The equitable delimitation of the continental shelf

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This article considers the law of continental shelf delimitation, and in particular the place and purpose of equity within that law and in international law generally.

I. INTRODUCTION

The development of continental shelf delimitation law has been marked in its content by both precision and generality. Examples of the latter are more numerous, as are their importance. The precision of the early law was procedural or related to forms or methods. Article 6 of the Geneva Convention sets out the procedure for approaching a delimitation, specifying what aspects of the article are pre-eminent, while at the same time dealing with the specific method of equidistance.

In the more recently developed law the precision has shifted to the substance. While the conventional law has become more general,[1] the law developed by the courts has progressed towards greater definition. The recent *Tunisian-Libyan* case,

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1 Convention on the Continental Shelf 1958 (the "Geneva Convention") art. 6 reads

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

Convention on the Law of the Sea 1982 (the "Montego Bay Convention") art. 83 reads

1. The delimitation of the Continental Shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the State concerned shall resort to tne procedures provided for in Part XV [Settlement of Disputes].

in which specific equitable principles were described, is a good illustration.[2] However, they are only of limited use. The law of equity, embodying a general discretion, remains largely unchanged. The law has to be applied to unique situations, its generality giving scope for a wide appreciation of the circumstances. The use of a broad, and largely undefined, discretion makes the role of the court particularly difficult, and its decision subject to criticism.

This raises the question whether it is better that a compromise be achieved by judicial means, or negotiation pursued within the framework of a party settlement. In the *Fisheries Jurisdiction* cases the International Court of Justice, having power under the *compromis* to determine the parties' rights, proceeded to the point where it decided that the law required the parties to resolve the dispute alone. The Court provided a framework of principle. It was then up to the parties to find a solution to the dispute.[3] That idea can be readily compared with the exhortations in article 6, and in various dicta, that a negotiated solution should be the primary method of resolution.

It should be emphasised that the parties are operating within the general law. Through one section of the continuum a judicial body can declare and apply the law because its application involves the implementation of legal techniques — the solution can be said to be more right than wrong. Where it is possible to have more than one right answer the choice of one is not decided by the general law but by agreement. And the agreement is for the parties to negotiate. The law remains as a guide to determine whether the particular solution chosen is equitable or inequitable.

The shifting between generality and precision is also typical of other parts of continental shelf delimitation law.[4] Under the Geneva Convention the outer limit of the continental shelf was determined by the criterion of exploitability. The Montego Bay Convention provided criteria of greater precision. In fact a rule rather than a principle was involved. This was also reflected in the argument of counsel in the *North Sea Continental Shelf* cases.[5] The Federal Republic of Germany argued for the application of a principle (equitable apportionment), and the Netherlands and Denmark for a rule (equidistance). In declaring the law the Court used principles as the guide, and also incorporated law of a more specific nature in the form of factors.

2 [1982] I.C.J. Rep. 18, para. 41. Unless otherwise indicated future references to this note are to paragraphs.

3 [1974] I.C.J. Rep. 3 (*United Kingdom* v. *Iceland*) and 174 (*Federal Republic of Germany* v. *Iceland*). Similarly in the *Haya de la Torre* case [1951] I.C.J. Rep. 71, the parties wanted to know the manner in which the asylum should be terminated. The Court at 79 stated that that sort of choice ". . . could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice." See also *Free Zones of Upper Savoy and the District of Gex* (Second Phase) (1930) P.C.I.J., Ser. A, No. 24, 15.

4 By "continental shelf delimitation law" the writer is referring to a delimitation between states, and no other boundary (e.g. with the deep sea bed).

5 [1969] I.C.J. Rep. 3, para. 95. Unless otherwise indicated, future references to this note are to paragraphs.

II. EQUITY AND INTERNATIONAL LAW

This part will briefly examine, for the purpose of comparison, the circumstances in which equity has been used on the international plane, and raise the question of why equity is used.

A. The Three Categories

In international judgments and in scholarly writings a distinction is drawn between three different types of equity, whose legal quality differs. These are equity *inter legem, praeter legem* and *contra legem (ex aequo et bono)*. The relationship of each to international law depends on the particular function which equity is fulfilling. The first category is equity operating within the law — that is as part of positive international law with the traditional sources in article 38(1) of the Statute of the Court. This analysis is accepted by all writers and predominates as a category in international judgments.[6]

Equity *praeter legem* is said to concern the question of whether international law is complete. It is argued that this kind of equity operates where there is an apparent absence of a principle or rule to apply to a specific case, or the principle or rule that does exist is insufficient.[7] In other words, there is an insufficiency of some nature — a gap. Most writers do not accept the existence of this category of equity.

There is no dispute among writers that special authority from the parties must be given before equity *contra legem* may be applied.[8] The power is available in proceedings before the Court under article 38(2) of the Statute and is a " . . . power to abrogate or modify the legal rights of the parties to a dispute . . . ".[9] It operates in circumstances where there is some applicable law.

6 There has been criticism of the validity of some of these sources: see Fitzmaurice "Some Problems Regarding the Formal Sources of International Law", in *Symbolae Verzijl* (Nijhoff, The Hague, 1958), 153; and Jennings "What Is International Law and How Do We Tell It When We See It?" (1981) 37 Annuaire suisse de dr. int., 59. Equity *intra legem* is positive law because it has these sources. See *The Diversion of Waters from the Meuse* case (1937) P.C.I.J., Ser. A/B, No. 70, where Judge Hudson (separate opinion) stated at 76-77, "What are widely known as principles of equity have long been considered to constitute a part of international law . . . . [and] the Court has some freedom to consider principles of equity as part of the international law which it must apply." See also *Rann of Kutch* case (1968) 50 I.L.R. 1, 18. Examples of this kind of equity are: Convention on the Law of the Sea, art. 83(1) (treaty); the *Fisheries Jurisdiction* case (custom); the *Abu Dhabi Arbitration* (1951) 18 I.L.R. 144 and the *Meuse* case (general principles).

7 Degan *L'Equité et le Droit International* (Nijhoff, La Haye, 1970), 29.

8 In the *Free Zones* case supra n. 3, 10, the P.C.I.J. stated: ". . . such power . . . could only be derived from a clear and explicit provision to that effect . . .". The tribunal in the *Rann of Kutch* case supra n. 6, 18, stated that such power has to be ". . . conferred on it by mutual agreement between the Parties."

9 Brierly "The General Act of Geneva, 1928" (1930) 11 Brit. Year Book Int. L., 119, 131. See also Schwarzenberger *A Manual of International Law* (Professional Books Ltd., Milton, 6th ed., 1976), 197; Rothpfeffer "Equity in the North Sea Continental Shelf Cases" (1972) 42 Nordisk Tidsskrift for Int. Ret, 81, 88; Habicht *The Power of the International Judge to Give a Decision 'Ex aequo et Bono'* (London, 1935), 21, 26, 63; Akehurst "Equity and General Principles of Law" (1976) 25 I.C.L.Q., 801; Lauterpacht *The Function of Law in the International Community* (Clarendon, Oxford, 1933), 115.

The commentaries on this power speak of two, broadly-defined, circumstances in which it is used. In the *Free Zones* case the Permanent Court of International Justice stated that this would involve ". . . disregarding rights recognised by [the Court] and taking into account considerations of pure expediency . . . [which would involve] departing from strict law."[10] On the other hand, Judge Kellogg in the same case stated that the power involved the application of ". . . the principles of equity and justice in the broader signification of this latter word."[11] In relation to the performance of the function, Lauterpacht took the position which the majority of writers support. The source of the power must relate to the judicial function and the accepted methods of determining the resolution of a dispute.[12] Hudson added that this power is not unlimited, and that if a decision is made contrary to law, it must be objective, and be explained on a rational basis.[13] There is some dispute whether the law may only be overriden where it is inconsistent with objective justice and equity, or whether it is wider than that, and refers to a criterion of expediency. Both, however, are really concerned with what is fair between the parties. Because it is not dealing with positive law, and is the subject of special agreement, the decision would have no value in declaring the law, but it may have some role in developing it.[14]

These categories of equity are at best an attempt to explain the variety of circumstances in which general principles are used for seeking solutions. The overlapping and therefore limited usefulness of the categories is pointed up in the *Cayuga Indians* case,[15] the first to discuss in any detail the relationship of equity to international law. New York State and the Cayuga Nation concluded a series of agreements after the American War of Independence, which provided for an annuity for the Indians. A majority of the Cayugas moved to Canada. After 1810 the annuity was only paid to those Cayugas still living in the United States. Britain brought an action on behalf of the Canadian Cayugas for their share of the annuity. It was argued that the core of the tribe and "the principal personages" lived in Canada; and alternatively, that because of their numbers they were entitled to a proportion of that annuity.

The tribe was only a legal unit of New York law and only the Nation as a body corporate was the object of payment.[16] Their corporate personality under that law was their only legal recognition. Therefore, as a separate part of the

10 Supra n. 3, 10 and 15.
11 Ibid., 40.
12 *The Development of International Law by the International Court* (Stevens, London, 1958), 213-215.
13 *The Permanent Court of International Justice 1920-1942* (MacMillan, New York, 1943), 620.
14 In the *Chaco Boundary* arbitration (1938) 3 U.N.R.I.A.A. 1817-1825, the tribunal was deciding a case *ex aequo et bono* under a provision of its constitution. The tribunal decided on a boundary which it considered would be an equitable one. In doing so it took into account the needs of the parties for mutual security and geographical and economic requirements. That sort of consideration of various factors took place in the continental shelf cases, although there they were decisions *intra legem*.
15 (1926) 20 Am. J. Int. L.. 574.
16 The Nation could not change its national character because it was in a dependent status under New York law.

Nation, the Canadian Cayugas had no legal claim. The tribunal held that they had an equitable claim because of certain special circumstances. First the Nation had no independent status, being only a unit of New York law; and secondly their dependent legal position, which was anomalous. The grounds for the decision were identified as " . . . general considerations of justice, equity, and right-dealing guided by legal analogies and by the spirit and received principles of international law", which would be applied to modify " . . . the harsh operation of strict doctrines of legal personality in an anomalous situation for which such doctrines were not devised . . . ".[17] Looking behind the corporate fiction, the tribunal awarded a proportionate share of the annuity to the Canadians.[18]

The case may be viewed as an example of the application of equity *intra legem* insofar as it is the development of an exception to the general rule concerning corporate personality. In addition, it may be described as the development of law to fill a gap, where before the law was inadequate (equity *praeter legem*). Finally, it might indeed be interpreted as equity *contra legem* to the extent that the decision was contrary to the law then existing. This example is illustrative of the weakness of these categories.[19] Without actually addressing itself to the question, the majority of the writing has assumed that the tribunal was applying customary international law. Indeed the category of equity *intra legem* is the only one which is fully accepted of the three in that it treats equity as part of existing law. However, the freedom with which the courts in the continental shelf cases develop, define and apply the law (while formally applying customary law) make the foregoing discussion a useful context for a consideration of the judicial function on the frontiers of law, the importance of reaching an acceptable solution to the dispute, and the functioning and operation of the international legal order.

B. Why Are These Principles Equitable?

For all the preceding definitional arguments about categorisation, why is it necessary to describe particular principles or rules as equitable in international law? There is no necessity to identify and set them apart as in Anglo-American jurisprudence. It is not intended that they should form a separate body of law. There are a number of possible reasons for this. It may be that the use of "equity" is a reference to the source of law (ideas of equity and justice); or to the judicial functions of interpretation and analogy; or because the principle or rule has been taken from English Equity. Is the function of equity any different from other parts of international law?

If we compare the use made of equity in domestic law, we find some explanation of its uses in international law. Equity in Anglo-American legal systems is a separate body of principles and rules which developed out of the office of Chancellor. These operated by creating exceptions to a Common Law rule which if strictly applied would cause hardship,[20] or to develop law where there was no applicable law.[21]

17 Supra n. 15, 581, 585. 18 Ibid., 586. 19 Supra n. 7, 3.
20 For example, part performance and equitable estoppel.
21 For example, the trust: see Maitland *Equity* (Cambridge, 2nd ed., 1936), 1 et seq; Keeton *An Introduction to Equity* (Pitman, London, 6th ed., 1965), 1 et seq.

In civil law countries there is one group of legal principles and rules (with its own hierarchy). There is no separate body of equitable principles and rules. An example of a substantive principle which operates in an equitable fashion is abuse of rights. The principle depends on the motive of the person who has the legal right. It seeks to modify his right where, under the circumstances, to allow its exercise would be unfair or unjust. However, it is not described as an Equitable principle. To describe it as equitable serves to indicate how just it is. It does not have a special nature or function. However it does emphasise the role of discretion and appreciation and the exercise of fairness by the judge, and so institutionalises equity.

Placing the international legal system in this context, the first point to be made is that it is not rigid as the Common Law was. While international tribunals and judges have recognised the limitations of the law,[22] the law continues to develop, and there is, as a result, no need to set aside a body of law or to attribute a special quality to it.

In the *Meuse* case, Judge Hudson applied the domestic law principle of estoppel. This is an Equitable principle in English law and it seems that on that basis he described it as equitable also in international law.[23]

Despite this absence of need, writers have identified a number of functions of equity operating within international law. There is the equity in the exercise of the judicial discretion to apply the law in accordance with justice and the spirit of the law.[24] This may involve " . . . choosing between different possible interpretations of the law . . . ",[25] or mitigating the harshness of the law in its application to individual cases.[26] The latter would involve the creation of exceptions. The Advisory Committee of Jurists on the Statute of the Permanent Court of International Justice stated that equity's function was to " . . . overcome the obscurities, insufficiency or silence of the positive law."[27] This includes the filling of gaps in the law. One writer has described its function as ". . . to liberalise and to temper the application of law, to prevent extreme injustice in particular cases, [and] to lead into new directions for which received materials point the way."[28]

There are a number of examples of international judicial decisions in which equity or equitable principles have been applied as part of international law. While not describing it as equitable, the Court in the *Fisheries* case[29] between the

22 See, for example, *Fisheries Jurisdiction,* supra n. 3; and the limitation on considerations in a judicially-determined delimitation: *United Kingdom-French Continental Shelf* case (1977) 54 I.L.R. 6. Unless otherwise indicated future references to this note are to paragraphs.

23 Many Equitable maxims have been incorporated into international law: Jenks *The Prospects of International Adjudication* (Stevens, London, 1964), 414-418.

24 Cheng "Justice and Equity in International Law" (1955) 8 Current Legal Probs., 185, 210.

25 Rothpfeffer supra n.9, 87.

26 Lauterpacht *Private Law Sources and Analogies of International Law* (Longmans, London, 1927), 65.

27 League of Nations, *Procès-verbaux* (1920), 48, (translated from French text).

28 Supra n.26, 617.

29 *(United Kingdom* v. *Norway)* [1951] I.C.J. Rep. 116.

United Kingdom and Norway, was in substance applying equity. This is equitable because through the attributes of discretion and flexibility specific factors were developed for the particular case. The finding of the Court was ". . . that the belt of territorial waters must follow the general direction of the coast, [along with fixing] certain criteria valid for any delimitation of the territorial sea."[30] The criteria, ". . . which can be adapted to the diverse facts in question", were first; close dependence of the territorial sea upon the land domain — the delimitation should not appreciably depart from the general direction of the coast; secondly, the close relationship between certain sea areas and land formations which divide or surround them; and thirdly, beyond purely geographical facts, " . . . that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."[31]

This range of criteria is defined specifically for the facts of that case. The equitable principle of having a power to develop factors for resolving individual cases, rather than more well-defined rules, is important. Further, no weighting is given to them. A similar body of criteria for continental shelf delimitation has been developed. The use of flexible criteria is important for continental shelf delimitation, and this was the first instance in the Court that reference was made to them.

The *Fisheries* case recognised the application of criteria or relevant circumstances for the delimitation of a maritime boundary, which are said in the continental shelf cases to be a part of the application of equity. Jenks stated that these factors ". . . must be regarded as equitable rather than legal considerations . . .".[32] By this distinction he must be taken as pointing to the considerations being ones of fact introduced under the aegis of equity.[33]

III. THE CONTENT AND OPERATION OF EQUITY IN THE LAW OF CONTINENTAL SHELF DELIMITATION

A. Introduction

The law governing continental shelf delimitation between two or more states has the thread of equity or equitable principles running through it. In its application to individual circumstances the law is measured against an assessment of the equity and justice of the particular delimitation. More recently, principles or rules of equity (involving a greater degree of precision) have been developing. The geographical circumstances with which the law has had to deal have been of a wide variety, and the results of any attempt to apply a particular method of delimitation would have been perceived as unfair by one of the parties. As a result the applicable law is general. It is in the need for flexibility that equity has a role to play.

30 Ibid., 129. 31 Ibid., 133.

32 Supra, n.23, 328. See dissenting judgment of Judge McNair, supra n.29, 161, 169; and Waldock "The Anglo-Norwegian Fisheries case" (1951) 28 Brit. Year Book Int. L., 114, 149, 156, 169, (Counsel for the United Kingdom).

33 The varying uses of these considerations are shown up in, for example, *Minquiers and Ecrehos* case [1953] I.C.J. Rep. 47; *The Temple of Preah Vihear* case [1962] I.C.J. Rep. 6; and the *Fisheries Jurisdiction* case supra n.3.

B. The Cases

The following is an outline of the background to and facts of the three cases on continental shelf delimitation which have been decided at the international level by a court or tribunal. In the discussion which follows the decision-making body is referred to generally as the Court.

1. *The North Sea cases*[34]

These, the first cases before an international court or tribunal which directly concerned the delimitation of a continental shelf,[35] were between the Federal Republic of Germany and the Netherlands and Denmark. The shelf to be delimited was off the North Sea coasts of the three countries, forming a reverse L-shaped configuration. It was treated by the Court as an adjacent or lateral, as opposed to an opposite, state relationship. In the Court's judgment the first general principles of customary law on delimitation were formulated. This law required the goal of an equitable solution to be achieved by consideration of the relevant circumstances.

2. *The Anglo-French case*[36]

The continental shelf concerned was between the United Kingdom and France extending through the Channel region, and out into the Atlantic. Two areas of difficulty arose. The Channel Islands are situated within a gulf of the French coast, and the Scilly Islands off the west coast of England extend farther into the Atlantic than does the island of Ushant off the French coast. The parties had agreed to an equidistance line through most of the Channel — only the two areas just described were in dispute. It is significant that although the parties were in dispute at times over whether customary or conventional law ought to apply, they did not dispute the law's substance. Both conventional and customary law was applied by the tribunal.

3. *The Tunisian-Libyan case*[37]

In configuration, the coast in question was broadly similar to that in the *North Sea* cases, but with three important differences: the presence of islands off the Tunisian coast; the states did not have a balanced or symmetrical territorial (land) boundary at the apex of the L-shaped coast; and the unequal lengths of the coastlines in the delimitation area. Although there was general agreement between the parties on the substance of the law (which was customary), some dispute did arise over the importance of the factors which determined the extent of the natural prolongation.

4. *The roles of the courts compared*

The latter two cases involved similar tasks. In 1977 the Court was actually required to make the delimitation, and in 1982 the Court indicated which directions the line should follow while the parties determined the precise coordinates of those lines. In 1969 the Court was just required to declare the law.

34 Supra n.5.

35 There was, however, the arbitration between Norway and Sweden to delimit their fisheries banks which are classed as shelf resources: *Grisbadarna Arbitration* (1909) 11 U.N.R.I.A.A. 147.

36 Supra n.22.

37 Supra n.2.

The Courts' statement of the law in 1969 was at a general level because it was not required to apply the law to the facts. So, in that declaration, the Court did not indicate the kind of weight to be given to the facts before it. The later courts were requested to apply that law. While the coast in the North Sea did not have any special problems beyond its general configuration, the other two involved a number of issues — in particular the effect of islands. Although further difficulties arose in the later cases, the law was also becoming more developed due to increased state practice and the case law.[38]

The two earlier cases involved, for the most part,[39] a shallow and uniform submarine topography, which consequently allowed little scope for discussion of the geology of the shelf as a factor in the delimitation. This was noted by counsel on both sides in the *Tunisian-Libyan* case.[40] However, the North African coast and submarine areas offered considerably more scope for the discussion of geology and bathymetry (measurement of water depth), so that both parties relied to a much greater extent than was done before on these factors. The Court found that those factors indicated no clear natural prolongation. In contrast, the arguments in 1969 and 1977 relied more on principles such as proportionality, and on the definitions of the coasts' relationship to each other.

There is, running through the three cases, a particular aspect of the physical facts which was at the core of most of the disputes. Article 6 of the Geneva Convention has two separate paragraphs applying in substance the same law to two separate situations. First, where the states are directly opposite each other. Secondly, where the states are adjacent to each other. Is such a distinction always clear on the facts? The Montego Bay Convention, while maintaining the distinction between opposite and adjacent, has incorporated them into one paragraph, with the same statement of the appropriate law. In the three cases, the major dispute centred around coasts which strictly fell into neither category, either because they were concave (*North Sea, Tunisian-Libyan*), or because there was no continuous belt of land from which to measure the delimitation (Western Approaches in *Anglo-French*).

Denmark and the Netherlands had drawn a line between themselves where they considered that the Federal Republic of Germany's continental shelf ended. They had no common territorial boundary, and had drawn the line applying article 6, both states having ratified the Geneva Convention. The Court stated that they

38 The formulation of law in the North Sea cases was general " . . . because that was all the Parties had asked the Court to do; they asked the Court to determine the applicable law, but not to apply it itself to the facts of the case . . . . [B]eing the first enunciation, this corresponds to the usual course of the evolution of law, starting with some general propositions, which are progressively refined, specified and qualified in the light of accumulated experience", I.C.J. Pleadings, *Tunisia/Libya* CR 81/8, 18 per Abi-Saab, Counsel for Tunisia.

39 In the *Anglo-French* case there was a geological fault zone known as the Hurd Deep which was present in the Channel, and the Western Approaches. The Court did not consider that it was substantial enough to affect the delimitation: supra n.22, 9, 12, 104-110.

40 I.C.J. Pleadings, *Tunisia/Libya* CR 81/7, 47 per Jennings, (Tunisia) and CR 81/17, 27 per Vallat, (Libya).

were neither opposite nor adjacent states, and so article 6 was inapplicable and another source of law would have to be applied.[41] However, the Court noted that "[i]n certain geographical configurations . . . , a given equidistance line may partake in varying degree of the nature both of a median [between opposite states] and of a lateral line [between adjacent states]."[42] The view of the Court was that article 6 was not exhaustive.

In 1977, France argued that in the Western Approaches the two states were neither opposite nor adjacent,[43] that article 6 was not exhaustive and did not cover the situation, and by that fact the area automatically[44] constituted a special circumstance in a similar way to the North Sea. The United Kingdom rejected that reasoning,[45] arguing that article 6 was exhaustive and that the region was an opposite states situation, where the argument[46] for a median line is generally stronger. That is because the opposite state acts as a buffer to reduce the effects of special features, while adjacent states face the open sea.

The Court decided that article 6 was exhaustive,[47] and noted that the essence of the distinction was that a lateral equidistance line extending far into the sea was more likely to be inequitable.[48] It played down the importance of the distinction, characterising the shelf as lying off the coasts and pointing out that " . . . the equitable character of the delimitation results not from the *legal* designation of the situation . . . *but from its actual geographical character* . . . ".[49]

In the 1977 case the Court emphasised that article 6 was exhaustive. This was consistent with its view that conventional and customary law were the same. On the other hand, it also discouraged trying to categorise each geographical situation as either opposite or adjacent, but it did consider that the median line was more likely to be equitable in an opposite state situation.

These statements were reinforced by pronouncements in the *Tunisian-Libyan* case. With regard to the first point, the Court stated that the change in the direction of the Tunisian coast after the territorial boundary " . . . modif[ies] the situation of lateral adjacency . . . , even though it clearly does not go so far as to place them in a position of legally opposite States" — emphasising the categorisation.[50] And with regard to the second point, the Court stated that the second line which it drew for the delimitation was more like an opposite state situation, in which greater weight would be given to equidistance (agreeing with the *Anglo-French* decision).[51]

C. The Substantive Law of Delimitation

Having put the three cases in their geographical contexts, and briefly compared the problems raised and the bodies of law applied, this section will be concerned with the law itself. The courts have declared conventional law and general inter-

41 Supra n.5, 36.
42 Ibid., 6.
43 Supra n.22, 89-90, 207.
44 Ibid., 207.
45 Ibid., 214, 217.
46 Ibid., 91, 93, 221, 230.
47 Ibid., 94, 237. See also supra n.5, 57 and 79, therefore disagreeing with the Court's position in 1969.
48 Ibid., 95.
49 Ibid., 233, 239.
50 Supra n.2, 78.
51 Ibid., 126.

national law (article 38(1)(b)-(d)) to be the same. A consideration of the applicable law will demonstrate the part which equity plays in a delimitation. An appropriate place to begin the discussion is by examining the fundamental basis of delimitation law as the courts have seen it.

1. *The inherent right to continental shelf*

In the *North Sea* cases, the Federal Republic of Germany argued that the shelf must be divided among the three states on the principle of "distributive justice", because the shelf was held in common by the three parties.[52] It argued further that in so doing only geographical factors should be considered. At the same time it rejected the application of the equidistance rule, as argued by the other side. The Courts response to those arguments was to introduce the conceptual basis of delimitation law, which was affirmed in the two later cases:[53]

> . . . the rights of the coastal State *in respect of the area* of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio,* by virtue of its sovereignty over the land . . . . In short, there is here an inherent right.

The Court then went on to state that[54]

> . . . apportioning an as yet undelimited area, . . . [is] inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States . . . . the fundamental concept involved does not admit of there being anything undivided to share out.

This will be called the geographical fundamental. The fallacy in this conceptual view was exemplified when the Court examined the question of delimitation. The law was employed to determine where an equitably-drawn delimitation should be, rather than as though the line had always been there. As the Court noted, "[t]he doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one."[55] By that acknowledgement it is clear to see that when in fact a delimitation is made the inherency, with regard to the area as opposed to the right, should start from that point. The right arises by virtue of sovereignty over the land, and the area is to be determined equitably.

The inherency principle formulated by the Court was not evident during the preparatory conferences for the Geneva Convention, which were concerned to find a suitable and practical method for delimitation. Placing the main emphasis on negotiation is inconsistent with the notion of a pre-existing entitlement to a specific area of shelf.[56]

52 [1968] I.C.J. Pleadings, *North Sea Continental Shelf* cases vol. 1, para. 30.

53 Supra n.5, 19 (emphasis added).

54 Ibid., 20. At 18, the Court stated: "Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area."

55 Ibid., 96.

56 Although at one point the Court states that the equidistance line is not compulsory, of course it is if the negotiation fails and there are no special circumstances, 85. The inconsistency between a compulsory method and pre-existing boundaries is recognised by the Court when it states that equidance was chosen in 1958 for practical convenience and cartography, and not on consideration of legal theory, 53.

The two later cases affirmed the inherency view,[57] but the judgments nevertheless exhibit diversions from that view. In the *North Sea* cases, the Court admitted that after the delimitation has been made, the natural prolongation of each state may still overlap. In that instance, this marginal area was to be divided into shares.[58] The Court specified in the *dispositif* that a reasonable degree of proportionality is to be a consideration, " . . . account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations . . . ".[59] This should be irrelevant if boundaries already exist between the parties. It does not matter what other delimitations may occur in the area, as they can have no influence on an existing line.

Perhaps the clearest departure from the inherency view related to the relevance of other delimitations in the area. In the *North Sea* judgment (where the cases had been joined) the continental shelves of the three countries were being delimited simultaneously. The Court commented:[60]

> . . . neither of the lines in question, taken by itself, would produce this effect [of giving the Federal Republic of Germany a smaller area], but only both of them together — an element regarded by Denmark and the Netherlands as irrelevant to what they viewed as being two separate and self-contained delimitations, each of which should be carried out without reference to the other.

The Danish and Dutch view in fact accorded with the Court's earlier reasoning. However, it went on to assert that " . . . although two separate delimitations are in question, they involve — indeed actually give rise to — a single situation."[61]

This point arose again in the *Anglo-French* case, where the United Kingdom argued that the prospective delimitation between itself and the Irish Republic was a factor, as directed by the *dispositif* in the 1969 judgment. After rejecting this early on,[62] the Court stated that it " . . . has necessarily taken cognizance of this feature of the Atlantic region . . . ",[63] and it recognised that the present and prospective delimitations might overlap. In the *Tunisian-Libyan* case, the existence or absence of delimitation agreements with neighbouring states were considered as part of the context. Particular importance was placed on the region to the north and north-east of the delimitation area.[64]

57 Supra n.22, 77.
58 Supra n.5, 20, 99, 101(C) (2). In Judge Ammoun's view the Court's statement on overlaps involved apportionment, p.148.
59 Ibid., 101(D)(3).
60 Ibid., 7.
61 Ibid., 11. In his separate opinion Judge Padilla Nervo noted that it was because the two delimitations were being taken together that there was an inequitable result; a fact the Court had to take into account, p.89. The ". . . matter constitutes an integral whole", p.90. Judge Koretsky stated in his dissenting opinion that macrogeography was irrelevant, " . . . except in the improbable framework of a desire to redraw the political map . . .", p.162. Judge Tanaka (dissenting) noted that if delimitation applied, the cases were divisible; otherwise the combined effect is important. He criticised the finding of inequity because it was dependent on a consideration of the combined effect of the two lines, pp.191-192. And further, the special circumstances clause was inapplicable because " . . . what seems to make the Danish and the Netherlands parts bigger in comparison with the German part largely comes fom elsewhere, not at the cost of German sacrifice", p.189.
62 Supra n.22, 200, 201.
63 Ibid., 236.
64 Supra n.2, 33.

The *Anglo-French* case was marked by concern with the surrounding geography, and in particular in respect of the Channel Islands region, where the Court observed that it " . . . must clearly have regard to the region as a whole and to its relation with the rest of the arbitration area."[65] The Court described as an equitable consideration the United Kingdom's argument that it was only to the north and north-west that the Islands could receive compensation for a restricted continental shelf in the gulf.[66] That acceptance clearly amounts to apportionment.[67]

However, dicta in the *Anglo-French* case gave a more restricted role to proportionality. It was only to be used for assessing the effects of particular features on a delimitation. To use it to determine the proportion of shelf entitlement with reference to the length of coastline would, the Court said, result in a distributive apportionment of shares, and proportionality does not provide " . . . an independent source of rights . . .".[68] In the result the Court applied the principle as though it did.

In that case, and in the *Tunisian-Libyan* case, the relevance of other maritime regimes was considered. When discussing the Channel Islands in the former case, it was stated that the delimitation should not be allowed to encroach upon the Islands' 12-mile fishing zone.[69] This zone is variable and bears no relation to the continental shelf. It appears that on the basis of this fishery zone treatment the Court subsequently accepted the Tunisian argument that any delimitation should not interfere with its historic rights in respect of fisheries.[70] Treating acquired rights as pre-eminent contradicts the inherency view.[71]

The fiction that particular parts of the continental shelf are already appurtenant to states is further pointed up by the sort of considerations taken into account by the Court. For example, the Channel Islands and the Scilly Islands were given the weighting they received in part because of their economic importance, their population and their political status. If the United Kingdom had succeeded in persuading the Court that the Channel Islands should be treated as an independent state the delimitation would almost certainly have been different. This is evidenced by the fact that the Court attached great significance to their legal and political status. Would the delimitation be reconsidered if they do achieve independence?[72]

65 Supra n.22, 145, 181.
66 Ibid., 198, 170.
67 The Court went on to say, however, that the United Kingdom was asking for too much compensation, and the example of the French islands of St. Pierre et Miquelon off the Canadian coast was considered, 200, 201.
68 Ibid., 101.
69 Ibid., 202.
70 Supra n.2, 102.
71 See also the Tunisian argument regarding the taking into account of economic factors (the relative wealth of the two states) and the Court's response which was based on the variability of the factor, and not its inconsistency with the ab initio principle, 107.
72 Blecher "Equitable Delimitation of Continental Shelf" (1979) 73 Am.J.Int.L., 60. In a dissenting opinion, Judge Oda, who was counsel for the Federal Republic in 1968, stated that the ab initio principle had " . . . been overtaken by events" and that here it ". . . was simply a question of equitably dividing, or apportioning, between the Parties, by means of a justifiable line of demarcation, those submarine area which either could potentially have claimed", 154. See also paras. 28, 152. He stated that proportionality involved eyeing the area " . . . from a very broad macrogeographical standpoint . . .", 163.

Similarly, if the Scilly Islands had been barren and unpopulated, or even under French sovereignty, would they have been ignored, or would they too have been entitled to an enclave? The French counsel recognised this problem in relation to the Channel Islands. He maintained that the Court had to take account of the " . . . variable political circumstances . . . " and that it was " . . . concerned only with islands or groups of islands not themselves directly responsible for their foreign relations, as distinct from island or archipelagic States."[73]

A more accurate interpretation of the ab initio principle, consistent with the dicta of the courts, is that a state with a coastline is entitled in principle to some continental shelf ab initio — that is, by virtue of its sovereignty over the land. As Judge Jiménez De Aréchaga stated in his separate opinion, "[t]o enjoy continental shelf rights all that a State needs is a coastal front to the sea . . . ".[74] It is something which is non-negotiable — an inherent right. It is then that the various considerations for a delimitation would be considered, giving equity a mandate.

2. *Equity and equitable principles*

The Truman Proclamation of 1945[75] introduced equitable principles into the law on continental shelf delimitation. This will be described as the legal fundamental. In the *North Sea* cases, a rule of law described as "the rule of equity" was propounded which required the application of equitable principles.[76] These equitable principles were left undefined, although there was concern to emphasise that " . . . it is not a question of applying equity simply as a matter of abstract justice . . . ".[77] Instead of defining those principles, the Court circumscribed them by limitations or qualifications. These included the propositions that "[e]quity does not necessarily imply equality",[78] and most importantly of all,[79]

> delimitation is to be effected by agreement in accordance with equitable principles . . . in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.

This broad approach was repeated in the *Anglo-French* case. As in the *North Sea* cases the pinpointing of core factors was continued: the appropriateness of any " . . . method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case."[80] And again, "[w]hat equity calls for is an appropriate abatement of the disproportionate effects . . . " of a particular feature.[81]

The development of limitations was again evident. The equality of states is not an equitable consideration because it is not the function of equity to " . . . pro-

73 Supra n.22, 158.
74 Supra n.2, 59 (separate opinion).
75 Proclamation by the President with respect to the Natural Resources of the subsoil and seabed of the Continental Shelf, 28 September 1945, (1946) 40 Am.J.Int.L. Supp., 45.
76 Supra n.5, 88.
77 Ibid., 85.
78 Ibid., 91.
79 Ibid., 101(C)(1).
80 Supra n.22, 97, 84.
81 Ibid., 249. And, ". . . whether . . . on equitable grounds, some modification of the application of the principle . . . " of natural prolongation is necessary, 195.

duce absolute equality of treatment, but an appropriate abatement of the inequitable effects of the distorting geographical feature."[82] However, the Court was of the opinion that equality was a ground of equity " . . . to be looked for in the particular circumstances of the present case and in the particular equality of the two States in their geographical relation to the continental shelf . . . ".[83]

In the *Tunisian-Libyan* case, the Court makes the first real attempt to define what is meant by "equity". Until this case, "equitable principles" and "equity" had been used interchangeably. However, the former received a greater definition from the Court. First the consideration of all relevant circumstances in a delimitation was identified as an equitable principle.[84] Another is that " . . . the only absolute requirement of equity is that one should compare like with like."[85] This attempt to be more precise takes the development of the law only so far. It was done in a limited way. While setting bounds, further questions continue to be raised, such as the weighting of the circumstances.

Secondly, the Court identified what may be described as transitory equitable principles. The principles or rules which are used for a particular delimitation become equitable because the result of their application is an equitable solution.[86] This takes the law's development no further, and raises again the question of why it should be described as equitable.

3. *Natural prolongation*

This is the first of three sections on factors which form the basis of the Court's appreciation of the cases. The way in which it has been defined and used by the Court has not been consistent. In general terms it is used to indicate the extension of a state's territory from its coastline under the sea to the outward boundary of the legal continental shelf.

Two views have developed regarding the definition and role of natural prolongation. One is that it is a relevant circumstance to be weighed with others, and therefore is a purely physical factor. The second view is that it is used first as a relevant circumstance, and then as a description of the legal delimitation made. This latter use serves no functional purpose. A variation of the second view, emphasising the importance of relying on geography and geology wherever possible, is to treat the physical natural prolongation as an overriding relevant circumstance and therefore determinant of the result. The distinction between the physical and legal natural prolongations was made in all the cases.

In dealing with the nature of natural prolongation the Court in the *North Sea* cases stated that proximity or nearness was not a conclusive criterion, it is the " . . . idea of extension which is . . . determinant."[87] That is, a method or calculation, or something otherwise arbitrary, will not determine the legal continental

82 Ibid., 251, 195.
83 Ibid., 195.
84 Supra n.2, 72, 81.
85 Ibid., 104.
86 Ibid., 70. Two of the judges identified statements of law from the earlier cases as equitable principles: Jiménez De Aréchaga (non-encroachment) 65, 69, 72; Evensen (nature should not be refashioned) 16.
87 Supra n.5, 43.

shelf. Rather it is an appreciation of the factors present which is important.[88] The Court, however, did not consider that the physical factors were decisive. It referred to "the most natural prolongation", allowing in non-geographical factors. And further the Court recognised that a determination of a continental shelf by this analysis may be the extension of two states. In such a case, equity and the relevant circumstances have to be taken into account " . . . in such a way as to leave *as much as possible to each* Party all those parts of the continental shelf that constitute a natural prolongation of its land territory . . . ".[89]

While giving emphasis in the *Anglo-French* case to the importance of natural features as factors in a continental shelf delimitation, the Court restricted their use where they led to an inequitable legal natural prolongation. This can be brought out in relation to the islands in that delimitation.

Two problems were illustrated here — either there was a unity of the geology (providing no useful factor in the delimination) or there was no unity (and so other factors had to be imported).[90] In the former category were the Channel Islands, and in the latter Ushant and the Scilly Islands. The result was that as a relevant circumstance natural prolongation was of no consequence. Other relevant circumstances were more important.[91] The juridical concept of the continental shelf is not determined exclusively by the physical facts of geography.[92] The Court emphasised the other side of the coin, that special circumstances and equitable principles show " . . . that the force of the cardinal principle of 'natural prolongation of territory' is not absolute, but may be subject to qualification in particular situations."[93]

In the *Tunisian-Libyan* case the Court recognised the dual nature of natural prolongation, describing it as " . . . a consideration which they [the parties]

88 As the Court reasoned ". . . that whenever a given submarine area does not constitute a natural — or the most natural — extension of the land territory . . . even though that area may be closer to it than it is to the territory of any other State, it cannot be regarding as appertaining to that State . . .", idem.

89 Ibid., 101(C)(1), (emphasis added).

90 The Court dealt with the Isle of Wight on the basis that it was ". . . comprised within the coastline of the mainland itself", supra n.22, 4.

91 This was stated by the Court. The uniformity of the physical facts " . . . means that geographically it [the Channel] may be said to be a natural prolongation of each one of the territories which abut upon it. The question for the Court to decide, however, is what areas of continental shelf are to be considered as *legally* the natural prolongation of the Channel Islands rather than of the mainland of France", ibid., 191.

92 Idem.

93 Idem. It went on to say that the principle of natural prolongation in its physical sense was not absolute otherwise " . . . a small island would block the natural prolongation of the . . . nearby mainland . . .", 192. In such a situation the prolongation " . . . has to be appreciated in the light of all the relevant geographical and other circumstances", and ". . . the legal rules constituting the judicial concept of the continental shelf take over and determine the question", 194. The Court then sought to determine whether the physical prolongation accorded with equitable principles, " . . . or whether their situation close to the mainland of France requires, on equitable grounds, some modification of the . . . principle . . . ", 195.

regarded as not only pertaining to the essence of the continental shelf but also a major criterion for its delimitation . . . ".[94]

This was the first case to give any scope for argument based on geology. However, the Court was careful to limit its role while emphasising the factor's fundamental nature.[95] Placing heavy reliance on that factor was discouraged — physical prolongation could not be equated with an equitable delimitation. Physical prolongation was not on the same plane of equality as equity.[96]

The Court found that the parties' arguments did not identify significant natural features which established a physical prolongation. It concluded that natural prolongation was not a useful criterion because it was common to both parties; the physical structure was not such as to determine an equitable line of delimitation.[97]

A close relationship would be expected to exist between the physical and legal natural prolongations. However, the Court did not indicate that if the geology had been more pronounced the physical natural prolongation would have acquired predominance as a relevant circumstance.[98] It is in fact unsurprising that in most cases the physical prolongation does not produce a clear line. That line is the extension of a political territorial boundary, which is not always determined by natural features. However, even if the physical prolongation was clear, it would not necessarily constitute the final delimitation because the principle is not decisive. In all three cases physical natural prolongation was not a useful criterion because there were no particular features which were sufficiently pronounced.

4. *Relevant circumstances*

The purpose of relevant circumstances is to define the legal situation from which an appreciation can be made. In 1969 the Court stated that in applying equity, " . . . there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures . . . "[99] and this most often involves a balancing of the factors, rather than reliance on one. However that statement should be understood in light of the fact that the delimitation was to take place through negotiation, where extra legal factors may be considered. In 1977 a limit was placed on the number where the court itself is applying them. The appropriateness of a method for an equitable delimination " . . . is a function or reflection of the geographical and other relevant circumstances of each particular case",[100] both under article 6 and customary law.[101]

94 Supra n.2, 36.
95 It is the basis of title, and has " . . . a certain role in the delimitation of shelf areas, in cases in which the geographical situation made it appropriate to do so", 43.
96 It " . . . *may*, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation . . . ", 44, (emphasis added).
97 Ibid., 67, 133A (2), (3).
98 However, see the comment by Judge Jiménez De Aréchaga that natural prolongation is the most fundamental and relevant circumstance, 37.
99 Supra n.5, 93.
100 Supra n.22, 97.
101 Ibid., 69.

(a) Physical circumstances

The *North Sea* cases identified the following factors; geology, geography and the unity of deposits, whose relative weight " . . . varies with the circumstances of the case."[102] The emphasis placed on physical factors is because " . . . the link between this fact [physical fact of the continental shelf] and the law . . . remains an important element for the application of its legal regime."[103] This was further elaborated. The geology of the shelf may indicate[104]

> . . . whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

This emphasis on geographical features must remain because any delimitation cannot change the existing geography. Further, it is important to consider the geographic configuration of the coastlines, for the presence of any special or unusual features.[105]

In the two areas of delimitation which presented particular problems, the Court in the *Anglo-French* case began systematically " . . . by identifying the geographical and other features which establish the legal framework for its decision . . .".[106] This emphasised the importance of the opposite or lateral categorisation and led to conclusions about the most equitable uses of the median line. It then proceeded to discuss the geology, and the position of the coastlines, as the *North Sea* cases indicated. In the Western Approaches, for instance, the similarities (both coasts were peninsulas with islands) and the dissimilarities (the United Kingdom peninsula and islands extended farther westwards) were considered.[107] Further, regard was had to the lateral relation of the two coasts as they abutted onto the shelf, and " . . . the great distance seawards that this shelf extends from those coasts."[108] The Court concluded that the Atlantic region ". . . has characteristics which distinguish it geographically and legally from the region within the English Channel."[109] Again, evidencing its discretion, the Court stated that the relative weighting depended on a " . . . reasonable evaluation of the effects of natural features."[110]

The *Tunisian-Libyan* case was marked by the detailed arguments of counsel concerning the geology of the continental shelf. It was their purpose to establish that there was a distinct natural prolongation.[111] The Court decided that the evidence was inconclusive and so this factor was inapplicable.[112] Geology, however, still had significance as a relevant circumstance, as did geomorphology — but in the circumstances they were not of much assistance.[113]

102 Supra n.5, 93, 94. 103 Ibid., 95. 104 Idem.
105 Ibid., 96, 101(D) (1). See also Judge Jessup, p. 73; Judge Koretsky, p. 156.
106 Supra n.22, 232; see also 187.
107 Ibid., 234, 235. 108 Ibid., 242.
109 Ibid., 232. 110 Ibid., 98.
111 Supra n.2, 52-57 (Libya), 58 (Tunisia).
112 Ibid., 70.
113 Ibid., 80, 122, 133(A).

As in the *Anglo-French* case, the Court began by defining the area in dispute and the area relevant to the delimitation. It noted the general configuration of the coasts and identified two special features. It was "legally significant" that the Tunisian coast did not turn north until after the boarder[114] and the island of Jerba and the Kerkennah Islands were " . . . a circumstance which clearly calls for consideration."[115] These were examples of the appreciation which the Court was making.

(b) Proportionality

The only other factor mentioned in the *North Sea* cases was,[116]

> . . . the element of a reasonable degree of proportionality . . . between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines . . . measured according to their general direction . . . to reduce very irregular coastlines to their truer proportions.

Allied to this is the taking into account ". . . of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region"[117] — a macrogeographic consideration. This factor was interpreted as having two distinct uses in the *Anglo-French* case, and was the basis of precise calculations by the Court in 1982. The Court in 1969 was conservative in its elaboration of factors, limiting itself to geographical or closely-related ones.

In the *Anglo-French* case, the Court stated that this criterion was not one which could be applied in all cases. Its role in that case was[118]

> . . . a broader one, not linked to any specific geographical feature. It is rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation, and in particular of a delimitation by application of the equidistance method [that is, a criterion to measure disproportion].

In the *North Sea* cases it was in the concavity of the coasts and the presence of three states that the factor was used as a test of the fair or balanced nature of any delimitation.

The Court in 1977 broadened the applicability of this factor by identifying two uses for it. First, " . . . in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the *North Sea* . . . cases." Secondly, more usually, " . . . for determining the reasonable or unreasonable — the equitable or inequitable — effects of particular geographical features or configurations upon the course of an equidistance-line boundary",[119] where there is a distortion of the general configuration of the coasts. This factor places a limit on a natural prolongation where it would be inequitable. Its second use appears limited to conventional law (equidistance), but the use of the line as a yardstick in customary law will be a point pursued in section 5 below.

To ensure that it only ranks as one factor, however, the Court emphasised that proportionality did not provide an independent source of rights to areas of shelf.[120]

114 Ibid., 78, 133(B) (2).
115 Ibid., 79, 133(B) (3).
116 Supra n.5, 98.
117 Ibid., 101(D) (3).
118 Supra n.22, 99.
119 Ibid., 100.
120 Ibid., 101.

In the second sense, it was used to identify the Scilly Islands as a special circumstance, and " . . . the extent of the adjustment appropriate to abate the inequity" arising from the distorting effects of particular geographical features.[121]

The Court in the *Tunisian-Libyan* case applied the proportionality criterion in a novel manner. It calculated the length of coastline to the area of the delimitation, following the sinuosities, and then the general direction, of the coast. The conclusion was that the proportion 40:60 was more or less appropriate.[122] In 1977, it was stated that " . . . nice calculations of proportionality . . . " ought not to be made, and that to award proportions ". . . would be to substitute for the delimitation of boundaries a distributive apportionment of shares."[123] Indeed the Court seems to have gone beyond the use of the factor as merely a confirmatory test of the delimitation.

If the principle is going to be used that precisely, Judge Oda has a valid point that " . . . if a method can be applied for the purpose of verification, why should it not have been tried in the first place?"[124] The Court also made reference to existing and potential delimitations, and the position of the land frontier.[125]

(c) Other circumstances

In the *Tunisian-Libyan* case the first part of the delimitation was made along a line corresponding to a de facto line which coincided with the granting of oil concessions by the two parties.[126] The Court also gave historic rights a pre-eminent position by stating that a delimitation could not encroach on them — emphasising acquired rights.[127] Tunisia also raised economic circumstances.[128] The Court held that this factor could not be taken into account, because economic[129] circumstances were extraneous factors and unpredictable variables. They were, however, made use of in the broader context of social factors in the *Anglo-Norwegian Fisheries* case.[130]

(d) Conclusion

The relevant circumstances[131] are balanced against each other. Physical circumstances may be reduced in importance if they result in a disproportionate delimitation. A boundary may not encroach on historic rights.

121 Ibid., 250.
122 Supra n.2, 131 Judge Jiménez De Aréchaga was in agreement with the Court in calculating proportions, but thought 50:50 was more appropriate, 123. Judge Evensen criticised the mathematical proportioning, and compared the Court's decision with treating proportionality as an independent source of rights, 23.
123 Supra n.22, 250, 101.
124 Supra n.2, 180, (dissenting opinion).
125 Ibid., 81, 133(B), (4), (5).
126 Ibid., 85-96. The Court held that the line corresponding to the oil concessions was appropriate for the first part of the delimitation, 117-118, 125.
127 Ibid., 102. In the end the Court found that the delimitation did not encroach on the historic rights, so they were not relevant, 121.
128 See also the separate opinion of Judge Bustemante Y Rivero in 1969, supra n.5.
129 Supra n.2, 107.
130 Supra n.29.
131 Two criteria which were considered by the Court in 1982 are new and unusual because they are really possible methods of delimitation: the drawing of a line perpendicular to

The fundamental considerations remain physical because the legal regime is based on, and still developing from, the geology.[132] Proportionality played an almost decisive role in the *Tunisian-Libyan* case. This development is out of harmony with the 1977 case, where the factor was downgraded, and it was emphasised that it was not a source of rights. The use of historic circumstances is problematic for two reasons. First, an historic right is acquired, and therefore incompatible with the state's entitlement to the shelf ab initio. Secondly, the de facto line of concessions was treated as a circumstance and an historic right but its position did not arise out of a conviction by either state that it represented this particular maritime boundary. The *Anglo-French* case was concerned with refining and developing the law, and in particular proportionality. The *Tunisian-Libyan* case marked a series of new developments, in the use of proportionality and historic circumstances.

The use of relevant circumstances in resolving a dispute is not unique to the law governing territorial boundaries.[133] They have become a part of customary law. The law, however, does not specify how they are to be balanced, and their relative importance. The Court was sensitive to this criticism:[134]

> While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.

Apart from identifying the factual situation, relevant circumstances help to identify potential special circumstances. They establish a geographical norm, so that certain features may be identified as special circumstances.

5. *Special circumstances*

The notion of special circumstances is taken from article 6 of the Geneva Convention, where it is an exception to the equidistance line. In article 6 the equidistance line is used as a standard of assessment. If the result of drawing that line is a delimitation which is inequitable on the geographical facts, then the inequality must arise because a special circumstance exists. Therefore, it is necessary to abate the effect of that special circumstance. For example, if the Channel Islands had had a median line boundary, their continental shelf would have joined with the English. The result would have been that the French shelf would be separated into two parts — a circumstance the Court considered inequitable.

the coast, and the prolongation of the general direction of the land boundary, 120. They had no part in the drawing of the boundary. Although classing them as "circumstances", the Court must only have conceived of them as possible delimitation solutions.

132 For example, the definition of the continental shelf in the Montego Bay Convention.

133 See, for example, in the context of maritime boundaries; *Fisheries Jurisdiction* case, supra n.3.

134 Supra n.2, 71. It will also be recalled that Judge McNair in the *Fisheries* case severely criticised the consideration of factors and interests which went beyond the strict geographical analysis of the facts. Brownlie commented that "[t]his caution is no doubt justified, but the law is inevitably bound up with the accommodation of the different interests of states, and the rules often require an element of appreciation", *Principles of Public International Law,* (Clarendon, Oxford, 3rd. ed., 1979), 30.

Where the Geneva Convention is not applicable between the parties the same analysis cannot be followed. The courts have held that the equidistance line does not have a special or prior position in a delimitation under customary law. As a result there is no standard to which a court may resort to identify a special circumstance. In the *Tunisian-Libyan* case, where customary law was applicable, the Court gave half-effect to the Kerkennah Islands to abate their effect on the delimitation. Logically, however, it is not possible to say that something has an effect unless you identify the influence which it has. If the equidistance line is being used, an island will entitle the sovereign to half of the shelf between that island and the other state. In the circumstances the court may decide that the island should not be permitted that degree of influence, and the appropriate abatement will be made. So, why was there a need to say, in the case of the Kerkennah Islands, that only half-effect would be given to them? The line which the Court drew in that part could have been drawn without mentioning the islands. The reference to the effect the islands have is inappropriate in the context of a delimitation which does not involve an equidistance line, because "effect" refers to the effect on the position of that equidistance line. If there is no line, the islands in that context cannot affect anything.

When a delimitation is being made under customary law a greater appreciation of the circumstances is involved because there is no line which serves as a yardstick. It would then follow that under customary law it is not possible to identify a special circumstance. All that is required is that an equitable solution is achieved. However, it could be argued that the Court, even where customary law is applicable, used the equidistance line as a yardstick to measure the effects of the various geographical features. The purpose of equidistance is to give states equal shares, and there is no reason why that principle should not extend into customary law. Even although the Court in 1969 held that conventional law was inapplicable, it stated that when two states have[135]

> . . . been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two [and this should be modified.]

The emphasis here is on treatment which is commensurate with the length of the state's coastline.

(a) *North Sea* cases

One test for the presence of a special circumstance which the Court in the *North Sea* cases put forward was, where the equidistance line produces " . . . results that appear on the face of them to be extraordinary, unnatural or unreasonable."[136] At other points it spoke of an "incidental special feature" and an "unjustifiable difference of treatment", "markedly pronounced configurations",[137] and the need to " . . . reduce very irregular coastlines to their truer proportions."[138] The Court

135 Supra n.5, 91. 136 Ibid., 24. 137 Ibid., 96.

138 Ibid., 98. See also Judge Padilla Nervo, p.92: "harsh inequities"; Judge Koretsky, p.162; Judge Lachs, p.239: "There must be, in other words, a combination of factual elements creating a situation to ignore which would give rise to obvious hardship or difficulties"; Judge Sorenson, p.256: special circumstances are not " . . . designed to rectify any such inequalities caused by elementary geographical factors in combination with the location of political frontiers."

did not specify how such features were to be abated, and used language which opened the assessment to individual appreciation. It also stated that inequity occurs when the slightest irregularity is magnified by an equidistance line, and in the situation which exists in the North Sea where three claims converge.[139]

(b) *Anglo-French* case

The *Anglo-French* case elaborated the law in two ways. First, it seemed to recognise the problem stated earlier, that no yardstick exists in customary law. Secondly, it indicated the sort of factors which determine whether a particular feature warrants special treatment. The parties were in dispute as to whether conventional or customary law was applicable to the Channel Islands area, because of the effect of the French reservations coupled with the British objections. During the consideration of that issue, the Court distinguished "special circumstances" from ". . . a circumstance creative of inequity."[140] The former is a reference to the Convention, and the latter to customary law, but they are both intended to indicate the same sort of circumstance. However, the Court did not develop that. The general reference to "inequity" indicates that a greater appreciation of the circumstances is involved than under article 6.

Two of these circumstances were identified in the *Anglo-French* case. How did the Court identify them? Having held that customary law applied to the Channel Islands region,[141] the Court started by describing the legal framework as one of opposite states in which the median line should in principle apply. The coasts were " . . . in relation of approximate equality."[142] So, the Court set the yardstick of a median line; how should the islands affect the legal framework of a median line?[143]

Noting that " . . . there may be some difference in the treatment of islands by reason of their geographical situations, size and importance"[144] and that small islands cannot block a natural prolongation, it stated that the presence of the Channel Islands " . . . disturbs the balance of the geographical circumstances . . . " where otherwise there would be a " . . . broad equality of the coastlines . . . ".[145] The Court then proceeded to discuss the importance of the Islands, for having indicated that they had a disturbing effect, it had to decide to what extent they should have an effect on the delimitation. This is the first indication of how a special feature is assessed. The Islands' population, economy, political status and legislative and administrative autonomy were mentioned,[146] along with the responsibility of the United Kingdom for their foreign relations. The Court concluded that these were islands of the United Kingdom and not semi-independent states.[147] It continued by assessing what were described as "various equitable considerations"; namely the navigational, defence and security interests in the region. However,

139 Ibid., 89. Judge Ammoun classed the coast in the North Sea as a special circumstance, p.149.
140 Supra n.22, 180.
141 Ibid., 62, 74.
142 Ibid., 181, 182 and 146.
143 Ibid., 189.
144 Ibid., 192.
145 Ibid., 183.
146 Ibid., 184.
147 Ibid., 186.

they were held not to have a decisive influence because the Channel was a major international route.[148] That was an important development in definition. A wider range of factors may be considered to determine the importance of a special feature than the types of factors considered for a delimitation.

Having decided that geology was of no assistance, the Court concluded that it had two options. First, it could give full effect to the Islands, cutting the French continental shelf into two pieces; or second, modify that result on equitable grounds.[149] It decided against the former because such a situation " . . . would be as extravagant legally as it manifestly is geographically . . .",[150] and that it would be ". . . a circumstance creative of inequity . . .".[151] It went on to say ". . . it appears to the Court . . . [that this is] a 'special circumstance' ", and this arises because it is " . . . on the wrong side . . . " of the mid-Channel line. The Court, therefore, used that mid-Channel line as a yardstick in its appreciation.

The second special feature was the delimination in the Western Approaches, where the Court found that conventional law governed.[152] Therefore, the equidistance line applied in principle. France argued that a special circumstance existed, because the English coast and islands extended further into the Atlantic than did the corresponding French coast and island. This deflected the equidistance line giving 4000 square miles more to the United Kingdom, than if the Scilly Islands had not been used as base points.[153] Although at first it stated that that fact was not enough in itself to justify another boundary, it examined the whole context of the delimitation area, and decided that because the coasts were not markedly different in the Channel and the projection was similar to an exceptionally long promontory, " . . . which is generally recognised to be one of the potential forms of 'special circumstances' ", the Court decided that this was such a circumstance.[154]

In determining the weighting of the Scilly Islands, the Court examined their political and legal status and their geographical and geological relation to the coasts. Because they were ". . . islands of a certain size and populated . . .",[155] some abatement had to be made in applying the equidistance line. The Court used the criteria of proportionality " . . . in appreciating whether the Scilly Isles are to be considered a 'special circumstance' . . . ".[156] It concluded that "[w]hat equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection on to the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom."[157] This is very much an appreciation independent of any concrete principle.

148 "They may support and strengthen, but they cannot negative, any conclusions that are already indicated by the geographical, political and legal circumstances of the region . . . . [All these elements] tend to evidence the predominant interest of the French Republic in the southern areas of the English Channel . . . ", ibid., 188.
149 Ibid., 189, 195.
150 Ibid., 190.
151 Ibid., 196.
152 Ibid., 205.
153 Ibid., 229, 235, 243.
154 Ibid., 243-244.
155 Ibid., 248.
156 Ibid., 250.
157 Ibid., 249.

(c) The *Tunisian-Libyan* case

The Court in the *Tunisian-Libyan* case began by pointing out that the size of the area to be delimited would be important in determining whether a feature is to be treated as a norm or an exception.[158] Conventional law was inapplicable between the parties, and consequently no reference was made to a "special circumstance". The Court, however, did not adopt the term 'a circumstance creative of inequity' from the *Anglo-French* case either. Instead, it included those features to which special treatment was given within the general term "relevant circumstances".

Although it identified the northward change in the coast after the border as "legally significant", that feature was not considered in the final delimitation because of the de facto line relating to the concessions.[159] The same non-treatment was given to the island of Jerba, just west of the border. The Kerkennah Islands off the coast of Tunisia were identified as a relevant circumstance, along with the surrounding low-tide elevations.[160] As in the *Anglo-French* case, the Court considered the islands' importance to determine how much influence they would have in setting the boundary. The Court described their size and distance from land, and concluded that giving the islands full effect ". . . would, in the circumstances of the case, amount to giving excessive weight to . . . [them]".[162] However, as noted earlier, if there is no yardstick, then it is difficult to see how the islands have an effect which can be calculated to include 1800 square kilometres in addition to some other area.

(d) Conclusion

A geographical feature only can be a special circumstance.[163] Perhaps the most significant aspect of the *Anglo-French* case was that the Court took the view that the difference in the law of delimitation between customary and conventional law was negligible, at least in the case.[164] This position was achieved by reducing article 6 to a combined equidistance special circumstance rule, which reduced " . . . the possibility of any difference in the appreciation of these circumstances under Article 6 and customary law."[165] There was an implicit reference to the fact that equidistance could only be mandatory under conventional law. But it avoided answering that issue and stated instead that the reference to special circumstances was to ensure an equitable delimitation,[166] in a further attempt to approximate conventional and customary law.

158 Supra n.2, 17.
159 Ibid., 78-79.
160 Ibid., 79, 127.
161 " . . . [B]y their size and position [they constituted] a circumstance relevant for the delimitation ,and to which the Court must therefore attribute some effect", ibid., 128.
162 Ibid., 128. Judge Schwebel, in his separate opinion, was of the view that the Court had not discharged the burden it had, to show that such substantial islands should have had less than their full effect.
163 Supra n.22, 108; supra n.5, Judge Koretsky, p.162. The *Anglo-French* case mentions, "the presence of islets, rock and minor coastal projections" which distort, disproportionately to their size", supra n.22, 89.
164 Ibid., 65.
165 Ibid., 68, 69.
166 Ibid., 84, 108 and see 70.

> . . . [w]hether under customary law or Article 6, it is never a question either of complete or of no freedom of choice as to method; for the appropriateness — the equitable character — of the method is always a function of the particular geographical situation . . . . Should the equidistance line not appear to the Court to constitute the appropriate boundary in any area, it will be because some geographical feature amounts to a 'special circumstance' justifying another boundary under Article 6 or, by rendering the equidistance line inequitable, calls under customary law for the use of some other method.

It is " . . . very much a matter of appreciation in the light of the geographical and other circumstances."[167] The Channel Islands were identified as a special circumstances and a circumstance creative of inequity.[168]

Statements can be found in 1969 which indicate the Court's view of the relationship of "special circumstances" to customary law. It stated that it was conceived from the beginning at Geneva that delimitation should be effected on equitable principles. It was pursuant to that that the conference " . . . introduced the exception in favour of 'special circumstances'."[169] Further, the Court recognised that if equidistance is not a customary rule it is not necessary to discuss special circumstances[170]

> . . . since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally [one might add, logically] necessary to prove the existence of special circumstances in order to justify not using that method.

The idea of special circumstances originated in conventional law. In the *North Sea* cases, the Court recognised that they were inappropriate when customary law applied. And in the *Anglo-French* case, the customary law alternative of "a circumstance creative of inequity" was enunciated. However the Court there did not discuss the problem that for there to be such a circumstance, it must be affecting some pre-existing line. It appears that the Court has, in the *Tunisian-Libyan* case, now implicitly recognised the inappropriateness of the idea in customary law. The Court spoke merely of relevant circumstances. There remains the puzzling reference to the half-effect being given to the Kerkennah Islands. In that situation, however, the Court was concerned with the angle of a delimitation line, rather than the amount of shelf which the islands might displace as a special circumstance.

6. *Equality and the equidistance/median line*

Equality of treatment between states in a delimitation is often implicit in the judgments. The provisions of article 6 provide for equal treatment in the case of opposite states where there are no agreement or special circumstances. However, the equidistance line between adjacent states does not always have that effect. This was clearly exemplified in the *North Sea* cases. But a distinction can be drawn between the two situations. In the case of the median line, the two states are given equal treatment because what separates them is halved. However, in

167 Ibid., 70.
168 Ibid., 196.
169 Supra n.5, 55. Judge Padilla Nervo said in his separate opinion that special circumstances were included " . . . in a spirit of *equity* . . . ", p.93.
170 Ibid., 82.

the *North Sea* cases the complaint was that the Federal Republic was not getting that equal treatment, the right to which was justified by the argument that the length of its coast was similar to those of Denmark and the Netherlands, and so they should all have similar areas of shelf. It was out of that argument that the principle of proportionality developed, which had as its aim to give to each state the same percentage of total shelf area in the delimitation region as that state had of the total coastline in the region. This development found its clearest expression in the *Tunisian-Libyan* case, where the Court compared the area allotted to each state with the length of its coastline.[171]

Under customary law, equality is also an important factor. Even though article 6 was inapplicable, the Court in the *Anglo-French* case started from the basis that the median line should, in principle, be used because it gave equal shares.[172] In such a case where the median line " . . . leave[s] broadly equal areas of continental shelf to each State [it will] constitute a delimitation in accordance with equitable principles."[173] While, in the *Tunisian-Libyan case,* it has been described how the second part of the line drawn involved a discussion of the effect of islands where there was no yardstick, and the Court must have had a predetermined line against which to measure the effect of geographical features. Indeed, the Court stated that because in that part they were more like opposite states, more weight would be given to the median line.[174]

Another instance of the emphasis on equality is to be found in the *dispositif* of the *North Sea* cases. There it provided that where a delimitation results in an overlap, the area in question is to be divided equally, unless the parties can agree.[175] However, both Courts have argued that "[e]quity does not necessarily imply equality", which they equate with "refashioning nature".[176] It is " . . . the particular equality of the two States in their geographical relation to the continental shelf . . . .[177]

The conflict between allowing all geographical features to be given their full effect, and the principle of equality, appeared markedly in the *Anglo-French* case. At first, the Court stated that the situation of the Scilly Isles was " . . . a fact of nature . . ." and to disregard it would be ". . . refashioning geography . . .".[178] But later it took into account the context of the Channel where equal shares had been given, and on that basis reduced the Scilly Isles to a half-effect.

One final point about equality is the use of proportionality to evaluate the effect of a feature on a delimitation. The criterion requires an answer to the

171 Supra n.2, 131.
172 Supra n.22, 87.
173 Ibid., 182.
174 Supra n.2, 126.
175 Supra n.5, 101(C) (2). Judge Ammoun, in his separate opinion in the *North Sea* cases argued that providing for equal shares in the event of an overlap in the delimitation amounted to an apportionment, p.148.
176 Ibid., 91. See also supra n.22, 195. But in elaborating that proposition the Court in 1969 gave the extreme examples of land-locked states; and two states together, one with a short and another with a long coastline; of which it said " . . . it is not such natural inequalities as these that equity could remedy", supra n.5, 91.
177 Supra n.22, 195.
178 Ibid., 244, 248.

question: is the effect of the feature equal to its importance? This is a very difficult thing to appreciate, because like is not being compared with like. The size of the area displaced by the feature, is being compared to the feature's political, legal and economic importance.

The reason why equality is developing as an underlying principle would seem to be that the continental shelf does not normally indicate by geography or history to which state it belongs. It seems fair therefore, in principle, that each state should receive treatment equal to the length of its coastline.

IV. CONCLUSION

The examples of the use of equity in part II have only limited use because the facts of each case greatly vary. A consideration of them serves two purposes. They establish that equity forms a part of international law, and that when applying equity, relevant factors must be identified and due weight given to them in accordance with their importance.

Delimitation law governs by principle rather than by rules. Instead of stating arbitrary rules it provides a framework of equitable principles, proportionality and relevant circumstances. The most important of these are the legal and geographical fundamentals identified earlier. Within that framework the law imposes an obligation on the parties to negotiate in good faith to reach a solution. The courts however remain available to assist in that resolution. This position should be compared with the decision in the *Fisheries Jurisdiction* case.

While the law continues to be refined, most evidently in the judgments in the *Tunisian-Libyan* case, this is leading only to the declaration of new principles with only a statement of their limitations as clarification. Indeed article 83 of the Montego Bay Convention has removed any pre-eminence which the equidistance rule ever had.

In the courts' application of equity, reasoning has become in some examples nothing more than an appreciation of where the equities lie, and a balancing of the legitimate interests of the parties. But this is equity's very nature. Equity will not necessarily be totally subjective if there are some legal standards, and the judge applies the judicial techniques of analogy, the deduction of principles and so on. Nevertheless the scope given to a judge by equity is substantial, so that an equitable solution may be reached.