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Law of the Sea: The Delimitation of the Maritime Boundary Between the United States and the Bahamas

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NOTE

LAW OF THE SEA: THE DELIMITATION OF THE MARITIME BOUNDARY BETWEEN THE UNITED STATES AND THE BAHAMAS*

INTRODUCTION

In a science based civilization dependent upon exploitation of dwindling supplies of natural resources, the law of the sea has undergone rapid and uneven development.[1] Freedom of the seas,[2] a doctrine designating the oceans as public highways for commerce and security, has given way to a trend of decisions which features several contemporaneous maritime regimes[3] through which nations claim control over ocean areas for a variety of exclusive and non-exclusive uses. This trend has been accelerated by the worldwide need to reach previously inaccessible resources and facilitated by corresponding technological advances which permit access.[4]

Where two or more nations abut the same ocean area, the problem of drawing boundary lines becomes manifest. International law has developed

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1. _See, e.g.,_ M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS (1962). McDougal and Burke provide a comprehensive overview of the law of the sea in the post-1945 era. The authors suggest that the interests of the world community in the oceans are best served by a balance of inclusive (public) and exclusive (private) uses. This balance would yield maximum reasonable use of the oceans by accommodating the most substantial claims of nations, while maintaining the oceans as an essentially public resource.

The effect of technology on this balance is a prime consideration in the development of the law of the sea. Science consumes natural resources and creates the technology necessary to extract them. Since World War II, this cause and effect relationship has created a trend of decision toward greater closure of previously public ocean areas. This trend was predicted with clarity by Professors McDougal and Burke. _See id._ at 4-5.

2. _See_ H. GROTIUS, DE JURI BELLI AC PACIS 190-91 (1646 ed. F. Kelsey trans. 1925). Hugo Grotius, the famous Dutch Jurist, was the first to conceive of freedom of the seas as an international legal principle. Groitus reasoned that, as the seas were incapable of division, they were the public property of mankind, incapable of exclusive national ownership.

The primary application of the doctrine was in regard to a coastal state competence to enforce its domestic laws against foreign vessels outside the three-mile territorial sea limit. _See_ 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 503-04 (1965).

3. The law of the sea includes several regimes or areas of control which overlap in location and purpose. The international race to claim adjacent ocean areas has left these various regimes rather poorly defined in size and scope. Starting from an imaginary coast and traveling seaward, the first three to twelve miles of ocean area is the territorial sea. From that limit, the Exclusive Economic Zone (EEZ) extends to a distance 200 nautical miles from the coast. The seabed adjacent to the coast falls under the regime of the continental shelf. International law has not yet formulated a seaward limit for the shelf regime, although the 200 nautical mile EEZ limit has been suggested. _See_ E. LUARD, THE CONTROL OF THE SEA-BED (2d ed. 1977). The inside cover of this book contains a useful illustration that describes the several maritime regimes and their location relative to the coast.

4. _See_ M. BARAM, D. RICE & W. LEE, MARINE MINING OF THE CONTINENTAL SHELF 59-94 (1978). Technological capability will make marine mineral exploitation at very great depths possible within the foreseeable future.

rules and principles that ostensibly provide for presumptive resolution of these inchoate maritime boundary disputes.[5] In light of the urgent need to develop ocean resources, the maritime boundary delimitation process is both vital and volatile. A threshold issue, therefore, is whether international law as a body of treaties,[6] cases,[7] practices[8] and customary norms[9] is an appropriate and effective forum for resolution of these sensitive disputes.

This issue need not be resolved at this stage in the development of the law of maritime boundary delimitation. The international community is proceeding with this development under the tacit assumption that a public order of the oceans is both necessary[10] and vital to minimum world order.[11] There is a growing recognition even among international law's most severe

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5. It has been estimated that 105 maritime boundaries must be negotiated in the Caribbean Sea alone. *See* Nweihed, *EEZ (Uneasy) Delimitation in the Semi-Enclosed Caribbean Sea: Recent Agreements Between Venezuela and Her Neighbors,* 8 OCEAN DEV. & INT'. L.J. 1, 1 (1980).

6. While treaties normally bind only nations that are parties to them, many form the basis for the development of internationally accepted legal principles. A case in point is the 1958 Geneva Convention on the Continental Shelf, *opened for signature* April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter the Geneva Convention]. Article 6 of that convention, which describes the method for delimiting continental shelf boundaries, has become part of the corpus of customary international law. See notes 68 & 71 and accompanying text, *infra.*

7. Decisions of the International Court of Justice (ICJ) or of international courts of arbitration lack the authoritative status of cases in common law jurisdictions. They are more properly viewed as reflections of the status of treaties and state practices than as rules of law. *See* G. VON GLAHN, LAW AMONG NATIONS 19-20 (3d ed. 1976). *Cf.* Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815). Chief Justice Marshall recognized the authoritative status of the law of nations in the courts of all civilized and commercial states. Such decisions were to be received "not as authority, but with respect." *Id.*

8. *E.g.,* The Scotia, 81 U.S. (14 Wall.) 170, 188 (1872). The court held that the law of the sea was applicable to an action by owners of a British vessel against the owners of an American vessel for damages arising out of a collision. These navigation rules, originally enacted by the United States and Great Britain, had been elevated to the status of international law through usage by more than thirty maritime nations. This illustrates the process by which state practices become binding rules of international law.

9. The term customary norm is used to describe a rule, holding, treaty or practice which has become part of the corpus of international law. President Jimmy Carter, in proclaiming August 19, 1977 World Law Day, called for the development of legal norms that would further the interests of world peace and security. *See* Presidential Proclamation No. 4514, 42 Fed. Reg. 42,299 (1977).

10. The Third United Nations Conference on the Law of the Sea (UNCLOS III) is engaged in an ongoing attempt to draft a comprehensive treaty which will resolve problems connected with the current trend toward greater closure of the oceans. *See, e.g.,* Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978),* 73 AM. J. INT'L L. 1 (1979). The United States views UNCLOS III as a necessary development. *See, e.g.,* Kissinger, *Secretary Kissinger Discusses Progress and Goals in the Law of the Sea Negotiations,* 75 DEP'T STATE BULL. 333 (1976).

11. *See* McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective,* in M. MCDOUGAL & ASSOCIATES, STUDIES ON WORLD PUBLIC ORDER 157 (1960). Minimum world order describes an international environment in which nations can resolve their disputes without resort to violence. Professor McDougal measures the success of the international legal system against this standard.

critics that a system of international dispute settlement, under cognizable rules of law and globally endorsed procedures, is a necessary and practicable goal.[12]

The primary objective of a law of maritime boundary delimitation is to create certainty of expectation[13] for prospective ocean resource developers, whether public or private. Interested parties will not risk the substantial investments[14] necessary to extract ocean resources if the target site is the subject of an international dispute. To quiet title to the world's seabed, international law must develop rules and principles which presumptively declare the limits of a given state's jurisdiction vis-à-vis its coastal neighbors.[15] Because legal doctrine alone cannot resolve all such boundary disputes, recourse to authoritative dispute settlement by judicial or quasi-judicial processes must be available.[16]

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12. For a discussion of international law as an effective forum for the conduct of international relations, see Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics,* 10 CAL. W. INT'L L.J. 193 (1980). Professor Boyle chronicles the discrediting of international law which occurred as a response to the failures of the Treaty of Versailles and the League of Nations, Reliance on the rule of law, in this view, led to World War II. Boyle concludes, however, that the extreme hazards of power politics in the nuclear age have forced reconsideration of international law as a rational practical means of pursuing world security. For a more forthright defense of international law, see Onuf, *International Legal Order as an Idea,* 73 AM. J. INT'L L. 244 (1979).

13. Certainty of expectation refers to the lawyer's task of predicting the legal outcome of a maritime boundary dispute. Precision and clarity in the delimitation process facilitates this objective, reduces the potential for protracted maritime disputes, and obviates recourse to judicial or arbitral settlement. *See generally* M. MCDOUGAL & W. BURKE, *supra* note 1.

14. *See, e.g., Hearings on Outer Continental Shelf Policy Issues,* 92d Cong., 2d Sess. 10 (1972) (statement of Hollis M. Doyle). As of 1972, 600,000 acres of outer continental shelf off Washington and Oregon had been explored at a cost of about $100 million. Despite high expectations, only uneconomical quantities of petroleum had been found. *See generally* W. AHERN, OIL AND THE OUTER COASTAL SHELF: THE GEORGES BANK CASE 9-12 (1973).

15. The current dispute between Greece and Turkey over control of the Aegean Sea continental shelf underscores the serious nature of maritime boundary disputes. In 1973 Turkey issued licenses to private interests for petroleum exploration in the area. The two nations disputed the legal effect of the presence of small Greek islands located near the Turkish coast. Greece invoked article 6 of the Geneva Convention, contending that the area should be delimited by drawing a median line between the islands and Turkey. *See* Geneva Convention, *supra* note 6. Turkey countered, stating that the islands be ignored. After an exchange of diplomatic notes the parties commenced boundary negotiations which remained deadlocked for a year and a half. Over Turkish objections, Greece submitted the dispute to the International Court of Justice (ICJ) which held that it lacked jurisdiction over the matter. Aegean Sea Continental Shelf Case, [1978] I.C.J. 1. The ongoing controversy has caused a serious rift in Greco-Turkish relations. The United States has joined other nations in urging the two nations to mutually consent to third party settlement. *See* Bennet, *United States Calls for Greece-Turkey Talks on Aegean Sea Dispute,* 75 DEP'T STATE BULL. 373, 374 (1976). *See generally* Evans, *Judicial Decisions,* 73 AM. J. INT'L L. 492 (1979).

16. United States policy, which accords with international trends, favors submission of maritime boundary disputes to either the ICJ or a court of arbitration when negotiations fail. *E.g.,* Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Guld of Maine Area, March 29, 1979, United States — Canada, T.I.A.S. No. 9448. The Informal Composite Negotiating Text (ICNT), the draft treaty being developed at UNCLOS III, provides in part XV detailed procedures for international judicial settle-

The combination of clear, predictable legal rules of boundary delimitation and ready access to judicial settlement will provide participant nations with the opportunity to assess probable outcomes.[17] This would result in the creation of a presumptive boundary,[18] and thus influence nations to adopt realistic negotiating positions. The certainty of expectation provided would promote the maximum reasonable use[19] of vital ocean resources.

Numerous complex policy considerations present obstacles to the development of this public order. An international legal system cannot survive unless it appears to the majority of participants that subscription to its operation is in their exclusive national interests.[20] Complicating this threshold consideration is the geopolitical conflict between the developed and third worlds.[21] Third world nations, acting as a bloc,[22] have asserted a preferential

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ment. *E.g.*, Third United Nations Conference on The Law of the Sea, Informal Composite Negotiating Text, 8 U.N. GAOR (6th sess.) 45-48, U.N. Doc. A/Conf. 62/W.P. 10 (1978). *See generally* Adede, *Law of the Sea — The Integration of the System of Settlement of Disputes Under the Draft Convention as a Whole*, 72 AM. J. INT'L L. 84 (1978).

17. Colson, *The United Kingdom — France Continental Shelf Arbitration*, 72 AM. J. INT'L L. 95, 111-12 (1978). Colson, an attorney-adviser in the Office of the Assistant Legal Adviser for Oceans, International Environment, and Scientific Affairs for the United States Department of State, discusses the problems confronting national decision makers in the promulgation of lawful limits to coastal state control. He calls for further judicial expression of the law of maritime boundary delimitation as a remedy.

18. A presumptive boundary, formed by operation of law, would provide an efficacious reference point for subsequent negotiation. The equidistance-special circumstances rule of article 6 of the Geneva Convention, *supra* note 6, potentially establishes a median or equidistance line as a presumptive boundary. Unfortunately, state practice and trends of decision have failed to apply the rule in this manner. See note 134 and accompanying text, *infra*.

The lack of certainty can be ameliorated by provisional use agreements pending settlement. *See* Press Conference with Secretary of State Cyrus Vance, *reprinted in* 79 DEP'T STATE BULL. 21 (1979).

19. Maximum reasonable use has been offered as the test for lawfulness of exclusive national uses of ocean areas and resources. *See* McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955). Professors McDougal and Schlei defended United States nuclear arms testing in the South Pacific during the early 1950's as lawful, considering the importance of the activity and the limited closure of the ocean it required. The urgency attached to developing maritime petroleum resources provides an interesting comparison.

20. For example, Venezuela has consistently denied the applicability of the equidistance-special circumstances rule in its boundary negotiations. The presence of numerous islands of varied national affiliation near its coast renders application of the rule highly undesirable, and it has therefore called for "delimitation in accordance with equitable principles." This is the rule of international law announced by the ICJ in the North Sea Continental Shelf Case, [1969] I.C.J. 12. The court in the *North Sea Case* considered a wide variety of physical features in boundary delimitation and offered no presumptive boundary as a negotiation starting point. See text accompanying note 93 *infra*.

21. *See generally* R. ANAND, LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES (1975).

22. Organized developing nation activities at UNCLOS III regarding deep seabed mining has led at least one United States public official to openly reconsider American participation in the conference. *See* Remarks of Elliot L. Richardson, Ambassador at Large and Special Representative of the President to the Law of the Sea Conference at the United Nations, *reprinted* in 77 DEP'T STATE BULL. 389 (1977).

right to exploit certain ocean resources.[23] These resources, it is claimed, are the common heritage of mankind, to be held in trust for the benefit of the developing world.[24]

Global subscription to a regime of maritime boundary delimitation is further impeded when individual nations view the operation of international law in a particular local dispute as inimical to their best interests.[25] A nation is unlikely to concede title to a seabed rich in petroleum merely for the sake of the international legal system.[26]

23. Most of the controversy surrounds the regime of the deep seabed and the potentially vast concentrations of manganese nodules which exist there. These potato-sized lumps of minerals apparently precipitate out of sea water, and are a rich potential source of manganese, nickel, copper and zinc. *See* REPORT OF THE MARINE BOARD OF THE NATIONAL ACADEMY OF SCIENCES, MINING IN THE OUTER CONTINENTAL SHELF AND IN THE DEEP OCEAN (1975). The issue has proved exceptionally thorny for the United States. On November 14, 1974, Deepsea Ventures, Inc., a Delaware corporation of multinational ownership, requested the State Department to recognize its exclusive claim to mine manganese nodules and to protect its claims from encroachment by other nations. *See* Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment, by Deepsea Ventures, Inc. (November 14, 1974), *reprinted in* 14 INT'L L. MATERIALS 66 (1975). The State Department refused either to recognize the claim, or to actively protect Deepsea's activities. However, the State Department announced the United States' position that mining in the seabed beyond national jurisdiction was a permissible use of the high seas under existing international law. *Id.*

In response, third world nations at UNCLOS III developed the common heritage of mankind doctrine which declared that resources of the deep seabed were held in trust for all nations. To ensure that nations with a technological headstart would not deplete the manganese nodule supply, these nations proposed creation of a Deep Seabed Authority. The Authority would manage development of the resource and distribute the proceeds among all nations with the bulk earmarked for the developing world. ICNT article 150, *supra* note 16, at 25. The United States has accepted the Seabed Authority and revenue sharing beyond the 200-mile limit in principle. However, it is the strategy of the third world bloc to delay agreement until the technology gap can be narrowed. *See* Adede, *Developing Countries' Contributions to Development of Institutional Arrangements for an International Seabed Authority,* 4 BROOKLYN J. INT'L L. 1 (1977); Friedman & Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea,* 16 SAN DIEGO L. REV. 555 (1979). The impasse has generated considerable congressional support for passage of a United States deep seabed mining bill which would offer the assistance requested by Deepsea Ventures, Inc. *See* H.R. REP. NO. 3350, 95th Cong., 2d Sess.; 124 CONG. REC. H7341 to H7382 (1978). *See also* Richardson, *Review of the Law of the Sea Conference and Deep Seabed Mining Legislation/House Committee on the Environment and Natural Resources,* 77 DEP'T STATE BULL. 751 (1977).

24. For a discussion of third world response to the prospect of a United States deepsea mining bill, see Biggs, *Deep Seabed Mining and Unilateral Legislation,* 8 OCEAN DEV. & INT'L L. 223 (1980). The author, applying Roman civil law principles, argues that freedom of the seas never included the right of nations to exclusively mine the seabed. In his view, manganese nodules are *res communes* (subject to public ownership and use) and not *res nullius* (unclaimed property which could become owned).

25. The position of Turkey in the Aegean Sea dispute with Greece provides an illuminating example. See note 15 *supra.*

26. Obviously, a legal regime that rigidly produces unacceptable results to one or more participants cannot offer minimum public order. At some point certainty of expectation must yield to situational exigencies. The dilemma may best be solved by routine submission of disputes to the ICJ or arbitral courts. *See* Baxter, *Two Cheers for International Adjudication,* 65 A.B.A. J. 1 185 (1979).

Against this background, a fledgling public order has emerged.[27] Whether it can provide the certainty of expectation necessary to assure maximum reasonable use and minimum public order is unclear. This will be answered as nations attempt to settle the numerous maritime boundary disputes that have emerged.[28] One such dispute has arisen in the waters off the coast of Florida. The United States and the Bahamas have made divergent, overlapping claims to the waters of the Florida Straits, and to the seabed of the Blake Plateau.[29] The Florida Straits, through which the Gulf Stream runs, is an area of deep water lying directly between South Florida and the Great and Little Bahama Banks.[30] Only fifty miles separate Bimini,[31] an island perched on the westernmost edge of Little Bahama Bank, from south Florida.[32] The continental shelf off south Florida is very narrow, ranging in width from four miles to only several hundred feet.[33]

The area north of the Bahamas and east of Florida is known as the Blake Plateau.[34] It is generally thought to be a portion of the North American continental shelf which sank to a much greater depth through a faulting process.[35] The Blake Plateau is, therefore, part of the continental margin. The distinction between shelf and margin is significant in determining whether an area is subject to exclusive coastal state jurisdiction.[36]

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27. *See* notes 150-153 and accompanying text, *infra.*

28. Since 1945 exclusive coastal state control over the adjacent waters and seabed has increased dramatically. For a graphic demonstration of this trend, *compare* 4 M. WHITEMAN, *supra* note 2, at 21-33 which contains a chart indicating national claims to ocean areas, *with* 6 R. CHURCHILL, M. NORDQUIST & S. LAY, NEW DIRECTIONS IN THE LAW OF THE SEA 881-84 (1977), which contains a similar compilation. The following developments are revealed: The territorial sea has increased in width from three miles to six, nine, or twelve miles. Fishery zones, once limited to three miles, are now 200 miles. For the seaward limit of the shelf regime, see note 142 and accompanying text, *infra.*

29. See appendix A. Line A-B-C-D-E-P and beyond represents the single United States maritime boundary. *See* Fishery Conservation Zone, Notice of Limits, 42 Fed. Reg. 12,937 (1977). The Bahamas claims separate boundaries for its EEZ, line M-N-O-E, and continental shelf, line A-B-O-P. *See* Bahamas Fisheries Resources Jurisdiction and Conservation Act, *reprinted in* U.N. ST/LEG/SER.B/19, at 192 (1977). See text accompanying notes 217 & 219 *infra.*

30. The depth of the water in the Florida Straits ranges between 350 and 450 fathoms (average depth 2,150 feet). The National Oceanic and Atmospheric Administration publishes charts which detail ocean depths in the Florida-Bahamas region. *See* Nautical Charts Nos. 11460 & 11009, published by the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Survey.

31. Bimini is the closest Bahamian island to the United States mainland. It has a small local population supported entirely by the sport fishing and tourist industries. *See* U.S. DEP'T OF STATE, COUNTRIES OF THE WORLD AND THEIR LEADERS 184 (rev. ed. 1976).

32. *See* Nautical Charts Nos. 11460 & 11009, *supra* note 30.

33. *Id.*

34. *Id. See* appendix A.

35. *E.g.*, K. EMERY & E. UCHUPI, WESTERN NORTH ATLANTIC OCEAN: TOPOGRAPHY, ROCKS, STRUCTURE, WATER, LIFE AND SEDIMENTS (1972); Stehli, *The Geology of the Bahama-Blake Plateau Region,* in THE OCEAN BASINS AND MARGINS 15 (1974).

36. The continental shelf is the portion of the continental margin nearest the coast. Generally, the shelf extends out from shore at a relatively constant depth until it slopes abruptly toward the deep ocean floor. This deeper area, while generally beyond the reach

This paper will examine and analyze the United States-Bahamas maritime boundary dispute and predict the probable outcome of a judicial or quasi-judicial settlement.[37] Several ancillary issues will be examined, including, whether the claims bear any reasonable relation to the current law of maritime boundary delimitation;[38] whether the probable judicial outcome would yield an internationally supportable result[39] thereby facilitating meaningful and equitable pre-litigation settlement negotiations; and whether further doctrinal developments in the law of the sea are necessary and, if so, what form they should take.[40]

THE INTERNATIONAL LAW OF MARITIME BOUNDARY DELIMITATION

Prior to 1945, the oceans were viewed as a public highway upon which all nations were entitled to conduct essential commercial and security activities.[41] International law developed the principle of freedom of the seas,[42] and implicit in its formulation was the widespread belief that minimum order required the oceans to remain public.[43] Exclusive national maritime jurisdiction was limited to three discernible regimes: inland waters,[44] such as rivers and

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of current mining technology, is geologically similar to the shallower shelf. Eventually, the sedimentary material of the continental margin gives way to the igneous basalt of the deep ocean floor. *See* E. LUARD, *supra* note 3, at 1-32. It is unsettled whether the margin is part of the shelf regime or part of the public regime of the deep seabed. See text accompanying notes 209-212 *infra.*

37. An agreement to submit the dispute to the ICJ or an arbitral court might resemble the United States treaty with Canada. See note 16 *supra.*

38. *See generally* Adede, *Toward the Formulation of the Rule of Delimitation of Sea Boundaries Between States with Adjacent or Opposite Coasts,* 19 VA. J. INT'L L. 207 (1979) (clarity and precision are lacking in this area).

39. See text accompanying notes 25 & 26 *supra.*

40. See text accompanying note 260 *infra.*

41. *See* The Jesse, the Thomas F. Bayard and the Peschawa (Great Britain v. United States), 6 R. Int'l Arb. Awards 57 (1929). Owners of British vessels were awarded damages for lost revenues caused by United States enforcement of seal conservation laws. Three British schooners, engaged in hunting sea otters in the North Pacific, were boarded by officers of the United States Cutter *Bear,* which was enforcing an American conservation law. No skins were found, but the hunters' weapons were placed under seal. In imposing liability for expense incurred by the vessels, the arbitral tribunal held that the bona fides of the United States officers were irrelevant. A mere error in judgment was sufficient to create liability, as freedom of the seas and therefore British sovereignty had been breached.

42. For a discussion of the history of the doctrine, see 4 M. WHITEMAN, *supra* note 2, at 501. Also see note 2 *supra.*

43. *See* The Jessee, the Thomas F. Bayard and the Peschawa (Great Britain v. United States), 6 R. Int'l Arb. Awards 57, 59 (1929). The arbitral court decided, without hesitation, that good faith errors in judgment could not absolve liability, even where demonstration of damages was highly speculative. This treatment of the freedom of the seas doctrine is representative of the importance placed on uninterrupted use of the oceans.

44. *See, e.g.,* The Faber Case (Germany v. Venezuela), 10 R. Int'l Arb. Awards, 438, 457 (1903) (arbitral court sustained Venezuela's absolute right to control navigation in the Catatumbo and Zula Rivers, over German objectives that the general interests of mankind created an implied easement of necessity).

bays, in which nations exercised full sovereignty;[45] the territorial sea,[46] a three-mile belt contiguous to the coast, in which nations exercised full sovereignty subject to the right of innocent passage;[47] and the claims of belligerent states in time of war, whose temporary closures of ocean areas were deemed lawful security measures.[48]

The notion of freedom of the seas was given firm expression in *The Le Louis*.[49] Sir Walter Scott, writing for the 1817 court, held that England lacked competence to enforce an anti-slave trade law[50] against a French vessel on the high seas.[51] The right of nations to the uninterrupted use of the oceans was held to preclude this affirmative exercise of sovereignty on the high seas, despite the desirability of the legislative objective.[52]

The modern trend toward greater closure of the oceans began in 1945 with the Truman Proclamation.[53] This document, which became the doctrinal foundation for the legal regime of the continental shelf,[54] was a unilateral declaration by the United States of jurisdiction and control over the resources of the seabed and subsoil of the continental shelf appertaining to its shores.[55] The proclamation did not affect the legal status of the waters adjacent to this seabed, which remained open to public use.[56]

45. A nation may lawfully exercise the full range of national powers in inland waters. In the United States there has been controversy between the states and the federal government over where that power resides. *Cf.* United States v. California, 332 U.S. 19 (1947) (Black, J.) (states own tidelands within their boundaries, but exclusive federal jurisdiction begins at the mean low water mark); Pollard's Lessee v. Hagan, 44 U.S. (Howard) 212 (1845) (states own inland waters because they entered the Union on an "equal footing" with the federal government).

46. The United States has traditionally claimed a three-mile territorial sea limit. *See* United States v. California, 332 U.S. 19, 33-35 (1947).

47. Innocent passage is the corollary to freedom of the seas within the territorial sea area. While the regime is one of actual sovereignty, it is a norm of customary international law that states may use the area for merchant or peaceful defense transit, where the action is not hostile. *Cf.* The Corfu Channel Case (United Kingdom v. Albania), [1949] I.C.J. 4. The International Court of Justice held that Albania had to compensate the United Kingdom for the damage to ships and loss of life that occurred when Albania fired on the ships and mined the straits. The United Kingdom was engaging in intelligence gathering operations in connection with aiding anti-leftist factions in the Greek Civil War. The court upheld the British activities as within the regime of innocent passage. *Contra,* ICNT U.N. Doc. A/CONF.62/WP.10/Rev. 1 (1979), *reprnted in* 10 M. NORDQUIST & K. SIMMONDS, NEW DIRECTIONS IN THE LAW OF THE SEA 142-43 (1980), which would proscribe the British activities in the Corfu Case. This trend has been criticized as a detriment to world security and order. *See* M. MCDOUGAL & W. BURKE, *supra* note 1, at 204-14.

48. *See generally* 4 M. WHITEMAN, *supra* note 2, at 503-04.

49. 165 Eng. Rep. 1464 (1817).

50. England contended that slave trade had been abolished by treaty between itself and France, and by act of Parliament. *Id.* at 1464.

51. Apparently, the seized vessel was English, masquerading as a French ship to avoid the anti-slave trade law. *Id.*

52. *Id.* at 1478.

53. Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, Presidential Proclamation No. 2667, 3 C.F.R. 943 (1945).

54. *See* North Sea Continental Shelf Case, [1969] I.C.J. 12.

55. *See* Presidential Proclamation No. 2667, *supra* note 53.

56. *Id.*

According to the Truman Proclamation, the United States possessed competence to exercise exclusive control over the continental shelf, because it was the natural prolongation[57] of its territory.[58] This natural prolongation metaphor became the ownership theory[59] of the shelf regime. Its application makes a variety of geophysical features relevant to analysis of maritime boundary delimitation.[60] The drafters anticipated the need to establish boundaries where the United States shared a continental shelf with a neighboring coastal state. Consequently, the proclamation provides that these boundaries are to be established through negotiation "in accordance with equitable principles."[61]

The idea of exclusive control over the continental shelf gained rapid international acceptance,[62] and numerous unilateral declarations of shelf jurisdiction were issued by nations in all parts of the world.[63] The emergent continental shelf regime soon became a norm of customary international law.[64] In recognition of this trend, the International Law Commission (ILC)[65]

57. *Id.* Natural prolongation is a reference to the geological relationship between the continental margins and the continents themselves. See text accompanying note 93 *infra.*

58. *See* Presidential Proclamation No. 2667, *supra* note 53.

59. When the Truman Proclamation was issued, coastal state control over the adjacent seabed was unknown. Natural prolongation implies that political control over the land mass carries with it certain inherent rights to the appurtenant shelf. For a discussion of early developments of the legal regime of the shelf, see Lauterpacht, *Sovereignty over Submarine Areas,* 27 BRIT. Y.B. INT'L L. 376 (1960).

60. In the North Sea Continental Shelf Case, [1969] I.C.J. 12, 54-55, the ICJ enumerated a non-exclusive list of physical features designed to define the natural prolongation of the nations involved. See text accompanying note 93 *infra.*

61. Presidential Proclamation No. 2667, *supra* note 53.

62. Although popularity of the shelf regime spread rapidly, it had not attained the status of a customary norm as of 1952 in the view of one arbitral court. *See* The Abu Dhabi Case, (Petroleum Development, Ltd. v. Abu Dhabi), 1 INT'L & COMP. L. Q. 247, 253-60 (1952). The Sheik of Abu Dhabi, one of the Trucial States of Arabia bordering the Persian Gulf, granted a concession contract to Petroleum Development, Ltd. for exploitation of oil resources in "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area." In 1949 Abu Dhabi issued a "Truman Proclamation" of its own, *reprinted in* National Legislation and Treaties Relative to the law of the Sea, U.N. Legislative Series, U.N. Doc. ST/LEG/SER.B/1 (1959), and the oil company argued that the 1939 contract granted it rights under the new regime. The arbitral umpire, Lord Asquith of Bishopstone, held that no international law of the shelf existed in 1939 and none had crystallized in 1949. Therefore, the oil company could claim no rights to resources outside the territorial sea. Its rights in the territorial sea had also been disputed, but were upheld by the court as a matter of contract construction. *Accord,* Petroleum Dev. (Qatar) Ltd. v. Ruler of Qatar, 18 I.L.R. 161 (1950).

63. *See* 1 S. LAY, R. CHURCHILL & M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA 307-52 (1973) for reprints of various unilateral declarations of shelf jurisdiction, *e.g.,* Iran (1955) *id.* at 307-22; Malaysia (1966) *id.* at 322-26; Union of Soviet Socialist Republics (1968) *id.* at 347-52. During the 10 years following the Truman Proclamation the following Latin American countries claimed continental shelf jurisdiction: Argentina, Mexico, Chile, Peru, Costa Rica, Ecuador, and Honduras. *See* Phleger, *Revent Developments Affecting the Regime of the High Seas,* 33 DEP'T STATE BULL. 934, 937-39 (1955).

64. North Sea Continental Shelf Case, [1969] I.C.J. 12, 19-21.

65. The International Law Commission (ILC) was established by resolution of the General Assembly to draft multilateral conventions, attempt the codification of international

met in 1951 to analyze the shelf regime. This work culminated in the 1958 Geneva Convention on the Continental Shelf (Geneva Convention).[66]

Article 6 of the Geneva Convention describes the method for determining the presumptive boundary of a shared seabed area when a negotiated settlement has not been achieved.[67] In situations where two opposite states[68] share a continental shelf, the boundary is a median line,[69] the points being equidistant from the baselines[70] from which the limits of the territorial seas of the two states are drawn. Where two states are adjacent,[71] a line drawn by connecting points selected along the adjacent coasts at equidistant points seaward establishes the boundary.[72] The ILC recognized that relatively minor physical features, such as the presence of small islands[73] or the unique shape of a coast,[74] might cause the boundary line to deviate disproportionately if the formula was applied mechanically. Consequently, article 6 permits the boundary to deviate from the equidistance line where special circumstances exist.[75]

The status and operation of the equidistance-special circumstances rule

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law, and consider ways to make "evidence of customary international law more readily available." G.A. Res. 174, 2 U.N. GAOR Doc. A/519, at 105 (1949).

66. *See generally* Young, *The Geneva Convention on the Continental Shelf: A First Impression,* 52 AM. J. INT'L L. 733 (1958).

67. *See* Geneva Convention, art. 6(1), *supra* note 6, which provides: "Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured."

68. *Id.*

69. *Id.* The term median line is applied to opposite states, while equidistance line is applied to adjacent states where the Geneva Convention is controlling.

70. Baselines, or straight baselines, refers to the rule of the Fisheries Case (United Kingdom v. Norway), [1959] I.C.J. 116. The ICJ held that Norway could lawfully delimit its territorial sea by drawing lines connecting the small rocks and islands known as the Skjaergaard Archipelagoe. The archipelagoe is located up to 50 nautical miles off the Norwegian mainland, and the court's ruling created a huge jurisdiction of inland waters for Norway. Since no fishery zone regime existed at that time, Norway was the first nation to gain exclusive control over the fishery resources off its shores.

The problems connected with the straight baseline rule are apparent. The presence of a small barren rock 50 miles from shore can operate to capture huge areas of ocean for exclusive use. *See* Karl, *Islands and the Delimitation of the Continental Shelf: A Framework for Analysis,* 71 AM. J. INT'L L. 642 (1977). *See also* R. Hodgson, *Islands: Normal and Special Circumstances,* in LAW OF THE SEA. THE EMERGING REGIME OF THE OCEANS (1973).

71. *See* Geneva Convention, art. 6(2), which provides: "Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

72. *Id.*

73. See note 70 *supra.*

74. The dilemma of West Germany in the North Sea Continental Shelf Case, [1969] I.C.J. 12, provides a classic example. See notes 76-79 and accompanying text, *infra.*

75. See notes 67 & 71 *supra.*

were disputed by West Germany, the Netherlands and Denmark in the *North Sea Continental Shelf Case (North Sea Case)*.[76] Application of the rule resulted in two equidistance lines intersecting at a point very near the West German coast.[77] Consequently, West Germany was left with a comparatively small area of continental shelf considering the length and location of its coast.[78] Failing to negotiate a boundary treaty, the parties agreed to submit the dispute to the International Court of Justice (ICJ).[79]

Although the Netherlands and Denmark were parties to the Geneva Convention,[80] West Germany was not,[81] and it therefore claimed article 6(2) was inapplicable.[82] West Germany contended that a correct boundary should grant each state a just and equitable share of the available shelf in proportion to the length of its coastline or sea frontage.[83] In the alternative, West Germany argued that if article 6(2) was applicable, the concave shape of its coast was a special circumstance[84] requiring departure from the equidistance lines. Denmark and the Netherlands countered that article 6(2) was applicable as a customary norm of international law and opposed the categorization of the West German coast as a special circumstance.[85]

The court held that article 6(2) had not attained the status of a customary norm.[86] Moreover, West Germany's proportion formula was rejected as it resembled equitable apportionment[87] rather than a legal delimitation in accordance with equitable principles.[88] The ICJ was therefore pressed to find applicable standards and rules of customary international law.

The court found these standards in the Truman Proclamation and accordingly held that national jurisdiction over seabed resources resulted from sovereignty over the adjacent land mass.[89] From this conceptual foundation, the court concluded that West Germany was entitled to that portion of the North Sea shelf area that was the natural prolongation of its territory.[90] The opinion placed the parties under a duty to negotiate a settlement[91] in ac-

76. [1969] I.C.J. 12, 20.

77. *Id.* at 14. See appendix B. This map was prepared for the court by the parties. Line C-D-E represents the equidistance line for West Germany and the Netherlands. Line A-B-E represents the equidistance line for West Germany and Denmark. The lines intersect at point E, cutting off West German jurisdiction. Line E-F represents the equidistance line between Denmark and the Netherlands. Lines C-D-F and A-B-F represent the West German claim that it was entitled to coastal jurisdiction in proportion to the length of its coastline. [1969] I.C.J. at 20-21.

78. [1969] I.C.J. at 17.

79. *Id.* at 12.

80. *Id.* at 19-20.

81. *Id.*

82. *Id.* at 20.

83. *Id.* at 21.

84. *Id.*

85. *Id.* at 20.

86. *Id.* at 43-44.

87. *Id.* at 46-47.

88. *Id.* See text accompanying notes 95 & 96 *infra.*

89. 1969 I.C.J. at 53.

90. *Id.*

91. *Id.* at 53-54. The parties had not empowered the court to actually delimit the

cordance with equitable principles[92] which, as developed by the court, included the area constituting the natural prolongation of the coastal state; the general configuration of the coast; the physical and geological structure and natural resources of the area; and a reasonable degree of proportionality given the length and general direction of the coast.[93]

The ICJ in the *North Sea Case* claimed to be applying a rule of law that determined a boundary from the physical facts of the area.[94] The court denied that it was equitably apportioning the area. It is difficult, however, to discern a cognizable legal standard within the term equitable principles.[95] The non-exclusive taxonomy of considerations which that term was said to subsume could offer little guidance for future boundary dispute resolution. The court announced no affirmative standard at all; it simply reached a just determination based on the narrow facts of the case.[96] Following the *North Sea Case,* advisors to nations attempting to negotiate a maritime boundary[97] could offer decision makers little guidance in the promulgation of claims which would ostensibly withstand judicial analysis.[98]

The *North Sea Case* stood alone in the law of shelf delimitation until 1977, when a court of arbitration[99] decided the *United Kingdom-France Continental Shelf Case* (*Anglo-French* Case).[100] This decision marked the first judicial settlement of a maritime boundary dispute between parties to the Geneva

area. The issue of which principles of international law were applicable was the sole question presented.

92. *Id.* at 54. The courts use of the Truman Proclamation's equitable principles formulation has become the leading foundational doctrine in the area. See text accompanying note 112 *infra. See generally* Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Coast?,* 16 N.Y.L.F. 327 (1970).

93. [1969] I.C.J. at 54.

94. *Id.* at 46-47. The court said: "On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves — that is to say, rules binding upon States for all delimitations; —in short, 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, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field."

95. The list of physical features that the court articulated as relevant was inclusive. *Id.* at 53. Equitable principles must be redefined with reference to the facts of a particular delimitation dispute. As a result, the impact of a given physical feature on the boundary process cannot be anticipated.

96. West Germany signed bilateral treaties with Denmark and the Netherlands on January 28, 1971. The boundaries gave West Germany approximately two-thirds of the jurisdiction it claimed before the I.C.J. For the text of the protocol jointly announcing the agreements and the two treaties, see 10 I.L.M. 600-01 (1971).

97. See note 95 *supra.*

98. See text accompanying notes 260-263 *infra.*

99. The Arbitration Agreement of 10 July, [1975] Gr. Brit. T.S. No. 137 (Cmd. 6280).

100. The United Kingdom of Great Britain and Northern Ireland and the French Republic Delimitation of the Continental Shelf (France v. United Kingdom) (1977) [hereinafter cited as *Anglo-French Case*], *reprinted in* S. ODA, THE INTERNATIONAL LAW OF THE OCEAN DEVELOPMENT (Supp. 1978). The decision has not been published in an official source. Citations will be by reference to paragraphs. For a visual description of the dispute see the map reproduced in Colson, *supra* note 17, at 107.

Convention.[101] The *Anglo-French Case* is significant because the court found more harmony than discord between customary law as announced in the *North Sea Case* and article 6 of the Geneva Convention;[102] indeed, the court found the two rules in accord.[103]

The boundary dispute involved in the *Anglo-French Case* was twofold. In regard to the English Channel, the parties disputed the boundary consequences of the presence of the Channel Islands.[104] These British protectorates[105] are located a few miles off the French coast. Their inclusion as basepoints in the median line process of article 6(1), which Britain claimed was applicable, would have moved the boundary line to within a few miles of France.[106] This formulation would have granted the United Kingdom virtually the entire shelf in the southern end of the English Channel.

France countered that article 6(1) was not controlling, because, upon ratifying the Geneva Convention, it had entered valid reservations to its applicability with regard to the Channel Islands.[107] Alternatively, France argued that, should the court find article 6(1) applicable, the presence of the Channel Islands was a special circumstance which warranted departure from the median line.[108] France proffered a solution to the dispute: the Channel Islands should be ignored in drawing the median line and granted an independant six-mile enclave[109] of territorial sea jurisdiction.

Although the court found the Geneva Convention a treaty in force between the parties, it upheld French reservations to article 6(1) and applied, instead, customary international law.[110] The court departed from the *North Sea Case,* however, in holding that the equidistance-special circumstances rule was a norm of customary law,[111] and that its application would lead to the same result: a boundary in accordance with equitable principles.[112] Deciding the Channel Islands were a special circumstance, the court delimited the area by drawing a median line which ignored their presence.[113] The court then created a twelve-mile enclave of territorial sea to the north and west of the

101. The United Kingdom ratified the Geneva Convention on May 5, 1964. France ratified on June 14, 1965. *See* 2 S. LAY, R. CHURCHILL & M. NORDQUIST, *supra* note 63, at 804-05.

102. *See Anglo-French Case, supra* note 100, para. 65.

103. *Id.*

104. *Id.* paras. 152-54.

105. The Channel Islands are of unique political status. They are neither part of the United Kingdom nor a colony; they are a quasi-independent state and have a direct dependency on the Crown. The United Kingdom argued the political and economic importance as well as the size of the population (130,000) as a justification for their inclusion in the delimitation process. *See Anglo-French* Case, *supra* note 100, para. 173; Belcher. *Equitable Delimitation of the Continental Shelf,* AM. J. INT'L L. 60, 67 (1979).

106. *Anglo-French Case, supra* note 100, para. 161.

107. *Id.* para. 65.

108. *Id.* paras. 150-51.

109. *Id.*

110. *Id.* para. 148.

111. *Id.* paras. 237-42.

112. *Id.*

113. *Id.* para. 95.

islands.[114] In the court's view, this result honored both the Channel Islands' existing fishery zone and afforded France jurisdiction over the natural prolongation of its territory.[115]

The second facet of the dispute concerned the boundary in the Atlantic region lying west of France and south of the United Kingdom.[116] France contended that the Scilly Isles,[117] which lie several miles off the southeastern tip of the United Kingdom, were geographically insignificant,[118] and should not be included as a basepoint in the delimitation process.[119] The United Kingdom invoked article 6 and contended that the boundary should be an equidistance line drawn with the Scilly Isles as a basepoint.[120]

The court was concerned that inclusion of the Scilly Isles, a relatively minor geographical feature,[121] would deflect the boundary several degrees closer to France.[122] As the line advanced seaward, it would progressively capture more shelf jurisdiction for the United Kingdom, thus depriving France of jurisdiction over a portion of the natural prolongation of its territory.[123] Implicit in this concern was the notion that there exists a necessary relationship between the extent of a nation's shelf jurisdiction and the significance of the physical features which create it.[124]

The court agreed with France that the presence of the Scilly Isles was a special circumstance and delimited the area by emphasizing the natural prolongation principle.[125] Noting that the Scilly Isles extended twice as far out

114. *Id.*

115. *Id.* para. 246. *But see* Blecher, *supra* note 105, at 62. The court found natural prolongation to be of little usefulness in the Channel Islands region because the seabed of the English Channel was geologically similar to the land masses of both nations. The court found other relevant considerations more compelling in delimitating the area. See text accompanying note 122 *infra.*

116. *Anglo-French Case, supra* note 100, para. 244.

117. A group of 48 small islands located 31 nautical miles off Land's End, England. Six of the islands are populated, with a total of 2,500 residents. See Colson, *supra* note 17, at 109 n.33. The Scillies, under the straight baseline rule, would provide the extreme seaward point from which the equidistance line would be derived. By comparison, the French Island of Ushant, which would form the extreme French basepoint, is located only 14.1 nautical miles out to sea. *Id.*

118. *Anglo-French Case, supra* note 100, para. 238.

119. *Id.*

120. *Id.*

121. *Id.* paras. 248-49. The court noted, however, that both the Scilly Isles and Ushant were natural geographical facts of the region which could not be totally disregarded. The court's reference to the size and population of the islands is evidence that these features are relevant circumstances in shelf delimitation.

122. *See* Colson, *supra* note 17, at 110. The equidistance lines drawn with and without regard to the Scilly Isles diverged approximately 16 degrees. The size difference of the English and French claims to shelf jurisdiction was approximately 4,000 square miles.

123. *Anglo-French Case, supra* note 100, para. 244.

124. *See* Blecher, *supra* note 105, at 73-75. The court distinguished between proportionality as discussed in the *North Sea Case*, and its application of the principle to the *Anglo-French* facts. To the arbitral court, proportionality was a criterion or factor by which the distorting effects of small islands or other physical anomalies could be measured. *Anglo-French Case, supra* note 100, paras. 100-01.

125. *Anglo-French Case, supra* note 100, paras. 248-49.

to sea as the opposite French island of Ushant,[126] the court decided to give the Scillies half-effect as a basepoint in the delimitation process. Consequently, the court drew an equidistance line disregarding the presence of the Scillies, and a second line giving the islands full effect.[127] The resulting angle was then bisected to arrive at the maritime boundary.[128] This is known as the half-effect[129] process.

Like the ICJ in the *North Sea Case*, the *Anglo-French Case* court of arbitration insisted that its function was not to redress inequalities of geography, but to equitably apply rules of law to a specific set of facts and thus determine the correct maritime boundary.[130] At first glance, the *Anglo-French Case* appears to have interjected into the delimitation process some of the certainty of expectation necessary to a coherent, efficacious legal system. Specifically, the court held that the equidistance-special circumstances rule was a norm of customary law,[131] and that the two apparently disparate approaches would each have produced the same result. This conclusion, however, is puzzling in view of the *North Sea Case* court's nondescript use of the phrase equitable principles.[132] If the equidistance rule is applied, the task of identifying special circumstances must be addressed. Neither the *North Sea Case* nor the *Anglo-French Case* provide a standard for measuring claims of special circumstances. Arguably, the lexicon of equitable principles identified in the *North Sea Case* forms the beginnings of a standard.[133] Manifestly, however, special circumstances will remain an ambiguous, ineffective corrolary to the equidistance rule until it is limited in scope and meaning through judicial decision, treaty, or state practice.[134]

Absent from the law of maritime boundary delimitation is the certainty of expectation necessary to an effective legal regime. From the perspective of the *Anglo-French Case* court, delimitation according to equitable principles should result in an award to each state of jurisdiction over the natural pro-

126. See note 117 *supra*.

127. *Anglo-French Case*, *supra* note 100, paras. 249, 251.

128. *Id.*

129. The United Kingdom and France had given half-effect to Eddystone Rock, a small island above water at high tide, in delimitation negotiations. *Id.* para. 249.

130. *Id.* paras. 248-49.

131. *Id.* para. 97.

132. [1969] I.C.J. at 54. *See* Blecher, *supra* note 105, at 83. In the view of Mr. Blecher, the court did not adequately explain its failure to give the Scillies full effect. Its use of the term equitable principles suggests that equity, and not law, persuaded the court to declare the Scillies a special circumstance. He suggests that intuition played an important part in the court's deliberations. *Id.*

133. [1969] I.C.J. at 53-54.

134. The decision of the *Anglo-French* arbitral court, that the Scilly Isles' location was a special circumstance, is the only judicial application of the special circumstances rule to date. A nation can now predict that an island of minor geographic and demographic importance will not be given full effect in the equidistance line process. Apparently, islands the size of the Scillies will be given half-effect where they are located a significant distance out to sea. The question arises, whether smaller or larger islands will be treated the same way. Under the *Anglo-French* Case, an island's size, location and population will determine whether it is given full, half, or no effect as a basepoint.

longation of its territory.[135] Before this aspiration becomes a reality several ancillary issues must be resolved. These include the weight to be given a particular geographical feature, the significance of social, economic, and political considerations, and the distribution of resources throughout a certain shelf area.[136]

The significance of geological features deserves special consideration. If the natural prolongation metaphor is the applicable theory of ownership, then evidence of geological compatibility[137] should be highly persuasive. Proof by one nation that the disputed continental shelf is of the same geomorphological origin and composition as its own land mass, and is unlike the land mass of its coastal neighbor, theoretically, should be controlling.[138] The proffering nation has ostensibly shown that the disputed area is the natural prolongation of its territory.

Further complicating the law of maritime boundary delimitation is the emergence of a new regime of exclusive coastal state control, the Exclusive Economic Zone (EEZ).[139] Within this belt, which extends 200 nautical miles from the coastal baseline, nations now claim exclusive competence to harvest the area's natural resources.[140] Where these zones overlap, the delimitation

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135. *Anglo-French Case, supra* note 100, paras. 9, 12.

136. *See* Alexander, *Special Circumstances: Semienclosed Seas,* in LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS 201 (1973) (discussion of the problems of islands, promontories, straits, and other geographic anomalies and their problematic effect in the equidistance-special circumstances rule).

137. Geological compatibility describes the following situation: state *A* and state *B* about the same semienclosed sea. The continental shelf in the area is sedimentary rock which was washed into the ocean by the decay of the mountain region of state *A*. State *B* is a flat plain formed by fossilized coral reef activity. The continental shelf in the area is geologically compatible with state *A*. Under the natural prolongation theory, state *A*'s claim to the shelf is much stronger than state *B*'s. See Blecher, *supra* note 105, at 65.

138. *But cf. Anglo-French Case, supra* note 100, paras. 9, 12. The Hurd Deep, a distinct fault in the geomorphology of the English Channel continental shelf, was disregarded by the court in the delimitation process. Two inferences may be alternatively drawn: first, since the Hurd Deep is a faulted portion of geologically compatible composition, it is the natural prolongation of both nations. Second, fault zones, trenches or "deeps" are not among the relevant circumstances to be considered in delimitation in accordance with equitable principles. Which view will emerge as controlling is significant to the delimitation of the Blake Plateau area. See note 238 and accompanying text, *infra.*

139. *See generally* Hollick, *The Origins of 200-Mile Offshore Zones,* 71 AM. J. INT'L L. 494 (1977).

140. *See* ICNT REVISION 1, art. 56, *supra* note 47, at 154 which provides:

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the preservation of the marine environment.

process again becomes necessary. While the delimitation procedures previously discussed were originated in the context of the shelf regime, current state practice indicates that the same boundary principles apply to the EEZ.[141]

A final unresolved issue in the legal regime of the shelf is the seaward limit of coastal state jurisdiction.[142] Early unilateral declarations of shelf jurisdiction claimed competence over the exploitable resources of the area.[143] Under this view, a state's exclusive claim to seabed resources was contingent only on its technological capability, regardless of the depth of the seabed or the distance of the site from its coast.[144] Another possible focus is the actual extent of the continental margin of the coastal state's land mass.[145] At some point out to sea the continental margin ends, and the basaltic ocean floor begins.[146] While this formulation is consonant with the natural prolongation theory of ownership, it is unacceptable to those nations whose limited technology prevents access to these deep water margin areas.[147] If the common heritage of mankind doctrine gains ascendancy,[148] then the seaward limit of

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(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

The United States delegation to the 1977 session of UNCLOS III reported general agreement among states regarding this provision. J. BOYD, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 536 (1977).

141. The 1979 version of the ICNT contains identical provisions for delimiting the EEZ and the continental shelf. *Compare* ICNT REVISION 1, art. 74(1), *supra* note 140 *with* art. 83(1), *supra* note 47, at 166, which provides: "The delimitation of the continental shelf between adjacent or opposite states shall be effected by agreement in accordance with equitable principles, employing, when appropriate, the median or equidistance line, and taking account of all the relevant circumstances."

142. See Oxman, *supra* note 10, at 19-22, reporting the debate at the seventh session of UNCLOS III in 1979 over the seaward limits of shelf jurisdiction. Negotiating group 6 discussed several alternatives. The "Irish" formula would limit seabed jurisdiction by analysis of the thickness of sedimentary rock at the foot of the continental slope. This is a pure application of the natural prolongation theory. The United Soviet Socialist Republic proposed a plan which would cut off exclusive jurisdiction at 100 nautical miles beyond the EEZ limit of 200 nautical miles, where the physical margin extends that far. The third world bloc contested any formula which would permit jurisdiction beyond the EEZ. Third United Nations Conference on the Law of the Sea, Summary Records of Meetings, 12 U.N. GAOR (resumed 8th sess.), 106-07, U.N. Doc. A/CONF.62/NG6/19 (1979).

143. *E.g.*, Presidential Proclamation No. 2667, *supra* note 53.

144. The Blake Plateau located off Georgia is rich in manganese nodules. Should the exploitability test emerge as the shelf regime's outer limit, the United States would have exclusive jurisdiction over these deposits. Interview with Dr. H. K. Brooks, Visiting Research Professor and Past Geology Professor at the University of Florida, April 7, 1980.

145. See note 142 *supra*.

146. Stehli, *supra* note 35, at 16.

147. See note 142 *supra*.

148. See Biggs, *supra* note 24, at 232-34. Advocates of this theory contend that the shelf regime arose at a time when deep seabed mining was impossible. Therefore, the shelf regime does not include the exclusive right to mine deep water margin areas.

the shelf may be limited to the shallower continental shelf proper.[149]

This array of overlapping contemporaneous legal regimes has been the focal point of the Third United Nations Conference on the Law of the Sea (UNCLOS III).[150] The conference is engaged in an attempt to produce a new, comprehensive treaty on the law of the sea. Its work product, the Informal Composite Negotiating Text (ICNT) is merely a draft document.[151] However, the treatment given the ICNT by the arbitral court in the *Anglo-French Case* indicates that the ICNT has achieved a certain degree of authoritative status.[152] While the court said, in dicta, that the ICNT accorded with the rules of customary law that it applied, it rejected French contentions that the ICNT had rendered the Geneva Convention obsolete.[153]

ICNT article 83(1),[154] in its most recent formulation, appears to have codified the *Anglo-French Case*. The article provides for delimitation between opposite or adjacent states in conformity with international law.[155] The article

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149. *See* Oxman, *supra* note 10, at 22. Another third world solution to the seaward limit problem is to cut off coastal state jurisdiction at depths below 200 meters.

150. Professor Bernard H. Oxman, Associate Professor of Law, University of Miami School of Law, has provided yearly chronicles of the UNCLOS III sessions. *See* Oxman, *supra* note 10; Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Sessions*, 72 AM. J. INT'L L. 57 (1978); Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 AM. J. INT'L L. 247 (1977); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975); Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974).

151. The failure of UNCLOS III to resolve several lingering issues, most notably deep seabed mining, has led some to wonder if the goal of a new law of the sea treaty can be reached. *See* Breaux, *Diminishing Prospects for an Acceptable Law of the Sea Treaty*, 19 VA. J. INT'L L. 257 (1979).

152. *See* Colson, *supra* note 17, at 111. Whether the ICNT is ever finalized as a treaty, certain provisions may attain the status of customary law through state practice. *E.g.*, ICNT article 83(1), *supra* note 141.

153. *Anglo-French Case, supra* note 100, para. 65.

154. See ICNT, art. 83, U.N. Doc. CONF.62/WP.10/Rev.3/Add. 1 (1980), *reprinted in* 19 INT'L L. MATERIALS 1174 (1980). The text of article 83 is reproduced below:

> 1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. 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.
>
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
>
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
>
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

155. This departs from article 6 of the Geneva Convention which treats opposite and adjacent states in separate subsections. Apparently, the distinction between these geographic relationships has blurred. *Cf.* the Anglo-French Case, where the court termed the relation-

borrows from the Truman Proclamation by calling for the application of equitable principles; it then calls for utilization of the median or equidistance line where appropriate, while taking account of all circumstances prevailing in the area concerned.[156]

Article 83(1) differs from its immediate predecessor in two ways. First, the article calls for delimitation under international law, a conspicuous reference in light of its absence in earlier versions.[157] This clause reintroduces into delimitation analysis the vague, standardless *North Sea Case* and *Anglo-French Case* decisions. Second, the 1980 version of article 83(1) qualifies application of the median or equidistance line with the phrase prevailing circumstances;[158] the predecessor version spoke of relevant circumstances.[159] As a matter of construction, prevailing circumstances appears to be a limiting term,[160] indicating that only the most significant features, geophysical or otherwise, will justify departure from the equidistance line.

Insofar as article 83(1) incorporates the *North Sea Case* and *Anglo-French Case*, perhaps the circumstances to which those courts attached significance comprise the lexicon of prevailing circumstances.[161] Yet nothing in either of those cases suggests that the factors considered therein were exclusive.[162] If the drafters of the ICNT intended to limit the concept of special or relevant circumstances by inserting the adjective prevailing, their simultaneous reference to international law may have thwarted the attempt.[163] Conceivably, future courts will sieze this language to exclude minor geophysical features from consideration.[164] Such a decision would bring welcome clarity to a body of law which otherwise cannot offer the certainty of expectation necessary to ensure the maximum, reasonable use of ocean resources. Until this clarity is achieved, there will be a cloud on the title to many resource-abundant maritime areas, and needless inhibition of public and private development of those resources.

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ship of the nations in the Atlantic region as neither opposite nor adjacent; the court found the nations "laterally related." Anglo-French Case, *supra* note 100, paras. 95-97.

156. *See* ICNT art. 83(1), U.N. Doc. A/CONF.62/WP.10/Rev.3/Add. 1 (1980), *supra* note 154.

157. *See* ICNT art. 83(1), U.N. Doc. A/CONF.62/WP.10/Rev.3/Add. 1 (1980), *supra* note 154.

158. See note 154 *supra*.

159. See note 141 *supra*.

160. *See* WEBSTER'S THIRD NEW INTERNATORIAL DICTIONARY 1797 (1971), which defines prevailing as "having superior force or influence." Relevant is defined as "bearing upon or properly applying to the matter at hand." *Id.* at 1917.

161. See text accompanying notes 92-93 *supra*.

162. See Blecher, *supra* note 105, at 61. The vague content of equitable principles as applied in both the *North Sea Case* and *Anglo-French Case* belies the protestations of both courts that they were applying legal rules, and not sitting in equity.

163. *See* ICNT art. 83(1), U.N. Doc. A/CONF.62/WP.10/Rev.3/Add. 1 (1980), *supra* note 154.

164. For example, under the latest version of article 83(1), the United Kingdom might have argued that the Scilly Isles were not a prevailing circumstance. In this context, the prevailing circumstance rule resembles the special circumstance rule of the Geneva Convention.

THE BACKGROUND OF THE DISPUTE

United States policy on the oceans is a composite of domestic coastal regulation[165] and foreign policy.[166] Having long claimed a three-mile territorial sea,[167] the United States was the first nation to unilaterally declare jurisdiction over the continental shelf.[168] In the international arena, the United States is caught between domestic pressures for further expansion of exclusive maritime boundaries and resources,[169] and organized resistance by developing nations asserting preferential claims to the resources of presently public areas.[170]

In response to contemporary international trends, the United States claimed a 200 nautical mile fishery zone, or EEZ, in the Fishery Conservation and Management Act of 1976.[171] Pursuant to the Act, the State Department published the coordinates of the United States maritime boundary in 1977.[172] The line runs equidistant between south Florida and the Great and Little Bahama Banks through the Florida Straits.[173] Northwest of Little Bahama Bank the boundary turns abruptly due west in a straight, cartographer's line,[174] thus deviating from the equidistance line. The distance between this line and the northern edge of the Bahamas is between fifty and seventy miles. At a point 200 miles east of the Florida coast, the statutory limit of United

165. Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§1331-1356 (1979). This law provides for management, lease authority, resource revenue provisions, and all matters relating to resource exploitation in the shelf area. For legislative history see [1978] U.S. CODE CONG. & AD. NEWS 1450; [1953] U.S. CODE CONG. & AD. NEWS 2176. *See also* Coastal Zone Management Act of 1976, 16 U.S.C. 1451-1463 (1979) (provides authority for environmental protection).

166. *See generally* I. OSGOOD, J. HOLLICK, M. PEARSON & T. ORR, TOWARD A NATIONAL OCEAN POLICY: 1976 AND BEYOND (1976).

167. *E.g.*, United States v. California, 332 U.S. 19, 33-35 (1947). See note 45 *supra*.

168. *See* Presidential Proclamation No. 2667, *supra* note 53.

169. See note 23 *supra*. That pressure may be mounting. Consider the advertisement of Champion International Corporation in the October 27, 1980 issue of Newsweek Magazine. A full color plate with illustrated dolphins diving amongst submarine tractors and harvesting machines is opposite the heading "In the future, nations will be dividing up mankind's common inheritance: the vast wealth of the oceans. But will we do it recklessly or with vision?" The advertisement goes on to herald the oceans as having the "potential for supplying far more energy, raw materials and food than man has ever dreamed of." The reader is counseled to consider with caution who owns the oceans. This consciousness-raising technique can be viewed as an attempt to muster further support for a United States policy of exclusivity in ocean areas. *See* NEWSWEEK, Oct. 27, 1980, at 44-45.

170. *See* R. ANAND, *supra* note 21; Biggs, *supra* note 24.

171. 16 U.S.C. §§1801-1882 (Supp. III 1979). The act replaced an earlier statute designating a nine-mile fishery zone. Act Establishing a Fisheries Zone Contiguous to the Territorial Sea of the United States. Pub. L. No. 89-658, §§1-3, 80 Stat. 908 (repealed 1976).

172. Fishery Conservation Zone, Notice of Limits, 42 Fed. Reg. 12,937 (1977).

173. See appendix A. line A-B.

174. *Id.* Line B-C-D. The precision map maker's line C-D bears no apparent relation to the geography of the area. Cartographic convenience, the practice of using straight, generalized lines in maritime boundaries, was considered, by the ICJ, as a relevant consideration in the Anglo-Norway Fisheries Case. Convoluted lines that trace the coastline present a difficult problem for mariners. The Norwegian fjords presented an extreme example of that difficulty. See note 70 *supra*.

States jurisdiction, the line turns to the northwest and begins to parallel the United States coastline.[175] This boundary brings within United States control much of the Blake Plateau that would otherwise fall within Bahamian jurisdiction if an equidistance or median line were employed.

At the press conference announcing this claimed boundary, the State Department indicated that special circumstances in the area of the Blake Plateau required departure from the equidistance line.[176] These special circumstances were not identified, and government officials refuse to divulge the substance of the claim.[177]

Under United States practice, this maritime boundary delimits both the continental shelf and the EEZ.[178] This practice raises the question of whether the Blake Plateau and its resources are part of the continental shelf regime, or part of the public area of the high seas. Although the seaward limit of the shelf regime is an unresolved issue,[179] the United States may have limited its shelf jurisdiction to the 200 nautical mile EEZ by promulgating a comprehensive, single maritime boundary. This limitation is unnecessary as the continental margin extends beyond this point, and under the natural prolongation theory of ownership exploitable resources of that area are property of the United States.[180] In any event, the 200 nautical mile EEZ seaward limit may be an appropriate limit for the shelf regime as well.[181] This issue will receive more focus when technological advances render deeper margin resources exploitable.

The Bahamas Alteration of Boundaries of 1948[182] corresponds to the Truman Proclamation in unilaterally claiming shelf jurisdiction. The Bahamian document simply extends coastal jurisdiction to include that area of the continental shelf contiguous to the Bahamian coasts.[183] If there is a theory of ownership within the Bahamian Alteration of Boundaries, it is a theory of proximity.[184] Notably, the Truman Proclamation, while using the

175. See appendix A, line D-E-P and beyond.

176. See Press Conference with Fredrick Z. Brown, Director of the Office of Press Relations of the Department of State, in Washington, D.C. (March 1, 1977), *reprinted in* J. BOYD, *supra* note 140, at 557.

177. *Id.* Telephone interview with Mary Elizabeth Hoinkas, Assistant Legal Adviser on the Oceans, Environmental Science Affairs, United States Department of State, in Washington, D.C. (May 7, 1980).

178. *See* J. BOYD, *supra* note 140, at 536.

179. See note 142 and accompanying text, *supra*.

180. This would seem to follow from the holding in the North Sea Case, [1969] I.C.J. at 54.

181. *See* Oxman, *supra* note 10, at 22. While some nations urge ending coastal state jurisdiction at the 200 nautical mile mark, Professor Oxman expressed concern that the simple expedient of a single boundary creates more problems than it solves. Such a regime might lead to "creeping jurisdiction." Since the revenue sharing obligation to the Deep Seabed Authority begins at 200 miles, there is no reason to limit jurisdiction outside that limit, if the physical shelf extends beyond it.

182. Order in Council No. 2574, Alteration of Boundaries, December 26, 1948, *reprinted in* National Legislation and Treaties Relating to the Law of the Sea, U.N. Doc. ST/LEG/SER.B/1, at 31-32 (1948).

183. *Id.*

184. *Id.* The Bahamian Alteration of Boundaries claims jurisdiction over the seabed

term proximity, relied instead on the natural prolongation theory as a justification for exclusive coastal state control.[185] The United States theory of ownership incorporates both concepts, while the Bahamian pronouncement is apparently confined to proximity, giving rise to the question of whether this doctrinal difference will shape the legal position of either nation.[186] The possible results of such a doctrinal disagreement will be examined further.

The Continental Shelf Act of 1970[187] subsequently defined the seaward limit of the Bahamian shelf as those submerged lands extending to a depth of 200 meters, or beyond that limit to an exploitable depth.[188] This latter caveat was likely intended to preserve the Bahamian position on the seaward limit of coastal state jurisdiction as international trends of decision and technological advances render the Florida Straits and the Blake Plateau practically and legally accessible.[189]

The Bahamas claimed a 200 mile fishery zone in the Fisheries Resources Jurisdiction and Conservation Act of 1977.[190] Section 11(2)(a) of the Act asserts that, in the absence of agreement on the boundary of overlapping areas of jurisdiction, the boundary will be a line twelve miles outside the baseline from which the territorial sea of the neighboring state is measured,[191] that is, twelve miles from the Florida coast.[192] As to shelf delimitation, section 11(2)(b)(i)-(ii) provides that where two states share the same continental shelf, an equidistance line will be employed.[193] Where no continuous shelf is shared, the limits of the shelf are to be determined by international law.[194] As previously noted, international law is unclear on the shelf regime's seaward limit. Thus it seems that the Bahamas, like the United States, reserves the right to include the Blake Plateau in its seabed holdings.[195]

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contiguous to its coasts. In contrast, the Truman Proclamation asserted competence to exclusive use of the shelf "since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it." Presidential Proclamation No. 2667, *supra* note 53. This language is the origin of the term natural prolongation as used in the *North Sea Case*, [1969] I.C.J. 12.

185. Presidential Proclamation No. 2667, *supra* note 53.

186. See text accompanying notes 237-240 *infra*.

187. Bahamas Continental Shelf Act of 1970, *reprinted in* National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and the Fishing and Conservation of Living Resources of the Sea, U.N. Doc. ST/LEG/SER.B/16, at 172-74 (1970).

188. *Id.* §2(1).

189. See note 142 and accompanying text, *supra*.

190. Bahamian Fisheries Resources Jurisdiction and Conservation Act of 1977, *reprinted in* National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and the Fishing and Conservation of Living Resources of the Sea, U.N. ST/LEG/SER.B/19, at 192-203 (1977).

191. *Id.* §11(2)(a).

192. See appendix A, line M-N.

193. Bahamian Fisheries Resources Jurisdiction and Conservation Act of 1977.

194. *Id.* §11(2)(b)(ii).

195. Continental Shelf Act of 1970, *supra* note 187, §2(1). The Bahamas applies the exploitability test to determine the shelf's seaward limit.

Although the United States ratified the 1958 Geneva Convention[196] and is therefore bound by it, the Bahamas status as a party to the convention is unclear. It was a member of the United Kingdom's commonwealth when the United Kingdom ratified the convention in 1964.[197] Since achieving independence in 1973, however, the Bahamas has not ratified the convention and so, arguably, is not a party to it.[198] Nevertheless, the holding in the *Anglo-French Continental Shelf Case,* that the equidistance-special circumstances rule is a norm of customary international law, apparently renders this issue unimportant.[199]

ANALYSIS OF THE CLAIMS

The Bahamian Two-Hundred-Mile Fishery Limit

The Bahamas, as the United States, has claimed a 200 nautical mile fishery limit.[200] As the Bahamian island of Bimini is only fifty miles from the south Florida coast, there is need to delimit the boundary of these overlapping maritime zones. The Bahamas' has asserted that, in the absence of an agreement, the limit of its fishery jurisdiction will be a line drawn twelve miles from the baseline of the neighboring coastal state.[201] This proposed boundary would trace the Florida coast at a distance of twelve miles off shore until the 200 nautical mile jurisdictional limit is reached.[202] This Bahamian boundary is an extravagant and unprecedented claim, wholly unsupported by international law. A rationale for the Bahamian claim is suggested by the inclusion of the twelve-mile provision; twelve miles is the current maximum allowable territorial sea limit in international practice.[203] The Bahamas has asserted the maximum possible fishery zone: all the area that is not potentially part of the United States' territorial sea.[204]

Significantly, the Bahamian claim is twofold: it provides for the maximum fishery zone in relation to swimming fish species,[205] yet provides for an equidistance line for fishery resources of the seabed and subsoil.[206] This bifurcated

196. The United States ratified the Geneva Convention on April 12, 1961. It entered into force on June 10, 1964. 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

197. See note 101 and accompanying text, *supra.*

198. Although it is sometimes argued to the contrary, a nation is not generally bound by a treaty which it has not ratified unless it adheres or accedes to it through its conduct. *See* The North Sea Continental Shelf Case, [1969] I.C.J. at 22. *See generally* G. VON GLAHN, *supra* note 7, at 438.

199. See note 102 and accompanying text, *infra.*

200. Bahamian Fisheries Resources Jurisdiction and Conservation Act of 1977, *supra* note 190, §5.

201. *Id.* §11(2)(a).

202. See appendix A, line M-N-O-E.

203. *E.g.,* ICNT Revision 1, art. 3, supra note 47, at 139.

204. Given the importance of security in the territorial sea regime, the Bahamas could not make a colorable legal claim to exclusive rights within the United States maximum potential territorial sea limits. *See generally* M. WHITEMAN, *supra* note 2, at 1-10.

205. Bahamian Fisheries Resources Jurisdiction and Conservation Act, *supra* note 190, §11(2)(a).

206. *Id.* §11(2)(b). Under the ICNT and state practice swimming fish are part of the

approach is a policy response to the depth of the waters in the Florida Straits and the Blake Plateau.[207] The seabed is at depths far greater than those at which the continental shelf is usually found.[208] This two boundary approach recognizes that international law has not resolved the issue of whether deeper adjacent areas of the continental margin are part of the exclusive shelf regime, or part of the public area of the high seas.[209] If the test is exploitability, then these areas are not continental shelf.[210] If the test is geological, and the subject seabed is continental sedimentary rock rather than basaltic deep ocean crust, then these areas are part of the shelf regime.[211] Should any of the proposed arbitrary depth limitations for the shelf regime become part of international law,[212] the majority of the area will be included in the public high seas regime.

Bahamian decision makers have made a calculated response to this legal ambiguity. In dealing with the familiar continental shelf they have felt bound by the rules of that regime and applied an equidistance boundary.[213]

EEZ regime, *see* ICNT Revision 1, arts. 63-67, *supra* note 47, at 158-59. Sedentary species such as lobsters, clams and crabs are part of the shelf regime. *See id.*, arts. 68 & 77, *supra* note 47 at 159 & 164.

The spiney lobster is of particular interest. American commercial fishermen had traditionally fished for spiney lobsters in the shallow waters of the Great and Little Bahama Banks. On July 9, 1975, the Bahamas declared jurisdiction over the spiney lobster as a living resource of the continental shelf. The United States protested and, in subsequent negotiations, recommended that the dispute be submitted to the ICJ. The United States contended that the Bahamas were bound by international law to recognize the historic fishing rights of American fishermen. *See* E. McDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 766, 766-68 (1975).

207. The depth and location of these two seabed areas make unclear whether they are part of the exclusive shelf regime, or part of the inclusive deep seabed regime. See text accompanying note 142 *supra*.

208. See notes 35 & 36 and accompanying text, *supra*.

209. Under the Bahamian Fisheries Resources Jurisdiction and Conservation Act, *supra* note 190, S11(2)(b)(i), the Bahamian fisheries boundary would also include the area's seabed if the shelf seaward limit issue is resolved to include the Florida Straits and the Blake Plateau.

210. The Bahamas defines continental shelf to include areas deeper than 200 meters if the resources of the area are exploitable. Bahamas Continental Shelf Act of 1970, *supra* note 187, §2(1).

211. See note 142 *supra*.

212. *E.g.*, Bahamas Continental Shelf Act of 1970, *supra* note 187, §2(1). The act sets 200 meters as a possible maximum depth. *But see, e.g.*, Oxman, *supra* note 10, at 20-21. The Soviet Union's proposal that the shelf regime extend no further than 100 nautical miles beyond the 200-nautical-mile EEZ would fix the Bahamian shelf by analysis of the geology of the area. The point where the natural prolongation of the Bahamas ends would mark the limit of its shelf jurisdiction.

213. Bahamian Fisheries Resources Jurisdiction and Conservation Act, *supra* note 190, §11(2)(b)(i)-(ii) which provides:

> (i) where there is a continuous continental shelf between the Bahamas and the neighboring state, a line every point of which is equidistant from the edge of the Great and Little Bahama Banks and the baselines from which the territorial sea limits of that state are drawn, and, in areas other than the Great and Little Bahama Banks, a line every point of which is equidistant from the baselines respectively from which the territorial sea limits of the Bahamas and that state are drawn;

However, in delimiting their fishery zone, or EEZ, they have not felt compelled to apply the equidistance-special circumstances rule.[214] Implicity, the Bahamas has declared that the existing rules of maritime boundary delimitation are inapplicable to the newer, developing EEZ regime.[215]

In contrast, the United States has announced a single maritime boundary which delimits both the continental shelf and EEZ jurisdictional limits.[216] The single boundary is the prevailing international practice[217] and is preferable for several reasons. A single boundary requires a single delimitation and thus simplifies and expedites the dispute settlement process. Further, the equitable principles governing continental shelf delimitation are equally relevant to fair resolution of disputes over the EEZ.[218] The equidistance-special circumstances rule possesses a logical appeal which invites mutual application to both the shelf and EEZ regimes.

The benefits of simplicity and symmetry are less compelling, however, when the origins and doctrinal foundations of the two regimes are closely examined. The Truman Proclamation infused the shelf regime with the natural prolongation metaphor theory of ownership.[219] The coastal state is competent to claim shelf areas, because those areas are geographically and geologically the natural prolongation of that state's land mass. In contrast, the notion of national competence in the EEZ originated with judicial recognition of historically created prescriptive rights to exclusive use.[220] Two decisions of the ICJ, the *Anglo-Norway Fisheries Case*[221] and the *Icelandic Fisheries Case*,[222] held that continuous reliance by an indigenous population on the fisheries of its adjacent waters created a preferential right to exploit those resources.[223]

(ii) where there is not a continuous continental shelf between The Bahamas and the neighbouring state, the limits of the continental shelf of that state shall be as determined by international law.

214. *Id.* §11(2)(a).

215. The Bahamian position is consonant with the historically maverick positions of Latin American Nations. *See generally* Rosental, *Some Brief Considerations on a Caribbean Condominium*, in REGIONALIZATION OF THE LAW OF THE SEA (1977).

216. *See* Fishery Conservation Zone, Notice of Limits, *supra* note 29.

217. For example, in the *Anglo-French Case* the court delimited a single maritime boundary applicable to all ocean regimes without considering whether separate boundaries might be more appropriate.

218. See note 181 and accompanying text, *supra*.

219. See discussion of competing American and Bahamian theories of ownership, *supra* note 184.

220. *But see* Rozental, *supra* note 215, at 47. In the late 1940's and early 1950's Panama, Costa Rica, Honduras and Nicaragua established 200-mile zones. The nations were situated on a coastal area which possesses very little physical shelf area. In response to the emerging shelf regime, these nations made analogous claims to adjacent waters. This development accelerated the trend toward greater ocean closure.

221. The United Kingdom-Norway Fisheries Case (United Kingdom v. Norway) [1951] I.C.J. 116.

222. The United Kingdom-Iceland Fisheries Judgment (United Kingdom v. Norway) [1974] I.C.J. 3.

223. [1951] I.C.J. at 159 (long Norwegian usage of local fisheries resources created certain legally cognizable economic interests); [1974] I.C.J. at 34. (United Kingdom usage of fisheries near Iceland created legally protectable interest).

Consequently, there exists two contemporaneous regimes with disparate theories of ownership. Whether international law will develop separate sets of boundary delimitation rules for each regime is unclear. The trend toward a single maritime boundary indicates that the rules of shelf delimitation are being incorporated into the EEZ regime.[224]

Assuming that a single maritime boundary is applicable, the Bahamian fishery claim must fail, absent a showing of special circumstances. It is highly unlikely that such special circumstances exist;[225] the Bahamians simply claim all of the area which cannot lawfully be considered part of the United States' territorial sea. The claim is therefore predicated on policy objectives, not on any cognizable special circumstances as that term has been developed.[226] The presumptive boundary is the equidistance line which even the Bahamians have recognized as appropriate in the context of the shelf regime.[227]

The United States Claim of Special Circumstances In the Blake Plateau Area

Assuming that the equidistance-special circumstances rule is applicable in defining a single maritime boundary, the United States claim in the Blake Plateau area is somewhat mysterious. The United States claims an equidistance line boundary through the Florida Straits.[228] This formula is then abandoned at a point approximately sixty miles due north of the northwest tip of Little Bahama Bank, where the boundary cuts abruptly due east and proceeds to a point 200 nautical miles from the Florida coast,[229] the statutory seaward limit of United States jurisdiction.[230] According to the State Department, special circumstances in the area mandate this departure from the equidistance line.[231] The nature of these alleged special circumstances is not in the public record, and the State Department, concerned with preservation of the United States position in future negotiations, declines to divulge this information.[232]

The legal justification for the claimed United States boundary is a matter for speculation. Notably, a straight cartographer's line marks the non-equidistance boundary to the north of the Bahamas,[233] suggesting that physical features are not the substance of the alleged special circumstances.[234] The United States and Bahamian claims may merely represent initial bargaining

224. See note 141 *supra.*

225. See appendix A, Line M-N-O-E. A look at the geography of the area reveals no physical features which would operate to create the Bahamas' claimed fishery boundary.

226. See text accompanying note 203 *supra.*

227. See appendix A, line A-B.

228. See appendix A, line A-B.

229. See appendix A, line B-C-D-E-P.

230. 16 U.S.C. §1801 (Supp. III 1979).

231. See note 176 *supra.*

232. See note 177 *supra.*

233. See appendix A, line C-D.

234. The line bears no apparent relation to either the equidistance line or to the geographic layout of the area under the equitable principles doctrine of the *North Sea* and *Anglo-French* cases.

positions, with each nation cautiously placing abundant bargaining chips on the negotiating table. One claim may be a response in kind to the other, each nation apprehensive that an international tribunal will simply split the difference between the competing claims. This apprehension may be justified because both the *North Sea* and *Anglo-French* decisions are hallmarked by the language of compromise.[235] The half-effect rule gives equal weight to the legal arguments of both nations. In the present dispute, this would work to the distinct disadvantage of the nation that claimed the equidistance line. If a court employs a half-effect solution, the nation with the larger claim would be the benefited party.[236] Therefore, decisional law provides strong incentive for coastal neighbors in a maritime boundary dispute to make the largest possible claims to the disputed area.

Alternatively, there may be a plausible physical justification for the United States special circumstances claim. According to the leading theory regarding the origin and geomorphology of the area, the Blake Plateau is the faulted continental shelf of the North American continent,[237] the natural prolongation of the United States mainland. The Great and Little Bahama Banks are a carbonate platform built directly on the igneous basalt of the deep ocean floor.[238] Florida, while also a carbonate platform, is built upon the sedimentary rock of the American continent.[239] The United States may argue that the Blake Plateau, by virtue of this common geomorphology, is properly included in its continental shelf jurisdiction.

Both the *North Sea Case* and *Anglo-French Case* included geology as a proper consideration in the delimitation process,[240] though neither decision

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235. *See* North Sea Continental Shelf Case, [1969] I.C.J. at 54. (court's inclusion of proportionality as an equitable principle suggests a compromise between the parties' legal positions); Anglo-French Case *supra* note 100, para. 251 (the half-effect simply bisected the two proffered claims of the parties).

236. For example, the Bahamas has claimed an equidistant boundary for the continental shelf in the Blake Plateau. The United States, alluding to special circumstances, has claimed virtually the entire area. Should a court reach a compromise solution, the Bahamas will lose vast areas of valuable shelf jurisdiction.

237. *See* Stehli, *supra* note 35 at 25-27.

238. *Id.* at 23-25. Volcanic activity forced the Atlantic sea floor to rise at the Mid-Atlantic Ridge. The volcanic material spread in both directions, reaching as far west as the present-day Florida Straits. Coral reef activity began on this shallow sea floor, forming carbonate platforms of fossilized organic matter. The Great and Little Bahama Banks were formed when the oceanic crust began to cool and sink, and unusually active reef formations continued to grow to sea level. For unknown reasons, no coral reef activity took place in the Florida Straits. *See also* K. EMERY & E UCHUPI, *supra* note 35, at 432.

239. *See* K. EMERY & E. UCHUPI, *supra* note 35, at 428-33. The North American continental margin in the Atlantic area was formed by the erosion of the Appalachian Mountains. As this material was washed out to sea, it formed the Blake Plateau. The region later faulted to its present depth. Florida was built by coral reef activity on this continental margin. As the margin sank, coral reefs grew to sea level. This process accounts for the absence of a substantial continental shelf off the south Florida Atlantic coast.

240. North Sea Continental Shelf Case, [1969] I.C.J. at 54; *Anglo-French Case, supra* note 100, paras. 9, 12. Apparently, geology played a minor role in the *Anglo-French* Case. The court chose to ignore the presence of two geologic anomalies; the Hurd Deep in the English Channel, and the Hurd Deep Fault Zone in the Atlantic region.

declared its significance. Reliance on geology as a special circumstance is problematic. The question arises whether geology is merely one of many circumstances relevant to a shelf delimitation, or whether it is dispositive. If the natural prolongation metaphor is given dispositive status, a United States demonstration of its common physical heritage with the Blake Plateau and the relative dissimilarity of the Bahamas geological formations would conclusively resolve the boundary dispute. Natural prolongation finds its origin in the Truman Proclamation and was declared the proper objective of delimitation in accordance with equitable principles by both the *North Sea Case* and *Anglo-French Case*.[241] From this a court might attach great significance to a United States proffer of geological compatibility.

The opposing view, and an anticipated Bahamian rebuttal, treats geological compatibility as one of the many circumstances deemed relevant in the *North Sea Case* and *Anglo-French Case*.[242] Arguably, the term natural prolongation contemplates not only geology, but also geography and non-physical circumstances.[243] The Bahamas might rely on the equitable principles announced in the *North Sea Case* and contend that the proposed United States delimitation does not comport with them. First, the Bahamas might argue that the geography of the area is an equally important consideration, that proximity is a component of natural prolongation.[244] Second, the Bahamas might contend that the United States boundary fails to adequately consider the reasonable degree of proportionality principle, and that the length of Bahamas abutting coastline entities it to more jurisdiction than the United States line would provide.[245] Third, the Bahamas might argue that because the Blake Plateau is the only marine area contiguous to its coast having the potential of significant mineral resources,[246] the United States boundary is per

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241. North Continental Shelf Sea Case, [1969] I.C.J. at 53-54; *Anglo-French Case, supra* note 100, para. 246.

242. For an exhaustive discussion of the *North Sea* and *Anglo-French* cases and the equitable principles rubric, see Karl, *supra* note 70, at 642-51.

243. *See* [1969] I.C.J. at 52. The court admonished the parties to take into consideration all relevant circumstances.

244. *Id.* Consider the ICJ's opinion that the equidistance principle produced an inequitable result in the *North Sea Case*. The lack of a prior standard by which the court could measure inequity suggests that the court's conclusion was intuitive. See note 132 *supra*. See appendix B, line A-B-E-D-C. The rough triangle formed by these points includes a manifestly small area of jurisdiction given the relative size, shape and importance of the three nations involved.

This intuitive inequity is missing in the United States-Bahamas equidistance boundary line. See appendix A, line A-B-O-P. Necessarily, submarine geologic features are less visually compelling than surface geographic features, natural prolongation notwithstanding.

245. For purposes of delimitation, the northern rim of Little Bahama Bank forms the relevant coastline. See appendix A. This area is ringed with numerous small islands and flats which form a series of straight baselines. Of these islands only Walker's Cay is significantly inhabited. See Nautical Charts, *supra* note 30. *See also* U.S. DEP'T OF STATE, *supra* note 31, at 185-86.

246. The Blake Plateau is a potentially significant source of petroleum. Interview with Dr. Francis G. Stehli, Chairman, Department of Geology, University of Florida, in Gainesville (October 1, 1980). It is not known whether the disputed portion of the Blake Plateau

se inequitable.[247] Fourth, the Bahamas might invite an economic comparison of the two nations, and claim that its status as a developing nation is a relevant circumstance in the delimitation process.[248] Elevating developing nation status to a relevant or special circumstance would be a significant, if not unanticipated, development.[249] To this date, however, no court has been confronted with this argument.

These two competing views of natural prolongation illustrate the confusion that the term has created in the law of the sea. The term can best be understood in its historical context. When the United States issued the Truman Proclamation, coastal state control over contiguous maritime zones was unknown in international law.[250] A theory of ownership was necessary to legitimize any exclusive claim to a previously public area, and the natural prolongation metaphor supplied this element.

But the invocation of the natural prolongation theory through a United States claim of geological compatibility with the Blake Plateau does not validate exclusive United States jurisdiction over the area. Geological compatibility need not alone define the term natural prolongation. While there is an appealing logical symmetry to a delimitation process that awards a coastal nation the physical shelf of its existing territory, and the theory served well in validating and legitimizing early exclusive shelf claims, it is inequitable to allocate strategic, vital natural resources wholly on the basis of the origin of the subsoil thousands of feet beneath the adjacent seabed. Geological compatibility ought to be dealt with as one of a non-exclusive list of relevant circumstances to be applied in the resolution of maritime boundary disputes.[251]

It is possible and, indeed, preferable for international law to reach an accommodation between these two competing views of natural prolongation. If the Truman Proclamation retains any vitality as the conceptual underpinning of the shelf regime, such an accommodation is necessary.[252] Since geological compatibility is analogous to natural prolongation,[253] it might be given stronger consideration than other physical features. Adopting the rationale of the *Anglo-French Case,* an affirmative showing of geological com-

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contains manganese nodules in commercially significant concentrations. *See* E. LUARD, *supra* note 3, at 26.

247. *See* 1969 [I.C.J.] at 54 (court listed local natural resource distribution as a relevant factor, but failed to develop the thought further).

248. See text accompanying notes 22-24 *supra.*

249. *See generally* D. LEIPSIGER & J. MUDGE, SEABED MINERAL RESOURCES AND THE ECONOMIC INTERESTS OF DEVELOPING COUNTRIES 83-120 (1976).

250. See text accompanying notes 52 & 53 *supra.*

251. See note 244 *supra.*

252. *See Anglo-French Case, supra* note 100, para. 62. The court, in delimiting the Channel Islands region, said: "[T]he effect to be given to the principle of natural prolongation of the coastal State's land territory is always dependent not only on the particular geographical and other circumstances, but also on other relevant circumstances of law and equity."

253. *See* Blecher, *supra* note 105, at 65.

patibility might result in the application of a half-effect process.[254] In the instant dispute, the court would draw two lines: one an equidistance line, the other a line reflecting the United States claim of special circumstances. The court would then bisect the resulting angle to arrive at the maritime boundary.[255]

This natural prolongation half-effect approach is an attractive possible solution to this doctrinal dilemma. To treat natural prolongation as a consideration separate from and superior to other relevant circumstances preserves that model as the conceptual cornerstone of coastal state jurisdiction. This theory of ownership is a corollary to territoriality, and is, therefore, a useful linguistic tool in the formulation of workable legal principles.[256]

CONCLUSION

The several standards which comprise relevant circumstances are a vague collection of situational considerations which raise more questions than they answer. The lawyer, whether legal adviser to a nation's decision makers, or counsel to prospective off-shore resource developers, is confronted with a bewildering array of irreconcilable considerations which provide little or no assistance in the essential predictive function.[257] There is simply no way to anticipate with certainty the degree of influence that a given physical feature will have in a specific factual context. Thus, where two nations have yet to negotiate a settlement, the legal status of a disputed area is unknowable. The portion of the Blake Plateau which the United States and the Bahamas both claim will remain in legal limbo until domestic or international political pressures influence the parties to either negotiate in earnest[258] or submit the dispute to an international tribunal.[259]

More certainty in the law could be achieved through several doctrinal developments and refinements. First, the role of natural prolongation needs to be critically examined and clarified. It is, at best, a convenient, familiar theory of ownership that provides a reasonable conceptual foundation for development of a workable system of maritime boundary delimitation. At worst, it is a talismanic contrivance that, carried to its logical extreme, can produce absurd and inequitable results.[260] Natural prolongation as a theory of ownership may be beneficially employed as a guide to any equitable delimitation process and as a reference point for the clarification of relevant circumstances.[261]

254. See text accompanying notes 126-129 *supra*.

255. See appendix A. Such a line would bisect the angles formed by lines B-O-P and B-C-D-E-P.

256. *See* ICNT art. 83(1), *supra* note 154, which makes no reference to natural prolongation. However, natural prolongation is incorporated by reference in the clause calling for agreement in conformity with international law.

257. See notes 17 & 18 and accompanying text, *supra*.

258. The United States has successfully negotiated a maritime boundary with Cuba. Maritime Boundary Modus Vivendi, Signed April 27, 1977, United States-Cuba, 28 U.S.T. 5285, T.I.A.S. No. 8689.

259. See note 16 *supra*.

260. See note 244 *supra*.

261. For the opinion that further judicial expression is needed see Colson, *supra* note 17, at 111-12.

Second, the lexicon of relevant or special circumstances should be clearly articulated, defined, and limited. The *Anglo-French Case* and *North Sea Case,* while dealing with many so-called circumstances, failed to articulate a standard by which to weigh or define them.[262] The predictive process, so necessary to meaningful boundary negotiation, will be impossible until this ambiguity is eliminated.[263]

Third, the equidistance-special circumstances rule must be reexamined in light of current trends of decision. As a norm of customary international law, it has proven an unsatisfactory principle. The divergent claims of the United States and the Bahamas, both ostensibly applying the rule, is primary evidence that reform is necessary.[264] The ICNT's adoption of the term prevailing circumstances[265] is a promising modification as it may be easier to fashion standards for circumstances which "prevail" than for circumstances which are merely "relevant." Unfortunately, ICNT article 83(1) incorporates by reference the *North Sea Case* and *Anglo-French Case,* thus reintroducing into the process the analytical vagueness of those decisions.[266]

Perhaps the most serious obstacle facing the international community in its quest for clarity is the nature of the international legal process itself.[267] Ambiguity and uncertainty are inherent components of any legal system. They are especially characteristic of a legal system in which compliance is largely voluntary.[268] The desire for certainty of expectation must be tempered with the realization that no nation will subscribe to even the most coherent legal order if it is inimical to its national interests.[269] Notwithstanding, there is considerable global support for the refinement and crystalization of maritime boundary delimitation rules[270] which, through clarity and certainty of expectation, facilitate and expedite resolution of pending disputes.

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262. See text accompanying notes 133 & 134 *supra.*

263. The need for certainty of expectation has not gone unnoticed at UNCLOS III. See Adede, *Law of the Sea: The Scope of the Third-Party, Compulsory Procedures for Settlement of Disputes,* 71 AM. J. INT'L L. 305 (1977).

264. See text accompanying notes 228-230 *supra.*

265. See note 154 *supra.*

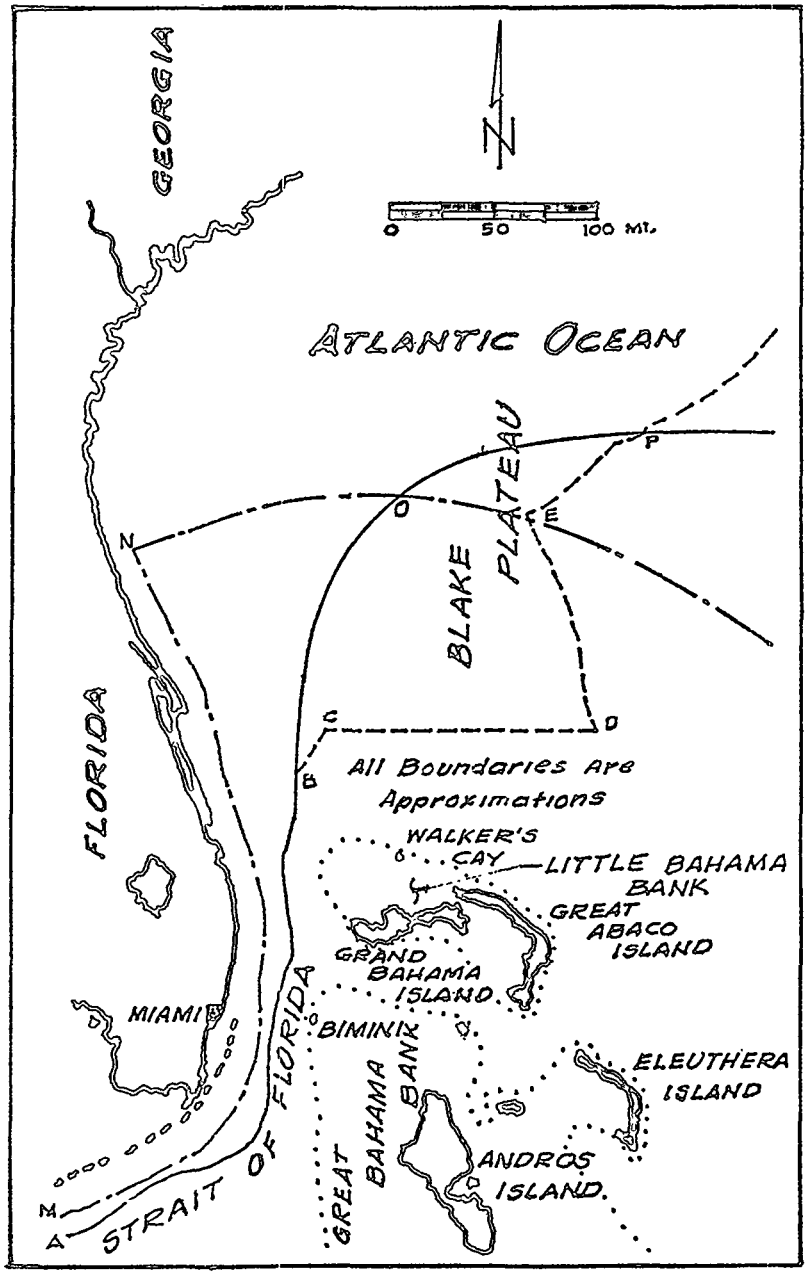
266. See text accompanying notes 158-161 *supra.*

267. See note 12 and accompanying text, *supra.*

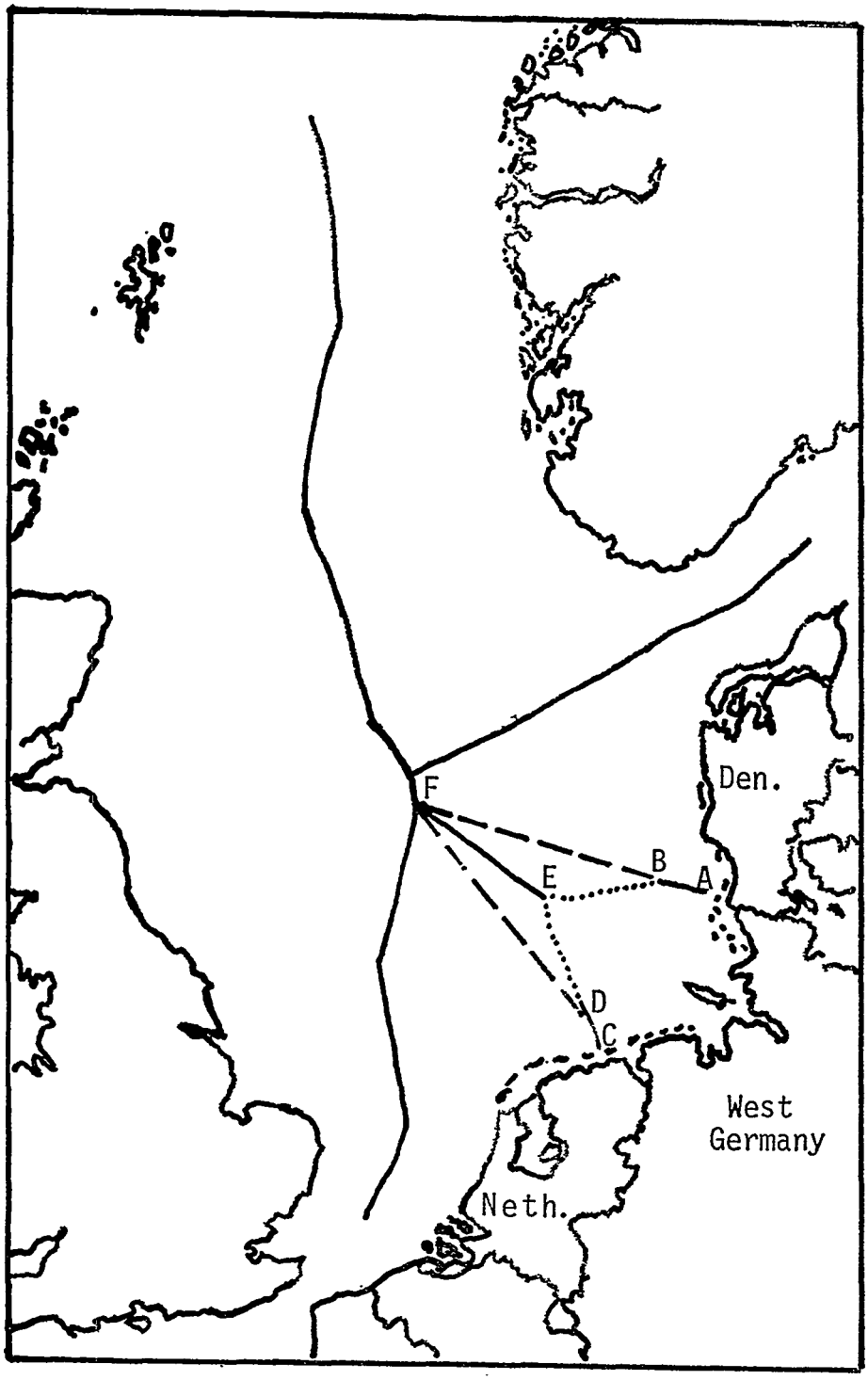
268. See note 15 *supra.*

269. See text accompanying note 15 *supra.*

270. See R. HODGSON & H. SMITH, BOUNDARIES OF THE ECONOMIC ZONE IN LAW OF THE SEA: CONFERENCE OUTCOMES AND PROBLEMS OF IMPLEMENTATION 183, 203-04 (1976) for a survey of various mechanical boundary rules designed to create certainty of expectation in the equitable delimination of maritime boundaries.



APPENDIX A



APPENDIX B