

Some Problems Concerning the Application of the Maritime Boundary Delimitation Provisions of the 1982 United Nations Convention on the Law of the Sea Between Adjacent or Opposite States

Hungdah Chiu

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**SOME PROBLEMS CONCERNING THE APPLICATION OF THE
MARITIME BOUNDARY DELIMITATION PROVISIONS OF THE
1982 UNITED NATIONS CONVENTION ON THE LAW OF THE
SEA BETWEEN ADJACENT OR OPPOSITE STATES †**

HUNGDAH CHIU*

I. INTRODUCTION	1
II. THE ADOPTION OF THE MARITIME BOUNDARY DELIMITATION PROVISIONS AT THE UNCLOS III.....	3
III. SELECTED PROBLEMS IN THE DELIMITATION OF MARITIME BOUNDARIES	6
A. <i>The Delimitation of Territorial Seas Between States with Adjacent or Opposite Coasts</i>	6
B. <i>The Delimitation of the Continental Shelf Between States with Adjacent or Opposite Coasts</i>	8
C. <i>The Delimitation of Economic Zones and Its Relation to the Delimitation of the Continental Shelf</i>	12
IV. CONCLUSION	16

I. INTRODUCTION

After almost ten years of negotiation, the Third United Nations Conference on the Law of the Sea (UNCLOS III) finally adopted the United Nations Convention on the Law of the Sea on April 30, 1982.¹ It was opened for signature at Montego Bay, Jamaica, on December 10 of the same year. As of January 18, 1984, 133 countries had signed the Convention and nine countries had ratified it.² Under article 316-1 of the Convention, sixty ratifications are required for its entry into force. While it is not

† Updated version of a paper delivered at the Conference on Contemporary Issues of International Law, June 26-28, 1984, in Taipei. See *Bibliography: Delimitation of Exclusive Economic Zone Boundaries Between Opposite and Adjacent States and the Gulf of Maine Dispute*, 9 MD. J. INT'L L. TRADE 181 (1985).

* LL.B., 1958, National Taiwan University; M.A., 1967, Long Island University; LL.M., 1962, S.J.D., 1965, Harvard University; currently Professor of Law, University of Maryland School of Law.

1. U.N. Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261, 1271-1354 (1982) [hereinafter cited as 1982 Convention]; and THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX (C. Helm ed. 1983) [hereinafter cited as LAW OF THE SEA].

2. *133 Have Signed Law of the Sea Convention*, 21 U.N. CHRON. No. 2, 96 (1984).

clear whether signatory countries will ratify the Convention, the fact that many of them were willing to sign should give it "a certain provisional status as a reflection of the views of the signatories."³

Moreover, major countries which have so far refused to sign the Convention rely solely on the ground of their dissatisfaction with the deep-seabed mining arrangements of the Convention.⁴ They do not seem to challenge other parts of the Convention. For instance, in a statement on ocean policy accompanying the U.S. proclamation on establishing an Exclusive Economic Zone⁵ issued on March 10, 1983, President Ronald Reagan stated that the Convention "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states . . ."; that the United States is prepared to act in accordance with this balance of interests relating to traditional uses of the oceans which is reflected in the Convention; and that the United States will exercise its navigational and overflight rights on a worldwide basis "in a manner that is consistent with the balance of interests reflected in the convention. . . ."⁶ Thus, as noted by a well-known authority on the law of the sea, "these two documents simply mean that the United States, though it did not sign the Convention, accepts its provisions relating to traditional uses of the sea (i.e., other than those relating to the novel problem of deep seabed mining) as customary international law binding on the United States."⁷ The Republic of China (ROC) on Taiwan is a special case. It was unable to sign the Convention because of its exclusion from the Conference at the insistence of the People's Republic of China.⁸ The ROC took, however, a similar attitude toward the Convention by accepting those parts of the Convention that codified customary international law.⁹

3. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 27, 100 (1970-1).

4. 19 U.N. CHRON. No. 6, 3, 16-17 (1982).

5. Proclamation No. 5030, 48 Fed. Reg. 1065 (1983), *reprinted in* 22 I.L.M. 464-65 (along with accompanying statement).

6. *Id.* at 464.

7. Sohn, *Thoughts on Customary International Law*, 1 RUSK CENTER NEWSLETTER, 1, 2 (1984).

8. The ROC's seat at the United Nations was taken over by the PRC on October 26, 1971. From then on, the ROC has been unable to participate in any United Nations sponsored international conferences. *See, e.g.*, N.Y. Times, Oct. 27, 1971, at 1, col. 4; 8 U.N. CHRON. No. 10, 34 (1971).

9. *See* ROC Foreign Minister's statement of January 12, 1983 before the Legislative Yuan, in Chiu, Chen, & Lee, *Contemporary Practice and Judicial Decisions of the Republic of China Relating to International Law, 1981-1983*, 2 CHINESE Y.B. INT'L L. & AFF. 228, 248 (1982). The minister stated the ROC would "comply with terms in principle." *Id.*

Therefore, it appears that there is a general consensus among most nations on the new Law of the Sea Convention, with the exception of those parts of the Convention dealing with the deep seabed mining regime. This paper will analyze some problems of applying those provisions of the Convention dealing with maritime boundary delimitation with respect to states with adjacent or opposite coasts.

II. THE ADOPTION OF THE MARITIME BOUNDARY DELIMITATION PROVISIONS AT THE UNCLOS III

Three articles deal with maritime boundary delimitation problems. Article 15 covers territorial seas,¹⁰ article 74 treats the exclusive economic zone,¹¹ and article 83 concerns the continental shelf between states with opposite or adjacent coasts.¹² Article 121 relating to the regime of islands is also relevant to the delimitation problem. Among these articles, the adoption of articles 15 and 121 was not controversial at UNCLOS III. In fact, the text of article 15 is substantially the same as article 12, paragraph 1 of the 1958 Convention on Territorial Sea and Contiguous Zone.¹³

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 [The 1958 Convention provides: "The provisions of this paragraph shall 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 with this provision.¹⁴

While article 121 is new, there was little debate over the adoption of this

10. 1982 Convention, *supra* note 1, at 1273, art. 15, *reprinted in* LAW OF THE SEA, *supra* note 1, at 5-6.

11. 1982 Convention, *supra* note 1, at 1284, art. 74, *reprinted in* LAW OF THE SEA, *supra* note 1, at 26.

12. 1982 Convention, *supra* note 1, at 1286, art. 83, *reprinted in* LAW OF THE SEA, *supra* note 1, at 29-30.

13. Convention on the Territorial Sea and the Contiguous Zone, *opened for signature*, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205, 212, art. 12, para. 1 [hereinafter cited as 1958 Territorial Sea Convention].

14. 1982 Convention, *supra* note 1, at 1273, art. 15, *reprinted in* LAW OF THE SEA, *supra* note 1, at 5-6.

article.¹⁵ Article 121 provides:

1. An island is a naturally formed area of land, surrounded by water, which is above water or high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.¹⁶

Articles 74 and 83, however, were subject to lengthy debate at UNCLOS III. The Conference ultimately took the position that these articles' principles for delimitation of the continental shelf and exclusive economic zone (EEZ) should be the same. One group of countries had favored drawing the line equidistant between the two shorelines in question, although many of those countries contended that "special circumstances" might justify another method.¹⁷ Another group had wished to emphasize "equitable principles" and "relevant circumstances."¹⁸ The Draft Convention on the Law of the Sea (Informal Text) issued by the President of the Conference on September 22, 1980 provides that the delimitation of maritime boundaries of the economic zone and the continental shelf between adjacent or opposite countries "shall be effected by agreement in conformity with international law" and "such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned."¹⁹

Among the countries that favored the 1980 draft arrangement were Canada, Costa Rica, Cyprus, Democratic Yemen, Denmark, the Dominican Republic, Ethiopia, Greece, Iceland, Italy, Japan, Malaysia, Nigeria, Norway, Oman, Portugal, the Republic of Korea, Sao Tomé and Príncipe, Spain, Sweden, the USSR, the United Arab Emirates and the United King-

15. See A/CONF.62/Third United Nations Conference on the Law of the Sea, Official Records, 2 UNCLOS III 278-89 (1975).

16. 1982 Convention, *supra* note 1, at 1291, art. 121, *reprinted in* LAW OF THE SEA, *supra* note 1, at 39.

17. See also Rhee, *Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine*, 75 AM. J. INT'L L. 590-628 (1981).

18. See U.N. Press Release, SEA/399, July 23, 1980, at 16.

19. Article 74, para. 1 (economic zone) and article 83, para. 1 (continental shelf) of the Draft Convention. U.N. Doc. A/CONF.62/WP.10/Rev. 3, at 30, 34.

dom. New Zealand favored an earlier formula presented at the informal negotiation referring to equitable principles and citing the median line as one method to be employed in appropriate cases. Kuwait and Peru also endorsed the equidistance principle.²⁰

Some of those states emphasizing "equitable principles" regarded the 1980 draft provision on delimitation as unacceptable. Among them were Algeria, Argentina, the People's Republic of China, Democratic Kampuchea, Ireland, Kenya, Libya, Mali, Morocco, Nicaragua, Poland, Romania, Senegal, Somalia, Suriname, Syria, Turkey, and Venezuela. They argued that delimitation should be based on agreement between the states concerned and the application of equitable principles, taking into account all circumstances, and without prejudicing the methods to be utilized. Some of them added first, that the text in the draft convention used terms such as "relevant circumstances" that were open to misunderstanding and would not help to avoid disputes, and secondly, that it was legally invalid, since delimitation criteria already existed in international law.²¹ Also favoring an emphasis on equitable principles were Bangladesh, Dominica, the Ivory Coast, Mozambique, Vietnam and Zaire.²²

In an effort to remove the deadlock over the question, the President of the Conference, Tommy T.K. Koh of Singapore, submitted a new compromise proposal at the Resumed Tenth Session in August 1981 which was finally accepted by the Conference²³ and became articles 74 and 83 of the Convention. Article 74 provides:

The delimitation of the exclusive economic zone between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.²⁴

Article 83 uses the same language as article 74 to deal with the delimitation of "continental shelves."²⁵

This compromise proposal was acceptable to the group in favor of subscribing to "equitable principles" in resolving maritime boundary disputes because it omitted the reference to the equidistance or median rule in the

20. U.N. Press Release, SEA/425, Mar. 4, 1981, at 24.

21. *Id.*

22. *Id.*

23. U.N. Press Release, SEA/455, Aug. 28, 1981, at 1.

24. 1982 Convention, *supra* note 1, at 1284, art. 74, *reprinted in* LAW OF THE SEA, *supra* note 1, at 26.

25. *Id.* at 29-30.

text. According to this group, in the 1969 *North Sea Continental Shelf* cases,²⁶ the International Court of Justice (ICJ) referred to "equitable principles" as the rule for delimitation. Thus, the reference to article 38 of the Statute of the International Court of Justice appears to support this group's view because the Court's decision is at least a subsidiary means for the determination of rules of international law.²⁷ On the other hand, the text only referred to the broad phrase "equitable solution" and not to "equitable principles," so that it is also acceptable to the group in favor of the equidistance or median rule.²⁸ It will be demonstrated that the need to compromise by adopting these two general articles relating to maritime boundary delimitation resulted in insufficiently clear guidelines for resolving various delimitation issues.

III. SELECTED PROBLEMS IN THE DELIMITATION OF MARITIME BOUNDARIES

A. *The Delimitation of Territorial Seas Between States with Adjacent or Opposite Coasts*

Article 15 of the 1982 United Nations Convention on the Law of the Sea was derived from article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone.²⁹ Forty-three countries including Western, Communist, and Third World nations, ratified the 1958 Convention.³⁰ Only one country, Venezuela, made reservations to article 12; however, Venezuela did not challenge the principle contained in that article. Rather, it asserted that certain sea areas around its coast should constitute "special circumstances" under that article, thus implying that the equidistance rule should not be applied in that particular controversy. Moreover, none of the countries withholding ratification appears to have actively challenged article 12

26. *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, (Judgment of Feb. 20).

27. Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, 3 Bevens 1179, art. 38(d) [hereinafter cited as ICJ Statute].

28. This information was supplied by a delegate who participated in the negotiations. Shen & Hsü, *Third United Nations Conference on the Law of the Sea and the Convention on the Law of the Sea* 2 CHUNG-KUO KUO-CHI-FA NIEN-K'AN [Chinese Yearbook of International Law] 401, 418 (1983).

29. 1958 Territorial Sea Convention, *supra* note 13, at art. 12.

30. Multilateral Treaties Deposited with the Secretary-General: Status as at December 1982, U.N. Doc. ST/LEG/SER.E/2 at 609. It listed 45 countries, but Byelorussia SSR, Ukrainian SSR and the Soviet Union are in fact one state, so they are counted as one state here. While 66 nations signed the 1958 Convention, 23 did not ratify.

of the Convention. Therefore, it may be argued that article 12 of the Convention has received prior acquiescence in the international community. This view is confirmed by the absence of challenge to the adoption of an almost identical article at UNCLOS III.

Despite the historic sense of consensus on general principles underlying the text of article 15 of the 1982 Convention, two questions remain to be resolved in applying that article to actual cases of delimitation. One issue is what constitutes "historical title" or "special circumstances" to exclude the application of the equidistance rule in the delimitation of adjacent or opposite territorial seas. There is voluminous literature on the question of historical title on adjacent seas³¹ and countries can consult that corpus of literature for equitable and legal solutions. The "special circumstances" problem is more difficult, however, because article 15 does not even provide a general guideline for determining what constitutes "special circumstances." Furthermore, the paucity of scholarly discussion on the topic³² renders negotiations over potential disputes more difficult.

The second problem relating to the application of article 15 is that the measurement of territorial sea is from the baseline³³ and not the shoreline³⁴ of the adjacent or opposite states. If one state's baseline encloses a large area of the sea, this would in fact extend its territorial sea beyond the me-

31. See the literature cited in J. BOUCHEZ, *THE REGIME OF BAYS IN INTERNATIONAL LAW* (1964); and G.H. KNIGHT, *THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 5-82* (1980). See also *Juridical Regime of Historical Waters, Including Historic Bays*, Study prepared by the Secretariat, U.N. Doc. A/CN.4/143 (1962), excerpt reprinted in G. H. KNIGHT, *supra* note 31, at 85-90.

32. Most discussions on "special circumstances" are related to the continental shelf. See, e.g., T.L. MCDORMAN, K. P. BEAUCHAMP & D. M. JOHNSTON, *MARITIME BOUNDARY DELIMITATION*, 78-87 (1983) [hereinafter cited as T. L. MCDORMAN].

Only Dr. Derek W. Bowett discussed briefly the problem of islands as an example of "special circumstances" in delimiting territorial sea boundaries with adjacent or opposite states. He wrote:

There is evidence to suggest that islands might well be a typical example of "special circumstances." Moreover, if one accepts the approach of the Arbitration Tribunal in the U.K./France Channel Award, the notion of "special circumstances" embodies a general appeal to equitable considerations rather than a notion of defined or limited categories of such circumstances. It is unlikely that the reference to "special circumstances" will bear in Article 12 of the Territorial Sea Convention a connotation different to that which it bears in Article 6 of the Continental Shelf Convention. Thus, the conclusion must be that islands may well call for a departure from the equidistance boundary in the territorial sea where equity so requires.

D.W. BOWETT, *THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW* 35-36 (1979).

33. The baseline has been described as "the low-waterline as marked on large scale charts." See G. H. KNIGHT, *supra* note 31, at 5-6 to 5-8.

34. The shoreline refers to the high-water line. *Id.*

dian line. However, article 7 of the 1982 Convention has provided detailed rules on how straight baselines should be drawn for delimiting territorial seas. According to paragraph 1 of this article, only "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," may the method of straight baseline be employed. Paragraph 3 further provides that "[t]he drawing of straight baselines must not depart to any appreciable extent from the general direction of the coasts, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."³⁵ Article 7, however, does not set the maximum length for a straight baseline and this ambiguity may cause problems in applying this article.³⁶

*B. The Delimitation of the Continental Shelf Between States with
Adjacent or Opposite Coasts*

Article 83 of the 1982 Convention does not mention any specific rules governing the delimitation of the continental shelf between states with opposite or adjacent coasts. It only vaguely provides that the delimitation "shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." Thus, in actual delimitation, one is confronted with the crucial problem of how to determine the applicable rules of international law.

According to article 38 of the Statute of the International Court of Justice, there are five sources of international law: (1) Treaties; (2) Customs; (3) General principles of law recognized by civilized nations; (4) Judicial decisions; and (5) Writers' views. The first three sources are usually referred to as primary ones, while the last two are subsidiary. However, in finding applicable rules in resolving the issue of delimitation of the continental shelf between states with opposite or adjacent coasts, the third principal source is largely irrelevant. The "general principles of law recognized by civilized nations" usually are interpreted to mean that international law can draw analogies from domestic legal systems, which are more developed.³⁷ Since the continental shelf is a relatively new concept, the domestic legal systems have not yet worked out satisfactory rules for possible use in international law, though some nations may face delimitation issues as be-

35. 1982 Convention, *supra* note 1, at 1272, art. 7, *reprinted in* LAW OF THE SEA, *supra* note 1, at 4.

36. For example, Ecuador set up a straight baseline of 136 miles, in disregard of the direction of the seacoast. *See* G. H. KNIGHT, *supra* note 31, at 5-50 to 5-54.

37. *See* MANUAL OF PUBLIC INTERNATIONAL LAW 144 (M. Sørensen ed. 1968).

tween political subdivisions. Ironically, some lawyers confronting domestic problems related to delimitation have even relied on international law practice in suggesting their resolution in the domestic legal context.³⁸ Nonetheless, article 83 of the 1982 Convention is simply too general to be useful in most practical applications, with the exception that it establishes that the goal of delimitation is to achieve an "equitable solution." There are, however, a number of bilateral treaties on delimitation of the continental shelf between adjacent or opposite states which may be helpful in identifying a trend of practice in this area.³⁹ With respect to international custom, in order to ascertain the existence of applicable customary rules, one must resort to judicial decisions, arbitral awards and writers' views. Thus, these so-called subsidiary sources of international law are playing a dominant role, by default, in identifying applicable customary rules in the delimitation of the continental shelf between states of opposite or adjacent coasts.

It is generally agreed that there are two ICJ decisions and one arbitral award which provide some guidance in the delimitation of continental shelf problems. The first relevant decision is the *North Sea Continental Shelf* cases, decided by the ICJ in 1969.⁴⁰ In *North Sea*, the Court laid down the following principles for delimiting the continental shelf between adjacent states:

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 into and under the sea, without encroachment on the natural prolongation of the land territory of the other;
2. if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;

[I]n the course of the negotiations, the factors to be taken into account are to include:

1. the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;

38. See, e.g., Charney, *The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context*, 75 AM. J. INT'L L. 28-68 (1981).

39. For a list of those agreements, see T. L. McDORMAN, *supra* note 32, at 158-95.

40. 1969 I.C.J. 3.

2. so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
3. the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.⁴¹

While the *North Sea Continental Shelf* cases provide guidelines for delimiting the continental shelf between *adjacent states*, it is not clear whether the principles enunciated in this case are applicable to delimiting the continental shelf of states with *opposite coasts*. Moreover, the case does not discuss the question of islands in the delimitation issue. These questions were discussed in the 1977 *Anglo-French Arbitral Award on the Delimitation of the Continental Shelf*.⁴² Under article 121, paragraph 3 of the 1982 Convention, only "rocks which cannot sustain human habitation or economic life of their own" cannot serve as a basis for claiming an economic zone or continental shelf. In other words, an island, as a matter of principle, can have an economic zone or continental shelf. However, under certain circumstances, inequitable results will arise from giving full effect to an island in delimitation. In the *Anglo-French Arbitral Award*, the tribunal also addressed these issues.

In that case, because both France and the United Kingdom were parties to the 1958 Convention on Continental Shelf,⁴³ the Arbitral Tribunal considered article 6 of the Convention applicable. On its face, that article seems to give preference to the median or equidistance rule. Paragraphs 1 and 2 provide that, in the case of opposite or adjacent coasts, the boundary of the continental shelf shall be determined by the agreement between the nations. In the absence of an agreement, and unless another line is justified by special circumstances, the boundary is the median or equidistance line. However, the Arbitral Tribunal considered that both "the equidistance-special circumstances rule [provided in Article 6 of the 1958 Convention] and

41. 1969 I.C.J. at 53-54 (para. 101).

42. *Delimitation of the Continental Shelf (U.K. v. Fr.)* reprinted in 18 R. Int'l Arb. Awards 3, 54 I.L.R. 11 (Ct. Art. 1977).

43. Convention on the Continental Shelf, *opened for signature April 29, 1958*, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311 [hereinafter cited as 1958 Convention].

the rules of customary law [stated by the Court in the *North Sea Continental Shelf* cases] have the same object—the determination of the boundary in accordance with equitable principles.” The Tribunal further observed that “in the present case, whether discussing the application of Article 6 or the position under customary law, both parties have had free recourse to pronouncements of the International Court of Justice regarding the rules of customary law applicable in the matter. . . .”⁴⁴ In other words, the Arbitral tribunal confirmed the customary rules stated by the ICJ in the *North Sea Continental Shelf* cases as applicable to this case of delimiting the continental shelf between states of opposite coasts.

In addition, unlike the *North Sea Continental Shelf* cases, the Arbitral Tribunal in the *Anglo-French Arbitral Award* was confronted with the problem of islands in delimitation. It took the position that if an island would cause a disproportionate effect in delimitation, then this would constitute a “special circumstance” and thus the island should not be given full effect in delimitation in order to avoid an “inequitable” result.⁴⁵ It also awarded a delimitation line between the two countries.

The third case concerning the delimitation of the continental shelf arose between Tunisia and Libya, and was decided by the International Court of Justice on February 24, 1982.⁴⁶ This decision further clarified certain principles relating to the delimitation of the continental shelf.⁴⁷ In contrast to the 1969 *North Sea Continental Shelf* cases, which merely enunciated certain principles of delimitation and let the parties concerned negotiate the lines themselves, the ICJ determined a continental shelf boundary between the two countries as it had done in the 1977 *Anglo-French Arbitral Award*. With respect to the Tunisian Kerkennah Islands, the ICJ drew on the approach of the 1977 Arbitral Tribunal in not giving full effect to these islands in delimitation.⁴⁸

It is beyond the scope of this paper to discuss various aspects of the two ICJ decisions and the one arbitral award, but these cases do indicate that it is possible to ascertain certain customary rules of international law in resolving the question of the delimitation of the continental shelf between states of adjacent or opposite coasts. Moreover, a voluminous corpus of

44. See 18 R. Int'l Arb. Awards at 47-48 (para. 75), 54 I.L.R. at 57-58.

45. See 18 R. Int'l Arb. Awards at 114-15 (paras. 244 and 245), 54 I.L.R. at 121-22.

46. 1982 I.C.J. 18.

47. See Feldman, *The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?* 77 AM. J. INT'L L. 219-38 (1983); Dunning, *International Court of Justice Judgment of February 24, 1982: Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* 4 OCEAN Y.B. 515-20 (1983).

48. See 1982 I.C.J. at 88-89 (para. 128).

literature,⁴⁹ and many bilateral agreements to delimit maritime boundaries, especially the continental shelf boundary, exist.⁵⁰ These two sources of information can thus be consulted in dealing with an actual delimitation case.

C. *The Delimitation of Economic Zones and Its Relation to the Delimitation of the Continental Shelf*

The text of article 74 of the 1982 Convention on the delimitation of exclusive economic zones is exactly the same as that of article 83 on the continental shelf. However, the only case relating to this issue arose between the United States and Canada concerning the maritime boundary in the Gulf of Maine, and was decided by a Chamber of the ICJ on October 12, 1984.⁵¹ Moreover, most literature on maritime boundaries focuses on the continental shelf. In view of this scarcity of decisions and commentary, the following discussion is primarily limited to the issues involved in the delimitation of economic zones rather than to solutions of the problem.

Unlike the concept of the continental shelf, which is based on the geographical situation of the seabed, the Exclusive Economic Zone (EEZ) arbitrarily sets a limit of 200 miles from the baseline of a coastal state. This regime was originally advocated by certain Latin American states such as Chile, Peru or Ecuador which have almost no continental shelf. Indeed, one commentator has noted that in the early stages of the UNCLOS III, the trend was for the continental shelf regime to be absorbed within the 200-mile limit of the EEZ.⁵² However, the broad-shelf countries, such as the United States, Australia, the Soviet Union, and Argentina, managed to reverse this trend. The 1982 Convention now allows a coastal state to extend its continental shelf beyond the 200-mile limit as far as 350 miles.⁵³ This parallel system of EEZ and continental shelf, however, creates a difficult problem with regard to delimitation between states of opposite coasts.

If the distance between two states with opposite coasts is more than 400 miles and there exists a continental shelf between them, then the delimitation

49. See sources cited in T. L. McDORMAN, *supra* note 32; Charney, *Ocean Boundaries Between Nations: A Theory for Progress*, 78 AM. J. INT'L L. 582-605 (1984); Collins & Rogoff, *The International Law of Maritime Boundary Delimitation*, 34 ME. L. REV. 1-62 (1982).

50. See, e.g., the list of such agreements cited in T.L. McDORMAN, *supra* note 32, at 158-95.

51. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12), *reprinted in* 23 I.L.M. 1197 (1984). For a summary of the case, see the Communiqué released by the I.C.J., in 28 INT'L PRAC. NOTEBOOK 11-16 (Oct. 1984).

52. See 1 D. P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 579 (1982).

53. 1982 Convention, *supra* note 1, at 1285, art. 76, para. 6, *reprinted in* LAW OF THE SEA, *supra* note 1, at 27.

itation issue can be resolved by resorting to the rules discussed in the previous section. If the distance between them is less than 400 miles, however, then the situation is more complicated. If both states have declared an EEZ, and both have agreed to disregard the continental shelf between them, then the issue may not be difficult to resolve. But if one state's shelf extends beyond the median line of the two opposite states' coasts, can that state still exercise sovereign rights over that part of the shelf as provided in article 77, paragraph 1, of the 1982 Convention?⁵⁴

Since the regime of the continental shelf emerged earlier than that of the EEZ, and since under the 1958 Convention,⁵⁵ the 1982 Convention⁵⁶ and writers' views,⁵⁷ "the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation,"⁵⁸ it is unlikely that a coastal state would give up its claim to its continental shelf beyond the median line of two states with opposite coasts. On the other hand, under article 56, paragraph 1, of the 1982 Convention, a coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil . . .,"⁵⁹ so it is unlikely that a state would allow an opposite state to claim the continental shelf under its EEZ.

One possible solution is to absorb the regime of the continental shelf within 200 miles into the EEZ. Thus, if the distance between two states with opposite coasts is less than 400 miles, then the EEZ should be delimited regardless of the continental shelf between them. Professor Shigeru Oda of Japan appears to favor this view.⁶⁰

On the other hand, a state with a broad shelf vis-a-vis an opposite state is likely to oppose this view. Under such circumstances, it is possible for that state not to declare an EEZ, but to base its claim exclusively on the doctrine of the continental shelf. Moreover, even if a state makes a declaration on an EEZ, it can still assert its rights on a continental shelf based on

54. *Id.* at 28.

55. See 1958 Convention, *supra* note 43, at art. 2, para. 3.

56. 1982 Convention, *supra* note 1.

57. None of the writers appears to oppose article 2, paragraph 3 of the 1958 Convention. See, e.g., Collins & Rogoff, *supra* note 49; Evensen, *The Delimitation of Exclusive Economic Zones and Continental Shelves as Highlighted by the International Court of Justice*, in *THE NEW LAW OF THE SEA* 107-54 (C. J. Rozakis & C.A. Stephanou eds. 1983).

58. 1982 Convention, art. 77, para. 3, *supra* note 1, at 1285, *reprinted in* *LAW OF THE SEA*, *supra* note 1 at 28.

59. 1982 Convention, art. 56, para. 1, *supra* note 1, at 1280, *reprinted in* *LAW OF THE SEA*, *supra* note 1, at 18.

60. S. ODA, *INTERNATIONAL LAW OF THE RESOURCES OF THE SEA* 93 (1979).

conventional and customary rules of international law. For instance, when the Republic of China made a declaration on its economic zone on September 6, 1979, it specifically pointed out:

The sovereign rights enjoyed by the Republic of China over the continental shelf contiguous to its coast as recognized by the Convention on the Continental Shelf of 1958 and the general principles of international law shall not be prejudiced in any manner by the proclamation of the present exclusive economic zone or the establishment of such zones by any other state.⁶¹

Another solution is to have different maritime boundary lines for EEZ and the continental shelf. For instance, in the hearing on the *Case Concerning the Continental Shelf* (Tunisia/Libya) on October 9, 1981, Libya expressed the following view:

Libya considers that, as between States with opposite or adjacent coasts, the delimitation of their respective continental shelf areas and of their economic zones ought not, in the majority of cases, to be different. Nevertheless, there may be factors relevant to fishing, such as established fishing practices, which have no relevance to shelf resources; and, conversely, there may be factors relevant to shelf resources—such as geological features controlling the extent of a natural prolongation—of no relevance to fishing. *It therefore follows that the two boundaries need not necessarily coincide.*⁶²

In actual cases of delimitation, a few states have agreed to have two different maritime boundary lines for different purposes. For instance, in the Treaty between Papua and New Guinea and Australia concluded on December 8, 1978, the fisheries-jurisdiction line does not correspond to the seabed and subsoil boundary.⁶³

Another problem relating to the delimitation of EEZs is the extent to which existing rules of international law, especially those relating to the delimitation of continental shelf, can *mutatis mutandis* be applied to the delimitation of the EEZ. Since the EEZ concept disregards the seabed's geographical or geological situation, there seems to be a natural limit to drawing analogies from rules of continental shelf delimitation to apply to the EEZ case. On the other hand, there are also similarities that may jus-

61. Chiu, Chen & Lee, *supra* note 9, at 248-56.

62. 1982 I.C.J. at 232 (dissenting opinion of Judge Shigeru Oda) (emphasis added).

63. See T.L. McDORMAN, *supra* note 32, at 194-95.

tify such analogies. For instance, on the question of to what extent an island should be given effect in delimitation, drawing analogies from the continental shelf delimitation experience certainly may prove useful.

While the above discussion is limited to the case of states with opposite coasts, to a certain extent the delimitation of EEZs between adjacent states may involve similar difficulties, especially in mixed delimitation cases involving EEZs and the continental shelf.

In the 1984 *Gulf of Maine Maritime Boundary Case*,⁶⁴ both the United States and Canada, as adjacent states, requested a Chamber of the ICJ to decide a single maritime boundary covering both the continental shelf and the superjacent fisheries zones. The ICJ Chamber noted that certain provisions concerning the continental shelf and the exclusive economic zone of the 1982 United Nations Convention on the Law of the Sea were adopted without any objections and thus "may be regarded as consonant at present with general international law on the question."⁶⁵ It also pointed out that despite the fact that both countries are contracting parties to the 1958 Convention on the Continental Shelf,⁶⁶ such a treaty obligation concerning the delimitation of the continental shelf does not apply by its explicit terms to superjacent waters.⁶⁷

With respect to the applicable criteria and methods in delimitation, the Chamber considered that it must exclude criteria which, however equitable they may appear in themselves, are not suited to the delimitation of both of the two objects in respect of which the delimitation is requested—the continental shelf and the fishery zones.⁶⁸ Thus, it stated:

. . . [A] delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard . . . preference will . . . inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation.⁶⁹

64. 1984 I.C.J. 246.

65. 1984 I.C.J. at 294 (para. 94).

66. See 1958 Convention, *supra* note 43.

67. 1984 I.C.J. at 291 (para. 84).

68. *Id.* at 326 (para. 192).

69. *Id.* at 327 (para. 194).

In view of these reasons, the Chamber turned to criteria derived from geography, concluding that it should favor the criterion whereby one should aim at an equal division of areas where the maritime projections of the coasts of the states between which delimitation is to be effectively covered overlap. However, "the adoption of this starting-point must be combined with the parallel and partial adoption of the appropriate auxiliary criteria insofar as it is apparent that this combination is necessitated by the *relevant circumstances* of the area concerned, and provided they are used only to the extent actually dictated by this necessity."⁷⁰

One of the relevant circumstances indicated by the Chamber is whether there is "significant inequality in the lengths of the two States' respective coastlines abutting on the delimitation areas."⁷¹ Another relevant circumstance is the presence of islands. Like the court in the 1982 *Tunisia/Libya Continental Shelf* case, the Chamber gave a Canadian island only half effect in delimitation.⁷²

IV. CONCLUSION

The provisions on delimitation of the exclusive economic zone/continental shelf between states with opposite or adjacent coasts in the 1982 United Nations Convention on the Law of the Sea are too general and therefore give rise to some difficult problems in their application to a concrete case. Moreover, the Convention fails to deal with the problem of the relationship between EEZs and the regime of the continental shelf. As a matter of fact, the UNCLOS III did not even discuss this issue and the UN Secretariat also did not provide any background analysis for the Conference participants.

Some rules of practices relating to the delimitation of the continental shelf between states of adjacent or opposite coasts can be, *mutatis mutandis*, applied to the delimitation of EEZs. Such rules, however, as stated by the ICJ Chamber in the 1984 *Gulf of Maine Maritime Boundary Delimitation*, are not necessarily suitable to a case delimiting a single maritime boundary for both the continental shelf and the EEZ.

In the 1984 *Gulf of Maine Maritime Boundary Delimitation*, the ICJ Chamber suggested a simple geographical approach to the multi-purpose delimitation case. The Chamber in fact suggested using a median rule, or an equidistance rule, in cases of opposite states, subject to the adjustment of this rule in the relevant circumstances, such as the proportionality of the

70. *Id.* at 328 (para. 197) (emphasis added).

71. *Id.* at 335 (para. 218).

72. *Id.* at 336-37 (paras. 221-22).

length of the coastlines of delimiting states or the presence of islands, in order to achieve an equitable solution as required by the 1982 United Nations Convention on the Law of the Sea. This approach has the merit of presenting a simple and practical solution to a difficult and complicated case of delimiting a single boundary for both the continental shelf and the EEZ. Although the ICJ Chamber was composed of Western judges only,⁷³ under article 27 of the ICJ Statute, a judgment given by a Chamber "shall be considered as rendered by the Court." Therefore, its impact on the development of international law should be the same.

Finally, assuming the ICJ Chamber rule is accepted as a principle of international law, there remains the question of delimiting the maritime boundary line between a state with an EEZ and a state with a continental shelf but without a declared EEZ. Recently the International Law Association (ILA) decided to form a Committee on the Exclusive Economic Zone to study this emerging regime, including the relationship between the EEZ and the continental shelf.⁷⁴ Hopefully the ILA study and more research by scholars will clarify some of the difficult issues raised in this paper.

73. Judges Ago (Italy), Gros (France), Mosler (Federal Republic of Germany), Schwebel (U.S.) and Cohen (Canadian Judge *ad hoc*) comprised the panel.

74. See INT'L L. ASS'N REPORT OF THE SIXTIETH CONFERENCE HELD AT MONTREAL (AUGUST 29-SEPTEMBER 4, 1982) 303-24 (1983). See generally Rhee, *supra* note 17.

