

# Delimitation and the Anglo-French arbitration

K. B. Berry,

Law of the Sea and Antarctica Section, Department of Foreign Affairs†

On 30 June 1977, a Court of Arbitration\* rendered a decision in a case between the United Kingdom and France concerning delimitation of their common continental shelf in the English Channel area. Although directed to the provisions of the 1958 Continental Shelf Convention and customary international law, the opinions expressed by the Tribunal are of relevance to the delimitation provisions of the draft Articles evolving in the Third United Nations Conference on the Law of the Sea in regard to the continental shelf and, by analogy, the concept of a 200 nautical mile exclusive economic zone (EEZ).

Major subjects touched on by the Tribunal included:

- (i) The main objectives of the equidistance/special circumstance rule under the 1958 Continental Shelf Convention;
- (ii) Difference in effect of the legal and geographical concepts of adjacent and opposite states;
- (iii) Non-absolute aspects of the natural prolongation concept;
- (iv) Effect of islands and troughs as 'special circumstances' under the 1958 Convention and in customary international law; and
- (v) Reservations to Conventions.<sup>1</sup>

## The Case

As noted above, the purpose of the arbitration was to draw the seabed boundary between the United Kingdom and France in the English Channel area, the two States having failed to reach agreement despite negotiations lasting over a decade. The boundary to be delimited more specifically lay off the entire southern coast of England and Cornwall, from just east of the Isle of Wight, and thence westwards into the Atlantic as far as the 1000 metre isobath.<sup>2</sup> For various reasons, the Tribunal found it convenient to break the delimitation into three components:

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† The views presented in this paper are purely personal.

\* The Court of Arbitration is hereinafter referred to as the 'Tribunal' and its judgment as the 'Award'.

1. This paper will not deal with the subject of reservations as discussed by the Tribunal in this case. Interests of space and the complexity of the subject dictate this omission. A concise study of the effect of reservations may be found in O'Connell, D. P., *International Law* 2nd ed (1970) pp 229-239. The 1969 Vienna Convention on the Law of Treaties also makes provisions as to reservations: Arts 19-23.
2. Article 2 of the Arbitration Agreement set this isobath as the outer limit of the boundary, with no explanation as to why it was chosen. It was clearly not regarded by either party as the outer limit of the continental shelf as the Arbitration Agreement also noted (Article 2(2)) that selection of the 1000 metre isobath was without

1. the areas to the immediate east and west of the Channel Islands (as there was substantial agreement between the parties as to the method of delimitation in those areas);
2. the area to the north and north-west of the Channel Islands (there being a dispute as to whether the islands were 'special circumstances'). The parties had agreed to exclude the area to the immediate east and south of the Islands from the Arbitration; and
3. the Atlantic sector (where there was again a dispute as to the effect of islands in the justification of a boundary other than one based on equidistance).

Both the United Kingdom and France are parties to the 1958 Convention on the Continental Shelf (hereafter referred to as the 1958 Convention). However, France had made a number of reservations<sup>3</sup> (which the Tribunal in this case adjudged to be valid) to the delimitation provisions of that Convention (Art 6). The United Kingdom had in turn lodged various objections to the French reservations<sup>4</sup> and the Tribunal thus found it necessary not only to judge the validity of the reservations but also the effect of objections to reservations. Without going into the substantive law on which this decision was based, it should be noted that the Tribunal found<sup>5</sup> that the effect of the reservations and objections was to render some parts of the delimitation area subject to the regime of Article 6 of the 1958 Convention and others to the equitable principles of customary international law. In the event, the Tribunal found that there was little difference between the two situations, and went so far as to

prejudice to either Government's position on the outer limits of the shelf. The Tribunal noted that extension of the boundary to this point might cause future problems if Ireland sought to extend its continental shelf boundary into the Atlantic. However, the Tribunal found that it was not competent to deal with such a hypothetical situation: see Award paras 23-28. The International Court in the *North Sea Continental Shelf* cases (hereinafter referred to as the *North Sea* cases) had not been so timid, and had expressly stated in its judgment ICJ Rep 1969 at 54 that states should take account of the effects 'actual and prospective' of their delimitations between adjacent states in the region. It might also be noted that Brown, E. D., in *The Legal Regime of Hydrospace* (1971), p 7, felt that the limit of exploitability criterion in the 1958 Convention would probably be insufficient 'to found a claim by the United Kingdom to an Atlantic Shelf out to a depth of 800 metres'. See also pp 22-23.

3. See Award para 33. One of the French reservations related to the 'Bay of Granville', the depression in the French coastline within the arms of which the Channel Islands are located. Britain objected that the term 'Bay of Granville' had no precise geographical meaning. It is strange that France did not point to an agreement of 1839 between it and the United Kingdom whereby areas of the Bay of Granville were reserved for French oyster fishermen: see Prescott, J. V. R., *The Political Geography of the Oceans* (1975), p 143; and also Award para 74.
4. See Award para 34. In addition to the United Kingdom, Canada, the United States, Spain and Yugoslavia have also lodged objections to the French reservations. Canada's objection, lodged in 1970, was to the reservation insofar as it related to areas where there were 'special circumstances'. This was obviously to protect the Canadian position with regard to the delimitation with France over St Pierre-et-Miquelon, concluded in 1972. The Tribunal in the present case made several references to that delimitation.
5. Award paras 59-62, 64, 71-75.

venture the opinion<sup>6</sup> that some of its comments were probably applicable to Article 71 of the Revised Single Negotiating Text (RSNT) which emerged from the Fourth Session of the Law of the Sea Conference. That Article also appears unchanged as Article 83 of the Informal Composite Negotiating Text (ICNT) which was produced after the Sixth Session.

#### **Equidistance/Special Circumstance Rule**

One of the ultimate effects of this case was perhaps to stress the paramountcy of equitable principles in delimitation, both under multilateral treaty law and customary international law. It was this fundamental principle which enabled the Tribunal to minimise the arguments for and against strict application of Article 6 of the 1958 Convention to the area to be delimited. It will also probably be this finding of the Tribunal which will be taken as firm support for the current delimitation provisions in the ICNT (Arts 74, 83), though it will receive criticism from those nations wishing to see the primacy of a clear equidistance rule incorporated into the future Law of the Sea Convention.

In reaching its conclusion, the Tribunal first noted that, if Article 6 of the 1958 Convention was applicable, the use of an equidistance line or another boundary justified by 'special circumstances' did not imply that there were two separate rules. They were only the two aspects of a single rule,<sup>7</sup> and this meant 'that the question whether "another boundary is justified by special circumstances" is an integral part of the rule providing for application of the equidistance principle'.

After referring to the records of the 1958 U.N. Conference on the Law of the Sea which produced the Continental Shelf Convention, the Tribunal noted that Article 6 was so worded as to avoid inequitable delimitations through rigid application of equidistance in situations of peculiar configurations. 'In short, the role of the "special circumstances" condition in Article 6 is to ensure an equitable delimitation; and the combined "equidistance—special circumstances rule", in effect gives particular expression to a general norm that, failing agreement, the boundary between states abutting on the same continental shelf is to be determined on equitable principles'.<sup>8</sup>

Although equidistance is only one of many possible ways of equitably delimiting a boundary under customary law, the Tribunal noted on several occasions that it was the method most readily applicable where the geographical conditions of the states were generally comparable. However, other considerations might require another method or combination of methods to achieve an equitable result.<sup>9</sup> So too with Article 6, the Tribunal held. Lack of definition of 'special circumstances' in Article 6 indicated that even under the 1958 Convention, 'the question whether

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6. Award para 96.

7. Award paras 68-70.

8. Award para 70; see also para 75. In the *North Sea* cases (ICJ Rep 1969, p 33) the International Court traced the concept of application of equitable principles, failing agreement, to the Truman Proclamation and noted that this concept had underlain all subsequent history of the subject of delimitation.

9. Award paras 75, 84, 87, 94, 206, 238, 240.

the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter for appreciation in the light of the geographical and other circumstances'.<sup>10</sup> Time and again the Tribunal emphasized that use of equidistance was not a controlling legal norm but was only one element amongst other relevant considerations to be taken into account.<sup>11</sup>

### **Opposite and Adjacent Coasts**

Flowing from its finding that the selection of equidistance as the method of delimitation depended principally on geographical considerations, the Tribunal dealt at length with the differences between the geographical concepts of opposite and adjacent states and the legal concepts of the same.<sup>12</sup> This was prompted by the dispute over the Atlantic sector, since the shelf there lay off the coast of England and France, and could not really be said to be either between the coasts or adjacent to coasts with a common border.<sup>13</sup> Thus, according to France, the situation of opposite or adjacent states did not arise and Article 6 was inapplicable.

In fact, the Tribunal did not touch on the concept of opposite states to any extent for it found that, all considerations being comparable, the median was the boundary most easily applicable, with some compensation being necessitated in the Channel Island sector in this particular case. Adjacency, the Tribunal however noted, as a general rule usually created more difficulty.<sup>14</sup> In this respect, detailed consideration of the International Court's decision in the 1969 *North Sea* cases<sup>15</sup> was made.

In particular, the Tribunal referred to the International Court's comment on the effect of distance from coastal irregularities on the lateral equidistance line.<sup>16</sup> The Court had first noted a fundamental difference: 'whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line leaves to one of the states concerned areas that are the natural prolongation of the territory of the other'.<sup>17</sup> Added to this the Court had noted that the effect of irregularities in the coastlines on the areas to be delimited by the lateral equidistance method was automatically magnified the greater the distance that the boundary extended from the shore. As this gave rise to inequity, it needed to be compensated for by variation of the equidistance line.<sup>18</sup>

The Tribunal in the present case found that there was nothing to indicate that the formulation of 'opposite or adjacent States' was meant to be anything but exhaustive of all possible situations.<sup>19</sup> By extension, this

10. Award para 70.

11. Cf *North Sea* cases, ICJ Rep 1969, p 47.

12. Award paras 85-95.

13. See Brown, *op cit*, p 5 for the 'ordinary meaning' of adjacency.

14. Award para 86.

15. ICJ Rep 1969, p 3.

16. Award, paras 85, 86.

17. ICJ Rep 1969, p 37, quoted Award para 85.

18. ICJ Rep 1969, p 49, quoted Award para 86.

19. Award para 94.

was also apparently true of the RSNT/ICNT.<sup>20</sup> In the Atlantic sector, the Tribunal found that the *legal* situation was one of opposite states<sup>21</sup> since neither France nor the United Kingdom shared a common border. However, it said that this was not really important for the Court had noted in the 1969 *North Sea* cases that, in certain situations, an equidistance line may 'partake in varying degree of the nature both of a median and of a lateral line.'<sup>22</sup> Consequently the Tribunal found that in determining whether two states were to be considered as 'opposite' or 'adjacent', for the purpose of delimiting a continental shelf on which both of them abut, the Tribunal must have regard to their actual geographical relation to each other and to the continental shelf at any given place along the boundary.<sup>23</sup> Thus geography again emerged as one of the principal determinant factors.

### **The Natural Prolongation**

As noted above, the Tribunal dealt with the subject of the continental shelf as the natural prolongation of a State's territory under the sea. In doing so, it adopted the opinions of the International Court in the *North Sea* cases.<sup>24</sup> As in the latter cases, the Tribunal in the present case was not called upon precisely to decide what may constitute the continental shelf, but rather, who may claim it or parts of it. Nor did the Tribunal turn its attention to the vexed question of exactly where the outer limit of the shelf may lie. Thus it is doubtful that this case could be used as further support for the positions of those nations which chose to use the *North Sea* cases as authority for the extension of shelf rights to the edge of the continental margin.<sup>25</sup> However, some aspects of the Tribunal's findings in the present case are of interest:

### **Proximity**

The Tribunal started by noting that proximity of shelf areas to a State's coasts was not necessarily identical with the legal concept of adjacency.<sup>26</sup> Application of the latter may, in some cases, lead to the granting to one State of shelf rights in respect of areas closer or more proximate to the coast of another state. Proximity is thus of itself not a legal basis of title, although it may often be one of the chief determinants of it.

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20. Award para 96.

21. Award para 242.

22. ICJ Rep 1969, p 17, quoted Award para 94.

23. Award para 94; see also paras 240-242.

24. ICJ Rep 1969, p 22. See also Brown op cit, p 41 et seq, for a critical analysis of the judgment in the *North Sea* cases. Brown's criticisms, however, have largely been ignored by the Tribunal in the present case.

25. See Art 76 ICNT. See also Hedberg, H. D., 'The Relation of Political Boundaries on the Ocean Floor to the Continental Margin' (1976) 17 Virg JIL 57, for the difficulties of accurately determining the outer limit of the margin.

26. Award paras 80, 81. The Court had already attempted to minimize the significance of the concept of proximity in the light of the basic concept of natural prolongation: ICJ Rep 1969, pp 30, 32.

**Proportionality**

The Tribunal rejected any notion that proportionality (of the length of a State's coastline to the area of shelf accruing to it) was necessarily a major factor in delimitation.<sup>27</sup> On the contrary, it found that *disproportionality* could be the important factor. Stressing equity and citing once again cases of coastal irregularities, the Tribunal said that it was important to consider whether the proportion of shelf allotted to a State had been inequitably affected by such irregularities.<sup>28</sup> Drawing on the *North Sea* judgment, the Tribunal also emphasized that its function was not to refashion nature in order to give one State with a small coast a similar area of shelf to that of a State with a large coastline. Rather the function of delimitation was to remove the disproportionate and inequitable effects of irregularities or peculiarities where otherwise the attribution of shelf might have been comparable under the geographical facts.<sup>29</sup>

While the Tribunal in the present case looked at factors relating to the status of the Channel Islands when delimiting the French sector of the shelf, it was nonetheless apparent that the virtual equality of the lengths and facades of the English and French coasts was a major determinant in limiting the shelf awarded to the Channel Islands. Although this may be justifiable in law, it does not answer the geographer's criticism as to the selection of what is natural or unnatural in judging whether there are disproportionate effects flowing from treating 'unnatural' situations in a particular way.<sup>30</sup> For instance, on what criteria may a coastline without islands be judged as natural while one with islands would necessarily be peculiar? The answer in this case would appear to be purely political in that the islands are under the sovereignty of another state.

**Juridical Concept of Natural Prolongation**

Perhaps the most significant concept rejected by the Tribunal was directly related to natural prolongation. While the continental shelf was seen *geographically* as being the natural prolongation of a State's land territory under the sea, the Tribunal refused to recognise any absolute *legal* effects as flowing from the situation.<sup>31</sup> The question arose in relation to the Channel Islands sector. The United Kingdom argued that the Islands generated their own shelf (as provided by the 1958 Convention) and that the natural prolongation of this shelf northward merged with the natural prolongation of the United Kingdom's shelf southward from the English mainland. The effect, in the British view, was thus to deflect the median to include the Channel Islands.<sup>32</sup> The Tribunal had earlier held that the

27. The Court in the *North Sea* cases (ICJ Rep 1969, pp 53-4) noted that 'reasonable degree' of proportionality should be one of the *objectives* of a just and equitable delimitation.

28. Award para 101.

29. *Ibid.*

30. See Prescott, *op cit.* p 169; Friedmann, W., 'The North Sea Continental Shelf Cases: a Critique' (1970) 64 AJIL 229 at 237, 239.

31. Award paras 191, 194.

32. Award paras 168, 169.

delimitation in this sector was governed by customary international law (i.e., 'equitable principles').

The Tribunal stated that the fact that in international law the concept of the continental shelf was a juridical one meant that its scope and the conditions for its application were not determined exclusively by the physical facts of geography but also by legal rules.<sup>33</sup> Moreover, the inclusion of 'special circumstances' in Article 6 and the emphasis on 'equitable principles' in customary law implied that the force of the principle of natural prolongation was not absolute but may be subject to qualification in the light of all relevant considerations in particular cases.<sup>34</sup> Accordingly the Tribunal found that the principle of natural prolongation could not be said to require that the shelf to the north and north-west of the Channel Islands should be considered as automatically and necessarily appurtenant to them rather than to France.<sup>35</sup> In the event, the Tribunal continued the median line through the Channel, but allocated an area of shelf to seaward of the Islands measured to 12 miles from the territorial sea baselines, and thus forming an enclave on the shelf of France.<sup>36</sup>

### **Equality of States**

One remaining contention of France was also rejected, namely that, all States being equal as political entities, they should share equally in common continental shelf areas. The Tribunal said that not only would this amount to re-fashioning of nature (rejected in the *North Sea Cases*) but it would have 'vast implications' (impliedly unacceptable) for the division of the continental shelf among the States of the world.<sup>37</sup> On the other hand, the Tribunal found it necessary to look at the equality of States in their geographical relation to the shelf.<sup>38</sup> In this case, the coastlines of France and the United Kingdom in the delimitation area were almost equal, and thus the areas of shelf accruing to each would also be approximately equal were it not for the presence of the Channel Islands. The resulting imbalance and *prima facie* inequity caused by the presence of the islands was therefore cited as yet another reason for not granting them full effect.<sup>39</sup>

### **Islands, Troughs as Special Circumstances**

Partial effect was given to the islands after a survey of all the 'relevant considerations' concerning them. Many of the islands were large, with substantial populations. Moreover the Bailiwicks of Jersey and Guernsey had a long history of semi-independence, with their own legislatures and

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33. Award para. 191.

34. *Ibid.*

35. Award para 192.

36. Award para 202.

37. Award para 195.

38. *Ibid.* The Court in the *North Sea cases* (ICJ Rep 1969, p 49) had already stated that equity did not necessarily connote equality.

39. Award paras 196-7; cf *North Sea cases* (ICJ Rep 1969, p 5) where the Court stressed the need to abate the effects of 'special incidental features' in situations of 'quasi-equality' of States.

financial and other institutions.<sup>40</sup> However, the Court found that, in relation to maritime jurisdiction (and foreign affairs generally), it was the United Kingdom that assumed responsibility. Consequently, the islands had to be treated as British territory, rather than semi-independent states entitled in their own right to their own continental shelf.<sup>41</sup> The status of the islands, however, implied that they should receive more than the 6 miles of shelf proposed by France. In awarding a 12 mile shelf to the Islands, the Tribunal did not ignore the potential of the United Kingdom to declare a 12 mile territorial sea,<sup>42</sup> the fact that the Islands already possessed a 12 mile fishing limit, or even that France had already arrogated to itself a 12 mile territorial sea.<sup>43</sup>

France had argued that its navigational, defence and security interests<sup>44</sup> would be jeopardised if the presence of the Islands was given full effect in terms of their continental shelf. The Tribunal said that these were minimized by the fact that the Channel was the world's busiest maritime thoroughfare. However, they did at least emphasize the predominant interests of France in the southern areas of the English Channel, 'a predominance which is also strongly indicated by its position as a riparian state along the whole of the Channel's south coast.'<sup>45</sup>

The Tribunal also gave only partial effect (in this case, half) to the presence of the Scilly Isles in extending the median into the Atlantic. The Scillies, with a sizeable population and land area, however, extended the outer limits of English baselines approximately twice as far as those of France as drawn to the large, populated French island of Ushant. The median drawn taking the Scillies fully into account would have deflected the median southwards. Were it not for the location of the Scillies further west than Ushant, the States were again geographically approximately equal, and the Tribunal decided that it would be inequitable to attribute such a magnified effect to the islands when extending the equidistance line into the Atlantic. However, the status of the islands was such that, as with the Channel Islands, they could not be ignored completely. The median was thus drawn midway between the medians that would have resulted from giving the Scillies full effect and from ignoring them completely.<sup>46</sup>

### **Rocks, Low Tide Elevations**

The Tribunal devoted considerable attention to the status of one of the Eddystone Rocks, the dispute being as to whether it was a proper island

40. Award paras 171, 184.

41. Award para 186.

42. Award para 187.

43. *Ibid.*

44. Award paras 161, 162. See Eustis, F. A., 'Method and Basis of Seaward Delimitation of Continental Shelf Jurisdiction' (1976) 17 *Virg JIL* 107 at p 121 for a rejection of national security as an appropriate foundation for the continental shelf doctrine.

45. Award para 187.

46. Award paras 243-251. See Prescott *op cit*, p 198, for another example of half-effect being given to islands. He refers (pp 196-202) to various examples of state practice relating to islands in delimitations disputes, and other areas where such disputes may arise.

or a low tide elevation.<sup>47</sup> In this context there was some dispute as to whether the measurement of the elevation should be at high water equinoctial spring tides (as argued by the United Kingdom) or whether (as argued by France) the 1958 Convention did not allow a State to select the tides from which to measure elevations.<sup>48</sup>

In the event, the Tribunal declined to find whether the rock was an island or not.<sup>49</sup> French acceptance of Eddystone as a basis for the measurement of Britain's fisheries limit and tacit acceptance by France of Eddystone as a basis for calculating a median in an abortive delimitation in 1971, led the Tribunal to decide it should treat the rock as a relevant base point for delimiting the continental shelf boundary in the Channel (i.e., the median moving eastwards). As for the median projecting westwards to the 1000 metre isobath, the Tribunal found it acceptable to use only two basepoints (one on Ushant, the other being Eddystone) to extend the median already drawn in the Channel into an area where there were strictly speaking no coasts from which to select basepoints.<sup>50</sup> It might also be noted that the Tribunal rejected the French submission that, in the absence of 'opposite' or 'adjacent' coasts or more than two basepoints, the boundary should be calculated from lines projecting the general direction of the English and French coasts into the Atlantic.<sup>51</sup>

### **Troughs<sup>52</sup>**

To the west of the Channel Islands there exists a trough known as the Hurd Deep and a fault line running in a south westerly direction, designated the Hurd Deep Fault Zone. In its submission to the Tribunal, the United Kingdom accepted a median line boundary in the western Channel sector only on the condition that the Tribunal could not designate the axis of the Hurd Deep Fault Zone as being a more suitable boundary.<sup>53</sup> Use of that axis would have resulted in moving the boundary to the south of the median, to the detriment of France. It should be noted that the average depth of the Hurd Deep is 100 metres while the surrounding shelf averages 35 metres but slopes downwards to 100 metres at the approaches to the Atlantic.<sup>54</sup>

The Tribunal refused to vary the median line on the basic ground that

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47. Award paras 122 et seq.

48. Award paras 125, 127. There is little authority on this point. A related question is with regard to the tidal line used in the drawing of baselines. State practice would appear to favour the low tide mark, with mean low-water spring tides providing the most constant datum: see Prescott op cit, p 49. Mean low-water spring tides were recommended by a sub-committee of the 1930 Hague Codification Conference, but the recommendation was not considered, much less adopted, by that conference: see McDougal, M., and Burke, W., *The Public Order of the Oceans* (1962), pp 322-3.

49. Award para 139.

50. Award paras 217, 224, 252-254.

51. Award paras 246-247.

52. See Fuelner, G. R., 'Delimitation of Continental Shelf Jurisdiction between States: the Effect of Physical Irregularities in the Natural Continental Shelf' (1976) 17 *Virg JIL* 77 at 89-104 for a discussion of this subject with reference to the Gulf of Maine and the East China Sea.

53. Award para 106.

54. Award para 12.

the Hurd Deep and Fault Zone did not disturb the essential geological continuity of the continental shelf throughout the entire Channel area and Atlantic sector.<sup>55</sup> The Tribunal stated that the axis of the Fault Zone was placed where it was simply as a fact of nature, and there was no intrinsic reason why a boundary should be placed along that axis and justified as a 'special circumstance' under Article 6.<sup>56</sup> Nor would recourse to the median be creative of inequity in customary law. In reaching its decision, the Court took into account the fact that Britain had been prepared to disregard the much deeper Norwegian Trough in the North Sea delimitations, and also that the trend in State practice was away from treating troughs alone as circumstances justifying variation of equidistance.<sup>57</sup>

### **Implications for the Law of the Sea Conference**

Before proceeding any further, it would be well to remember that the conclusions of the Tribunal in the Anglo-French Arbitration are only directed to the facts of that particular case, are limited to continental shelf delimitation, and are only binding on the two States party to the Arbitration Agreement.<sup>58</sup> However, in view of the Court's specific references to the RSNT (and, by extension, the ICNT) of the Law of the Sea Conference, and in view of the tendency of nations to rely on such rulings, the opinions of the Tribunal in this case will doubtless be influential in possible changes in the delimitation policies of some participants in the Law of the Sea Conference. And, in view of the identical wording of Articles 74 and 83 of the ICNT, such influence could extend not only to continental shelf but also to Exclusive Economic Zone delimitations.<sup>59</sup>

Two aspects of the Case are of major relevance to current negotiations in the Law of the Sea Conference: (i) the emphasis on equitable principles and (ii) the gloss placed by the Tribunal on the principle of natural prolongation.

Article 83 of the ICNT provides as follows:

*'Delimitation of the continental shelf between adjacent or opposite States*

1. The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement or settlement, the States concerned shall make

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55. Award para 107.

56. Award para 108.

57. Award para 107. See Prescott *op cit* pp 159-60, 190 *et seq.* for examples of State practice, in each of which the depressions in the shelf are considerably in excess of the Hurd Deep. Prescott also predicts that practice will be increasingly to ignore such depressions when establishing areas of sovereignty.

58. See Brown *op cit*, p 32 for similar restrictions on the decision in the *North Sea cases*.

59. Award para 96 refers to the RSNT in relation to the economic zone.

provisional arrangements, taking into account the provisions of paragraph 1.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.<sup>60</sup>

Article 76 of the ICNT<sup>61</sup> attempts to provide a legal definition of the continental shelf which includes a reference to the outer edge of the continental margin. This was a result of the efforts of various States with wide margins to secure rights over the whole margin on the basis that it constituted the natural prolongation of the land mass under the sea, as enunciated by the International Court in the *North Sea* cases. However as has been pointed out during the Conference and by others,<sup>62</sup> there is no clear definition of what comprises the continental margin in geological or even geomorphological terms. It remains, therefore, for the States most interested in securing rights over the whole margin (especially where it exceeds 200 nautical miles in width) to elaborate and gain acceptance for viable methods of determining the outer limits of the margin.

To the extent that the Tribunal in the Anglo-French Arbitration endorsed the Court's decision in the North Sea Cases on the natural prolongation, the position of the 'margineer' States remains unaffected. As noted above, however, the Tribunal rejected the notion that any absolute *legal* consequences necessarily flow from the *geographical* fact that the continental shelf is the continuation of the land territory of a State under the sea. Although the Tribunal's finding on this point resulted from consideration of a situation wherein two states faced each other with island territory of one state lying on the common continental shelf but closer to the other state than to it, this is not to say that the Tribunal's opinion would necessarily be seen as limited to only such a situation by States using the case as support for their own delimitation problems.

On the basis of the Tribunal's decision not to accord full effect to the populated and developed Channel Islands, there may be some support for the contention that the insular territory of one State which lies on the shelf of another State likewise should not be treated as having full effect, irrespective of whether the metropolitan power and the other State lie opposite or adjacent to each other. While this would primarily be a matter for agreement between the States, recourse to arbitral or judicial settlement and the application of equitable principles therein could have such an effect.

The Tribunal in the present case made a number of references to the delimitation of a seabed boundary between Canada and France's territory of St Pierre-et-Miquelon.<sup>63</sup> In the provisional agreement between the two

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60. Article 74 makes identical provision for delimitation of the Exclusive Economic Zone. Part XV of the ICNT referred to in para 2 provides Disputes Settlement mechanisms. Articles 74 and 83 of the ICNT are identical to Articles 62 and 71 of the RSNT which emerged from the Fourth Session of UNCLOS.

61. Art 64 RSNT.

62. See Hedberg, *op cit*; Eustis, *op cit*.

63. Award paras 177, 200.

States on 26 May 1972 France agreed to renounce its rights provided by the 1958 Convention over the shelf appurtenant to its islands (apart from a 'reduced' area) in return for substantial rights over exploration for and exploitation of hydrocarbons in designated areas. Although the Tribunal successfully distinguished the case of St Pierre-et-Miquelon from that of the Channel Islands,<sup>64</sup> one conclusion seems clearly to emerge: what may be considered equitable principles in one case may be productive of inequity in another.

It might be noted in passing that the ICNT has attempted to restrict the generous provisions of the 1958 Convention which allowed all islands, irrespective of size or status, a full shelf. Article 121(3) of the ICNT provides that 'rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. However, as will readily be seen, human adaptability to a wide range of climatic and other conditions makes such a provision susceptible of no simple interpretation.

All of these considerations, however, are begging the question of who is to decide upon the boundary<sup>65</sup> as well as the broad question of what may constitute relevant circumstances in a particular case.

### Dispute Settlement

A number of States, among the most outspoken of which is Canada, have long argued for the primacy of equidistance in any Law of the Sea Convention draft delimitation articles. In particular, Canada has argued that reliance on the 'equitable principles' formula by itself is only productive of great uncertainty, especially since the provisions of the ICNT relating to dispute settlement (Part XV) are neither agreed nor even certain to be incorporated into the final Convention.<sup>66</sup>

Canada has proposed a formula whereby equidistance qualified by special circumstances is pointed to as a certain *method* of delimitation with an equitable result being expressed as the *aim* of delimitation. The Tribunal in the present case also stated that an equitable result was the goal of delimitation.<sup>67</sup> However it may have levelled against it the same criticism which may be made of the Court in the *North Sea* cases,<sup>68</sup> namely that although it has identified the goal of delimitation, it has not identified any certain method of achieving that goal.

The argument for certainty is also underlined by the Tribunal's adoption of the Court's finding in the *North Sea* case that any recourse to equitable considerations must be to considerations 'lying not outside but within the rules' of law in situations where the parties to a delimitation had submitted a dispute to judicial or other settlement procedures.<sup>69</sup> (For

64. Award para 200.

65. See also McDougal and Burke, *op cit*, p 729.

66. Canadian concerns are set out in an unpublished *Bout de Papier*. See also McDougal and Burke, *op cit*, pp 431/432, 436/437, 726-729.

67. Award paras 70, 75.

68. Award para 245.

69. 'It is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles': *North Sea* cases. ICJ Rep 1969, p 47.

example, a court or arbitral body cannot simply render a decision which would be to divide up the shelf into equitable shares since this would be at variance with the legal rule that the shelf is already an appurtenance of states and thus there is nothing undivided to share out.)<sup>70</sup> Thus it is not even clear which degree of equity is to be applied. True, though, the considerations which a court may take into account in arriving at an equitable delimitation *in law* are probably the same as the parties may themselves take into account in arriving at an agreement themselves by reference to the equidistance/special circumstances rule or customary international law without reference to a court or arbitration. But—and this is more ammunition for the Canadian argument—there is simply no certainty as to what these considerations or equitable principles may be in any given case.

By extension, the reference to 'equitable principles' and 'relevant circumstances' in the ICNT delimitation Articles are equally uncertain.

The Court noted in the *North Sea* cases<sup>71</sup> that there was no legal limit to the considerations which States may take into account to ensure the application of equitable principles. Clearly, however, some considerations will be more important than others in particular cases. And to confuse the issue further, arguments have been advanced that 'special circumstances' may be more restricted than the 'equitable principles' of customary international law.<sup>72</sup> If such is the case there is no certainty that the 'equitable principles' of the ICNT are necessarily the same as those in customary international law.

An example may help illustrate the uncertainty. There is no provision in the ICNT which specifically preserves pre-existing or traditional rights except where they are enshrined in agreements.<sup>73</sup> Moreover there is no clear body of law to establish that such rights would necessarily be 'special circumstances'. The delimitation provisions of the ICNT (Art 74, 83) require delimitation to be in accordance with any agreement already in force between the State concerned which covers the question. In the absence of such an agreement, however, there is no certainty that pre-existing or traditional rights would necessarily be a 'relevant circumstance' which might influence the application of 'equitable principles' under the ICNT.

## Conclusion

Despite its limited binding effect, the decision of the Tribunal in the Anglo-French Delimitation is likely to be cited as an important authority in future delimitations as well as in discussions in various fora about the subject. This will be especially so insofar as the Court adopted aspects of

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70. ICJ Rep 1969, p 22.

71. ICJ Rep 1969, pp 51 et seq.

72. See Brown, *op cit*, p 48. See also Friedmann *op cit*, pp 229-240.

73. Art 62(3) of the ICNT mentions traditional fishing as one of the aspects which a coastal State should take into consideration when deciding whether or not to allow the fishermen of another State access to fisheries within its economic zone. Art 15 of the ICNT preserves historic rights only with regard to delimitation of the territorial sea: cf Article 12 of the 1958 Convention on the Territorial Sea.

the *North Sea Continental Shelf* cases—conclusions which themselves have had a profound effect on the subject of delimitation generally, despite the peculiar facts of those cases and the, again, limited binding nature of the decisions. It is hardly likely, therefore, that the Arbitration will be ignored by nations participating in the Law of the Sea Conference for which delimitation is an important issue.

While the Tribunal's discussion of islands, troughs, baselines, the effect of coastal irregularities, and even the more general concept of natural prolongation, are important, it is clear that its opinions as to the role of 'equitable principles' will be the most significant in the Law of the Sea context. But the very fact that the considerations which the Tribunal took into account in delimiting the particular boundary in this case were not claimed to be exhaustive of all possibilities, is in itself illustrative of the uncertainty which adoption of a delimitation formula of 'agreement in accordance with equitable principles' will produce in the future. While it is admitted that a formula referring to 'special circumstances' may also be fraught with uncertainties, it is submitted that primary reliance on equidistance (qualified by such circumstances) in the absence of agreement will, in the majority of cases, produce a certain and equitable result.

The question of failure of agreement also highlights another important aspect of the Anglo-French delimitation, and one which has not been considered in any detail in this paper; namely, the effect of reservations. Reservations to conventions, especially if they purport to limit or exclude the effects of provisions relating to disputes settlement, will usually only exacerbate problems arising from vague, and thus potentially litigable, provisions elsewhere in the convention. This will *a fortiori* be the case in any comprehensive Convention on the Law of the Sea in which it is by no means certain that adequate disputes settlement procedures will be incorporated, or reservations to them allowed. In view of such uncertainty, therefore, it would appear that a formula such as equidistance/special circumstances, despite its deficiencies, would be more capable of standing by itself than one based on vague 'equitable principles'.