Filling the Gap — Delimiting the Australia-Indonesia Maritime Boundary

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Introduction

> "First, it has to be faced that the law governing maritime delimitations is still affected with a degree of indeterminacy, in the sense that the reasonings put forward do not invariably and automatically 'produce' a delimitation line. Often, even, a regrettable but doubtless inevitable gap can be observed between the arguments expounded in a judicial decision and the concrete findings as regards the choice of delimitation line adopted. However well-founded, the reasoning does not necessarily, mathematically, 'issue' in the conclusion adopted. This is, of course, because the law of the sea is still quite rudimentary and comprises few rules, and more especially because the entire process of maritime delimitation law is dominated by a 'fundamental norm', that of the equitable result, which is as uninstructive as it is all-embracing. That being so, a judge can but anxiously, humbly, gauge and compare his crushing responsibility and the modest means at his disposal for assuming it. He undergoes what Verlaine called 'l'extase et la terreur de celui qui a été choisi'. He cannot see how to escape from the frustrating tyranny of a certain 'praetorian subjectivism' when the very margin of indeterminacy responsible for it originated in a law still young and permeated with equity — which, though a highly respectable legal concept, is inevitably measured with a 'human' yardstick. The finest legal dissertations on equity will never succeed in completely eliminating what is perhaps an irreducible core of the judicial subjectivism mentioned above. The utmost, in all honour, that a judge can then do is modest: to summon up all his resources with a view to reducing its scope and effects to a minimum".

This crie de coeur, from Judges Ruda, Bedjaoui and Jiménez de Aréchaga,[1] is illustrative of the frustration felt by many, if not most, people with an interest in the law of maritime delimitation. But perhaps it is the uncertainty as to the applicable rules, as well as the enormous practical importance of many delimitations, which makes the subject one of such compelling interest.

It is against a background of at least five judicial decisions and widespread State practice, which neither independently nor collectively create or affirm relevant rules of international law, that division of the remaining undelimited areas between Australia and Indonesia will take place.

1. *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (hereinafter called the Libya-Malta case) [1985] ICJ Rep. 13, 90, para 37 of the Joint Separate Opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga.

(i) General description of the area

Australia, the smallest of the continents, lies to the south of the Indonesian archipelago and of Papua New Guinea. The north western coast of Australia is separated from the island of Timor and other small Indonesian islands such as Kep Sermata and Kep Tanimbar by the Timor and Arafura seas.[2]

(A) Timor and the Timor and Arafura Seas

The island of Timor is the largest of the lesser Sunda Islands. It lies roughly south west/north east and is 290 miles in length by 62 miles in width at the widest point.

The island has been politically divided since European settlement took place in the sixteenth and seventeenth centuries. The Portuguese, who first established a settlement in 1520, and the Dutch, who overran part of the island a hundred years later, fought each other almost continuously until 1811 when the British occupied the Dutch East Indian colonies. These were returned to the Dutch in 1815 but it was not until 1859 that the island was permanently partitioned between Portugal and the Netherlands by the Treaty of Lisbon. After World War II Indonesia became independent from the Netherlands, the Republic of Indonesia, including the western part of Timor, being established in 1949. Portugal remained in possession of the larger, eastern, part of the island until it was ousted by Indonesia in 1975.

The Timor Sea, which is between 300 and 400nm wide, has a significant submarine feature, the Timor Trough. This is separate from but continues the line of the Sunda Trench, a deep submarine depression running parallel to and south of the island arc which consists of Sumatra, Java and the smaller islands such as Lombok, Sumba and Timor, eventually linking up with Papua New Guinea. The Trough is situated between 30 and 60nm from Timor, over 200nm from the Australian coast, and is up to 3,400 metres in depth.[3]

To the east of the Timor Sea is the Arafura Sea which extends to the Torres Strait and covers a large shallow bank of geologic continental shelf. This shelf links Australia to Papua New Guinea. To the northwest, the Arafura Sea is separated from the Banda Sea by the deep Aru trough. This is one of the links in the arc of troughs, mentioned above, which run from the Ceram Sea in the Indonesian archipelago westwards through the Aru and Timor troughs to the Java or Sunda Trench.[4]

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2. See generally: Jeans DN (ed.), *Australia: a geography* (1977), Allied Geographical Section, *Terrain Study No. 70. Area Study of* Dutch Timor, Netherlands East Indies *(1943), Allied Geographical* Section, *Terrain Study No. 50. Area Study of Portuguese Timor* (1943), Prescott "The international limits of Australia's continental shelf" in JRV Prescott (ed.), *Australia's Continental Shelf* (1979), Alastair Cooper (ed.) *The Times Atlas of the Oceans* (1983).
3. Prescott "The international limits of Australia's continental shelf" in Prescott JRV (ed.), *Australia's Continental Shelf* (1979) 22, 37.
4. Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State, *Limits in the Seas No. 87* (1979) 3.

(B) CHRISTMAS ISLAND

Christmas Island,[5] is situated in the Indian Ocean 225 miles south of Java Head (the western most tip of Java) at the south entrance to the Sunda Strait. It lies 815 miles south of Singapore and 1,425 miles northwest of Perth. The nearest point of the Australian coast is the North West Cape which lies 880 miles to the southeast. It is a small island with an area of approximately 52 square miles.

Christmas Island was annexed by Britain in 1888 at which time there was no evidence of occupation by others. When phosphate mining began there in 1900 the island was incorporated, for administrative purposes, with the Straits Settlements. Japanese forces occupied Christmas Island in March 1942 but after the war it became part of the new British colony of Singapore. Finally, in 1958, after 10 years of phosphate mining controlled by the Governments of Australia and New Zealand, the island became a territory of the Commonwealth of Australia.

The island, which is the summit of a submarine mountain, is in the volcanic zone about 200 miles from Krakatua. Between Christmas Island and Java the continuity of the seabed is broken by the Sunda or Java Trench. This lies roughly midway between Java and Christmas Island and reaches 4,000 metres in depth.

(ii) Maritime zone claims

Australia first articulated its claim to the continental shelf in 1953[6] and confirmed it in the Seas and Submerged Lands Act, 1973.[7] In 1967, legislation regulating the exploration and exploitation of the petroleum resources of the shelf was promulgated[8] and this was followed by the issuing of permits for oil exploration in the area.[9] A 200nm Fishery Zone was declared in 1980.[10] As yet, Australia has not claimed an exclusive economic zone (EEZ).

Indonesia originally stated its archipelagic claim by an Announcement in 1957.[11] In 1960 legislation was promulgated which defined the baselines, consequent on the archipelagic claim, from which the territorial sea was to be

5. See generally: Department of Home Affairs and Environment, *Christmas Island Annual Report 1981–1982* (1984), Williams M, *Three Islands* (1971) and the references given in footnote 2 above.
6. Pearl Fisheries Act (No. 2) 1953.
7. Section 11 of the Act declares as follows: "It is by this Act declared and enacted that the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth."
8. Petroleum (Ashmore and Cartier Islands) Act 1967, Petroleum Search Subsidy Act 1967, Petroleum (Submerged Lands) Act 1967, Petroleum (Submerged Lands) (Exploration Permit Fees) Act 1967, Petroleum (Submerged Lands) (Pipeline Licence Fees) Act 1967, Petroleum (Submerged Lands) (Production Licence Fees) Act 1967, Petroleum (Submerged Lands) (Registration Fees) Act 1967, Petroleum (Submerged Lands) (Royalty) Act 1967.
9. Miller, "Australian Practice in International Law" AustYBIL (1970–1973), 136, 145.
10. Fisheries Act, 1952, as amended by the Fisheries Amendment Act 1980.
11. Announcement on the Territorial Waters of the Republic of Indonesia, December 13, 1957; Nordquist, Park, *North America and Asia Pacific and the Development of the Law of the Sea*, 2, Indonesia, 5. For a discussion of Indonesia's 1957 archipelagic claim see: Syatauw JJG *Some Newly Established Asian States and the Development of International Law* (1961) 168 and 186–189.

measured.[12] Finally, in 1980, the Indonesian Government made a declaration claiming a 200nm EEZ.[13]

Given the unilateral acts of Australia and Indonesia there was clearly the likelihood of conflicting claims in the area of the Timor and Arafura Seas where the two States are less than 400nm apart. And once it became known that the seabed in that area was likely to contain hydrocarbon deposits[14] it became urgent that a boundary finally be settled.

(iii) Establishment of boundaries

Accordingly, in the early 1970s, negotiations were held which resulted in the establishment of seabed boundaries in the Arafura and Timor Seas in two sections divided by a gap opposite what was then Portuguese East Timor (the Timor gap).[15] The first part of the boundary to be agreed was from point A.12, opposite the Tanimbar Islands, eastwards through the Arafura Sea to point B.1.[16] This ran along the median line.

In 1972 agreement was reached on two further sections of the boundary;[17] an extension westwards from A.12 to A.16 which is opposite the tip of East Timor, and a separate section, opposite western Timor, from A.17 to A.25. The latter point lies to the north of Ashmore and Cartier Islands. Between the two sections is a gap, the Timor gap, which is 130nm wide.

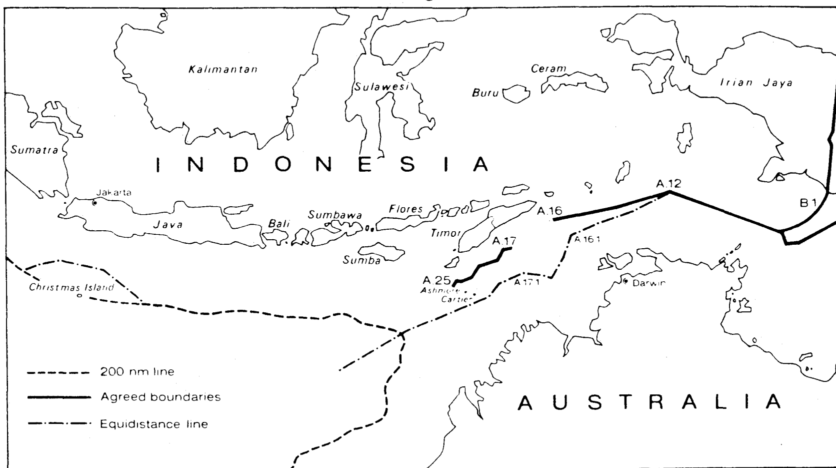
These two sections of the boundary do not follow the median line. As stated above, the continuity of the seabed of the Timor Sea is interrupted by the Timor Trough which lies between 30 and 60nm from the baselines of Timor. At point A.12, south of the Tanimbar Islands, the boundary line begins to diverge from the median line and runs almost due west. By the time it reaches the eastern tip of East Timor it lies roughly halfway between the median line and the Timor coast. Similarly, the boundary between points A.17 and A.25 is well to the north of the median line. Australia's original proposal was that the boundary should run along the thalweg of the Trough. Indonesia would not agree to this, however, so the delimitation was made instead approximately one third of the way down the southern side of the Trough following the 200m isobath.[18]

12. Act No. 4 [Straight Baselines], Government Gazette No. 22, February 18, 1960, ibid 9.
13. Declaration by the Government of the Republic of Indonesia concerning the Exclusive Economic Zone, March 21, 1980, U.N. Law of the Sea Bulletin, (1983) No. 2, 43.
14. "The most conservative estimate puts the oil reserves in Kelp at around 500 million barrels, and the most optimistic is for more than 5 billion barrels. Gas reserves are estimated at 50,000 billion (or 50 million million) cubic feet of natural gas." International Law Association (Australian Branch) Australian International Law News May 1984, 212.
15. Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries. Signed, Canberra, 18 May 1971 (Aust TS 1973 No. 32).
16. See map below.
17. Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of 18 May 1971. Signed Jakarta, 9 October 1972 (Aust TS 1973 No. 32). Both Agreements came into force on 8 November 1973.
18. Shearer "International Legal Aspects of Australia's Maritime Environment" Australia's Maritime Horizons in the 1980s (1982) 1, 7. The U.S. Geographer describes this part of the boundary as having been "negotiated on the basis of equitable principles relating to the geomorphology of the seaflow and, in part, to existing Australian petroleum concessions": see Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State, Limits in the Seas No. 87 (1979) 3.

Right in the middle of the gap in the agreed boundary, opposite East Timor, lies the Kelp Structure or Prospect, the existence of which was discovered by Burmah Oil in 1970.[19] The Kelp Prospect is estimated to contain oil reserves of between 500 million and 5 billion barrels and also 50 million million cubic feet of natural gas. The delimitation in the gap is therefore crucial since the use of one method rather than another could lead to either Australia or Indonesia possessing the entire Prospect while the other receives none of it.

In addition to the agreements on the seabed boundaries mentioned above, in 1981 a memorandum of understanding was signed by representatives of each State in relation to a provisional fisheries delimitation line.[20]

One of the principal difficulties raised by the Australia-Indonesia delimitation is the question whether the applicable norms are those appertaining to the continental shelf or those which govern the Exclusive Economic Zone. These matters are dealt with in the following two sections.



Australia-Indonesia Continental Shelf Boundary

I — Continental Shelf

The provisions of the 1958 Geneva Convention on the Continental Shelf (the Convention)[21] govern continental shelf delimitations between opposite States parties to the Convention. Moreover, States which have not ratified the Convention will be subject to its provisions in so far as they represent customary international law.

19. International Law Association (Australian Branch) Australian International Law News, May 1984, 212.
20. Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Australia Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement. The provisional fisheries line runs more or less along the median line between the two States and is therefore inconsistent with the seabed boundaries so far agreed. The arrangement was established to divide the area outside the territorial sea of each country, where economic or fishing zones established by either country, in accordance with international law, would overlap. The understanding is that neither Government will exercise jurisdiction for fisheries surveillance and enforcement beyond the agreed line against fishing vessels licensed to fish by the authorities of the other country. See also Prescott, "Australia's Maritime Boundaries" (1983) 10 Dyason House Papers No. 1, 27.

Australia has been a party to the Convention since 1963 but Indonesia, having become a signatory in 1958, has never ratified it. Continental shelf delimitation between Australia and Indonesia will therefore be governed by the rules of customary international law.[22]

To what extent did the Convention embody the norms of customary international law which applied in 1958? Does it include norms which may have become applicable since then as a result of crystallization? Have those norms been modified in the past twenty-five years and, if so, with what effect?

(a) Geneva Convention on the Continental Shelf 1958

The Convention, which is binding on 75 States[23] was drafted largely as a codification of State practice subsequent to the 1945 Truman Proclamation on the Continental Shelf.[24] Like most documents which are the result of multilateral negotiations it contains compromise provisions which are inevitably vague and ambiguous and are not the first choice of most of the voting States.[25] There has been scope, therefore, for legislation subsequently enacted by States parties to the Convention to be diverse and vague but still consistent with the norms laid down therein.[26] Article 1 of the Convention defines the shelf with alternative outer limits. One of these is the 200 metre isobath and the other, the open ended "exploitability" criterion. As yet there have been no judicial decisions in relation to these outer limits except incidentally as a result of delimitation disputes between States with opposite or adjacent coasts and a common, or abutting, continental shelf.

Article 6.1 of the Convention deals specifically with boundary delimitation between States with opposite coasts.[27] In order to establish to what extent it is consistent with customary international law on continental shelf delimitation it is

21. Geneva Convention on the Continental Shelf, U.N. Doc. ST/LEG/SER.E/1, 499 UNTS 311.
22. This is true except in so far as Indonesia, a signatory to the Vienna Convention on the Law of Treaties, is bound by article 18 of that Convention "to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty; . . .". The fact that Indonesia has signed the United Nations Convention on the Law of the Sea may, however, be sufficient to imply a clear intention not to become a party to the 1958 Geneva Convention on the Continental Shelf.
23. Multilateral Treaties Deposited with the Secretary General. Status as at 31 December 1981. U.N. Doc. ST/LEG/SER.E/1, 604.
24. Laws and Regulations on the Regime of the High Seas, U.N. Doc. ST/LEG/SER.B/1 (1951), 38.
25. Brown ED, *The Legal Regime of Hydrospace* (1971), 14.
26. For example, the Australian Continental Shelf (Living Natural Resources) Act 1968 (Cth.), the Netherlands North Sea Installations Act (1964), the U.K. Continental Shelf Act 1964 and see the following extract from Brown cited at fn. 25 above:

    "From 1963 onwards the trend [towards following the terms of the Geneva Convention very closely] became more pronounced and the legislation of the following States is based on the Geneva Convention formula: Denmark (1963), South Africa (1963), New Zealand (1964), Finland (1965), Guatemala (1965), Yugoslavia (1965), Malaysia (1966), Sweden (1966), Dominican Republic (1967) and the Soviet Union (1968)."
27. 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 line 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 of each state is measured.

necessary to look at judicial interpretation of the relevant norms and at State practice since the Convention came into force.[28] There have been four decisions specificially on continental shelf delimitation since 1958. These are: the *North Sea Continental Shelf Cases,*[29] the *Anglo-French Continental Shelf Case on Delimitation in the English Channel,*[30] the *Case Concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiri)*[31] and the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya-Malta).*[32] In the case between the United States and Canada on maritime delimitation in the Gulf of Maine,[33] the ICJ was asked to draw a single line to delimit both the continental shelf and the exclusive fishery zone. The choice of potentially applicable legal principles was therefore wider in that case than in a simple continental shelf delimitation.

In addition, pursuant to an Agreement of 28 May 1980 between Iceland and Norway,[34] a Conciliation Commission was established to consider and report on the dividing line for the continental shelf area between Iceland and Jan Mayen Island. The Commission reported in May 1981.[35] Iceland and Norway accepted the Commission's recommendations and concluded an Agreement implementing them.[36] The Commission's report will be considered in the section on State practice. Other relevant State practice is evidenced by the delimitation agreements between the United Kingdom and Norway,[37] Australia and Indonesia,[38] and the Republic of Korea and Japan.[39] These cases are particularly relevant to the Timor Gap delimitation because of the submarine trenches in the areas to be delimited.

(b) Judicial Interpretation

1. North Sea Continental Shelf Cases

The *North Sea* cases were the first post-1958 maritime delimitation disputes to come before the International Court of Justice (ICJ). The Court's judgment was given in February 1969.[40] The disputes were between Denmark and the

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28. In June 1964, following ratification by Great Britain.
29. [1969] ICJ Rep. 3 (hereinafter called the *North Sea* cases).
30. The United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf Decision of 30 June 1977, CMND. 7438 (1978), reprinted in 18 ILM 397 (1979) (hereinafter called the *Anglo-French* case).
31. *Case Concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya)* [1982] ICJ Rep. 15 (hereinafter called the *Tunisia-Libya* case).
32. [1985] ICJ Rep. 13.
33. [1984] ICJ Rep. 246.
34. 62 ILR 108 (1982).
35. Ibid.
36. 21 ILM 1222.
37. Agreement relating to the Delimitation of the Continental Shelf between the United Kingdom and Norway, 10 March, 1965 (UKTS 1965 No. 71).
38. Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, Aust TS 1973 No. 31, and Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of 18 May 1971, Aust TS 1973 No. 32.
39. Agreement Between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, in Churchill, Nordquist, *New Directions in the Law of the Sea,* Vol. IV 117.
40. [1969] ICJ Rep. 3.

Netherlands, which were both parties to the 1958 Geneva Convention, and the Federal Republic of Germany which was not. The Court was requested by the parties to decide what were the applicable principles and rules of international law.[41] Having refused to accept the argument of Denmark and the Netherlands that the Federal Republic was subject to the Convention, the Court considered their argument that the conventional equidistance/special circumstances rule was part of the *corpus* of general international law. The majority held that this was not so.[42]

> . . . the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance — special circumstances basis."

The *North Sea* cases did not, in fact, require an interpretation of Article 6.1 but rather 6.2 since it was a question of delimiting the continental shelf between adjacent rather than opposite States. The wording of the two sections is, however, almost identical. The Court referred to the work of the International Law Commission (ILC) when the latter was involved in drafting the provisions of the Convention.[43] The ILC apparently found the task of providing a method for delimitation a hard one. It was clear that, failing agreement between States, it should be effected on equitable principles. How these equitable principles could be articulated as rules, was, however, much less clear. In pursuance of this objective the Commission adopted the equidistance method with an exception in favour of special circumstances. Even given this mitigation, however, ". . . doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable."[44] These doubts were strongest in relation to lateral boundaries between adjacent States.[45]

> "Less difficulty was felt over [the case] of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.
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> But in fact, 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 often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other."

41. Id. 13 para. 2.
42. Id. 41 para. 69.
43. Id. 33 para. 48.
44. Id. 36 para. 55.
45. Id. 36 para. 57.
46. Id. 53 para. 101.

The Court's conclusion was that the applicable rules and principles of international law were that the delimitation should be "... in accordance with equitable principles, and taking account of all the relevant circumstances ...".[46] Some of the factors to be taken into account were to include: "the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features; ... the physical and geological structure, and natural resources, of the continental shelf areas involved; ... a reasonable degree of proportionality ... between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast ...".[47] It should be noted that in addition to the other propositions stated by the Court there was heavy emphasis placed on the concept of the "natural prolongation" of land territory as the basis of the continental shelf doctrine.[48]

The question for commentators as a result of this judgment was what, if anything, was the difference between the conventional "equidistance principle", modified by "special circumstances", and the customary "equitable principles" modified by "relevant circumstances"?

The problem was, of necessity, considered in the *Anglo-French* arbitration on delimitation in the English Channel.

2. *Anglo-French Arbitration*

The Court of Arbitration (the Court) had to consider the effect of three French reservations to Article 6 of the 1958 Geneva Convention to which both States were parties. It concluded that the practical significance of the reservations was very small because:[49]

> "... the combined effect of the reservations and of the United Kingdom's rejection of them, is to render the rules of customary law applicable where application of the equidistance principle under Article 6 is excluded by one of the French reservations and because, in the circumstances of the present case, the rules of customary law lead to much the same result as the provisions of Article 6."

The Court concluded that, in spite of the French reservations and the U.K. objections to them, Article 6 was applicable to the delimitation. Nevertheless, it was found that given that the provisions of Article 6 do not define the conditions for the application of the equidistance/special circumstances rule and that both conventional and customary law rules have the same object, that is, the delimitation of the boundary in accordance with equitable principles, the rules of customary law were an essential means of interpreting and completing the provisions of Article 6.[50] In relation to the role of the equidistance principle the Court said:[51]

> "... the validity of the equidistance method, or of any other method, as a means of achieving an equitable delimitation of the continental shelf is always relative to the particular geographical situation. In short, whether 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

47. Id. 54 para. 101.
48. Id. 51 para. 95.
49. 18 ILM 397 (1979), para. 65.
50. Id. para. 75.
51. Id. para. 84.

> equitable character — of the method is always a function of the particular geographical situation.''

And in evaluating the ICJ judgment of 1969 in the *North Sea* cases the Court of Arbitration said:[52]

> ''As to the Court's observations on the role of the equidistance principle, it was far from discounting the value of the equidistance method of delimitation, while declining to regard it as obligatory under customary law. 'It has never been doubted', the Court commented, 'that the equidistance method is a very convenient one, the use of which is indicated in a considerable number of cases' (ICJ Reports 1969, para 22); and again it commented 'it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application' (*ibid,* para 23).''

The Court accepted that the need for a reasonable degree of proportionality between coastline length and continental shelf area was a peculiarly relevant factor in the *North Sea* cases but decided that in general it was no more than a criterion ''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.''[53] On the contrary the Court determined that ''it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor''[54] and concluded:[55]

> ''Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf.''

The Court also had to deal with the presence of islands in the disputed area. Its treatment of the Channel Islands could be argued to be an example either of the application of existing customary law, or, alternatively, of a discretionary decision which the Court believed led to an equitable result. The Court did not decide what is necessary to qualify an island for its own continental shelf or what the extent of such a shelf should be, although implicit in the decision is the assumption that, had the Channel Islands been independent rather than being British dependencies, they would have been entitled to their own continental shelf.

The Court specifically rejected the UK suggestion that the baselines along the south coast of England should be extended southwards in a sort of loop or promontory so as to include the Channel Islands within British internal waters.[56] It chose instead to establish an enclave round the islands giving them a 12nm continental shelf. The French Republic had proposed a six mile zone round the islands but it seems the Court considered it appropriate that their continental shelf be at least coterminous with their fishing zone or with their potential maximum territorial sea. The Court made it clear that the solution was applicable to the

52. Id. para. 85.
53. Id. para. 99.
54. Id. para. 101.
55. Ibid.
56. Id. paras 197–201.

specific features of the region with which the arbitration was concerned and would not necessarily be appropriate to areas which are geographically different.[57] The Scilly Isles and the island of Ushant, which are off the west channel coasts of England and France respectively, were each given half effect to modify what would have been the median line going westward into the Atlantic Ocean between the French and English coasts.

The Court also considered the question of the effect on the delimitation of the Hurd Deep, lying off the south west coast of England. The decision was that the existence of the Hurd Deep should not result in a modification of the median line.[58]

> "The geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the seabed and sub-soil which do not disrupt the essential unity of the continental shelf whether in the channel or the Atlantic region."

As can be seen from the foregoing the Court's decision not only settled the maritime boundary between France and the UK, it was also a discussion of the judgment of the ICJ in the *North Sea* cases, in relation to a different geographical setting, and an interpretation of Article 6. With reference to the latter, the Court found that the Article does not establish two separate rules, one based on equidistance and the other on special circumstances, but rather an equidistance rule an integral part of which is the possibility of modification to take account of special circumstances.[59] The Court concluded there was virtually no difference between this and the customary law rule that delimitation should be in accordance with equitable principles and taking account of all the relevant circumstances. The Court also seems to have endorsed the notion that "natural prolongation" is the basis of the continental shelf doctrine.[60]

Shortly after the *Anglo-French* arbitration the ICJ considered its second post-1958 continental shelf delimitation case, the *Tunisia-Libya* case.

3. *Tunisia-Libya Case*

Unlike the *Anglo-French* arbitration, the *Tunisia-Libya* case involved delimitation between adjacent rather than opposite States. The Court was required "first to state 'the principles and rules of international law [which] may be applied for the delimitation of the area of the continental shelf' appertaining to each of the two countries . . .".[61] The Court was called upon to take account of three factors: equitable principles; the relevant circumstances which characterize the area; and the new accepted trends in the then Draft Convention of the Third UN Conference on the Law of the Sea (UNCLOS III).

No mention is made of the EEZ although its burgeoning is perhaps implicitly acknowledged with the reference to "recent trends". The States involved, not being parties to the Geneva Convention, considered that the delimitation should

57. Id. para. 199.
58. Id. para. 107.
59. Id. para. 68, c.f. the travaux préparatoires of Article 6 which clearly demonstrate that equidistance is the general rule and special circumstances the exception. See generally UN Docs. A/CN.4/SR.204 and SR.205 (1953); [1953] 1 Y.B. Int'l L. Comm'n 125–35.
60. Id. para. 77.
61. [1982] ICJ Rep. 15, 18, para. 23.

be governed by customary international law. It seems possible that they also considered the new "accepted" trends at UNCLOS III to be part of customary international law. This raises the question of the status of conventional norms drawn up by consensus when the agreement in which they are contained is not yet in force. In his Separate Opinion Judge Aréchaga accepted Tunisia's view "that even if a new accepted trend does not yet qualify as a rule of customary law, it may still have a bearing on the decision of the court, not as part of applicable law, but as an element in the interpretation of existing rules . . .".[62] This was consistent with the Court's conclusion that it was not the intention of the parties to impose supplementary rules on themselves but rather that the trends should be taken into account as factors which were relevant to the interpretation of the rules.[63]

The Court found that the applicable rules of customary international law were: that an equitable delimitation must be made having regard to all the relevant circumstances and that one of the ways of achieving this might be to use an equidistance line.[64] In other words the Court confirmed the rule which was given in the *North Sea* cases but also implicitly endorsed the view in the *Anglo-French* case that an equidistance line modified in accordance with special circumstances would often lead to an equitable solution and that therefore in many cases it would make little difference which rule was used. Both the Court in its judgment[65] and Judge Aréchaga, in his Separate Opinion,[66] however, stressed the absence of a presumption in favour of equidistance. The drawing of a median line was simply one method available, among others, for reaching an equitable solution. Given that the case before the Court was one of adjacent rather than opposite States, that was probably the correct conclusion. It can be argued, however, that it is a misinterpretation of the earlier cases so to downgrade the equidistance principle in cases where the States concerned are opposite.

Dissenting Judge *ad hoc* Evensen could not agree with the Court's decision on the rules to be applied.[67]

> "In my opinion the arguments advanced . . . fail to mention any legal principles on which a decision on delimitation should be based. The 'relevant circumstances' to be evaluated must be applied in relation to some rules of law. However, in the present case, the court seems to consider that delimitation based on 'relevant circumstances' as [sic] a purely discretionary operation where the Court more or less at will can disregard relevant geographical factors . . . without any attempt to establish reasonable equality as to distance between the nearly opposite coasts concerned. . . . the reasoning in the Judgment as well as the operative paragraphs thereof seem closer to a decision-making process based on an *ex aequo et bono* approach . . . than to the authority given to the Court in Article 38, paragraph 1, of the Statute [of the Court]. The results, however, are not equitable in my respectful opinion."

His suggestion was that it is not possible, or was not in the *Tunisia-Libya* case,

62. Id. 108, para. 33, separate Opinion of Judge *ad hoc* Aréchaga.
63. Id. 38, para. 24.
64. Id. 79, para. 110.
65. Id. 78, para. 109.
66. Id. 107, para. 31.
67. Id. 293, para. 14, dissenting Opinion of Judge *ad hoc* Evensen.

to achieve an equitable result without using the equidistance line at least as the *basis* for the boundary.

Dissenting Judge Oda was equally unable to accept the Court's view that the use of the equidistance line should not be the primary method of boundary delimitation.[68]

> "Neither is there anything specific to delimitation in the requirement to reach such agreement in accordance with equitable principles, while the declaration that use of the equidistance method must be denied the status of a rule of law on account of some *a priori* incompatibility with this requirement is a dictum that could only be justified if it had been proved that the line reflecting equitable principles could not be, or could only by coincidence be, an equidistance line. Suffice it to say that a rule may be a rule, even a paramount rule, and yet not have to be 'compulsorily applied in all situations'."

He acknowledged that in 1969 the Court found that the equidistance principle could not be a rule of law but pointed out that it was not able to suggest any alternative:[69]

> "In place of suggesting a method, it provided a definition whereby the appurtenance of a given sea-bed area to a particular State could be ascertained or recognised: the area in question had to be the "natural prolongation" of that State's land territory. Whatever method could be devised for applying that definition might thus be an aid to delimitation, but it could hardly be described as a method *of* delimitation."

Judge Oda then went on to discuss the idea of natural prolongation and to show that its role in the concept of the continental shelf has changed as the concept itself has changed.

In common with Judge Oda, the Court downplayed the importance of natural prolongation in continental shelf delimitation.[70] It was argued that the apparent importance of the concept in the *North Sea* cases was because of the special facts there present — in particular that all of the area to be delimited lay within the 200m isobath. The significance of the 200 metre line is that, following the Truman Proclamation, it has been generally accepted as marking the narrowest possible outer limit of a State's continental shelf.[71] The judgment stresses the point that although natural prolongation is the basis of a coastal State's

68. Dissenting Opinion of Judge Oda, id. 194, para. 60.
69. Id. 194, para. 61.
70. Id. 45, para. 43.
71. Oda S, *International Law of the Resources of the Sea* (1979) 86 "The criterion of 200 metres depth, generally considered as the limit of the continental shelf ever since the Truman Proclamation was issued in 1945, was not referred to in the 1951 [ILC] draft [Convention on the Continental Shelf]. . . . The rationale of the 200 metre depth has always rested on the fact that the continental shelf (in the geographical sense) generally comes to an end at that point, and it is there that the continental slope begins, with a steep drop to a great depth". O'Connell argues (O'Connell DP, *The International Law of the Sea* (1982), 492–495) that the 200 metre limit was not soundly based, but he implicitly accepts that until that limit was extended (as technology advanced and it was possible to exploit greater depths) it did represent at least the minimum limit. In addition, the practice of States suggests that there was general acceptance of the 200 metre line as the minimum limit — the general acceptance perhaps amounting to the *opinio juris* necessary for the creation of a norm of international law. See, e.g. the Australian Pearl Fisheries Act No. 2 1953, and Article 1 of the 1958 Geneva Convention on the Continental Shelf.

continental shelf claim this does not mean that it will also define the limit of a claim to a shared shelf.[72] The conclusion reached by the court was that while the principle of natural prolongation might still, in some circumstances, have an important role to play, this was subordinate to the application and satisfaction of equitable principles.[73]

Employment of the concept of natural prolongation in continental shelf delimitation means that the effect of a deep discontinuity in the seabed between two States must be considered because, it can be argued that, in some cases such a feature divides two discrete continental shelves.

In the *Tunisia-Libya* case the Court was called upon to consider the effect, if any, of the Tripolitanian Furrow. The conclusion was that the furrow was a relatively insignificant feature which did not interrupt the continuity of the Pelagian Block as the common natural prolongation of the territory of both parties.[74] Accordingly, it was given no effect.

Thus the Court having decided that the continental shelf was to be delimited on the basis of equitable principles divorced from the concept of natural prolongation, said that it was bound to apply:[75]

> "equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. 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."

What does this quotation tell us? The Court had already made it clear that the application of equitable principles is to be distinguished from a decision *ex aequo et bono* — but without attempting to explain how this was so except by their statement quoted above.

In his dissenting judgment, Judge Evensen criticised the Court for applying equity in a vacuum. He said "The equitable solution in this case based on equitable principles must have its foundation in international law not in a discretionary decision-making process."[76] His conclusion was that the distinction between a decision based on equitable principles and a decision *ex aequo et bono* is a very delicate one[77] and that the Court had strayed towards the latter rather than confining itself to the former. He does not state how the distinction may be made in general terms. But he suggests that in the *Tunisia-Libya* context, following the decisions in the *North Sea* and *Anglo-French* cases, the equidistance principle should be the, or, at least, a, juridical starting point for the application of equity. The corollary is that if there is a principle, in this case the equidistance principle, used "at least as one point of departure . . . for the application of equity" then any risk of the decision being in fact, or being construed as, *ex aequo et bono* will be avoided.[78]

Judge Oda does not discuss the difference between the two types of decision

72. [1982] ICJ Rep. 15, 46, para. 44.
73. Ibid.
74. Id. 64, para. 80.
75. Id. 60, para. 71.
76. Id. 290, para. 12, dissenting Opinion of Judge *ad hoc* Evensen.
77. Ibid.
78. Ibid.

either. Implicit in his Opinion however is a view similar to that of Judge Evensen's:[79]

> "... the Court suggests as the positive principles and rules of international law to apply in this case only equitable principles and the taking into account of all relevant circumstances. . . . [This] appears simply to suggest the principle of non-principle. The Judgment does not even attempt to prove how the equidistance method, which has often been maintained to embody a rule of law for delimitation of the continental shelf, would lead to an inequitable result."

Judges Evensen and Oda both clearly favour an approach to continental shelf delimitation which takes as its starting point an equidistance line which can then be modified to take account of special circumstances, in accordance with equitable principles. In their view the inevitable result of the application of equitable principles "in a vacuum" will be a decision *ex aequo et bono.* This approach can probably best be characterised as the traditional one and is in contrast to that of the majority of the Court.

The majority examined what equitable principles might entail and, in so doing, fell into semantic difficulties.[80]

> "The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant: the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable: it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term "equitable principles" cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result."

The Court discussed the concept of equity in domestic legal systems and stated that in the context of municipal law it was often contrasted with the inflexible rules of positive law. It pointed out that there is no such contrast in international law where the "concept of equity is a general principle directly applicable as law".[81]

Having thus disposed of "equitable principles" the Court went on to consider the "relevant circumstances which characterize the area". It had been requested by the Special Agreement between Tunisia and Libya,[82] in rendering its decision, to take account of equitable principles and the relevant circumstances which characterize the area as well as the new accepted trends in the Third United Nations Conference on the Law of the Sea. The Court pointed out that the first two of these factors were "in complete harmony with the jurisprudence of the

79. Id. 157, para. 1, dissenting Opinion of Judge Oda.
80. Id. 59, para. 70.
81. Id. 60, para. 71.
82. Id. 21, para. 1.

Court, as appears from its Judgment in the *North Sea Continental Shelf* cases, . . .''.[83] There is no question, therefore, but that ''relevant circumstances'' in this case has the same meaning as it had in the *North Sea* cases and as ''special circumstances'' had in the *Anglo-French* arbitration.

There were six circumstances which were considered relevant by the Court. These were: the configuration of the Tunisian Coast,[84] the presence of the island of Jerba and of the Kerkennah Islands and surrounding low-tide elevations,[85] the position of the land frontier's intersection with the coastline, alleged maritime limits,[86] historic rights,[87] and the proportion of continental shelf to length of coast.[88] Factors which had been put forward by the Parties but which were specifically held by the Court *not* to be relevant were the Tripolitanian Furrow[89] and economic factors.[90]

4. Libya — Malta Case

The parties to this case requested the ICJ to delimit the continental shelf between them. While Malta was a party to the 1958 Convention, Libya was not and both parties agreed that the principles of law governing the case should be those of customary international law. They further agreed that the delimitation was to be effected in accordance with equitable principles and taking account of all relevant circumstances.[91]

This was the first occasion on which the Court had to deal with a delimitation exclusively between opposite coasts, without any element of adjacency between them. The Court emphasised that despite the fact that the case was on the delimitation of the continental shelf, the principles and rules underlying the regime of the EEZ could not be left out of consideration. The legally permissible extent of the EEZ appertaining to any State is, at the very least, one of the relevant circumstances to be taken into account in delimiting the continental shelf. It was made clear that within 200nm of the coast there is no reason to ascribe any role to geological or geophysical factors.[92]

This conclusion was particularly significant as it seems that like Australia and Timor, Libya and Malta are on different tectonic plates with a convergent plate boundary between them.[93] The fact that even in these circumstances geomorphology was totally ignored suggests that the relevant law has changed fundamentally since 1971/72 when the earlier Australia-Indonesia agreements were negotiated.

The court decided that the applicable law was that the delimitation was to be effected in accordance with equitable principles and taking account of all

83. Id. 37, para. 23.
84. Id. 63, para. 78.
85. Id. 63, para. 79.
86. Id. 64, para. 81 — these include the *modus vivdeni* line (tacity accepted by both Parties as a provisional fisheries demarcation line) see paras. 93–95 and the *de facto* line (which was the result of the manner in which both Parties initially granted concessions for offshore exploration and exploitation of oil and gas).
87. Id. 71–75, paras 97–102.
88. Id. 75–76, paras 103–105.
89. Id. 64, para. 80.
90. Id. 77, para. 107.
91. [1985] ICJ Rep. 13, 31, para 29.
92. Id. 33, paras 33 and 34.
93. Malta is on the Eurasian plate while Libya is on the African plate, see Sawkins FJ, Chase CG, Darby DG and Rapp G Jr. *The Evolving Earth* (2nd ed 1978) 160–163 and discussion below.

relevant circumstances, so as to arrive at an equitable result.[94] The relevant factors were held to be geography and the general configuration of the coasts, the disparity in the lengths of the relevant coasts of the parties and the distance between them. Those factors specifically held not to be relevant were: natural prolongation; the proposition that landmass is a generator of entitlement; and the relative economic position of the parties. Referring back to the *North Sea* cases, however, the Court did acknowledge that, in contrast to the economies of the parties "the natural resources of the continental shelf under delimitation . . . might well constitute relevant circumstances".[95]

Referring to its earlier judgments and also to the *Anglo-French* case, the Court made the point that proportionality, though likely to be a relevant factor, does not amount to an independent principle or method for drawing a boundary. It is sufficient to ensure that the final delimitation does not exhibit excessive disproportionality.[96]

Despite this conclusion, it seems that proportionality between coastline lengths, or the lack of it, was in fact considered by the Court, and in some of the separate opinions, to have been the most significant factor present in the *Libya-Malta* case.[97] Other judges, however, were of the opinion that its significance was overstated and that to give it such weight in the delimitation process was inconsistent with earlier decisions.[98]

Certainly, the Court's reasons for the arbitrary northwards shift of the line, for regarding the delimitation, at least in part, as one between the northern and southern littorals of the Mediterranean Sea, and for disregarding the likely delimitations between Malta and other States in the area and between those States themselves, are not very compelling. In particular, it is difficult to counter the arguments put forward by Judge Schwebel to show that the use of the equidistance line would have led to an equitable result.[99] How much better it could have been had the wider area been looked at, without prejudice to the rights and future claims of third States, so that an idea could be gained of how the dispute before the Court, and its resolution, would look in the context of the area as a whole as delimited between each and every riparian State.

Summary of Judicial Interpretation

As a result of looking at the jurisprudence of the ICJ, and at the *Anglo-French* arbitration, on the question of continental shelf delimitation, it may be concluded that the current rules of customary international law for such delimitations are as follows.

The overriding task for the Court is to determine the boundary by the application, and to the satisfaction, of equitable principles. The concept of

94. [1985] ICJ Rep. 13, 56, para 79.
95. Id. 40, paras 49 and 50.
96. Id. 44, paras 57 and 58.
97. See: Separate Opinion of Judge Sette-Camara, id. 73 and 74; Joint Separate Opinion, id. 82, para. 20 and 88, para. 31, although these three judges considered that the equidistance principle was equally important.
98. See: Separate Opinion of Judge *ad hoc* Valticos, id. 110 paras 19–22; Dissenting Opinion of Judge Mosler, id. 121; Dissenting Opinion of Judge Oda, id. 134, para. 18; Dissenting Opinion of Judge Schwebel, id. 182–187.
99. Dissenting Opinion of Judge Schwebel, id. 182–183.

natural prolongation is subordinate to this prime consideration. There is no presumption in favour of the equidistance principle although the drawing of a median line is one of the methods which may be employed to reach an equitable solution. Relevant circumstances which may be taken into account include: coastal configuration, islands, proportionality with overall lengths of coastlines and distance between coasts, encroachment of third States, and existing provisional or permanent boundaries including concessions and historic rights. With the decrease in importance of natural prolongation, factors such as physical and geological structure, which were considered relevant in the *North Sea* cases, will no longer carry any weight. The existence of natural resources in the shelf, which was also considered to be of importance in the *North Sea* cases remains a likely relevant factor. It was acknowledged in the *Tunisia-Libya* case in the recognition of the *de facto* offshore exploration and exploitation line.

In addition to judicial decisions, however, it is also necessary to look at State practice which may further illustrate the details of the current norms. Particularly apposite are those agreements dealing with areas where there is a trough or trench.

State practice

United Kingdom — Norway

In 1965 the United Kingdom and Norway reached agreement on delimitation of the continental shelf in the North Sea.[1] The delimitation was based on the median line taking no account of the Norwegian Trough. This was because the Trough is only 12 miles from the Norwegian coast while the area to the west of it is huge. Moreover, at its southern end the Trough is well inside the 200 metre isobath,[2] the narrowest definition of a State's continental shelf under the 1958 Convention. The fact that the United Kingdom was prepared to agree to ignore the Trough indicates acceptance of the fact that it was an accidental feature which did not divide two separate shelves, and that to have delimited their shelf along the bottom of the Trough rather than along the median line would have been inequitable.[3]

Australia — Indonesia

As stated above, seabed boundaries in the Arafura and Timor Seas were agreed upon by Australia and Indonesia in 1971 and 1972.[4] Although part of the agreed delimitation follows the median line between the two States, the border on either

1. Agreement relating to the Delimitation of the Continental Shelf between the United Kingdom and Norway, 10 March, 1965 (UKTS 1965 No. 71) Cmnd 2757.
2. Lumb "The Delimitation of Maritime Boundaries in the Timor Sea" 7 AustYBIL (1981) 72, 79.
3. Prescott suggests that the UK Concession was generally believed to be the result of the British desire to avoid any further delays in exploration and exploitation of the oilfields of the North Sea. See Prescott JRV, Collier HJ, Prescott AF, *Frontiers of Asia and South East Asia* (1977) 78.
4. Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of 18 May 1971. Signed Jakarta, 9 October 1972, entered into force 8 November 1973 (Aust TS 1973 No. 32), which supplemented Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries. Signed, Canberra, 18 May 1971, entered into force 8 November 1973 (Aust TS 1973 No. 31).

side of the Timor gap does not. It lies well to the north of the median line, approximately 60nm from the Indonesian baselines and 230nm from the Australian baselines. The reason for the departure from the median line is the existence of the Timor Trough. The Trough is a deep trench which runs roughly parallel to the Timor coastline. It reaches a depth of 3,400 metres and lies between 30 and 60nm south of Timor.[5]

In negotiating the boundary, Australia had originally proposed that the line be drawn following the thalweg of the Trough. The agreement which was eventually reached, however, was that the boundary be fixed roughly one third of the way down the southern side of the Trough.[6] Professor Lumb states[7] that this was a concession on the part of the Australian government which took the position that the Trough separated two discrete continental shelves with the result that Australia's shelf ended only at the bottom of the Trough. The compromise preserved for Australia the seabed within the 200 metre isobath and was thus within the narrowest definition of the continental shelf although still on the basis that the Timor Trough divided two separate continental shelves. The Indonesian argument was, at the time of the earlier negotiations, and still is, that there is one continental shelf stretching northwards from Australia which continues well to the north of the island of Timor.[8] The Timor Trough, so the Indonesian position holds, is simply an accidental discontinuity which should be ignored as were the Norwegian Trough, the Hurd Deep[9] and the Tripolitanian Furrow.

The Australian argument seems very much the more convincing given the rules of maritime delimitation which were applicable at the time. As stated earlier, Article 6.1 of the 1958 Convention applies where opposite States abut onto the same continental shelf. Implicit in the use of the word "same" in the Article is the proposition that if opposite States abut onto separate shelves then each has the right to the natural prolongation of its own territory to the outer limit prescribed in the Convention.

Indonesia is not, of course, a party to the 1958 Convention so the question arises whether the inference drawn above can be argued to have been a norm of customary international law at that time. Such an argument is supported by the judgment of the ICJ in the *North Sea* cases where the Court stated that under customary international law:[10]

> ". . . delimitation is to be effected by agreement . . . 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."

As long as it can be shown that Australia and the island of Timor are on separate continental shelves the 1972 delimitation would seem to be completely justified.

5. Prescott "The international limits of Australia's continental shelf" in Prescott JRV (ed), *Australia's Continental Shelf* (1979) 22, 37.
6. Shearer "International Legal Aspects of Australia's Maritime Environment" Australia's Maritime Horizons in the 1980s (1982) 1, 7.
7. Lumb "The Delimitation of Maritime Boundaries in the Timor Sea" 7 AustYBIL (1981) 72, 73.
8. Prescott JRV, *The Political Geography of the Oceans* (1975) 192.
9. Lumb op. cit. 74.
10. [1969] ICJ Rep. 3, 54.

International law has tended to eschew a very scientific definition of the continental shelf[11] and to concentrate rather on concepts such as natural prolongation,[12] extension of land mass[13] and adjacency to the coast.[14] Inevitably, however, Indonesia's argument in support of its claim to a median line delimitation, has provoked consideration of the theory of plate tectonics.

Plate tectonics

It has been established that the earth's surface is almost completely covered by nine large, rigid plates which move relative to each other but within each of which there is little movement.[15] Using this analysis many, if not most geologists place Australia on the Indian plate separated from Indonesia (including the island of Timor) by the Java Trench. Indonesia is on the Eurasian plate. The boundaries between one plate and another are marked by long narrow belts of seismic activity. The movement of one plate relative to an adjacent plate can take place in one of three ways: the plates may diverge, converge or slip past each other.[16] Where oceanic plates move away from each other the effect is of the sea floor spreading and creating a new oceanic lithosphere. Where two plates approach each other a process of subduction takes place and the sliding past each other of different plates, with neither divergence nor convergence, is called transform faulting resulting in a transform fault boundary.[17]

It is the second of the above forms of movement, convergence, which is characteristic of the boundary between the Indian plate and Eurasian plate in the Timor Sea.[18]

> ''If the surface area of the earth remains constant, as seems likely, the creation of new, lithosphere [crust and mantle] at divergent plate boundaries must be balanced by destruction of lithosphere at convergent plate boundaries. . . . Although many ways can be imagined for the earth to accomplish this destruction, one process, subduction, actually takes places. When two oceanic plates converge, one or the other of them is deflected down into the asthenosphere rather than both remaining on the surface to be crumpled and buckled.''

This process means that when an oceanic plate enters a subduction zone the edge of it bends under the edge of the converging plate and slides down into the asthenosphere at a steep angle. The distinctive topographic feature resulting from

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11. See eg *Tunisia-Libya* case [1982] ICJ Rep. 18, 287 per Judge *ad hoc* Evensen.
12. [1969] ICJ Rep. 3, 51, para. 95.
13. See the Truman Proclamation, Laws and Regulations on the Regime of the High Seas, UN Doc ST/LEG/Ser.B/1 (1951), 38.
14. See the 1958 Geneva Convention, Article 6.1.
15. Sawkins FJ, Chase CG, Darby DG and Rapp G Jr. *The Evolving Earth* (2nd ed. 1978) 160–163; Thiede J (ed.), *Whither the Ocean Geosciences* (report for the III International Workshop on Marine Geosciences), (1982), 131; Burk CA, Drake CL *The Geology of Continental Margins,* (1974) 94. For a contrary view see: Audly-Charles, Carter and Wilson, ''Tectonic development of eastern Indonesia in relation to Gondwanaland dispersal'' (1972) 239 Nature 35; Johnston and Bowing, ''Crustal Reactions resulting from the mid-Pliocene to Recent continent-island arc collision in the Timor region'' (1981) 6 BMR J Aus Geol and Geophys 223.
16. Sawkins FJ et al, op. cit., 165.
17. Ibid.
18. Id. 175.

this convergence is a great oceanic trench often accompanied by a parallel island arc.[19]

This view of the Timor Trough as the surface expression of the division between two plates is shared by most contemporary geologists,[20] and appears to be almost axiomatic. On this premise the Trough or Trench clearly also marks the boundary between two separate continental shelves and was correctly designated as the borderline delimiting the continental shelves of Australia and Indonesia in the 1972 Agreement. One basis for Indonesia's argument that the boundary of the Indian (Australian) plate lies north of Timor is that at the point of convergence (the surface expression of which is the Timor Trough) it is the Indian plate which is subject to subduction sliding down into the asthenosphere, beneath the earth's crust or lithosphere, at a steep angle. The leading edge of the Indian plate which is at least 100km beneath the earth's surface is probably located north of Timor.[21]

Even if there has been a need for international law to acknowledge certain geological phenomena in the delimitation of continental shelf boundaries, it cannot be supposed that anything other than the surface expression of these phenomena is relevant. It would seem, therefore, that the Indonesian argument on this point is without substance and that, given the norms of international law current in 1972, each State had the right to extend its continental shelf jurisdiction to the 200 metre isobath on the closest side of the Trough or, alternatively further down that side of the Trough as long as the seabed remained within exploitable depth.

Japan — Republic of Korea

Between Japan and the Republic of Korea (RoK) lies part of the East China Sea. This area has been the source of conflict between the two States; first over fisheries jurisdiction[22] and latterly over the exploitation of mineral resources.[23]

The dispute over continental shelf rights is complicated by the presence of a deep depression in the floor of the East China Sea, the Okinawa Basin or Trough. Given the existence of the Basin each State had a different conception as to how its continental shelf should be delimited. Japan's view was that the Okinawa Basin should be ignored for the purposes of drawing the boundary which should follow the median line. Korea, on the other hand, argued that the Basin marked

19. Id. 217; Burk CA and Drake CL *The Geology of Continental Margins* (1974) 93ff; Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) *The Offshore Hydrocarbon Potential of East Asia* (1976) 7–8.
20. See footnotes 15 to 19 above. See also Habouty MT, Maher JC and Lian HM (eds) *Circum-Pacific Energy and Mineral Resources* (1976) passim. This is a collection of papers from the Circum-Pacific Energy and Mineral Resources Conference, held in 1974, to which *inter alia,* eminent Indonesians contributed. But c.f. Audley-Charles, Carter and Wilson, op cit, and Johnston and Bowin, op cit, see note 15 above.
21. Sawkins FJ et al op. cit., 176.
22. For many years after the Second World War there was conflict between Japan and the RoK over fishing interests. This was resolved by agreements between the two States reached in 1965, 4 ILM (1965) 1128.
23. Oda S, *The Law of the Sea in Our Time — 1: New Developments 1966–1975* (1977) 251.

the dividing line between two separate continental shelves.[24] The inevitable result was that there was much overlap between each State's claim.[25]

It was suggested by Japan that the dispute be referred to international arbitration but, rather than proceed with this course, a Japanese-Korean joint ministerial meeting in 1972 proposed that the area become a joint development zone.[26] Presumably in the interests of preventing any further delay in the exploitation of the resources, the two States agreed to this proposal with the signing of an Agreement in 1974.[27] The Agreement will remain in force for 50 years, and continue to be operative indefinitely if neither party gives the three year's notice necessary to terminate it.[28]

NORWAY — ICELAND

In 1982 the Agreement on the Continental Shelf between Iceland and Jan Mayen (Norway) entered into force.[29] The Agreement was based on the recommendations of a Conciliation Commission which was established by the two States to consider the delimitation of the area.[30] Jan Mayen Island is an inhabited volcanic island under Norwegian sovereignty approximately 290 miles north-east of Iceland.[31] Iceland claimed a continental shelf extending beyond its 200nm zone, which had already been agreed to by Norway, in the area near Jan Mayen Island.

The Conciliation Commission considered that the concept of natural prolongation would not form a suitable basis for delimiting the continental shelf area as geological experts had determined that the Jan Mayen Ridge was neither morphologically nor geologically an extension of Jan Mayen Island or Iceland.[32] The implication of the Commission's statement is that, had the Ridge been the natural prolongation of Iceland or Jan Mayen Island either geologically or morphologically, the concept would have been applicable to the delimitation of the area.

In terms of plate tectonics the Jan Mayen area lies between two diverging plates.[33] The consequence of oceanic plates diverging is that the sea floor spreads and midoceanic ridges, such as the Jan Mayen Ridge, are created.[34] In these circumstances the edge of each plate is less easy to determine than in the case of converging plates where deep trenches are formed.

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24. Id. 253.
25. "The unilateral claims advanced by each State overlapped to such an extent that, out of 17 designated areas claimed by Japan, Korea and Taiwan, only four remained uncontested." Choon-Ho Park "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy" 14 Harvard International Law Journal (1973) 212, 213.
26. Oda, op. cit. 253. For the possible disadvantages of a JDZ see Choon-Ho Park, op. cit. 227.
27. Agreement Between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, in Churchill, Nordquist, *New Directions in the Law of the Sea,* Vol. IV 117.
28. Oda, op. cit. 257; for a detailed discussion of the JDZ Agreement see 256–264.
29. Iceland-Norway: Agreement on the Continental Shelf between Iceland and Jan Mayen (1982) 21 ILM 1222.
30. Continental Shelf Area Between Iceland and Jan Mayen (Jan Mayen Continental Shelf) (Report and Recommendations to the Governments of Iceland and Norway) (1982) 62 ILR 108.
31. Id. 113.
32. Id. 124.
33. Sawkins FJ et al op. cit., 166–167.
34. Id. And see Couper A (ed.), *The Times Atlas of the Oceans* (198 32–34 and 114.

The diverging plate boundary in the Iceland-Jan Mayen area runs roughly north-south through the middle of Iceland itself and to the west of Jan Mayen Island. If Jan Mayen is on a plate, rather than in the area between two, it is on the Eurasian plate as is part of Iceland. For this reason the theory of plate tectonics performs no useful role in helping to delimit the boundary between Iceland and Jan Mayen and it is not surprising that the Conciliation Commission did not consider it.

The Commission did examine State practice and judicial decisions and also took account of Article 83 of what was then the Draft Convention on the Law of the Sea, which they considered to have been influenced by the decision in the *North Sea* cases.[35] In addition to the concept of natural prolongation the Commission considered proportionality to be a relevant factor.[36]

The Report contains a brief discussion of the various solutions adopted in earlier delimitations. These include the use of the equidistance line modified, where appropriate, because of the special circumstances of the case and also agreements for joint development zones in overlapping areas of continental shelves.[37] For a number of reasons including the reluctance of the Commission to delimit the continental shelf along a line different from the economic zone line, the recommendation was that the disputed area be shared as a joint development zone.[38]

Summary of State practice

At first glance the Australia-Indonesia delimitation appears to be the odd one out as it is the only case in which an oceanic trench was influential in the determination of the boundary. This apparent exception is justified, however, by the fact that in none of the other cases considered, apart from the Iceland-Norway delimitation, was there a plate boundary in the area to be delimited. The United Kingdom and Norway both lie on the Eurasian plate as do Japan and the Republic of Korea.[39] As has already been explained the diverging plate boundary in the area to be delimited between Iceland and Jan Mayen (Norway) provided no assistance in settling the boundary there.

What the State practice considered in the previous pages does show is that, in the absence of a deep oceanic trough separating two continental shelves, continental shelf delimitation between opposite States is customarily effected by drawing a boundary which follows the median line. Where States cannot agree on such a line the tendency is towards the creation of joint development zones in disputed areas.

United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (the Convention),[40] which

35. Id. 125.
36. Ibid.
37. Id. 126.
38. Ibid.
39. Sawkins FJ et al. op. cit., 163.
40. U.N. Doc A/CONF.62/122 of October 7, 1982. Reproduced in (1982 21 ILM 1261. (Hereinafter called the 1982 Convention.)

was signed in December 1982 in Jamaica but is not yet in force,[41] was the outcome of nine years of consensus negotiating by delegates to the Third United Nations Conference on the Law of the Sea. Part VI of the Convention is devoted to the continental shelf which has thus been preserved as a concept of current international law.

As a result, no doubt, of the evolution of customary law in relation to the continental shelf and also of the need for unanimity at the Conference, the provisions of the convention are different in many respects from those in the 1958 Geneva Convention. For example, the rules to be applied for delimiting the outer edge of a State's continental margin[42] are completely new and implicitly acknowledge not only the new exclusive economic zone but also the fact that resource exploitation is now possible, or potentially possible, at depths undreamt of in 1958.

A change has also been made to the article on delimitation of the continental shelf between States with opposite or adjacent coasts.[43] On the face of it, Article 81.1 is no more than a non-article. It provides no substantive rules for delimitation but throws States back onto customary international law. Gone is the reference to the median or equidistance line modified by special circumstances, while the only gloss on the application of international law is that it shall be done in order to achieve an equitable solution — a prime example of an otiose provision.

The progress of the article through the nine years of negotiations at UNCLOS III was a tortuous one. The main area of disagreement was between two large groups of States one of which argued that delimitation of the EEZ and the Continental Shelf between adjacent or opposite States should be effected by applying "equitable principles" taking into account "all relevant circumstances and employing any methods, to lead to an equitable solution". The other group "argued that delimitation should be effected by agreement employing, as a general principle, the median or equidistance line, where this was justified".[44] This dichotomy, of course, reflects the two different forms of words, identified above, one of which was the rule of customary international law and the other

41. By the time the Convention closed for signature on 10 December 1984 it had been signed by 159 States. It has been ratified, or acceded to, by 25 States. See LOS/PCN/INF/7 of 4 September 1984 as updated to 27 November 1985 by the Australian Mission to the United Nations. The Convention will come into force 12 months after 60 States have deposited instruments of ratification or accession. This will probably not be for many years, however: see Wulf, comment on Vallenta "Protection and Preservation of the Marine Environment and Marine Scientific Research at the Third United Nations Conference on the Law of the Sea" 46 Law and Contemporary Problems No. 2, (1983) 153: "I believe a reasonable case can be made for the proposition that the LOS Treaty will not receive the sixty ratifications required to bring it into force."The author notes that it may be some time before the proposition stated above can be proved or disproved. He instances the Vienna Convention, a far less contentious treaty, which was opened for signature in 1969 but did not receive the 38 ratifications required to bring it into force until 1980.
42. Article 76.
43. Article 83.1 states: 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.
44. *UNCLOS III, Resumed Seventh Session, Report of the Australian Delegation* (1979), 44.

that used in the 1958 Geneva Convention. At that time the Conference did not have the benefit of the decision in the *Anglo-French* arbitration to the effect that whichever of the two formulae is applied the result will be the same.

The innocuous result was almost inevitable given the opposing views, the number of alternative and conflicting drafts and the fact that no two delimitation problems are the same. One is forced to conclude that delimitation between States with adjacent or opposite coasts is too intractable a problem for multilateral agreements to be reached except in terms so general as to be totally unhelpful.

There is, however, one possibly noteworthy difference between the two conventional delimitation articles. In the 1958 Convention, Article 6 refers to "the same" continental shelf which is adjacent to the territories of two or more States, while in the 1982 Convention the word "same" is omitted from Article 83.1. The significance of this change is not discussed in the records of negotiations at UNCLOS III. Nevertheless the plain meaning leaves little room for dispute — certainly in relation to Article 83.1. States whose delimitations were governed by Article 6 of the Geneva Convention could argue that a deep trench in the seabed separated two discrete shelves and that therefore the Article did not apply to a delimitation between them.[45] Such an argument would be even less likely to succeed in relation to Article 83.1 than it was in relation to Article 6.

Conclusion on Norms Applicable to Continental Shelf Delimitation

Until the Convention comes into force and its provisions are subject to judicial interpretation, indeed even once this is so, it would seem that the rules for delimitation of the continental shelf will be as given by the ICJ in its more recent decisions, modified by any later judicial decisions and by State practice.

The emergence of the EEZ has had an important effect on these rules so that all that can confidently be stated to govern interstate continental shelf delimitations is the requirement that the result be equitable. The generality and abstraction of this "norm" must be one of the main reasons for what seems to be a growing trend towards States establishing joint development zones in disputed areas.[46]

II — Exclusive Economic Zone

In contrast to the well established concept of the continental shelf, the EEZ is of recent provenance — the concept having developed very rapidly over the past 15 years. Delimitation of the zone, indeed its very existence is yet to be the central issue in a case. Nevertheless, when the US and Canada requested a Chamber of the ICJ to draw a single boundary line through the Gulf of Maine, they could be said, in effect, to have requested an EEZ delimitation. When, during the course of the case, the US proclaimed an EEZ, the Chamber stated that this would make no difference to their deliberations. And, in the *Libya-Malta* case, although the parties requested a continental shelf delimitation, the Court emphasised that the principles and rules applicable to the EEZ regime must be taken into account.

45. It appears that no such argument has ever been accepted by a court nor has it prevailed in State practice.
46. As between Japan and RoK and also Iceland and Norway, mentioned above.

It is probably correct to say, however, that the only place in which the formal rules applicable to the EEZ can be found, is Part V of the United Nations Convention on the Law of the Sea which is not yet in force.

United Nations Convention on the Law of the Sea

Articles 55, 56 and 58 deal with the regime of the EEZ, the jurisdiction of the coastal State therein and the rights and duties in relation to it of both the coastal State and other States. It is expressly stated in Article 56 that the coastal State has sovereign rights in the *sea-bed and subsoil* as well as the superjacent waters. Article 57 provides for its breadth. "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." There follow several articles dealing with specific matters including Article 74 on delimitation of the EEZ between States with opposite or adjacent coasts.[47] This is, *mutatis mutandis,* identical to Article 83.1 on continental shelf delimitation — a non-article.[48]

Douglas Johnston, in discussing Articles 74 and 83 of the Convention, refers to the drawn out battle between the two groups of States (the equidistance and the equitable principles groups) at UNCLOS III.[49] He is forced to admit:[50]

> "The truth is, of course, that doctrinal or philosophical differences had less to do with the controversy than the variety of geographical situations addressed by the delegations, each in their own national interest. Accordingly, the language of Articles 74 and 83 should be regarded as designed, in the final version, as intended to facilitate, rather than to guide, negotiations, and to ensure maximum flexibility in the disposition of boundary delimitation issues within the dispute settlement system provided for in Part XV of the Convention."

Judicial Interpretation

In the *Tunisia-Libya Case* the judgment of the ICJ barely touches on the EEZ concept. Each of the dissenting Judges Evensen and Oda, however, discusses it in some detail in his Opinion as does Judge *ad hoc* Aréchaga in his Separate Opinion.[51] And in the *Libya-Malta* case the court said that even though the dispute related to the delimitation of the continental shelf only, the principles and

47. Article 74.1 states: The delimitation of the exclusive economic zone 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.
48. "Article 74 on the delimitation of the Exclusive Economic Zone between states with opposite or adjacent coasts is another example of a formula designed to satisfy the requirements of states with diametrically opposed views" Arvid Parvo "Before and After" 46 Law and Contemporary Problems No. 2, (1983) 95, 99.
49. Johnston "Maritime Boundary Delimitation" in Johnston DM, Gold E and Tangsubkul P (eds) *International Symposium on the New Law of the Sea in South East Asia — Developmental Effects and Regional Approaches,* 1983, 139, 143.
50. Id. 143.
51. Dissenting Opinion of Judge *ad hoc* Evensen, [1982] ICJ Rep. 15, 283 paras 7ff, Dissenting Opinion of Judge Oda, id. 222, Chapters 5, 6 and 7, and Separate Opinion of Judge *ad hoc* Aréchaga id. 114–115.

rules underlying the EEZ concept could not be left out of consideration.[52] In the absence of any judicial decisions on the subject the discussions of the Court and of the individual judges mentioned are worth consideration.

Tunisia-Libya Case — Judge Oda

In Chapter VII of his Dissenting Opinion, Judge Oda summarises his perception of the principles and rules for the delimitation of the continental shelf and EEZ. He emphasises the importance of the change in the continental shelf concept brought about by the universal introduction of the 200nm zone. He suggests that the distance criterion will override the traditional concepts of contiguity and continuity[53] and that there is a trend towards the absorption of the continental shelf regime into that of the EEZ.[54] He is much persuaded to this view by the fact *inter alia* that throughout the negotiations at UNCLOS III delimitation of the EEZ and of the continental shelf were dealt with together. He does, however, acknowledge the possibility of arguing that even if the principles applying to the delimitation of each are the same, the results of practical application may be different. This argument apart, he concludes that distance should be the primary criterion for delimitation of both the EEZ and the continental shelf.[55]

Tunisia-Libya Case — Judge ad hoc *Evensen*

In his discussion of what should be classified among the "new accepted trends in the Third United Nations Law of the Sea Conference" Judge Evensen dwells at some length on the concept of, and the rules applicable to, the EEZ.[56] He puts forward a number of propositions including the following: "the economic zone principle up to 200 miles is as *valid and important a principle* as the continental shelf principle."[57] "[T]he concept of exclusive economic zones of 200 miles has already won wide recognition in the practice of States,"[58] ". . . it is not a criterion for claiming a continental shelf up to 200 miles that this part of the shelf constitutes a *natural* prolongation of the land territory,"[59] and, ". . . note should be taken of a development in the Law of the Sea Conference and in the domain of State practice which has weakened the practical impact of the concept of natural prolongation through the development of that of the 200 mile economic zone;"[60] Judge Evensen felt that it was "hardly conceivable in the [Tunisia-Libya] case to draw a different line of delimitation for the exclusive economic zone and for the continental shelf" even though neither country had claimed an EEZ and they had requested a ruling on continental shelf delimitation only. The implication of his statements is that distance, or equidistance, should be the prime consideration.

Tunisia-Libya — Judge ad hoc *Aréchaga*

Judge *ad hoc* Aréchaga agreed with the decision of the majority in the case but

52. [1985] Rep. 13, 33, para. 33.
53. [1982] ICJ Rep. 15, 248.
54. Id. 248–249.
55. Id. 249.
56. Id. 283–288.
57. Id. 284.
58. Id. 285.
59. Id. 286.
60. Id. 288.

wrote a Separate Opinion in order, *inter alia*, to record his view on the effect of the 200nm zone on the continental shelf. He states that the incorporation of the 200nm limit into Article 76.1 of what was then the draft convention has "done away with the requirement of a geological or geomorphological continental shelf, thus destroying the conception of 'natural prolongation' . . .".[61] He goes on[62]

> ". . . it is difficult to deny that, at least in the case of continental shelves not extending beyond 200 miles, the notion of the continental shelf is in the process of being assimilated to, or incorporated in that of the Exclusive Economic Zone . . .".

Libya-Malta Case

Even though Libya and Malta had asked the Court to delimit between them only the continental shelf, in the Court's view:[63]

> "As the 1983 Convention demonstrates, the two institutions — continental shelf and exclusive economic zone — are linked together in modern law. Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the seabed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State. This does not mean that the concept of the continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts."

This conclusion influences the rest of the judgment, justifying further conclusions such as that to ascribe a role to geophysical or geological factors in delimitation would be to apply a jurisprudence "which now belongs to the past, in so far as seabed areas less than 200 miles from the coast are concerned".[64]

In his Separate Opinion, however, Judge Sette-Camara rejects the notion that under the 1982 Convention "the concepts of continental shelf and exclusive economic zone tend to merge and become the same thing". He considers that the two concepts differ in many ways and that the "*excursus* of the Judgment on the exclusive economic zone was unnecessary . . .".[65]

Gulf of Maine Case

This case was the first occasion on which the ICJ — or rather a Chamber of the Court — had been asked to decide a single delimitation line to serve as a boundary between the continental shelves and also the EEZ's of the US and

61. Id. 114.
62. Id. 115.
63. [1985] ICJ Rep. 13, 33, para. 33.
64. Ibid. 36, para. 40.
65. Ibid. 71.

Canada. The case therefore, at least impliedly, raised the sorts of difficulties likely to be encountered in an EEZ delimitation between States.[66]

The Chamber very clearly made the point that geomorphology was not a factor which would be taken into account and therefore completely discounted natural prolongation — at least as far as the specific circumstances of the Gulf of Maine were concerned.[67] It was stated that the fundamental norm of delimitation is that it "is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring with regard to the geographic configuration of the area and other relevant circumstances, an equitable result".[68] The Chamber said:[69]

> "What is here understood by geography is of course mainly the geography of the coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect. Within this framework, it is inevitable that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap."

The auxiliary criteria mentioned as relevant by the Chamber were the relative coast line lengths, the presence of islands in the area to be delimited and the need to correct any effect of applying the basic criterion that would result in the cutting off of one coastline, or part of it, from its appropriate seaward projection.

The only dissenting judge, Judge Gros, was not prepared to accept that within 200nm of the coast the continental shelf has been subsumed within the EEZ, nor that the equidistance/special circumstances rule for continental shelf delimitation has been abrogated between these two States parties to the 1958 Convention. In his view the judgment of the Chamber is unconvincing on these points.[70]

He criticized the Chamber's failure to give grounds for its conclusion, saying:[71]

> "A single boundary not justified by legal reasoning can be neither the 'reasonable' solution called for by the 1969 Judgment . . . nor the equitable result in terms of the fundamental norm propounded by the parties and taken up by the Chamber . . .".

Even if, unlike Judge Gros, one were to find Chamber's delimitation and the

66. Clain makes the point that the Chamber found itself in the position of having to delimit with a single line two separate horizontal zones. It was considered inappropriate, in these circumstances, to allow criteria relevant only to one of the zones to be taken into account. The only criterion common to both zones was said to be geographical. In Clain's view ". . . that rationale cannot be applied to the delimitation of the EEZ, where [the] excluded criteria would now relate directly to — and be peculiar to — the very zone being delimited. Thus, if the Chamber here had been requested to delimit two adjoining EEZs . . . surely [it] would not have excluded from consideration criteria which are peculiar to the EEZ as a unified whole (e.g., geomorphological, geological, ecological, and economic criteria — particularly as those criteria relate to the natural resources of the EEZ)" Clain "Gulf of Maine — A Disappointing First In The Delimitation of A Single Maritime Boundary" 25 Va.J.Mt'l L. 521, 599 (1985).
67. [1984] ICJ Rep. 246, 274 and 275, paras. 45, 46 and 47.
68. Id. 300, para. 112(2).
69. Id. 327, para. 195.
70. Id. 374 and 375, para. 22.
71. Id. 370, para. 16.

reasons for it acceptable, there would be no escape from the fact that the judgment failed to provide enlightenment on any substantive rules which could apply to maritime delimitations. It may be argued that as there had been no previous similar case no substantive rules existed and it was not within the jurisdiction of the Chamber to invent them.[72] This approach seems, however, to deny the existence of *inter alia* the 1958 Geneva Convention which, if it had not been superseded by other rules of law, would have been relevant to the delimitation of the continental shelf. It also suggests that the Chamber could not function in accordance with Article 38 of the Statute of the International Court of Justice. To say that there are no rules therefore no rules can be developed seems to be an abrogation of judicial responsibility.

Summary of Judicial Consideration

Neither the *Tunisia-Libya* case, the *Libya-Malta* case nor the *Gulf of Maine* case provides any rules for the delimitation of the EEZ between opposite or adjacent States. But at least the three Opinions from the *Tunisia-Libya* case and the judgments in the *Gulf of Maine* and the *Libya-Malta* case, discussed above, demonstrate that the majority of those judges who have considered the question are of the view that the concept of the continental shelf has altered. According to them the EEZ, with its sole criterion of distance, now takes precedence over the continental shelf within 200nm of the territorial sea baselines of either State, and geological and geomorphological factors are no longer relevant to the creation of maritime boundaries within that distance.

This being so, one is presumably thrown back on the drawing of an equidistance or median line, modified if necessary to take account of special circumstances such as length of coastline or the presence of islands, as being the method most likely to achieve an equitable solution. If the median line is not to be used, and the jurisprudence denies that its use is a rule or prime method of delimitation, one is left with nothing but the subjective requirement of achieving an equitable solution.[73]

State Practice

In addition to the conventional norms and judicial consideration of EEZ delimitation there has been some State practice which can usefully be

72. McDorman, Saunders and VanderZwaag say: "No law has yet developed to deal with new jurisdictional zones (in particular the exclusive economic zone) which exist to allow states functional control over ocean space for particular purposes, rather than quasi-territorial control such as that of the continental shelf regime. A period of legal development and state practice will be required before international law can respond to the particular exigencies of functional or managerial zone delimitation, but the chamber was requested to perform such a delimitation prior to the emergence of such new law. The resulting divergence between the origins of the dispute and the rationale of the decision was perhaps inevitable". "The Gulf of Maine Boundary: Dropping anchor or setting a course?" Vol 9 No 2 Marine Policy, 90, 101 (1985).

73. As Clain says: ". . . [if] the law of delimitation has been reduced to a question of subjective equity, then negotiating an agreement of a delimitation line has been made at once more difficult, because of the absence of legal guidelines, and yet more certain, because nations will prefer agreement to 'roll-the-dice' judicial discretion. Further, if the delimitation dispute does go to adjudication, advocacy — the ability to persuade a judge of the 'equity' of one's case — becomes the primary concern"; Clain *op cit* 592.

mentioned.[74] This includes delimitation agreements between Australia and Papua New Guinea, Australia and France, Haiti and Cuba, India and Sri Lanka, Colombia and Haiti, Colombia and Costa Rica, France and Tonga and the United States and the Cook Islands.

Australia and Papua New Guinea negotiated their maritime boundaries in 1978,[75] but the Treaty contains no mention of the EEZ. Recognition of the incipient zone is, however, implicit in the provision for "residual jurisdiction" in Article 4(4). In part of the area of Torres Strait, which is less than 400nm wide, different seabed and fisheries jurisdiction lines were drawn.[76] In addition, a Protected Zone was created to enable the continuation of the traditional livelihood and lifestyle of the inhabitants. The seabed delimitation line, and except in the area of divergence, the fisheries jurisdiction line, is a modified median line. It was assumed by the negotiators that when each country established an EEZ this modified median line would represent the EEZ delimitation line.[77]

Agreement was reached in 1982[78] on boundaries separating the Australian mainland and New Caledonia in the southwest Pacific and the Heard and Kerguelen Islands in the South Indian Ocean. In each case the boundary delimits France's EEZ from Australia's EFZ and seems to follow the equidistance line between the base points of each State.[79] The agreement leaves undefined the limits of the continental shelf where it differs from the EEZ.

Haiti and Cuba agreed their maritime delimitation boundaries in 1977.[80] Article 1 of the agreement provides that the boundary between the economic maritime zone (Haiti) and the economic zone (Cuba), be established on the basis of equidistance or equity as the case requires. This suggests a median line modified where necessary to take account of special circumstances.

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74. Churchill and Lowe state "in the case of the thirty or so EEZ boundaries that have already been agreed, the EEZ boundary is the same as the continental shelf boundary in all but one case . . .", see Churchill RR and Lowe AV, *The Law of the Sea* (1983), 129. The writer has been unable to find that number of agreements. It seems that those authors may have included under the term "agreed boundaries" provisions such as Article 2.1 of Spain's Act No. 15/1978 on the Economic Zone of 20 February 1978, which states "Except as provided in international treaties with States whose coasts are opposite or adjacent to Spanish coasts, the outer limit of the economic zone shall be the median or equidistant line," Office of the Special Representative of the Secretary General for the Law of the Sea, Law of the Sea Bulletin (No. 2 December 1983) UN/DOC 83-35821, 77.
75. Treaty concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters 18 ILM 291 (1979).
76. This was in an area shaped roughly like a top hat where the divergence of the seabed and fisheries lines was to accommodate, among other things, the interests of the inhabitants of some Australian islands lying just off the Papua New Guinea coast.
77. Burmester "The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement" 76 AJIL (1982) 321, 338.
78. Australian Treaty Series 1983, No. 3.
79. Both Australia and France have used small islets, reefs and rocks as basepoints. This illustrates the importance of such features in the delimitation of maritime areas. See Burmester, "Outposts of Australia in the Pacific Ocean" 29 Australian Journal of Politics and History (1983) 14, 20.
80. Agreement Between the Republic of Haiti and the Republic of Cuba Regarding the Delimitation of the Maritime Boundaries Between the Two States in Nordquist, Lay and Simmonds, *New Directions in the Law of the Sea* Vol. VIII (1980), 69.

India and Sri Lanka employed a modified median line in their supplementary boundary agreement which was signed in 1976.[81] The agreement mentions jurisdiction over both the continental shelf and the EEZ each of which was delimited by the single boundary line.[82] The implication of this would seem to be that at that time the EEZ was seen by the two States primarily as a fisheries zone while the continental shelf encompassed seabed and subsoil resources.

In the delimitation of the boundary between Colombia's "marine and submarine areas" and Haiti's "exclusive economic marine zone and Continental Shelf" in 1978,[83] the line chosen was the median line.[84] Once again, however, it seems that the parties either did not recognise the possibility that the continental shelf was encompassed within the emerging EEZ, or, if they did, they avoided express acknowledgment of the fact.

The Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica[85] mentions neither specific maritime zones nor the method by which the boundary is to be drawn. According to Churchill and Lowe, however, the delimitation appears to have been based on equitable principles.[86]

The convention between the French and Tongan Governments on delimitation of the EEZ between Wallis and Futuna and the Kingdom of Tonga was signed in 1980.[87] Delimitation was by way of the median line drawn equidistant from the territorial sea baselines of each of the parties. There was no modification to the median line.

In 1980 the United States and the Cook Islands agreed on a common maritime boundary between American Samoa and the Cook Islands.[88] The boundary appears to follow the line of equidistance.

The agreements discussed above were all negotiated and signed not only during the period of evolution of the norms governing delimitation of the EEZ, a period which has not yet come to an end, but also during a time when the very existence of the EEZ was still gaining acceptance. For this reason the State practice identified is not particularly helpful in the search for norms of customary international law on the subject. Indeed, it seems that a pragmatic approach was probably taken in most cases and that the *opinio juris* necessary for the formation of rules was almost certainly lacking. Although, as Judge *ad hoc* Valticos has

81. Supplementary Agreement between Sri Lanka and India on the Extension of the Maritime Boundary between the Two Countries in the Gulf of Manaar from Position 13m to the Trijunction Point between Sri Lanka, India and Maldives (Point T) in Nordquist, Lay and Simmonds, op. cit. 97.
82. Ibid. 101, Article 5.2.
83. The text of the Maritime Limits Agreement appears in Nordquist, Lay and Simmonds, op. cit. 76.
84. Ibid. 76, Article 1.
85. Reproduced in Nordquist, Lay and Simmonds, op. cit. 93.
86. Churchill RR and Lowe AV, *The Law of the Sea* (1983) 128.
87. Convention entre le Gouvernement de la République Francaise et le Gouvernement du Royaume de Tonga relative a la délimitation des zones economiques, reproduced in Journal Officiel de la Réublique Francaise 19 April 1980.
88. Treaty on friendship and delimitation of the maritime boundary between the United States of America and the Cook Islands. Signed at Raratonga June 11, 1980. Ratified and entered into force September 8, 1983; 22 ILM 1416 (1983).

suggested, perhaps the widespread use of the median line reflects at least an *opinio aequitatis.*[89] In so far as the practice can be argued to be evidence of the existence of an incipient norm, a median line, subject to modification where appropriate, seems to have been the method of delimitation most commonly used.

Conclusion on Norms Applicable to EEZ Delimitation

The search for norms of international law on delimitation of the EEZ between adjacent or opposite States is a frustrating and fruitless one.[90] As has been seen, Article 74 of the Convention refers back to customary international law for the appropriate rules. But because of the recent development of the concept no such rules yet exist.

III — Overlap between continental shelf and exclusive economic zone concepts — which should take priority?

The formal rules of delimitation of the continental shelf and the EEZ between States with opposite coasts have been discussed above. It can be concluded from them that while the rules in relation to the continental shelf are fairly well developed and clear even if circular, the rules in relation to the EEZ are far from clear. Nevertheless, it is immediately apparent that there will be some cases where application of the two different regimes will produce inconsistent and irreconcileable results.

The most obvious type of case where this is likely to occur is where two opposite States are less than 400nm apart; as is the case with Australia and Indonesia.

The possibility then arises that the continental shelf border between the two States will be along one line and the EEZ border will be along another, quite different, line. Although it is possible, even if inconvenient, to have different fisheries and seabed demarcation lines,[91] as they delimit separate horizontal jurisdictions, it is not possible to have separate EEZ and seabed lines as EEZ jurisdiction encompasses the seabed and subsoil.

The question is therefore posed: how should a multilateral convention be interpreted when it is internally inconsistent? On the face of the Convention the meaning of Articles 55, 56 and 57 on the EEZ and 76 on the continental shelf is clear. Neither regime is ambiguous and each is applicable on its own. In

89. [1985] ICJ Rep. 13, 108, para. 11.

90. It is no accident that O'Connell, in his book published in 1984 (that is, two years after the signing of the Law of the Sea Convention) has 42 pages on delimitation of the continental shelf and 4 pages on delimitation of the EEZ, see O'Connell DP, *The International Law of the Sea* (Vol II) (1984), Chapter 18.

91. For examples of agreements which include different fisheries and seabed demarcation lines see: Argentina-Uruguay: Treaty Concerning the La Plata River 13 ILM 251 (1974). There is a fisheries and navigation zone of joint jurisdiction in the middle of the La Plata river between the two States whereas the delimitation of the seabed and subsoil is along the thalweg of the upper and middle La Plata and along the equidistance line of the lower La Plata. See Gros Espiell, "Le Traité Relatif au 'Rio De La Plata' Et Sa Façade Maritime" 21 Annuaire Français de Droit International (1975) 241, 244 and 245, and also the Treaty concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters, between Australia and Papua New Guinea 18 ILM 291 (1979).

addition, Article 56.3 provides that EEZ rights with respect to the sea-bed and subsoil are to be exercised in accordance with the rules governing continental shelf jurisdiction. This does not, however, solve the problem where there is an overlap of the two different zones.

It seems, therefore, that if the Articles on the EEZ and the continental shelf are to be interpreted so as to be consistent with each other, an aid other than the words themselves must be employed. Possibilities would be to attempt to ascertain the purpose of the Convention[92] and see if that clarifies the matter, or, to see if the words of the Articles when read together might suggest the subordination of one to the other.[93]

Article 76.1 of the Convention differs from Article 1, its predecessor in the 1958 Convention, in its definition of the continental shelf. Article 76.1 refers to the:[94]

> ". . . sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, *or to a distance of 200 nautical miles from the baselines* . . . where the outer edge of the continental margin does not extend up to that distance."

The reason for the need to specify the 200nm distance is to accommodate the EEZ which has overtaken natural prolongation as a criterion which 200nm of the territorial Sea baselines. In their Dissenting Opinions in the *Tunisia-Libya* case Judges Evensen and Oda, the Judge *ad hoc* Aréchaga in his Separate Opinion, all seem to have accepted that the concept of natural prolongation can be discounted within 200nm of the coast.[95] Likewise, the Chamber of the ICJ which heard the *Gulf of Maine* case and the Court in the *Libya-Malta* case reached a similar conclusion.

This would, perhaps, imply the subordination of Article 76, on the continental shelf, to Article 55 of the EEZ. It would, however, be an oversimplification of the problem to suggest that the inconsistency is thus resolved.

In the Geneva Convention on the Continental Shelf, Article 6 refers specifically to the "same" continental shelf being adjacent to the territories of two or more States. In contrast, Article 83 of the 1982 Convention refers only to "the continental shelf". It can be argued, therefore, on a textual analysis, that the latter is not restricted in its application to circumstances where there is a common continental shelf but will apply equally where there is a deep trench or other similar feature which may divide two separate shelves.

If this argument is correct then the delimitation is likely to be along the median line, modified to take account of special or relevant circumstances, as this will normally produce the most equitable result.

If, however, Article 83 of the 1982 Convention is interpreted consistently with the wording of Article 6 in the Geneva Convention, there is no possibility of

92. Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, PCIJ, ser. A/B, No. 50 (1932) 365, 373.
93. Interpretation by reference to matters intrinsic in the terms of the treaty, O'Connell DP *International Law* Vol. 1 (1965), XX.
94. Emphasis added.
95. Dissenting Opinion of Judge *ad hoc* Evensen, [1982] ICJ Rep. 285 paras. 8–10, Dissenting Opinion of Judge Oda, id. 222, para. 107.

avoiding the question — where the continental shelf of one State overlaps with the EEZ of another, which should prevail?

If the EEZ were a zone primarily for fishing the answer would be relatively simple — there would be one boundary for the sea-bed and subsoil and another for the superjacent waters. While a common boundary for both jurisdictions is obviously preferable, to have different ones is not unworkable. But such a solution would presumably not be acceptable to the State part of whose EEZ had been downgraded, as a result, into an EFZ only.

The alternative possible solutions are:

— that the EEZ takes precedence and that one State is thereby denied part of its appurtenant natural prolongation;
— that the continental shelf takes precedence;
— that the area of overlap be created a joint development zone; or
— that the area of overlap be equally divided between the two States concerned.

Primacy of EEZ

The arguments in favour of this solution are first that, as was suggested above, the continental shelf has been subsumed within the EEZ. If this proposition is correct, the concept of natural prolongation has relevance only beyond the 200nm limit and as long as it does not encroach into the EEZ of another State. Secondly, in the 1982 Convention, the Articles relating to the EEZ come before those on the continental shelf which suggests that the EEZ takes precedence.

Primacy of continental shelf

The fact that historically, the continental shelf pre-dates the EEZ suggests that the former should take precedence. Secondly, continental shelf rights exist *ab initio* and do not depend on occupation, proclamation or use[96] while the EEZ has to be claimed by a State before it will be opposable to other States. Thirdly, as discussed earlier, the sea-bed and subsoil aspects of the EEZ are said to be governed by the continental shelf part of the 1982 Convention which suggests that the EEZ is derivative from the continental shelf and thus subordinate to it. In addition, in Article 76 of the 1982 Convention which defines the continental shelf, the criterion of natural prolongation is mentioned before the 200nm measurement. This, again, suggests that natural prolongation and, therefore, the old continental shelf concept, should take precedence over the recently developed EEZ.[97]

Joint Development Zone

While a JDZ might seem an acceptable compromise between friendly neighbours, there is always the chance that circumstances may change, new regimes may find themselves incompatible with each other, and that such an arrangement will prove fertile in nourishing disputes. Nevertheless the notion is

96. See Article 2(3) of the 1958 Geneva Convention which was repeated in Article 73(3) of the 1982 Convention. There is no such provision in relation to the EEZ.

97. While, in theory, the arguments in favour of the continental shelf having primacy over the EEZ are weightier and more convincing than the opposite arguments, judicial decisions and State practice suggest that — perhaps for pragmatic reasons — the EEZ is to take precedence.

of sound provenance having been suggested by the ICJ in the *North Sea* cases ". . . or by agreements for joint exploration, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit".[98]

There are precedents for such zones. For example, although Japan and Korea failed to settle their continental shelf dispute, they were able, in 1972, to put aside their legal claims and work together to develop the area where claims overlapped.[99] Iceland and Norway also agreed to a JDZ in the disputed area between Iceland and Jan Mayen Island.[1]

Equal division of area of overlap

In the *North Sea* cases, the ICJ suggested equal division, between the parties, of overlapping areas as one possible solution to this sort of problem.[2] In that case, of course, the Court was dealing with delimitation only of the continental shelf but there is no reason why the method should not be applied also to overlapping EEZ claims and EEZs/continental shelves.

Neither the norms of international law identified earlier, nor consideration of the concept and evolution of the continental shelf and EEZ respectively, provides a definitive answer to the question as to which of the two concepts should take priority in areas of overlap.

This lacuna in the law of the subject can be filled only, it seems, by principles of law handed down in judicial decisions or by State practice which, if supported by the necessary *opinio juris,* will eventually crystallise into custom and provide the missing norms.

The arguments given above supporting the proposition that the continental shelf should take precedence over the EEZ may appear much more persuasive than the counter arguments. Despite this, however, and even before the recent ICJ judgments in the *Gulf of Maine* and the *Libya-Malta* cases, the trend in judicial decision making was clearly towards holding that within 200nm of the coast the continental shelf has been subsumed within the EEZ. And the same result is suggested by the practice of States. The two recent decisions simply confirm the fact that the most realistic prediction is that, given the wide-ranging support it has engendered and the momentum of its evolution over the past 20 years, the EEZ will probably prevail in cases of overlap with the continental shelf. Such a result would mean that in circumstances such as where the outer portion of the continental shelf of one State overlaps with the EEZ of another — even though they are more than 400nm apart, the latter's claim to its EEZ would outweigh the former's sovereign rights to the tip of its continental shelf. This conclusion is supported by the demise of Provision 84 of the Main Trends Paper[3]

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98. [1969] ICJ Rep. 3, 52, para. 99.
99. Oda S, *The Law of the Sea in Our Time — 1 New Developments 1966–1975* (1977) 253.
1. *Continental Shelf Area Between Iceland and Jan Mayen* (1982) 62 ILR 108, 126. For further JDZ agreements see Prescott, "Australia's Maritime Boundaries" (1983) 10 Dyason House Papers No. 1, 27.
2. [1969] ICJ Rep. 3, 52, para. 99 and see also [1984] ICJ Rep. 246, 327, para 195 and [1985] ICJ Rep. 13, 90, para. 36 of the Joint Separate Opinion.
3. Main Trends Paper UN DOC A/Conf.62/C.2/WP1 (1974).

which served as a basis for discussion at the beginning of UNCLOS III.[4] If there were a case in which the continental shelf State was already in the course of exploiting the resources of the sea-bed and subsoil in the area then, presumably, some form of compensation should be payable. That problem is not, however, central to this article.

It is in circumstances similar to those in the Timor Sea that primacy of the EEZ will give the most significant result. It will mean that even in a case where there are two separate continental shelves, because the area is at the boundary of two separate plates, delimitation should be by means of a median line modified to take account of relevant circumstances. The concept of natural prolongation will be replaced by measurement of equal-distance from the territorial sea baselines which will be the fundamental criterion of delimitation. Such a result is consistent with the new definition of the continental shelf in the 1982 Convention which also, unlike the 1958 definition, includes a distance criterion.

Given the apparent inequalities of the result in such a case, if delimitation were based on natural prolongation, and given the teleological function accorded to equity by the 1982 Convention, this would seem to be the correct legal solution.

Judicial and arbitral decisions, which may not be numerous, are likely to resolve individual delimitation disputes rather than to lay down norms which are universally applicable. This is for the obvious reason that each geographical area in which a border is to be delimited is unique. It is suggested, nevertheless, that in future judicial delimitations of areas such as the Timor Sea, primacy will be given to the equidistance principle with the result that the boundary will be drawn along the median line modified so as to take account of relevant circumstances.

If the opinion expressed above proves to be correct it may be possible, in the future, to state that the basic rule of delimitation of the continental shelf and the EEZ between opposite States is that the border should follow the median line.[5] Past experience suggests, however, that the Court is unlikely to commit itself expressly to this principle but will qualify it because of special or relevant circumstances, referring to the need for an equitable result. If there are judicial and arbitral decisions which are sufficiently precise and consistent to articulate a norm of international law then this will be the norm to which the 1982 Convention will refer interested States. In the absence of clear judicial statements, however, there is the possibility of the creation of relevant norms as a result of State practice.

There have already been several, and there will inevitably be more, EEZ delimitation agreements between opposite States. Unfortunately, however, it is impossible to detect, let alone prove, that the practice of States in reaching these agreements was accompanied by the necessary *opinio juris*. Herein lies the difficulty.

Agreements on EEZ delimitation between States, particularly in areas where there are known hydrocarbon and other deposits, may well be made on grounds

4. Provision 84 of the Main Trends paper states: "No State shall by reason of this Convention claim or exercise rights over the natural resources of any area of the seabed and subsoil over which another State had under international law immediately before the coming into force of this Convention, sovereign rights for the purpose of exploring it or exploiting its natural resources." This provision was not included in the final text of the Convention because of lack of support.
5. But cf [1985] ICJ Rep. 13, 37, paras. 43 and 44.

of political expediency. A State which might appear to have the legal right to extend its EEZ to the median line but whose only prospect of reaching agreement at all is by compromising and accepting a JDZ extending over the median line into its EEZ, might well take the latter course for pragmatic reasons. Similarly, islands may be given greater or less weight in the modification of a median line not because of legal principles but as part of a package deal, most of the elements of which might have no legal relevance at all, let alone be connected with the delimitation.

In the writer's opinion, and as a result of the discussion above, two propositions can be stated with some confidence. First, where there is an area of sea floor to which, prima facie, both EEZ and continental shelf principles apply, the former should prevail. Secondly, since the fundamental criterion of the extent of the EEZ is distance, delimitation of the EEZ between States with opposite coasts should be along the median line, modified where necessary to take account of relevant circumstances, but regardless of submarine topography.

It is predicted that future judicial and arbitral decisions will have this result — without necessarily expressly referring to the median line. It is also predicted that in many, but not all, cases State practice will have this result. Several such agreements entered into by States, when taken at face value, would be sufficient to constitute the equidistance principle a norm of customary international law. The difficulty of showing that States agree on median line EEZ delimitations because they consider that that is the law and that they are therefore obliged to do so, however, means it is possible that no norm of customary law articulating such a rule will develop for many years, if ever.

IV — Application of the current norms of international law to the delimitation of maritime boundaries between Australia and Indonesia

Australia has not claimed an EEZ. Is the proposed boundary, therefore, to be only a continental shelf one, as Australia would like, or is it not to be limited to the seabed but to include the superjacent waters? Given that Australia has declared a 200nm fishing zone and that a provisional fisheries jurisdiction line, which is largely equidistant, has been agreed, it must be assumed that Australia would prefer to have separate boundaries, the seabed line being much closer to the Indonesian coast than the fisheries jurisdiction line. Similarly, Indonesia would, presumably, never accept that the existing parts of the seabed boundary should apply also to the water column.

Given the momentum of the evolution of the EEZ over the past 20 years, the wide-ranging support it has engendered and its codification in the 1982 Convention, it seems undeniably part of customary international law. As such, Indonesia's EEZ is opposable to Australia as Australia's would be, were it to claim one, to Indonesia. And, as discussed above, the development of the EEZ has almost certainly resulted in the subsumation within it of the continental shelf concept so that natural prolongation is irrelevant within 200nm of the coast.

This leads to the conclusion that, despite its desire for a seabed boundary delimited on the basis of the earlier established norms applicable only to the continental shelf, that possibility is not open to Australia given the current norms of international law. What should be agreed in the areas yet to be delimited is a

single maritime boundary[6] covering both the seabed and the superjacent waters.[7]

These areas can be considered in three discrete sections: the Timor gap, the area to the west of point A.25 and between Christmas Island and Java (see the map above). Each of these areas will be considered in turn although it would be unrealistic not to acknowledge that for political reasons, the border agreed in one section may affect the delimitation of another. That is to say, the tremendous difficulties in settling a disputed border in resource rich territory may best be overcome by compromises in the form of a "package deal" with each State making what may seem, in isolation, to be unwarranted concessions in the different areas.

Before considering the border in each of these sectors, however, the question should be addressed whether there is a case for arguing that the boundaries fixed in 1972 should be reconsidered.

Reconsideration of Boundary Agreed in 1972

It was concluded earlier that the current norms of international law are that within 200nm of the coast the continental shelf has been subsumed within the EEZ and that where States are less than 400nm apart the EEZ between them should be delimited along the median line modified to take account of relevant circumstances. If this conclusion is correct, the boundaries agreed between Australia and Indonesia in 1972 look to be inequitable and unreasonably generous to Australia. Indonesia might well be tempted, if not determined, to press for review of those boundaries.

Indonesia could argue for reconsideration of the agreed boundaries on the basis of the *rebus sic stantibus* doctrine or on the ground that the earlier agreement was "unequal".

REBUS SIC STANTIBUS

Indonesia could put forward a *rebus sic stantibus* argument demonstrating that while in the early 1970s the EEZ concept was in its infancy it has now developed to the extent that there has been a complete change in the rules governing maritime delimitation. While the boundaries agreed then were consistent with at least one interpretation of the rules on delimitation of the continental shelf applicable at the time, they are extremely inequitable and are not in accordance with the norms of current international law.

There are, however, two reasons for that argument's failing. First, because of Article 62.2(a) of the Vienna Convention on the Law of Treaties, which states that a fundamental change of circumstances may not be invoked as a ground for

6. The trend in recent State practice has been towards the negotiation of single maritime boundaries, see Collins, and Rogoff "The International Law of Maritime Boundary Delimitation" 34 Maine L. Rev. (1982) 1, 8 fns. 21 and 22. Feldman believes that in the Tunisia-Libya case the ICJ took "a significant step towards the formulation of integrated principles that can be applied to the delimitation of unitary maritime boundaries governing both the continental shelf and the exclusive economic zone." Feldman "The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?" (1983) 77 AJIL 219, 220.
7. There are precedents for different boundary lines in different horizontal jurisdictions, notably: Argentina-Uruguay, Treaty Concerning the La Plata River 13 ILM 251 (1974) and Australia-Papua New Guinea, boundary delimitation in the Torres Strait area, 18 ILM 291 (1979).

terminating or withdrawing from a treaty if the treaty establishes a boundary, and secondly, because the 1982 Convention itself provides that the norms contained therein are subject to agreements already in force. This would mean that the question of the continental shelf boundary could not be reopened. While there is no concluded EEZ boundary agreement between the two States, to negotiate one now, in places where there is an agreed continental shelf boundary would be to ignore Articles 83.4 and 311.5 of the 1982 Convention. Indonesia wishes to rely on other Articles in the Convention for the basis of its case but, in the absence of reservations, which in any case are here prohibited, it cannot employ only those which are to its advantage and disregard those which are not.

Unequal treaty

There are formidable problems involved in trying to prove that the 1972 agreement was an unequal one. It would first be necessary to show that international law recognises unequal treaties as an exception to the rule *pacta sunt servanda* and, therefore, as open to termination or review. Even if this could be demonstrated, and it seems there is no discussion on the subject which suggests it could, it would still have to be proved that the boundary agreement was an unequal one not just because it is now seen to be inequitable, but because of the inequality of the parties at the time of negotiation. These hurdles would seem to be insurmountable. Nevertheless, in filling in the gaps, or deciding where the undetermined parts of the boundary should be, the area as a whole and the equitableness of the boundaries in total needs to be the prime consideration.

Timor Gap

From Australia's point of view the most advantageous boundary in the Timor Gap would be a delimitation along the thalweg of the Timor Trough or, more conveniently, a straight line joining points A.16 and A.17 (which would run roughly along the 200m isobath on the southern side of the Trench). This would undoubtedly be the tidiest solution but the arguments supporting it are not strong. They are that:

— Australia has inherent sovereign rights to the full extent of the natural prolongation of its territory and the Timor Trough is the surface expression of the plate boundary dividing two separate continental shelves the most southern and larger of which appertains to Australia; and

— since Australia has not declared an EEZ, the delimitation of the seabed will be according to the rules relating to the continental shelf.

Australia's inherent sovereign rights to its continental shelf

Australia could put forward an argument, based on the doctrine of intertemporal law, that its inherent rights to its continental shelf throughout the extent of its natural prolongation, subsist despite the development and current supremacy of the EEZ doctrine.

The intertemporal law doctrine certainly applies to the acquisition of territory[8]

8. *Island of Palmas Case* (Netherlands, United States), 2 R.Int'l Arb. Awards 831.

and a State's territory includes the continental shelf.[9] As stated by Judge Huber in the island *Island of Palmas* arbitration, the doctrine has two elements:[10]

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."

The first element requires that acts should be judged in the light of the law contemporary with their creation. Australia's sovereign rights over its continental shelf accrued, like those of all other States, *ab initio,* that is, from the inception of the continental shelf doctrine. Undoubtedly Australia's exercise of jurisdiction over the shelf has been justified by international law; the only question would be as to its correct outer limit. Whatever that may have been from time to time it was never less than the 200m isobath.

The second element of the doctrine provides that even though title may have been validly gained at the time of acquisition it may subsequently be lost through not being maintained in accordance with developing international law or through the evolution of customary international law. In relation to ownership of the continental shelf, because sovereign rights to it are inherent, there is no need for the original acquirer to show that it has continuously maintained its authority and manifested it in an unmistakable way. But the second element may also be stated:[11]

> ". . . a right or title, once acquired, must not in a dynamic and constantly changing system of law be regarded as good for all time . . ."

and it is this expression of the doctrine which may prove fatal to Australia's case. Australia's claim that it cannot be denied its inherent rights to the continental shelf can be defeated by Indonesia which need only show:[12]

> ". . . that the old rule has been changed to a new one being claimed by a state party to a dispute, and that this new law has been generally accepted as part of contemporary international law."

As has been shown earlier the old rules about the extent and delimitation of a State's continental shelf have been considerably altered by the evolution of the EEZ which has been generally accepted as part of contemporary international law.

Australia does not claim an EEZ

Australia's view is that since it does not claim an EEZ, seabed delimitation should be governed by the rules which relate to the continental shelf. It seems, however, that this view is not and cannot be supported because, except in the area beyond the 200nm limit, the continental shelf concept has ceased to apply. And, even if this were not true and the continental shelf norms were the

9. *Aegean Sea Continental Shelf Case* [1978] ICJ Rep. 1, 36.
10. *Island of Palmas Case* (Netherlands, United States), 2 R.Int'l Arb. Awards 831, 845.
11. T.O. Elias, "The Doctrine of Intertemporal Law" 74 AJIL (1980) 285, 288.
12. Id. 293.

appropriate ones to use, it is likely that those norms would currently prescribe a median line for delimitation.

Indonesia, on the other hand, would be justified in arguing for, at the very least, a median line boundary joined at right angles to points A.16 and A.17. Given the qualification to the equidistance principle, however, that the median line be modified to take account of relevant circumstances, Indonesia may have a good case for receiving a larger share. The question that arises here is whether the existing boundary line agreed in 1972 amounts to a relevant circumstance justifying departure from the median line? If it does then perhaps a line should be drawn parallel to but south of the median line.[13]

The arguments in support of a delimitation along the median line between points A.16.1 and A.17.1, joined to points A.16 and A.17 by lines at right angles, are that the norms of customary international law governing delimitation of the continental shelf and EEZ between opposite States should be applied. These are that the boundary should be determined by the application, and to the satisfaction of equitable principles. One of the methods which may be employed to reach an equitable solution is to draw the boundary along the median line modified by relevant circumstances.

In the relatively small area of the Timor gap none of the recognized relevant factors such as coastal configuration, islands, proportionality with overall lengths of coastlines and encroachment of third States, is present — or, at least, not to a significant degree. Also, such a median line boundary would coincide with the provisional fisheries surveillance and enforcement line delineated in the Memorandum of Understanding between Australia and Indonesia which was signed in 1981.[14]

Since it has become evident, however, that reserves of oil are to be found in the area which would accrue to Indonesia with this method of delimitation, Australia would presumably be unwilling to agree to it.

For pragmatic reasons, given the reserves of mineral resources in parts of the area, it seems likely that, even if it entails each State making some concessions, both would prefer to reach agreement on the boundary sooner rather than later. In these circumstances one solution would be a JDZ in the quadrilateral area formed by a straight line joining points A.16 and A.17, a line along the median line opposite the straight line mentioned above, between points A.16.1 and A.17.1, and lines joining A.16 to A.16.1 and A.17 to A.17.1. If that were thought by Indonesia still to be too favourable to Australia to be acceptable then the southern line of the JDZ, parallel to the A.16 — A.17 line, could be drawn as far to the south of the median line as the gap is to the north.

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13. Such an argument is unlikely to be successful. The ICJ in the *Libya/Malta* case said: "Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although, there is assuredly no closed list of considerations, it is evident that only those *that are pertinent to the institution of the continental shelf as it has developed within the law,* and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature . . ." [1985] ICJ Rep. 13, 40, para. 48 (emphasis added).
14. Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Australia Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement.

Area to the West of Point A.25

As has already been explained, the western end of the boundary agreed in 1972, point A.25, lies on the southern slope of the Timor Trough, well to the north of the median line between the two coastlines. Point A.25 also happens to lie roughly on the median line between Ashmore Island and the Indonesian island of Roti which lies south west of Timor and marks Indonesia's southernmost baseline point.

If Ashmore Island (and Cartier Island which lies to the southeast of Ashmore) were used as a baseline point or given full effect in delineating the median line between Indonesia and Australia, A.25 would be more or less correctly positioned on that line. But neither island is inhabited,[15] they are about 150nm from the nearest point on the Australian mainland, and, as islands on the "wrong" side of the median line it is doubtful whether they should have any effect on the drawing of that line. In this case, had no boundary lines already existed, there would seem to be two possibilities: either, that the median line be drawn between the Australian territorial sea baselines[16] and the Indonesian archipelagic baselines[17] and that Ashmore and Cartier Islands, which would lie on the north of that line, each be given a 12nm territorial sea and no other EEZ or continental shelf entitlement, or, since the islands are fairly close to the median line, that the median line should be drawn to a point either side of the islands with a loop going round the north of Ashmore Island at a distance of 12nm from the island's baselines.[18] Either of these possibilities would be consistent with the treatment of the Channel Islands in the *Anglo-French* Arbitration. It may be argued that Ashmore and Cartier Islands deserve more generous treatment than the Channel Islands as the latter were so close to the French coast that there was no obvious alternative solution. Ashmore and Cartier Islands lie well away from the Timor coast and like all islands generate their own EEZ and continental shelf.[19] On the other hand, the Channel Islands are heavily populated with thriving independent economies and as such might be expected to have more influence on the delimitation line than Ashmore and Cartier Islands — not less.

Because of the position of point A.25, however, neither of these possibilities exists. In the circumstances, the most equitable result would probably be achieved by drawing a line, as directly as possible[20], from point A.25 to the point on the true median line (between each State's proclaimed baselines) which is 12nm south west of Cartier Island.

Further west of Ashmore and Cartier Islands, the geography bears some similarity to the South-western Approaches from the Atlantic Ocean into the

15. Indonesian fishermen and members of the Royal Australian Navy make frequent visits to the islands.
16. As determined by a Proclamation made pursuant to s.7 of the Seas and Submerged Lands Act 1973.
17. Act No. 4 [Straight Baselines], Government Gazette No. 22, February 18, 1960.
18. This is the delineation of the Provisional Fisheries Surveillance and Enforcement Line agreed in the Memorandum of Understanding of 1981.
19. Article 1, Geneva Convention on the Continental Shelf and Article 121.2 of the United Nations Convention on the Law of the Sea.
20. No closer than 12nm to the baselines of either island.

English Channel but without the complicating factors of islands[21] or a neighbouring third State.[22] In the *Anglo-French* case the Court concluded that an equitable result could best be achieved by recognizing the fact that in this area although legally the Parties might be "opposite" their coasts had a lateral relationship to the shelf.[23] In spite of the complications in the area, however, and the need to reach an equitable solution, the court did not reject the equidistance method but rather modified it to reflect one factor which it considered relevant.[24] There seems no good reason in the present case for the delimitation not following the equidistance line until the point where this line is 200nm from each coastline. There are areas much further to the south west of this point where Australia's natural prolongation extends, in places, more than 200nm from the coast but these areas are not relevant to the delimitation between Australia and Indonesia.

Christmas Island

Christmas Island lies just under 200nm from the island of Java and Indonesia's archipelagic baselines. Under both the 1958 Geneva Convention and the 1982 Convention it is, as an island, entitled to its own continental shelf and, under the latter, also to an EEZ.[25] Between Christmas Island and Java there is a submarine canyon, the Sunda Trench, which in places reaches a depth of 4,000m.[26]

One possibility for delimiting the boundary between Java and Christmas Island would be to draw a median line between the two which, at either end, would join the line delimiting the 200nm zone of each State.

An alternative would be to follow the precedent set in the Agreement between Iceland and Norway on the maritime delimitation of Jan Mayen.[27] The circumstances of Christmas Island are somewhat different however, as the area in dispute in the Jan Mayen case was outside Iceland's 200nm limit on the Jan Mayen Ridge which was argued by Iceland to be a part of its continental shelf. Given the existence of the Sunda Trench no such argument is available to Indonesia in this case.

If, however, the overall lengths of coastline were taken into account, as in the *Libya-Malta* case, then Indonesia would have a basis for arguing that the delimitation should be closer to Christmas Island than the median line.[28] Whether Indonesia would wish to press this argument would depend on the negotiations in relation to the other two sections of the boundary and the desire of each State to achieve the best possible package of agreements.

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21. The Scilly Isles and the Island of Ushant both had to be taken into account by the Court in the *Anglo-French* case.
22. Ireland.
23. *Anglo-French* case, para. 244.
24. The fact that the Cornish peninsula and Isles of Scilly projected further seawards into the Atlantic than the Brittany peninsula and the island of Ushant.
25. Article 1, Geneva Convention on the Continental Shelf and Article 121.2 of the United Nations Convention on the Law of the Sea.
26. Times Books, *The Times Atlas of the World* (5th ed. 1975).
27. Iceland-Norway: Agreement on the Continental Shelf between Iceland and Jan Mayen (1982) 21 ILM 1222.
28. See the *Malta-Libya* delimitation and the suggestion by the court that had Malta been part of Italy the delimitation line would have been drawn further to the north, ie even closer to Malta than it was, [1985] ICJ Rep. 13, 51 para. 72.

IV — Conclusion

An attempt has been made in this article to identify and analyse the norms of international law applicable to the maritime border delimitation between Australia and Indonesia. It has been shown that the relatively precise norms which governed the question during the 1960s and early 1970s have been superseded. It has not been possible to state with confidence what the current norms are. Indeed, it is tempting to say that there is at present a hiatus. It has, however, been suggested, as a result of recent developments in the relevant area of law, what the norms ought to be.

It has also been acknowledged that future bilateral maritime border agreements will inevitably be based at least partly, if not wholly, on political rather than legal considerations. This reflects, *inter alia* the fact that each area to be delimited is unique. It is mainly that fact which has caused the difficulties faced by courts and multilateral conferences alike in their attempts to formulate applicable norms. The failure of the 1982 Convention in this respect has confirmed the prediction Professor Shearer made in that same year:[29]

> "The interaction of existing customary law, developing customary law, the law of the Convention, and opposability as between this country and that will provide a Pandora's Box of legal problems that will keep the international lawyers agreeably busy for the remainder of this century".

As a result, there would seem to be three possibilities open to Australia. It could either make concessions to Indonesia, or, maintain its present position and go to the ICJ, or, suggest an innovative approach to deal with the complexities of the delimitation as was done in the Torres Strait.

The first approach would mean that Australia would not have sole sovereign rights to the reserves in the Kelp Prospect. But as long as part of the disputed area was confirmed as Australia's or a JDZ was established, the benefits accruing from such an agreement would probably outweigh the putative advantages of maintaining a negotiating position which might never prevail. If this were the preferred course of action, there are obvious advantages to be gained from setting up a conciliation commission as was done by Iceland and Norway to resolve the Jan Mayen dispute. That procedure was "swift, cheap and successful" and had the added bonus of "removing the matter for a time from the political arena".[30]

If Australia were to adopt the second course it would, in all likelihood, fare less well than if it were to make concessions. As explained earlier neither the jurisprudence of the ICJ nor developing customary law is favourable to Australia's case.[31]

The third possibility might be worth pursuing although the complexities are different from those in the Torres Strait and the difficulty is exacerbated by the position of the boundary already agreed.

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29. Shearer "International Legal Aspects of Australia's Maritime Environment" Australia's Maritime Horizons in the 1980s Canberra, Australian Centre for Maritime Studies, 1982, 1, 8.
30. Churchill "Maritime delimitation in the Jan Mayen area" 9 Marine Policy 16, 25, (1985).
31. Also there are huge costs involved in taking such a case to the ICJ, see: the Dissenting Opinion of Judge Gros, [1984] ICJ Rep. 246, 360, para. 2; and McDorman, Saunders and VanderZwaag, *op cit,* 107.