (1970), p. 229. For further discussions, see Rothpfeffer, *op. cit.*, 42 *Nordisk Tidsskrift for International Ret* (1972), pp. 93-137.
222. *ICJ Reports*, 1969, p. 49, para. 89. For example, the Court felt that if the equidistance method were applied to a concave coastline, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable would be the results produced. See Brown, *op. cit.*, 23 *Current Legal Problems* (1970), p. 187, at pp. 191-94.
223. *ICJ Reports*, 1969, p. 49, para. 89(a).
224. *Ibid.*, pp. 49-50, para. 91.
225. *Ibid.*, p. 51-52, paras. 95-99; p. 53, para. 101. In his dissenting opinion in the *Fisheries Jurisdiction Case*, Judge Gros criticised the Court's invocation of equity. 'To hold a balance between the economic survival of a people and the interests of the fishing industry of other states' raised issues which were too complex and explosive to be resolved by the application

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- of equity; striking such a balance was a political and economic task, not a legal one. *ICJ Reports*, 1974, p. 3. In preparing recommendation with regard to the dividing line for the shelf area between Iceland and Jan Mayen (Norway), the Commission shall take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances. See 'Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen', 20 *ILM* (1981), pp. 797 *et seq.*
226. *Channel Award* (Cmnd. 7438). On equitable principles, see paras. 97, 194-96, 199, 239-42, 244, 248-51.
277. The Court interpreted that there is no legal limit to the considerations that states may take into account to ensure the application of equitable principles. *North Sea Continental Shelf Cases*, *ICJ Reports*, 1969, p. 50, para. 93. See above, III. C.
228. *Channel Award* (Cmnd. 7438), p. 60, para. 99.
229. *Ibid.*, p. 94, para. 198.
230. *Ibid.*, pp. 59-60, para. 97. Cf. Separate Opinion of Sir Humphrey Waldock, pp. 197-201.
231. Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)', 162 *Recueil des Cours* (1979-I), p. 287.
232. See, e.g., the Bahrain-Saudi Arabia Boundary Agreement, Agreement concerning the sovereignty over the islands of Al-Arabiyyah and Farsi and the delimitation of the boundary line separating the submarine areas between the Kingdom of Saudi Arabia and Iran, Agreement for settlement of the offshore boundary and ownership of islands between Abu Dhabi and Qatar, Offshore Boundary Agreement between the Amirates of Abu Dhabi and Dubai, Agreement concerning the Boundary Line dividing the continental shelf between Iran and Qatar, Agreement concerning delimitation of the Continental Shelf between Bahrain and Iran, Agreement concerning the boundary line dividing parts of the continental shelf between Iran and the United Arab Emirates (Dubai), Agreement concerning delimitation of the continental shelf between Iran and Oman. For details, see R. Young, 'Equitable Solutions for Offshore Boundaries: The 1968 Saudi-Arabia-Iran Agreement', 64 *AJIL* (1970), p. 152; El-Hakim, *op. cit.*, Ch. III, pp. 83-131; MacDonald, *op. cit.*, pp. 126-40. Dr. Amin observed that equitable principles do not always require the application of the equidistance method. Whatever method is applied for delimitation, it is essential that the result be equitable. See Amin, *op. cit.*, p. 142.
233. The Helsinki Rules of the ILA provide that 'each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin' (Ch. 2, Art. 4). *The ILA Report of the 52nd Conference* (Helsinki, 1966), p. 486. Cf. Colin Phagan, 'GATT Article XVI. 3: Export Subsidies and Equitable Shares', 16 *Journal of World Trade Law* (1982), pp. 251-64.
234. The maxim *sic utere tuo ut alienum non laedas*, the duty to exercise one's own rights in ways that did not harm the interests of other subjects of law. See e.g., *The Trail Smelter Arbitration*, III *RIAA*, p. 1905; *The Corfu Channel Case*, *ICJ Reports*, 1949, p. 4. Art. 3 of the Charter of Economic Rights and Duties of States provides: 'In the exploitation of of a system of information and prior consultations in order to achieve optimum use of such

- resources without causing damage to the legitimate interest of others'.
235. See, e.g., Arts. 13(1)(3) and 14(1)(2). UN Doc. A/CN.4/Ser. A/1980/Add. 1 (Part 2), p. 9. Cases holding that equitable compensations must be paid for expropriation fall into the same category. See, e.g., *The Chorzow Factory Case* (1928) PCIJ Ser. A, No. 17, p. 46; *Affaire Goldenberg Arbitration* (1928) II RIAA, pp. 903-10; *Jessie Watson (Great Britain) v. United Mexico States* (1931), V RIAA, p. 162. For discussion, see B.A. Wortley, *Expropriation in Public International Law* (Cambridge U.P., 1959), pp. 6-7; M. Akehurst, *The Law Governing Employment in International Organization* (Cambridge U.P., 1967), pp. 85-88; Charles Rousseau, *Droit international public*, Tome 1 (Paris: Editions Sirey, 1970), pp. 406-7.
236. UN Doc. A/CONF. 62/L. 78 (28 August 1981). It seems Article 83(1) does not represent a consensus since a large number of states favour the strict application of the equidistance solution. Cf. Art. 74 of the Draft Convention on the Law of the Sea. See above, III. B.
237. *ICJ Reports*, 1982, p. 49, para. 50.
238. About 50 states have continental shelf boundary problems. They can be divided into two groups: (a) the median line group and (b) the equitable principle group, the former basing their view on Article 6 of the 1958 Continental Shelf Convention and the latter on the judgement of the *North Sea Continental Shelf Cases*. The former regard equidistance as providing an ultimate equity. Under the Convention on the Law of the Sea, in the absence of agreement there is no rule: neither formulae, nor any reservations, are permitted.
239. 'Trough' is defined as follows: (1) An elongated region of low barometric pressure between two areas of higher (meteorology). (2) The hollow between two waves. (3) A syncline (geology). (4) An elongated valley or trench. See Stamp (ed) *A Glossary of Geographical Terms op. cit.*, p. 464; idem (ed.) *Longmans Dictionary of Geography, op. cit.*, p. 423; Swayne, *A Concise Glossary of Geographical Terms, op. cit.*, p. 144; F.J. Monkhouse, *A Dictionary of Geography*, 2nd ed. (London: Edward Arnold, 1970), p. 359.
240. 'Trench' is defined as 'a long narrow steep-sided submarine valley', Stamp, *op. cit.*, p. 463; Swayne, *op. cit.*, p. 143; Monkhouse defines trench as (i) An elongated trough or deep in the coean floor; (ii) A U-shaped valley in the mountains. Monkhouse, *op. cit.*, p. 357.
241. See generally, Richard Young, 'Offshore Claims and Problems in the North Sea', 59 *AJIL* (1965), pp. 505-6; D.W. Bowett, *The Law of the Sea*, p. 39, n. 3; idem, *The Legal Regime of Islands in International Law*, p. 144, n. 10; p. 162, n. 55; pp. 222-23; Brown, *The Legal Regime of Hydrospace*, p. 7; Juraj Andrassy, *International Law and the Resources of the Sea* (N.Y.: Columbia U.P., 1970), pp. 88-89; H.M. Jain, 'Continental Shelf - Some Geological Aspects', 12 *Indian JIL* (1972), p. 576; L.F.E. Goldie, 'A Lexicographical Controversy - the Word 'Adjacent' in Article 1 of the Continental Shelf Convention', 66 *AJIL* (1972), pp. 829, 834; Prescott, *op. cit.*, p. 191; E. Lauterpacht, 'Oil and Gas Resources of British Waters - Some Problem of International Law', *International Bar Association, 2 Proceedings of the Petroleum Law* (8-13 January 1978, Cambridge), 34.8; Symmons, *op. cit.*, pp. 190-91.
242. *Scientific Considerations Relating to the Continental Shelf*, UN Doc. A/CONF. 13/2 and Add. 1 in the UN Doc. A/CONF. 13/37, p. 39, at p. 41, para. 20; pp. 43-44, paras. 32(a) and 34. The Deep off Norway goes down in the Skagerrak to about 430 fathoms and in 17 December 1963. Snaking along the Norwegian coast is the Norwegian Trough, between

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- 50 and 150 kilometres wide and 287 to 700 metres deep. John Andrews, 'Norway's Oil Riches', *The Guardian*, April 9, 1981, p. 18.
243. UN Doc. A/CONF. 13/c. 4/SR. 17 (24 March 1958), A/CONF. 13/42, p. 41, para. 10. The 1st and 2nd drafts of the ILC had the word 'contiguous' to the coast - as indeed the Truman Proclamation itself - but since *contiguity* suggests always touching or contact this might have been thought to exclude for example the shelf off Norway. The Norwegian Deep, Lord Shackleton suggested, excluded Norway from taking advantage of the North Sea continental shelf. *Hansard*, H.L. Deb., Vol. 257, Col. 216: 17 December 1963. Cf. Jennings, *op. cit.*, 121 *Recueil des Cours* (1967-II), p. 396. For Norwegian Trough, see also Bowett, *The Legal Regime of Islands in International Law, op. cit.*, pp. 162, n. 55; 196, n.4; 222-23.
244. UN Doc. A/CONF. 13/C. 4/SR. 19 (25 March 1958), A/CONF. 13/42 p. 48, paras. 21 and 23. In the Memorandum prepared by the Secretariat of UNESCO it was in conformity with this approach that the depressions in the Norwegian shelf ought not to be disassociated therefrom because they form an integral part of the shelf. UN Doc. A/CONF. 13/2 (20 September 1957), A/CONF. 13/37, p. 39, at p. 41, para. 20; pp. 43-44, paras. 32 and 34.
245. 1933 PCIJ Ser. A/B, No. 53, p. 71.
246. *Ibid.*, p. 91.
247. In the *Temple of Preah Vihear Case* where the Siamese authorities such as Prince Devawongse, the Minister of Foreign Affairs, Prince Damrong, the Minister of the Interior, the Siamese members of the First Mixed Commission and the Siamese members of the Commission of Transcription, did not make any reservation nor raise any query about the accuracy of the Annex I map, either then or for many years thereafter; they must thereby be held to have acquiesced to the Annex I map. *ICJ Reports*, 1962, p. 15.
248. Norway No. 1 (1965), Cmnd. 262; UKTS No. 71 (1965), Cmnd. 2757. Instruments of ratification were exchanged on 29 June 1965, and the Agreement entered into force on that date. See also *BPIL* (1965), p. 139. Cf. *Hansard* H.C. Deb., Vol. 688, Col. 277: 28 January 1964. See also *BPIL* (1964), p. 58.
249. E. Lauterpacht, *loc. cit.*, Prescott suggests that the UK, perhaps, try to avoid further delays in securing firm title to potential oil and gas. See Prescott, *op. cit.*, p. 191; Birnie & Mason, *op. cit.*, in Mason (ed) *The Effective Control of Resources*, pp. 28-34.
250. *Hansard*, H.L. Deb., Vol. 253, Cols. 916-17, 936: 3 December 1963; *ibid.*, Vol. 254, Col. 216: 17 December 1963. A similar query was raised by Sir Frank Soskice in the House of Commons, see *Hansard*, H.C. Deb., Vol. 688, Cols. 270, 277: 28 January 1964.
251. At first the UK contended that the Norwegian Trough marked the proper division between the UK and Norwegian continental shelves. Norway, however, contended that the Norwegian Trough was only an accidental depression in the surface of the continental shelf, and the correct boundary was a line of equidistance between the British and Norwegian coasts. Prescott, *op. cit.*, p. 191.
252. Art. 4, Norway No. 1 (1965), Cmnd. 2626. Cf. the 1974 Agreement between Japan and the Republic of Korea on Joint Development of the Southern Part of the Continental Shelf adjacent to the two Countries. Shigeru Oda, *The International Law of the Ocean Development: Basic Documents*, Vol. II (Leyden: Sijthoff, 1975), pp. 95 *et seq.* For discussion see

- Oda, *The Law of the Sea in Our Time – I. New Developments, 1966-1975* (Leyden: Sijthoff, 1977), pp. 256-64.
253. UKTS 6, Cmnd. 5193, 1973.
254. UKTS 7, Cmnd. 5192, 1973.
255. Netherlands No. 2 (1965), Cmnd. 2831.
256. Art. 1.
257. Art. 2.
258. Netherlands No. 1 (1965), Cmnd. 2830. The difference between the UK-Norwegian Agreement and the UK-Netherlands Agreement is the arbitral clause which provides that either Party may, if necessary, refer to a single Arbitrator designated jointly, and the decision of the Arbitrator shall be binding upon the Contracting Parties. Cf. Ian Gault, 'The Frigg Gas Field-Exploitation of an International Cross-boundary Petroleum Field', 3 *Marine Policy* (1979), p. 302; Philippe Manin, 'Le Traite de Frigg', *Annuaire Francais de Droit International* (1978), p. 792. See Appendix Diagram.
259. UN Doc. ST/LEG/SER. B/15 (1970), p. 780.
260. *ICJ Reports*, 1969, pp. 13-14, para. 4.
261. *Ibid.*, p. 32, para. 45.
262. *Channel Award*; for discussions, see D.M. McRae, 'Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration', 15 *Canadian YIL* (1977), p. 187; D.W. Bowett, 'The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches', 49 *BYIL* (1978), p. 1; E.D. Brown, 'The Anglo-French Continental Shelf Case', 33 *YBWA* (1979), p. 304; *idem*, *op. cit.*, 16 *San Diego LR* (1979), p. 461.
263. *Channel Award*, pp. 61-62, paras. 104. Cf. p. 25, para. 12. See, e.g. The Timor Trench boundary between Australia and Indonesia where a 2,000 metre deep trench marking the northern limit of the Australian continental margin. The Australia-Indonesia Agreement of 1972, UN Doc. ST/LEG/SER. B/18 (1976), p. 441.
264. *Channel Award*, p. 24, para. 9. Isolated and narrow but deeper depressions are found scattered in certain seas, such as the Hurd Deep in the English Channel (172 metres). UN Doc. A/CONF. 13/2 and Add. 1 in the UN Doc. A/CONF. 13/37, p. 43, Para. 31.
265. *Channel Award*, p. 25, para. 12. It is true that the Hurd Deep is a very minor depression in the shelf.
266. *Ibid.*
267. *Ibid.*, p. 25, para. 12; 62-63, para. 107.
268. *Ibid.*, pp. 62-63, para. 107.
269. *Ibid.* It has been noted above that the Norwegian Trough is not a fault, nor a feature with any structural or geological significance; it is an erosional feature with a purely topographical significance.
270. *Ibid.*, p. 63, para. 108. The language suggests that the word 'geographical' was chosen quite deliberately and in contra distinction to 'geological'. Bowett, *The Legal Regime of Islands in International Law*, *op. cit.*, pp. 222-23.
271. Bowett, *The Legal Regime of Islands in International Law*, *op. cit.*, p. 223.

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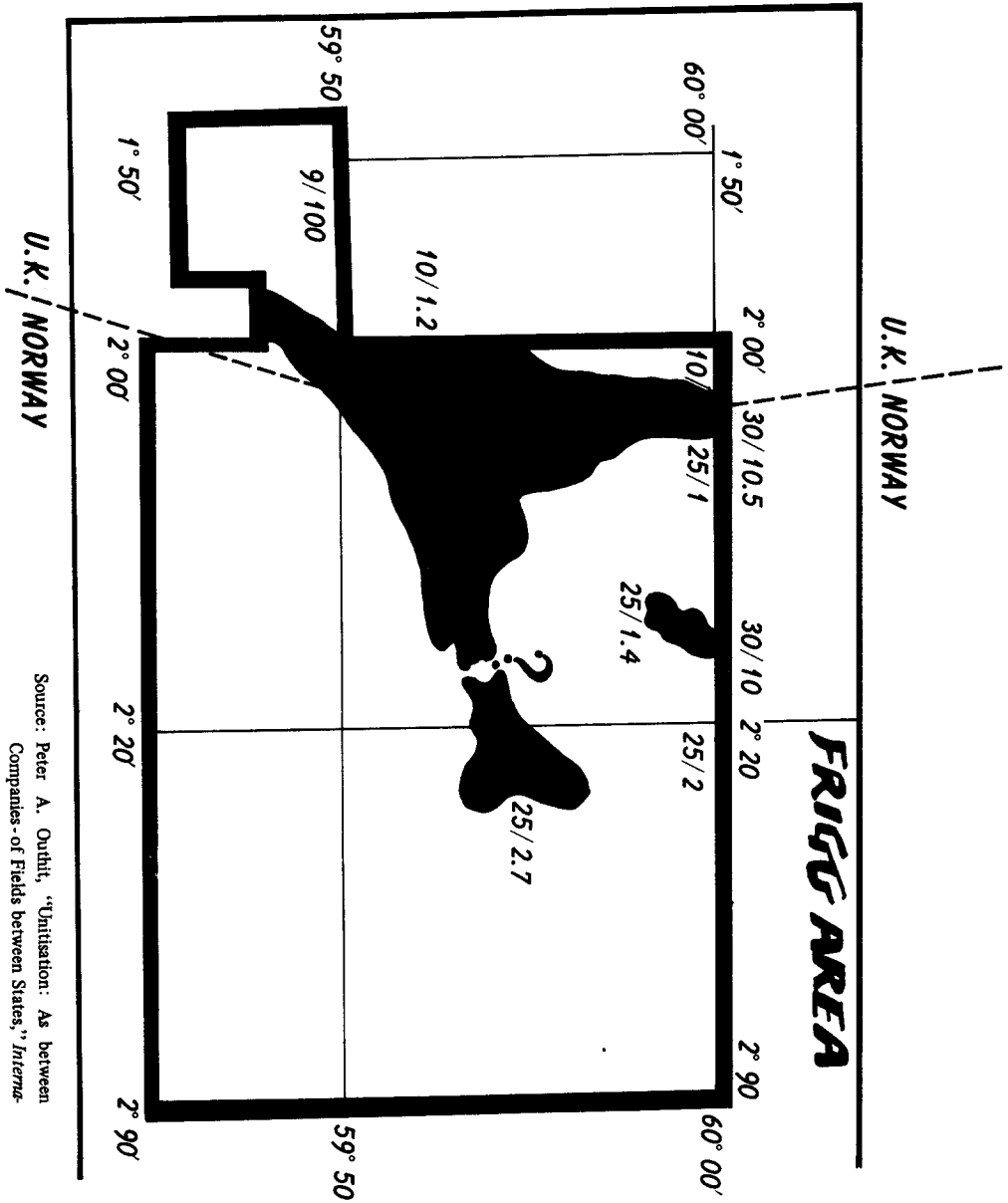
272. Northcutt Ely, 'Seabed Boundaries Between Coastal States: The Effect to be Given Islets as "Special Circumstances"', 6 *International Lawyer* (1972), pp. 227-30, 236.
273. In the demarcation of the Iran-Qatar, Iran-Abu Dhabi and Iran-Oman continental shelf boundaries the existence of all islands has been ignored. For details see Richard Young, 'The Persian Guld', *New Directions in the Law of the Sea*, Vol. III, pp. 232. Cf. Husain M. Albaharna, *The Legal Status of the Arabian Gulf States* (Manchester U.P., 1968), Ch. 17, p. 278; S.H. Amin, 'Law of the Continental Shelf Delimitation: The Gulf Example', 27 *Netherlands ILR* (1980), p. 335.
274. UN Doc. A/CONF. 13/C. 4/L. 60 (2 April 1958), UN Doc. A/CONF. 13/42, p. 142.
275. UN Doc A/CONF. 13/C. 4/L. 25/Rev. 1, UN Doc. A/CONF. 13/42, p. 133.
276. UN Doc. A/CONF. 13/C. 4/SR. 33 (9 April 1958), UN Doc. A/CONF. 13/42, p. 96, para. 2.
277. In the 1958 Bahrain-Saudi Arabia Agreement, only some islands were taken into account, while others were totally ignored. UN Doc. ST/LEG/SER. B/16 (1974), p. 409. In the 1960s, Iran maintained that the baseline for measuring the median line in the Gulf should be fixed from the southern edge of the Iranian island of Qesham. Amin, *op. cit.*, 27 *Netherlands ILR* (1980), p. 341; Amin, *International and Legal Problems of the Gulf*, *op. cit.* p. 146. In the 1969 Abu Dhabi-Qatar Maritime Boundary Agreement, the presence of Abu Dhabi's island of Dina and Qatar's islands of Lashat and Shraho were ignored. UN Doc. ST/LEG/SER. B/16 (1974), p. 403.
278. M.A. Movahhed, one of the negotiators of Iran, asserted that the Iranian island of Kharg merits a 'full effect' because of its particular characteristic. See M.A. Movahhed, *naft-i ma va masael-i huguqi-i an* (Our Oil and its Legal Problem) (Teheran: Khorazmi, 1970), p. 237. See also Amin. *op. cit.*, p. 146.
279. Choon-Ho Park, 'Oil under Troubled Waters: The North East Asia Sea-bed Controversy', 14 *Harvard ILJ* (1973), p. 242; *idem*, *Continental Shelf Issues in the Yellow Sea and East China Sea*, Law of the Sea Institute, University of Rhode Island, Occasional Paper No. 15, Sept. 1972, p. 31. Cf. the 1973 Canada-Denmark Agreement relating to the Delimitation of the Continental Shelf Between Greenland and Canada. UN Doc. ST/LEG/SER. B/18 (1976), p. 447; the 1974 Japan-Republic of Korea Agreement concerning the Establishment of a Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries. For text, see Oda, *The International Law of the Ocean Development, Basic Documents*, Vol. II, pp. 92-95.
280. UN Doc. ST/LEG/SER. B/18 (1976), p. 403; 'Continental Shelf Boundary: Iran-Saudi Arabia', *International Boundary Study*, Series A. No. 24 (US Dept. of State, Office of the Geographer, 1970); for discussions, see Young, *op. cit.*, 64 *AJIL* (1970), p. 152. M.A. Movahhed, one of the Iranian negotiators, observed that no island in the Gulf should be given any continental shelf rights. He however asserts that the island of Kharg merits a full continental shelf because of its particular individual characteristics. This is the Iranian official position with regard to the Iran-Kuwait continental shelf boundaries. See Amin, *op. cit.*, p. 146; MacDonald, *op. cit.*, pp. 126-40.
281. *Channel Award* (Cmnd. 7438), p. 117, para. 251. See above, III. C.
282. *Ibid.*

283. *ICJ Reports*, 1982, p. 89, para. 129.
284. In the *Anglo-French Continental Shelf Arbitration*, a 12-mile continental shelf accorded to the Channel Islands by the Court of Arbitration because a 12-mile limit had been accepted by both parties as a fishery limit. Miscellaneous No. 15 (1978), Cmnd. 7438. In the 1968 Agreement concerning the Sovereign over Al-Arabiyyah and Farsi Islands and Delimitation of Boundary Line separating Submarine Areas between Saudi Arabia and Iran, a 12-mile territorial sea is recognised for both islands in the determining of the baseline from which the submarine boundary line is to be delimited. UN Doc. ST/LEG/SER. B/18 (1976), p. 403.
285. In the *Anglo-Icelandic Fisheries Case*, the Court held that it cannot render judgment *sub specie legis ferenda* (anticipate the law before the legislator has laid it down). *ICJ Reports*, 1974, p. 23, para. 53. In the *South West Africa Cases*, the Court stated that its duty is to apply the law as it finds it, not to make it. *ICJ Reports*, 1966, p. 48, para. 91; *Fisheries Jurisdiction (Merits) Case*, *ICJ Reports*, 1974, pp. 23-24. Similar attitude was also taken by the Tribunal in *Texaco v. Libyan Arab Republic* (1977), 53 *ILR* (1979), p. 483.
286. Parry, *op. cit.*, pp. 76 above. Cf. *The Le Louis* (1817), 2 Dods. 210.
287. J.A.C. Gutteridge, 'The 1958 Geneva Convention on the Continental Shelf', 35 *BYIL* (1959), pp. 102-123; *idem*, 'The Regime of the Continental Shelf', 44 *Transactions of the Grotius Society* (1958 & 1959), p. 77, at p. 88.
288. Ian Brownlie, 'Recommendations on the Limits of the Continental Shelf and Related Matters, A Commentary', Lewis M. Alexander (ed) *The Law of the Sea: National Policy Recommendations*, Proceedings of the Fourth Annual Conference, Law of the Sea Institute, June 23-26, 1969, University of Rhode Island, Kingston, Rhode Island, 1970, p. 145.
289. F.A. Vallat, 'The Continental Shelf' 23 *BYIL* (1946), p. 336. UN Doc. A/CN. 4/32 (14 July 1950), II *YBILC* (1950), p. 111, para. 333.
290. UN Doc. A/CN. 4/32 (14 July 1950, II *YBILC* (1950), p. 111, paras. 334-35. On 17 July 1950 at the ILC's 69th meeting, Hudson read out a passage from the previously mentioned report of the Committee on 'rights to the seabed and its subsoil': 'Criteria for the division of the sea bed (and subsoil) of a continental shelf shared by two or more coastal states should be developed, taking into account factors such as the configuration of the coastlines, the economic value of proven deposits of minerals etc.' I *YBILC* (1950), p. 233, para. 51.
291. S. Oda, 'Proposals for Revising the Convention on the Continental Shelf', 7 *Columbia Journal of Transnational Law* (1968), p. 24; *idem*, 'Boundary of the Continental Shelf', 12 *Japanese Annual of International Law* (1968), p. 281; *idem*, 'International Law of the Resources of the Sea', 127 *Recueil des Cours*, (1969-II), pp. 452.
292. Andrassy, *op. cit.*, p. 103. In the *Anglo-French Continental Shelf Case*, the UK asserted that the Channel Islands could not be characterised as very small islands for the purpose of considering their effect on the delimitation of a median line between opposite states. *Channel Award*, pp. 85-86, 171-72. Under Art. 1(b) of the 1958 Continental Shelf Convention the capacity to generate a continental shelf; this interpretation would give Greece more than 97 per cent of the seabed of the Aegean Sea. *ICJ Reports*, 1976, p. 3. See above, III. B.
293. D.J. Padwa, 'Submarine Boundaries', 9 *ICLQ* (1960), p. 628. It is also evidenced by the *Anglo-French Continental Shelf Judgment*. Miscellaneous No. 15 (1978), Cmnd. 7438. pp.

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- 163-65, paras. 32-36.
294. 'Argument of Mr. Jacobsen', *North Sea Continental Shelf Cases, ICJ Pleadings*, Vol. II, 1968.
295. Cf. Yi-Ting Chang, *The Interpretation of Treaties by Judicial Tribunals* (New York: Columbia U.P., 1933), Ch. V, p. 95; Alan H. Schechter, *Interpretation of Ambiguous Documents by International Administrative Tribunals* (London: Stevens, 1964); I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester U.P., 1973), pp. 69-76; Maarten Bos, 'Theory and Practice of Treaty Interpretation', 27 *Netherlands ILR* (1980), pp. 1-38, 135-70.
296. UN Doc. A/CN. 4/61/Add 1, 18 May, 1953, Annex, p. 6.
297. Hodgson, *op. cit.*, in John King Gamble, Jr. and Guilio Pontecorvo (ed) *Law of the Sea: The Emerging Regime of the Oceans*, Proceedings of Eighth Annual Conference, Law of the Sea Institute, June 18-21, 1973 (Cambridge, Mass.: Ballinger 1973), pp. 189.
298. UN Doc. A/CONF. 13/C. 4/SR. 32 (9 April 1958), UN Doc. A/CONF. 13/42, p. 93, para. 3. Cf. UN Doc. A/CONF. 13/C. 4/SR. 33 (9 April 1958), UN Doc. A/CONF. 13/42, p. 96, para. 2.
299. Lars Delin, 'Shall Islands be Taken into Account When Drawing the Median Line According to Art. 6 of the Convention on the Continental Shelf?' 41 *Nordisk Tidsskrift for International Ret* (1971), pp. 205, 212.
300. Miscellaneous No. 15 (1978), Cmnd. 7438, pp. 84-85, para. 170. Cf. the 1968 Saudi Arabia-Iran Agreement Concerning the Sovereign Over Al-Arabiyyah and Farsi Islands and Delimitation of the Boundary Line Separating Submarine Areas Between the Two Countries. See above, VI.

Appendix Diagram



Source: Peter A. Outhit, "Utilisation: As between Companies - of Fields between States," *International Bar Association - Section on Business Law*, 1978, Vol. 2, p. 26.23, illustration 5.