
Prospective Anglo-Scottish Maritime Boundary Revisited

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Abstract

The inauguration of the devolved Scottish Parliament has given greater relevance to the question of whether Scotland should have complete independence from the rest of the United Kingdom. For an international lawyer, this raises the question of what might be the prospective continental shelf boundary between England and Scotland. The present article is not concerned with the political or economic aspects of independence or who gets the bigger share of continental shelf¹ or its natural resources. Rather, it focuses on the legal aspects of a prospective maritime boundary delimitation between England and Scotland, taking into consideration other states' practice in relation to disputed maritime boundaries.

1 Rules and Principles Relating to the Delimitation of a Continental Shelf

Two sets of rules and principles are available in international law. The first is Article 6 of the 1958 Convention on the Continental Shelf, and the second is the customary solution stated by the International Court of Justice in the *North Sea Continental Shelf Cases* in 1969. As for the outcome of the Third United Nations Conference on the Law of the Sea (UNCLOS III, 1973–1982), which culminated in the 1982 United Nations Convention on the Law of the Sea, it only managed to assert the substantial elements of the said two sets of rules and principles.² Article 83(1) of the 1982 Convention stated that:

The delimitation of the continental shelf between States with opposite or adjacent coasts shall

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¹ The continental shelf as understood by international lawyers nowadays consists of the geographical continental shelf — the slight slope of the submerged land up to the first substantial fall-off — and the continental slope and rise. See Article 76 of the 1982 Convention on the Law of the Sea (hereinafter the 1982 Convention). Thus, the whole submerged land under the shallow water of the North Sea is considered a continental shelf. For the history and development of the continental shelf doctrine, see Marjorie M. Whiteman, 'Conference on the Law of Sea: Convention on the Continental Shelf', 52 *AJIL* (1958) 629 at 629–634; Marjorie M. Whiteman, *Digest of International Law*, vol. 4 (1963–1973) 814–842.

² See below relating to the discussion of the equidistance principle during UNCLOS III.

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.

The general reference in this Article to international law in the light of Article 38 of the ICJ's Statute means that it added nothing new, and instead it referred to the already existing rules and principles — the conventional and customary solutions. The discussion here, therefore, will concentrate on these two sets of rules and principles.

2 The Conventional Solution

Great difficulties faced the International Law Commission (ILC) in the search for a proper solution for the delimitation of continental shelf between states. This forced the ILC eventually to choose a fairly elastic solution that could be a comprehensive guide to cases in a wide variety of circumstances.³ This solution, despite the dissatisfaction of numerous states with its vagueness and elasticity,⁴ was approved by the UNCLOS I, in Geneva in 1958, with some minor amendments.⁵ It states that:

Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.⁶

In this sense, the conventional solution introduces a tri-point set of rules and principles. These are:

- 1 a boundary line effected by agreement; or
- 2 a boundary line justified by special circumstances; or

³ See *ILC Report*, 3rd Session (1951) 139–141; *ILC Report*, 5th Session (1953) 28 (Article 7) and 35–38; *ILC Report*, 8th Session (1956) 251, Article 72 and its comments; see also E.D. Brown, *The Legal Regime of Hydrospace* (1971) 8–15; Whiteman, 'Conference', *supra* note 1, at 648–654; Whiteman, *Digest*, *supra* note 1, at 903–917.

⁴ See Colombia's comment in the 1958 UNCLOS I, *Official Records*, vol. VI, 10, see also *ibid.*, at 94; Yugoslavia, *Official Records*, *ibid.*, at 91, para. 11 and A/Conf.13/C.4/L.16 and Add 1*, 19 March 1958; The Netherlands, *Official Records*, *ibid.*, at 91, para. 5, and the relevant footnote of A/Conf.13/C.4/L.16 and Add 1*; see also the UK's fluctuating stand, *Official Records*, *ibid.*, at 92–93, 96 and A/Conf.13/C.4/L.28.

⁵ Article 72 of the *ILC Report* (1956) was approved by the Fourth Committee after a vote which resulted in 36 votes in favour, none against, and 19 abstentions, UNCLOS I, *Official Records* (1958), Fourth Committee, vol. VI, 98; it was also approved in the Plenary Session by 63 votes in favour, none against and two abstentions, *ibid.*, vol. II, 15.

⁶ Article 6(2) of the 1958 Convention on the Continental shelf (hereinafter the 1958 Convention). Article 6 provides two different solutions for lateral boundaries of the continental shelf, namely, opposite and adjacent situations. The median line was envisaged in para. 1 for the former situation, whereas the equidistance principle was envisaged in para. 2 for the latter. However, because there is no material difference between these two principles, the discussion hereinafter will refer to them both as one principle under the title of 'equidistance principle'.

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

Article 6 has three main features, namely, an elastic nature, a general character and a wide-ranging solution.⁷ Two interwoven problems may arise during the application of the conventional solution as enshrined in Article 6. The first is the legal status of the equidistance principle, and the second is the real meaning and scope of the 'special circumstance' clause.

Although the *equidistance principle* seems to be a fair solution to many boundary disputes, the peculiarities of the delimitation of continental shelf between lateral states makes this method unacceptable in numerous cases. Due to the presence of certain circumstances such as an irregular configuration of the coast,⁸ the presence of islands and the effect of the particular application of straight baselines, the application of the equidistance principle may cause extreme disproportionality at the expense of one of the parties; and is thus unable to produce an equitable solution in all cases.

The equidistance method was introduced by the Committee of Experts who suggested it as a solution for the delimitation of the territorial waters as well as the continental shelf.⁹ The Committee further explained that:

In a number of cases [the equidistance principle] may not lead to an equitable solution, which would be then arrived at by negotiation.¹⁰

Accordingly, the ILC and later UNCLOS I did not rely on a strict or rigid application of this principle. Rather, they regarded it as an alternative solution when neither agreement nor special circumstances would exist. The ILC further commented that:

while ... the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances.¹¹

This statement poses a very important question, namely, what, in reality, is the scope of application of the equidistance principle *vis-à-vis* the 'special circumstances' clause. Due to the ambiguity of their sphere of application, and because of the interdependent relationship between the two concepts, it can be seen that a precise identification of the real meaning and scope of the 'special circumstances' clause will automatically result in identifying the role of the equidistance principle as provided in Article 6; and the identification of the role of the equidistance principle will undoubtedly result in determining the real meaning and scope of the 'special circumstances' clause. Consequently, the wider and broader the meaning and scope of the 'special circumstances' clause, the less the emphasis on the equidistance principle will be, and *vice versa*.

⁷ *ILC Report*, 5th Session (1953) 36, para. 82; see also *ILC Report*, 8th Session (1956) 251, comment 1 on Article 72.

⁸ The geographical configuration of most of the coasts is irregular especially if regularity means a straight or even semi-straight coast line; see also Wolfgang Friedmann, 'The North Sea Continental Shelf Cases — A Critique', 64 *AJIL* (1970) 229, at 237–239.

⁹ Whiteman, *Digest*, *supra* note 1, at 907–908, as quoted from A.CN.4/61/Add.1, Annex, 6–7.

¹⁰ *Ibid* (emphasis added).

¹¹ *ILC Report*, 5th Session (1953) 36, para. 82.

The equidistance principle has not been very popular in the international community as a means of achieving an equitable result for the delimitation question of the continental shelf. The ICJ found that neither state practice nor the *opinio juris* of states were sufficient for the equidistance principle to become a customary rule or to give it any priority in respect of the other methods.¹²

As far as *unilateral state practice* is concerned, some 91 proclamations have been collected from the available records.¹³ Out of these 91 proclamations, only six proclamations stated their explicit preference for the equidistance principle;¹⁴ 13 proclamations inclined to accept the equidistance principle as it was provided in the 1958 Convention;¹⁵ 22 proclamations stated other methods of delimitation such as in accordance with agreement/equitable principles formula,¹⁶ or on the basis of reciprocity,¹⁷ or in accordance with international law,¹⁸ or other solutions.¹⁹ The remaining 50 proclamations mentioned nothing about the method of delimitation they preferred.²⁰

As for *multilateral state practice*, 81 bilateral and multilateral agreements have been

¹² *North Sea Continental Shelf Cases*, ICJ Reports (1969) 3, at paras 72–80.

¹³ *Infra* note 22.

¹⁴ Italy, 1967, 'pending agreement, the median line'; Kuwait, in the information that was given by the Permanent Commission to the UN in 1972, the median line was suggested; Malta, 1966; Norway, 1963; Oman, 1972; and India, 1976, 'pending agreement and unless otherwise agreed on, the boundary must not extend beyond the median line'.

¹⁵ Cayman Island, 1969; Costa Rica, 1967; Denmark, 1963; Finland, 1965; France, 1968, with three reservations; German Democratic Republic, 1964, and in 1968 according to Article 6 with special effect to the median line; Madagascar, 1970; Malaysia, 1968; South Africa, 1963; Sweden, 1966; Turkey, in the information given by its mission to the UN in 1968 stated that 'it is normally stipulated that those undertaking the drilling should conform to the provisions of the Convention on the Continental Shelf'; and USSR, 1968.

¹⁶ Eleven proclamations, namely, US, 1945; Abu Dhabi, 1949; Ajman, 1949; Bahrain, 1949, just principles; Dubai, 1949; Qatar, 1949; Ras Al Khaimah, 1949; Saudi Arabia, 1949; Sharjah, 1949; Umm Al Qaiwain, 1949; and Kuwait, 1949.

¹⁷ Three proclamations, namely, Mexico, 1945; Costa Rica, 1949; and Honduras, 1957.

¹⁸ Two proclamations, namely, Iraq, in its information to the UN in 1968, 'full adherence to the rules and principles of international law'; and the People's Democratic Republic of Yemen, 1970.

¹⁹ Six proclamations, namely, Australia, 1953, and Papua New Guinea, 1953, unilateral action in accordance with the principles of international law; Federal Republic of Germany, 1964, by agreement; Nicaragua, 1950, by treaty and law; Iran, 1955, in conformity with the rules of equity; and Chile, Ecuador and Peru, in their Declaration of 1952, the parallel of latitude.

²⁰ Argentina, 1946, 1966 and 1973; Bahamas, 1948 and 1970; Brazil, 1950; British Honduras, 1949; British Solomon Islands, 1970; Canada, 1970; Chile, 1947; Cook Islands, 1977; Cyprus, 1972; Dominican Republic, 1952, 1967 and 1977; Ecuador, 1950; El Salvador, 1950; Fiji, 1970; Ghana, 1963 and 1973; Guatemala, 1949; Honduras, 1950; Iceland, 1948; India, 1955 and 1959; Iraq, 1957; Ireland, 1968; Israel, 1952; Jamaica, 1948; Korea (Republic of), 1952; Mauritania, 1962; New Zealand, 1964; Nigeria, 1969; Panama, 1946 and 1967; Papua New Guinea, 1977; Peru, 1947; Philippines, 1949; Portugal, 1956; Sarawak, 1954; Seychelles, 1962; Spain, 1966; Sri Lanka (Ceylon), 1959; Sri Lanka, 1976; Sudan, 1970; Tonga, 1970; Trinidad and Tobago, 1945; UK, 1964; Venezuela, 1956; and Yugoslavia, 1965.

collected from the available records.²¹ These agreements related either to continental shelf boundaries, or to maritime boundaries including that of the continental shelf.²² In addition, the said agreements were concluded by 60 states representing various parts of the world.²³

Examining these agreements, the following conclusions can be drawn. Only four states depended solely on the application of a simple equidistant boundary line without any modification in all of their agreements. Taking into account that only one of these four states was a party to the 1958 Convention,²⁴ the remaining three states were very small in number in comparison with the vast majority of the remaining states.²⁵ The remaining 56 states followed various choices of methods of delimitation which can be classified as follows:

- 1 three methods, namely, a simple equidistance line, a modified equidistance line, and a negotiated boundary line including the parallel of latitude method;²⁶
- 2 two of the following methods, either (a) a simple equidistance line, and a modified equidistance line,²⁷ or (b) a simple equidistance line, and a negotiated boundary line including the parallel of latitude method,²⁸ or (c) a modified equidistance line, and a negotiated boundary line including the parallel of latitude method;²⁹

²¹ These materials have been collected from 1–27 ILM (1962–1988); *Limits in the Seas*, Series A (Office of the Geographer, Department of State, US), Nos 1–100; Churchill, Nordquist, Lay and Simmonds, *New Directions in the Law of the Sea*, vols I, IV, V and VIII (1973–1980); UN Legislative Series, ST/LEG/SER.B/Nos 15, 16 and 18 (1970–1976); UNTS (1971–1980); and UKTS (1984).

²² Forty-four agreements related to the continental shelf boundaries, and 36 related to maritime boundaries in general, see *infra* note 24.

²³ A brief account of these agreements is provided by the writer in his PhD thesis, ‘Delimitation of Continental Shelf Boundaries with Particular Reference to “Relevant Circumstances” and “Special Circumstances”’ (Glasgow University, May 1990), chapter II, section 1, and chapter III, as well as Annexes II and III.

²⁴ New Zealand, one agreement (maritime boundary) with US in 1980. The omission of this state from the total number is to defuse the argument that, by applying the equidistant method, this state was under the impression that it was applying a rule of law. This, of course, is regardless of the fact that the relevant agreement is concerned with maritime boundary and not with continental shelf boundary.

²⁵ These are: Cook Islands, one agreement (maritime boundary) with US in 1980; Saint Lucia, one agreement (maritime boundary) with France in 1981; and Turkey, one agreement (continental shelf boundary) with the USSR in 1978. The number of states is three out of 24 if we consider only those states which applied a simple equidistant line; or it is three out of 60 if we take account of the total number of the collected agreements.

²⁶ See Annex 1 to this article.

²⁷ See Annex 2 to this article.

²⁸ See Annex 3 to this article.

²⁹ See Annex 4 to this article.

- 3 one of the following methods, either (a) a modified equidistance line,³⁰ or (b) a negotiated boundary line including the parallel of latitude method.³¹

Accordingly, state practice could hardly substantiate the existence of a preference for or even the acceptability of, let alone an obligatory character of, the equidistance principle. Rather, state practice, including that of states party to the 1958 Convention,³² proves that the customary status of the equidistance principle is that it is *one method among many* and it enjoys *neither an obligatory character nor priority vis-à-vis the other methods existing in international law*.

As there was no alternative but to include the delimitation question of the continental shelf among the hard-core issues,³³ the hot controversy that erupted during the UNCLOS III negotiations was concerned with the weight that should be given to the equidistance principle.³⁴ In its late sessions, the Conference was divided into two groups: the equity group which was in favour of considering the equidistance principle as a mere method in international law, and the equidistance group which insisted on the obligatory character of the equidistance principle.³⁵ Because the Conference could reach no consolidated formula to satisfy both groups at the same time, it eventually settled for a compromised formula which avoided any involvement

³⁰ Eighteen states: Abu Dhabi and Qatar, 1969; Argentina and Uruguay, 1973; Australia with each of Indonesia, three agreements, 1971, 1972, 1973 and Papua New Guinea, 1978; Bahrain with each of Iran, 1971 and Saudi Arabia, 1958; Canada and Denmark, 1973; Cuba with each of Haiti, 1977 and the US, 1977 and Mexico, 1976; Greece and Italy, 1977; Iran with each of Bahrain, 1971 and Oman, 1974 and Saudi Arabia, 1968 and Qatar, 1969 and United Arab Emirates, 1974; Japan and Korea (Republic of), two agreements, 1974; Kenya and Tanzania, 1976; Korea (Republic of) and Japan, two agreements, 1974; Oman and Iran, 1974; Papua New Guinea and Australia, 1978; Qatar with each of Abu Dhabi, 1969 and Iran, 1969; Tanzania and Kenya, 1976; Tunisia and Italy, 1971; United Arab Emirates and Iran, 1974; and Yugoslavia and Italy, 1968.

³¹ Ten states: Brazil with each of France, 1981 and Uruguay, 1972; Chile and Peru, 1952 and 1954; Ecuador with each of Colombia, 1975 and Peru, 1952 and 1954; Federal Republic of Germany with each of Denmark, 1971 and Netherlands, 1971 and the UK, 1971, and German Democratic Republic, 1974; Gambia and Senegal, 1975; Iceland and Norway, 1981; Ireland and the UK, 1988; Peru with each of Chile, 1952 and 1954, and Ecuador, 1952 and 1954; Senegal and Gambia, 1975; and Sudan and Saudi Arabia, 1974.

³² This conclusion is in favour of a wider view of the interpretation of the meaning and scope of the 'special circumstances' clause in the context of Article 6.

³³ Having found some difficulties, UNCLOS III identified seven issues as being outstanding problems. Negotiating Group 7 was entrusted with the delimitation question of the continental shelf. See A/Conf.62/62, 13 April 1978.

³⁴ For the work of UNCLOS III (1973–1982) concerning the delimitation of the continental shelf, see *supra* note 23, at 43–51 and 83–84; S.P. Jagota, *Maritime Boundary* (1985) 232–240; S.P. Jagota, 'Maritime Boundary', *Hague Recueil* (1981-II) 81, at 165–191; Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)', 73 *AJIL* (1979) 1, at 22–24; Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)', 74 *AJIL* (1980) 1, at 29–32; Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)', 75 *AJIL* (1981) 211, at 231–233; Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)', 76 *AJIL* (1982) 1, at 14–15; and Article 83 of the 1982 Convention.

³⁵ See the references, *supra* note 34.

in the controversial status of the equidistance principle.³⁶ The question arises, then, of what the fate was of the disagreement between the said two groups regarding the interpretation of Article 83 of the 1982 Convention; Article 83 refers to international law in the context of Article 38 of the ICJ Statute. However, international law in no way considers the equidistance method to be more than one method (amongst many) that could be utilized where appropriate by means of satisfying the requirements of equity. So, what is the position of the equidistance group regarding this understanding? Since it is high time that international law should declare, once and for all, the customary rule that equidistance is *one method among many and there is no obligation to use it or give it priority* in delimitation of the continental shelf, so any other interpretation is useless; i.e. the equidistance group is now in deadlock, especially after Article 83 entered into force.³⁷

The foregoing conclusion relating to the customary status of the equidistance method was unanimously confirmed by recent judicial and arbitral cases.³⁸

The 'special circumstances' formula was suggested by Professor Speropoulos, who suggested replacing the phrase 'as a general rule' by the phrase 'unless another boundary line is justified by special circumstances',³⁹ upon the finding that the application of the equidistance method was unable to produce an equitable solution in all cases. Although the proposers of this clause realized the need for providing some clarification to it, they failed to do so. However, few examples could be found in the report of the Committee of Experts and in the ILC deliberations relating to this clause. Due to the complexity of the delimitation question and the lack of the requisite knowledge, the ILC could not add any clarification as to the scope of this clause more than citing some examples of circumstances that might mitigate the harshness of the application of the equidistance method. These examples were the exceptional configuration of the coast and the presence of islands and of navigable channels.⁴⁰

The scope of 'special circumstances' has included circumstances that belong to legal, political, economic and geophysical considerations, such as the geographical configuration and general direction of the coast, the geographical complexity of the area concerned, the presence of islands, the presence of common mineral deposits,

³⁶ Article 83 of the 1982 Convention, cited above.

³⁷ The Convention entered into force in accordance with its Article 308 on 16 November 1994, 12 months after the date of deposit of the sixtieth instrument of ratification or accession. By the end of December 1998, at least 171 states and three entities signed the Convention, and 130 states and one entity ratified it: see www.un.org/Depts/los/losconv1.htm; see also K.R. Simmonds, *New Directions in the Law of the Sea* (looseleaf, 1984–), Release 89.1, July 1989.

³⁸ See *Anglo-French Arbitration*, 18 ILM (1979) 397, at paras 68–72, especially para. 70; *Iceland/Jan Mayen (Norway) Conciliation*, 20 ILM (1981) 797, at para. 824; *Tunisia/Libya Case*, ICJ Reports (1982), at paras 109–110; *Gulf of Maine Case*, ICJ Reports (1984), at para. 115; *Libya/Malta Case*, ICJ Reports (1985), at para. 65; *Guinea/Guinea Bissau: Dispute Concerning Delimitation of Maritime Boundary*, 25 ILM (1986) 251, at para. 102.

³⁹ *Yearbook of the International Law Commission* (1953-I) 130, at para. 62; and for the rest of the debate see *ibid.*, at 131, paras 10, 13, 14, 17 and 18; *ibid.*, at 132, para. 23; and *ibid.*, at 133, para. 34; see also *Yearbook of the International Law Commission* (1953-II) 213.

⁴⁰ See *supra* note 8.

historic rights, navigation and fishing rights, the conduct of the parties, pre-existing agreements, defence and security.⁴¹

3 The Relationship between ‘Special Circumstances’ and the ‘Equidistance Principle’

The Court of Arbitration in the *Anglo-French Arbitration* (1977–1978) made an interesting analysis of the relationship between the equidistance principle and the ‘special circumstances’ clause. As the equidistance principle was considered a general rule, which is subject to modification by the ‘special circumstances’ clause, they did not form, in the view of the Tribunal, two separate rules. Rather, the Tribunal commented that:

Article 6 . . . does not formulate the equidistance principle and ‘special circumstances’ as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance–special circumstances rule.⁴²

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

the combined character of the equidistance–special circumstances rule means that the obligation to apply the equidistance principle is always one qualified by the condition ‘unless another boundary line is justified by special circumstances’.⁴³

It seems natural here to assume that the said status of the equidistance principle gives the equidistance–special circumstances rule a strict and narrow interpretation.⁴⁴ That is to say, the burden of proof is always on those who claim the existence of any special circumstances. However, this viewpoint was entirely rejected by the Tribunal in the *Anglo-French Arbitration*, which based its argument on the combined character of the equidistance–special circumstances rule, saying that:

The fact that the rule is a single rule means that the question whether ‘another boundary is justified by special circumstances’ is an integral part of the rule providing for application of the equidistance principle. As such, although involving matters of fact, that question is always one of law of which, in case of submission to arbitration, the tribunal must itself, *proprio motu*, take cognizance when applying Article 6.⁴⁵

Having examined the role of the equidistance principle in the conventional solution, the ICJ was also in favour of giving this principle a downgraded importance, stating that:

Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement.⁴⁶

Based on the above-cited status of the equidistance principle, especially in state practice and in judicial and arbitral cases, it seems logical to say that this principle is

⁴¹ See *supra* note 23, at chapter V.

⁴² *Anglo-French Arbitration*, *supra* note 38, at para. 68.

⁴³ *Ibid.*, at para. 70.

⁴⁴ See Judge Tanaka, Dissenting Opinion, *North Sea Continental Shelf Cases*, *supra* note 12, at 186.

⁴⁵ *Anglo-French Arbitration*, *supra* note 38, at para. 68.

⁴⁶ *North Sea Continental Shelf Cases*, *supra* note 12, at para. 72.

included in Article 6 as a weak and optional alternative solution and not as a general rule.⁴⁷ The degree of emphasis on the equidistance principle as a conventional obligation is mitigated by the inclusion of the 'special circumstances' clause in the conventional solution. As mentioned above, because it has such a broad meaning and scope, the 'special circumstances' clause is more likely to be regarded as a strong alternative solution to that of the equidistance and not only an exception. Accordingly, the role of the equidistance principle in the conventional solution is attenuated to its lowest effect.

4 The Customary Solution

Having found that Article 6 was not altogether applicable to the *North Sea Continental Shelf Cases*, the ICJ examined those rules and principles relevant to the continental shelf doctrine. It eventually declared that, because 'no one single method of delimitation was likely to prove satisfactory in all circumstances',⁴⁸ the delimitation process should:

be effected by agreement in accordance with equitable principles, and taking account of all relevant circumstances . . .⁴⁹

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

if . . . the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them.⁵⁰

Thus, customary international law has established two kinds of solution. The first is to attempt meaningful negotiations based on equitable principles and taking into account all the relevant circumstances;⁵¹ and the second is to seek a judicial or arbitral award based on equitable principles and the relevant circumstances of the case in question. Two problems may arise during the application of the customary solution; the first relates to the meaning of the 'equitable principles' concept, and the second to the meaning and scope of the 'relevant circumstances' clause.

The 'equitable principles' solution has three functions. The first is to identify those relevant circumstances that belong to each party. In this process, the 'equitable principles' clause controls the selection, classification and judging processes of the relevance of the factors and circumstances that are claimed by either party to have relevance to the case. The second function is to calculate the degree of effect of the approved relevant circumstances. And the third function is to identify the method(s)

⁴⁷ That was why the phrase 'as a general rule' was replaced by the phrase 'unless another boundary line is justified by special circumstances' during the ILC deliberations in the 1950s: see *supra* note 39.

⁴⁸ *North Sea Continental Shelf Cases*, *supra* note 12, at para. 55.

⁴⁹ *Ibid.*, at para. 101(C)(1).

⁵⁰ *Ibid.*, at para. 101(C)(2).

⁵¹ *Ibid.*, at paras 85 and 101.

of delimitation that are appropriate to the case concerned.⁵² 'Equitable principles', therefore, is not a quantitative expression; rather, it is a qualitative clause. That is to say, the emphasis must always be on the adjective 'equitable' more than on 'principles'; for, it is patently obvious that any principle, procedure or consideration can be applied in order to secure an *equitable* result. Equity is one of the foremost aspects of this clause as the following discussion will make clear.

The *concept of equity* is a well-known concept in both municipal and international law.⁵³ However, it has been given a unique meaning in respect of the delimitation of the continental shelf between states. In order to uncover some of the vagueness of the concept of equity, it is useful to cite statements from relevant judicial and arbitral cases.

To begin with, '[e]quity does not necessarily imply equality'.⁵⁴ This restriction of the concept of equity was motivated by the desire to exclude an obligation to give each party a just and equitable share of the continental shelf; for this kind of share 'is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement'.⁵⁵ Secondly, it excludes the application of 'equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles'.⁵⁶ Thirdly, a decision based on equity 'finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is, consequently, no question in this case of any decision *ex aequo et bono*'.⁵⁷ Fourthly, equity has a unique status in every case, and 'therefore, no attempt should be made here to overconceptualize the application of the principles and rules relating to the continental shelf'.⁵⁸

Equity, finally, is a relative justice, the achievement of which passes through the application of an equitable balancing of the relevant circumstances.⁵⁹ This can be deduced from the following statements:

There can never be any question of *completely refashioning nature*.⁶⁰

[It is] not a question of totally refashioning geography . . . but, given a geographical situation of *quasi-equality* as between a number of states, of *abating the effects* of an incidental special feature.⁶¹

⁵² These functions are deduced after a thorough examination of the relevant judicial and arbitral cases. Cf. M.D. Evans, *Relevant Circumstances and Maritime Delimitation* (1989) 87–94; in his framework, Evans identifies functions similar to those cited above. However, it seems that he framed them in an almost mathematical framework of hierarchical order. The functions of the equitable principles cited in this article are meant to be only for the purpose of clarification — an explanatory statement.

⁵³ Ralph A. Newman, *Equity in the World's Legal Systems — A Comparative Study* (1973).

⁵⁴ *North Sea Continental Shelf Cases*, *supra* note 12, at para. 91.

⁵⁵ *Ibid.*, at para. 20.

⁵⁶ *Ibid.*, at para. 85.

⁵⁷ *Ibid.*, at para. 88.

⁵⁸ *Tunisia/Libya Case*, *supra* note 38, at para. 132; see also *North Sea Continental Shelf Cases*, *supra* note 12, at para. 100.

⁵⁹ *North Sea Continental Shelf Cases*, *supra* note 12, at paras 85–93.

⁶⁰ *Ibid.*, at para. 91 (emphasis added).

⁶¹ *Ibid.* (emphasis added).

The function of equity . . . is not to produce absolute equality of treatment, but an appropriate abatement of the inequitable effects of the distorting geographical feature.⁶²

With regard to continental shelf delimitation, equity, therefore, means an objective balancing of all relevant factors and circumstances of a given case in the light of equitable principles in order to achieve an equitable solution leaving to each party all those areas that constitute its natural prolongation without encroaching on the natural prolongation of the other party. If this meaning is compatible with the real implication of equity in this field, the following observations can be made. First of all, as a matter of fact, there has not as yet been an exhaustive list of the relevant factors or circumstances.⁶³ The possibility of including new unforeseen circumstances will leave the door ajar for a subjective identification of some circumstances as relevant to the case concerned. This gap sustains a reasonable possibility of reaching a subjective decision, since the decision is built on a subjective allocation of some circumstances.

Secondly, balancing of the relevant circumstances depends on each case's merits,⁶⁴ which means that weight given to a relevant circumstance in a given case does not mean that the same circumstance will be given the same weight in another case (the clearest example for the case in point is the position of islands as a relevant circumstance).⁶⁵ These differing weights that may be given to the same circumstance in several cases create another possibility of a subjective balancing of relevant circumstances.

Thirdly, the identification of the goal of equity as being to achieve an equitable solution is quite ambiguous. When the ICJ identified the final goal of the delimitation process, it was inspired by the idea that it should provide *more safeguards to secure an objective delimitation* of the lateral boundaries of the continental shelf. However, since the concept of equity controls the means — 'equitable principles' — and the goal — 'equitable solution' — then there is no room for any safeguards to guarantee an objective allocation of the continental shelf between states. That is to say, the lack of sufficient criteria, by the aid of which the objective character of equity can be achieved, is the major problem that faces the customary solution.

The 'relevant circumstances' clause was not sufficiently explained by the ICJ: the ICJ found it appropriate to mention only some examples of these circumstances.⁶⁶ The factors that are to be taken into consideration include:

(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features; (2) . . . the physical and geological structure, and natural resources, of the continental shelf areas involved; (3) the element of a reasonable degree of proportionality.⁶⁷

However, these examples were of very little help in illustrating or setting a precedent to judge other unforeseen circumstances in other cases. That was due to the fact that all the relevant judicial and arbitral cases including the 1969 *North Sea*

⁶² *Anglo-French Arbitration*, *supra* note 38, at para. 251; see also *ibid.*, at para. 249 (emphasis added).

⁶³ See *infra* note 68.

⁶⁴ ICJ Reports (1982), at para. 132.

⁶⁵ See the discussion below relating to islands.

⁶⁶ *North Sea Continental Shelf Cases*, *supra* note 12, at para. 101(D).

⁶⁷ *Ibid.*

Continental Shelf Cases indicated, or rather emphasized, the uniqueness of each individual case of continental shelf and/or maritime boundary delimitation.⁶⁸ And, instead of clarifying the meaning of this clause, they established many more illustrations of new circumstances, leading this clause to become loose and open-ended.⁶⁹

The scope of the ‘relevant circumstances’ clause has managed so far to include a long list of factors which relate to considerations of a geophysical, legal, economic and political nature. This list embraces categories such as the geographical configuration and general direction of the coast, the geographical complexity of the area concerned, the presence of islands, the presence of common mineral deposits, historic rights, sedentary fishing rights, the conduct of the parties, pre-existing agreements, natural prolongation, proportionality, security and defence.⁷⁰

5 The Relationship between the Conventional and Customary Solutions

Article 6, as it presents the ‘conventional solution’, introduces two specific rules: agreement and equidistance–special circumstances rules. These two rules are supposed to be controlled by the relevant principles in international law. The ‘customary solution’, on the other hand, does not introduce, apart from the obligation to resort to agreement, any specific rules. Rather, it establishes some principles according to which the delimitation process is carried out. Equitable principles, equity, equitable solution and natural prolongation represent general principles which guide states in their endeavour to arrive at a reliable solution to delimitation of the continental shelf. From this, one can deduce that the conventional solution is *regulatory*, whereas the customary solution is *explanatory*. Yet, a thorough examination of the customary and conventional solutions inevitably leads to the undoubted conclusion that, though co-existing, they are interrelated; and hence any interpretation of one of them must *sine qua non* rely on the interpretation of the other.

Although it seems that the conventional solution gives more weight to the equidistance principle than the customary solution, the actual weight that is given to the equidistance principle in both solutions is quite similar. The inclusion of the ‘special circumstances’ clause in the conventional solution has mitigated the weight that is given to the equidistance principle to its lowest effect so much so that it has made it stand on equal footing with the other methods as being subject to the

⁶⁸ ICJ Reports (1969), at paras 93–99 and 101; *Anglo-French Arbitration*, *supra* note 38, at paras 74, 183–190, 194, 196, 199, 201–202 and 251; *Iceland/Jan Mayen (Norway) Conciliation*, *supra* note 38, 798 at 825–842; *Tunisia/Libya Case*, *supra* note 38, at paras 82–86, 117–129, 131 and 133; *Gulf of Maine Case*, *supra* note 38, at Section V, especially paras 112, 114, 125, 155–163, 206 and 209–225; *Libya/Malta Case*, *supra* note 38, at paras 61–73; *Guinea/Guinea Bissau Case*, *supra* note 38, at paras 91, 103–104 and 109–111.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

requirements of equity.⁷¹ Obviously, it is the same weight which is given to the equidistance principle in the customary solution.

Since the meaning and scope of the 'special circumstances' clause and the 'relevant circumstances' clause have, so far, enabled both clauses to embrace almost identical categories of considerations, does that mean that the meaning and scope of the two clauses are the same? Professor O'Connell observes that there are two views concerning this problem. The first is that the 'special circumstances' clause possesses:

only a minor corrective role in the use of the equidistance principle because of its apparent subordinate position in the arrangement of the concepts in Article 6, and may play either no role at all, or a greater or a lesser role, in customary law because of the mandatory character which equidistance has in Article 6 but may not have in customary law.⁷²

The other view believes that:

there is no difference in practice between the role played by special circumstances in Article 6 and in customary law because in both it is the obverse of equidistance.⁷³

According to the facts available so far, the latter viewpoint is more credible than the former. That is, the meaning and scope of the 'special circumstances' clause and the 'relevant circumstances' clause are likely to be very similar.⁷⁴ Does that mean that the role of the equidistance principle is the same whether under the conventional solution or the customary solution? So far, in the light of the available data and the above-cited conclusions, the answer is very likely to be that the role of the equidistance principle is quite similar in both solutions. This leads to the conclusion, so far, that both solutions are similar to a great extent. In fact, this finding consolidates the conclusion that the customary solution of the 1969 *North Sea Continental Shelf Cases* has not been an alternative solution to that of Article 6, but an explanatory solution in the light of which the real meaning of the conventional solution can be clarified.⁷⁵

⁷¹ See the discussion above relating to the equidistance principle.

⁷² D.P. O'Connell, *The International Law of the Sea*, vol. II (1982) 705–706.

⁷³ *Ibid.*, at 706.

⁷⁴ Cf. Evans, *supra* note 52, at 78–83. Evans has provided a short discussion relating to the difference between the special circumstances and relevant circumstances clauses; and concludes that the two clauses 'tend to be seen as interchangeable'. Although he attributes an ameliorative function to the special circumstances clause and an indicative function to that of relevant circumstances, Evans comments (*ibid.*, at 83) that the two functions 'are not clearly distinguished as separate aspects by the judicial reasoning. This, it is suggested, is at least in part due to the use of the same term to describe both, and their separation would be an aid to clarity.'

⁷⁵ Yet, this conclusion is very likely to dominate the future development of the delimitation question of the continental shelf (and single maritime boundaries) due to the fact that any judicial organ will find itself obliged to give priority to the equity requirements whether it applies the conventional solution of Article 6, the customary solution, or the conventional solution of the 1982 Convention.

6 The Applicable Rules and Principles

Based on the foregoing conclusions which indicate the fact that both — the conventional and the customary — solutions lead to much the same result:⁷⁶ the applicable rules and principles of the hypothetical Anglo-Scottish continental shelf boundary line are those substantive elements that are deduced from the said solutions. That is, *the delimitation of the continental shelf between states shall be effected by a proper method of delimitation so as to achieve an equitable solution, taking into account the presence of all the circumstances that may produce an irredeemable disproportionately distorting effect,*⁷⁷ to the effect that if the circumstance is disregarded the concerned state will be deprived, wholly or in part, of the exercise of its legal rights.

Applying these rules and principles to the hypothetical Anglo-Scottish continental shelf boundary, it is found that three main circumstances are present. These are: the geographical configuration of the coast, the presence of islands and the presence of mineral deposits.

The *natural prolongation concept* is one of the most entangled principles of the customary solution. Taking into account the development of the delimitation question of the continental shelf, the natural prolongation concept is found to have two interrelated connotations.⁷⁸ The first introduces the natural prolongation concept as a general principle which constitutes the basis of title of the continental shelf doctrine (i.e. it is a basis for both entitlement and delimitation matters).⁷⁹ In this case, the natural prolongation concept is a purely legal concept which exists *ipso facto* and *ab initio* for the benefit of all states.⁸⁰ The second is that natural prolongation constitutes a geologically⁸¹ relevant circumstance in certain cases where it is proven by the existence of a fundamental natural discontinuity of the relevant continental

⁷⁶ Having established that, so far, both — the conventional and customary — solutions lead to the same result, the question of state succession and whether Scotland, as a new political entity, is going to join the 1958 Convention or not, is negligible.

⁷⁷ Taking into account the equidistance principle as a parameter, the author, in his PhD thesis, identifies a concept in the light of which an objective identification of the equity requirements can be achieved efficiently. This concept is the 'irredeemable disproportionately distorting effect' principle. Unlike the *North Sea Continental Shelf Cases*, *supra* note 12, at para 57 (which restricts this concept only to islands), and also unlike the *Anglo-French Arbitration*, *supra* note 38, at paras 99–101 (which restricts this concept only to geographical circumstances), the author has found that the disproportionately distorting effect principle can function as a criterion not only for geographical factors but also for all categories of circumstances whether they are of a geophysical, legal, economic or political nature. For, in the course of examining the individual categories of 'special' and 'relevant' circumstances, it is found that all the stated categories belong, directly or indirectly, to a geophysical objective, and hence would have some sort of disproportionately distorting effect, see *supra* note 23, chapter VI.

⁷⁸ *Ibid.*, at 100–110 and 231–246.

⁷⁹ *North Sea Continental Shelf Cases*, *supra* note 12, at paras 19, 43 and 85(C).

⁸⁰ *Ibid.*, at paras 19 and 43.

⁸¹ See M.D. Blecher, 'Equitable Delimitation of the Continental Shelf', 73 *AJIL* (1979) 60, at 65; Gary R. Feulner, 'Delimitation of Continental Shelf Jurisdiction Between States: The Effect of Physical Irregularities in the Natural Continental Shelf', 17 *Virginia Journal of International Law* (1976) 77, at 83–85 and 105; O'Connell, *supra* note 72, vol. I, at 491 and 495–498, and vol. II, at 726; and Edward Collins and Martin A. Rogoff, 'The International Law of Maritime Boundary Delimitation', 34 *Maine Law*

shelf.⁸² In this sense, the concept of natural prolongation as a relevant circumstance is based on the legal implications as well as on the geological facts.

As far as the North Sea seabed is concerned, it is a single, continuous and uniform continental shelf and does not contain any marked depression or interruption that might constitute a natural prolongation circumstance. This circumstance, therefore, cannot play any role in the delimitation in question.

The *geographical configuration circumstances* appear in various forms. The coastal configuration of the concerned states is one form, and the general direction of the coasts is another. These two forms might mix together with or without the presence of islands forming a geographical complexity of the area concerned.⁸³ The coastal configuration has been the classical form of the geographical configuration circumstance, so to speak. This circumstance was articulated in the 1969 *North Sea Continental Shelf Cases*,⁸⁴ and used in numerous other cases.⁸⁵ The selection of the method of delimitation is also very likely to be affected by the general direction of the coast. If the general direction of the coast constituted a right or semi-right angle, the method of delimitation would be, and very often was, a perpendicular line to that general direction.⁸⁶ Besides, the presence of an unusual change in the general

Review (1982) 1, at 39–41. Cf. Mark B. Feldman, 'The Tunisia/Libya Continental Shelf Case: Geographic Justice or Judicial Compromise', 77 *AJIL* (1983) 219, at 220 and 225–228; and D.W. Bowett, 'The Arbitration Between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches', 49 *BYIL* (1978) 1, at 15–17; see also E.D. Brown, 'It's Scotland's Oil? Hypothetical Boundaries in the North Sea — A Case Study', *Marine Policy* (1978) 3; and Jonathan I. Charney, 'Ocean Boundaries Between Nations: A Theory for Progress', 78 *AJIL* (1984) 582, at 591–592 and 600.

⁸² *Anglo-French Arbitration*, *supra* note 38, at para. 107; see also Blecher, *supra* note 81, at 65; ICJ Reports (1982), at para. 80; see also *ibid.*, at paras 66 and 68; ICJ Reports (1984), at para. 45; ICJ Reports (1985), at paras 34 and 39; see also Weil's comment on this conclusion, Prosper Weil, *The Law of Maritime Delimitation — Reflections* (Maureen MacGlashan trans., 1989) 38–45; Judge Oda, Dissenting Opinion, *Libya/Malta Case*, *supra* note 38, at 128–129, para. 6; *Guinea/Guinea Bissau Case*, *supra* note 38, at para. 116.

⁸³ Such a geographical complexity can be formed by a combination of the coastal configuration and the presence of islands, such as the Guinea/Guinea Bissau boundary line, second sector, *supra* note 38, at para. 111; or a combination of the coastal configuration and the general direction of the coast, e.g. the Gulf of Maine boundary line, second sector, *supra* note 38, at paras 209–213; or a combination of the general direction of the coast and the presence of islands, e.g. Tunisia/Libya boundary line, second sector, *supra* note 38, at paras 122–129; or a combination of the coastal configuration, the general direction of the coast, and the presence of islands e.g., the Gulf of Maine boundary line, second sector, *supra* note 38, at paras 215–222, and the Guinea/Guinea Bissau boundary line, third sector, *supra* note 38, at paras 103–110.

⁸⁴ Although the exceptional coastal configuration circumstance was mentioned during the ILC deliberations as a possible special circumstance, it was not enshrined in the rules relating to the continental shelf delimitation until the 1969 cases: see ICJ Reports (1969), at para. 101(D); see also *supra* note 8.

⁸⁵ *Supra* note 83.

⁸⁶ Numerous instances can be recalled: the *Gulf of Maine Case*, third sector, *supra* note 38, at paras 224–225; and the *Guinea/Guinea Bissau Case*, third sector, *supra* note 38, at paras 109–110. Brazil and Uruguay concluded a boundary line which is nearly perpendicular to the general direction of the coast on 21 July 1972, *Limits in the Seas*, *supra* note 21, No. 73, 4–5, at 5. The choice of the perpendicular line method was due to the geographical configuration of the concerned coasts which forms a semi-straight coast with some negligible indentations.

direction of the coast might result in a change in the method used.⁸⁷ These forms of geographical configuration may be found in two contexts, namely, the micro-geographical context, and the macro-geographical context, depending on the continental shelf areas involved, and on the location of the states concerned.⁸⁸ Despite the priority of the geographical context as a relevant circumstance, with respect to the other relevant circumstances (except the relevant circumstance of the conduct of the parties), it is the function of equity to decide the weight that can be given to any such circumstances in any given case.

As for the Anglo-Scottish geographical configuration, it is not very complicated. Two main features can be identified in the area concerned. The first is the radical change in the direction of the Scottish coastline between the Firth of Forth and the Buchan promontory; and the second is that the general direction of the relevant coast constitutes a semi-right angle *vis-à-vis* the latitudes. In the *Tunisia/Libya Case* of 1982, the radical change in the general direction of the Tunisian coast was given due consideration and justified a change in the method used in the first sector — the perpendicular line to the general direction of the coast — by using the modified equidistance principle in the second sector.⁸⁹ The radical change in the Scottish coastline, therefore, cannot be ignored, and, it is submitted that, some sort of effect must be given to it.

If an imaginary closing line is drawn on the Firth of Forth's outer mouth, the general direction of the combined Anglo-Scottish coastlines seem to constitute a semi-right angle *vis-à-vis* the latitudes. In practice, when the general direction constitutes a right or semi-right angle to the latitude, it is dealt with in two ways. As far as the first is concerned, at least two instances can be recalled. The first instance is the third sector of the boundary line in the 1984 *Gulf of Maine Case*. Due to the general direction of the back of the gulf, which constituted a right angle, the appropriate method of delimitation was a perpendicular line to that angle.⁹⁰ The other instance was the third section of the final boundary line of the 1985 *Guinea/Guinea Bissau Case*. The method used in this sector was also a line perpendicular to the general direction of the west African coast, which was chosen instead of the general direction of the coasts of the concerned states, as it would result in a more equitable solution.⁹¹

In state practice, some agreements followed another method; that is the parallel of latitude method. The first two examples of such a method being used are the Ecuador–Peru agreement of 4 December 1954, and the Chile–Peru agreement of 4

⁸⁷ E.g. *Tunisia/Libya Case*, second sector, *supra* note 38, at paras 122–129.

⁸⁸ For instance, whereas the general direction of the coast in the Gulf of Maine and *Tunisia/Libya* cases was examined in a micro-geographical context, it was used in a macro-geographical context in the *Guinea/Guinea Bissau Case*, *supra* notes 86 and 87.

⁸⁹ *Supra* note 87.

⁹⁰ ICJ Reports (1984), at paras 224–225.

⁹¹ *Guinea/Guinea Bissau Case*, *supra* note 38, at paras 109–110.

October 1954.⁹² Because the general direction of the Chile–Peru–Ecuador coast was almost vertical to the latitudes, the parallel of latitude method was thought to be the most appropriate method for those three states. A third example, which also followed the parallel of latitude method, was signed between Colombia and Ecuador on 23 August 1975. The choice of the parallel of latitude method in this Agreement was inspired by a combination of two circumstances. The boundary line was affected, only partially, by the geographical configuration and the general direction of the coast of the two countries. The Colombian coast was slightly convex, whereas the Ecuadorian coast was slightly concave. In addition, the general direction of the two coasts was semi-vertical to the latitudes, declining slightly towards the north-east. The presence of some Ecuadorian islands (the Galápagos Islands) also played an effective role in the choice of this method; for these Ecuadorian islands managed to push the Ecuador–Colombia boundary line up again, causing it to be a parallel of latitude boundary line.⁹³

Islands, as a geographical circumstance, play a significant role in the delimitation process of the continental shelf. However, despite the orthodoxy that the presence of islands is considered a special/relevant circumstance in most of the cases,⁹⁴ the biggest controversy is very often attributed to two groups of considerations. These are, first, considerations relating to the identification and qualifications of the notion of islands; and, secondly, those relating to the degree of effect that can be given to an island when it is regarded as a relevant circumstance. Article 10(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which was repeated verbatim in Article 121(1) of the 1982 Law of the Sea Convention, states:

An island is a naturally-formed area of land, surrounded by water, which is above water at high tide.⁹⁵

Based on this paragraph, the geophysical objects that can fall within the scope of the definition of islands range from a small drying offshore rock, such as Eddystone Rock, to a huge island such as the British island itself. Accordingly, the identification of islands as a circumstance is not dependent on the island's size, economic, political or

⁹² *Limits in the Seas*, *supra* note 21, No. 86, 2 July 1979; *Limits in the Seas*, *supra* note 21, No. 88, 2 October 1979. It may be necessary to note that the two agreements in question were concluded in the light of the declaration of 18 August 1952, and the supplementary agreement of 8 October 1954, between Chile, Ecuador and Peru.

⁹³ *Limits in the Seas*, *supra* note 21, No. 69, 1 April 1976; see also Churchill, Nordquist, Lay and Simmonds, *supra* note 21, vol. V, 12.

⁹⁴ See generally, Derek W. Bowett, *The Legal Regime of Islands in International Law* (1979) 2–5; ICJ Reports (1969), at para. 57; cf. Clive Ralph Symmons, *The Maritime Zones of Islands in International Law* (1979) 170–172; Donald E. Karl, 'Islands and the Delimitation of the Continental Shelf: A Framework for Analysis', 71 *AJIL* (1977) 642, at 643–645.

⁹⁵ See Bowett, *supra* note 94, at 2–7; see also *ILC Report*, 6th Session (1954), reprinted in 49 *AJIL* (1955) 1, at 31, Article 10 and its comments; the same definition reappeared in the final ILC report, *ILC Report*, 8th Session (1956) 163. This definition of islands was provided in the course of defining islands as having a territorial sea of their own. However, because this is the only definition of 'island' in the law of the sea generally, this definition could be used for all purposes including the delimitation question of the continental shelf.

population status,⁹⁶ or any criteria other than the satisfaction of the conditions stated in Article 10(1) cited above and the requirements of equity. Thus rocks of all sizes, reefs, islets, isles and, of course, islands in the true sense can constitute a special/relevant circumstance. However, having felt the need for more restrictions to the qualifications of islands as a relevant circumstance, the ICJ found itself obliged to say that:

ignoring the presence of islets, rocks, and minor coastal projections, the disproportionately distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.⁹⁷

By thus saying, the ICJ can be said to have taken into account an implicit criterion, the implication of which is twofold. It apparently considered the *size* of a geophysical projection as an indication of its importance. If it is a small islet or a little rock, it is likely not to be regarded as a relevant circumstance.⁹⁸ And, should the *disproportionally distorting effect* of a geophysical projection be *redressable by other means*, it can be disregarded as a relevant circumstance. Nevertheless, what is the idea that underlies the expression ‘disproportionally distorting effect’? Is it not the distance criterion — how far from the shore the object is — especially if we bear in mind that the above-cited ICJ wording has been taken from a paragraph which originally discussed the situation of opposite states? If the answer to the latter question is affirmative, so the twofold meaning of the ICJ’s implicit criterion would be concerned with the size and distance parameters.

In practice, islands have been given four kinds of effect in the delimitation of the continental shelf between states,⁹⁹ namely, *full effect*,¹⁰⁰ *partial effect*,¹⁰¹ *no effect* at

⁹⁶ The economic and population conditions that are stipulated in Article 121(3) are concerned with islands when they generate a continental shelf or EEZ of their own and not to islands as a relevant circumstance. On the contrary, the definition provided in Article 121(1) constitutes a general definition of islands that can be utilized wherever the term ‘island’ is used.

⁹⁷ *North Sea Continental Shelf Cases*, *supra* note 12, at para. 57 (emphasis added).

⁹⁸ Cf. Symmons, *supra* note 94, at 170–172.

⁹⁹ See *supra* note 23, chapter IV, ‘Islands as a Relevant Circumstance’.

¹⁰⁰ Full effect was given when the concerned islands are considered as a full relevant circumstance, e.g. Ushant Island in the *Anglo-French Arbitration*, and the Italian and Spanish islands in the convention between Italy and Spain in 1974; see *Anglo-French Arbitration*, *supra* note 38, at para. 251; and Italy and Spain Agreement of 19 February 1974, in Churchill, Nordquist, Lay and Simmonds, *supra* note 21, vol. V, 261.

¹⁰¹ As far as the partial effect is concerned, it appears in various forms. The most salient form of the partial effect is the half-effect form. This form was used in numerous cases such as the Scilly Isles in the *Anglo-French Arbitration*, *supra* note 38, at para. 251; Kerkennah Island in the *Tunisia/Libya Case*, *supra* note 38, at paras 127–129; and Seal Island in the *Gulf of Maine Case*, *supra* note 38, at paras 215–222. The other form of the partial effect ranges between giving islands some effect more or some effect less than the half effect. A notable example of such a form can be seen in the *Guinea/Guinea Bissau Case*, *supra* note 38, in which Alcatraz Island was given two kinds of partial effect — minimum in the north, and maximum in the west and south — *Guinea/Guinea Bissau Case*, *supra* note 38, at para. 111. Giving islands

all,¹⁰² and *minus* effect.¹⁰³ Some cases have taken into account all the islands present in the area concerned,¹⁰⁴ whereas other cases have disregarded the presence of some,¹⁰⁵ and in some cases all,¹⁰⁶ of the islands and drawn their continental shelf boundary relying on other relevant circumstances.

In the Anglo-Scottish case, the only islands that are present are Holy Island and Farne Islands. These islands constitute minor coastal projections, due to their small size and their being close to the shores.¹⁰⁷ With this in mind, and taking into account the ICJ's statement regarding islands as a relevant circumstance, cited above, these islands can be ignored as their disproportionately distorting effect is minor and could easily be redressed by other means. However, England might insist that these islands be taken into consideration in a fashion similar to the UK's position in the Anglo-Norwegian agreement of 1965, in which the Farne Islands were considered as a basepoint for the calculation of the equidistance boundary line.¹⁰⁸ In this case, due to the minor effect that might be produced by either taking these islands, in particular Farne Islands, into account or not, it is found that they can be considered as a relevant

partial effects appears also in another form, namely, the enclaved and semi-enclaved method of delimitation around islands: an example of the former is the Channel Islands in the *Anglo-French Arbitration*, *supra* note 38, at paras 183–190 and 196–202; and an example of the latter is the agreement between Italy and Tunisia in 1971, Italy/Tunisia agreement of 20 August 1971, Churchill, Nordquist, Lay and Simmonds, *supra* note 21, vol. V, 247.

¹⁰² The best example would be the case of Jerba Island, which was disregarded and given no weight at all in the *Tunisia/Libya Case*, *supra* note 38, at paras 120–121.

¹⁰³ Although it seems illogical to call it a minus effect, it is, in fact, one of the kinds of effects that can be given to islands in certain situations. For instance, in the Torres Strait agreement, the Australian islands were so close to the Papua New Guinea coast that, if the boundary line gave them the minimum partial effect, it would have resulted in an inequitable solution with regard to Papua New Guinea. Instead, the Australian islands were left without any continental shelf and the boundary line was drawn on their southward side leaving the shelf around them to belong to Papua New Guinea. Such an effect can be called a full minus effect since it deprives the concerned islands of any continental shelf by means of a cut-off effect. See Australia–Papua New Guinea Agreement of 18 December 1978, 18 ILM (1979) 291. The other example can be found in the agreement between Saudi Arabia and Bahrain in 1958 according to which a different minus effect was given to each of the Lubainah islands. Because the sovereignty problem over the said islands was solved by giving each party that island which was closer to the other's territories, the two parties agreed to use these two islands as turning points of the boundary line. Accordingly, a selected point on the tip of each island was chosen for that purpose; i.e. these two islands were deprived of any continental shelf on the side facing the territories of the other country. This kind of effect, therefore, can be called a partial minus effect. See Bahrain–Saudi Arabia Agreement of 22 February 1958, Churchill, Nordquist, Lay and Simmonds, *supra* note 21, vol. V, 207.

¹⁰⁴ E.g. the Channel Islands in the *Anglo-French Arbitration*, and the Italian islands in the Italy/Tunisia Agreement of 1971; see *supra* note 102.

¹⁰⁵ E.g. in the *Tunisia/Libya Case*, the presence of Jerba Island was ignored in the first sector, whereas Kerkennah Island was given half effect in the second sector: *Tunisia/Libya Case*, *supra* note 38, at paras 120–121 and 127–129.

¹⁰⁶ For instance, the Iran and Qatar Agreement of 20 September 1969, concluded a median boundary line which disregarded the presence of all islands in the area: Churchill, Nordquist, Lay and Simmonds, *supra* note 21, vol. V, 226, at 228–229; the analysis is taken from *Limits in the Seas*, *supra* note 21, No. 25.

¹⁰⁷ Cf. 'Lines in the Sea', *Economist*, 16 January 1999.

¹⁰⁸ *Ibid.* See also Norway/United Kingdom Agreement of 10 March 1965, Churchill, Nordquist, Lay and Simmonds, *supra* note 21, vol. I, 120 and 122; and Symmons, *supra* note 94, at 190.

basepoint following the UK practice in the Anglo-Norwegian agreement of 1965, and also following the *Anglo-French Arbitration* decision with respect to the Eddystone Rock.¹⁰⁹

As far as the *common mineral deposits* issue is concerned, the unity of a deposit is the major issue in the delimitation of the continental shelf between states,¹¹⁰ in the sense that such a unity is preserved for the benefit of all the concerned parties and not for the benefit of one of them to the detriment of the others. The presence of mineral deposits has been considered a relevant circumstance in some cases,¹¹¹ whereas other cases have solved the problem by establishing a joint common zone for the benefit of all the parties concerned.¹¹² However, in the majority of cases, the presence of mineral deposits has been regarded as a separate problem:¹¹³ some states left the mineral deposits problem for future settlement.¹¹⁴

Various solutions of the apportionment of common mineral deposits can be found in state practice, such as: an equal division of the deposit; equal rights of exploration and

¹⁰⁹ *Anglo-French Arbitration*, *supra* note 38, at para. 144.

¹¹⁰ *North Sea Continental Shelf Cases*, *supra* note 12, at para. 97.

¹¹¹ In the *Iceland/Jan Mayen (Norway) Conciliation*, *supra* note 38, 826, at para. C, the potential presence of hydrocarbon deposits in the Jan Mayen Ridge was one of the prime factors that had underlain the choice of the location of the boundary line.

¹¹² Examples can be found in: the Japan/Korea agreement of 5 February 1974, which established a common zone for the purpose of the joint development of the southern part of the continental shelf adjacent to both countries; the Bahrain/Saudi Arabia agreement of 22 February 1968, in which the parties designed a common zone in the Saafa Hexagon which would be developed as Saudi Arabia saw fit, but the two governments would share equally the revenue received; the Abu Dhabi/Qatar agreement of 20 March 1969, which established the Al-Bunduq Joint Development Zone, which would be exploited by Abu Dhabi and the revenue received would be shared equally by the two governments; the France/Spain agreement of 29 January 1974, which established a joint zone for the purpose of equal opportunities of exploitation for both parties; the Iceland/Norway (Jan Mayen) agreement of 22 October 1981, which designed a common zone for joint development in which each party was entitled to participate in a share of 25 per cent of the petroleum activities in the part of the zone that belonged to the other party; and, finally, the Sudan/Saudi Arabia agreement of 14 May 1974, which established a common zone in which each party had an equal right of exploration and exploitation.

¹¹³ Professor Brown said: 'The existence of the deposit would scarcely seem to constitute a "special circumstance", however, entitling a coastal state to demand a deviation from the equidistance line.' Brown, *supra* note 3, at 67; and E.D. Brown, 'The Anglo-French Continental Shelf Case', 16 *San Diego Law Review* (1979) 461, at 492. However, relying on the Grisbadarna principle of refraining from modifying a settled state of things, and on the historical right doctrine, Professor Brown's above-stated conclusion was followed by an exception to the effect that mineral deposits could be considered a relevant circumstance, only if 'a coastal state had acquired exclusive rights to such resources independently of, and prior to, the development of the continental shelf doctrine'. *Ibid.* The conclusion reached by Professor Brown was reaffirmed by Professor O'Connell who also relied on the vested rights doctrine to aid his conclusion: O'Connell, *supra* note 72, vol. II, 711. Contrary to this conclusion, Judge Padilla put his view, saying: 'In addition to special situations of a technical nature — . . . indivisible deposits of mineral oil or natural gas, etc — . . . have been regarded as special circumstances.' Judge Padilla, Separate Opinion, *North Sea Continental Shelf Cases*, *supra* note 12, at 93.

¹¹⁴ Some agreements tried to face the problem of common mineral deposits by suggesting the manner which could help them to overcome such an issue in the future. For instance, some agreements suggested effecting a solution by agreement; others suggested an arbitral solution as an alternative when failing agreement; others established a protected zone within which none of the parties was allowed to initiate any exploitation unless by agreement with the other parties; others established a joint commission which

exploitation; equal or proportional shares of the received revenue; a division proportional to the volume of resources on each side of the delimitation line; and rights of exploration and exploitation proportional to the volume of resources on each side of the delimitation line.¹¹⁵

In the North Sea, the presence of oil deposits constitutes a major source of disagreement between England and Scotland. Numerous fields of oil and gas, such as the Fulmar, Clyde, Auk, Innes, Argyll, Duncan, Joanne, Judy, Angus, Fife and Fergus fields, have been discovered in the area where the hypothetical dispute may arise.¹¹⁶ More new discoveries are quite likely to occur. This, therefore, constitutes a significant circumstance that cannot be ignored.

Based on the foregoing discussion, three kinds of method of delimitation can be utilized in the North Sea section of the continental shelf boundary. As has been said above, the geographical configuration of the coastline presented two major contexts: the first is within, and the second is outwith, the Firth of Forth. Therefore, for the purpose of clarifying these two contexts, and following the lead of the *Gulf of Maine Case*, the concerned area is divided into two sectors by using an imaginary closing line of the geographical indentation of the coast taking into account the presence of Holy Islands and Farne Islands and the peak of the unusual change in the Scottish coastal configuration culminating at Buchan Ness. The first sector is located west of the closing line, whereas the second is at its east.

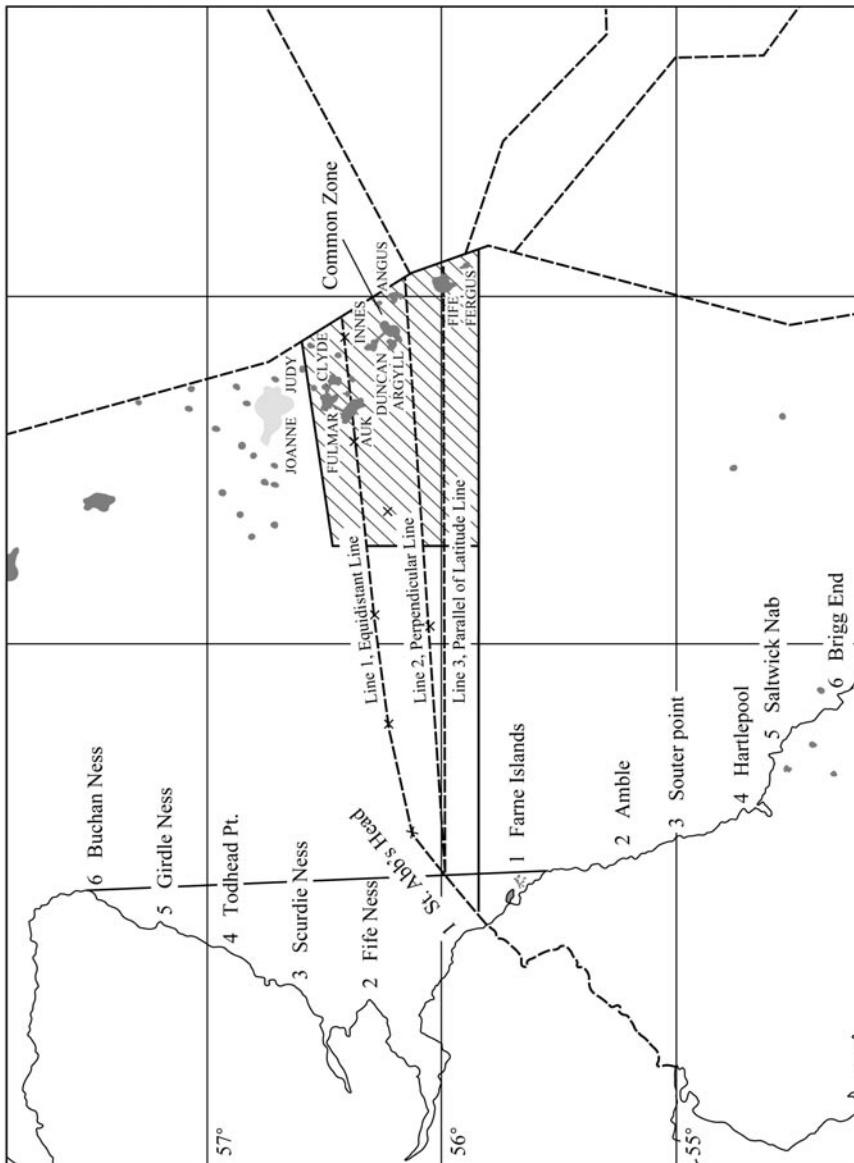
Although the radical change in the direction of the Scottish coastline within the Firth of Forth constituted a relevant circumstance, the equidistance method is proposed as presenting an equitable solution for the first sector of the Anglo-Scottish continental shelf boundary line. Having considered the geographical context of the area, it has been realized that the radical change in the direction of the coastline produces sufficient impact on the equidistant line causing it to have no distorting effect. Such an impact, however, is only effective if the boundary line was within the geographical configuration of the coasts. Besides, as has been said above, full weight should be given to Holy Island and Farne Islands in the drawing of the boundary line. Accordingly, six points on each side of the coast are selected as representing the base points from which a proper construction of the equidistant line can be initialized (see Map 1, line 1).¹¹⁷

would solve any problem relating to common mineral deposits; and, finally, one can find those states which, although they have suggested a solution by agreement, have preserved for themselves an equitable share of the resources, and others who have preserved for themselves all those resources that are located on their portion of the continental shelf: see *supra* note 23, chapter IV, at 251–255.

¹¹⁵ See *supra* notes 112 and 114; cf. William T. Onorato, 'Apportionment of an International Common Petroleum Deposit', 26 *ICLQ* (1977) 324, especially at 332–337.

¹¹⁶ This is based on data taken from *A Report to Parliament by the Secretary of State for Energy (April 1991)*, *Development of the Oil and Gas Resources of the UK (1990–1991)*; and DTI, *The Energy Report, Oil and Gas Resources of the United Kingdom*, vol. 2 (1997); cf. 'It's England's Oil Too', *Economist*, 16 January 1999.

¹¹⁷ Cf. John P. Grant, 'Oil and Gas', in John P. Grant (ed.), *Independence and Devolution: The Legal Implications for Scotland* (1976), chapter 5, especially at 87–93; and also Brown, *supra* note 81.



Map 1

No.	England	Scotland
1	Farne Islands	St Abb's Head
2	Amble	Fife Ness
3	Souter Point	Scurdie Ness
4	Hartlepool	Todhead Point
5	Saltwick Nap	Girdle Ness
6	Brigg End	Buchan Ness

Note: These locations are selected as approximately representing the most prominent points on the coast; if not, the nearest points thereabouts could be taken instead.

The Anglo-Scottish boundary in the second sector, i.e. beyond the imaginary closing line, would be a projection outwith the coastal configuration of the Firth of Forth, in a similar fashion to the Gulf of Maine third sector. As such, the radical change in the direction of the coast will lose its impact on the equidistant line and would in turn cause the equidistant line to have a greater distorting effect. In this case, an alternative solution is required. Having examined the geographical context beyond the said imaginary closing line, the general direction of the Anglo-Scottish coastline is found to be more suitable to moderate the distorting effect of the equidistant line and thus produce an equitable solution to the second section of the continental shelf boundary line. Based on the above discussion of judicial, arbitral and state practice, one of two methods could be used to draw the boundary in this sector. The first is the perpendicular line method drawn on the closing line of the geographical indentation of the coast at the point where the equidistant line meets the said closing line (see Map 1, line 2). The second is the parallel of latitude line method drawn starting from the said point of intersection of the equidistant line and the closing line. This boundary line is likely to concur with latitude 56° or thereabouts (see Map 1, line 3). Although both lines seem to be able to produce an equitable solution, line 2 — the perpendicular line — is very likely to be the selected solution as it reflects an equitable apportionment of the overlapping continental shelf areas of the parties concerned.

The third method of delimitation is that, taking into consideration the presence of oil mineral deposits in the area of overlapping claims, a common zone for the purpose of joint development can be established (see Map 1, Common Zone). As the 'Common Zone' in Map 1 is intended to be a suggestion, both the limits and the apportionment of this common zone can be effected by agreement between the parties taking into account whether they can either design a proportional or equal share of revenue, or a joint enterprise, or an allocation of designated areas to each party.

In conclusion, it seems that line 2 — the perpendicular line — combined with the Common Zone is likely to be the most equitable solution to the second sector of the Anglo-Scottish continental shelf boundary for the following reasons. It takes into account all the relevant circumstances present in the area concerned: it considers the geographical configuration of the coast and, therefore, it reflects the general direction of the relevant coast; it takes into account the presence of mineral deposits which is

the most prominent circumstance in this area; and, finally, it helps to avoid bringing into play the concept of proportionality. The concept of proportionality is concerned with the ratio between the lengths of the coasts of the interested states and the extent of their continental shelf areas.¹¹⁸ It, successfully, plays the role of being an independent relevant circumstance and, at the same time, a test ground of equity.¹¹⁹ When the disproportionately distorting effect of the proportionality circumstance is irredeemable, this circumstance plays the role of being an independent relevant circumstance. Conversely, if its disproportionately distorting effect is redressable, proportionality turns to be employed as a test ground of equity.¹²⁰

The remaining question is what would happen if the Orkney Islands or the Shetland Islands or even both decided to opt out of Scotland and joined the new UK.¹²¹ First of all, it is important to note that the Orkney and Shetland Islands seem to have been given full effect in previous boundary lines between each of Denmark and Norway and the UK because these islands, at the time of negotiating the boundaries, were seen as an extension of the UK mainland. Should these islands decide to stay with Scotland, they will have the same effect, forming an extension to Scotland's mainland. However, where the Orkney and Shetland Islands decided to join England, then they could not be seen as an extension to the mainland but would be considered as detached islands belonging to a mainland state and situated close to the mainland of another state. Therefore, they cannot be given the same full effect.

Nonetheless, without going into too much detail, a few examples can be found in practice when islands are located either on the wrong side of the boundary line or closer to the other country than to their own. The first instance was concerned with the Channel Islands which were given special effect because of two factors. On the one hand, these British islands were situated closer to the French coast than the British coast, such that, if a true median line was employed giving full effect to these islands, it would have created inequities.¹²² On the other hand, the Channel Islands were considered separate islands of the United Kingdom.¹²³ In fact, the Channel Islands were 'not only "on the wrong side" of the mid-Channel median line', but also 'wholly detached geographically from the United Kingdom'.¹²⁴ It was, therefore, based on these factors that the tribunal decided to use two methods of delimitation. The main boundary line was the median line which ignored the presence of the Channel Islands; and a band of 12-mile continental shelf around the northern and western coasts of the

¹¹⁸ *North Sea Continental Shelf Cases*, *supra* note 12, at paras 101(D)(3) and 98.

¹¹⁹ See the *Anglo-French Arbitration*, *supra* note 38, at paras 99–101; the *Tunisia/Libya Case*, *supra* note 38, at paras 130–131; the *Gulf of Maine Case*, *supra* note 38, at paras 219–221; the *Libya/Malta Case*, *supra* note 38, at paras 54–59, 66–70, 73 and 75; and the *Guinea/Guinea Bissau Case*, *supra* note 38, at paras 118–120.

¹²⁰ See the references, *supra* note 119.

¹²¹ Grant, *supra* note 117, at 93; see also Brown, *supra* note 81, at 19–21.

¹²² *Anglo-French Arbitration*, *supra* note 38, at para. 196.

¹²³ Although the Channel Islands enjoyed 'a very large measure of political, legislative, administrative and economic autonomy', they were considered 'separate Islands of the United Kingdom, not separate States': *Anglo-French Arbitration*, *supra* note 38, at paras 183–190, especially paras 184 and 190.

¹²⁴ *Ibid.*, at para. 199.

Channel Islands was drawn leaving the continental shelf areas between this band and the median line to belong to France.¹²⁵ The choice of the 12-mile limit around the Channel Islands was due to the existing 12-mile fishery zone of the Channel Islands, which was 'expressly recognized by the French Republic',¹²⁶ and also due to 'the potentiality of an extension of their territorial sea from three to 12 miles'.¹²⁷ In addition, the invocation of security, defence and navigational considerations by the UK was approved by the tribunal, which accepted these equitable considerations 'as carrying a certain weight'.¹²⁸ Due to, *inter alia*, these considerations, the tribunal rejected the French proposition of giving the Channel Islands a six-mile enclave continental shelf around them.¹²⁹

Italy concluded an agreement with Tunisia on 20 August 1971.¹³⁰ The two parties had agreed that a median line could be employed taking into account the presence of islands, islets and low-tide elevations. Nevertheless, as the full effect of the Italian islands of Lampedusa, Linosa and Partelleria would have produced an inequitable solution, the two countries agreed that these islands should constitute an exception. Subsequently, the four islands were ignored for the purposes of the calculation of the median line; instead, the islands were given a semi-enclaved continental shelf extending up to 13 nautical miles (12 nautical miles in the case of Lampedusa Island) around the Tunisian side of these islands up to the median line. This exception was caused by two considerations, namely, the location of the said islands close to the Tunisian coast, and the geographical configuration of the Tunisian coast, which, from a macro-geographical viewpoint (the situation of Italy, Malta, Libya and Tunisia), would have disadvantaged Tunisia had a true median line been used.

Australia and Papua New Guinea concluded an agreement on 18 December 1978, concerning their maritime boundaries in the Torres Strait and the Coral Sea.¹³¹ The seabed boundary, which coincides with the fishing boundary at its outer edges, is a negotiated line giving various effects to the respective islands. The interesting thing about these various effects was that the central part of the boundary had completely ignored the presence of some Australian islands which were very close to the Papua New Guinea coast. That is to say, the Australian islands situated north of the agreed boundary were given a, so to speak, *minus* effect, thus depriving these islands of any continental shelf whatsoever. The choice of the location of the boundary line was due to the geographical complexity of the area in question, namely, the presence of scattered islands that belong to one party very close to the coast of the other party, and the geographical situation of the area, being a strait.

In the *Libya/Malta Case*,¹³² Malta was an independent island state but not a

¹²⁵ *Ibid.*, at paras 201–202.

¹²⁶ *Ibid.*, at para. 187.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, at paras 188 and 198–199.

¹²⁹ *Ibid.*, at para. 198.

¹³⁰ *Supra* note 101.

¹³¹ *Supra* note 103.

¹³² *Libya/Malta Case*, *supra* note 38.

detached island that belonged to a mainland state. This was in addition to the fact that there were fewer circumstances in the area to justify a different boundary line. The ICJ had to rely on the proportionality factor to shift the initial median line, thus giving Libya more maritime area. If the Orkney and Shetland Islands decided to become an independent state that belonged to neither England nor Scotland, then the *Libya/Malta Case* would be a good case for comparison whereby a tribunal would probably employ an initial equidistant line and then calculate the proportionality factor to shift the equidistant line to the north. However, if the Orkney and Shetland Islands opted to join England, then they would become two sets of islands belonging to a mainland state and situated close to the mainland of another state. As such, the Orkney and Shetland Islands would produce a cut-off effect, and any extra maritime area given to these islands would encroach on the coastal projection of the maritime area of Scotland. The cut-off effect and the non-encroachment principle have been taken into account in several cases including the 1969 *North Sea Continental Shelf Cases*,¹³³ the 1984 *Gulf of Maine Case*¹³⁴ and the *St Pierre et Miquelon Case*.¹³⁵

The case of Jan Mayen is perhaps more akin to the Orkney and Shetland Islands in that they are detached islands that belonged to mainland states. However, the problem is that the Orkney and Shetland Islands are not similar to Jan Mayen if one takes into account the geographical context in which they exist. In both the *Iceland/Jan Mayen Conciliation* of 1981¹³⁶ and the *Greenland–Jan Mayen Case* of 1993,¹³⁷ Jan Mayen was far enough from the coasts of Iceland and Greenland that the Conciliation Commission and the ICJ were able to give a wide maritime zone to both Iceland (200 nautical miles) and Denmark (up to 200 nautical miles). In addition to this huge zone of continental shelf and/or EEZ, the Conciliation Commission also gave the parties in the former case a common zone for joint development for the mineral deposits which were situated near Jan Mayen. The Orkney and Shetland Islands are so close to the Scottish coast that a comparison between the Anglo-Scottish case and the two cases of Jan Mayen is not possible.

Although it was severely criticized,¹³⁸ the *St Pierre et Miquelon Case*¹³⁹ is very much akin to the Orkney and Shetland Islands case in that the geographical context of the islands involved are similar. However, the question of mineral deposits was not a major factor in the *St Pierre et Miquelon Case* to an extent that the Arbitration Tribunal¹⁴⁰ opted to disregard this circumstance. The situation in the Anglo-Scottish

¹³³ *North Sea Continental Shelf Cases*, *supra* note 12, at para. 101(C)(1) and (2).

¹³⁴ *Gulf of Maine Case*, *supra* note 38, at para. 157.

¹³⁵ *Court of Arbitration for the Delimitation of Maritime Areas Between Canada and France: Decision in Case Concerning Delimitation of Maritime Areas (St Pierre et Miquelon Case)*, 31 ILM (1992) 1145, at paras 67 and 70.

¹³⁶ *Iceland/Jan Mayen (Norway) Conciliation*, *supra* note 38.

¹³⁷ *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Reports (1993) 36.

¹³⁸ E.D. Brown, *The International Law of the Sea*, vol. 1 (1994) 197–198.

¹³⁹ *St Pierre et Miquelon Case*, *supra* note 135.

¹⁴⁰ *Ibid.*, at paras 89–91.

boundary is that the area contains quite a considerable number of oil and gas fields such that there would undoubtedly be overlapping claims to these deposits.

As it disagreed with the claims of both parties, it is clear that the Tribunal in the *St Pierre et Miquelon Case* decided to use the enclave method (of variable widths up to 24 nautical miles) with only one exception. This exception was that St Pierre and Miquelon were given a narrow strip of continental shelf starting from the ends of the enclaved lines and stretching towards the south. According to the Tribunal, the reason for this extension was that:

In the second sector, towards the south and the southeast the geographical situation is completely different. The French islands have a coastal opening towards the south which is unobstructed by any opposite or laterally aligned Canadian coast. Having such a coastal opening, France is fully entitled to a frontal seaward projection towards the south until it reaches the outer limit of 200 nautical miles, as far as any other segment of the adjacent southern coast of Newfoundland. There is no foundation for claiming that Saint Pierre and Miquelon frontal projection in this area should end at the 12 mile limit of the territorial sea. On the other hand, such a seaward projection must not be allowed to encroach upon or cut off a parallel frontal projection of the adjacent segment of the Newfoundland southern coast.¹⁴¹

The special status of St Pierre and Miquelon and the very results of this case were predicted earlier by the *Anglo-French Arbitration* Tribunal who stated:

although it clearly presents some analogies with the present case [the *Anglo-French Arbitration*], [it] also differs from it in important respects. . . Secondly, there being nothing to the east of St Pierre et Miquelon except the open waters of the Atlantic Ocean, there is more scope to redress inequities than in the narrow waters of the English Channel.¹⁴²

Nonetheless, if one applies the result of this case to the Orkney and Shetland Islands, then two possible solutions may emerge. First, the enclave method seems to be the most equitable solution available for the Orkney and Shetland Islands. This enclaved zone, however, does not have to be restricted to 12 nautical miles. Rather, it can be left to the parties or the tribunal to decide the various widths of this zone taking into account other elements such as historic rights and fishing rights. It is also important to note that an equitable solution should not deprive the Orkney and Shetland Islands of mineral deposits off their coast merely because they were detached from their mainland state. The establishment of a common zone would serve this purpose. The proposed common zone could enclave the mineral deposits situated in the area north of an imaginary equidistant line between the Orkney–Shetland coast and the Scottish coast using the existing continental shelf boundary as its eastern and north-eastern limit.¹⁴³ Again, the limits and apportionment of this common zone would be identified by agreement between the parties. Such a common zone would serve two purposes: the first is that it would help to avoid depriving the Orkney and Shetland Islands, and

¹⁴¹ *Ibid.*, at 1170.

¹⁴² *Anglo-French Arbitration*, *supra* note 38, at para. 200.

¹⁴³ The choice of an imaginary equidistant line is based on the assumption that it is very likely that England will suggest the equidistant method as the proper method to delimit the boundary between the Orkney and Shetland Islands and Scotland; i.e. by such a claim, England would have already conceded that it does not have any claim below the equidistant line.

hence England, from benefiting from the mineral deposits present in the area; and, secondly, it would provide a safeguard against any claim by Denmark and/or Norway to renegotiate the existing boundary line.¹⁴⁴

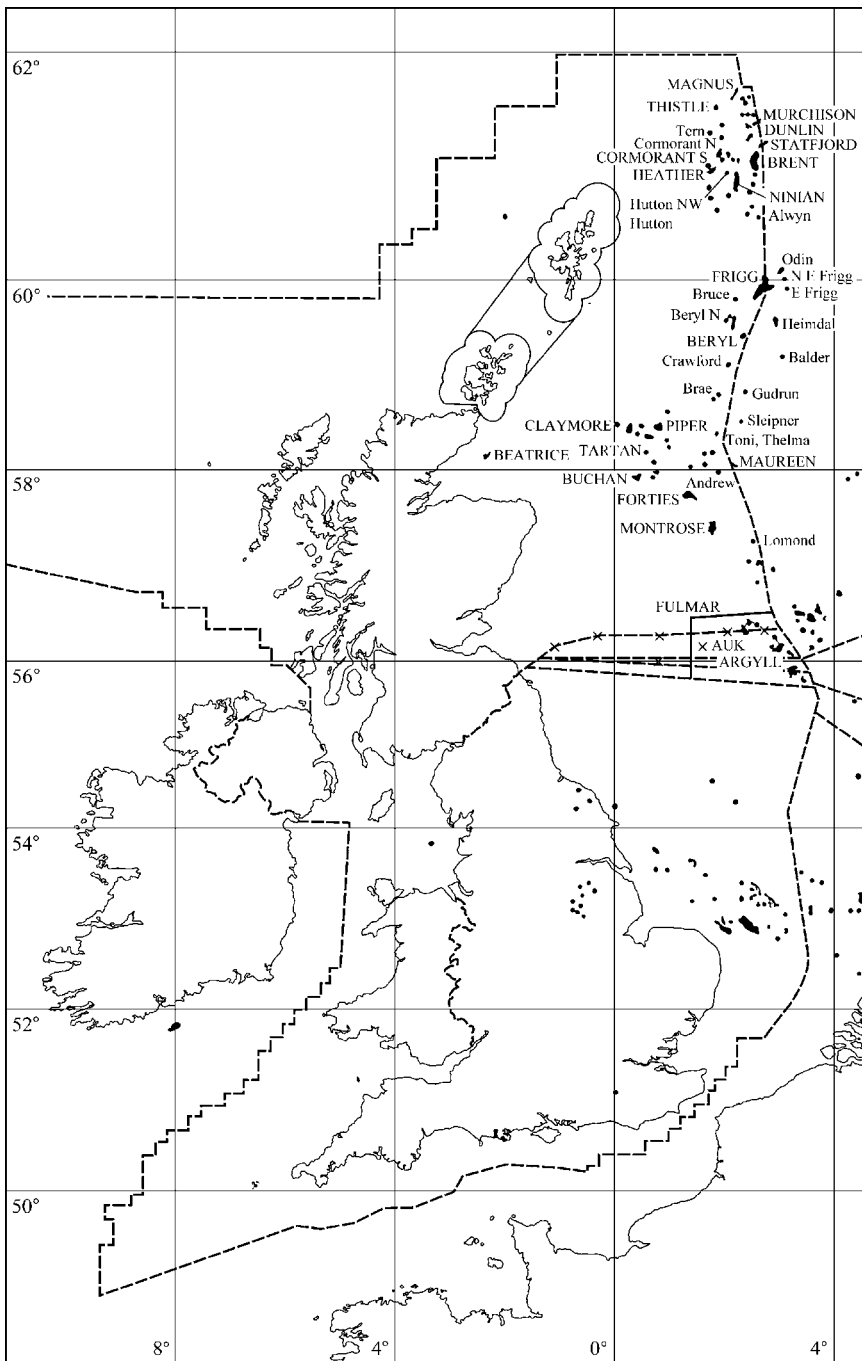
The other possible solution is to follow the lead of the *St Pierre et Miquelon Case* and extend the enclaved zone towards the north (north-east), thus giving these islands a further narrow strip of maritime zone up to the existing continental shelf boundary lines. Two problems are inherent in this solution. The first is that it would be likely to produce a cut-off effect to the Scottish north-eastern coastal projection; and the second is that it would not be of a great benefit to the Orkney and Shetland Islands as it could not give them access to the mineral deposits available in the area. Therefore, based on the circumstances of the presence of mineral deposits, the avoidance of the cut-off effect, and the non-encroachment principle, and to avoid depriving the Orkney and Shetland Islands of benefiting from mineral deposits in the area, the first solution would be very likely to be the most equitable solution where the Orkney and Shetland Islands opt to join England together as shown in Map 2.

In the western shores — in the Irish Sea and the North Atlantic Ocean — the Anglo-Scottish continental shelf boundary is more complicated due to the presence of fringes of islands near the Scottish coast and also due to the presence of Northern Ireland and the dispute over Rockall Island.¹⁴⁵ However, without going into a detailed discussion, it is still possible to sketch out a rough idea concerning the probable equitable solution therein. As far as Rockall Island is concerned, the method of an enclaved belt of continental shelf, similar to that of the Orkney and Shetland Islands, could serve as an equitable solution. This, of course, is based on the assumption that the dispute over Rockall Island is resolved in favour of the UK. In the Irish Sea and the North Atlantic Ocean, it seems that the equidistance method, taking into account the presence of all islands in the area, is undoubtedly the fairest solution of the boundary delimitation between Scotland and Northern Ireland up to the point where it meets the Anglo-Irish continental shelf boundary line.¹⁴⁶

¹⁴⁴ In my opinion, Norway and Denmark will not be able to reopen the case and renegotiate the boundary with Scotland. This is based on the argument that Scotland's devolution is based on, *inter alia*, the right to self-determination and, although there is some controversy on the implication and requirements of this right, one point has been clearly emphasized by the Arbitration Commission in *EC Conference on Yugoslavia*, 92 ILR (1992) 167, that: 'It is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence . . . except where the State concerned agreed otherwise.' Therefore, there would be no legal ground for Norway and Denmark to demand renegotiation. However, as I realized the importance of taking this particular point into account, I thought the establishment of a common zone will provide an extra safeguard against any claim by Norway and/or Denmark.

¹⁴⁵ For the dispute over Rockall Island, see C.R. Symmons, 'Legal Aspects of the Anglo-Irish Dispute over Rockall', 26 *NILQ* (1975) 65, at 81–82; Grant, *supra* note 117, at 91–93; E.D. Brown, 'Rockall and the Limits of National Jurisdiction of the UK', 2 *Marine Policy* (1978) 181 and 275, especially Part 2, at 275, and also R.B. Clark, *The Waters Around the British Isles* (1987) 25–27.

¹⁴⁶ UK–Ireland agreement of 2 November 1988. It is important to note that the equidistance method can be applicable in this case following the zigzag course as it is used in the Anglo-Irish Agreement.



Map 2

Annex 1

Simple equidistant line	Modified equidistant line	Negotiated line
Denmark with each of the Netherlands, 1965, Norway, 1965, and the UK, 1966	Denmark with each of Canada, 1973, and Sweden, 1984	Denmark and the Federal Republic of Germany, 1971
Norway with each of the UK, 1965, Sweden, 1968, and Denmark, 1965	Norway and the USSR, 1957	Norway and Iceland, 1981
US with each of the Cook Islands, 1980, New Zealand, 1980, and Mexico, 1978	US and Cuba, 1977	US and Venezuela, 1978

Note: see the main text accompanying note 26 above.

Annex 2

	Simple equidistant line	Modified equidistant line
Dominican Republic	with Colombia, 1978	with Venezuela, 1979
Finland	with the USSR, 1967	with Sweden, 1972, and the USSR, 1965
Haiti	with Cuba, 1977	with Colombia, 1978
India	with Sri Lanka, 1976, Sri Lanka and Maldives, 1976	with Indonesia, 1974, Sri Lanka, 1974, Indonesia, 1977, Thailand, 1978, Maldives, 1976, Indonesia and Thailand, 1978
Italy	with Spain, 1974	with Greece, 1977, Yugoslavia, 1968, and Tunisia, 1971
Maldives	with India and Sri Lanka, 1976	with India, 1976
Mexico	with the US, 1978	with Cuba, 1976
Panama	with Colombia, 1976	with Costa Rica, 1980
Poland	with the USSR, 1969	with the German Democratic Republic, 1968
Sri Lanka	with India and Maldives, 1976,	with India, 1974 and India, 1976
Sweden	with Norway, 1968	with Finland, 1972, and Denmark, 1984
USSR	with Finland, 1967, and Poland, 1969 and Turkey, 1978	with Norway, 1957, Finland, 1965

Note: see the main text accompanying note 27 above.

Annex 3

	Simple equidistant line	Negotiated line
Colombia	with Dominican Republic, 1978, Panama, 1976, and Haiti, 1978	with Costa Rica, 1977, and Ecuador, 1975
France	with Saint Lucia, 1981, the UK, 1983, and Venezuela, 1980	with Spain, 1974, and Brazil, 1981
Netherlands	with Denmark, 1965, and the UK, 1965	with Federal Republic of Germany, 1971, and Venezuela, 1978
Spain	with Italy, 1974	with France, 1974
UK	with Denmark, 1966, the Netherlands, 1965, Norway, 1965, and France, 1983	with Federal Republic of Germany, 1971, and Ireland, 1988

Note: see the main text accompanying note 28 above.

Annex 4

	Modified equidistant line	Negotiated line
Costa Rica	with Panama, 1980	with Colombia, 1977
German Democratic Republic	with Poland, 1968	with Federal Republic of Germany, 1974
Indonesia	with Australia, 1971, 1972 and 1973, India, 1974 and 1977, Malaysia, 1969, Thailand, 1971 and 1975, India, and Thailand, 1978	with Thailand, Malaysia, 1971, Thailand, 1971, and Malaysia, 1971
Malaysia	with Indonesia, 1969	with Thailand, and Indonesia, 1971 Thailand, 1971
Saudi Arabia	with Iran, 1968, and Bahrain, 1958	with Sudan, 1974
Thailand	with India, 1978, Indonesia, 1971 and 1975, India, and Indonesia, 1978	with Indonesia and Malaysia, 1971, Indonesia, 1971, and Malaysia, 1971

	Modified equidistant line	Negotiated line
Uruguay	with Argentina, 1973	with Brazil, 1972
Venezuela	with Dominican Republic, 1979	with the US, 1978, and France, 1980, and the Netherlands, 1978

Note: see the main text accompanying note 29 above.