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## Lifting the Veils of Equity in Maritime Entitlements: Equidistance with Proportionality around the Islands

### Keywords

Equity, Politics, Boundaries

# LIFTING THE VEILS OF EQUITY IN MARITIME ENTITLEMENTS: EQUIDISTANCE WITH PROPORTIONALITY AROUND THE ISLANDS

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## I. INTRODUCTION

The modern maritime entitlements over vast oceanic spaces over the continental shelf and over the exclusive economic zone have produced sharp disagreements among neighboring nations about their delimitation, the definition of their borders, many of which remain unresolved. Economic interests are only part of the picture. The rest is nationalistic pride of the mine and the thine.

For almost half a century international law has been striving to develop a fair and predictable regime of delimitation through two major multilateral, if not global, treaties<sup>1</sup>. One would have expected the process to be easy. The basis of entitlement has been clear and undisputed from day one: extended territorial sovereignty and appurtenance results from adjacency to a coast. What is left is only the quasi-ministerial task of charting lines on the map by means of some identifiable and workable methods. Yet it is only now, after many decades of international adjudication and arbitration,<sup>2</sup> and after the

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1. Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311 [hereafter Geneva Convention]; United Nations Convention on the Law of the Sea, December 10, 1982, U.N.Doc. A/CONF. 62/122, reprinted in 21 I.L.M. 1261, in force since November 16, 1994 [hereafter UNCLOS]. Separate articles provide for entitlement and for delimitation both in the Geneva Convention (articles 1 and 6), and in and UNCLOS (articles 55-71, 76-82 and 74, 83).

2. See generally *Anglo-French Continental Shelf Arbitration*, 16 I.L.M. 54 (1977) [hereinafter *Anglo-French Arbitration*]; *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18 (Feb. 24) [hereinafter *Tunisia-Libya*]; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (October 12) [hereinafter *Gulf of Maine*]; *Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau*, 24 I.L.M. 267 (1985) [hereinafter *Guinea-Guinea/Bissau*]; *Case Concerning The Continental Shelf (Libyan Arab Jamahiriya v. Malta)* 1985 I.C.J. 13 (June 3) [hereinafter *Libya-Malta*]; *Court of Arbitration for the Delimitation of Maritime Areas Between Canada and France (St. Pierre and Miquelon)*, 31 I.L.M. 1145 (1992) [hereinafter *St. Pierre & Miquelon*]; *Case Concerning Maritime De-*

conclusion of numerous agreements in particular regions, that an intelligible regime of delimitation is starting to gel.

The blame for this delay and confusion lies mainly with the *North Sea Continental Shelf Cases* [hereinafter "*North Sea*"].<sup>3</sup> In the first delimitation adjudication in 1969, the ICJ [hereinafter "ICJ"], uncomfortable with the apparent dominance of equidistance, took a wrong doctrinal turn and set sail upon the uncharted waters of an elusive equity. In this uncertain environment, another wrong doctrinal turn came later, mostly in some writings, in deciding the question of whether islands were to be treated somehow differently than mainlands. These doctrinal turns have haunted the delimitation process ever since. The actual borders in the cases already decided, while on balance reasonable, were drawn despite rather than because of them.

While the literature on these maritime zones, including the equitable quest<sup>4</sup> and the island question,<sup>5</sup> is immense,<sup>6</sup> this article

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limitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14) [hereinafter Jan Mayen] (important cases decided after North Sea Continental Shelf Cases).

3. North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) [hereinafter North Sea].

4. See, M.D. Blecher, *Equitable Delimitation of Continental Shelf*, 73 AM. J. INT'L L. 60 (1979); Vladimir-Djuro Degan, *Equitable Principles in Maritime Delimitations*, in 2 ESSAYS IN HONOR OF ROBERT AGO 107 - 137 (1987); Robert Jennings, *Equity and Equitable Principles*, in 1986 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27; Barbara Kwiatkowska, *The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and Its Impact on the International Law of the Sea*, in FORTY YEARS INTERNATIONAL COURT OF JUSTICE: JURISDICTION, EQUITY AND EQUALITY 119 (A. Bloed & P. van Dijk eds., 1988) [hereinafter Kwiatkowska, *Forty Years*]; T. Rothpfeffer, *Equity in the North Sea Continental Shelf Cases*, 42 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET. 81, 84 - 86 (1972); Paul Bravender-Coyle, *The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries Between States*, 19 OCEAN DEV. & INT'L L. 171 (1988); Barbara Kwiatkowska, *Equitable Maritime Boundary Delimitation, as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Yewdall Jennings and Beyond*, 28 OCEAN DEV. & INT'L L. 91 (1997) [hereinafter Kwiatkowska, *Jennings*]; Ruth Lapidot, *Equity in International Law*, 22 ISR. L. REV. 161 (1987); Elihu Lauterpacht, *Equity, Evasion, Equivocation and Evolution in International Law*, AM. BRANCH INT'L L. ASS'N, PROC. & COMM. REP. 33 (1977 - 78). Two recent books on international equity cover the maritime dimension in rather general terms: MASAHITO MIYOSHI, *CONSIDERATIONS OF EQUITY IN THE SETTLEMENT OF TERRITORIAL AND BOUNDARY DISPUTES* (1993) [hereinafter MIYOSHI]; and CHRISTOPHER R. ROSSI, *EQUITY AND INTERNATIONAL LAW* (1993) [hereinafter ROSSI].

5. We even find major monographs dedicated exclusively to the issues raised by the presence of islands such as HIRAN W. JAYEWARDENE, *THE REGIME OF ISLANDS IN INTERNATIONAL LAW* (1988) [hereinafter JAYEWARDENE]. Most of the major pieces, however, antedate *St. Pierre & Miquelon* and *Jan Mayen*; the key pieces, however, addressed the island question more fully and in the most acute context will inform the present arti-

updates the implications of the two most recent and important cases, *St. Pierre & Miquelon* and *Jan Mayen*. Its most significant novelty, however, lies in lifting the veils of the purported marine equity to show that after *North Sea*, through a negative sorting out process, the courts have been able to reach sensible outcomes by accommodating the equitable qualms about equidistance through the concept of proportionality of zones to coastal lengths, and that, therefore, the doctrinal imbroglia created by *North Sea* should finally be laid to rest. Particular attention will be paid to specific solutions, including the mechanics of how to calculate weights and sizes and how to decide where and how much to cut and readjust. Finally, this article will closely examine how all of these considerations play out in the context of islands, and will focus on some practical issues where further clarification may be needed.

## II. THE GENEALOGY OF EQUITY IN MARITIME DELIMITATIONS: PARTING THE NORTH SEA

### *A. The Concerns About the Equidistance-Special Circumstances Formula and the Turn Toward Equity*

In *North Sea*, a divided ICJ boldly played down the role of the

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cle.

Major earlier works include CLIVE R. SYMMONS, *THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW* 1979 [hereinafter SYMMONS], and DEREK W. BOWETT, *THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW* (1979) [hereinafter BOWETT]. See also HARITINI DIPLA, *LE REGIME JURIDIQUE DES ILES DANS LE DROIT INTERNATIONAL DE LA MER* (1984), and HUESEYIN PAZARCI, *LA DELIMITATION DU PLATEAU CONTINENTAL ET LES ILES* (1982) [hereinafter PAZARCI]. For related chapters in treatises, see M.D. EVANS, *RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION* (1989), [hereinafter EVANS], at 133-151; R.D. Hodgson, *Islands: Normal and Special Circumstances*, in *LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS* (J.K. Gamble & G. Pontecorvo, eds. 1974) [hereinafter Hodgson]; and D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA*, chaps. 16 & 18 [hereinafter O'CONNELL]. For a comprehensive recent review of state practice, see Derek W. Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, in I.M.B. 130 - 151 [hereinafter Bowett IMB].

In the periodical literature, special mention should be made to Donald E. Karl, *Islands and the Delimitation of the Continental Shelf: A Framework for Analysis*, 71 AM. J. INT'L L. 642 - 673 [hereinafter Karl], slightly updated in Donald E. Karl, *The Delimitation of the Aegean Continental Shelf: Equitable Principles and the Problem of Islands*, in FOR. POL'Y INSTIT., *THE AEGEAN ISSUES: PROBLEMS AND PROSPECTS* (Ankara) [hereinafter Karl, TPI].

6 See for example, *INTERNATIONAL MARITIME BOUNDARIES* 2-262 (Jonathan I. Charney & Lewis M. Alexander eds., 1993) [hereinafter IMB], for a recent composite picture of the issues, factors, and argumentation in the division of maritime spaces, and for references to the bibliography generally. See Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227-56 (1994) [hereinafter Charney, *Progress*], for an update of this work.

manageable rule of equidistance as the natural law of the continental shelf,<sup>7</sup> a rule which had been incorporated in Article 6 of the Geneva Convention, modified by the exception of special circumstances.<sup>8</sup> To be sure, the ICJ recognized its virtues as a convenient method capable of being employed in almost all circumstances, and stressed that no other method has the same combination of practical convenience and certainty of application.<sup>9</sup> However, its utility had to be evaluated each time, at least in cases of adjacent coasts, under the applicable equitable principles, in view of all relevant circumstances, in order to reach reasonable results.

It is not an exaggeration to compare the birth of this marine equity in *North Sea* to Athena springing from the head of Zeus without much gestation. Any conceivable precedent was thin and opaque. Article 6 of the Geneva Convention, with equidistance as its centerpiece, resulted from a lengthy and laborious process by the International Law Commission, and met with world-wide approval, or at least acquiescence.<sup>10</sup> There had not even been a thought of putting into the general rule a criterion such as equitable principles because it could not produce a line on a map. Indeed, the ICJ itself recognized in *North Sea* that in the pre-Convention proposals a workable methodology had been viewed as an essential prerequisite of delimitation.<sup>11</sup> Nevertheless, the majority focused selectively on a few concerns expressed during the deliberations, and on the possibility of reservations,<sup>12</sup> interpreted the

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7. *North Sea*, 1969 I.C.J. 3, paras. 37-46.

8. Examples of such circumstances were the exceptional configuration of the coast, as well as the presence of small islands or navigable channels. It is apparent that these examples originated in the traditional law of the territorial sea, where it had been recognized that the median line could be diverted to preserve the unity of a navigable channel (thalweg), to ignore uninhabited rocks or islets, or to respect straight baselines or adjustments in the general direction of the coast. See II Y.B. INT'L L. COMM'N 216, 300 (1953). Such circumstances would operate less forcefully under the regime of the continental shelf, which does not impose full sovereignty rights and where national security and navigational considerations are not the main issue.

9. *North Sea*, 1969 I.C.J. 3, para. 22.

10. For a summary of this process, see Evans, *supra* note 6, at 8-15, and ROBERT D. HODGSON & ROBERT SMITH, BOUNDARIES OF THE ECONOMIC ZONE IN THE LAW OF THE SEA: CONFERENCE OUTCOMES AND PROBLEMS OF IMPLEMENTATION 183-85 (1977). See also Etienne Grisel, *The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases*, 64 AM. J. INT'L L. 562, 570-573.

According to Lauterpacht, "It appears that the basis of the Court's approach [that such delimitations must be established by reference to equitable principles] is a single sentence in a report of a committee of experts [cartographers] nominated by the International Law Commission in 1953 to provide. . . technical assistance." Lauterpacht, *supra* note 4, at 35.

11. *North Sea*, 1969 I.C.J. 3, para. 53.

12. *North Sea*, 1969 I.C.J. 3, paras. 48-55, 62-69. Cf. I 1953 Y.B. INT'L L. COMM'N 100, 123-126; Jan Mayen, 1993 I.C.J. 38, paras. 22-26; (separate opinion of Judge Sha-

special circumstances exception as originating in equity,<sup>13</sup> and jumped to the conclusion that some undefined equitable principles have always underlain the regime of the continental shelf, seeking inspiration directly from them. The main support for this was supposed to be the Truman Proclamation of 1945 [hereinafter "Declaration"],<sup>14</sup> where the United States [hereinafter "U.S."] had extended its continental shelf to 200 miles, and had declared that the boundaries with the neighboring states would be determined on the basis of equitable principles. However, this blanket unilateral reference to unspecified principles in the Declaration had been little more than a gesture of reassurance to the international community that this novel major appropriation of the open seas will respect the legitimate rights of other states on the basis of equality.<sup>15</sup>

A good number of the judges in the ICJ expressed their dismay over this adventure into a process with no discernible practical choices in sight.<sup>16</sup> Many commentators have also criticized this process.<sup>17</sup>

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habuddeen).

13. North Sea, 1969 I.C.J. 3, para. 55.

14. *Id.* paras. 47, 86. See Proc. No. 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea-bed of the Continental Shelf, Sept. 28, 1945, 10 Fed. Reg. 12303, 3 C.F.R. 1943-48, Comp., p. 67. See also *id.* Ammoun, J., separate opinion, para. 39 for some additional examples. On the evolution of the policy of the United States, see WHITEMAN, 4 DIG. INT'L L. 752 (1946).

15. Incidentally, the international significance of the Truman Proclamation is quite limited, since its main purpose was internal, that is to draw a line between federal and state jurisdiction in this field. See WOLFGANG FRIEDMAN ET AL., INTERNATIONAL LAW: CASES AND MATERIAL 558 (1969); see also Elizabeth M. Borgese, *Boom, Doom and Gloom Over the Oceans*, 11 S. DIEGO L. REV. 543 (1974).

16. Judge Tanaka deplored the use of nebulous criteria such as equity or equitableness, which just beg the question. The rule of law and not anarchy must prevail. North Sea, 1969 I.C.J. 3, at 172, 185, 195-96. He, as most of the dissenters, favored equidistance, which is "practical, appropriate, objective and clear," reflecting proximity, propinquity and contiguity, indeed inherent in the very concept of the continental shelf and teleologically deducible from it, leading to just and equitable apportionment." *Id.* at 180-182, 186. He was not persuaded that coastal irregularities produce legally-recognizable distortions. *Id.* at 186-89. Judge Koretzky was concerned about the vagueness, subjectiveness and arbitrariness of the term, going beyond the restricted connotation given to it in the common law countries. The Court should not be addressing questions of a political nature. *Id.* at 165-70. Equidistance is the direct and inevitable consequence of the premises of the continental shelf right. *Id.* at 158-161. Judge Sorensen expressed concern that equity breeds uncertainty in "a field where legal certainty is in the interest not only of the international community in general, but also -on balance- of the states directly concerned." *Id.* at 257. For inequity we need a separate standard of evaluation. *Id.* at 255. Cf. Ammoun, J., separate opinion, at 32 (stating that "the Judgment arrives at the obvious truth that it is necessary to be just, and does not give much indication to the parties, each of whom considers that its own position is equitable.")

However lacking in authentication, was this recourse to equity in *North Sea* at least wise like Athena and helpful in resolving disputes fairly? The ICJ cited three basic ideas for the delimitation of the continental shelf: (1) negotiate in good faith to reach an agreement; (2) do not encroach on natural prolongation; and (3) apply equitable principles, taking all circumstances into account and employing appropriate methods, including equidistance,<sup>18</sup> in order to arrive at a reasonable result.<sup>19</sup> The duty to negotiate does not provide much guidance on content and outcome and the ICJ's attachment to natural prolongation proved to be futile as will be discussed later. Will the third idea of equitable principles, relevant circumstances and reasonable results work?

### *B. The Difficulties with the Equitable Doctrine of North Sea*

#### 1. A Good Beginning : Staying with Equity-Within-the-Law

*North Sea* started out correctly by providing the proper framework of the applicable law. The ICJ was indeed committed to the idea that the most fundamental of all rules of law relating to the continental shelf was that the entitlement of each state was an extension of its territorial sovereignty over land, existing inherently *ab initio* and *ipso facto* by virtue of its coastline.<sup>20</sup> A state without a coast has no continental shelf.<sup>21</sup> Thus, the ICJ disclaimed any intention of using delimitation to produce just and equitable shares by a wholesale refashioning of nature or to remedy natural inequalities.<sup>22</sup> Marine equity did not implicate either abstract justice<sup>23</sup> or results *ex aequo et bono*.<sup>24</sup> In other words, the ICJ unequivocally limited itself to equity within the law, disclaiming any recourse to equity as fountainhead of the law, or as the source of just results directly rather than through positive law. Equity within the law denotes a method of effectuating the law necessitated by the priority of first principles over rules, and by the impossibility of

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17. See ROSALYN HIGGINS, PROBLEMS AND PROCESS 219-228 (1994) [hereinafter HIGGINS]; EVANS, *supra* note 5, at 241; Jennings, *supra* note 4, at 27, 31-35; Michel Virally, *Panorama de Droit International Contemporain*, in 5 COLLECTED COURSES OF THE HAGUE ACADEMY 157-160; Wolfgang Friedman, *The North Sea Continental Shelf Cases: A Critique*, 64 AM. J. INT'L L. 229, at 236.

18. *North Sea*, 1969 I.C.J. 3, para. 85.

19. *Id.* para. 90.

20. *Id.* para. 19.

21. *Id.* para. 91.

22. *Id.* paras. 18-19, 39, 91.

23. *Id.* para. 85. See also para. 32 (Ammoun, J., separate opinion).

24. *Id.* para. 88. Cf. para. 84.



anticipating a total solution for every conceivable situation because of the complexity of facts and the generality of rules.

*North Sea* was on solid ground by distancing itself from any form of equity without the law. No international tribunal has ever asserted general authority to use equity on its own to make law, or to contradict the positive law.<sup>25</sup> Many commentators have eloquently exposed the perversions of instant, instinctive judicial justice, no matter how well-intentioned,<sup>26</sup> and they need no belaboring here. The practice of visceral jurisprudence is particularly objectionable in international adjudication, where states zealously protect their sovereignty. No central government is entrusted with a general police power and armed with an executive branch. The tribunals have no general jurisdiction to remedy the ills of society, but are under a strict obligation not to make policy, but only to apply the existing law within the narrow terms of the submission of the dispute before them. In this environment, equity cannot be a roguish thing measured by the chancellor's foot.<sup>27</sup>

The most authoritative international text on treaty interpretation, the Vienna Convention on the Law of Treaties [hereinafter the "Vienna

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25. The ICJ even avoids referring to any equitable power *praeter legem*, i.e. merely to supplement and fill in the gaps of the law, let alone *contra legem*. It is also clear that whatever international equity may be relevant, it has never taken the coloration of mercy, or a similar notion of benevolence. On the other hand, international law itself admits, under the rubric of autonomy of the parties, broad authority to contending parties to avoid its permissive, substantive norms and select criteria which may be extra-legal, e.g., the relative interests, needs and aspirations of the parties or quasi-legal, and/or to bypass its adjudicatory procedures and submit their dispute to an agreed-upon process. Article 38 (2) of the Statute of the International Court of Justice recognizes that the Court has *ex aequo et bono* power based on prorogation, although it has not as yet exercised it for failure of submissions. The reasons for such action may vary: considerations of expediency, when coupled with trust in the wisdom and impartiality of the decision maker, may support a speedy, informal process; mediation and reconciliation without adversarial argumentation may be deemed more suitable to the preservation of long-term relationships; or even the law on a particular point may not be sufficiently developed and articulated as yet, and the dispute cannot be postponed. In terms of format, an equitable decision of this type may contain only an operative part of just results perceived directly, or it may also include the reasoning that led to it. The necessity for this kind of a process is even greater in international than in domestic law, both because of the greater gaps within it, and because of the failure of most states to accept generally the compulsory jurisdiction of international tribunals, leaving negotiation as the only other alternative when international law appears to favor one of the parties.

26. See, e.g., RONALD DWARKIN, *LAW'S EMPIRE* (1986); D.N. Mac Cormick, *Formal Justice and the Form of Legal Argument*, in *ETUDES DE LOGIQUE JURIDIQUE* 103-118 (Chaim Perelman, ed. 1976); LON N. FULLER, *THE MORALITY OF LAW* 33-38, 96-108, 145-163 (1969); JOHN NORTON POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* 46-47 (SPENCER W. SYMONS, Ed., 5th Ed. 1941); RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION* 60 (1961). Cf. John Dewey, *Logical Method and Law*, 10 *CORNELL L.Q.* 17, 19-24.

27. *THE TABLE TALK OF JOHN SELDON* 61 (Samuel Harvey Reynolds ed., 1892).

Convention"),<sup>28</sup> contains no explicit reference to anything resembling fountainhead or direct-results equity.<sup>29</sup>

## 2. Trouble Starts : How Can Equity-Within-the-Law Help Here?

### (a) The Need for Particularization

The ICJ was aware that the mere invocation of equity was not enough and that a particularization and a practical approach were necessary:

[I]t is a truism to say that the determination must be equitable; . . . it would . . . be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case.<sup>30</sup>

For this task, the long history of equity within-the-law could have helped. Such equity, which goes at least as far back as Aristotle, has influenced legal practice through the Roman praetors and the English chancellors for many centuries, and has found its way into the modern codifications. In operation, it appears within positive law in the form at the one end of overriding general principles and at the other of particularizing interpretations, respectively preceding and following the formal, strict and general rules. Another main function of such equity is procedural, aiming to devise remedies giving fuller effect to the norms of positive law.

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28. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, 8 I.L.M. 679.

29. Of course, it is possible for nations to transfer international-law-making powers to international organizations, as was done to a very limited extent with the United Nations. In recent years, a noble but controversial and inconclusive attempt to construct a new economic order, pursued mostly through the U.N. General Assembly, has invoked some equity in the international distribution of wealth. At this stage, however, such equity has not taken a concrete form, but remains an aspirational and abstract goal of states seeking to create advantageous relations in the future through multilateral agreement. See generally Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, in 162 HAGUE COLLECTED COURSES 245, 245-318 (1980); MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 127; ROSSI, *supra* note 4, at 199-204. See also M.W. Janis, *The Ambiguity of Equity in International Law*, 9 BROOKLYN J. INT'L LAW 16, 16-22 (1983).

A similar invocation at a comparable level of futurism has been included in the U.N. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Nov. 12, 1979, U.N. Doc. A/34/664, 18 I.L.M. 1434 (equitable sharing in the benefits derived from outer space resources giving special consideration to the interests and needs of developing countries). See also *Convention on International Liability for Damage Caused by Space Objects*, 66 AM. J. INT'L L. 702 (1972).

30. North Sea, 1969 I.C.J. 3, para. 92.

Translating these intangible qualities into working tools of the legal process, however, remains a most difficult process. The primary danger is that equity will be transformed from a Panacea to a Pandora: the gods would have given her a box containing not only all the gifts of the world, flexibility and fairness, but also the winds of its destruction through variability and arbitrariness, the two implacable enemies of justice through law. In other words, the invocation of equity within the law is not equivalent to a talismanic incantation to be followed by whatever outcome a court wants to adopt. On the contrary, it must be accompanied by a detailed, reasoned explanation, available for scrutiny, of why a literal application of a rule is excessive, insufficient or inconsistent by reference to its purpose or comes into conflict with an identifiable overriding principle, coupled in each instance with a justification of the proposed deviation or supplementation as the best rectification of the perceived defect. In addition, any creative remedy must be justified as a better technique of effectuating the purpose of the law.

The problems of using equity in international dispute resolution have been noted in the masterful study of C. Wilfred Jenks, who reviewed arbitral practice and cautioned that equity's role was qualified by four limiting factors. First, equity has been applied in claims cases related primarily to loss and damage incurred by private persons who are desirous of financial compensation rather than to the larger issues which may arise in the course of international adjudication. Second, there have been serious ambiguities relating to interpretation and to hierarchy between equity and the other sources of international law. Third, the actual performance of tribunals whose mandates included reference to equity has been less than satisfactory. Fourth, it is not clear whether and how particular decisions did in fact apply equity.<sup>31</sup>

Against this background, the ICJ in *North Sea* was required to proceed cautiously to devise a delimitation formula which was consistent with the continental shelf positive right as the ICJ perceived it. Given the prevalence of equidistance, the ICJ had to explain why the exceptional adjustment through the special circumstances window was insufficient to take care of any equitable concerns. The combination of a presumptive rule with a qualified exception is quite common in legal texts, subject to standard methods of interpretation.<sup>32</sup>

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31. C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 335-336, 411-412 (1964). For the limited use of equity in international arbitration; see also ROSSI, *supra* note 4, at 59-86; Lapidoth, *supra* note 4, at 166-168; Louis F.E. Goldie, *Reconciling Values of Distributive Equity and Management Efficiency in the International Commons*, in *THE SETTLEMENT OF DISPUTES ON THE NEW NATURAL RESOURCES* 335, 338-339 (René-Jean Dupuy ed., 1983); and George Schwarzenberger, *Equity in International Law*, in 1972 Y.B. WORLD AFF. 346-369.

32. See Anglo-French Arbitration, 16 I.L.M. 54, para. 126, pointing out that under

Unfortunately, this was not done in any systematic, principled and articulate way. We must not hesitate to criticize the ICJ for this failure, which has burdened the delimitation process ever since. Let us take up the three equitable considerations, principles, circumstances and results, proposed by the ICJ in *North Sea* separately, starting with equitable principles.

(b) What Equitable Principles?

The idea that there are some fundamental maxims within a legal system which may qualify positive legal rights is well established.<sup>33</sup> More to the point, it would appear that international law itself incorporates such principles either inherently or through the general principles of law of nations. Indeed, we do sometimes find references to

customary international law, the burden of proof of the existence and importance of "special circumstances" lies on their proponent (Briggs, J., separate declaration). The distinction is important and supports the primary status of equidistance.

33. In Roman law, the effects of fraud, duress and mistake in transactions were negated through equitable principles. These principles also included notions such that voluntary transactions should be interpreted and implemented in good faith, and the intention of the parties should prevail even if there are irregularities as to form (doctrine of bonitary ownership and enforcement of the *fideicommissum*); that unjust enrichment must be reversed; that a condition of *rebus sic standibus* should be implied in bargains; and that unconscionably unequal bargains should not be enforced (doctrine of *laesio enormis*). See Peter Stein, *Equitable Principles in Roman Law*, in EQUITY IN THE WORLD'S LEGAL SYSTEMS 75 (1973).

The prevailing terminology in the Roman, and later in the Germanic, legal systems quite often avoided the word "equity" in these contexts, referring instead to "the general principles of law." A typical and central example of such principle is the notion *dolus omnia corrumpit* (fraud corrupts all), which tempers the strict norms of *pacta sunt servanda* (promises must be kept), and *caveat emptor* (let the buyer beware).

By and large, modern continental legislators have enacted most of these innovations into positive law, and even have incorporated and expanded the foundational principles themselves, e.g. through the doctrine of "abuse of right," within the codes, especially the Civil Codes and the Codes of Civil Procedure, so that now not only is their legitimacy beyond question, but also the reconciliation between the spirit and the letter of the law has become mandatory.

It is these general principles that were at the heart of equity practice in England over the centuries, and were later exported to the four corners of the Anglo-American world. Indeed, there are striking parallels between the principles of Roman *aequitas* and those of English equity. To the preceding enumeration, the clearer protection in English Equity of reliance interests through the concept of estoppel and the crystallization of various maxims such as the clean hands doctrine, the reciprocity notion articulated under the tenant of discussion of "he who seeks equity must do equity" and the like. For a fuller discussion of the operation of equitable principles in both systems, see Ralph A. Newman, *Equity in Comparative Law*, 17 INT'L & COMP. L.Q. 807, 807-48 (1968). See generally Ralph A. Newman, *Equity in the Law of the United States*, in EQUITY IN THE WORLD'S LEGAL SYSTEMS 82-109 (1973).

equitable maxims and to doctrines such as estoppel, unjust enrichment, clean hands, laches, non-contradiction, and prevalence of substance over form. Equity's *locus classicus* in international law is the celebrated separate opinion of Judge Manley Hudson in *Diversion of Water from the River Meuse*,<sup>34</sup> where he referred to the hardly controversial principle of equality between the parties, and where he applied the equitable doctrine of clean hands (or 'he who seeks equity must do equity') to reject the Dutch claim.<sup>35</sup> The task of the ICJ in *North Sea* on this issue, therefore, was to name, to defend and to apply any equitable principles or maxims relevant to delimitations. Quite appropriately, the ICJ in fact did consider the possibility of using of estoppel against Germany, but found that there was no factual support for it.<sup>36</sup> The only other equitable principle that qualified and that the ICJ considered was "equality." The ICJ referred to the obvious notion that equal things should be treated equally, but at this level of generality this meant little more than that equal coasts should get equal shares of shelf. This begged the questions of what makes one coast equal to another, and of how this equality is to be implemented in drawing the lines. The ICJ gave a major clue by treating equidistance as appropriate for states with opposite coasts because basically it produces an "equal division of the particular area involved."<sup>37</sup> What then made the results of equidistance unequal in adjacencies? Since equality cannot operate in a vacuum, it was then incumbent on the ICJ to identify those features of the coast (the source of the right) that were relevant to delimitation, and that distinguished opposite from adjacent coasts. This meant that a prior particularizing interpretation of the continental shelf right was needed. In other words, a second-level equitable operation had to be conducted.

That equitable principles by themselves offered no help here should come as no surprise. Their typical function is to limit the excessive or inappropriate exercise of already existing rights, not to define and to delineate them in the first place.<sup>38</sup> The basic irrelevance of free-range

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34. *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70, at 76-78 (June 28).

35. The clean-hands principle surfaced later in decisions such as *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 393-394 (June 27) (Judge Schwebel dissenting). A similar kind of equity surfaces in international arbitration, where the *compromis* sometimes refers the conjunctive or disjunctive to "justice," "equity," "public law," "good faith," or even "international law" or the "law of the nations." For examples, see MIYOSHI, *supra* note 4, at 21-70.

36. *North Sea*, 1969 I.C.J. 3, para. 30. See generally I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 512 (1958).

37. *Id.* paras. 57, 79-80.

38. While "equity" in general is not recognized as a formal source of international law, and has been deliberately excluded from Article 38(1)(c) of the Statute of the International Court of Justice, we do encounter in the cases some references to the general

equitable principles in maritime delimitations has now been confirmed by UNCLOS. The formula that eventually found its way into Articles 74(1) and 83(1) speaks of delimitations:

on the basis of international law, as referred to in Article 38 of the

maxims of equitable nature. For an overview, see Mark W. Janis, *Equity in International Law*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 109 (1992). See also Rothpfeffer, *supra* note 4, at 82-87; OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 49-65 (1991); Michael Akehurst, *Equity and General Principles of Law*, 25 *INT'L & COMP. L.Q.* 801, 808-825 (1976); Mark W. Janis, *The Ambiguity of Equity in International Law*, 9 *BROOK. J. INT'L L.* 7, 8-13 (1983); and Lapidoth, *supra* note 4, *passim*. For an admiring view, see Louis B. Sohn, *The Role of Equity in the Jurisprudence of the International Court of Justice*, in *MELANGES GEORGES PERRIN* 303-312 (B. Dutoit & E. Grisel eds., 1984). Whether such maxims have already become part of customary international law or keep finding their way into international law through the gate of the general principles recognized by the nations of the world is an interesting theoretical question with little practical consequence here. Another such question is whether these maxims trace their roots to the venerable common law (and Roman law) tradition of equity. While this ancestry is historically more than obvious, it is technically correct to say that the search for them is not confined to such tradition. See ROSSI, *supra* note 4, at 121-124.

Sections 102 and 903 of the recent *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987) contain some typically ambiguous language on these theoretical issues. Section 102, Sources of International Law, Comment (m) reads as follows:

*Equity as a general principle.* Reference to principles of equity, in the sense of what is fair and just, is common to major legal systems, and equity has been accepted as a principle of international law in several contexts [giving, however, only the example of maritime delimitations]. That principle is not to be confused with references to "equity" . . . in traditional Anglo-American jurisprudence . . .

*RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987), cmt. m. See § 903, Reporters' Note 9.

Reporters' Note 9 to 102 recognizes, however, that: "The principle of equity is frequently invoked in discourse between states but there are few references to equity as a legal principle in international judicial decisions" [citing only the Fisheries Jurisdiction Case of 1974 and the maritime delimitations]. In addition, in Reporters' Note 9 to 903, it is stated that a decision *ex aequo et bono*:

*should be distinguished from application by the Court of the basic principles of equity that are part of customary international law . . . . In two cases related to maritime boundaries [Tunisia-Libya and Libya-Malta], the Court was authorized by the parties to apply, and did apply, equitable principles.*

This language raises more questions than it answers. Is there one principle of equity or many principles of equity? Beyond the "fair and just" truism, are there any special characteristics of equity as to content and function? Indeed, is there any difference between legal and equitable principles? Is party agreement required for the application of equitable principles? Be that as it may, there is little doubt that certain general maxims, whether labeled "legal" or "equitable", do apply in international adjudication. What is important here is to get an understanding of the nature and scope of these principles or maxims and of their function within international law.

International ICJ of Justice, in order to achieve an equitable solution.

Thus, the high winds<sup>39</sup> of equitable principles, that risked mistaking "obscurity for profundity,"<sup>40</sup> blew away.

(c) What Relevant Circumstances and Reasonable Results?

Perhaps the next considerations, relevant circumstances and reasonable results, can help particularize our interpretation by identifying those particular features of the coasts that matter so that equality has something to measure and to calculate.

Aristotle was the first major philosopher to propose and to explain how this type of particularizing equitable process works. The notion of equity (*epeikeia*) as an enemy or an antagonist of the law is alien to Aristotle. Equity is not better than the law, but only better law.<sup>41</sup> Equity goes beyond the words of the statute only to make redress of its imperfection traceable to its generality,<sup>42</sup> which is inevitable because it is virtually impossible to draft a text which will anticipate all potential sets of facts.<sup>43</sup> Equity only puts the law on the intended track; it does not correct it.<sup>44</sup> The exercise of discretion is perverted where it leads to deliberate departures from the law, and to the substitution of unmediated intuitions. The ideal statute should aim to cover everything, leaving as little discretion as possible to those who apply it.<sup>45</sup> Thus, Aristotle views the judges not as creators of substantive law through equity, but only as procedural effectuators of pre-existing norms.

Aristotle falls back to his famous doctrine of teleological interpretation on the crucial question of how to make the transition from the generality and incompleteness of the law to the appropriate specific rule and to a reasonable result. The rule is but an instrument for the implementation of a purpose. Its spirit may be discovered by

39. St. Pierre & Miquelon, 31 I.L.M. at 1212, para. 36 (Weil, J., dissenting opinion).

40. Jan Mayen, 1993 I.C.J. at 139, (Shahabuddeen, J., separate opinion).

41. Aristotle, *Ethics*, in COMPLETE WORKS OF ARISTOTLE E. 14.1137b. 9' (Jonathan Barnes ed., 1984) [hereinafter Aristotle, *Ethics*].

42. *Id.* at 27.

43. *Id.* at 14-15. Compare Aristotle, *Rhetoric*, in COMPLETE WORKS OF ARISTOTLE A. 13.1374a. 26-33 (Jonathan Barnes ed., 1984) [hereinafter Aristotle, *Rhetoric*] with Aristotle, *Politics*, in COMPLETE WORKS OF ARISTOTLE C. 12.1282b. 1, C. 16.1287a. 23 (Jonathan Barnes ed., 1984) [hereinafter Aristotle, *Politics*] ("[T]he judges should decide about] what the statutes are incapable of covering with precision because it is not easy to cover everything through general rules").

44. Aristotle-*Politics*, *supra* note 43, at 12-13, 22, 26. See also Aristotle-*Rhetoric*, *supra* note 43.

45. See Aristotle, *Rhetoric*, *supra* note 43, at 1353b. 31-33. Cf. Plato, *Laws*, 820.C & 934.B; Plato, *Politics*, 291 & 295.

focusing "not on the statute but on the legislator; not on the words but on the mind of the legislator; not on the act but on the intention; not on the part but on the whole."<sup>46</sup> This search for purpose and for context does not stop at the specific statute (equity of the statute), but extends to the legal system as a whole.

Aristotelian teleology opened the door beyond the letter of the rules to the overall requirement of crafting specific remedies in order to give the purpose of the law its fullest effectuation. This was at the heart of subsequent equitable practice.<sup>47</sup> Aristoteleian *epieikeia* and the Roman and Anglo-American practice point the way to the proper uses of equity within international law. No lesser authority than Hugo Grotius thought of equity in the same spirit.<sup>48</sup>

The Vienna Convention uses a similar process in treaty interpretation. Article 31.1 provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

Article 31.2 defines context very narrowly to cover prior related language and action by the parties, and Article 31.3-4 gives weight to subsequent actions and expressed intentions of the parties as well as to

46. Aristotle-*Ethics*, *supra* note 41, at E. 1374b. 11-15.

47. The Roman classical *aequitas* codified into a *jus honorarium* the extraordinary remedies developed through the *praetorian formulae*. The rigidity and technicality of the *jus civile*, which recognized only one form of *legis actio*, was moderated by the judicial creation of additional remedies. These were either supplementary and more convenient, (specific performance and additional remedies to recover possession), or novel, (enforcing the possessory rights not only of an owner but also of a pledge-creditor), or even creative (recognizing the rights of legatees under an informal will as against the heirs in intestacy). See H.F. Jolowicz, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 98 (1952). See also Sir Henry Maine, ANCIENT LAW 618-22 (1931).

In all these instances, the extraordinary remedy was intended to give effect either to the purpose of the related rule or to reflect certain principles that permeated the entire legal system. In England, as concerns remedies, the rigidity of the writs and forms of action was moderated by the availability of a host of forms of relief, (specific performance, rescission, reformation, restitution, constructive trust, accounting) including orders which restrained the person, such as injunctions and mandates, rather than remedies that were enforceable only against property. See HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 3-45 (13th ed. 1985); and J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 83-100 (2d ed. 1979), for an overview regarding legal remedies.

48. The letter of the law must be adjusted to reflect its purpose when it becomes defective in application because of its generality:

For since all cases can neither be foreseen nor expressed, there is necessity for some liberty for excepting cases which he who has spoken would except if he were present. But this is not to be done rashly; (for that would be for the interpreter to determine the acts of another); but on sufficient indications.

HUGO GROTIUS, DE JURE BELLI ET PACIS, BOOK TWO, ch. xvi, para. 26 (1901).



the relevant rules of international law (broader context). Other than plain meaning and context, this language at most imports good faith and teleology, but does not give free-wheeling authority to resort to some form of generic justice or equity.

In this spirit, before a feature of the coast can be characterized as relevant, and before a result can be qualified as reasonable, they must be connected to the source of the right, the coastal extension of territorial sovereignty. Likewise, the sole ultimate requirement in *UNCLOS* of an equitable solution suggests again that any particular rules should not be applied blindly ignoring or contradicting the basic concept and purpose of the related maritime rights.<sup>49</sup>

In delimitations, it bears repeating that we are dealing with a limited, geography-based, property-type right existing *ab initio* and *ipso facto*. The sole issue is appurtenance to a coast. Any form of distributive justice has no place here, and the invocation of some magical equity is hardly useful. Occasionally, we also see the exercise of some remedial discretion in determining the amount of damages or reasonable compensation for claims of loss or nationalization.<sup>50</sup>

#### (d) Equidistance Versus Natural Prolongation, Natural Resources and Coastal Length

The ICJ in *North Sea* identified three items which could have qualified as potentially relevant objective features of the coast, and therefore could be treated as relevant circumstances : 1) undersea continuation of the land mass (natural prolongation, especially geology and geomorphology); 2) the location of natural resources; and 3) length of the coastal front. In the abstract, all of these features could have been evaluated in equity as against the distance from the coastline criterion, which undergirds equidistance, in terms of the essence and purpose of the continental shelf right. In the concrete case factual matrix of *North Sea*, however, it was quite apparent that only the coastal length factor had to be weighed against equidistance. Indeed, the only concern of the ICJ was that under equidistance, Germany, a state with a sea frontage comparable in length to that of the two adjacent states,<sup>51</sup> would get a much smaller and grossly

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49. The term 'reasonable' result used in *North Sea* is more apt than 'equitable' solution as it suggests more clearly the instrumental function of testing the outcome against the purpose and nature of the right, rather than evaluating it under some external or subjective criteria. *But see* *North Sea*, 1969 I.C.J. 3, at 36 (Ammoun, J., separate opinion) (criticizing this resort to the morally neutral notion of 'reasonable').

50. *See* ROSSI, *supra* note 5, at 81-83; Thomas M. Franck & Dennis M. Sughrue, *The International Role of Equity-as-Fairness*, 81 GEO. L.J. 563, 564-569 (1993); Lapidoth, *supra* note 5, at 167-169.

51. ROSSI, *supra* note 5, at 89, 91, 98.

disproportionate share because of its concavity.<sup>52</sup> This is because simple distance automatically magnifies the slightest irregularity of the coastline in adjacent delimitations.<sup>53</sup> The greater the irregularity and the greater the distance the more unreasonable the results.<sup>54</sup> This exaggeration of the consequences of geography created distortions leading to inequity.<sup>55</sup> Thus, the ICJ was persuaded that the surface-distance-proximity<sup>56</sup> approach did not fully incarnate here the legitimate projections of the coast. It is these distortions that should be corrected by searching for a reasonable result, taking into account the relevant circumstances.<sup>57</sup> The coast-length proportionality correction would have completely taken care of the ICJ's concerns, and there was no need to refer to anything else.<sup>58</sup> But the majority insisted on addressing all three considerations, and most of the *North Sea* opinion is in the nature of dicta, and confusing dicta at that.

First, the ICJ's fixation on an undefined concept of natural prolongation<sup>59</sup> created considerable ambiguity in an area where guidelines were needed. Furthermore, treating natural prolongation as a separate consideration outside the equitable formula, thus suggesting a two-track approach, added another burdensome layer to the process. Second, the reference to the unity of the deposits of the shelf to avoid prejudicial or wasteful exploitation of straddling resources<sup>60</sup> as something to negotiate about,<sup>61</sup> maked good practical sense. However, it was accompanied by an ambiguous statement suggesting that where

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52. See for example, Thomas M. Frank & Dennis M. Sughrue, *The International Role of Equity-as-Fairness*, 81 GEO. L.J. 563, 576-580 (1993); Paul Reuter, *Quelques réflexions sur l'équité en droit international*, 15 REV. BELGE DR. INT'L 165, 174-75 (1980), for the view that proportionality is the only legacy of North Sea.

53. *North Sea*, 1969 I.C.J. 3, para. 87.

54. *Id.* Germany had produced a chart showing that a 100-mile straight coast, which under equidistance normally would have received five times as much continental shelf as a parallel, equally straight coast of 20 miles to 200 miles, would lose close to 1/3 of it (about 6,000 square miles) if the latter coast had just a five mile protruding headland. *North Sea Continental Shelf Cases (Ger. v. Den./Neth.)* 1993 I.C.J. Pleadings 2, 29.

55. *North Sea*, 1969 I.C.J. 3, paras. 89(a), 91.

56. *See id.* paras. 39-43 (discussing the not always clear distinction between 'adjacency' and 'proximity').

57. *Id.* para. 90.

58. Some of the judges held even stronger and clearer views about this being the key corrective factor to equidistance. *See id.* para. 15 (Morelli, J., dissenting) (stating that a 'remarkable disproportion' between length of coastline and continental shelf share is of a 'gravely inequitable nature'); *id.* para. 4 (Bustamante y Rivero, J., separate opinion) (wishing that proportionality be treated not just as a factor but as an obligatory principle, and he would have also counted as part of the shelf the seabed under the territorial sea). *See id.* at 92 (Nervo, J., separate opinion); *see id.* paras. 43, 51, 56 (Ammoun, J., separate opinion).

59. *Id.* para. 85.

60. *Id.* para. 97.

61. *North Sea*, 1969 I.C.J. 3, para. 97; *see also id.* paras. 94, 95, 101(a)-(d).

the areas appertaining to the parties where resources are located overlap, failing agreement, either such areas must be divided equally or they must be jointly explored, especially to preserve the unity of a deposit.<sup>62</sup> Some judges disagreed, denying that the location of seabed resources has anything to do with the lines of demarcation;<sup>63</sup> this is generally supported by state practice.<sup>64</sup> Now the voluntary joint exploration of straddling deposits presents no problems.<sup>65</sup> The alternative language about equal division, however, certainly cannot mean that when there are deposits anywhere in the overlapping areas, they should be divided in such a way as to attribute them in shares equal in size.<sup>66</sup> If that were the case, a tiny island facing a large landmass would get up to half of the deposits and possible shelf, which is a *reductio ad absurdum*. The plausible way to read this contextually is to connect it to the ICJ's commitment to natural prolongation. Where natural prolongations overlap and where resources are located within this overlap, they should be divided equally. Third, by understating the importance and the sufficiency of the coast-length proportionality adjustment, which would have taken care completely of its concerns in the case, the ICJ was led to overstate the shortcomings of equidistance and thus justify letting loose the genie of equity *tout court*. Fourth, the suggestion that there was no limit to the potentially relevant considerations in such a concrete field of law generated doubts on whether we were not turning to abstract and distributive justice after all, despite loud disclaimers, rather than applying the standard interpretive particularization that was really needed.

Backing out of the commitment to a futile search for natural prolongation was relatively easy and painless for the courts, and does not deserve much comment. However, finding the way out of the doctrinal imbroglio generated by the high-sounding but diverting

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62. *Id.* paras. 99, 101 (c)(1-2), *see also id.* para. 101(d)(2) (identifying natural resources as a factor to be taken into account).

63. The location of natural resources is in principle irrelevant unless 'decisive circumstances' require otherwise. They are a 'disturbing factor to the detriment of equity'. *Id.* para. 5 (Bustamante y Rivero, J., separate opinion). Submarine resources are irrelevant. Taking these resources into account in the drawing of boundaries would amount to an apportionment of the shelf, not its delimitation. *Id.* para. 53 (Ammoun, J., separate opinion). *See also id.* at 168 (Koretsky, J., dissenting opinion).

64. Barbara Kwiatkowska, *Economic and Environmental Consideration in Maritime Boundary Delimitations*, in *IMB* 75, 106-07. (1993)[hereinafter Kwiatkowska].

65. *See* Bletcher, *supra* note 5, at 65. For examples of related state practice, *see* Kwiatkowska, *supra* note 64, at 86-96.

66. *See* Ammoun, J., separate opinion, *North Sea*, 169 I.C.J. 3, para. 51 and Koretzky, J., dissenting opinion, *Id.* para. 168. *Cf.* *Gulf of Maine*, 1984 I.C.J. 246, para. 195 and Munkman at 91. Only Jessup, J. argued expressly in favor of the general 'principle' of joint exploitation not only of resources extending across a boundary line but also of those lying in still undelimited areas. *Id.* para. 82 (Jessup, J., separate opinion).

references to equity has proven extraordinarily difficult. Indeed, the best that has been accomplished even to the present day is not express disavowal but simple shrinkage of equitable discussion to the vanishing point. In the next sections, I will first give samples of the misbegotten equitable doctrine of the post-*North Sea* cases. Then I will show how the courts were generally successful over time and place in overcoming it. Finally, through the interpretive particularization of an already defined and strict regime of continental shelf and exclusive zone, I will convert the concepts into lines on the map. Equidistance reemerged as the dominant method in fact, if not in law, and all competing considerations other than the length of the coastal fronts were rejected on short order. State practice by and large followed a similar path.

### III. STRUGGLING WITH EQUITABLE DOCTRINE IN THE DELIMITATION CASES AFTER NORTH SEA

In the seven important cases following the *North Sea* adjudication, culminating with *St. Pierre & Miquelon* and *Jan Mayen*, the courts persisted in the unequivocal rejection of any intention to refashion geography, to share resources or to depart from the coastal front. At the same time, the pattern of ritualistically proclaiming the importance of equitable principles and of relevant circumstances, and of pursuing equitable results within the law, or any combination thereof, continued. The connection, however, between these doctrinal positions and the outcomes was anything but clear. Let us focus now on the equitable doctrine of these cases.

Eight years after *North Sea*, in the *Anglo-French Arbitration*, the ICJ, invoking relevant circumstances and equitable principles,<sup>67</sup> repeated the proposition that "an equitable delimitation . . . cannot have as its object simply the awarding of an 'equitable' share . . . to each Party,"<sup>68</sup> thus at least suggesting that it was applying only equity within the law.<sup>69</sup> The ICJ made certain statements that sounded too close to 'I know inequity when I see it,'<sup>70</sup> without connecting them to the

67. *Anglo-French Arbitration*, 16 I.L.M. 54, para. 97.

68. *Id.* para. 78.

69. *See also* para. 245.

70. "[I]t is manifest from a mere glance at the map that . . . the Channel Islands region presents particular features and problems . . . [Therefore] the equities in the region [must be balanced]." *Id.* paras. 180, 187.

For serious criticism of the equitable doctrine of the Court, *see* Brownlie, *supra* note 29, at 287:

[The equitable principles of the Court] amount to no more than a bundle of highly impressionistic ideas about the 'distorting effect', so-called, of islands. Employed in this way, 'equitable principles' became merely faint indication of the reasoning, or the unreasoned premises, on which judicial discretion can be excused . . . .

eventual outcome. Later in *Tunisia-Libya*, the ICJ had been invited "to take account of equitable principles and the relevant circumstances which characterize the area, as well as the recent trends admitted at the Third Conference of the Law of the Sea."<sup>71</sup> Under this *carte blanche*, the ICJ majority, consisting of seven of the thirteen judges, made some vague statements about the cardinal importance of equitable principles,<sup>72</sup> and about the legal concept of equity being a direct emanation of the idea of justice, binding on the ICJ as a general principle directly applicable, but emptying it of content by disassociating it from the Roman-English tradition.<sup>73</sup> The ICJ continued on this inconclusive track with the statement that, under equity, "a court may choose among several possible interpretations of law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice."<sup>74</sup> But is this not the task of every court applying all law anyway? Furthermore, how can we give meaning to the requirements of justice and the circumstances of the case here except by reference to the preexisting context and the purpose of the law of maritime rights and delimitations? What do we add or gain by calling this process equitable? The ICJ ultimately purported to apply equitable principles seeking equitable results.<sup>75</sup> But how do the principles relate to the results? Well, here is what has been aptly called by a noted publicist a startling conclusion<sup>76</sup>:

The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution.<sup>77</sup>

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See also Blecher, *supra* note 5, at 87-88.

71. *Tunisia-Libya*, 1982 I.C.J. 18, at 21. See, however, the cautious treatment of this broad mandate by the Court. *Id.* para. 24.

72. *Id.* para. 44.

73. *Id.* para. 71.

74. *Id.*

75. *Id.* para. 70.

76. See HIGGINS, *supra* note 17, at 225. Such language suggests "first the judgment, then the evidence." Krateros M. Ioannou, *Some Preliminary Remarks on Equity in the 1982 Convention on the Law of the Sea*, in *THE NEW LAW OF THE SEA* 104 (C. L. Rozakis & C. A. Stephanous, eds. 1983).

77. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahirya), 1982

Does all of this tell us how to find out whether a result is equitable? Can it be equitable if it does not derive from equitable principles? Conversely, is it possible for equitable principles to produce inequitable results? Well, the ICJ concluded later:

[I]t is clear that what is reasonable and equitable must depend on its particular circumstances. There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances which characterize the area.<sup>78</sup>

The relevant considerations must be balanced up.<sup>79</sup> Wait a minute! Are we not back at square one? How do we know through equity what circumstances are relevant and how much they weigh?<sup>80</sup> Dissenting Judges Oda, Gros and Evensen questioned the meaningful applicability of such equity in the case. Judge Gros pointed out that *North Sea* provided not only a goal, "equitable delimitation. . . which intrinsically is merely to pose the problem without providing the solution," but also the rules and methods for reaching it,<sup>81</sup> and criticized the ICJ for contenting itself "with some generalities on the equidistance method without giving the reasons why it would unquestionably 'lead to inequity.'"<sup>82</sup> Indeed, "this lack of a systematic search for the equitable has produced a result the equity of which remains to be proved."<sup>83</sup> Only the "presence in the area . . . of geographical features, the effect of which is disproportionate to their relevance" should be taken into account.<sup>84</sup> Judge Evensen quoted Maitland to the effect that "equity came not to destroy the law but to fulfil it."<sup>85</sup> In other words, you cannot use equity unless there is prior law: "equity principles cannot operate in a void. . . [In *North Sea* and the *Anglo-French Arbitration*] the

I.C.J. 18, para. 70.

78. *Id.* para. 72.

79. *Id.* para. 71.

80. In his separate opinion in *Jan Mayen* Judge Weeramantry tried to give an example of an equitable result: equidistance when there is a vast difference in the length of the coasts. para. 34. *See also* paras. 35-42. This should instead serve as a perfect example of why this kind of terminology and distinction is unhelpful. Both from the coast and length of the coast may be relevant considerations in the delimitation of the continental shelf, deriving from its very definition. To the extent that they produce different results and must be balanced up. What does this have to do with equitable principles not producing equitable results? The confusion inherent in the Weeramantry approach become more apparent in another of his passages, "The stress upon the need for an equitable solution and the rejection of any solution which, though reached in accordance with equity, is inequitable, is thus one which has philosophical support." *Id.* para. 109.

81. *Tunisia-Libya*, 1982 I.C.J. 18, para. 10. (Gros, J., dissenting opinion).

82. *Id.* para. 11.

83. *Id.*

84. *Id.* para. 13.

85. *Id.* para. 12 (Evensen, J., dissenting opinion).

equidistance principle was applied as a juridical starting point for the application of equity."<sup>86</sup> Judge Oda characterized the equitable references as amounting to a truism, to the "principle of non-principle," leading to a line not supported by any considerations.<sup>87</sup>

*Gulf of Maine* comes next, involving the single boundary of the continental shelf and the fishery zone between Canada and the United States [hereinafter U.S.].<sup>88</sup> The U.S. argued natural prolongation and historical fishing, distinguishing also between primary and secondary coasts. Canada proposed instead equitable equidistance, excluding certain U.S. coasts, acquiescence and economic repercussions. The Chamber basically rejected all of these contentions,<sup>89</sup> but could find nothing specific in international law effectuating the equitable criteria and methods.<sup>90</sup> For example, the principle that "delimitation must be effected by agreement or recourse to a third-party" produces no answers.<sup>91</sup> Well, then, where are we going to find some guidance? Perhaps in the prior cases and in the literature. But the Chamber was committed to the idea that "each specific case is, in the final analysis, different from all the others. . . it is monotypic."<sup>92</sup>

At the same time, while there has been no systematic definition of the relevant equitable criteria, here are some examples: (a) the land dominates the sea; (b) equal division of the areas of overlap; (c) non-encroachment and no cut-off; (d) proportionality to the length of coast lines; (e) preservation of vital existing fishing patterns; (f) optimum conservation and management of living resources; and (g) lines which reduce the potential for future disputes.<sup>93</sup>

One thing is immediately apparent. There is no connection between these criteria and what is known as equity. Their content is different from that of the traditional equitable principles, and their function is neither to override nor to remedy the unintended effects of a rigid rule. Indeed, they constitute mere attempted particularizations of the concepts of the maritime zones in question. Incidentally, the

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86. Tunisia-Libya, 1982 I.C.J. 18, para. 12.

87. *Id.* paras. 1, 38, 155 (Oda, J., separate opinion). For a similar view, see Jonathan Charney, *Ocean Boundaries Between Nations*, 78 AM. J. INT'L L. 582, 586-87. For a detailed exploration of the views of Oda as judge and publicists in this field, see Barbara Kwiatkowska, *Judge Shigeru Oda's Opinion in Law-of-the-Sea Cases: Equitable Maritime Boundary Delimitation*, 15 GERMAN Y.B. INT'L L. 225-294.

88. *Gulf of Maine*, 1984 I.C.J. 246, paras. 79, 98-99, 112.

89. *Id.* paras. 36, 57-59, 104-107, 108, 126-153, 166-172, 178-182, 237-238.

90. *Id.* paras. 81, 110-111.

91. *Id.* paras. 90, 112.

92. See *Gulf of Maine*, 1984 I.C.J. 246, para. 81.

93. *Id.* paras. 110, 157. It is interesting to note that the Chamber treated equidistance not as a principle but only as a method implementing the first two of these principles. *Id.* paras. 159, 178.

Chamber recognized real equitable principles in the discussion of estoppel, acquiescence and *modus vivendi*.<sup>94</sup> Judge Gros was quite eloquent in his doctrinal challenge to this equitable weathervane.<sup>95</sup>

Coming to the equitable solution, the Chamber suggested that the method itself is not equitable, but solely instrumental.<sup>96</sup> The examples of method included (a) median line, (b) lateral equidistance, (c) line perpendicular to the coast where the territories meet, (d) line perpendicular to the general direction of the coast, (e) boundary prolonging the existing division of territorial waters, and (f) boundary prolonging the direction of the final segment of the land boundary or of its overall direction.<sup>97</sup> Thus, contrary to *Libya-Tunisia*, the equitable solution has no meaning of its own, but only effectuates the relevant criteria. The solution was also subjected to an ultimate test of not being radically inequitable, meaning "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."<sup>98</sup> We may again wonder whether anything was gained by using the equitable label. The Chamber then turned to the old chestnut of looking to the facts and circumstances of each case.<sup>99</sup> This sounds fine, but what does it mean that "the equitableness [of a criterion] can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases?"<sup>100</sup> It is all well and good if it refers to the obvious fact

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94. *Id.* para. 152.

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[I]f there is any legal concept to which each attaches his own meaning, it is equity . . . [E]quity does not consist in a successive search for equality, proportionality, result; each of these considerations is a way of applying equity, it is a choice made in the manner of applying the law, and not an accumulation of equities which there is nothing to forbid supplementing with such others as one may glimpse in that frame of mind. One must not narrow down the law of delimitation to two words, agreement plus equity, only to equate that with judicial discretion . . . . By introducing disorder into the conception of equitable principles, and freedom for the judge to pick and choose relevant circumstances and criteria, the Court [in *Tunisia-Libya* has], given equity in maritime delimitation this doubtful content of indeterminate criteria, methods and corrections which are now wholly result-oriented . . . . Equity discovered by an exercise of discretion is not a form of application of law . . . It is no more conclusive to say that a result is equitable than to say that it is just, if the judge does not refer to an order of equity or justice.

*Id.* paras. 27, 29, 37, 39.

96. *Id.* para. 199. *See generally id.* paras. 159, 191.

97. *Id.* para. 159.

98. *Gulf of Maine*, 1984 I.C.J. 246, para. 237.

99. *Id.* para. 158. *See generally id.* para. 81.

100. *Id.* para. 158.



that the same criterion may produce different outcomes in different circumstances, and if the Chamber had in mind such truisms as, for example, that short coasts generate shorter shelves than longer coasts or that a criterion that deals with islands is irrelevant in an island-free delimitation. But we must raise an eyebrow if the idea is that the very same criterion, for example, proportionality or even more specific ones such as 'the land dominates the sea' is sometimes equitable and sometimes not. Such statements would not only be implausible but also circuitous and question-begging. Obviously, we would then need another set of standards to help us decide what makes a particular criterion equitable in a particular context. It is also disturbing that the Chamber, in the same spirit of doctrinal escape, emphasized that maritime delimitations are monotypical, which "preclude[s] the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law giving specific provisions for subjects like those just mentioned."<sup>101</sup>

In *Guinea-Guinea/Bissau*, two neighboring African states submitted to arbitration the delimitation of their three maritime zones by a single line. Natural prolongation,<sup>102</sup> old treaties,<sup>103</sup> economic factors and security<sup>104</sup> were conceded or found irrelevant. The submission called for the application of international law, and it was agreed that the key objective was to find an equitable solution.<sup>105</sup> How can this be achieved? This can be achieved by recourse to "factors and methods based on considerations of law."<sup>106</sup> Which ones? The Tribunal merely emphasized that each case of delimitation is a *unicum*, and referred to the "characteristics peculiar to the region."<sup>107</sup>

In *Libya-Malta*, the standard was the "rules and principles of international law."<sup>108</sup> Libya argued that this means equitable principles, relevant circumstances and equitable results which in this case led to natural prolongation and reasonable proportionality to coastlines.<sup>109</sup> Malta countered with "international law in order to achieve an equitable solution," which in this case translated to equidistance.<sup>110</sup>

In terms of doctrine, this is a landmark case because the ICJ finally

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101. *Id.* para. 81.

102. *Id.* paras. 116-117. *See generally id.* para. 19.

103. *Id.* para. 86.

104. *Id.* paras. 121-24.

105. *Id.* para. 89.

106. *Id.*

107. *Id.*

108. *See Libya-Malta*, 1985 I.C.J. at 16.

109. *Id.* at 19.

110. *Id.*

began the process of extrication from the morass of equitable theory.<sup>111</sup> To be sure, it started with certain banal quotes about equity from *North Sea* and *Tunisia-Libya*.<sup>112</sup> In the same breadth, however, in some memorable phrases, the ICJ transcended them and stressed the need both for predictability and for reasoned decision-making, thus rehabilitating the importance of recognizable principles of general application and raising doubts about the uniqueness of each case and the possibility of seeking equity through ad hoc results.<sup>113</sup> The ICJ also rejected the notion that: "[T]here is no legal limit to the considerations [which may be taken into account]. . . it is evident that only those that are pertinent to the institution of the continental shelf . . . will qualify for inclusion."<sup>114</sup> Some of the other judges also strongly supported these views. Some judges even held the opinion that the majority did not go far enough.<sup>115</sup> The decision was accompanied by voluminous separate and dissenting opinions and declarations.<sup>116</sup> Finally, the ICJ made clear that these so-called maritime equitable principles are mostly negative, saying no more than do not mess with geography: do not refashion geography, do not compensate for the inequalities of (objective) nature, do not engage in distributive justice, and do not encroach on another's shelf.<sup>117</sup> Furthermore, the equality of states does not mean equal shares of shelf,<sup>118</sup> and neither natural prolongation nor economic factors count.<sup>119</sup>

The impact of the redescription of the issues in *Libya-Malta* in

111. *Id.* paras. 26-29.

112. *Id.* para. 45.

113. *Id.* paras. 45-46, 76.

114. *Id.* para. 48.

115. "The judicial task is to make the law more determinable by objective criteria, and thus make more predictable to potential parties . . . . Facts and circumstances to be taken into consideration must be as objective an intelligible as possible." *Id.* para. 114 (Mosler, J., dissenting opinion.). Judge Oda suggested that referring to equitable principles, equitable results and relevant circumstances 'merely amounts to an uninformative rearrangement of the terms of the . . . question.' Equity "at most. . . can be held to proscribe the frame of mind in which the negotiators should approach their task." *Id.* para. 33 (Oda, J., dissenting opinion). Marine Equity is not a means of pursuing world social justice. *Id.* para. 66. Judges Rouda, Bejaoui, and de Arechaga, had the following reflections in their separate opinions on the "praetorian subjectivism" of the equity in maritime delimitations: "[The] "fundamental norm" . . . of the equitable result. . . is as uninformative as it is all embracing. . . . [E]quity. . . though a highly respectable legal concept is inequitably measured with a "human" yardstick. . . and remains mysterious.' *Id.* para. 37. On the other hand, Judge Sette-Camara, in a separate opinion, was not comfortable with this "over conceptualization of the application of principles." *Id.* at 63.

116. Seventeen judges sat on the case. Six judges wrote or supported separate opinions, three judges filed dissenting opinions and there was one declaration. Thus, the main opinion reflected the views of the plurality of the Court.

117. *Id.* para. 46.

118. *Id.* para. 54.

119. *Id.* para. 25.

terms of the maritime rights themselves rather than in equitable verbiage has been felt in the two major subsequent cases of *St. Pierre-Miquelon* and *Jan Mayen*, where the majority opinions barely use the "E" word beyond a decorative function. In *St. Pierre & Miquelon*, the composite fundamental norm of equitable principles or criteria, relevant circumstances and equitable results was mentioned,<sup>120</sup> only to be soon forgotten, the ICJ making clear that "[g]eographical features are at the heart of the delimitation process,"<sup>121</sup> and are proceeding to specific applications.

On the heels of *St. Pierre-Miquelon* came *Jan Mayen*, with a similar dilemma of a tiny island claiming a vast segment of the ocean as its shelf and fishery zone against a massive opposing mainland. The ICJ adopted a modified median line. Did equity provide any guidelines? We will look in vain in the majority opinion for any real equitable discussion. Indeed, the single reference that qualifies is a quote from *Libya-Malta* stating that only pertinent considerations count which, coupled with a promise to consult the practice of states and the cases, suggests that free-wheeling equity must be reigned in to avoid arbitrariness and to strengthen predictability.<sup>122</sup> The basic approach of the ICJ was merely to add the equitable label to whatever factual factors were chosen on their own merits. Judge Schwebel articulated an even more jaundiced view of equity, and expressed concern that the ICJ used the equitable labels at will to divide certain fishing resources in a manner as supportable as any of its alternatives. The anti-equity language in his separate opinion is quite potent:

[I]f what is equitable is as variable as the weather of the Hague, then this innovation [equal access to certain areas] may be seen as, and may be, as defensible and desirable as another<sup>123</sup> . . . the obscure measure of adjustment of the median line between Libya and Malta appears to have had the benefit of inspiration, if divine, then from Roman gods<sup>124</sup> . . . the authority to seek an equitable solution by the application of a law whose principles remain largely undefined affords the ICJ an exceptional measure of judicial discretion<sup>125</sup> . . . the ICJ

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120. *St. Pierre & Miquelon*, 31 I.L.M. 1145, para. 38.

121. *Id.* para. 24. Judge Weil, in a dissenting opinion, criticized the Tribunal for adopting a position amounting to "I know an equitable result when I see it" which is contrary to the principles and corrective equity of *Libya-Malta*, *Anglo-French Arbitration and North Sea*. In his view, the Result her constituted an injustice committed in the name of equity. *Id.* paras. 29-30. His apparent substitute principle of drawing a line far enough to assure "a sufficient maritime territory" and not too close to "threaten sovereign interests" is, however, vulnerable to a similar charge.

122. *Jan Mayen*, 1993 I.C.J. 38, paras. 57-58.

123. *Id.* at 120. See also Judge Oda's dissent, *id.* paras. 1, 90-100.

124. *Id.* at 125.

125. *Id.* at 128.

leavens its Judgment with a large infusion of equitable ferment . . . and so concocts a conclusion which does not lend itself to dissection or, for that matter, dissent.<sup>126</sup>

On the other hand, in Judge Weeramantry's separate opinion in *Jan Mayen* we are exposed to the lengthiest yet most judicial elaboration of equitable doctrine. This constitutes a challenge that must be addressed.<sup>127</sup> That opinion is mostly a learned treatise on equity in general, as well as in international law and in maritime delimitations, exploring in detail its historical and conceptual dimensions. The question that needs to be answered, however, is whether this doctrinal discussion had anything to do with the issues of the case. The approach of Judge Weeramantry was more or less the following. First, he cited the multiple equitable labels used by the ICJ in the past to embellish its particular choices.<sup>128</sup> But there was no examination of whether the label affected the choice of what was relevant and where to draw the line.<sup>129</sup> Second, he called equity the creative force which animates the life of international law, citing the concept of international mandates and trusts, good faith, *pacta sunt servanda*, *ius cogens*, unjust enrichment, *rebus sic standibus* abuse of rights,<sup>130</sup> prescription, reciprocity, equality in court,<sup>131</sup> estoppel, fairness, reasonableness,<sup>132</sup> use of one's property as not to harm others,<sup>133</sup> as well as the *audi alteram partem* rule,<sup>134</sup> and the notions that equity looks to the intent rather than to the form, and that a person must not act contrary to his own representation on the faith of which others have acted.<sup>135</sup> However, do these lofty concepts give us any guidance on how to address the main controversies on the drawing of maritime boundaries? Third, he tried to distinguish maritime equity from absolute equity and *ex aequo et bono*, but only at the level of rhetoric.<sup>136</sup> Particularly disturbing is his proposition that relevant circumstances means all conceivable factors unless a rule of law excludes them,<sup>137</sup> rather than the other way around. Fourth, he

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126. *Id.*

127. Judge Ajibola also separately engaged in an abstract dithyramb for equity. *Id.* at 280-314.

128. *Id.* paras. 60, 62-65, 68, 70, 75, 87, and 90-92.

129. *Id.* para. para. 5-10.

130. *Id.* paras. 16-17.

131. *Id.* para. 84.

132. *Id.* para. 110.

133. *Id.* para. 145.

134. *Id.* para. 25.

135. *Id.* para. 48.

136. *Id.* paras. 20, 52-64.

137. *Id.* para. 26. However we find a contrary statement in para. 150: "The decision whether a matter has relevance or not would naturally be dependent also on any applicable rules of law, for, the equity the Court is here using is not Equity not equity *contra le-*

repeated in many places that not only equitable principles but also equitable procedures and results are important. Fine, but which ones are relevant here, why, and how do they work? Fifth, he cautioned against viewing equity in the Roman and Anglo-American tradition as corrective of the insufficiencies and rigidities of the law, and viewed it rather as a general principle.<sup>138</sup> But and if we detach it from this tradition, not only do we diminish its international function but we also empty it of content. While we cannot fail to admire Judge Weeramantry's erudition and concern, we must not forget the dangers to justice posed by indeterminate, subjective concepts and processes. These dangers are all the more real if they are combined with the notion of instinctive distributive justice under various guises,<sup>139</sup> with which Judge Weeramantry flirted despite ambiguous disclaimers.<sup>140</sup> The crystallization over time of the elements of the maritime zones within their own frame of reference enables us to describe and to implement the rights directly and with greater precision, which will both encourage submissions to adjudication and facilitate the task of the judges. The factors named by Judge Weeramantry, such as proportionality to coast lengths, equidistance, security, population, economic need, prior conduct of states etc., are best dealt with on their own terms. The equitable icing adds little, if anything.

In conclusion, it took more than a quarter century of mostly wasted effort to realize that there was not much equity out there, and that the boundaries of the continental shelf should be delimited directly on the basis of internal criteria through a logical and teleological interpretive particularizing process. At most, equity provided an umbrella of

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*gum.*"

138. *Id.* paras. 43-51. *But see id.* paras. 133-135.

139. Examples :

[The] additional juristic basis for checking a result for its equity or inequity comes from the "sense of injustice" which has an ancient history in the philosophy of jurisprudence'(para. 41); '[as] principles relating to an equitable sharing of resources become more urgently required, this route for the entry of equity will perhaps assume increasing importance in developing the law of the sea' (para. 85); '[a]lthough justice by its very nature is incapable of comprehensive formulation, injustice by its very nature is often a matter of instant detection' (para. 105); equitable. . . sharing of resources. . . is playing an increasingly important international role, (paras. 118-120); the relevant considerations 'cannot be limited to the purely geographic' or 'geophysical' (paras. 185, 210) and population or economic factors may be taken into account even if changeable (paras. 150, 211-219).

140. *See, e.g. id.* para. 60 (equity not *ex aequo et bono*); *id.* para. 62 (we should not disregard the letter for the spirit of the law); para. 121 ("equity in the sense of distributive justice and redistribution of wealth in not involved in [this] case").

justification and a time lag for the courts to search for a consensus on the components of the maritime zones and on the factors which teleologically and practically were more consistent with the underlying maritime rights. This process explored the implications of geographical appurtenance without filtering them through some magical equitable potion. UNCLOS restored the primacy of positive international law, and preserved equity only in the exceptional form of a test of the ultimate solution, thus placing it in the Aristotelian teleological mold.

#### IV. THE CURRENT SCENE IN DELIMITATIONS - BACK TO THE FUTURE OF EQUIDISTANCE WITH OR AGAINST PROPORTIONALITY

Starting with a brief resume of the current status of what was rejected and what has been preserved, I will focus mainly on the specifics of how and where to adjust, the old monster equidistance, the white knight of equity, to the requirements of proportionality which have not yet been explored sufficiently in the literature. I will then consider how all of this affects the position of islands, and especially how it plays itself out in the Aegean.

##### *A. Clearing Up the Debris : The Rejections*

###### 1. No to Factors Unrelated to Coastal Geography

In the spirit of equity within the law, the cases progressively limited the delimitation factors first to geography and then only to coastal geography. As aptly put by a leading commentator:

The black letter of the law, however, has not been swallowed up in the black hole of equity. The jurisprudence has winnowed and shed light upon the circumstances relevant to delimitation. The legal basis of title remains central to the idea of an equitable result. Geography retains - or rather, has regained - its primacy over all other factors. And natural boundary concepts have been laid to rest, probably for all time.<sup>141</sup>

A state without a coast has neither continental shelf nor exclusive economic zone. A coastal state standing alone and without a neighbor within 200 miles is entitled to the entire shelf and zone. All coasts count the same: there are no primary or secondary ones. States with equal coastal geography receive equal shares.

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141. Leonard Legault & Blair Hankey, *Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation*, in INTERNATIONAL MARITIME BOUNDARIES, *supra* note 4, at 203, 206 [hereinafter Legault & Hankey].

This conception led to the unequivocal rejection of the following non-geographical considerations:

(a) Demographic, social or general economic factors, which, in any event, are ephemeral and changeable.<sup>142</sup>

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142. There was no reference to these factors in North Sea or the Anglo-French Arbitration. In Tunisia-Libya, variable economic factors such as poverty and need were rejected. Tunisia-Libya, 1982 I.C.J. 18, paras. 106-107. In Judge Oda's view, such issues as well as the size of the population involve "global resource policies, or basic problems of world politics which not only could not have been solved by the judicial organ of the world community, but stray well beyond equity as a norm of law into the realm of social organization". *Id.* para. 157 (dissenting opinion). With the "catastrophic consequences" proviso (para. 237), Gulf of Maine also supports the proposition that economic, social etc. considerations are irrelevant. Gulf of Maine, 1984 I.J.J. 246, paras. 59, 157, 196, 234-238. In Libya-Malta, relevant circumstances did not include economic factors such as the absence of energy resources, developing requirements and fishing activity. Libya-Malta, 1985 I.C.J. 13, para. 50. To the same effect see Guinea/Guinea-Bissau, 24 I.L.M. 267, paras. 122-123. In St. Pierre & Miquelon, the separate agreements on fisheries among the parties had taken care of the issue of access to them eliminating the issue of "catastrophic consequences" (Pierre & Miquelon, 31 I.L.M. 1145, paras. 85-87) and the economic dependence and needs were not otherwise to be taken into account. *Id.* para. 83. *Cf.* Judge Weil (dissenting opinion): "It goes without saying that a maritime delimitation line cannot be dictated by the concern to apportion resources. . . . In short, the boundary is where it is and the resources are where they are." *Id.* para. 34. Particular socio-economic and cultural factors and the size of the populations were excluded from the relevant considerations in Jan Mayen. Jan Mayen, 1993 I.C.J. 38, para. 79-80.

On the other hand, Judge Weeramantry considered as "juristically untenable and not in conformity with the flexibility of equity . . . the general proposition that population of economy are irrelevant because . . . they may change with time". *Id.* para. 211 (separate opinion). *See also id.* paras. 212-219. For a similar view, *see id.* para. 14 (Judge Fischer dissenting).

For a comprehensive and accurate review of these issues, see Derek W. Bowett, *The Economic Factor in Maritime Delimitation Cases*, in *ESSAYS IN HONOR OF ROBERT AGO*, *supra* note 5, at 45. Kwiatkowska's doubts on this reflect her strong doctrinal preference for resorting to economic and social considerations *de lege ferenda*. She delphically states:

[The inclusion of economic consideration into circumstances relevant to maritime delimitation (to an extent broader than the courts so far admit)] . . . is advocated in this chapter on the basis of the assumption that the courts' present restrictive approach may be subject to evolution toward the latter, more liberal, approach. Would that assumption prove incorrect, there still seems to exist an additional, unstated alternative. In particular, the possibility could not with certainty be excluded that, in spite of a formal rejection of the relevance of economic factors, the courts do and will continue to take such factors into account in the delimitation process. Such assumption would seem to be supported by the difference between the courts' role in making the law and the court's role in applying the law.

Kwiatkowska, *supra* note 5, at 106-107.

On the other hand, considerations of distributive justice rather than the delineation of the seaward projection of coasts are reflected in the UNCLOS regime of sharing certain resources within the exclusive economic zone and on the ocean floor. The Convention imposes significant "equitable access" obligations on coastal states for the benefit of certain

(b) Historical practice and usage,<sup>143</sup> with the exception of the "catastrophic-repercussions-historical-dependence" proviso for fishing.<sup>144</sup>

The emphasis on coastal geography further led to the equally clear rejection of the following non-coastal considerations:

(c) The size, shape or depth of the land territory behind the coast.<sup>145</sup>

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other states with respect to certain surplus living resources within their exclusive economic zone. See FRANCISCO ORREGO VICUNA, *THE EXCLUSIVE ECONOMIC ZONE* 49-69 (1989), for a detailed study of this access right.

While such "sharing" obviously opens the door to considerable discretion, the use of the equitable label does not constitute an invitation for the decision makers to develop their own intuitions. The Convention takes a major step toward specificity by identifying the key economic and geographical criteria of distribution.

Similarly and in a related field, the Convention on the Non-Navigational Uses of Watercourses (U.N. Doc. A/42/10 (1987)) seeks to regulate the distribution of a scarce resource, directing that international watercourse systems in state territories shall be used in an *equitable and reasonable manner*. The relevant criteria are then identified with specificity: geographic, hydrographic, climactic factors, social and economic needs, existing and potential uses, conservation, protection, development and economy, the availability of alternatives, etc. For a description of the scheme of the Convention, see Stephen C. McCaffrey, *The Law of International Water Courses: Some Recent Developments and Unanswered Questions*, 17 DENV. J. INT'L L. & POL'Y 505 (1989).

It is debatable whether the equitable label used in these contexts is helpful. This sharing reflects adjustments in the exercise within a defined area of an indivisible joint, although not identical, right, while maritime delimitations draw the lines that separate divisible rights. While it might be argued that the equitable characterization is more apt where the legislative motivation is distributive of resources rather than merely definitional of geographic appurtenance, the reference to predetermined and identified, albeit broad, criteria suggests that we are again dealing with particularizing interpretations consistent with the logic and purpose of the related regimes and that a more direct approach is indicated.

143. Gulf of Maine, 1984 I.C.J. 246, para. 237. Cf. Jan Mayen, 1993 I.C.J. 38, paras. 73-78. For the comparable views of Oda, J., see para. 98 of his separate opinion.

144. There was no reference to these factors either in North Sea, or in the Anglo-French Arbitration. North Sea, 1969 I.C.J. 3; Anglo-French Arbitration, 16 I.L.M. 54. In Tunisia-Libya, the Court did examine historical factors but only in the context of past conduct of the parties on a theory of estoppel and gave some incidental weight to them. Tunisia-Libya, 1982 I.C.J. 18, paras. 81-102, 105, 116-21. In Gulf of Maine, the Chamber considered the historical development of the land boundary between the two countries as irrelevant. Gulf of Maine, 1984 I.C.J. 246, para. 42. In Guinea/Guinea-Bissau, the Tribunal made partial use of a treaty-based "southern limit" as the line in support of the conduct of the parties and its coincidence with the land boundary. Guinea/Guinea-Bissau, 24 I.L.M. 267, paras. 105-06. In Jan Mayen, the Court concluded that the conduct of the parties in other delimitations between them had not established a binding precedent. Jan Mayen, 1993 I.C.J. 38, paras. 82-86.

It should be pointed out that we are discussing here only continental shelf and exclusive zone delimitations. The role of historic rights, however limited, in territorial and archipelagic waters is another matter.

145. There was no reference to these factors in North Sea or the Anglo-French



(d) Whether the coastal land territory is entirely surrounded by water (island), or whether it belongs to a landmass (mainland). This last topic will be explored in-depth in a subsequent section.

## 2. No to Physical Natural Prolongation

The second seminal determination was to abandon the idea of the physical natural prolongation for the continental shelf and, by extension, the exclusive economic zone. Thus, the characteristics of the ocean floor, such as geomorphology and geology, nature of the sea-bed and the subsoil, direction and angle of the slope, and the character of the water column, such as depth and content, have been treated as irrelevant. As a consequence, where distance counted, it was measured not on the seabed, but on the surface of the water. In the *Anglo-French Arbitration*, the ICJ downgraded the natural prolongation idea and put the emphasis on geography rather than on geology or geomorphology.<sup>146</sup> In *Tunisia-Libya*, the parties, reading *North Sea* as basically a natural prolongation case, equated equity with prolongation which, however, they interpreted differently.<sup>147</sup> The ICJ disagreed with this approach, sounding the death-knell for natural prolongation by treating it not as a physical fact but as a legal concept, as a label for all the other relevant considerations.<sup>148</sup> This continued in *Libya-Malta*,<sup>149</sup> and it is safe to assume that natural prolongation belongs to the past. A noted publicist has characterized natural prolongation as an "unfortunate device" and a "pure figment of the ICJ's imagination."<sup>150</sup> The joint delimitation of continental shelf and exclusive economic zone, if not the absorption of the former by the latter in subsequent cases, and the measurement of the lines uniformly on the surface of the water have sealed the fate of natural prolongation.

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Arbitration. In Guinea/Guinea-Bissau, the Tribunal rejected any test of proportionality to the respective landmasses. *Id.* at 118-120. In *Libya-Malta*, relevant geography did not include the size of the landmass behind the coast. *Id.* para. 49.

146. *Anglo-French Arbitration*, 16 I.L.M. 54, paras. 107, 194.

147. *Tunisia-Libya*, 1982 I.C.J. 18, para. 39. Judge de Arechaga criticized this approach, taking the position that "equitable principles have pride of place and apply from the start to the whole area subject to delimitation and not just to marginal or overlapping segments of that area." *Id.* paras. 13-17 (de Arechaga, J., separate opinion).

148. *Anglo-French Arbitration*, 16 I.L.M. 54, paras. 40-61, 66-68. See also the separate opinion of Judge de Arechaga, where the concept of the continental shelf is fully dissociated from any geological or geomorphological facts. *Id.* paras. 37-64 (de Arechaga, J., separate opinion).

149. *Libya-Malta*, 1985 I.C.J. 13, paras. 30-36.

150. Robert Jennings, *The Principles Governing Maritime Boundaries*, 397, 406 in *FESTSCHRIFT FUER KARL DOEHRING* (1989).

## B. The Preservations and Refinements

### 1. The Rehabilitation of Equidistance

Distance from the coast on the surface of the water has re-emerged as the dominant consideration, with equidistance as the primary implementing equality rule.<sup>151</sup> A full review of all the cases will become quite repetitive, so only some highlights will be pointed out in the notes.<sup>152</sup> In the text, it suffices to refer to the boost that equidistance received in the last case, *Jan Mayen*. The ICJ determined that the median line occupies an important place in the practice of states. In addition, the ICJ determined that, in opposite coast situations, it "produces, in most geographical circumstances, an equitable result." It began the delimitation with a provisional single median line as "entirely appropriate."<sup>153</sup> It also warned against resorting to an open-ended list of special or relevant circumstances to undermine consistency and predictability,<sup>154</sup> and examined the fishery zone in the same vein.<sup>155</sup>

Confirmed by its overwhelming prevalence in state practice,<sup>156</sup> equidistance reflects acceptance of the inherently equal and equitable nature of the median line, treated in fact and often in law as the appropriate line, especially the starting line, subject to some adjustment for proportionality of shares to coast lengths. While it is a natural for opposite coasts, it will not produce distorting effects in adjacencies either if the respective coastlines are streamlined in terms of relevance, direction, configuration and projection.

It is important to stress at this point that the verbal distinctions between high-level, primary (sole, obligatory, final) equidistance, and

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151. See George P. Politakis, *The 1993 Jan Mayen Judgment: The end of Illusions?*, 41 NETH. INT'L L. REV. 1 [hereinafter Politakis]; KWIAKOVSKA, FORTY YEARS, *supra* note 5, at 95; Jennings, *supra* note 150, at 408; Kenneth Highet, *Whatever Became of Natural Prolongation*, in RIGHTS TO OCEANIC RESOURCES 87-100 (Dallmeyer & De Vorsey eds., 1989); Shigeru Oda, *The Delimitation of a Single Maritime Boundary-The Contribution of Equidistance to Geographical Equity in the Interrelated Domains of the Continental Shelf and the Exclusive Economic Zone*, in ESSAYS IN HONOR OF ROBERT AGO 349-362 (1989).

152. See Politakis, *supra* note 151, at 95.

153. *Jan Mayen*, *supra* note 2, paras. 49-53, 56, 64-65 (citing *North Sea*, *supra* note 3, paras. 57-58 and *Libya-Malta*, *supra* note 2, para. 62); see e.g., Politakis, *supra* note 151, at 16-17.

154. *Jan Mayen*, 1993 I.C.J. 38, paras. 57-58.

155. *Id.* paras. 47, 53, 71, 90. Oda, J., explained in detail his opposition to treating the fishing zone under the standards applicable to the exclusive zone. *Id.* paras. 6-23 (Oda, J., dissenting opinion).

156. See e.g., Charney, *Progress*, *supra* note 64, at 245; Legault & Hankey, *supra* note 141, at 221.

lowly, secondary equidistance (provisional, possible) have now lost most of their significance since the elimination of most of its competitors makes its dislocation virtually impossible. Furthermore, the theoretical discussions about its classification as a norm, a principle, a method, a consideration, a factor or even a technique are largely inconsequential. Under whatever name and form, when it stands alone its message is quite clear: other things being equal, the equality of the shares derives from the equality of the distances. The only significant reasons for deviation revolve around the disproportionality issue to which we will now turn.

## 2. The Intermediation of Proportionality to Avert Gross Disparities Between Zones and Lengths of Coastlines

In international law, the concept of proportionality as an aspect of equality has played a very limited role. Basically, it has been used only to implement the remedial notion that action taken to effectuate a right or power must not be excessive. Typical examples involve proportionality in the use of force and in the restriction of human rights.<sup>157</sup>

Its emergence as the principal instrument to contain the potential inequitable results of equidistance in making the final cuts of the pie of the continental shelf and the exclusive economic zone, reflects not so much the application of principle as the recognition that a substantive factor other than distance from a coast on the water, namely the length of such coast, should also be taken into consideration. In other words, it is not the commitment to proportionality but the recognition of the relevance of the coastal length that explains this development.

The concern about gross disproportionality of shelves to coastlines was there from the very beginning. In *North Sea*, its role was pivotal in underwriting the concavity argument.<sup>158</sup> A reasonable degree of proportionality between shelves and lengths is a reasonable result dictated by equitable principles.<sup>159</sup> Most of the judges who dissented or who wrote separate opinions were equally, if not more, concerned about this problem of disproportion.<sup>160</sup>

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157. See HIGGINS, *supra* note 17, at 230-236.

158. *North Sea*, 1969 I.C.J. 3, paras. 87, 91, 98. The exact language of the majority opinion at paragraph 91 deserves to be quoted: "What is unacceptable in this instance is that a State should enjoy continental shelf rights different from those of its neighbors merely [because of the convex or concave form of the coastline] although those coastlines are comparable in length."

159. *Id.* paras. 89, 90, and 98. See Legault & Hankey, *supra* note 141, at 217.

160. 1. Bustamante Y Rivero:

[T]he conclusion is inescapable that the State which has a longer coastline will have a more extensive shelf. The Judgment . . . men-

The need to avoid unreasonable disproportionality was instrumental in configuring the outcomes reached in the cases after North Sea. In the Anglo-French Arbitration, the ICJ stressed that "proportionality. . . is clearly inherent in the notion of a delimitation in accordance with equitable principles."<sup>161</sup> While proportionality may not be relevant in all contexts,<sup>162</sup> and is not an independent source of rights,<sup>163</sup> the disproportionate effects of a considerable projection of an attenuated portion of the coast must be abated.<sup>164</sup>

Both parties in Tunisia-Libya referred to a "reasonable degree of proportionality . . . between . . . shelf . . . and length of . . . coast."<sup>165</sup> The ICJ added that it is "indeed required by the fundamental principle of ensuing an equitable delimitation between the states concerned,"<sup>166</sup> and gave it certain weight in assessing the equitableness of the lines drawn on the basis of other criteria. Proportionality was also recognized in some of the other opinions. Concurring Judge de Arechaga accepted it in the form of a "test to be applied *ex post facto* . . . not a relevant circumstance or independent factor in itself."<sup>167</sup> For Judge Oda, equidistance was equitable because it satisfied the requirement of proportionality.<sup>168</sup> On the other hand, Judge Gros took the position that the ICJ went too far because proportionality is only the verifying factor, and not

tions this element as one of the factors to be taken into consideration for the delimitation of a shelf; the Court nevertheless did not confer upon it the character of an obligatory principle.

North Sea, 1969 I.C.J. 3, para. 59.

2. Padilla Nervo: "The distorting effect caused by the application of the lateral equidistance line, when it cannot be accounted for by the length of the coastline, justifies the application of the special circumstances principle." *Id.* para. 92.

3. Ammoun: "The Federal Republic is justified in rejecting . . . a share which . . . would be out of all proportion to the respective lengths of coastal frontage of the parties." *Id.* para. 43.

4. Morelli:

In my opinion, the gravely inequitable nature of the result to which the application of the criterion of equidistance in the present case leads must be recognized, this inequitable character consisting in the remarkable disproportion between the area of the continental shelves pertaining to each of the three States on the one hand and the length of their respective coastlines on the other . . . .

*Id.* para. 15.

161. Anglo-French Arbitration, 16 I.L.M. 54, paras. 98-99; *see id.* paras. 99, 250.

162. *Id.* para. 99.

163. *Id.* paras. 101, 250.

164. *Id.* para. 249.

165. Tunisia-Libya, 1982 I.C.J. 18, para. 37.

166. *Id.* para. 103.

167. *Id.* para. 117.

168. *Id.* para. 176.

even a method.<sup>169</sup>

In Gulf of Maine, the Chamber employed as a principal method an equal-division geographical approach reflecting the same consideration as equidistance,<sup>170</sup> but also made corrections in all sectors based on the auxiliary criterion of proportionality to the length of the respective coastlines.<sup>171</sup> In the first segment, the Chamber sought to avoid the disproportionately distorting effect of certain rocks and low-tide elevations under equidistance, as well impractical zig-zaggings.<sup>172</sup> In the central area, it took a look at the Gulf, and concluded that it was "obvious that the length of the coasts belonging to the United States . . . is considerably greater than that of the coasts belonging to Canada,"<sup>173</sup> considered this difference notable, and gave it some weight as a special circumstance.<sup>174</sup> Not to recognize this circumstance of undeniable importance would be a denial of the obvious.<sup>175</sup> The Chamber then totally corrected the median line only in this short segment to reflect exactly the proportionality ratio in the entire area. The shift also had some indirect effect on the third segment,<sup>176</sup> with significant impact on the division of Georges Bank, the apple of discord.

Nevertheless, the Chamber did not justify this last consequences as a proportionality adjustment, but only as a reflection of the general geography.<sup>177</sup> The division of the overlapping areas in the triple-line-delimitation case of *Guinea/Guinea-Bissau* was complicated both by treaties,<sup>178</sup> and by the determination of the Tribunal to place it within the context of past and future delimitations with the other neighboring states.<sup>179</sup> Still, the Tribunal determined that the coasts of the parties were about the same length, and considered whether the line, constructed on other grounds, required adjustment for reason of proportionality to the length of the coastlines. The answer was in the negative since the division ended up equal.<sup>180</sup>

A major portion of the opinion in *Libya-Malta* is devoted to an elaborate discussion of the factor of proportionality, which arises from the equitable principle that nature must be respected.<sup>181</sup> First, the ICJ

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169. *Id.* para. 17.

170. Gulf of Maine, 1984 I.C.J. 246, paras. 178, 188, 201, 210, 212.

171. *Id.* para. 185.

172. *Id.* paras. 202, 209, 213.

173. *Id.* para. 184.

174. *Id.*

175. *Id.* para. 218.

176. Gulf of Maine, 1984 I.C.J. 246, paras. 223-26.

177. *Id.* para. 226.

178. *Guinea/Guinea-Bissau*, 24 I.L.M. 267, para. 106.

179. *Id.* paras. 108-09.

180. *Id.* para. 120.

181. *Libya-Malta*, 1985 I.C.J. 13, paras. 55-57.

rejected Libya's far-reaching and novel proposition that proportionality be used as independent criterion, thus leaving it in an auxiliary status.<sup>182</sup> However, the ICJ suggested that where disproportion is very great, as here, proportionality may be employed not only at the end to test the result obtained on other grounds, but also in the initial stage of seeking the overall methodology.<sup>183</sup> It is, however, significant that a good number of judges questioned the relevance of proportionality altogether, especially in this context.<sup>184</sup> In *St. Pierre & Miquelon*, the ICJ made positive reference to proportionality,<sup>185</sup> but rejected the notion that the ratio of coastal lengths should itself be determinative of the respective areas,<sup>186</sup> and sought its own solution in the form of concrete lines, apparently taking into account proportionality, but without quantified particularization.<sup>187</sup> On the other hand, Judge Weil, in his dissenting opinion, attacked proportionality as providing a sham equity in situations where it might operate blindly and mechanistically on largely arbitrary data. At most, only a great disparity counts and only as one relevant circumstance and *a posteriori*.<sup>188</sup> An important contribution of this case to the doctrine of proportionality is that it did not accept the Canadian contention that "particular segments of a coast may have an increased or diminished projection, depending on their length. The extent of the seaward projection will depend, in every case, on the geographical circumstances. . . ."<sup>189</sup> In other words, a mile of coast is a mile of coast, whether it is part of a long or a short coast, and whatever the ratio of the competing coasts.

Finally, *Jan Mayen*, as the last word from the ICJ on the subject, deserves our careful attention:

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182. *Id.* para. 58.

183. *Id.* paras. 66-67. See Judges Ruda, Bedjaoui and de Arechaga, who also stressed the great importance of proportionality. *Id.* paras. 20-34.

184. In his dissenting opinion, Judge Oda both disputed the use of proportionality in the initial stage and questioned its applicability in a situation of opposite coasts where no major distorting circumstances, for example, concavity were involved. In addition, he attacked the failure of the Court to particularize and explain the application. *Id.* paras. 13-28 (Oda, J., dissenting opinion). In his dissenting opinion, Judge Valticos cautioned that the proportionality factor should not be used in opposite situations not involving any abnormalities. He also wondered whether it was possible to quantify it without relying on subjective judgments. *Id.* paras. 19-22 (Valticos, J., dissenting opinion). Judges Mosler and Schwebel were even more unequivocally against proportionality here, arguing that the difference in the length of the coasts was already reflected in the way they projected into this large area. *Id.* at pp. 112, 173-75 (Mosler & Schwebel, J's., dissenting opinions).

185. *St. Pierre & Miquelon*, 31 I.L.M. 1145, para. 45.

186. *Id.* para. 63 (citing *Libya-Malta*, 1985 I.C.J. 13, paras. 58, 66).

187. *Id.* paras. 60-65.

188. *Id.* paras. 20-23 (Weil, J., dissenting opinion).

189. *Id.* para. 45.

[T]he law does not require a delimitation based upon an endeavor to share out an area of overlap on the basis of comparative figures for the length of the coastal fronts and the areas generated by them.<sup>190</sup>

The ICJ also rejected the notion that proportionality requires a direct and mathematical application of ratios.<sup>191</sup> But when the shares are "so disproportionate. . . it has been found necessary to take this circumstance into account in order to ensure an equitable solution."<sup>192</sup> Indeed, the first and main *Jan Mayen* rule was that equidistance and proportionality appeared only as a moderating factor to test the results reached under other geographical methods. In view of the nine-to-one ratio of lengths, the median line was moved somewhat toward Jan Mayen.<sup>193</sup> Some judges who were committed to the primacy of equidistance considered proportionality as too indeterminate and subjective to be of much help.<sup>194</sup>

The ascendancy of proportionality as a corrective equitable factor of equidistance has been noticed and generally applauded by commentators,<sup>195</sup> but not without some dissent, mostly resulting from its indeterminacy.<sup>196</sup> The practical significance of the distinction between proportionality operating at the initial stage of delimitation, and proportionality being used only as a final test of a result reached under other methods is not as important as it sounds. This is so because only gross disproportion counts, and the adjustment will be similar regardless of stage.

### 3. How About the Location of Natural Resources, Non-Encroachment and No-Cut-Offs?

Before consecrating the marriage of equidistance with proportionality as monogamous and pursuing its practical applications, we should consider whether any other factors may still play some equitable role.

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190. *Jan Mayen*, 1993 I.C.J. 38, para. 64. The primacy of equidistance both as leading to equitable results and as reflecting the practice of states is emphasized in paras. 64-65. *Id.*

191. *Id.* para. 69.

192. *Id.* para. 65.

193. *Id.* paras. 65-69. Some writers viewed the minor movement as downgrading 'to the vanishing point' the 'tyranny of coastal ratios.' See, e.g., Politakis, *supra* note 153, at 1.

194. See *id.* at pp. 3-11 (Schwebel, J., separate opinion).

195. See e.g. Legault & Hankey, *supra* note 141, at 217-221; Charney, *Progress, supra* note 6, at 241-243. See also O'CONNELL, *supra* note 5, at 724.

196. See HIGGINS, *supra* note 17, at 230 and 236

## (a) Natural Resources

The entire logic and system of the maritime zones, based on territorial appurtenance and coastal geography and excluding distributive justice and other economic factors, suggest that the resources fall where they may. What about the situation, however, where the geographic boundary line is to be adjusted in response to a non-precise localizing criterion, such as proportionality to the length of the coastlines? Since the decisionmaker enjoys a degree of flexibility in deciding where to cut,<sup>197</sup> may the location of resources be given some weight? In what way?

As explained previously, the technical preservation of the unity of resources proposed in *North Sea* through joint exploration or other means of avoiding waste makes good sense where they straddle the natural boundary. With the now extinct factor of natural prolongation which undergirded it,<sup>198</sup> at most this factor may still have some analogical applicability only in situations where the ICJ, under the current theories of identifying an overlap, (i.e. proportionality or avoidance of catastrophic repercussions), has some flexibility to adjust the line drawn within the fringe area. In the post-*North Sea* cases, there were some references to this factor. But the ICJ only explicitly took this factor into account in the last case, *Jan Mayen*,<sup>199</sup> where it relied on proportionality to divide a certain area on Jan Mayen's side of the equidistance line. Within that area, the ICJ divided Zones 2 and 3 two-to-one. But the ICJ split the comparatively smaller Zone 1, which contained most of high stakes of the dispute, the capelin, on the basis of a median line to provide Greenland equitable access to that resource.<sup>200</sup> Some judges severely criticized this for its obscurity and apparent arbitrariness. Judge Oda wondered whether we compare the interests of all Danish versus all Norwegian fishermen. Why limit this

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197. See *Jan Mayen*, 1993 I.C.J. 38, para. 90.

198. See *supra* text accompanying notes 62 *et seq.*

199. See Malcom Evans, *Less Than an Ocean Apart: The St. Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones*, INT'L & COMP. L.J. 678, 692-693, [hereinafter Evans]. In *Tunisia-Libya*, the Court left open the possibility that the location of existing oil wells may be an element to be taken into account to achieve an equitable result. *Id.* para. 107. This, however, can be explained in terms of the prior action and conduct of the parties. In *Gulf of Maine*, the case where the fishing grounds of Georges Bank were clearly at the heart of the dispute, the Court excluded such location as a relevant factor of delimitation. *Id.* para. 232. See also para. 237. Cf. Gros, J. dissenting opinion, para. 48. The way that it adjusted the line for proportionality, especially its outer-zone projection, however, may be interpreted as sensitive to its impact on resources. In *Libya-Malta*, we find a vague dictum to the effect that natural resources in the shelf might constitute a relevant circumstance to be reasonably considered. *Id.* para. 50, citing *North Sea*, 1969 I.C.J. 3, para.101 (D2).

200. *Jan Mayen*, 1993 I.C.J. 38, paras. 91-92.



consideration only to a small part of the area? Why equal division?<sup>201</sup> Judge Schwebel was stunned by this apparent intrusion of distributive justice, and was quite sarcastic in his opposition:

While the ICJ may be commended for the simplicity of its conclusion, a principled consistency with its earlier case-law is less conspicuous. . . . [I]n this, the most critical holding of the Judgment on the real assets at stake, the ICJ jettisons what its case-law, and the accepted customary law of the question, have provided [cites and quotes from past cases].<sup>202</sup>

It is in this context that Judge Schwebel made reference to the equitable being as predictable as the weather in the Hague! Judge Fischer was also critical of the introduction of this new type of median line, arguing in the other direction that economic considerations supported an even larger share for Greenland.<sup>203</sup> A limited reading of this action in *Jan Mayen* would consider it as a variant of the catastrophic repercussions theme of radical inequity relating to fisheries as articulated first in *Gulf of Maine*.<sup>204</sup> A more plausible and geographical interpretation would focus on the fact that these resources were on the fringes of the equidistance-cum-proportionality line, and were divided on the theory that, in that narrow range, when in doubt, cut in half.<sup>205</sup>

All of this boils down to the conclusion that in principle the location of natural resources in the shelf or economic zone is irrelevant to their delimitation, subject to the catastrophic repercussions proviso. When, however, resources happen to be located on or about the equidistance-cum-proportionality line, there is some judicial discretion to adjust the line to reflect the internal considerations of delimitation overall. This, of course, excludes either equal shares, as such, or shares out of a hat. In case of doubt, however, an equal split would not be inappropriate.

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201. *Id.* paras. 92-95.

202. *Id.* at 118. (Schwebel, J, separate opinion).

203. *Id.* paras. 15, 21 (Fischer, J., dissenting opinion)

204. *Gulf of Maine*, 1984 I.C.J. 246, para. 75. See e.g., *Jan Mayen*, *supra* note 2; KWIATKOVSKA, *Jennings*, *supra* note 45, at 105-06. Professor Charney criticized the Court for the reference to population which may be misunderstood to revive the socio-economic factors. Jonathan I. Charney, *Panel, The Law of the Sea: Recent Delimitation Cases*, AM. SOC. INT'L L. PROC. 1, 13, 17 (1993). See also Charney, *Progress*, *supra* note 4, at 237-39. Such factors had been specifically repudiated by the Court. *Gulf of Maine*, *supra* note 2, paras. 79-80

205. See e.g., John P. Kozyris, *Remarks, The Law of the Sea: Recent Delimitation Cases*, in AM. SOC. INT'L L. PROC. 15 (1993).

## (b) Non-Encroachment and No-Cut-Offs (Security?)

Our first observation must point out the question-begging, if not tautological, nature of both these considerations, casually mentioned in some of the cases. Indeed, non-encroachment appears merely to state a legal conclusion, that one should not cross into areas that already belong to another. It does not address the question of what belongs to whom. It was used for the first time in *North Sea* in exactly that sense: thou shall not intrude into another's prolongation, with nature providing the boundary. The demise of natural prolongation has taken the wind out of the sails of this derivative idea of non-encroachment. It has persisted, however, in the form of the related but not identical notion of no-cut-off. Unlike non-encroachment, which is aimed at intrusion into one's own, the no-cut-off idea reflects a connection concept: it is intended to prevent interference with access. It stands to reason that such a concept argues primarily for the unity of allocated shares,<sup>206</sup> and, where proportionality adjustments are being made, the technique e.g. of 'equiratio',<sup>207</sup> gives it maximum effect. The references to no-cut-off suggest also two other possible but problematical uses.

First, we do find language in some cases to the effect that the boundary should not be drawn too close to the shores of a state.<sup>208</sup> But this begs the question since, by definition, assuming that equidistance or a similar geometrical method has been used, the same line is equally close to the shores of the other state. Indeed, *St. Pierre & Miquelon* recognized that a cut-off is the typical and unavoidable consequence of drawing lines between competing seaward projections.<sup>209</sup> If only certain projections, for example frontal or primary projectors versus radial or secondary projectors, are preferred as a matter of law will this cut-off notion assume a meaning of its own. But these distinctions have been decisively rejected.<sup>210</sup> A related but much narrower idea would give

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206. See Bernard H. Oxman, *Political, Strategic and Historical Consideration, in* IMB 3, 22-30 (1993), for the state practice of occasional mutually-beneficial readjustment of the boundaries to that effect.

207. See *infra* notes 269-272 and accompanying text.

208. See *Gulf of Maine*, 1984 I.C.J. 246, para. 196; *Guinea/Guinea-Bissau*, 24 I.L.M. 267, para. 92. In *Tunisia-Libya*, Judge de Arechaga referred to the "equitable principle of nonencroachment . . . in front of or close to the coasts of a state, based on distance from the coast." *Tunisia-Libya*, 1982 I.C.J. 18, paras. 69, 72, 75. See generally Elisabeth Zoller, *Recherche sur les methodes de delimitation du plateau continental: A propos de l'affaire Tunisie-Libye*, 86 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 645, 668-670 (1982) (criticizing *Tunisia-Libya* on the grounds of ambiguity and subjectivity). See also Mark B. Feldman, *The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?*, 77 AM. J. INT'L L. 219, 229 (1983) [hereinafter Feldman].

209. *St. Pierre & Miquelon*, 31 I.L.M. at 1169, para. 67.

210. *Gulf of Maine*, 1984 I.C.J. 246, paras. 36, 108; *St. Pierre & Miquelon*, 31 I.L.M. at 1166-67, paras. 57-59; *Cf.* at 1171, para. 73.

priority, in proportionality adjustments, to a port over a rocky promontory.<sup>211</sup> Perhaps this no-cut-off notion is not merely a geographical construct, and a quite problematic one at that, but is connected to considerations of national security. This is suggested in *Libya-Malta*,<sup>212</sup> *Guinea/Guinea-Bissau*,<sup>213</sup> and *Jan Mayen*,<sup>214</sup> where the emphasis was given to lines being drawn far enough off the coasts of the parties. However, here again it is quite likely that the security needs of one state are reciprocated by those of the other so that the end result is again the median line. Furthermore, the extension of the territorial sea up to twelve miles and the perfection of the modern means of detection as well as of warfare make the security argument rather obsolete.

Second, no-cut-off may be deemed to refer to access to the high seas from the zones of each of the competing states.<sup>215</sup> The problem with this possible interpretation is not only that it may be inconsistent with both equidistance and proportionality, but depending on geography that makes little sense in terms of the nature of the maritime rights at issue. Indeed, neither the continental shelf nor the exclusive economic zone rights allow the state to interfere with navigation and passage of any kind, so that access to other areas is assured no matter where these delimitation lines are drawn.

### (c) Conclusion

While there have been some incidental references in cases and in literature to the location of natural resources, to non-encroachment and to no-cut-offs, these factors have not been given much weight. Indeed they have never operated by themselves. It is only where an adjustment of the line is to be made for other reasons that they may derivatively play a tangential role. At most, within the realm of making

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211. See, e.g., *Anglo-French Arbitration*, 16 I.L.M. 54, para. 244; *Tunisia-Libya*, 1982 I.C.J. 18, para. 75 (de Arechaga, J., separate opinion). See also *St. Pierre & Miquelon*, 31 I.L.M. 1145, para. 29 (Weil, J., dissenting opinion). In *Libya-Malta*, Judges Ruda, Bedjaoui and de Arechaga, expressed the view that in situations affected by the coastal projections of third states, the projection of the two delimiting states should not be radial, in the shape of a trapezium, but frontal, in order to avoid cut-offs. *Libya-Malta*, 1985 I.C.J. 13, paras. 2, 4-15. (Ruda, J., Bedjaoui J., and de Arechaga, J., separate opinions). This limited practical suggestion does not detract from the force of the basic principle of equal treatment of all coasts and projections.

212. *Libya-Malta*, 1985 I.C.J. 13, para. 51.

213. *Guinea/Guinea-Bissau*, 24 I.L.M. 267, para. 124.

214. *Jan Mayen*, 1993 I.C.J. 38, para. 81.

215. Indeed, the objective of preventing cut-offs supports the position that, even where the size of the zones of each party is quite different, each zone should touch the median line. For example, in *North Sea*, Germany wanted its slice extended all the way to the point where it met the median line with the opposite states of England and Norway. *North Sea*, 1969 I.C.J. 3, para. 15. In the final negotiation, this claim was honored.

proportionality adjustments, a court may exercise some remedial discretion to adjust the line drawn in a manner that preserves and allocates straddling resources according to the internal shelf-zone criteria; and that prefers the geographical unity of shares and frontal projections and links with the median line or with the open seas or with significant localities, which should satisfy any external legitimate security considerations.

### *C. Synthesizing Equidistance with Coast-Length Proportionality*

Once equidistance is placed on the surgical table to make cuts are to harmonize it equitably with coastal lengths and to take in any tangential considerations, the considerations of how much and where to slice require both quantification and some organizing principles.<sup>216</sup> A major problem in synthesizing the two methods is that either by itself can, by and large, produce a total delimitation, so that some type of balancing and prioritizing between them becomes necessary. Another problem relates to the different quality of these two methods. Equidistance as a geometric method is rather concrete. The discretion in selecting basepoints and drawing baselines is manageable. On the other hand, the operation of proportionality is less reducible to sizes and lines. In *St. Pierre & Miquelon*, Judge Weil spoke eloquently of "the uncertainties and dangers of the proportionality test in its quantified form." Is the length of the coasts to be measured following the slightest sinuosities and the deepest indentations, or is it to be measured according to more or less arbitrary general directions? What are the contours of the relevant area? These operations have "this in common with love or Spanish inns: each finds in them what he brings to them."<sup>217</sup> The courts have been meandering through various techniques, raising concerns that the lines are being drawn impressionistically, if not randomly. For example, in the relatively straightforward opposite-coasts *Libya-Malta* case, which ended up in a moderate adjustment of the median line, the majority appeared to be jumping to its conclusions, no fewer than nine judges filed separate or dissenting opinions or declarations. In another simple geographical situation, *Jan Mayen*, ten of the fifteen judges on the ICJ filed separate or dissenting opinions or declarations!

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216. See Legault & Hankey, *supra* note 141, at 206.

217. *St. Pierre & Miquelon*, 31 I.L.M. at 1206, para. 24 (Weil, J., dissenting opinion).

## 1. Determining Relative Importance and Weights

### (a) Priority of Equidistance

The first thing that stands out is that reasonable proportionality to coast length is not equal in rank to equidistance. No case used it as the sole, the initial or even the provisional method. In no case was the outcome due primarily to it. It appears in no treaty or comparable text. Its principal function has been to test the result obtained through some other method or at most to qualify the application of such other method. Furthermore, the negative emphasis on disproportion, rather than on proportionality, as such, and the requirement of some magnitude, if not grossness, together with the qualification of reasonableness, suggest that this factor is of the safety-valve type, intended to moderate only serious offenses to the equality principle.<sup>218</sup>

### (b) Opposite v. Adjacent Coasts

A second distinction is that proportionality fades in opposite, versus adjacent, coast delimitations.<sup>219</sup> This differentiation is obvious when we compare how proportionality was used in *Libya-Malta* and *Jan Mayen* with its role in the mixed contexts of *Tunisia-Libya*, *Gulf of Maine* and *St.Pierre & Miquelon*.

### (c) Third-State Claims and External Projections

Where the delimitation does not cover the entire area within the

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[T]o take into account the extent of the respective coasts . . . is . . . mainly . . . a means of checking whether a provisional delimitation established initially on the basis of other criteria . . . satisfactory . . . [A] maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts . . . but . . . a substantial disproportion . . . call[s] for an appropriate correction.

*Gulf of Maine*, 1984 I.C.J. 246, para. 185.

219. See e.g., *North Sea*, 1969 I.C.J. 3, paras. 57-58; *Anglo-French Arbitration*, 16 I.L.M. 54, paras. 99, 182; *Gulf of Maine*, 1984 I.C.J. 246, para. 197. In its first case dealing exclusively with opposite coasts, the International Court of Justice reiterated this primacy of the median line and commenced the delimitation on this basis before making any adjustments. *Libya-Malta*, 1985 I.C.J. 13, para. 62. The dissenting judges would have made no adjustments for proportionality, unless there was abnormal configuration of the relevant coasts, *id.* para. 19 (Valticos, J., dissenting opinion); criticizing the 'unspecified impressions of equitableness,' *id.* para. 120 (Mosler, J., dissenting opinion); emphasizing that '[i]t is doubtful whether the test of proportionality has any place in the delimitation between purely opposite states,' *id.* para.184 (Schwebel, J., dissenting opinion). See also BOWETT, *supra* note 6, at 164

200-mile radius, due to the potential claims of third states in the region, such Italy in *Libya-Malta*, the ratio of coast to zones may arguably be beyond reasonable calculability.<sup>220</sup> In addition, where some coasts also project outside or beyond the delimitation area, it may become necessary to determine how much they are already being used up or partially satisfied. There are some hints in some separate opinions in *Jan Mayen* that the more the coasts are satisfied elsewhere, the lesser the necessity is of adjusting for disproportionality.<sup>221</sup>

(d) Determining and Quantifying Gross Disproportion and Making Corrections

Starting with opposite-coast situations in chronological order, the result in the *Anglo-French Arbitration* is very difficult to quantify. The mainland coasts were comparable in length and dominated the delimitation,<sup>222</sup> and over 90% of the total space would have been allocated the same way under either proportionality or equidistance. The Channel Islands would have more than doubled their allotted share under equidistance, but would probably have received less if proportionality were the only factor. Comparable figures come out of the Atlantic region. The ICJ endorsed a localizing approach in that proportionality "does not relate to the total partition of the area of shelf among the coastal States concerned, its role being rather that of a criterion to assess the distorting effect of particular geographical features,"<sup>223</sup> and made the related cuts in the areas of the shorter shores, those of the islands.

In the more recent opposite-coast cases, the grossness calculations and the sizes of the corrections are easier to decipher, and are more precise. In *Libya-Malta*, pure proportionality would have produced a Libyan share eight times larger than that of Malta, while under equidistance the shares would have been comparable in size. Thus, the grossness factor was about eight. The ICJ first shifted the median line to some extent in the direction of Malta, and then tested the outcome for reasonable proportionality, rejecting any predetermined arithmetical ratio and concluding that no further reduction was appropriate because, under "a broad assessment of the equitableness of the result," there was no evident disproportion.<sup>224</sup> While this entire

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220. *Libya-Malta*, 1985 I.C.J. 13, para. 74. See also *id.* para. 15 (Judge Oda dissenting opinion).

221. See *Jan Mayen*, 1993 I.C.J. 38, para. 92 (Oda, J., separate opinion); *id.* at 142 (Shahabuddeen, J., separate opinion).

222. *Anglo-French Arbitration*, 16 I.L.M. 54, para. 181.

223. *Id.* para. 250.

224. *Libya-Malta*, 1985 I.C.J. 13, paras. 74-75. Judges Ruda, Bedjaoui and de Arechaga wanted the line to move up a bit further, in essence giving Malta a three-quarters

process was affected both by the proximity of the Northern littoral of the Mediterranean (Italy)<sup>225</sup> and the intrusion of potential claims of third states,<sup>226</sup> and while the ICJ's explanations about the dimension of the shift were not very revealing,<sup>227</sup> Malta ended up with roughly three quarters of what it would have had in the delimitation area without this shift. The ratio of shares to coast lengths in the delimited area ended at roughly three to one,<sup>228</sup> so that a disproportion of more than two to one was apparently found acceptable. In other words, equidistance was given more than twice the weight of proportionality.

In *Jan Mayen*, under equidistance the shares of the overlap<sup>229</sup> would have been comparable whereas the coast-length ratios were slightly over nine to one.<sup>230</sup> Such substantial disproportion called for some correction,<sup>231</sup> by moving the median line to ensure an equitable solution.<sup>232</sup> Since the coast of Greenland received extra satisfaction elsewhere in the form of about two-thirds of one-quarter of the area outside the overlap,<sup>233</sup> the grossness factor was roughly over seven, comparable to the one in *Libya-Malta*. On that basis, Denmark claimed the full 200 miles of the 254 miles between them.<sup>234</sup> The ICJ rejected

effect. *Id.* paras. 31, 35-38. Judge El Khani also would have supported a larger shift. *Id.* at 59.

225. *Id.* para. 72.

226. *Id.* para. 74.

227. *Id.* para. 73. According to Judge Schwebel's dissenting opinion:

I cannot agree that the Court's cryptic references to the length of coasts, the distance between coasts, the scarcity of basepoints, and the general geographical context, suffice to justify the selection of the line of delimitation it has chosen in this case. Nor do these arrested allusions conduce towards building the sense of consistency and predictability at which the Court and the law so rightly aim.

*Id.* at 187.

228. Judges Ruda, Bedjaoui and de Arechaga, in a separate opinion, claimed that the Court's line produced a 2.38:1 ration (*id.* paras. 35-38), whereas Judge Schwebel put it as 3.8:1. *Id.* at 186. Judge Oda suggested a way of using equidistance in trapezoids and covering more total area between the two states to produce shelf ratios of between 2.3:1 and 4:1. *Id.* paras. 16-17 (Oda, J., dissenting opinion).

229. *Jan Mayen*, 1993 I.C.J. 38, paras. 18-21, 59.

230. The Court used two methods, both following straight lines across the coastal fronts and producing results close to 9:1. The first counted the length of the fronts from one end to the other along a single line (ratio: 9.2:1) and the second followed the successive baselines which had produced the median line (ratio: 9.1:1) *Id.* para. 61.

231. *Id.* para. 66.

232. *Id.* paras. 65-69.

233. Judge Oda argued that the median line should not be shifted unless there is disproportionality in the total areas allocated, not only in the overlapping regions. *Id.* para. 92 (Oda, J., separate opinion).

234. *Id.* paras. 62, 70. In his dissenting opinion, Judge Fischer would have honored the Danish claim on a theory of proportionality. *Id.* at paras. 12-13.

that claim and divided the area on the *Jan Mayen* side of the median line, treated as disputed, apparently for proportionality, first one to two. Another small segment was then added to the Greenland part in zone one to equalize access to the fishing resources. Thus, a total disproportion of the magnitude of at least three to one was tolerated. In terms of this difference in results, it is fair to conclude that equidistance weighed at least twice as much as proportionality.

Turning to the adjacencies or composite situations, in *North Sea* equidistance would have produced a German share one-third the size of the others, with the coastlines being comparable in length. The ICJ considered this split inequitable.<sup>235</sup> Germany argued for a share larger by about 65%, still lagging considerably in total area. Following negotiations, Germany ended up with an even lesser share by roughly one third.<sup>236</sup> In rounded figures, a grossness factor of close to two prevailed. The other cases were factually more complex, and the division of the delimitation area into sectors enabled the courts both to differentiate between opposite and adjacent areas, and to locate the corrections in distortion areas, even though typically the proportionality *ex post* test operated in a total fashion (i.e. to verify the equitableness of the entire shares allocated to the parties). This selective location approach also makes the incorporation of the tangential considerations related to division of natural resources and no cut-offs possible. In *Tunisia-Libya*, the dividing lines which awarded approximately 60% of the entire sea-bed to Tunisia and 40% to Libya were found to satisfy the proportionality test where the coast lengths stood in the approximate ratios of 69-31 along the actual coastlines, and 66-34 across the coastal fronts.<sup>237</sup> The only correction to the median line that was not related to historical or to past-conduct reasons occurred in the opposite-coast segment, by giving the Kerkennah Islands half effect. Without it, the Tunisian share would have increased by less than 10%. The Tunisian island of Jerba, located closer to the coast and ignored in drawing the baselines, was treated as if it were a promontory attached to the coast and was given comparable effect under proportionality. In these circumstances, it is virtually impossible to quantify a grossness factor. If, as is apparently the case, the ICJ was thinking only of the lengths of the opposite-coast segments, the correction is consistent with the magnitudes tolerated in the other cases.

In *Gulf of Maine*, the Chamber had started using in all three segments a process which basically drew median lines. Only in one

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235. *North Sea*, 1969 I.C.J. 3, para. 91.

236. *Treaty Concerning the Delimitation of the Continental Shelf under the North Sea*, Jan. 28, 1971, 857 U.N.T.S. 131, 155 reprinted in 1970-71 I.C.J. Y.B. 117.

237. *Tunisia-Libya*, 1982 I.C.J. 18, para. 131. See Feldman, *supra* note 208, at 219-238.



segment did it engage in an empirical, common-sense kind of proportionality adjustment exactly in the total coastal ratio of 1:1.32. A look at the map shows that the effect of the correction was felt mostly in the outer region and that, in total terms, it added less than 10% to the total United States share. The Chamber did not consider what the total share ratios would have been before and after the correction. *Guinea/Guinea-Bissau* ended up with equal shares for equal lengths under a special kind of median line, so there was no disproportion to be accounted for. In *St. Pierre & Miquelon*, the relevant coasts stood in the ratio of over 15:1,<sup>238</sup> and, under a rough equidistance, the grossness factor came close to four. In one of the two sectors, a reasonable and equitable zone for the islands met "to some degree the reasonable expectations of France."<sup>239</sup> It extended to the end of the contiguous zone (24 miles) up to the median line, and operated close to equidistance for about half the frontage. In the other sector, where the narrow coast of the islands faced the open sea, a 188-mile frontal projection of the islands beyond the territorial sea was recognized in parallel with Newfoundland. The radial projections of both were prevented in order to avoid a cut-off effect.<sup>240</sup> In the remaining small segment of the easterly projection of St. Pierre, the line was fixed at 12 miles without explanation or discussion.<sup>241</sup> The ICJ finally examined the lines under both the catastrophic-repercussions-radical-inequity and the coast-length-disproportionality tests, and found them satisfactory. The ratio of the shares came to about 16.4:1, thus certainly showing no disproportion to the 15.3:1 coastal length ratio. In total figures, the islands received about one quarter of their shares under equidistance. Thus, the ICJ relied principally on proportionality in drawing the lines. The ICJ hinted, however, that if only the opposite coasts counted, the correction would have been different.<sup>242</sup>

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238. *St. Pierre & Miquelon*, 31 I.L.M. at 1162, para. 33. Judge Gotlieb, in a dissenting opinion, disagreed with the measurements, claiming a minimum 21.4:1 ratio. He complained that the Court did not use the same degree of generalization for the coasts of each party. Canada used 12 straight lines to reach 514.4 miles for its own coasts, for an average line of 42.9 miles, whereas the Court used three lines to measure the coast of the islands for an average line of 9.95 miles. Breaking up the Canadian coast the same way would have pushed up the Canadian figure. *Id.* paras. 8-17 (Gotlieb, J., dissenting opinion). It was generally agreed that measuring along all sinuosities was not proper. *Id.* para. 12.

239. *Id.* para. 69.

240. *Id.* paras. 70-71. Judge Weil, in a dissenting opinion, strongly opposed the distinction between frontal and radial projections. In his view, this strange concept has no support either in state practice or in the cases. The outer limits of maritime jurisdiction are commonly determined by the "arcs of circle method" on a given radius in all directions. *Id.* paras. 11-14.

241. *Id.* para. 71. Judge Weil wondered why an additional 12-miles zone was not recognized on the same basis as in the first sector. *Id.* para. 7 (Weil, J., dissenting opinion).

242. *Id.* paras. 72-73.

These quantifications of grossness and correction may appear somewhat brusque and simplistic, and may reflect more the outcome of the cases than the doctrine, but they have decent explanatory power. While any proposed figures may be challenged in a musical-chairs fashion, the real question is whether it makes better sense to affix some numbers on the slices of the pie and debate and defend them, than to rely on chance and intuition.

By way of conclusion, the cases by and large support the proposition that, given the priority and equitableness of equidistance, the disproportion is not gross and needs no correction unless the result between coasts and shares obtained under equidistance in the particular region or sector is in excess of *twice* the coastal ratios in that region or sector. All of the cases except *St. Pierre & Miquelon* can be cited for at least that number. The fact that the French mainland was too far to reinforce the claims of the islands may be part of the explanation in *St. Pierre & Miquelon*. In any event, the later case of *Jan Mayen*, with the ICJ behind it, gave substantially more weight to equidistance than to proportionality in a similar situation. An auxiliary proposition is that even where a correction must be made, it is limited in that it does not seek to bring the ratio down to the non-grossness level but only to moderate it. Another important point is that the sectorization practices adopted by the courts enable them, in a micro-geographic context, to localize a disproportionality at the initial stage, and to correct it only there within the above parameters, as was done, for example, in the *Anglo-French Arbitration*. Of course, this does not preempt the ultimate use of the proportionality test for the total picture. Finally, it would seem that the greater the distance between the competing coasts, and therefore the more room to spare, the heavier the weight of the proportionality factor.<sup>243</sup> It should be remembered that the ICJ's concern about equidistance in *North Sea* centered on the magnification of its effect in the outer regions. This is also reflected in the different standards for the territorial sea under UNCLOS.

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243. For example, in *Libya-Malta*, the shift was facilitated by the great distance between the coasts. *Libya-Malta*, 1985 I.C.J. 13, para. 73. Judge Mbaye, in a separate opinion, took issue with this. *Id.* at 100-102. See also Schwebel, J., dissenting opinion, at 182. On the other hand Judge Valticos' separate opinion agreed with the majority. *Id.* para. 23.

## 2. The Mechanics of Adjusting Equidistance for Disproportionality and Other Factors

### (a) Establishing and Streamlining the Relevant Maritime Fronts and Defining Their Projections

Recognizing the maritime front as the sole source of right is a crucial, but only a first step toward boundary demarcation. The relevant coast needs to be identified in terms of abutting on and facing toward the area to be delimited. While this process is highly outcome-determinative, in all cases except *St. Pierre & Miquelon* there had been no major consequential disagreement on which coasts counted.

Next, choices must be made as to how the fronts project onto the maritime spaces. Appurtenance calls for the allocation of the maritime zones to the states *in front* of whose territory they lie. The frontal projection of the coasts does not mean that they project only or preferentially in the direction perpendicular to the general direction of the maritime front. The basic rule is that *every* coastal front, regardless of its length and orientation, projects *equally in all directions* up to 200 miles. The U.S. argument in *Gulf of Maine* that primary coasts project more than secondary ones, or should be otherwise preferred, was rejected by the Chamber,<sup>244</sup> and has not resurfaced. In *St. Pierre & Miquelon*, the ICJ was equally unreceptive of the notion that shorter coasts have diminished projections than longer ones under relative reach.<sup>245</sup> But in making adjustments for other reasons such as proportionality, frontal projections may be preferred over radial ones in certain sectors, for example, on a 'cut off' rationale, as was done in that case.

### (b) Pursuing the Details of Adjustment for Proportionality

#### (i) Measuring Lengths and Counting Sizes: Straight Lines v. Sinuosities and Total v. Related Sea-Beds and Water Columns

Judge Weil's doubts in *St. Pierre & Miquelon* on the math of proportionality, which incidentally undermine its very validity, are eloquent, albeit exaggerated:

How is [the] length [of the coasts] to be measured: by allowing for the slightest sinuosity and calculating the perimeters of the deepest

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244. *Gulf of Maine*, 1984 I.C.J. 246, at 36, 108.

245. *St. Pierre & Miquelon*, 31 I.L.M. 1145, paras. 43-45, 57-59.

indentations and the longest promontories, or by following a general direction that is more or less simplified and thus necessarily arbitrary? And how should the contours, and hence the size, of the relevant area be defined?<sup>246</sup>

However, without some such math we are chasing rainbows. Judge Weil identified the two key proportionality issues. One, how do we measure the coastal length? Two, what counts as a 'share' of the shelf? More particularly, does the share also include the sea-bed and the water column of the territorial sea and the internal waters?

Streamlining the coasts starts, if possible, with the establishment of their general direction,<sup>247</sup> and then of various basepoints at key locations, joining them by drawing straight baselines, often divided into sectors.<sup>248</sup> This is particularly evident in the drawing of the median line.<sup>249</sup> The waters inside the baselines are treated as internal.

In *North Sea*, the ICJ assumed that "the length of [the] coast [will be] measured in the general direction of the coastline" for

246. *Id.* para. 24. For his attack on 'the arithmetical equity of coastlines and areas' as 'blind and mechanistic proportionality' see *id.* para. 21.

247. See *North Sea*, 1969 I.C.J. 3, paras. 89, 91, 98; *Anglo-French Arbitration*, 16 I.L.M. 54, at 251; *Tunisia-Libya*, 1982 I.C.J. 18, paras. 76, 93, 120 and paras. 77-102 (Arechaga, J., separate opinion); *Guinea/Guinea-Bissau*, 24 I.L.M. 267, paras. 97-98 (giving the islands full effect in determining the crucial "coastal configuration and orientation"); *Libya-Malta*, 1985 I.C.J. 13, para. 70. See also *Jan Mayen*, 1993 I.C.J. 38, para. 61.

It should be pointed out that establishing the general direction of the coast does not necessarily mean that the dividing line must be parallel to it and even less to the abutting land frontier. In *Gulf of Maine*, the Chamber rejected perpendicularity to the direction of the coast where the two territories met or to the general direction of the coast, on the ground that they were useful in drawing the dividing line only where the territories of the two countries "lie successively along a more or less rectilinear coast, for a certain distance at least." *Gulf of Maine*, 1984 I.C.J. 246, paras. 175-76. However, it did draw perpendiculars in certain limited contexts.

248. See F. AHNISH, *THE INTERNATIONAL LAW OF MARITIME BOUNDARIES AND THE PRACTICE OF STATES IN THE MEDITERRANEAN SEA* 11-30 (1993), for a brief but informative discussion on baselines [hereinafter AHNISH]. See generally Louis B. Sohn, *Baseline Considerations*, I.M.B. 153-161 (1993); Peter Beazley, *Technical Considerations in Maritime Boundary Delimitations*, I.M.B. 243-262 (1993).

Article 7 of UNCLOS provides for the discretionary deployment of straight baselines, from which the breadth of the territorial sea is measured, across the general direction of the coast, where the coastline is deeply indented or there is a fringe of islands in its immediate vicinity. The system, however, has been used more broadly. Most states of the world, with the significant exception of the United States of America, Japan and Greece, use basepoints to draw straight baselines, and typically also the breadth of the continental shelf and the exclusive zone are measured from the same baselines. See Jayewardene, *supra* note 6, at 43-79, for the use of straight baselines regarding islands.

249. As stated in *North Sea*, "[Where the median line is used], the establishment of one or more baselines . . . can play a useful part in eliminating or diminishing the distortions that might result [from coastal anomalies]." *North Sea*, 1969 I.C.J. 3, para. 98.

proportionality purposes.<sup>250</sup> This suggests straightening in front of the sinuosities, but not necessarily with straight baselines. *Tunisia-Libya* is the first case where the inclusion of the other waters in the calculation of the size of the shares would have made a big difference, in this instance against Tunisia. Here we find in the opinions significant references to both of these issues. While conceding that the continental shelf, in the legal sense, does not include the sea-bed areas below territorial and internal waters, the ICJ noted that the coastal state does enjoy sovereign rights for the purpose of exploiting their natural resources. Since, for proportionality purposes, the lengths of the coasts were measured in full and not along straight baselines, it was also appropriate to include those additional areas in the shares. The only absolute requirement of equity is that one should compare like with like.<sup>251</sup> The ICJ undercut the cogency of its approach, however, by emphasizing that this inclusion was not strictly required by international law but was legitimized by the 'relevant circumstances' in the case, including the fact that the parties here had not been calculating their own related waters in the same way and in similar configurations.<sup>252</sup> The ICJ measured the length of the coastlines once along straight lines following the coast, but apparently technically not straight baselines and once apparently along the sinuosities, coming up with comparable results: 31:69 and 34:66.<sup>253</sup> In the end, the ICJ compared these extended lengths with the extended shares and found them satisfactory.<sup>254</sup>

In *Gulf of Maine*, the Chamber added up the total relevant coastlines of Canada and the United States as measured along the coastal fronts in straight lines in a number of segments,<sup>255</sup> not following all their sinuosities. A major issue was how to measure the coasts of the Canadian Bay of Fundy, whose wide mouth fronted on the Gulf. The Chamber counted it as part of the Gulf up to the point where it narrowed, so that it contained only maritime areas lying no more than

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250. *Id.* para. 101(D)3.

251. *Id.* para. 104. Judge de Arechaga agreed in a separate opinion, "[that not to include those areas] would be to commit the sin of formalism; to allow that form of inequity which the Romans called *subtilitas*, that is to say, an exaggerated adherence to the strict letter of the law when equity demands a broader approach for the purposes of comparison." (Valticos, J., separate opinion). *Id.* para. 120. On the other hand, Judge Evensen was quite critical, especially of the inclusion in the shares of the internal low-depth waters. *Id.* para. 23. Including the territorial waters in the calculation had originally been suggested by Judge Bustamante y Rivero. (Bustamante y Rivero, J., separate opinion) *Id.* para. 4.

252. *Id.* para. 103.

253. North Sea, 1969 I.C.J. 3, para. 131. See also Judge Evensen, dissenting. *Id.* para. 23.

254. *Id.* para. 131.

255. *Id.* para. 221.

12 miles from the coast.<sup>256</sup> Consequently, its coast up to that point, plus a line across the mouth of the Bay there, was included in the proportionality calculus.<sup>257</sup> This inclusion had materially favorable consequences for Canada. The Bay added only 7% to the entire sea area but apparently increased the length of the Canadian coast by 93%!<sup>258</sup> The straightening of the coastal fronts was adumbrated in *Libya-Malta's* perception that proportionality requires that "coasts which are broadly comparable ought not to be treated differently because of a technical quirk of a particular method of tracing the course of a boundary line."<sup>259</sup> The coasts were measured in straight lines to produce the figures of 194 and 24 miles.<sup>260</sup>

In *St. Pierre & Miquelon*, the ICJ measured the respective coasts "by segments, according to their lines of general direction," not following their sinuosities which would have favored Canada.<sup>261</sup> Judge Gotlieb took the ICJ to task for relying on longer line segments for Canada and shorter ones for the islands, thus reducing the disparity in the ratios;<sup>262</sup> and Judge Weil referred to the elusive and arbitrary ways of measuring lengths and shares to challenge proportionality altogether.<sup>263</sup> With regard to the size of the shares awarded, the ICJ relied on experts who calculated the relevant area, which was allocated 16.4:1 to Canada.<sup>264</sup> Finally, in *Jan Mayen* the measurement of the relatively straight and parallel coastlines did not present a problem.<sup>265</sup>

While there is some ambiguity on how to calculate the lengths of lines, and especially the size of shares, for purposes of the

256. *Gulf of Maine*, 1984 I.C.J. 246, para. 31.

257.

[T]he fact that the two coasts opposite each other on the Bay of Fundy are both Canadian is not a reason to disregard the fact that the Bay is part of the Gulf of Maine, nor a reason to take only one of these coasts into account for the purpose of calculating the length of the Canadian coasts in the delimitation area. There is no justification for the idea that if a fairly substantial bay opening on to a broader gulf is to be regarded as part of it, its shores must not belong all to the same State.

*Id.* para. 221.

258. *Id.* at 356 (Schwebel, J., separate opinion). Schwebel argued that the Chamber should have considered the fact that in the past Canada had claimed that the entire Bay contained 'internal waters.' Furthermore, the Chamber was accused of being inconsistent by not making the same fine distinction in calculating the length of the inner coast of the Massachusetts Bay. *Gulf of Maine*, 1984 I.C.J. 246, paras. 354-55.

259. *Id.* para. 56.

260. *Id.* para. 68.

261. *Id.* paras. 8-17 (Gotlieb, J., separate opinion).

262. *Id.* paras. 8-17 (Gotlieb, J., separate opinion)..

263. *Id.* para. 24 (Weil, J., dissenting opinion)..

264. *Id.* para. 93. Judge Gotlieb challenged in great detail the Court's position on what constituted the relevant area. *Id.* paras. 34-37 (Gotlieb, J., dissenting opinion).

265. *Jan Mayen*, 1993 I.C.J. 38, paras. 89-93

proportionality calculus, a couple of things stand out as sensible and grounded in the cases. First and foremost, there must be congruity between the criteria that determine lengths and those that define shares. If territorial and even internal sea areas are included in the shares, then the coast lines that generate them should also be included in the lengths, and vice-versa. On the merits, the explanation offered in *Tunisia-Libya*, the only case that dealt explicitly with issue, of why the territorial and internal waters may be included in the size of the shares is sketchy and unconvincing. The definition of the shelf and the exclusive zone could not be clearer: areas "beyond . . . the territorial sea."<sup>266</sup> Internal waters are defined as those "on the landward side of the baseline of the territorial sea."<sup>267</sup> By what logic are those spaces to be counted in determining the size of the shelf and zone shares? To be sure, the coastal state has exploitation rights in these sea-beds and water columns. But these rights not only arise from a different source, but they have different content: they are not shelf and exclusive zone rights, and they trigger the exercise of higher or full sovereignty. Furthermore, the sovereignty over these waters preceded by centuries the recognition of the new rights to extended maritime spaces. Thus, the titles differ in all important respects. The only community is factual: they all relate to areas under the surface of the water. This should not suffice to justify penalizing a state for the geography of its coasts. Second, the coastlines may be divided into sectors and/or be measured in segments, reflecting the directions of the front and reducing indentation, with localized straightening, to avoid disparities between the shares of territorial belts and the shelves. Indeed, we find here perhaps the kernel of an idea that could prove quite useful as a surrogate in taking account the length of the fronts. Assuming that we use the same standards and methods for establishing the territorial belts and for minimizing the internal waters, a reasonable test of proportionality should be that the median line has produced shelf and exclusive zone areas which are not grossly out of line with the total ratio of territorial belts. In any event, whatever approach is chosen should apply in a neutral fashion, equally and consistently to the coasts and shares of all parties.

(ii) Where to Draw the Lines : Symmetry?

*Jan Mayen* addressed the issue of symmetry in some detail. To explain why a small segment of the line was moved in a different manner than the others, the ICJ stated:

So far as the continental shelf is concerned, there is no requirement

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266. UNCLOS, arts. 55, 76.

267. *Id.* art. 8.

that the line be shifted eastwards consistently throughout its length: if other considerations might point to another form of adjustment, to adopt it would be within the measure of discretion conferred on the ICJ by the need to arrive at an equitable result. For the fishery zones, equitable access to the resources of the southern part of the area of the overlapping claims has to be assured by a substantial adjustment or shifting of the median line provisionally drawn in that region.<sup>268</sup>

This now confirms what was implicit in all important cases, that the line need not be moved equally along its entire length and that varying approaches can be used in different sectors, taking into account, if and as appropriate, whether the shelf and/or the zone is delimited, and taking into account tangential considerations such as location of natural resources, non-encroachment and no cut-offs. Within each sector, however, the tendency is to move in a consistent manner. Total symmetry is not present where some reduced effect or enclaving is attributed to some coasts, such as in *St. Pierre & Miquelon*. On another issue, we may even detect a preference for adjusting in favor of frontal versus radial projections, although the nature of the projection does not affect the dimensions of the calculation.

The availability of judicial remedial discretion in line-drawing does not mean, however, that it should be exercised arbitrarily or at random. It should be presumed that, in the absence of any articulated and sufficient factors justifying a departure, symmetry should be the rule as more consistent both with the notion of appurtenance based on distance and with neutrality.

### (iii) Where to Draw the Lines : Why Not Equi-Ratio?

Practical wisdom requires an effort for the unity of shares and the avoidance of odd shapes or zig-zag lines. Furthermore, if there is one field in which an equitable solution is most useful and consecrated, it is in the fashioning of flexible remedies for concrete needs. The asymmetrical and protruding mushroom shape of the French zones in *St. Pierre & Miquelon* makes little sense. To be sure, the ICJ wanted to demonstrate that islands have full rights by giving them some 200-mile zones. The differentiation of methods by sectors, here semi-enclaving, there equidistancing, is also within reason. But why not devise some technique to construct zones that make geographical sense?

One sensible method for synthesizing equidistance and proportionality is equiratio, developed by a Dutch hydrographer,<sup>269</sup>

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268. Jan Mayen, 1993 I.C.J. 38, para. 90.

269. Wijnand Langeraar, *Maritime Delimitation: The Equiratio Method A New Approach*, MARINE POL'Y 10, 3-18 (1986).



which works both where a small island faces a massive nearby coast, such as in *St. Pierre & Miquelon*, and in difficult adjacent state delimitations. In the former situation, equidistance normally creates a parabola which keeps opening as we move backward toward the open sea. Under equiratio, the 1/1 equidistance parabola can be replaced by an ellipse maintaining a constant ratio of distances from the nearest points of the baselines, the dimensions of which can be changed according to a scale, such as 9/10, 4/5, or 7/10, to reflect a proportionality correction. Another way of describing equiratio is to state that the distance part of equi-distance is transformed from 1:1 to 9:10, for example. Applying this technique to *Libya-Malta*, a .74/1 equiratio would have produced a line very close to the one constructed by the ICJ,<sup>270</sup> which can be interpreted as giving the proportionality factor a 25% weight. A 9/10 equiratio comes close to explaining the outcome in *North Sea*, as finally negotiated, and in *Libya-Tunisia*, giving full weight to the islands.<sup>271</sup> The beauty of equiratio is threefold. First, it helps us bring out to the open and explain what the courts did both in terms of quantification and of where the lines were drawn. Thus, we are on the way of constructing guidelines for future boundaries. Second, it largely by-passes the confusing and unprincipled apparent discrimination against islands while it does a better job in effectuating the rationale behind those attempted distinctions. Third, it provides a model for drawing viable and sensible lines, especially curved, oval ones, around islands, with or without enclaving, avoiding rather grotesque shapes such as the one in *St. Pierre & Miquelon*.<sup>272</sup> When additional considerations must be taken into account, appropriate deviations may be made *ex post*.

## V. SPECIAL ISSUE : THE STATUS OF ISLAND COASTAL FRONTS

The second doctrinal wrong turn in delimitations, largely due to the confusion generated by the first one, the escape to equity, concerns the treatment of islands. Here, we are confronted with what appears as a major and irreconcilable contradiction. On the one hand, the international treaties and the cases uniformly recognize the equal status and rights of all coastal territory, including that of islands.<sup>273</sup> On the other hand, we find in some cases what appears to be the short-

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270. *Id.* at 16-18.

271. *Id.* at 8-14.

272. The way that dissenting Judge Gotlieb discussed the drawing of borders in *St. Pierre & Miquelon* suggests that he would have been receptive to the equiratio technique, albeit in less generous terms. See *St. Pierre & Miquelon*, 31 I.L.M. at 1186-1189, 1191, paras. 29-38, 47

273. However, rocks which cannot sustain human habitation or economic life are excluded. UNCLOS, *supra* note 1, art. 121.3.

changing of minor or small islands through lesser effect, movement back or enclaving. State practice reflects similar results. Is there perhaps some equitable way of reconciling these two positions?

At the outset, one is hard put even to articulate a logical or policy reason for why the extent to which a particular territory of the coastal state is surrounded by water should be relevant in determining its continental shelf and economic zone rights. Remember, these rights derive from, and depend solely on, appurtenance on the territory having a coastal front. All islands have coastal fronts. These coastal fronts face equally toward the areas to be delimited. Of course, depending on the respective coastal fronts, the shares of islands, like the shares of other territory, may be different (that is larger or smaller) than those of a particular mainland or of another island. For example, even under equidistance, the share of Jan Mayen came to about only one-half the size of the share of Greenland. This was unrelated to the island-mainland characterization. Is there any other basis for the lesser treatment of island coastal fronts? Why should it matter whether, for example, Malta is separated by sea from or is connected to the northern littoral?

In addition, setting islands apart creates serious practical problems of administration. To begin with, what is an island? The major continents of the earth are technically islands. Should Malta be classified as island but Cyprus or Great Britain or Greenland or Australia not? Should a promontory surrounded 90% by water be treated in a similar way?<sup>274</sup> Another difficult problem is whether all, or only some, islands should be diminished. If only some should be, which ones, why, in what way and how much? In other words, are some islands more equal than others?<sup>275</sup> In particular, should it matter whether an island, but not other territory, is politically independent?<sup>276</sup>

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274. See *Anglo-French Arbitration*, 16 I.L.M. 54, para. 244.

275. The wide shelf areas with plenty of islands which exist in many places on earth, also indicate that it would be a very difficult task in practice to establish criteria for distinguishing between islands entitled to a shelf of their own and other islands. Lars Delin, *Shall Islands Be Taken Into Account When Drawing the Median Line According to Article 6 of the Convention on the Continental Shelf?*, 41 *NORDS. INT. RET.* 205, 208 (1971).

276. The references to political independence appear inconclusive. In the *Anglo-French Arbitration*, the Court stated that the Channel Islands "only as islands of the United Kingdom, not as semi-independent States," *Anglo-French Arbitration*, 16 I.L.M. 54, para. 186, have "their own entitlement to continental shelf separate from the United Kingdom." *Id.* para. 190. In *Libya-Malta*, Malta's argument that as an 'island State' it had some sort of special status was rejected. *Libya-Malta*, 1985 I.C.J. 13, para. 53. See Bowett, *supra* note 6, at 133-34, for a discussion on the ambiguities of *Anglo-French Arbitration* and *Libya-Malta*. The most unequivocal statements against different treatment appear in *St. Pierre & Miquelon*:

In the view of this Court there are no grounds for contending that the extent of the maritime rights of an island depends on its political

After so many adjudications and settlements over a long period,, most of which involved islands, and with the help of so many relevant texts, the time is ripe to move beyond the *ad hoc* indeterminacy of impressionism. It is time to search for the rhyme and reason of any special rules applicable to islands, as well as, some method of carrying them out.<sup>277</sup> Many future delimitations involve islands in complicated geographical patterns,<sup>278</sup> and some guidelines are desperately needed. The literature on this topic is a bit dated, as it was written mostly before *St. Pierre & Miquelon* and *Jan Mayen*, the major island cases, and it tends to be mostly descriptive. For lack of a better explanation, some commentators sought the reason for the different treatment of islands in their location, in how close they were to the coasts of their own versus the other states. Is this the right path?

#### A. *The Conventions*

First, both Article 1 of the *Geneva Convention* and Article 121.2 of UNCLOS solemnly recognize that islands enjoy equal status and equal continental shelf and exclusive zone maritime rights with any other configuration of territory.

This position received a boost when all attempts by delegates from certain nations at the Third UN Law of the Sea Conference, which produced UNCLOS, to reduce, circumscribe, and even eliminate, in

status. No distinction in this respect is made by Article 121, paragraph 2 of the 1982 Convention on the Law of the Sea or by the corresponding provisions of the 1958 Conventions . . . .

*St. Pierre & Miquelon*, 31 I.L.M. 1145, para. 49.

However, non-independence may affect the mechanics of drawing the lines since the inclusion of an island, as of any other non-independent territory, in an overall delimitation may have an impact, for example, reflecting considerations of proportionality to the total coast lengths. It should also be mentioned here that the past debates, especially in UN contexts, on the special status of islands under 'foreign' control located near the coasts of states freed from colonial domination, which remain in any event inconclusive, have no impact on the general issue of island maritime entitlements. See SYMMONS, *supra* note 6, at 57-60

277. Compare, Charney, *Progress*, *supra* note 4, at 256, n. 153, stating that:

There are grounds to demur [to Judge Weeramantry's argument in *Jan Mayen* that it is too early for conveyance toward more determinative law]. In the last 50 years, there have been more separate international adjudications and arbitrations on this subject of public international law than any other. Furthermore, approximately one-third of the potential maritime boundaries have already been settled by agreement or otherwise. If now is too early, when would it be time?

278. Many of the Central East Asian maritime boundaries can be so classified. See e.g., Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724-749 (1995).

certain contexts, island rights were resoundingly rejected.<sup>279</sup> These proposals focused primarily on location and the more drastic ones would have eliminated *tout court* the entitlements of *islands situated closer to another state*:

Islands which are situated on the continental shelf of another state, or which on the basis of their geographical location affect the normal continental shelf or EEZ of another state shall have no economic zone or continental shelf of their own.<sup>280</sup>

Turkey had also made a separate complex proposal eliminating the rights of *smaller islands* providing that an island:

situated in the economic zone or the continental shelf of other States shall have no economic zone or continental shelf of its own if it does not contain at the least one tenth of the land area and population of the State to which it belongs'.<sup>281</sup>

A subsequent proposal, which addressed the broader category of *non-adjacent* islands but which was more limited in scope and reach, provided that the maritime spaces of such islands:

shall be delimited on the basis of relevant factors taking into account *equitable criteria*. . . These equitable criteria should normally relate to (a) *the size* of these normally formed areas of land (b) their geographical configuration and their *geological and geomorphological structure* (c) *the needs and interests of the population* living thereon (d) *the living conditions* which prevent a permanent settlement of population (e) whether these islands are situated *within, or in the proximity of, the maritime space of another state* (f) whether, due to their *situation far from the coasts*, they may influence the *equity* of the delimitation.' (emphasis added).<sup>282</sup>

Note that all of these criteria (size, geomorphology, needs and interests of population, living conditions, and even location as such) have been either explicitly rejected, or have not been taken into consideration in the prior cases. This stance is even more clearly reflected in the subsequent cases. UNCLOS did not even include any provisions that qualified the maritime rights of islands in the context of

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279. See generally SYMMONS, *supra* note 6, at 94-100 (discussing the early phases). These early proposals were intended to promote national interests rather than to reflect an *opinio juris* and not one of them was incorporated in or affected in any way the final text of UNCLOS. KARL, *supra* note 6, at 645. It is also to be remembered that Iranian and Italian proposals in the negotiations leading to the Geneva Convention to discount islands were heavily defeated in 1953.

280. A/CONF.62/c.2/L.96 (proposed by nine states).

281. *Id.* at L.55 (Article 3.2).

282. *Id.* at L.62, Rev. 1.

a semi-enclosed sea.<sup>283</sup> This decisive and generalized defeat of all these qualifications also established, beyond doubt, especially after the demise of the natural prolongation concept, that islands as such situated near another state are not themselves just special circumstances sitting on such state's shelf.<sup>284</sup> Rather, they have full entitlements either on their own, or in conjunction with other territory fronting on the delimitation area.

### *B. The Cases and the Commentators*

Beside the texts of the Conventions, we find in the cases many authoritative, unequivocal assertions that islands have the same rights as any other territory.<sup>285</sup> Indeed, we cannot find a single unambiguous judicial statement qualifying or reducing the entitlements of islands as such. This suggests that Article 121.2 of UNCLOS codifies customary international law.

Why, then, in many cases and in a good number of state settlements do we find in certain islands' situations diminished shelves and zones below the equidistance reduction, drawn without much explanation beyond the notion that 'I know equity when I see it?' Is there some logic, some principle, or some practical wisdom underlying this differentiation beside an *a priori* lesser entitlement of islands as such? Is proportionality perhaps the explanation for these situations?

Many commentators did not seriously pursue that explanation. One reason was that courts and states have been hesitant to give that much explicit weight to proportionality. The other reason was that many

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283. As had been proposed by Turkey (A/CONF.62/C.2/L.55) and this despite the fact that UNCLOS recognizes the concept of an "enclosed or semi-enclosed" sea (Part IX, Article 122-123) and provides for certain duties of cooperation and coordination of the littoral states. Incidentally, the irrelevance of that concept in boundary formation is reflected in Libya-Malta where the International Court of Justice referred to the entire Mediterranean as being a "semi-enclosed sea" and still applied the same general criteria of delimitation. *Id.* para. 47. This, of course, does not mean that, where proportionality adjustments are being made in tight quarters, the radial projections of shorter coasts may be where the cuts are to be made. *Cf.* Evans, *supra* note 199, at 686.

284. As explained by Judge Schwebel in his separate opinion in Jan Mayen:  
The acceptance of islands as a special circumstance in the travaux préparatoires (of the Geneva Convention) plainly refers to islands whose situation or size or other characteristics may constitute a special circumstance in a delimitation between two other coasts; an island was not conceived to be of itself a special circumstance which affects its own coastal projections. That concept is so bizarre that naturally it finds no expression in the intentions of those who drafted the 1958 Convention.

Jan Mayen, 1993 I.C.J. 38, at 121-23. *See also* Karl, *supra* note 6, at 651

285. This position was recognized early in no lesser case than North Sea, 1969 I.C.J. 3, para. 57; *see also* JAYEWARDENE, *supra* note 6, at 344.

commentators mentally focused on the model of two mainland states, *first* dividing maritime spaces of less than 400 total miles between their coasts, *then* adding islands on the map to see what effect they would have on the delimitation. In that context, it is easy to understand why the island distance criterion became relevant, and why it made sense to classify the islands into three categories: islands close to their own mainland, islands straddling the median line, and islands closer to the other state's mainland. The rhetoric associated with this locational approach proceeded to label islands as being on the wrong side of the median line, or deflecting it excessively or distorting the geographical situation. Once this characterization is accepted, it sounds sensible that such islands should be pushed back to their proper place.<sup>286</sup>

It seems to me that this approach not only reflects false assumptions, but fails to guide us toward a method for the resulting adjustments. The idea of islands being at the wrong place or on the wrong side assumes that we have predetermined where the right side lies. Perhaps the Creator, or nature, first generated the mainlands and endowed them with their entitlements, and then mistakingly, or at least inadvertently, cast the islands where they do not belong. With equal plausibility we could argue the reverse, that after the sea came the islands and the continents constitute misplaced latecomers. The absurdity of this distinction is only further strengthened by the fact that it does not take size into account, so that an island would come second even where its coast is longer than that of the mainland. It is apparent that this approach not only begs the question, but violates the cardinal rule of delimitation, that geography should not be refashioned.

The second, fatal, flaw of this explanation is that it tells us nothing about how much and where the island shares should be diminished. We need a measuring rod to determine how much deflection of the normal line is excessive or distortive, as well as a technique of correction. (How much lesser effect (a half, a third?), and how (e.g. movement back?) and when is partial or full enclaving justified instead, and of what size?) Excessiveness or distortion presuppose that we know what is proper and normal. As explained earlier, most of the typical characteristics of a piece of territory, including an island, such as landmass, population, economic need and political status have been eclipsed as relevant factors. The distance-to-its-own-versus-to-another-mainland idea which underlies the wrong place argument not only lacks legal authentication

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286. This approach was cultivated especially by Karl, *supra* note 6, at 651, 654-63 and Pazarci, *supra* note 6, at 92, 246, 257, 327, 336. It has also been elaborated by JAYEWARDENE, *supra* note 6, at 349-70. The latter author refined the classification, creating seven categories of islands: coastal, offshore, offlying, right-side, astride the median line, wrong-side and detached. *Id.* at 366-70.

but also it is difficult to manage.<sup>287</sup>

It follows that where the 200-mile radius from a mainland, or for that matter from another island with competing claims, extends to shelf or to exclusive zone waters behind a distant island, all sides of such island facing toward the same areas should count. There is no such thing as a natural back side of a distant island. As the competing mainland coast is counted first to share the in-between space with the inner side of the island, and then again to share in full the outer space with the external side of the island, all sides of the island constitute relevant coasts.<sup>288</sup> The concerns expressed about islands projecting in more directions than mainlands, especially straight ones, and thus a mile of an island coast getting more mileage than a mainland mile,<sup>289</sup>

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287. Karl's approach, including the basepoint dimension, is to recognize genuine shelf rights only to islands lying close to their own mainland, to independent insular states and to distant islands on the wrong side. Karl, *supra* note 6, at 654-61 and at 669, n. 108. This bundling not only brings in the questionable factor of independence but leads to the paradox that far off distant islands fare better than such islands within 400 miles of their mainland! As for the remaining islands, Karl further subdivides them into 'substantial' ones (more or less 25% of the territory of the state) and the rest, and short changes the rest by providing for them only territorial waters, giving the benefit of the proportionality factor only to substantial islands. *Id.* at 662-64. The Karl approach is not plausible either in its classifications or in its outcomes. See also Jayewardene, *supra* note 6.

288. While the cases contain little explicit language on this issue, mostly because it did not really matter in most contexts, there is nothing to suggest a different approach. In the Anglo-French Arbitration, as well as in Gulf of Maine, the length of the coasts of the islands was insignificant and the proportionality adjustment was very gross. It would appear that the treatment of the coastal front of the islands in St. Pierre & Miquelon is consistent with the position taken in the text. Indeed, the Court included in the proportionality measurements all sides of the French islands except those that fronted on the area charted by the 1972 territorial sea delimitation agreement between the two countries. By the same token, however, the Canadian coasts facing the same area were equally excluded. St. Pierre & Miquelon, 31 I.L.M. 1145, paras. 30-33; *cf.* paras. 8-25 (Gotlieb, J., dissenting opinion).

This issue has also escaped the attention of the publicists. Karl is not sufficiently explicit: on the one hand, he agrees that the "measure of an island's size for the purpose of delimitation is . . . the length of [its] coastline," and clarifies in his footnote that we count "the amount of coastline that borders the area to be delimited," suggesting a total measurement. Karl, *supra* note 6, at 663, n. 86. On the other hand, he adds that "the maximum length of an island would be an appropriate measure of the length of the island's coastline," *id.*, and it is not clear that he includes all sides facing the delimitation areas in his mathematical calculations for the Aegean.

Of course, when the overlapping claims do not extend to the sea areas 'behind' an island or group of islands, as happened, for example, in Jan Mayen, Libya-Malta, and Guinea/Guinea-Bissau, we count only the front side of the island, plus the lateral sides as appropriate. While, for the Aegean, Karl apparently takes in only the northern coastline of the Greek island of Crete, this is justifiable since the other side of Crete does not border on the area under delimitation. *Id.* at 671-72, n.116

289. Pazarci has been arguing that it is inequitable for an island to project in four directions when the mainland projects in fewer, maybe only one. Pazarci, *supra* note 6, at 289-90, 307-08.

are taken care of by the proportionality adjustment, as will be explained below.

In the opposite situation, where an island is situated along its own mainland, foreclosing the latter's projection to the outer area, and where the water space between them is less than the internal waters plus the double breadth of the territorial sea, that is less than 24 miles from the baselines, both inner coasts should not count for shelf and exclusive zone purposes, and the external side of the island should constitute the relevant maritime front.<sup>290</sup> The same logic applies within a group of islands, as was recognized in *Guinea/Guinea-Bissau*. In the Bijagos Archipelago, the nearest island was two miles from its mainland, the furthest island was 37 miles away, and no two islands were further apart than five miles. Without the islands, the length of the coasts would have been 128-154.<sup>291</sup> Counting the perimeter of each would have transformed the shorter coast into a much longer one. The Tribunal took into account only the outer perimeter of the group.<sup>292</sup> This is sensible since the coast of a group of islands should not be considered to be longer than if the water space between them was land.

An evaluation of the outcomes in the cases and of most settlements shows that the island-distance criterion lacks explanatory power. The adjudicated boundaries which appear to disfavor islands are reflective of two quite unexceptional ideas: first, the natural diminution of the shares of shorter shores under equidistance,<sup>293</sup> and second, the further correction for gross disproportionality to total coastal fronts. This produces moves of islands back, or downgrades in establishing base points for the total shelf and zone, or half-enclaves or even total enclaves in proper circumstances, for example, with small, minor islands far off their main coast. All these particularizations, when properly executed, are not inconsistent with the full rights of islands to the maximum limit of 200 miles in all directions of all coastal fronts. A more particularized analysis of the cases indeed supports the *proportionality-adjustment* explanation.

In the *Anglo-French Arbitration*, where the whole thing started, the ICJ accepted the position that islands have full continental shelf rights.<sup>294</sup> However, the presence of these islands, by virtue of their particular geographical circumstances, led to modification of the strict

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290. In *Tunisia-Libya*, there was no question that only the front of the Kerkennahs counted and this is consistent with the position reflected in the text. *Tunisia-Libya*, 1982 I.C.J. 18. Cf. *Gulf of Maine*, 1984 I.C.J. at 269-70, 335-36, paras. 31, 221.

291. *Guinea/Guinea-Bissau*, 24 I.L.M. 267, para. 95(b).

292. *Id.* para. 97.

293. See, e.g., *Jan Mayen*, 1993 I.C.J. 38, , at 174-75 (Shahabuddeen, J., separate opinion); *Id.* at para. 92 (Oda, J., separate opinion).

294. *Anglo-French Arbitration*, 16 I.L.M. 54, paras. 158, 190-94.



equidistance line, which would have given most of the Channel shelf and an inordinate portion of the near-Atlantic shelf to Great Britain. The reasoning is rather clear: reduced effect to the islands was only the result of an adjustment to correct disproportionality to coast lengths equitably.<sup>295</sup> No other type of proportionality surfaced as potentially relevant.<sup>296</sup> The references to the islands being detached from their mainland and on the wrong side of the median line related to the creation of a radical distortion of the boundary, not to their being islands.<sup>297</sup> Indeed, the ICJ would have treated the Scilly Isles the same way had they been a promontory.<sup>298</sup> The source of the distortion was the perception that the shares of the shelf should not be manifestly disproportionate to the length of the relevant coastlines, which were comparable in this case.<sup>299</sup> Enclaving or half-effect for islands is just an adjustment technique applicable to shorter coastlines. For the Channel Islands, enclaving was just the practical solution.<sup>300</sup> If they had been closer to Great Britain, or if they stretched out one after another long distances from the mainland, another technique would have been to divert the course of the mid-Channel median line toward France.<sup>301</sup> Alternatively, if there had been more space in the area, the islands could have received the benefits of equidistance, compensating France by shifting the line in the other regions in its favor under a total adjustment approach.<sup>302</sup> In the Atlantic region, with more space to

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295. *Id.* para. 202.

296. The Court suggested in dicta that proportionality is a more general concept, extending to other potentially relevant geographical features or configurations, but none appeared on the scene in this case. *Id.* paras. 99-100.

297. *Id.* para. 199.

298. *Id.* paras. 244, 250.

299. The Court referred to the 'equality of the two States in their geographical relation to the continental shelf of the Channel' with coast lengths of about 300 miles each, to the disturbance by the islands of the 'balance of the geographical circumstances' and to the 'substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic. . . *prima facie* a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses this inequity.' *Id.* at paras. 181, 195, 183, 196. For the near-Atlantic region, the logic was the same. *Id.* paras. 243-244.

300. The Court was apparently also aided in its approach of enclaving the Channel islands by the perception that Great Britain had agreed with the notion that there were two separate delimitations, not one total. Consequently, it treated the island question in a three-way manner as if Great Britain itself was claiming against the islands, in which case the concept of enclaving would have been meaningless, but the shortness of the shores of the islands would have counted heavily against them when measured against the opposite French coast. *Id.* paras. 190, 201-02. France's proportionality argument also envisaged the possibility of treating the islands in a similar 'micro-geographical' way on the basis both of the actual lengths of the coasts and of the maritime facades. *Id.* para. 166.

301. Anglo-French Arbitration, 16 I.L.M. 54, para. 199; *see also id.* para. 177

302. The Court suggested that this approach was appropriate for situations such as

spare, there was only a half-effect proportionality correction,<sup>303</sup> to offset the fact that the Scilly Islands projected the English coast twice as far into the ocean as the corresponding French island of Ushant.<sup>304</sup>

Two islands played a role in *Tunisia-Libya*: the Kerkennahs and Jerba. Their status as islands did not remove them from consideration as claimants to the maritime areas.<sup>305</sup> The ICJ concluded, however, that using a median line approach amounted to giving the islands too much weight, as this approach straightened the coastline seaward fully in front of the Kerkennahs, which were located close to their own state, (thus adding a big chunk of ocean space to Tunisia's share,<sup>306</sup>) and made the waters behind them internal waters.<sup>307</sup> While the ICJ did not elaborate on what created this excessiveness, the context points to proportionality. To correct it, the ICJ drew two coastal lines, one giving these islands full effect, and another ignoring them. The ICJ then cut the resulting area in half,<sup>308</sup> thus notionally moving them half-way back toward the coast.<sup>309</sup> With regards to the Tunisian island of Jerba, the ICJ gave it full effect, as if it were a promontory, but concluded that the other factors in the first sector overrode its projection, as they also did certain other projections of the mainland.<sup>310</sup>

Two minor questions relating to islands arose in *Gulf of Maine*. In the segment where the proportionality adjustment was to be made, the Chamber recognized that Seal Island, a small island near the Canadian

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St. Pierre and Miquelon where the abundant oceanic spaces left room for compensatory adjustment. *Id.* para. 200. It is an interesting question whether the actual St. Pierre & Miquelon decision, rendered much later, can be explained in those terms

303. *Id.* para. 249.

304. *Id.* para. 251.

305. Tunisia-Libya, 1982 I.C.J. 18, para. 79. See also R.D. Hodgson, *The Tunisio-Libyan Continental Shelf Case*, CASE W. RES. J. INT'L L. 1, 16, 28-29 (1984).

306. Tunisia-Libya, 1982 I.C.J. 18, paras. 78, 122, 124.

307. *Id.* para. 128.

308. *Id.* paras. 128-129.

309. Even this limited reduction of the rights of the Kerkennahs was controversial. Three judges disagreed, but a fourth judge would give them no effect at all. Judge Gros disputed the presence of disproportionality and castigated the Court because "in sum, the Tunisian coastline was effaced . . . as if some geographical features did not exist . . . . This is a perfect example of trying to unmake geography." *Id.* paras. 14-15. According to Judge Evensen, giving half-effect to these islands, whose size approaches that of Malta and which form an archipelago, without an explanation about 'excessiveness,' violates the equitable principle of not refashioning nature. *Id.* paras. 17, 19. Judge Schwebel also criticized the lack of explanation of the notion of 'excessive weight.' *Id.* at 99. On the other hand, Judge Oda was wedded to the notion of straightening the coastlines before applying equidistance moderated with proportionality, calculated in the general direction of the coast. *Id.* paras. 169-72, 179, 183-87.

310. *Id.* paras. 79, 131.

coast, was entitled to full maritime rights but refused to locate basepoints on it because "it would be excessive to treat the coastline of Nova Scotia as transferred south-westwards [forward] by the whole of the distance between [it] and that coast."<sup>311</sup> The solution, quite generous in result, was to give the island half-effect for a transverse displacement of the median line.<sup>312</sup> The U.S. island of Nantucket fell outside the delimitation area, as the ICJ did not use strict equidistance,<sup>313</sup> but rather drew a median line following the general direction of the Massachusetts coast parallel to Nova Scotia. However, since the parties had already agreed that Nantucket was to be used as the farthest U.S. point in drawing the closing line that separated the inner and outer Gulf,<sup>314</sup> its location shifted that line in the direction of Canada. Thus, its indirect impact was significant.

The Tribunal in *Guinea/Guinea-Bissau* had to deal with three categories of islands. First, it had to contend with the islands close to the coast of Guinea-Bissau. Second, it had to deal with the Bijagos Islands Archipelago of Guinea-Bissau, consisting of many islands within two to 37 miles of the coast and five miles of each other. Within this inner region, the ICJ treated all of the water as territorial. Both sets of islands were treated as mainlands for purposes of determining the crucial "coastal configuration and orientation,"<sup>315</sup> and "the general direction of the entire coastline of the country,"<sup>316</sup> and therefore, the coastal projection and the drawing of baselines. In addition, their seaward projection (but not their entire perimeter, since they were treated like promontories) was counted in determining the length of the coastlines. This treatment of the Bijagos alone added 20% to the Guinea-Bissau coast length, and brought it to the same level as that of Guinea.<sup>317</sup> The third category consisted of a few islands scattered in shallow waters closer to Guinea, the most important one being the Guinean island of Alcatraz.<sup>318</sup> The Tribunal recognized their maritime rights.<sup>319</sup> Using equidistance and a southern limit line derived from a treaty, the Tribunal considered Alcatraz, which was located only 2.25 miles on the right side of that line, as a factor of delimitation on its own,

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311. Gulf of Maine, 1984 I.C.J. 246, para. 222.

312. *Id.*

313. Counting it and Cape Cod under strict equidistance would have increased the U.S. maritime zones by roughly eight times their land area in the outer region. See Jan Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 AM. J. INT'L L. 539, 558 (1985). Canada had proposed that they be ignored under equidistance. Gulf of Maine, 1984 I.C.J. 246, para. 182.

314. Gulf of Maine, 1984 I.C.J. 246, para. 33.

315. Guinea/Guinea-Bissau, 24 I.L.M. 267, para. 98.

316. *Id.* para. 97.

317. *Id.*

318. *Id.* para. 95.

319. *Id.*

and gave it territorial waters of 12 miles extending above the line. As this shifted the entire line for a considerable length, its effect on the delimitation of the shelf and exclusive zone exceeded by far the 12-mile limit.

In *Libya-Malta*, the parties had already agreed that "the entitlement to continental shelf is the same for an island as for mainland."<sup>320</sup> This equality means that their coasts are subject to the same adjustments for distortions, such as disproportionality of shares to coastal lengths.<sup>321</sup> It was this factor, in the context of the proximity to the northern littoral of the Mediterranean, that justified shifting the median line northward.

If there ever was a case where a couple of small islands standing very close to a massive mainland, and without any geographical support from their own mainland, arrogantly claimed equal treatment, it was *St. Pierre & Miquelon*! Yet, the ICJ rejected the idea that their share was to be reduced because they were purportedly superimposed on the Canadian continental shelf,<sup>322</sup> or because they were not independent.<sup>323</sup> By the way, Newfoundland itself is as much of an island as St. Pierre and Miquelon!<sup>324</sup> No, islands should not be enclaved within their territorial sea;<sup>325</sup> and yes, they have the potential of generating full 200-mile zones.<sup>326</sup> No, the location of potential hydrocarbon resources has no bearing on this delimitation.<sup>327</sup> Judge Weil applauded this treatment of islands which, in his view, abandons the impossible and internally contradictory theory of special geographical circumstances and constitutes, therefore, a milestone.<sup>328</sup> With this case, any doubts about the equal treatment of islands have been laid to rest.

Finally, in *Jan Mayen*, Denmark had not even argued that Jan Mayen, which is basically an uninhabited island resembling a rock, had

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320. *Libya-Malta*, 1985 I.C.J. 13, para. 52. The Court recognized, however, the possibility that the coasts of an independent states, be it an island or other kind of territory, may have a different relationship to the neighboring coasts than the same coasts if they belonged to the same state.

321. *Cf.* Judge Oda's view that the effect of "narrow promontories of peninsulas or even of islands" might be mitigated in "settling the basepoints on coastlines." *Id.* para. 68. *See also id.* para. 70.

322. "[S]ince it is all one shelf it cannot be considered as exclusively Canadian. Each coastal segment has its share of the shelf." *St. Pierre Miquelon*, 31 I.L.M. 1149, para. 46.

323. *St. Pierre & Miquelon*, 31 I.L.M. at 1164-65, paras. 48-51.

324. *Id.* para. 52.

325. *Id.* para. 68. On the lack of precision of the term 'enclave' see also the point made by Gotlieb, J., dissenting opinion, that even if France had won on equidistance, the entire French zone would have been 'enclaved', i.e. contained within an outer Canadian zone. *Id.* para. 38 (Gotlieb, J., dissenting opinion).

326. *Id.* para. 74.

327. *Id.* paras. 89-91. *Cf. Id.* para. 34 (Weil, J., dissenting opinion).

328. *Id.* paras. 46-48 (Weil, J., dissenting opinion). *See also Id.* paras. 18-19.

no entitlement to a continental shelf or fishery zone of its own, possibly even within the exception of Article 121.3 of UNCLOS. Its position was only that it can only be accorded partial effect. The rejection of this contention by the ICJ deserves a full quote:

The coast of Jan Mayen, no less than that of eastern Greenland, generates potential title to the maritime areas recognized by customary law, i.e. in principle up to a limit of 200 miles from its baselines. To attribute to Norway merely the residual area left after giving full effect to the eastern coast of Greenland, would run wholly counter to the rights of Jan Mayen and also to the demands of equity.<sup>329</sup>

*Jan Mayen* rejected even the terminology of islands receiving partial effect. It is quite remarkable that *no* judge in *Jan Mayen* took the position that islands, as such, should be treated differently than other kinds of territory. Judge Adjibola quoted Vattel to the effect that:

"A dwarf is no less of a man than a giant. A small Republic is no less of a State than the most powerful Kingdom". . . Thus however small the Island of Jan Mayen may be, this cannot affect its rights under international law with respect to the issue of entitlement and the non-encroachment principle. . . since Jan Mayen is acknowledged to be an island, it is entitled to the considerations that would normally be attached to *other land territory*."<sup>330</sup>

Judge Schwebel reminded us that an island in itself cannot be a special circumstance with limited coastal projections: "That concept is so bizarre that naturally it finds no expression in the intentions of those who drafted the 1958 [Geneva] Convention."<sup>331</sup>

While the negotiated settlements do not contain as many clues on their reasoning and motivation, and sometimes are affected by political considerations and bargaining with trade-offs and concessions,<sup>332</sup> they

329. *Id.* at para. 70. *See also* paras. 60, 80

330. *Id.* at 292, 300 (Adjibola, J., separate opinion).

331. *Id.* at 123 (Schwebel, J., separate opinion).

332. Negotiated settlements as such, even when they fall into certain patterns, absent an *opinio juris sive necessitatis* or at least *opinio aequitatis*, do not establish norms of international law because they often reflect other considerations. According to the editor of the massive study of more than 130 maritime boundary delimitation settlements sponsored by the American Society of International Law, the results of which are reported in the IMB volumes:

To no one's surprise, few patterns of state practice and *opinio juris* have merged from these settlements. While the augmented access to this information of foreign offices, courts and other tribunals may encourage the development of new law, at present the international judgments and awards have the leading oar in these murky waters.

Charney, *Progress*, *supra* note 6, at 228-29.

A striking example of the potential discrepancy between adjudication and negotiation is provided by the Jan Mayen story itself. In the negotiated settlement between Jan Mayen

are, overall, consistent with this jurisprudence.

### C. Conclusion

The message is clear: islands as such enjoy equal status with any other land configurations. In every instance where an island was somehow given lesser effect, or status below equidistance, a proportionality adjustment was being made. In no case was an island of comparable coastal dimensions with a mainland treated differently. The share of every island, however, like that of any other coastal territory, is affected by applicable considerations in the general geographical context.

## VI. CONCLUSION

The equitable storm unleashed by *North Sea* upon maritime delimitations is proving to be more like a tempest in a teapot. At that early juncture, with enormous ocean stakes up for grabs, and with divergent state interests, the ICJ wanted to preserve some flexibility in searching for principles, methods and factors other than equidistance, leaving some space for a more complex notion of natural prolongation, and giving some weight to the length of the coastal frontage. This quasi-heretical stance needed some heavy-duty protective juridical cover, and the respectable and suitably open-ended notion of equity lent its wings.

But genuine equity had very little to do with the dilemmas that were addressed in drawing the boundaries of the continental shelf and of the exclusive economic zone. Despite their ritual invocation, no recognizable equitable principles emerged in the delimitations. Equitable maxims which inform, and sometimes override, the specific rules of the law, such as the doctrines of clean hands, estoppel, acquiescence, and unjust enrichment, or corrections for mistake, undue influence and fraud, or notions that substance prevails over form and that rights should be pursued diligently or at least should not be

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(Norway) and Iceland, the latter received the entire 200-mile zone toward Jan Mayen. In the Jan Mayen case, Denmark sought to invoke this precedent against Jan Mayen on the theory that it constitutes relevant conduct of the parties on what is equitable. Norway argued that the agreement represented a 'political concession'. Jan Mayen, 1993 I.C.J. 38, paras. 82-84. The Court rejected the Danish position, stating that, "in the context of relations governed by treaties, it is always for the parties concerned to decide, by agreement, in what conditions their mutual relations can best be balanced." *Id.* para. 86. In the eventual decision under international law, Greenland, despite its size and coastline, received substantially less than 200 miles. See also Judge Shahabuddeen's separate opinion, *id.* paras. 18-20; Libya-Malta, 1985 I.C.J. 13, para. 44

exercised in an abusive manner, which have made a dent in international law, have no relevance to the delimitation issues. The search for equitable results proved equally elusive. The typical equitable flexible remedies such as personal injunctions (including specific performance), or adequate financial compensation, are beside the point. The courts displayed little imagination where the remedial aspect of equity could have helped to produce viable zones rather than geographical aberrations, such as the *St. Pierre & Miquelon* mushroom pie. The general interpretative mandate that equal circumstances should be treated equally, and that the relevant factors should receive their proportionate weight, presupposes that the equality and relevance of the circumstances and factors are supplied by some identifiable source. The courts, however, made clear that this source could not be abstract equity or distributive justice or refashioning of geography or just shares. Furthermore, despite some language suggesting otherwise, the courts did not espouse a theory equivalent to abstract justice, that is *ad hoc* solutions to unique geographical situations, to be perceived through some form of unmediated and intuitive meditation over multiple considerations and incommensurable circumstances. Indeed, there are few subjects in human knowledge where the variety of circumstances is more easily catalogued, classified and organized than geography, especially the types of coastlines and their seaward extensions. In this field, principled and predictable guidelines are feasible and desirable. In other words, equity of the type produced by the Chancellor's foot or, more fittingly here, the mermaid's tail, was least needed.

This brought the courts back in a circle to square one. The source of the equity of delimitations were the regimes of the continental shelf and exclusive zone themselves. Such regimes had to be explored and defined directly and internally, and the equitable label was at best superfluous and confusing. Only standard logical and teleological interpretation, i.e. conforming the maritime boundaries to the rationale of the law of continental shelf and exclusive economic zone, was needed. Such rationale was clear enough: geographical extension of land sovereignty over appertaining seabeds and water columns. Methodologically, however, the escape to equity produced great confusion. To suggest without more that equidistance, which is based on the very notion of equality, produces distortions which lead to inequitable solutions borders on the apocryphal; to say that it leads to inequitable results because it does not take into account all relevant circumstances calls for the ouija board! After a quarter century of refinement through seven major cases, a large number of delimitation agreements, a comprehensive new global treaty on the law of the sea, and extensive commentaries by publicists, the regime of continental shelf and exclusive economic zone boundaries has reached maturity and no longer needs the equity blanket. Virtually all potentially relevant

factors and considerations have been tried out in variegated settings; most were rejected. The darling on *North Sea*, natural prolongation, did not float. Economic, social, political, demographic justice, and even geology and geography other than the coastal front were ruled out. This negative clearance did not touch equidistance, whose role remained major, in fact, and whose practical and equitable virtues became increasingly recognized. Only one significant competitor of equidistance has emerged during this maturation period: the reasonable proportionality of shares to the length of the relevant coastlines. Equidistance already reflects proportionality both in that it allocates shares proportionate to distances from the coast, and that shorter coasts typically have lesser projections. However, some further adjustments may become necessary. Furthermore, even under a fixed geometrical method such as equidistance, the coastal front needs to be identified and streamlined. Proportionality does not replace or compete with equidistance on the same plane, but rather operates to moderate its results if, and to the extent that, geometrical method produces a gross disproportion between the share of continental shelf or exclusive economic zone allotted and the length of the coastline on which the claim is based. The mechanics of correcting disproportionality have not, as yet, been worked out adequately. A very rough and oversimplified quantification of the results suggests a formula between two-to-one and three-to-one equidistance-proportionality.

It is also important to mention that the reasonable proportionality factor opens up the field for some discretionary, non-symmetrical readjustment of lines, which enables the courts to take care of two nagging problems in this field. First, the treatment of islands: proportionality makes it possible to look through the distinctions between full, half or lesser effect or enclaving or semi-enclaving of islands, which produce discrimination fundamentally inconsistent with the equal rights of islands, and give all islands full effect but draw lines closer to them in order to make the total shares correspond more to total coast lengths. Second, such tangential factors as no-cut-off, security and the location of resources: while equidistance normally takes care of these ideas, some rare situations may arise needing specialized attention. Furthermore, the non-symmetrical adjustments of shares through proportionality may be made in a manner that preserves their unity and corresponds to the applicable criteria of sharing, either geographical or reflecting the need to avoid catastrophic consequences. A method called *equiratio* may make the adjustments more intelligible and intelligent.