

## **EQUITABLE PRINCIPLES AND THE DELIMITATION OF THE CONTINENTAL SHELF**

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*One of the controversial areas of the International Law of the Seas is the delimitation of the maritime boundary of continental shelf between states with opposite or adjacent coasts. The 1958 Geneva Convention on the Continental Shelf established the equidistant principle, which became the accepted rule as regards the parties to the convention. As regards states which are not parties to the convention as has been the case predominantly in International adjudication bodies the rules of customary international law have to be employed. The first time a maritime dispute of such a nature was submitted to the International Court of the Justice was in the North Sea Continental Shelf Cases where it held that customary international law warrants the application of the rules of equity to delimitate the boundary of the continental shelf. Whereas, the equidistant principle was applied in the Anglo French Arbitration. From an understanding of the decisions of the World Court and arbitral tribunals it appears there exists a*

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*divergence in opinion on which rule reflects customary international law the equitable principle or the equidistant principle? The object of this paper is summarily to determine at length how the principles of equity have developed and how far they would be applicable in disputes of such a nature with an insight into the India, Bangladesh and Myanmar dispute.*

## I. INTRODUCTION

*Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience. – John Seldon.<sup>1</sup>*

Delimitation of maritime areas may be regarded as one of the important problems of the law of the sea. Disputes over the extent of sovereign rights over the sea and submerged areas are inherently the most bitter and protracted, as they involve crucial interests of states. Although rarely, they may develop into serious conflicts as in the dispute between Greece and Turkey.<sup>2</sup> These disputes have become

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<sup>1</sup>JOHN SELDON, THE TABLE-TALK 58 (J.M. Dent and co.) (1818).

<sup>2</sup>Republic of Turkey, Ministry of Foreign Affairs, Press Release, *The Outstanding Aegean Issues* (Jul. 28, 2012), <http://www.mfa.gov.tr/maritime-issues---aegean-sea---the-outstanding-aegean-issues.en.mfa>; Hellenic Republic, Ministry of Foreign Affairs, *Issues of Greek - Turkish Relations* (Jul. 20, 2012), <http://www1.mfa.gr/en/issues-of-greek-turkish-relations/>; Leo Gross, *The Dispute Between Greece and Turkey Concerning the Continental Shelf in the Aegean* 71

even more problematic to solve with introduction of the notion of continental shelf into International Law, and the acceptance of the right to exclusive economic zones as they, often create overlapping zones where the need for delimitation arises. Further, it has been noted that usually the substance of a dispute over the delimitation of a continental shelf or an exclusive economic zone does not involve exclusively the extension of the disputed area, but rather its natural resources.<sup>3</sup> Other than these difficulties in recognising legal rules to apply to delimitation, the idea of *unicum*<sup>4</sup> makes it impossible to posit fixed rules governing the establishment of maritime boundaries between states. Furthermore the particularity of each case effectively impedes the formulation of customary rules of international law.<sup>5</sup>

In spite of these impediments the process of the delimitation has been marked by two trends throughout its history namely the equidistant method and the equitable method. The 1958 Conventions<sup>6</sup> recognised both these trends and adopted a procedure known as the equidistant-special circumstances principle which encompassed both of them; Article 15 of the United Nations Convention on the Law of the Sea,<sup>7</sup>

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A.J.I.L. 31 (1977); Aegean Sea Continental Shelf (Greece v. Turkey), 1978 ICJ Rep.1974, 36 (Dec. 19).

<sup>3</sup>Janusz Symondies, *Delimitation of Maritime Areas between the States with Opposite or Adjacent Coasts*, 8 POLISH YEARBOOK OF INTERNATIONAL LAW 19 (1984).

<sup>4</sup>“Unique” Of unique character or facts for which no general rule of law or precedent provides a clear resolution; See, AARON X FELLMETH AND MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 284 (2001).

<sup>5</sup>P. WEIL, THE LAW OF MARITIME DELIMITATION- REFLECTIONS (Cambridge University Press; 1<sup>st</sup> ed. 1989).

<sup>6</sup>The 1958 Geneva Conventions on the Law of the Sea (Jun. 13, 2012), <http://untreaty.un.org/cod/avl/ha/gclos.html>.

<sup>7</sup>The United Nations Convention on the Law of the Sea, 1982, art. 15 states, Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

1982 also stipulates it, for the territorial sea. The arrangement has been described as the equidistant principle along with enough elbow room for equity and other methods where they may seem justified.<sup>8</sup> The equidistant method provides a method for delimitation, whereas it remains silent on the result and on the other hand the equitable principle provides a result, that which should be an 'equitable solution' but lacks a method.<sup>9</sup> The abovementioned equidistance-special circumstance combined rule which had been codified in early treaty law had a number of advantages. Firstly, this formula struck a balance between predictability and flexibility, certainty and dynamism and objectivity and discretion. Secondly, in the absence of inequities resulting from aberrated coastlines the rule divides the overlapping territory into equal portions. Finally, it took into account the proximity of marine areas for the purpose of delimitating them. States and International Adjudication Tribunals have interpreted this rule in differing ways and are not unanimous as to which is the rule that reflects customary international law correctly. The United Nations Conference on the Law of the Sea III was faced with one of the most important issues whether in effect to repeat the provisions of the earlier treaty, supporting the view that it reflects customary international law or to modify them after reaching consensus from fresh negotiations. From a reading of the awards of International Arbitral Tribunals and the judgments International Court of Justice it appears that whatever method be employed the result should be an equitable one, thus making equity the cornerstone of maritime delimitation and at the same time not defining clearly the circumstances requisite to provide an equitable result. Summarily, a judgment of the International Court of Justice states:

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<sup>8</sup>Leonard Legault & Hankey Blair. 1996. *Method, Oppositeness and Adjacency and Proportionality in Maritime Boundary Delimitation*, AMERICAN SOCIETY OF INTERNATIONAL LAW (eds.); JONATHAN I. CHARNEY AND LEWIS M. ALEXANDER, 1996, INTERNATIONAL MARITIME BOUNDARIES 203 (Netherlands: Martinus Nijhoff Publishers).

<sup>9</sup>United Nations Convention on the Law of the Sea, 1982, art. 74.

*In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such circumstances that will produce this result rather than reliance on one to the exclusion of others.*<sup>10</sup>

Thus it becomes important to analyse how an equitable result is achieved with or without the equidistant principle.

## II. THE GENESIS OF THE PROBLEM AND THE IDEA OF UNICUM

From the time of the recognition of the doctrine of the continental shelf, the argument has been advanced that geographical features varies so greatly that it was difficult, if not impossible to posit fixed rule governing establishment of maritime boundaries between states.<sup>11</sup> The Jurisprudence of arbitral tribunals and the World Court support this view in a number of instances.

In the Tunisia/Libya case the International Court of Justice held that:

*“Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore. No attempt should be made here to over conceptualize the application of the principles and rules relating to the continental shelf.”*<sup>12</sup>

The Chamber of the International Court of Justice revisited this point in its judgment:

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<sup>10</sup>North Sea Continental Shelf Cases(Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), 1969, ICJ Rep. 1969, 50 (Feb. 20).

<sup>11</sup>L.D.M. Nelson, *The Roles of Equity in The Delimitation of Maritime Boundaries*. 84 A.J.I.L837 (1990).

<sup>12</sup>*Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*,1982 I.C.J. Reports 92, ¶132 (Feb. 24.), *reprinted in* 21 International Legal Materials (I.L.M.) 225 (1982) [*hereinafter* Tunisia/Libya].

*“Although the practice is still rather sparse, owing to the relative newness of the question, it too is there to demonstrate that each specific case is, in the final analysis, different from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its characteristics. This precludes 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>13</sup>

Further, the arbitral tribunal in the Guinea/Guinea-Bissau arbitration<sup>14</sup> citing the *Gulf of Maine Case*<sup>15</sup> proclaimed in its award that:

*“The factors and method referred to result from legal rules. Although they evolve from physical, mathematical, historical, political, economic or other facts. However, they are not restricted in number and none of them is obligatory for the Tribunal, since each case of delimitation is a unicum, as has been emphasized by the International Court of Justice.”*

The almost endless variety of geographical situations, differing historical backgrounds and political factors are main reason which makes each case a *unicum*. According to one learned author Nuno Marques Antunes, the notion of *unicum* stems from the factual matrix which he argues is different in every case, but the difference is not enough to not allow a ‘typification’, which is the level at which normativity operates. According to him all cases may be typified to

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<sup>13</sup>Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.), 1984 I.C.J. Rep. 290, ¶81. (Oct. 12), *reprinted in* 23 I.L.M. 1197 (1984) [*Hereinafter*, *Gulf of Maine Case*].

<sup>14</sup>*Guinea/ Guinea-Bissau Dispute concerning Delimitation of the Maritime Boundary*, Arbitral Award, 1985, International Legal Materials 251 (Feb. 14) [*Hereinafter*, *Guinea/ Guinea-Bissau*].

<sup>15</sup>Tunisia/Libya, *supra* note 12.

some degree which is why generalisations and legal analogies do operate and normative rules may be applied.<sup>16</sup>

Judge Waldock disagrees with this view and states clearly that:

*“The difficulty is that the problem of delimitation the continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances. In consequence, to attempt to lay down precise criteria for solving all cases may be to chase a chimera; for the task is always essentially one of appreciating the particular circumstances of the particular case.”*<sup>17</sup>

Some disagreement with idea of *unicum* have been stated as follows:

*“An excessive individualisation of the rule of law, which changes from one case to another, would be incompatible with the very concept of law. Every legal rule presupposes a minimum of generality. A rule which is elaborated one a case by case basis rests on the discretionary power of the judge, on conciliation, on distributive justice- in brief of ex aequo et bono.”*<sup>18</sup>

In this regard it may be important to refer to the opinion of the International Court of Justice in the Libya/Malta Case<sup>19</sup>, which found equity to the principle of normative application in maritime boundaries. The court stated that:

*“The justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its*

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<sup>16</sup>NUNO MARQUES ANTUNES, TOWARDS THE CONCEPTUALISATION OF MARITIME DELIMITATION: LEGAL AND TECHNICAL ASPECTS OF POLITICAL PROCESS, Vol. 42 260 (Martinus Nijhoff Publishers, 2003).

<sup>17</sup>H.M. Waldock, *The International Court and the Law of the Sea*, Cornelis van Vollenhoven Memorial Lecture, University of Leiden (1979).

<sup>18</sup>Counter- Memorial submitted by the Republic of Malta (*Libya v. Malta*), 1983 I.C.J. Pleadings 59 ¶111. (Oct. 26); D.W. Bowett, *The Arbitration between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-western Approaches*, 49 BRITISH YEARBOOK OF INTERNATIONAL LAW 14 (1978).

<sup>19</sup>Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. Rep. 13 (June 3), reprinted in 24 I.L.M. 1189 (1985) [Hereinafter, *Libya/Malta Case*].

*application should display consistence and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application."*

According to Nelson a conclusion may be drawn that the persistence of the viewpoint of the notion of a '*unicum*' leads one to believe that the law seems here to be faced with a stubborn fact of nature. Inevitably, it will be the law that will have to accommodate itself to this phenomenon, perhaps shedding in the process what some consider its most fundamental characteristic, its universality.

### III. EQUITY IN INTERNATIONAL LAW

From the above chapter it becomes clear that each continental shelf is a *unicum* and requires the subjective application of rules for its delimitation. The absence of concrete legal rules in providing a remedy had been a problem for the common law a long time ago, against the backdrop of which emerged the doctrine of 'equity'. At the time when the common law and equity were distinct from each other the Lord Chancellor would have the power to give certain judgements based on morality and reasoning and provide remedies where the common law had failed. The doctrine of estoppel, unjust enrichment and specific performance all have their roots in equity, but are now part of almost every legal system in the world. Equity is the name given to the set of legal principles, in jurisdictions following the common law tradition, which supplement strict rules of law where their application would operate harshly. Equity can be identified in many societies and religions even if in different forms, in fact a form of *justitia distributive* which has entered all legal systems of the world.<sup>20</sup> The Greeks called it clemency. The Romans termed it as '*aequitas*' or equality. Ancient Chinese law described it as

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<sup>20</sup>*Supra* note 18 at 21, ¶17.



compassion and in Hindu Philosophy is found in the doctrine of righteousness. In some Islamic schools ‘*Istihan*’ is employed to avoid undue hardship from the application of the law.<sup>21</sup> A better understanding of equity may be drawn from the explanation given by the Lord Chancellor Woolsey:

*“The King ought of his royal dignity and prerogative to mitigate the rigour of the law, where conscience hath the most force; therefore, in his royal place of equal justice, he hath constitute a chancellor, an officer to execute justice with clemency, where conscience is opposed by the rigour of law. And therefore the Court of Chancery hath been heretofore commonly called the Court of Conscience; because it hath jurisdiction to command the high ministers of the common law to spare execution and judgment, when conscience hath most effect.”*<sup>22</sup>

In International Law there has been a divergence of opinion whether equity is a source of International Law or not.<sup>23</sup> In spite of the divergence International Tribunal have made reference to equity in a number of occasions. The most famous decision on these lines was the of Judge Hudson in the *Diversion of Water from the Meuse*<sup>24</sup> case regarding a dispute between Holland and Belgium. Judge Hudson pointed out that what are regarded as principles of equity have long been treated as part of International Law and applied by the courts. ‘Under article 38 of the Statute he declared, “if not independently of that article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.” In the

<sup>21</sup>M. White, *Equity- A General Principles of Law Recognized by Civilized Nations*,4 QUEENSLAND UNIVERSITY OF TECHNOLOGY LAW AND JUSTICE JOURNAL 103 (2004).

<sup>22</sup>SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 381 (Methuen Sweet & Maxwell, 1945).

<sup>23</sup>Micheal Akehurst, *Equity and General Principles of Law*, 25 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 801 (1976).

<sup>24</sup>International Court of Justice, *Series A/B: Collection of Judgments, Orders and Advisory Opinions (from 1931)*, No. 70, 73.

Rann of Kutche Arbitration between India and Pakistan in 1968<sup>25</sup> the Tribunal agreed that equity formed part of international and that accordingly the parties could rely on such principles in the presentation of their cases. The Tribunal had recourse to the principle of equity in delimitation of two deep inlets.<sup>26</sup>

In International judgements<sup>27</sup> and in scholarly writings<sup>28</sup> a distinction is drawn between three different types of equity whose legal quality differs. These are equity *inter legem*, *preater legem* and *contra legem* (*ex aequo et bono*). This relationship of each to international law depends on the particular function which equity is fulfilling. The first category is equity operating within the law- that is as part of positive international law within the traditional sources in article 38(1) of the Statute of the International Court of Justice.<sup>29</sup> Equity *praetor legem* is said to concern the question of whether international law is complete. It is argued that this kind of equity operates where there is apparent absence of a principle or rule to apply to a specific case, or the principle or rule that does exist is insufficient. In other words, it plays a role when there is insufficiency. The thirds criteria of equity *contra legem* is the same as deciding a dispute *ex aquo et bono*, and can be applied by the International Court of Justice by special consent from

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<sup>25</sup>*The Rann of Kutch Arbitration (India v. Pakistan)*, 1968, 50 International Law Reports 2.

<sup>26</sup>M.N. SHAW, INTERNATIONAL LAW. 106 (Cambridge University Press; 6 ed. 2008).

<sup>27</sup>See, the *Jan Mayen case*, I.C.J. Rep. 1993, 38 (June, 14).

<sup>28</sup>*Supra* note 18; Stephen Beaglehole, *The equitable delimitation of the continental shelf*, 14 VICTORIA UNIVERSITY WELLINGTON LAW REVIEW 415 (1986).

<sup>29</sup>The Statute of the International Court of Justice, 1945, art. 38 (1). "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

the parties under the procedure mentioned in article 38(2) of the Statute.<sup>30</sup>

An understanding of equity as applied by the International Court of Justice can be found in the judgment of the court in the *Libya/Malta case*.<sup>31</sup>

*Equity as a legal concept is a direct emanation from the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term equity has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.*

In his separate opinion<sup>32</sup> Judge H. E. Eduardo Jiménez de Aréchaga further held that:

*To resort to equity means, in effect to appreciate and balance the relevant circumstances of the case so as to render justice not through the rigid application of general rules and principles of formal legal concepts, but through an adaption and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case. In other words, the judicial application of equitable principles means that a court should render justice in the concrete case by means of a decision shaped by and adjusted to the relevant factual matrix of that case.*

The Chamber in the *Gulf of Maine Case*<sup>33</sup> noted that absence of any “systematic definition of the equitable criteria that may be taken into

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<sup>30</sup>*Id.*; The Statute of the International Court of Justice, 1945, art. 38(2). “This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”

<sup>31</sup>*Supra* note 18, at 60, ¶ 71.

<sup>32</sup>*Id.* at 106, ¶ 24.

consideration for an international maritime delimitation.” The Court observed that defining such criteria “would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations.” In other words the idea of *unicum* prevents systematic definition.

However the court in the *Libya/ Malta Case*<sup>34</sup> held that:

*While every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law to be attained.*

Even Judge R.Y. Jennings agreeing with this view has noted that a “structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate.”<sup>35</sup>

This opinion may be appreciated in the light of the opinion given by the World Court in the *North Sea Continental Shelf*<sup>36</sup> case. “It is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles.” These opinions lead us to the conclusion that equity in International Law allows some amount of deviation from legal rules particularly where the resultant of their application would be inequitable; equity too would have its own governing principles and confines to amount of discretion.

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<sup>33</sup>Gulf of Maine Case.

<sup>34</sup>*Supra* .note18, at 33, ¶34.

<sup>35</sup>R.Y. Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27 (1986).

<sup>36</sup>*Supra* note 18, at 47, ¶ 85.

#### IV. EQUITABLE PRINCIPLES AND THE DELIMITATION OF THE CONTINENTAL SHELF

In order to identify the equitable principles in the delimitation of the continental shelf it is important first to understand the meaning of 'delimitation'. According to the World Court in the *North Sea Continental Shelf*<sup>37</sup> case "Delimitation is a process which involves establishing the boundaries of an area already, in principles, appertaining to the coastal state and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable or even identical." In short the delimitation means the recognition or declaration of a boundary over which the state previously had an inherent right. It is different from apportionment in process but may mean the same thing when it comes to the result.

The *fons et origio* of much law concerning the continental shelf, the Truman Proclamation of September 28, 1945,<sup>38</sup> declared that in cases where the continental shelf off the coast of the United States extended to the shores of another state or was shared with an adjacent state, the boundary should be determined by the United States and the state concerned "in accordance with equitable principles." A number of subsequent declarations, such as those of Saudi Arabia and the various coastal states on the Arabian Peninsula have contained similar statements,<sup>39</sup> such as the Anglo-Venezuelan Treaty of 1942 and the

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<sup>37</sup>*Id.*, at 22, ¶18.

<sup>38</sup>Proclamation by The President with Respect To The Natural Resources Of The Subsoil and Sea Bed Of The Continental Shelf, Signed by Harry S. Truman, President of the United States of America, Presidential Proclamation No. 2667, 3 C.F.R. 67 (1943-48); 13 Department of State Bulletin 485 (1945), 40 American Journal of International Law (Supplement) 45 (1946).

<sup>39</sup>David J. Padwa, *Submarine Boundaries*, 9 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 628 (1960).

Bahrain-Saudi-Arabian Treaty of 1958 with respect to one area of the Persian Gulf.<sup>40</sup>

In the *North Sea Continental Shelf* Case<sup>41</sup> the court relied on the Truman Proclamation as *opinio juris* enough to reflect the prevailing customary international law at the time. In the words of the court:

*This regime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin.*

The Court expounded two basic rules of customary international law which were codified in the Truman Proclamation they were:

Firstly, to delimitate the boundary of the continental shelf through agreement and negotiations and secondly, to delimitate boundaries in accordance with equitable principles. The court further relied on Article 33 of U.N. Charter<sup>42</sup> a judgment<sup>43</sup> and an advisory opinion<sup>44</sup> of the Permanent Court of International Justice to strengthen the grounds for the obligation to negotiate. Apart from these principles the court also relied on the Truman Proclamation for another principle. In the words of the court:

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<sup>40</sup>Elihu Lauterpacht, *The Contemporary Practice of The United Kingdom in the field of International Law-Survey and Comment*, VI, 7 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 514 (1958).

<sup>41</sup>*Supra* note 9.

<sup>42</sup>The Charter of the United Nations, 1945, art. 33. "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

<sup>43</sup>Free Zones of Upper Savoy and District of Gex (France v. Switzerland), Order, 1929 P.C.I.J. (ser. A) No. 22 (Aug. 19).

<sup>44</sup>Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42 (Oct. 15).

*The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal state as having an original, natural, and exclusive right to the continental shelf off its shores, came to prevail over all other, being now reflected in Article 2 of the 1958 Geneva Convention of the Continental Shelf.<sup>45</sup>*

In a nutshell the court established the principles regarding the delimitation of the continental shelf in the following words:<sup>46</sup>

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

Thus the first case regarding the delimitation of the continental shelf lead to the formation of a three cornerstone principles for delimitation, namely first agreement, second equitable principles along with relevant circumstances and lastly the principle of natural prolongation.

## **V. THE EQUITABLE PRINCIPLES AND RELEVANT CIRCUMSTANCES**

The International Court of Justice has stressed that it was impossible to reach an equitable solution for the delimitation of an area without taking into consideration the specific, relevant circumstances related to that area.<sup>47</sup> Along the same lines it was also recognised by the

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<sup>45</sup>*Supra* note 12, at 34, ¶ 47.

<sup>46</sup>*Id.* at 54, ¶ 101.

<sup>47</sup>*Supra* note 11, at 4.

Arbitral tribunal in the Anglo-French Arbitration<sup>48</sup> that the righteousness of the application of any principle to reach equitable delimitation is a function or reflection of geographical or other relevant circumstances in any particular case, but before we spell out the relevant circumstances it is important to consider the other principles required for a delimitation according to international law.

#### A. *Natural Prolongation*

The expression 'natural prolongation' entered the vocabulary of the international law of the sea with the Judgment of the Court in the *North Sea Continental Shelf case*.<sup>49</sup> There the Court declared as the most fundamental of all rules culled from the Truman Proclamation<sup>50</sup> relating to the continental shelf that:

*The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.*<sup>51</sup>

Thus the court held that in determining rights over the submarine areas the legal regime of the seas follows the land.<sup>52</sup> Therefore the basis of title over the continental shelf was that it constituted a natural prolongation of its land territory. The only reservation to this is that it

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<sup>48</sup>Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (U.K. v. France), 1977, 18 R.I.A.A. 3 reprinted in 18 I.L.M. 397 (1979) [hereinafter Anglo-French Award].

<sup>49</sup>*Supra* note 11.

<sup>50</sup>*Supra* note 37.

<sup>51</sup>*Supra* note 11, at 22, ¶19.

<sup>52</sup>*Id.* at 52, ¶96. The court held that: The Contiguous zone and the continental shelf are in this respected concepts of the same kind. In both instances the principle is applied that the land dominates the sea.



must not encroach upon the ‘natural prolongation of the territory of another state.’<sup>53</sup>

The *Anglo- French Award*<sup>54</sup> also relied on this principle in dismissing the French claim of the equitable method of delimitation. The reason for the rejection was that it detached the delimitation almost completely from the coasts actually abutting on the continental shelf. In the words of the court:<sup>55</sup>

*The equitable method of delimitation which is advocated by the French Republic, and which invokes a medial line delimited by reference to prolongation of general direction of the Channel coasts of the two countries, does not appear the Court to be one that is compatible with the legal regime of the continental shelf. It detaches the delimitation almost completely from the coasts which actually abut on the continental shelf of the Atlantic region, and is thus not easily reconciled with the fundamental principle that the continental shelf constitutes the natural prolongation of a State’s territory under the sea.*

Although the theory of natural prolongation was recognised in this case it proved to be of limited use. The Court held that even though the theory of sovereign rights over continental shelf is based on that principle, in the present case it could not give rise to a satisfactory solution because the continental shelf in the Channel was, geologically, the natural prolongation of the territories of both the United Kingdom and the French Republic, not to mention the Channel Island considered as a separate territory. In such a situation the court modified the principle by adding that:

*In these cases the effect to be given to the principle of natural prolongation of the coastal State’s land territory is always dependent*

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<sup>53</sup>*Id.* at 54, ¶ 101.

<sup>54</sup>*Supra* note 11.

<sup>55</sup>*Id.* at 115, ¶ 246.

*not only on the particular geographical and other circumstances but also on any relevant considerations of law and equity.*<sup>56</sup>

In the *Tunisa/Libya case*,<sup>57</sup> the Court recognised the dual nature of natural prolongation, describing it as: “*a consideration which they regarded as not only pertaining to the essence of the continental shelf but also a major criterion for its delimitation.*”

This was the first case to give any scope for argument based on geology. However, the Court was careful to limit its role while emphasising the factor’s fundamental nature.<sup>58</sup> Likewise the court held in the *Libya/Malta case* that:

*The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe an role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial. It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the 'rift zone' cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf*

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<sup>56</sup>*Id.*, at 92 ¶ 194.

<sup>57</sup>*Supra* note 11.

<sup>58</sup>*Supra* note 27.

*and the northward extension of the Libyan as if it were some natural boundary.*<sup>59</sup>

Thus it was concluded that physical prolongation could not be equated with an equitable delimitation and the natural prolongation argument was not a useful criterion as there were no particular features which were sufficiently pronounced. It may be concluded that the natural prolongation argument also no particularly useful in delimitation on its own but aided the court in recognizing the relevant circumstances for equitable delimitation.

### *B. Relevant Circumstances*

The older equidistant- special circumstances conventional rule which was correctly interpreted by Arbitral Tribunal in the *Anglo-French Award*<sup>60</sup> recognised the idea of *unicum* and laid down that in the absence of any agreement between the parties who have opposite or adjacent shores the continental shelf will delimited according by drawing a median line from the baseline, taking into consideration the special circumstances. It is important to note that the court considered the equidistant method at par with the special circumstances, proposing the application of both principles harmoniously.<sup>61</sup> Thus whether the delimitation is to be undertaken according to the conventional rule or according to the equitable principle they must consider the relevant circumstances or special circumstance or in other words the factual matrix.

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<sup>59</sup>*Supra* note 18, at 35, ¶ 35.

<sup>60</sup>*Supra* note 47.

<sup>61</sup> J.G. Merills, *The United Kingdom – France Arbitration*, 10 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 314 (1978); E.D. Brown, *The Anglo-French Continental Shelf Case*, 16 SAN DIEGO LAW REVIEW 461 (1978); D.M. McRae, *Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration*, 15 CANADIAN YEARBOOK OF INTERNATIONAL LAW 173 (1977).

- a) *Geography* – The International Court held in the *North Sea Continental Shelf case*<sup>62</sup> that account should be taken of the general configuration of the parties' coasts, as well as the presence of any special or unusual features. Earlier parts of the judgement make clear that the court had in mind the relevance of concave and convex or otherwise irregularly shaped coastlines, which may have effects on the delimitation by means of the equidistance method.

In his opinion in the *Tunisia-Libya case*,<sup>63</sup> Judge Oda emphasized “*that delimitation of the continental shelf (or of the exclusive economic zone) should be effected in accordance with the geography of the area concerned, i.e., so as to secure reasonable proportionality between lengths of coastline and the expanses allocated.*”

In this judgment the court stated that for the purpose of achieving an equitable solution, there had been necessary to take into account the factor of a reasonable degree of proportionality between the extent of the continental shelf apportioned to the coastal State and the length of the respective part of its coast, measured in the general direction of the coastal line.

As, regards the length of the coastline as a relevant circumstance to be taken into consideration the arbitral tribunal in the *Barbados-Trinidad and Tobago arbitration* held that:

*However, as was observed above (paragraph 236) this does not require the drawing of a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines. Although mathematically certain, this would in many cases lead to an inequitable result. Delimitation rather requires the consideration of the relative lengths of coastal frontages as one element in the process of delimitation taken as a whole. The degree of adjustment called for by any given disparity in coastal lengths is a*

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<sup>62</sup>*Supra* note 10, at 54.

<sup>63</sup>*Supra* note 11, at 270, ¶ 181.

*matter for the Tribunal's judgment in the light of all the circumstances of the case.*

- b) Geology – In the *North Sea Continental Shelf case* the geological structure of the areas of continental shelf was held to be relevant.<sup>64</sup> Presumably, if one part of the continental shelf between states A and B were geologically more like the territory of state A, and another part more like the land mass of state B, this could influence a delimitation of the shelf. Whether it would influence the delimitation in a particular case would be a question of fact and degree. In the *Anglo-French Award*<sup>65</sup> the court noted that the Channel Islands archipelago and the seabed and subsoil of the Golfe breton-normand formed part of the same armorican structure as the land mass of Normandy and Brittany. The Golfe breton-normand was characterized by the same essential geological continuity as the rest of the Channel, but a few nautical miles to the north and northwest of the Guernsey and Alderney groups of islands, the geomorphology of the Channel was marked by a distinct fault, known as the Hurd Deep (Fosse Centrale). The court found that the presence of the Hurd Deep should not affect the delimitation.

In the words of the court:

*The Court does not consider that the Hurd Deep-Hurd Deep Fault Zone is a geographical feature capable of exercising a material influence on the determination of the boundary either in the Atlantic region or in the English Channel. The Court shares the view repeatedly expressed by both Parties that the continental shelf throughout the arbitration area is characterized by its essential geological continuity. The geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the seabed and subsoil which do not disrupt the*

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<sup>64</sup>*Supra* note 10, at 54, ¶ 101.

<sup>65</sup>*Supra* note 47.

*essential unity of the continental shelf either in the Channel or the Atlantic region.*

- c) Natural Resources – Another factor that could perhaps be called geographic (although it is also an economic one) is natural resources. Natural resources were adverted to as relevant to delimitation by the International Court, but it did not elaborate on this point.<sup>66</sup> One can imagine a situation, however, in which ninety-nine percent of an oil deposit lies beneath what might otherwise be considered the continental shelf of state A and one percent beneath what might otherwise be considered that of state B. If the latter one percent cannot be used economically by state B, whereas the former ninety-nine percent can and is being profitably exploited by state A, an equitable delimitation between states A and B may well be affected by natural resources. In the current era where petroleum resources are being found in the continental shelf, equitable delimitation according to natural resources becomes an idea for the future.
- d) Security – The United Kingdom submitted in the *Anglo-French* case that for the purposes of the delimitation in the region of the Channel Islands both legal and equitable principles would be observed if the parties were treated as opposite states and a median line drawn between their coastlines.<sup>67</sup> The United Kingdom contended that for this purpose the Channel Islands formed a part of the coastline of England. On such a basis, the French Republic would be allotted an eastern and a western segment of the continental shelf in the Channel, but a tongue of the United Kingdom's continental shelf would intervene between them, reaching out from its mainland shelf to the Channel Islands.

France argued that such delimitation would be inequitable because it would sever its continental shelf in the Channel into two separate

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<sup>66</sup>*Supra* note 9, at 54. ¶ 101; SURYA P. SHARMA, DELIMITATION OF LAND AND SEA BOUNDARIES BETWEEN NEIGHBOURING COUNTRIES 87 (Lancers Books) (1989).

<sup>67</sup>*Supra* note 47, at 77, ¶152 – 155.

zones. Although the allocation of the intervening area to the United Kingdom would theoretically not affect the legal status of the superjacent waters and airspace, France's vital interests in the security and defense of its territory would be put in doubt.

Here, then, is another possible constituent of an equitable decision, the military security of claimant states. (The French Republic also claimed that its economic interests would suffer if it did not have an unbroken stretch of continental shelf.) While the United Kingdom contended that France's claims concerning its security, defense, and navigational interests should not be given weight, it did not maintain that these factors were inappropriate for consideration.

On the contrary, it urged similar considerations in support of its own proposal to establish a continuous link between the continental shelf of the Channel Islands and that of the English mainland. The court found these British and French claims to be mutually counterbalancing, and that finding, together with the fact that the Channel was a major route of international maritime navigation serving ports outside the territories of both parties, led the court to believe that defense and security could not be regarded as exercising a decisive influence on the delimitation of the boundary in the case at hand. "They may support and strengthen, but they cannot negative, any conclusions that are already indicated by the geographical, political and legal circumstances of the region which the Court has identified."

The court went on to say, however, that considerations of navigational defense, and security did evidence the predominant interest of the French Republic in the southern areas of the Channel, a predominance which was also strongly indicated by France's position as a littoral state along the whole of the Channel's south coast- *The "Nature" of Islands*. The United Kingdom adverted to a number of considerations it broadly described as related to the "nature" of the Channel Islands. Among those considerations, which the court found to be relevant,

was geography (the size of the islands was held to be significant); but in addition there were some that had not been specifically mentioned by the International Court in the *North Sea Continental Shelf case* - demography, economics, political organization, and legal status. The United Kingdom cited the islands' area of about 75 square miles, their population of 130,000, and their substantial volume of sea and air traffic and commerce, and claimed that they were highly developed, busy territories providing financial facilities of international repute. Moreover, they enjoyed a peculiar legal status, being neither a part of the United Kingdom nor of its colonies, but rather for several hundred years having been direct dependencies of the Crown with their own legislative assemblies, fiscal and legal systems, courts of law, and systems of local administration, as well as their own coinage and postal service. Counsel for the United Kingdom argued that historical, political, and economic factors combined to entitle the Channel Islands to their own continental shelf. They were of sufficient political and economic importance to warrant influencing the course of the median line merely by their presence in a particular location. As has been said, the court did regard the above considerations as relevant. Similarly, when it considered the delimitation in the Atlantic region, the court regarded it as significant that both the island of Ushant and the Scilly Isles were "islands of a certain size and populated." Ushant and the Scillies also constituted "natural geographical facts of the Atlantic region" that could not be disregarded in delimiting the continental shelf boundary without "refashioning geography."

Apparently, there is an overlap between considerations of population and geography. Indeed, "relevant considerations" may be variously named and grouped, as the occasion demands. Those that have been discussed above, as well as those still to be mentioned, presented themselves in certain ways in the two leading cases on the delimitation of continental shelf. By no means are they an exhaustive



list or classification of the considerations that could arise in future cases.

Other than these an authors have offered a few more categories namely navigation, fishing, and conservation.<sup>68</sup>

## **VI. DISAGREEMENT IN THE BAY OF BENGAL**

In the case of the Bay of Bengal delimitation disagreements arose between the Bangladesh Government and India when the Bangladesh Government began signing contracts with oil companies for exploration.

The disputed territory is the region just south of Bangladesh land territory. Bangladesh maintains the position that no rigid principles, i.e. the equidistance- special circumstances should not be applied for delimitation. On the other hand India advocates the application of the equidistance – special circumstances principle.

Furthermore, the rising of new islands in the Bay of Bengal have also lead disputes regarding their territorial sovereignty. Both Bangladesh and India have claimed ownership of these newly emerging island(s)- New Moore/South Talpatty/Purbasha-in the estuary of the Haribhanga River on the border between the two countries. The boundary between Bangladesh and India in this area is the midstream of the main channel of the Haribhanga. The island, formed in the estuary of the Haribhanga and the Raimangal rivers, most probably after the cyclone and tidal bore of 1970, is new terrain, rising initially as a low-tide elevation.<sup>15</sup> Known as South Talpatty Island in Bangladesh; it is a U-shaped formation with the eastern arm elongated toward the north. In 1978 its approximate area at low tide was about two square miles, but this may have increased. It was uninhabited at that time, though fisher-men from the Bangladesh mainland were observed on

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<sup>68</sup>*Supra* note 2, at 42.

the island during the dry season. The Indian authorities named this island New Moore and claim to have notified the British Admiralty about its location in 1971, during the period that the people of Bangladesh were engaged in their struggle for independence.

According to Professor Rehman<sup>69</sup> On achieving independence, Bangladesh was faced with the equally challenging task of rehabilitation and national reconstruction. At no time during this period did the Indian government specifically draw to the attention of the Bangladesh government their claim upon this island as required under international law and practice despite the close and friendly relations existing between the two countries. Bangladesh lays claim to this island on the assumption that the midstream of the border river Haribhanga flows to the west of the island, while India claims it on the assumption that the midstream flows to the east of the island.

When the Indian Prime Minister visited Bangladesh on April 16-18, 1979, the President of Bangladesh took up the matter with him. In the interest of good neighborly relations, Bangladesh proposed a joint survey to dispel any misgivings about the actual location and rightful ownership of the island with the aim of peacefully settling this problem between the two countries. The Indian Prime Minister in a demonstration of the two countries' friendly relations and in a spirit of understanding, agreed to the Bangladesh proposal for a joint survey. This commitment was confirmed by the Indian Prime Minister when the Bangladesh Deputy Prime Minister called on him in New Delhi in the second week of May 1979. Since then, the Indian side has been asked repeatedly to expedite the proposed joint survey. The Bangladesh High Commissioner in New Delhi, in his message of May 30, 1980, informed Dhaka that he had had three meetings in the Indian External Affairs Ministry and that the Indian side had decided to study the situation more thoroughly before taking up a joint survey.

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<sup>69</sup>M. Habibur Rehman, *Delimitation of Maritime Boundaries: A Survey of Problems in the Bangladesh Case*, 24 ASIAN SURVEY 1302 (1984).

Moreover, in March 1980, the Indian daily Ananda Bazar Patrika and other West Bengal newspapers carried news of the emergence of a second island on the estuary of the Haribhanga River, reportedly detected by the Indian Naval Hydrographic Survey some time in 1975. It was also reported that the state government of West Bengal called this new island Purbasha. From the description in the West Bengal Press, it appeared that the new island was situated very near to South Talpatty Island on its western side. Satellite images available to Bangladesh indicated the presence of a low-tide elevation conforming to the location of Purbasha Island mentioned in the West Bengal press. And a satellite photograph sent by the Indian Ministry of External Affairs in their Note of April 9, 1980, to the Bangladesh Ministry of Foreign Affairs also showed a similar low-tide elevation in the midstream of the Haribhanga. The Indian government subsequently denied that there was, indeed, a second island and adopted the position that New Moore and Purbasha were one and the same island. At this stage it is important to point out that all misgivings regarding the location of newly emerged islands in the estuary of the Haribhanga and their rightful ownership could be easily dispelled by a joint physical survey of this area. This would also remove existing confusion over the names and would establish facts on the ground regarding the number of islands, their location, and ownership. It is clear that if the flow of the mainstream of the Haribhanga is deter-mined, there will be no question of the island's ownership. Considering the importance of the factual matrix in the delimitation of the maritime boundaries there seems to be no doubt that the conflict between Bangladesh and India over the newly emerged island is concerned with matters of fact rather than of law.

## VII. ANALYSIS AND CONCLUSION

The equidistance- special circumstances principle and the use of the equitable principles in the delimitation of the continental shelf have

taken up by the parties to a conflict to suit their own goals and advantages. The old rule of equidistance- special circumstances has been taken up by the state whose geography is not aberrated and is in the form of continuous stretch, on the other hand states who have aberrated coasts, concave coasts have advocated the use of the equitable principles. With the acceptance and formalisation of the idea of the *unicium*, and declaration of the equidistance- special circumstances principle to be merely one method of many for delimitation and not part of international custom, the International Court of Justice has created a vacuum for specific legal rules in the absence of conventional obligations. In fact it has had a more unsettling effect than a consolidating one on the law of the maritime delimitation. The *Anglo- French Award*,<sup>70</sup> had a consolidating effect on the law as it placed reliance on the intention of the United Nations Conference on the Law of the Sea I. It placed reliance on the *travaux preparatoires* to show that the older equidistance rule complied with the requirements of equitable principles.

In the words of the court:

*The role of the special circumstances condition in Article 6 is to ensure an equitable delimitation and the combined equidistance special circumstances rule in effect gives particular expression to a general norm that, failing agreement, the boundary between State abutting on the same continental shelf is be determined on equitable principles.*

The adoption of a vague criterion of only equitable principles misguides the parties, and prompts them to advocate adoption of one sided criteria for delimitation. The flexible nature of the relevant circumstances, the absence of positive law, and revelation of new interests in the continental shelf lead to uncertainty and arbitrariness. The median line provides a procedural beginning in the negotiation

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<sup>70</sup>*Supra* note 47, at 45, ¶ 70.

process and reflects the need of the times, the adoption of the special circumstances removes any inequity which this line would lead to.

Recently, the International Court of Justice in the case between Nigeria and Cameroon has held that the procedure for delimitation is the following:

The process involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of the line in order to achieve an equitable solution.<sup>71</sup>

In the view of the researcher this view represents the *de lege lata* as applicable between parties effecting delimitation of their continental shelf.

An appraisal of the recent judgments of the court confirms that the equidistance- special circumstances rule is being followed, with emphasis on development on categories of special circumstances.

In the *John Mayens case*,<sup>72</sup> the court applied the old conventional rule of equidistance and differentiated between the special circumstances in the conventional rule and relevant circumstances as the customary rule. It considered economy as additional special factor while delimitating the area. The court also applied and recognised the geographical features and specifically proportionality.

Further in the *Barbados and Trinidad and Tobago arbitration*,<sup>73</sup> the parties had taken up conflicting positions as to which rule represents the prevailing customary law. Further a prior customary delimitation based on cultural rights was claimed. The court applied the earlier consolidated principle and did not deviate from it that is drawing a

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<sup>71</sup>Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), 2002 I.C.J. Rep. 2002, 442, ¶ 291 (Oct. 10).

<sup>72</sup>Case concerning Maritime Delimitation between the area of Greenland and John Mayen, (Denmark v. Norway), 1993, I.C.J. Rep. 93 (June 14).

<sup>73</sup>Barbados and Trinidad and Tobago Arbitration, 2006 27 R.I.A.A. 147.

median line and adjusting it as an when relevant circumstances are recognised and taken into account to adjust the line.